

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

MISCELLANEOUS APPLICATION No. 0027 OF 2023

5 (Arising from Civil Suit No. 0930 of 2022)

1. JUNACO (T) LIMITED }
2. JUSTINIAN LAMBERT }
APPLICANTS

3. VEDASTINA JUSTINIAN }

10 VERSUS

DFCU BANK LIMITED
RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

15. Background.

The respondent sued the 1st applicant by way of summary suit for recovery of a sum of shs. 12,817,499,272/= The claim arose from three credit facilities borrowed from the respondent constituted by a Performance Guarantee Limit of shs. 1,197,425,600/= (“Facility 1”); an Import
20 Loan Facility Limit of the Uganda Shillings equivalent of US \$ 2,000,000, approximately shs. 7,420,000,000/= (“Facility 2”); and an unsecured Invoice Discounting Facility Limit of shs. 200,000,000/= (“Facility 3”), the purpose of which was to enable the applicant perform the conditions of a contract to supply water meters to National Water and Sewerage Corporation. Facility 1 and Facility 2 were valid for a period of 18 (eighteen) months while Facility 3 was
25 valid for a period of 12 (twelve) months. On 24th June, 2019, Facility 2 was varied to avail the 1st applicant an Import Loan Facility Limit of US \$ 2,800,000. The said facilities were payable immediately upon demand by the respondent and were secured by: a fixed and floating charge over the 1st applicant’s assets; personal guarantees of the 2nd and 3rd applicants; a 50% upfront cash cover on each Performance Guarantee issued; and a 30% upfront cash cover on each Letter
30 of Credit issued.

The 1st applicant having defaulted on its repayment obligations under the facility agreements, this triggered the charging of penal interest in addition to the normal interest. Both continue to accrue

on the facilities. Nevertheless the respondent on 22nd January, 2021 granted the applicant's request to extend the facilities and defer the scheduled repayment for a period of 150 (one hundred fifty) days from their respective dates of expiry in order to ease repayment. The 1st applicant still breached the terms of the revised repayment schedule. Meetings were held
5 between the respondent and the 1st applicant on 19th and 20th November 2021 at which the applicants admitted the outstanding sum of shs. 9,800,000,000/= The applicants committed to deposit shs. 3,000,000,000/= with the respondent between July and August, 2022 which commitment they still failed to honour. The respondent engaged in further meetings with the applicants and their lawyers in an attempt to have a joint reconciliation of the accounts. At a
10 meeting held on 24th August 2022, the parties agreed on the principal amounting to shs. 5,478,421,071/=

The respondent agreed to the 1st applicant's request to waive penal interest conditional upon payment of the undisputed principal sum by 31st October 2022. The respondent shared with the
15 applicants and their lawyers a comprehensive breakdown of the arrears and interest due on each account totalling to the outstanding sum of shs. 12,817,499,272/= being the principal, normal and penal interest due as at 24th August, 2022, which breakdown was not disputed or rebutted. Instead, the applicants responded with a letter denying liability and claiming to have settled all outstanding sums, without sharing their detailed counter proposal on the proposed repayment
20 terms by 29th August, 2022 as requested by the respondent.

The applicant's position against that claim is that the respondent Bank has sole control over how and where the amounts deducted from proceeds collected from the intermediary are to be apportioned in regard to the existing loan amounts; whether on the principal, normal interest or
25 penal interest arising under the facility agreements. As a result the respondent bank chooses to let the principal sum run while it keeps generating interest on both normal and penal interests thereby creating delays in repayment of the loan amount. This eventually leads to interest accruing to exorbitant figures since the bank prioritises interest rather than recouping the principal sums / amounts which priority acts to the detriment of the 1st applicant. The respondent
30 has from time to time closed some of the applicant's account after the 1st applicant met its

obligations and subsequently re-opened and charged them without knowledge and explanation to the 1st applicant.

5 The 1st applicant has quite often requested for reconciliation of these loan accounts since disbursement of the facility and still requests for the same in order to determine the question of this anomaly but the respondent has not been cooperative. In spite of these anomalies and failure / refusal by the respondent to avail reconciliation of accounts, on the 15th August, 2022 the 1st applicant paid shs. 600,000,000/= toward the Import Loan Facility. That payment was higher than the running balance even when interest is considered, thereby leaving an outstanding
10 balance of shs. 54,103,011/= which the respondent has never accounted for. The principal amount has also been increased by the respondent bank without any plausible explanation which has impacted on the accrued interest and the 1st applicant's exposure, leading to a variance of shs 2,285,954,657/= over a period of 41 days. The respondent bank has since been paid over and above the Import Loan Facility. Although from the year 2018 to-date the respondent has
15 advanced to the 1st applicant only shs 15,199,856,434/=-, the 1st applicant has repaid a total of 18,205,816, 973/= The implication is that the respondent has received shs. 3,005,960,539 /= over and above what was originally advanced to the 1st applicant as a loan. Therefore the applicants have a good and tenable defence to the respondent's suit.

20 When the applicants filed an application or unconditional leave to paper and defend the suit, having perused the affidavit in support of the application, considered the submissions of both counsel and the intended defence and counterclaim, this Court formed the view that the proposed defence and the legal theory presented therein by the applicants, was clearly applicable to only part of the claim. Although the applicant took out multiple credit facilities, the affidavit in
25 support of the application only raised issues regarding the shs. 600,000,000/= paid in respect of the Import Loan Facility. The applicant had not questioned amounts accruing as principal in respect of the Performance Guarantee and Invoice Discounting Facility. In respect of the latter two, the applicant only raised un-particularised vague claims of the respondent having chosen to let the principal sum run while it keeps generating interest on both normal and penal interests
30 thereby creating delays in repayment of the loan amount. The Court considered that to be essentially a dispute over the interest charged rather than the principal sum. The application was

totally silent as regards the meeting held on 24th August 2022, where the parties agreed on the principal amounting being shs. 5,478,421,071/=

5 Furthermore, while in the affidavit supporting the application the applicants contended the respondent had received shs. 3,005,960,539 /= over and above what was originally advanced to the 1st applicant as a loan, in the draft counterclaim they did not seek a recovery of that sum but only intended to ask the court declare “that the terms of the facilities are unconscionable, repressive, negate the essence of contract and are therefore unenforceable,” and accordingly “order for an audit, reconciliation and account to determine the amounts so far received by the
10 [respondent] and how these amounts have been apportioned under the facilities,” as well as “to determine how the interest rate has been applied on both normal and penal interest on the amounts so far received.” The Court considered this aspect of the proposed defence to have been averred in so vague, bald or sketchy manner, which showed that the applicants did not have a bona fide defence as regards the shs. 5,478,421,071/= mutually agreed upon by the parties on
15 24th August 2022, as the principal amount outstanding.

In accordance with Order 36 rule 6 of *The Civil Procedure Rules*, since it appeared to the Court that the defence set up by the applicants applied only to a part of the respondent’s claim, it found that the respondent was entitled to a decree immediately for the sum of shs. 5,478,421,071/= being that part of the claim as the defence did not apply to, without imposing terms as the
20 suspension of execution or the payment of any amount realised by attachment into court, the taxation of costs or otherwise. The applicants were allowed to appear and defend the residue of the respondent’s claim.

Being dissatisfied with that decision, the applicants have since ten filed a notice of appeal.

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b. The application.

This application is made under the provisions of section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Rules* and Order 22 rules 23 (1) and 89 (1) of *The Civil Procedure Rules*.
30 The applicant seeks an order restraining the respondent from attaching funds due to them from third parties, pending the determination of the appeal. It is the applicants’ case that the

respondent has applied for a garnishee order seeking to attach the applicants' funds which will render the ending appeal nugatory, yet the appeal has a high likelihood of success.

5. The affidavit in reply;

By its affidavit in reply the respondent avers that upon entry of the partial judgment, the respondent on 25th November, 2022 wrote to the applicants demanding for payment the sum of shs. 5,478,421,071/= decreed to the respondent. Instead the applicants filed this application seeking to prevent recover of the sum, yet the applicants' intended appeal has no likelihood of success and they have not furnished security for due performance of the decree. The applicants will not suffer substantial loss and the application is brought in bad faith.

d. Submissions of counsel for the applicant.

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M/s T-Davis Wesley & Co. Advocates on behalf of the applicants submitted that the applicants are dissatisfied with part of the decision and a notice of appeal and request for the proceedings has been made. The applicants seek to contest the quantum; the monetary award is contested. The respondents are taking more than they are entitled to. In the absence of an account the amount cannot be determined. The right of appeal should be unfettered as was held in *Theodore Sekikubo and Four others v. Attorney General, Constitutional Application No. 3 of 2014* such that an order of stay should issue pending the determination of the main issues between the parties. In *China Henan International Corporation Group Company Limited v. Kyabahwa C.A. Civil Application No. 101 of 2020*, the Court of Appeal held that it is necessary to preserve the right of appeal by maintaining the status quo in order not to render the appeal nugatory.

e. Submissions of counsel for the respondent.

M/s S & L Advocates, on behalf of respondent submitted that the applicant is not resident in the country. The respondent has sought to garnishee funds due to the applicants. The applicants have not provided any undertaking of due performance of the decree. In *Mabu Commodities Limited v.*

Nakitende H.C. Misc. Application No. 530 of 2020 Justice Musa Sekaana held that substantial loss needs cogent evidence. In absence of any books of accounts of the applicant the court is not persuaded by mere statements that the company will suffer any substantial loss. In *Andrew Kisawuzi v. Dan Oundo Malingu H. C. Misc. Application No. 467 of 2013* it was held that
5 substantial loss cannot mean ordinary loss or the decretal sum or costs which must be settled by the losing party but something more than that. The applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is granted. In *Twinamasiko Onesmus v. Agaba Aisa and another H. C. Election Petition 702 of 2021* Justice Ajiji observed that to
10 the paragraphs, is a sloppy practice with fraudulent intent. The assumption is that the affirmant did not appear before the commissioner for oaths and the affidavit was not read to him.

f. The decision.

15 According to Order 43 rule 4 (3) of *The Civil Procedure Rules*, an application of this nature must be made after notice of appeal has been filed and the applicant should be prepared to meet the conditions set out in that Order including; - furnishing proof of the fact that substantial loss may result to the applicant unless the stay of execution is granted; that the application has been made without unreasonable delay; and that the applicant has given security for due performance of the
20 decree or order as may ultimately be binding upon him (see *Lawrence Musiitwa Kyazze v. Eunice Businge, S. C. Civil Application No 18 of 1990*).

The Court of Appeal in *Kyambogo University v. Prof. Isaiah Omolo Ndiege, C. A. Misc. Civil Application No 341 of 2013* expanded the considerations to include: - there is serious or
25 imminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory; that the appeal is not frivolous and has a likelihood of success; that refusal to grant the stay would inflict more hardship than it would avoid.

i. A notice of appeal has been filed.

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The applicant have satisfied this requirement. The applicants filed a notice of appeal on 30th August, 2022 which was served on counsel for the respondent on the same day. By a letter dated 28th November, 2022, the applicants have also applied for certified copy of the record of proceedings. The applicants have satisfied this requirement.

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ii. The application has been made without unreasonable delay.

Applications for a stay of execution ought to be made within a reasonable time. Whether delay is unreasonable will depend on the peculiar facts of each case. Delay must be assessed according to the circumstances of each case. The reckoning of time to determine if a delay is unreasonable begins at the time the decree or order is sealed and becomes enforceable.

In the instant case, the partial judgment was rendered on 25th November, 2022. The application was filed on 10th January, 2023. This was after the respondent had on 22nd December, 2022 filed an application for a garnishee order followed by an application for attachment of a debt filed on 3rd January, 2023. I therefore do not find any unreasonable delay in the filing this application. The applicants have satisfied this requirement too.

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iii. The appeal is not frivolous and has a likelihood of success;

An appeal by itself does not operate as a stay of proceedings under a decree or order appealed from nor should execution of a decree be stayed by reason only of an appeal having been preferred from the decree (see Order 43 rule 4 of *The Civil Procedure Rules* and Rule 6 (2) of *The Judicature (Court of Appeal Rules) Directions*). In other words, the ordinary rule is that an execution of the decree need not be stayed pending an appeal unless the appellant shows good cause. A presumption lies in favour of the integrity of the proceedings of any court of general jurisdiction. The administration of justice rests largely upon the presumption of the law that a court, acting within its jurisdiction, has acted impartially and honestly, and with integrity such that a final judgment of a court of general and competent jurisdiction is always presumed to be right.

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The court must be satisfied that the prospects of the appeal succeeding are not remote but that there is a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There should be a sound, rational basis, founded on the facts and the law, and a measure of certainty justifying the conclusion that the appellate court will differ from the court whose judgment has been appealed against; that the appellate court could reasonably arrive at a conclusion different from that of the trial court.

The appeal will be considered frivolous if *prima facie* the grounds intended to be raised are without any reasonable basis in law or equity and cannot be supported by a good faith argument. If there is a strong showing that the appeal has no merit, which is strong evidence that it was filed for delay or not in good faith. Additional evidence indicating a frivolous appeal is the applicant's conduct of prior litigation which may show that the appeal is merely part of a series of suits, applications and appeals over the same subject matter in which the applicant has engaged with no success or no chance of success. The prior litigation or procedural history can be used to establish the lack of merit in the present appeal or the bad faith of the applicant in filing the present appeal.

The applicants have not provided court with a draft memorandum of appeal of the intended appeal to the Court of Appeal. It is only during submissions for this application that counsel for the applicants has adverted to the arguments they intend to raise on appeal which appear to relate only to quantum, not liability. It is therefore not possible to assess whether they have an arguable case on appeal. I have formed the opinion that that it is not possible on the material before me to determine whether or not there is a reasonable basis in law and equity to support the grounds intended to be raised and that they can be supported by good faith argument. It is therefore not possible to determine that the Court of Appeal could reasonably arrive at a conclusion different from that of the trial court. The applicants have failed to prove this requirement.

iv. The appeal would be rendered nugatory;

Nugatory means “of no force or effect; useless; invalid.” In this context, the term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid, it also means trifling. Whether or not an Appeal will be rendered nugatory if a stay is not granted depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible, whether damages will reasonably compensate the party aggrieved, or it is in the public interest to grant a stay. This may include all cases where it is necessary to preserve the status quo pending appeal, in aid of and to preserve the appellate power, so that the rights involved in the appeal may not be lost or reduced by reason of an intervening execution of the judgment.

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If the judgment is of a nature to be actively enforced by execution and its execution does not delay or impair the character of the appeal, a stay will ordinarily not be granted. Satisfaction of a money decree does not ordinarily pose the danger of rendering a pending appeal nugatory, where the respondent is not impecunious, as the remedy of restitution is available to the applicant in the event the appeal is allowed. The presumption then is that payment made to the respondent in execution of the decree will be reversible in the event of the applicant succeeding on appeal. If it is not reversible, it has not been shown that damages will not reasonably compensate the applicant, or that it is in the public interest to grant a stay. The respondent has not been shown to be impecunious. The applicants have failed to prove this requirement too.

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- v. There is serious or imminent threat of execution of the decree or order and if the application is not granted.

Imminent threat means a condition that is reasonably certain to place the applicant’s interests in direct peril and is immediate and impending and not merely remote, uncertain, or contingent. An order of stay will issue only if there is actual or presently threatened execution. There must be a direct and immediate danger of execution of the decree. There should be unequivocal evidence showing that unconditional steps as to convey a gravity of purpose and imminent prospect of execution of the decree, have been taken by the respondent. Steps that demonstrate a serious expression of an intent include; extracting the decree, presenting and having a bill of costs taxed,

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applying for issuance of a warrant of execution and issuing a notice to show cause why execution should not issue. The applicant has not adduced evidence of this in the application.

The applicants have presented evidence to show that on 22nd December, 2022 the respondent
5 filed an application for a garnishee order followed by an application for attachment of a debt
filed on 3rd January, 2023. I therefore find that the applicants have satisfied this requirement.

vi. Substantial loss may result to the applicant unless the stay of execution is granted.

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Substantial loss does not represent any particular size or amount but refers to any loss, great or small that is of real worth or value as distinguished from a loss that is merely nominal (see *Tropical Commodities Supplies Ltd and Others v. International Credit Bank Ltd (in Liquidation)* [2004] 2 EA 331). “Substantial” though cannot mean the ordinary loss to which every judgment
15 debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. The loss ought to be of a nature which cannot be undone once inflicted.

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The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his or her appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his or her judgment (see *Alice Wambui Nganga v. John Ngure Kahoro and another, ELC Case No. 482 of 2017 (at Thika);*
25 [2021] eKLR). For that reason, execution of a money decree is ordinarily not stayed since satisfaction of a money decree does not amount to substantial loss or irreparable injury to the applicant, where the respondent is not impecunious, as the remedy of restitution is available to the applicant in the event the appeal is allowed. The respondent has not been shown to be impecunious nor the fact that execution of the decree will have any irreversible effect. The
30 applicants have failed to prove this requirement too.

vii. The applicant has given security for due performance of the decree or order.

In granting an order of stay of execution pending an appeal, the court has to balance the need to uphold the respondent's right to be protected from the risk that the appellant may not be able to satisfy the decree, with the appellant's right to access the courts. It is the reason that courts have been reluctant to order security for due performance of the decree. This requirement has been interpreted as not operating as an absolute clog on the discretion of the Court to direct the deposit of some amount as a condition for grant of stay of execution of the decree in appropriate cases, more particularly when such direction is coupled with the liberty to the decree holder to withdraw a portion thereof in part satisfaction of the decree without prejudice and subject to the result of the appeal.

Courts have instead been keen to order security for Costs (see *Tropical Commodities Supplies Ltd and others v. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 and *DFCU Bank Ltd v. Dr. Ann Persis Nakate Lussejere, C. A Civil Appeal No. 29 of 2003*), because the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals. The purpose of an order for security for costs on an appeal is to ensure that a respondent is protected for costs incurred for responding to the appeal and defending the proceeding, which therefore implies such an order does not adequately meet entirely the purpose of security for due performance of the decree. In the case of a money decree, furnishing security for due performance of the decree denotes providing depositing the disputed amount.

The applicants have not undertaken to furnish such security, yet the court has a duty in exercise its discretion to grant stay of execution of a money decree, to balance the equities between the parties and ensure that no undue hardship is caused to a decree holder due to stay of execution of such decree. For that reason, the applicants has failed to prove this requirement too.

viii. Refusal to grant the stay would inflict more hardship than it would avoid.

The Court has the duty to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from

the enjoyment of the fruits of his or her judgement. No doubt it would be wrong to order a stay of proceedings pending appeal where the appeal is frivolous or where such order would inflict greater hardship than it would avoid (see *Erinford Propertied Ltd. v. Cheshire County Council* [1974] 412 All ER 448). It is also a fundamental factor to bear in mind that, a successful party is
5 *prima facie* entitled to the fruits of his or her judgement.

Apart from the averments that the applicants stand to suffer irreparable loss if execution ensues, the applicants have not offered evidence of objective facts from which it can be deduced that in the circumstances of this case, execution will cause significant difficulty, expense or disruption,
10 beyond that to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. I therefore have not found evidence to show that that execution of the partial decree would cause significant difficulty, expense or disruption, beyond that to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. If granted,
15 the order is therefore likely to inflict greater hardship than it would avoid.

In conclusion, the applicants have not satisfied the majority of the essential requirements for the grant of an order of stay of execution pending appeal. Consequently, the application fails and is hereby dismissed with costs to the respondent.

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Delivered electronically this 13th day of February, 2023
Mubiru.....

.....**Stephen**

Stephen Mubiru
Judge,
13th February, 2023.

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