

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION NO. 2265 OF 2023  
ARISING FROM MISCELLANEOUS APPLICATION NO. 2264 OF 2023  
ARISING FROM MISCELLANEOUS APPEAL NO. 0032 OF 2023  
ARISING FROM EMA NO. 0152 OF 2023  
ALL ARISING FROM CIVIL SUIT NO. 404 OF 2018**

**GABAS INVESTMENTS LIMITED  
T/A AIRPORT VIEW HOTEL ::::::::::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**EXIM BANK (UGANDA) LIMITED ::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**(Before: Hon. Justice Patricia Mutesi)**

**RULING**

**Background**

This application is brought by notice of motion under **Section 33** of the **Judicature Act Cap 13**, **Section 98** of the **Civil Procedure Act Cap 71** and **Order 52 rules 1 and 3** of the **Civil Procedure Act S.I. 71-1**. The application seeks an interim order staying the execution of the Consent Judgment and Decree in Civil Suit No. 404 of 2018 and all applications arising therefrom pending the hearing and final determination of Misc. Application No. 2264 of 2023. The grounds of this application are that:

1. On 14<sup>th</sup> December 2022, the applicant entered into a consent judgment in Civil Suit No. 404 of 2018. At the time, the applicant believed that the Microfinance Support Centre Ltd (MSC) was going to lend to it UGX 1,400,000,000/= which would be applied to the payment of the first installment under the Consent.
2. However, unbeknownst to the applicant, Microfinance Support Centre Ltd (MSC) had adopted a new financing policy which precludes refinancing non-performing loans. The applicant has, as a result, not been able to secure

alternative funding to meet the obligations stipulated in the consent judgment on 14<sup>th</sup> December 2022.

3. The applicant applied to this Honourable Court vide Misc. Application No. 2050 of 2023 seeking to review and set aside the Consent judgment and decree on grounds that the Consent was signed under a misapprehension about MSC's financing policy.
4. The respondent filed EMA No. 0152 of 2023 to execute the decree in Civil Suit No. 404 of 2018. The learned Deputy Registrar of this Court has since allowed execution to proceed.
5. The applicant filed Misc. Appeal No. 0032 of 2023 challenging the ruling and orders of the learned Deputy Registrar allowing EMA No. 0152 of 2023 in disregard of Misc. Application No. 2050 of 2023 which is still pending before this Honourable Court.
6. The properties which are the subject of the ruling and orders in EMA No. 0152 of 2023 are developed with a hotel trading as Airport View Hotel which represents the applicant's only source of income. If the instant application is not granted pending the determination of Misc. Appeal No. 0032 of 2023, the applicant will suffer irreparable damage.
7. If this application is not allowed, Misc. Appeal No. 0032 of 2023 which raises serious triable issues will be rendered nugatory and academic.
8. The applicant is willing to comply with the orders of this Honourable Court as to security for the due performance of the decree.
9. It is in the interests of justice and equity that this application be allowed.

The application is supported by the affidavit of James Byagaba, a director in the applicant. Briefly, he told the Court that the applicant company obtained a term loan of USD 600,000 on 1<sup>st</sup> September 2014 from Imperial Bank (Uganda) Limited (now Exim Bank Uganda Limited – the respondent) for construction and furnishing of 9 additional rooms and for refinancing term loans with Stanbic Bank and East African Development Bank. The applicant obtained an additional term loan of USD 490,000 on 22<sup>nd</sup> March 2016 from the respondent to construct and furnish 10 rooms. The two credit facilities, totalling to USD 1,090,000, were secured by two properties to wit LRV 2692 Folio 24 Plot 34 Kiwafu Close, Entebbe and LRV 4409

Folio 10 Plot 36A Kiwafu Close Entebbe (“the suit land”). Upon completion of construction, the applicant applied for another additional loan of USD 60,000 for furnishing but the respondent only offered and disbursed UGX 157,971,923.

On 26<sup>th</sup> July 2017, the applicant applied for restructuring of its credit facilities and for additional financing support. However, the respondent declined both requests on 12<sup>th</sup> October 2017. The respondent rejected a subsequent proposal for refinancing of the loan from Stanbic Bank and proceeded to categorise the loan as non-performing. It demanded that all arrears be cleared and went ahead to advertise the suit land for sale on 9<sup>th</sup> April 2018.

The applicant then filed Civil Suit No. 404 of 2018 (“the main suit”) in this Court to stop the sale of Airport View Hotel. On 30<sup>th</sup> May 2019, the Minister for Finance, Planning and Economic Development wrote to Uganda Development Bank (UDB, Microfinance Support Centre Ltd (MSC) and the respondent recommending syndicated financing of UGX 3,000,000,000 to the applicant to refinance the loan with the respondent and operationalize all the rooms at Airport View Hotel. MSC agreed to lend UGX 1,500,000,000 for the partial settlement of its term loan with the respondent. On that basis, the applicant entered into a Consent judgment with the respondent on 14<sup>th</sup> December 2022 and settled the main suit. After the Consent, the applicant learnt that MSC had changed its financing policy and that MSC was now precluded from refinancing non-performing loans.

This Court has since allowed the respondent to execute the Consent by attaching and selling the suit land. The applicant filed a miscellaneous appeal against this decision but the same is yet to be disposed of. The applicant filed another application to set aside the Consent on grounds that it was entered into under an honest but mistaken belief about MSC’s financing policy. The applicant has also filed an application seeking a substantive order of stay of execution pending the determination of the application to set aside the Consent and an application for an interim order staying execution pending the disposal of the main application.

The applicant filed a supplementary affidavit informing the Court that the respondent has advertised the suit land for sale by public auction on 26<sup>th</sup> October 2023 at 10:00 am which means that there is now an imminent threat of execution.

The respondent opposed the application through an affidavit in reply sworn by John Nambale, its Legal and Company Secretary. He reminded the Court that the main suit was initially settled through the Consent judgment of 1<sup>st</sup> November 2018. The applicant failed to comply with that Consent and, in a total turn around, applied to set it aside on the ground of being misadvised by its lawyers. The application was allowed on 13<sup>th</sup> April 2021 and the main suit was set down for hearing on its merits.

Mr. Nambale further told the Court that when the main suit came up for hearing in December 2022, the applicant again requested that the matter be mediated and settled out of court. The parties, upon mediation, entered into another Consent judgment on 14<sup>th</sup> December 2022. The applicant still failed to honour the terms of the 2<sup>nd</sup> Consent Judgment forcing the respondent to institute execution proceedings. The Court has since allowed execution to proceed. In a total turn around, similar to the one in 2019, the applicant has again applied to set aside the Consent on grounds of mistake. In Mr. Nambale's view, this application is an abuse of court process because it is only brought to further delay execution unfairly.

The applicant did not comply with the Court's directive of filing its affidavit in rejoinder on 25<sup>th</sup> October 2023 by 10:00am.

### **Issue arising**

1. Whether this application discloses grounds for the grant of an interim order staying execution of the Consent Judgment and Decree in the main suit.

### **Representation and hearing**

At the hearing of this application, the applicant was represented by Mr. Francis Gimara, S.C., Mr. Lastone Gulume and Ms. Lucy Suki from M/S ALP Advocates while the respondent was represented by Mr. Eriya Mikka from M/S MMAKS Advocates. I have considered all the materials on record in coming up with this decision.

### **Determination of the issue**

It is a settled position of the law that an interim order of stay of execution should only be granted subject to the well-settled conditions, and for a short time, until a named day or a further order of the court pending the determination of the

main/substantive application for stay of execution. The purpose of an interim order of stay of execution is to preserve the status quo until the substantive application is resolved. In **Hon. Theodore Ssekikubo & 3 Ors v The Attorney General & Ors, Supreme Court Constitutional Application No. 4 of 2014**, it was held that the considerations for the grant of an interim order of stay of execution are:

- (a) whether there is a pending substantive application for stay of execution;
- (b) whether there is a serious threat of execution before the hearing of the substantive application; and
- (c) whether there is a competent notice of appeal.

These considerations are still good law in this case, notwithstanding the fact that I am now dealing with an application for an interim order for stay of execution arising from a pending miscellaneous appeal against the orders of the learned Deputy Registrar.

There is no doubt that the applicant has filed Misc. Appeal No. 0032 of 2023 challenging the decision of the learned Deputy Registrar of this Court in allowing execution to proceed vide EMA No. 0152 of 2023. That appeal is yet to be heard and determined. It is also not in dispute that the applicant has filed Misc. Application No. 2264 of 2023 seeking a substantive order staying execution until the disposal of Misc. Appeal No. 0032 of 2023. Although this substantive application was heard on 24<sup>th</sup> October 2023, the same is yet to be disposed of.

Furthermore, the applicant's supplementary affidavit in support of the application has revealed that the respondent, through its agent – Tropical General Auctioneers, advertised the suit land for sale in the Daily Monitor newspaper of Tuesday September 26<sup>th</sup> 2023. The suit land is scheduled to be sold off by public auction at the said agent's offices on 26<sup>th</sup> October 2023 at 10:00 am or soon thereafter. This proves that there is an imminent threat of execution before the substantive application is disposed of. There is no doubt in my mind that if the sale proceeds as scheduled, Misc. Application No. 2050 of 2023, Misc. Appeal No. 0032 of 2023 and Misc. Application No. 2264 of 2023 will all be rendered nugatory and moot.

Ground 8 of the application, as earlier reproduced, confirms that the applicant is willing to comply with the orders of this Honourable Court as to security for the due performance of the decree as may ultimately be binding upon it. This Court is, therefore, inclined to exercise its discretion to preserve the status quo of the suit land, at least until the disposal of the substantive application, subject to the deposit of security of 30% of the amount outstanding on the loan as at the date of this ruling pursuant to **Regulation 13(1)** of the **Mortgage Regulations, 2012**.

The only complication which is peculiar to the facts of this application is that the sale is scheduled to take place in less than 24 hours from the date of delivery of this ruling. Practically, it may not be feasible for the applicant to deposit the said security with the respondent within this limited time. By way of illustration, even if the applicant, upon receipt of this ruling, were to initiate an Electronic Funds Transfer to settle the security deposit, ordinary banking parlance in Uganda dictates that this transfer can only be expected to be fully effected within 48 – 72 hours after initiation.

I note that this is a unique situation which is not adequately anticipated by **Regulation 13(1)** of the **Mortgage Regulations, 2012**. This provision does not envisage any timelines within which the security ought to be deposited before the adjournment of the sale can have legal effect. Thus, while I am aware of the plethora of decisions from this Court uncompromisingly enforcing the 30% deposit before the adjournment of any sale of mortgaged property, I find that I do not have the luxury in this case to remain silent on the timeline within which the deposit should be made since the sale is scheduled to take place in less than 24 hours after I deliver the ruling. In the premises, the interests of justice and judicial economy lean more towards the crafting of a customized interim order for the parties in order to salvage and preserve their respective interests.

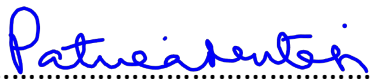
I understand the respondent's grievances and concerns, as expressed through Mr. Nambale's affidavit, to the effect that the applicant seems to be playing *ping-pong* with the Court and abusing the court process through entering consents which it later applies to set aside. I am also deeply concerned that the applicant has not adduced any iota of evidence before me to show that it has ever repaid even a

single shilling or dollar since the first tranche of the loan was disbursed in 2014. Nonetheless, I consider it fair and just at this point, solely for practical reasons, that the applicant is given some little time by this Court to organize and prepare itself to deposit the 30% security with the respondent. In the meantime, the scheduled sale of the suit land shall be halted.

Consequently, I make the following orders:

- i. Subject to the deposit of a sum of money equal to 30% of the current outstanding balance of the loan within 14 (fourteen) days from the date of this ruling, an interim order doth issue staying the execution of the Consent Judgment and Decree in Civil Suit No. 404 of 2018 and all applications arising therefrom pending the disposal of Miscellaneous Application No. 2264 of 2023.
- ii. For the avoidance of doubt, should the applicant fail to comply with (i) above on or by Wednesday 8<sup>th</sup> November 2023, the interim order shall automatically lapse irrespective of whether Miscellaneous Application No. 2264 of 2023 will have been disposed of or not.
- iii. Costs of this application shall abide by the outcome of Miscellaneous Application No. 2050 of 2023.

Dated this 25<sup>th</sup> day of October 2023

  
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**Hon. Justice Patricia Mutesi**

**JUDGE**