

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
Miscellaneous. Application. No. 50 of 2020
(Arising from EMA 562 of 2019
(Arising from CAD/ABR No. 15 of 2018)

BYAMUGISHA JULIUS ARINAITWE:.....APPLICANT

VERSUS

SHIFA LOVE WOOD:.....RESPONDENT

Before: Hon. Lady Justice Cornelia Kakooza Sabiiti

RULING

This application was brought under **Section 98 Civil Procedure Act, Order 22 Rule 26, Order 52 r 1, 2 & 3 of the Civil Procedure Rules, SI 71-1** for orders that; stay of execution be granted and costs of the application.

The grounds of this application were laid in the affidavit of **Byamugisha Julius Arinaitwe**, he stated that; He entered into a sale agreement with the respondent for the sale of a kibanja measuring 50 decimals in Lubowa. The respondent took possession of the said land and she is in occupation. Four years after the transaction, the respondent sought to rescind the transaction and hence filed the head suit against the applicant at CADER. That the Arbitrator abused her powers under the Act and hence made an erroneous and grossly inflated award that has caused great prejudice and injustice to him. That he has filed an application for setting aside the arbitral award which application has high chances of success.

That respondent has commenced execution proceedings for enforcement of the arbitral award vide EMA No. 562 of 2019. That it is in the interests of justice that this application is granted to prevent the pending suit at the Commercial Court from being rendered nugatory.

The application was opposed by **Shifa Lovewood** who deposed that; On the 17th day of December 2018, Ms. Belinda Lutaya Nakiganda an Arbitrator with the CADER delivered her judgement/award in CAD/ABR NO.15 of 2018, in which she was the successful party and the applicant was ordered to pay Ushs. 230,000,000/= following his breach of a land sale agreement. That she registered the award on the 6th day of February 2019 with the High Court Commercial Division and duly served the same on the applicant. That she proceeded to execute the said Award vide EMA No. 562 of 2019 and a warrant of arrest was issued by this court on the 10th day of July 2019 against the applicant.

That the applicant reached out to her and they executed a consent order, the terms of which were that the applicant would pay Ushs.12,000,000/= before 31st January 2020 and the balance in four installments of Ushs 54,500,00/= from 2nd February 2020 to 2nd February 2021. That as at 6th February 2020, the respondent had not fully paid the Ushs. 12,000,000/= payable by 31st January 2020 nor the Ushs. 54,500,000/= payable by 2nd February 2020.

That clause 4 of the consent order specifically provided that if the applicant failed to pay any of the installments, she would proceed with execution by way of arrest or attaching and selling the property of the applicant. That this application is a ploy by the applicant to delay execution and deny her an opportunity to enjoy the fruits of her arbitral award. That if this court is inclined to grant a stay of execution, the applicant should be ordered to deposit the entire decretal sum or security in this court. She prayed that this application is dismissed with costs.

In rejoinder, Byamugisha deposed that; the proceedings giving rise to the arbitral award were flawed in substance and hence his application challenging the same. That he was advised by his lawyers that once he successfully challenges the arbitral award, the schedule of payment contained in the consent order and the various warrants of arrest against him will collapse and be of no effect. That an arbitral award can be set aside for offending the Act.

Representation.

The applicant was represented by **M/s Mushabe, Munungu & Co. Advocates** and the respondent by **M/s Ekirapa & Co. Advocates.**

This court gave directives in which parties should file their submissions. None of the parties' submissions are on file, nonetheless I have determined the application based on the pleadings on file.

Resolution.

The issue drawn from the pleadings is *whether the execution of the award in CAD/ABR 15 of 2018 should be stayed?*

Conditions for stay of execution are provided for in **Order 43 Rule 4(3) of the Civil Procedure Rules** provides;

"3) No order for stay of execution shall be made under sub-rule (1) or (2) of this rule unless the court making it is satisfied—

(a) That substantial loss may result to the party applying for stay of execution unless the order is made;

(b) That the application has been made without unreasonable delay; and

(c) That security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her."

It is clear from the above provisions of the law that a party seeking stay of execution has to satisfy court on the conditions provided hereinabove. Meaning, if the applicant fulfils the above requirements, Court can go ahead and stay execution. I will therefore consider whether this application meets these requirements.

i) Substantial loss

The grounds advanced by the applicant in his affidavit are that; he entered into a sale agreement with the respondent for sale of Kibanja measuring 50 decimals in Lubowa, the respondent took possession and four years later, the respondent sought to rescind the transaction and filed a suit against him in CADER. That the arbitrator abused her powers and erroneous and grossly inflated the award to the applicant's prejudice. That the application has filed an application for setting aside the arbitral award which application has high chances of success. That the respondent has commenced the execution proceedings for enforcement of the arbitral award Vide EMA No. 562 of 2019. The application should be granted to prevent the pending suit being rendered nugatory.

From the above pleadings, the application has neither demonstrated any substantial loss nor substantiated the same. I believe that the provisions of Order 43 r 3 CPR are mandatory and not optional. Ordinarily, a successful party should not without good reason be deprived of the fruits of a judgment/decreed in their favour. The court must be satisfied as to the conditions laid in Order 43.

A number of authorities have observed that substantial loss cannot mean ordinary loss of the decretal sum or costs which must be settled by the losing party but something more than that. In the case of **Steel Rolling Mills Limited & Anor vs Gestation Economique Des Mission Catholique & Anor (supra)** Mukasa. L, J cited the case of **Pan African Insurance Company (U) Ltd vs International Air Transport Association High Court Misc. Application No. 86 of 2006** where the applicant merely stated that if the decree is not stayed the applicant will suffer substantial loss and stated: *"The deponent should have gone a step further to lay the basis upon which court can make a finding that the applicant will suffer substantial loss as alleged. The applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is not*

granted." The Learned Judge also cited the case of **Banshidar vs Pribku Dayal Air 41 1954** where it was stated: "*It is not merely enough to repeat the words of the code and state that substantial loss will result, the kind of loss must be given and the conscience of court must be satisfied that such loss will really ensure*"

The applicant has neither pleaded nor demonstrated any substantial loss that will be occasioned to him if the award is not stayed. I have therefore established no substantial loss that may occur to the applicant.

ii) Unreasonable delay.

The award was delivered on 17th December 2018, the applicant waited up until 24th January 2020 to file this application (13 months). I consider this period unreasonable for an application of this nature that should be rather imminent.

iii) Security for due performance of the decree.

Furthermore, it is a mandatory requirement under **Order 43 CPR** that execution is stayed only on condition that the applicant has before or at the filing of the substantive application for stay, furnished due performance of the decree. The applicant has demonstrated no commitment or willingness in his application or in the supporting affidavit to furnish security for due performance of decree or costs.

The applicant has failed to prove the essential conditions for court to grant an order for stay of execution. The Supreme Court in **Musiitwa Vs Eunice Busingye CA No. 18/1990** directed that a party seeking a stay should be prepared to meet the conditions set out in Order 43 r 4(3). The applicant has not satisfied this court on all the conditions for stay of execution. In the premises, I find that this application is void of any merit. This application is hereby dismissed with costs to the respondent.

It is so ordered



CORNELIA KAKOOZA SABIITI
JUDGE

Date: 29th August 2022