THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION NO. 2926 OF 2023

[ARISING FROM CIVIL APPEAL NO. 20 OF 2021]

[ARISING FROM TAT APPLICATION NO. 94 OF 2020]

UGANDA REVENUE AUTHORITY	**]**	**APPLICANT**
VERSUS		
ROCHE TRANSPORT & LOGISTICS UGANDA LIMITED	**]** **]**	**RESPONDENT**

Before: Hon. Justice Ocaya Thomas O.R

RULING

Introduction

This is an application for stay of execution of the judgement and decree in Civil Appeal No. 20 of 2021 pending the determination of the Appellant's appeal against the same judgment and decree to the court of appeal.

The Appellant is the statutory body charged with the duty to collect tax for the Government of Uganda. The Respondent is a company providing transportation services. Some time ago, the Respondent entered an agreement with a company called Hima Cement to transport certain good from outside of Uganda into Uganda. The Respondent sub-contracted the performance of the same contract to a company called Ultra Eureka Farm Limited ["UEFL"].

Soon thereafter, the Respondent made an application for a refund from the Applicant of some monies it claimed were overpaid as tax. Upon conclusion of the audit, the Applicant raised further assessments as below

PERIOD	ASSESMENT AMOUNT [UGX]
1st July 2016 to 30th June 2017	12,160,161
1st June 2017 to 30th July 2017	I,073,347,793
1st June 2018 to 30th June 2018	3,558,163,265

The assessments were based on an assertion by the Respondent that the appellant was under an obligation to withhold on payments made to UEFL. The appellant objected to these additional assessments and their objection was overruled by the respondent.

The appellant then commenced TAT Application No. 94 of 2020 challenging the decision of the respondent. The Tax Appeals Tribunal ["TAT"] found in favour of the respondent, holding that there was an obligation on the appellant to withhold on payments made to UEFL.

The Respondent was dissatisfied with the decision of the TAT and filed Civil Appeal 20 of 2021 before this court. By a judgment rendered on 3rd April 2023, this Court found for the Respondent and overturned the decision of the TAT.

The Applicant herein was dissatisfied with that decision and indicates that it has commenced an appeal against the judgment in Civil Appeal 20 of 2021 to the Court of Appeal vide Civil Appeal 798 of 2023 and the same is pending determination.

The Applicant states that it is concerned that the Respondent is trying to enforce the decision of this Court in Civil Appeal 20 of 2021 which would render its appeal nugatory. The Applicant contends that enforcing the judgment in the Civil Appeal 20 of 2021 will compel the Appellant to refund a hefty amount of money, to wit, UGX 1,510,143,126 which it might never again recover from the Respondent and that it is willing to provide security for the due performance of the decree.

For the Respondent, this application was heavily opposed. The Respondent contended that:

(a) The Respondent has not commenced execution proceedings in Civil Appeal 20 of 2021 and this application is premature.

(b) Filing of a notice of appeal, letter requesting the record or registration of the appeal in ECCMIS is not a magic wand necessitating grant of the application for stay of execution.

(c) Appellant's appeal has no likelihood of success.

(d) The writing of letters to the Permanent Secretary, Ministry of Finance was merely seeking clarification on Uganda's tax policy rather than an attempt at execution as the writing of letters is not one of the recognized modes of execution.

(e) The sum of UGX 4,643,671,219 was wrongly assessed and collected by the Applicant and court correctly ordered for the refund of the same in Civil Appeal 20 of 2021.

In rejoinder, the Applicant averred that it only collected UGX 1,510,143,126 of the assessed sum by way of an agency notice on a sum of money due to the Respondent by way of a refund. The Respondent denied that this application was premature and asserted that it in the event that this court was inclined to order security for judgment, it was willing to deposit part of the above collected sum as security.

Representation

The Applicant was represented by a team from its Legal Services and Board affairs department while the Respondent was represented by M/s Cristal Advocates.

Evidence and Submissions

The Applicant led evidence by way of an affidavit in support and an affidavit in rejoinder deponed by a one Diana Mulira, an advocate in the Applicant's Legal Services and Board affairs department while the Respondent led evidence by way of an affidavit in reply deponed by Felix Orech, the Respondent's head of finance.

Both parties made written submissions in support of their respective cases which I have read but did not feel the need to reproduce extensive here.

Decision

PART I: PRELIMINARY POINT OF LAW

The Respondent, in its submissions, raised a preliminary point of law, to wit, that the Applicant's application was premature. In its submissions, the Respondent contended that there was no threat of execution to warrant this application.

I notice that this preliminary point of law is related to one of the considerations for an application for stay of execution, namely, the existence of a threat of execution. Accordingly, I find it more appropriate to deal with this objection in the merits of the application.

PART II: DECISION ON MERITS

Rule 6(2)(b) of the Court of Appeal rules provides thus:
"in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just."

Rule 42(1) of the Court of Appeal Rules provides thus:
"Whenever an application may be made either in the court or in the High Court, it shall be made first in the High Court."

Order 22 Rule 26 of the CPR provides thus:
"Where a suit is pending in any court against the holder of a decree of the court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."

It should be noted that **Order 22 Rule 26** applies to a wide range of suits, and not just appeals. Where there is litigation between the parties in the same court or different courts (be they higher or lower) between the same parties, **Order 22 Rule 26** may be relied on to stay execution pending the determination of those matters.

There isn't an explicit provision of the CPR that provides for stay of execution from decisions of the High Court. However, Rule 42 of the Court of Appeal Rules requires the application for stay to be made first in the High Court.

There has been a steady stream of authorities to the effect that the considerations for stay of execution pending an appeal to the High Court are the same as those in Order 43 Rule 4. See **Lawrence Musitwa v Eunice Busingye SCCA 18/1990, Tropical Commodities Supplies Ltd and Others versus International Credit Bank Ltd (In Liquidation) HCMA 379 of 2003, Transtrack Ltd v Damco Logistics (U) Ltd HCMA 608 Of 2012, DFCU Bank Ltd v Ann Persis Nakate Lussejjere HCMA 78 of 2003**.

In other instances, courts have considered applications for stay under the provisions of Order 22 Rule 26. See **UMEME v Irene Nankabirwa HCMA 154/2021, Peter Mulira v Mitchell Cotts HCMA 715 of 2009, Rebecca Nabunya Iga v Senteza Kabali Bunya HCMA 948 of 2020**

Order 43 Rule 4 is confined to appeals to stay of execution in respect of appeals to the High Court. If the rules committee had wanted to apply it to other matters in which the High Court is empowered to grant stay, it would have said so. In my view, the proper provision of law, albeit being a broad provision, is **Order 22 Rule 26**. The decision in Lawrence Musitwa (supra) is correct in as far as it finds that the considerations are similar, since a reading of Order 43 Rule 4 and Order 22 Rule 26 show significant similarity of Considerations.

Having established that Order 22 Rule 26 is the appropriate law, we must identify the considerations for grant of this application. A reading of the provisions establishes that the considerations are

(a) Is the pendency of a suit [In this case an appeal] by a judgment creditor/losing party against a holder of a decree.

(b) Existence of a threat of execution

(c) Sufficient Ground for grant of the relief sought

See **Beeline Travel Care Limited & Anor v Finance Trust Bank HCMA 296/2023, Donati Kananura v Tribet Rujugiro HCMA 1782/2022, Uganda Debt Network v Edward Ronald Sekyewa HCMA 1657/2023.**

Pendency of an Appeal

The Respondent contended that it was never served with the memorandum of appeal in time and therefore the Applicant's appeal is incompetent and fatally defective in accordance with **Rule 88 of the Court of Appeal Rules**.

Once a notice of appeal is filed, it can be said that there is an appeal. See **Rule 76, 82 of the Court of Appeal Rules, Malinga Noah & Ors v Akol Henry CACA 203/2015 and Elizabeth Batabaire v Ngobi Siraj & Ors CACA 36/2017**.

It is common ground that the Applicant has commenced an appeal by way of Court of Appeal Civil Appeal 798 of 2023.

I therefore find that the first requirement has been met.

Threat of Execution

A threat of execution means exists where it 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, applying for issuance of a warrant of execution and issuing a notice to show cause why execution should not issue. A threat of execution exists where there is no legal bar against execution and where it is probable that the same will occur, usually by some act undertaken by the adverse party. See **Formula Feeds Limited & Ors v KCB Bank HCMA 1647/2022**

Whereas the filing of letters with the Permanent Secretary of the Ministry of Finance, Planning and Economic Development ["MOFPED"] is not, per se, a mode of execution, I note that the Respondent was requiring for clarification on the extent of compliance with the Judgment and Decree in Civil Appeal 20 of 2021. The Respondent's letters led to a letter to the Applicant from the Permanent Secretary of the said ministry asking for a report on the extent of compliance with the said Judgment and Decree against which the Applicant is appealing.

In my view, these letters were not simply "innocent" policy inquiries as suggested by the Respondent. I note that under Section 2(3) of the Uganda Revenue Authority Act, the Minister of MOFPED is the Applicant's statutory supervisor. The intention of these letters appeared to have been to apply some pressure on the Applicant to comply with the judgment against which it appears.

Even then, clearly from the content of the letters, they seek compliance with a judgment which is the subject of an appeal. It is not inconceivable that, having not found any head way with MOFPED, the Applicant likely would have commenced execution proceedings; the letters appeared to be a precursor to execution proceedings before this court.

I do not agree with the contentions of counsel for the Respondent that execution proceedings must have essentially "matured" for a stay of execution application to be made. Often, execution proceedings are very fast moving and waiting for them to be concluded may negate the purpose of the application, as by the time the same is filed, execution may be fully or partly undertaken.

For this consideration to be met, execution need not have been commenced, for as long as there is a real and reasonably held fear of execution, arising out of circumstances demonstrating a real and reasonable threat of execution. See **Beeline Travel Care Limited & Anor v Finance Trust Bank HCMA 296/2023, Donati Kananura v Tribet Rujugiro HCMA 1782/2022, Uganda Debt Network v Edward Ronald Sekyewa HCMA 1657/2023.**

Accordingly, I find that, owing to the Respondent's overt steps requiring compliance with the impugned Judgment and Decree, it is likely that, the Applicant having refused to comply with the same on account of its appeal, the Respondent will seek to enforce consent by execution. In my view, there is a threat of execution and accordingly, this consideration is met.

Sufficient Cause

Sufficient Ground

To demonstrate sufficient ground for grant of a stay, a party must demonstrate that:

(a) The appeal has a likelihood of success

(b) The Applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted

(c) If 1 and 2 above has not been established, Court must consider where the balance of convenience lies

(d) that the Applicant must also establish that the application was instituted without delay

Likelihood of Success

In my view, for an appeal to satisfy this ground, it should reveal at least one matter warranting adjudication by the court. Essentially, a triable issue is a material proposition of law or fact between parties that is capable of, and warrants determination by court. See **Maria Odido v Barclays Bank HCMA 645/2008, Children of Africa v Sarick Construction Limited HCMA No. 134/2016, Donati Kananura v Tribet Rujugiro HCMA 1782/2022**

In applications of this nature, where a Memorandum of Appeal has not been filed, the Applicant should ideally either annex a draft memorandum of appeal to indicate the proposed grounds of appeal or particularise them in their affidavit. See **Ssalongo Kakumba Bonny v Nyombi Eric HCMA 761/2021, Hajji Mohammed Katoto v Justus Kyabahwa HCMA 875/2023, Geralldine Busingye Begumisa v EADB & Ors HCMA1043/2023.**

In paragraph 10 of the Applicant's affidavit in support, the Applicant identified three grounds of appeal as forming the basis of its appeal to the Court of Appeal. These are:

(a) The Learned Judge erred in law when he held that Section 88(5) of the Income Tax Act as amended, has retrospective application.

(b) The Honourable Judge erred in law when he held that the Tax Appeals Tribunal erred in law when it interpreted the provisions of the Income Tax Act to hold that the appellant was liable to pay withholding tax assessments of UGX 4,643,671,219.

(c) The Honourable Judge erred in law when he awarded the Appellants (perhaps meant Respondent) costs of the appeal and costs of the application in the Tax Appeals Tribunal.

In my view, the above grounds of appeal raise serious triable issues warranting adjudication. Accordingly, I find that this requirement has been met.

Irreparable Harm

In the case of **Proline Soccer Academy v Commissioner Land Registration HCMA 494 of 2018**, the court defined irreparable damage in the following way;

"By irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage must be substantial or material one, that is one that cannot be adequately atoned for by way of damages."

As a general rule, where execution is based on a claim for payment of money, a stay should not be granted except if such an application is for interim stay or if the judgment creditor is unlikely to repay the judgment sum if they lose the appeal or if there are exceptional circumstances warranting the grant of stay. See **UMEME Limited v Jane Nankabirwa HCMC 154/2021 and Luwa Luwa Investment v URA HCMA 1336/2022**

In the instant case, the Applicant contended that, considering the sums of money sought to be refunded, it is unlikely that the said monies will be recovered if its appeal succeeds. For the Respondent, this contention was denied. The Respondent submitted that it has a fixed place of business in Uganda operating a business requiring

significant capital/funds to operate and therefore it is unlikely that, should the appeal go against it, the Respondent will fail to pay the sums which would have been refunded.

The Appellant did not produce evidence of any volatility in the Respondent's financial position, or indeed any threat of volatility. The present case is fairly unique because the Respondent's application before TAT was for the interpretation of Section 88(5) of the Income Tax Act. The Respondent was not required to pay 30% of the assessed tax, in accordance with the decision in Fuelex Uganda Limited v Attorney General CCCP 3/2009.

However, of all the assessed tax, a good portion has already been collected and is presently retained by the Applicant. In the absence of real evidence showing a threat of failure to repay the sums in the event of the decision in HCCA 20 of 2021 being overturned, such as by way of volatility in a party's financial situation, market control, evidence of previous non-justified refusal to pay creditors or third parties or any real evidence presenting serious doubts on a party's failure to pay, it is difficult for the court to find accordingly.

Whereas the Applicant alleged that it is unlikely that the sums which could be recovered would not be refunded in the event that the court of appeal overturns the impugned decision, the Applicant did not present convincing evidence for why it held or asserted that view.

In my opinion, the above said amount having been collected, and the Respondent having taken no measures to recover the same in light of the position in Fuelex (above) since it filed its application in 2020, the same demonstrates that the Respondent is, on the balance of probabilities, likely to be able to refund the said amounts should the appeal go in the Applicant's favour.

Balance of Convenience

In **Moses Kasozi v Muhammad Batte & Ors HCCA 24/2020**, the court defined "balance of convenience" thus

"balance of convenience literally means that if the risk of doing an injustice is going to make the Applicants suffer then probably the balance of convenience is favourable to him/her and the court would most likely be inclined to grant to him/her the application for a temporary injunction."

See Also **Proline Soccer Academy v Commissioner Land Registration HCMA 494 of 2018, GAPCO Uganda Ltd v Kaweesa & Anor HCMA 259 of 2013, Vision Empire Ltd v Uganda Communications Commission HCMA 1141 of 2020.**

I recognize that both sides will experience some hardship whichever way this decision goes. However, the court must consider who is likely to suffer the most harm.

In **Luwa Luwa Investments v Uganda Revenue Authority HCMA 1336/2022**, I held thus:

"As this a commercial court, the decisions of the court should be cognizant of economic realities in Uganda today. For a business, loss of cash flow can be akin to driving a dagger at the heart of a person, who will most certainly die. Surely, that should be a consideration that court should look at to identify the justice of the case. Moreover, Uganda, like many African countries experiences high costs of credit, which mean that borrowing to replace lost cash flow can be difficult or ruinous. This, coupled by inflation, that can affect the value of money retained means that the retention of money from a business can cause "irreparable damage" ... Tax is the life blood of government. The state relies heavily on tax to be able to perform its functions including to govern, provide welfare, execute public projects and ensure security. This is ever more critical in Uganda, which has a history of instability as a result of, to some extent in my view, the absence of the state or its inability to discharge its roles. Uganda is also uniquely placed at this time; it exists in a fairly turbulent region which poses security threats to the state and people of Uganda as well as to our neighbours. The state must therefore have the resources to fulfil its functions, and have them on time. On the other hand, the people must have an efficient and permissive environment to challenge tax assessments which they find to be incorrect, and not be prevented from pursuing reversals, either at first instance or appeal because of onerous pre-conditions. There should be a balancing act. In each case, the court should consider all

the circumstances together and give a decision that best achieves the justice of the case."

In **Stanbic Bank Limited v Kesacon Services Limited HCMA 724/2023** I dealt with some of the policy considerations relating to how this Court considers applications/actions involving money or its recovery

"The role of the Commercial Court in my view is to ensure that there is expeditious disposal of suits to avoid thrombosis in commerce occasioned by a backlog of an unresolved commercial claims or disputes. This is more so where the claims are for money. It must be recalled that money is an asset and a lengthy period of its retention means credit will become more expensive as lenders are precluded from putting their monies to use and will shift to prefer institutional borrowers that are unlikely to default as opposed to other borrowers. This has the effect of raising the cost of money and making it difficult, if not impossible, especially for domestic borrowers to access credit."

See also **Ropani International Limited & Ors v DFCU Bank Limited HCMA 1919/2023**

It must be noted that, at law, there is equality between the Government (including its agencies such as the Applicant) and private persons, including private corporations such as the Respondent. See **Attorney General v Osotraco Limited CACA 32/2002** Therefore, the application for stay of execution by the Applicant will be assessed in the same and against the same threshold as that of a private person. There is no justification for special treatment of government or private persons except if there is a clear legal basis which meets the constitutional threshold. See **Christopher Martin Madrama v Attorney General SCCA 1/2016**

In an application of this nature, Court has to balance the right of one party to appeal an unfavourable decision on a tax matter and not have their appeal rendered nugatory and the right of another party to exercise rights conferred/affirmed or pronounced in a judgment, in this case recovery of tax unduly paid. In doing so, the court should

consider which party is likely to suffer the most amount of inconvenience in the circumstances of the case and whether there are any mitigants.

In my view, the retention of UGX 1,510,143,126 which is the quantum of tax collected since, at least, 2020 and until the conclusion of the appeal, which is likely to take some time, will inconvenience the Respondent more than the Applicant unless there are some mitigants. Therefore, I need to consider the question of security before returning a decision on this issue.

Security

Order 22 Rule 26 of the CPR requires the provision for security as a precondition for grant of stay of execution.

In my view, the purpose of security is to achieve a balance between the need to preserve the essence of the appeal and the need to give a Respondent comfort that the judgment will be performed. Security is given by the appealing party such that, if the decision is maintained, and subject to the existence of a further right of appeal, the Respondent has a ready resource they can utilise to obtain full or partial payment of the judgment debt. The quantum of security is achieved at by arrogating a sum which doesn't discourage the appeal by creating a larger than necessary burden on the appellant and is a sizeable amount of the sum that the Respondent is, at that point, entitled to. Therefore, the provision of the security should be matched with the grant of the stay, if any will be granted. See **Luwa Luwa Investment v URA HCMA 1336/2022**

In my view, the issuance of security need to have been done at the time of determining the application for stay. If that was so, the rules would have designated what sufficient security is, so that litigants are aware from the onset and do not have to speculate on what sufficient security is; certainty of substantive and procedure rules is a key ingredient of the right to a fair trial. Instead, once the application is to be granted the court should;

(a) In the case where no security was offered by the Applicant: Determine an applicable amount of security and a timeframe within which to provide it and then make the order conditional on the compliance with the security obligation. The court may, in the interim, stay execution until the deadline for the provision of the security by the Applicant. If the Applicant fails to furnish the security, the application should stand dismissed in accordance with Order 43 Rule 4(1)(c).

(b) In the case where the Applicant availed a security prior to the ruling: Determine if the security is sufficient and if it not, order that an additional security be issued and issue a timeframe within which to provide it and then make the order conditional on the compliance with the security obligation. The court may, in the interim, stay execution until the deadline for the provision of the security by the Applicant. If the Applicant fails to furnish the security, the application should stand dismissed in accordance with Order 43 Rule 4(1)(c).

See **Luwa Luwa Investment v URA HCMA 1336/2022, Luwa Luwa Investments v Uganda Revenue Authority HCMA1336/2022, Beeline Travel Care (U) Ltd & Anor v Finance Trust Bank Uganda Limited HCMA 296/2023, Ahairwe Dennis v Standard Chartered Bank HCMA 1851/2023**

In my view, the provision of 70% of the sum collected by the Applicant to Respondent is sufficient security to allay the inconvenience it would suffer by the retention of the collected amount until the determination of the Appellant's appeal which, from the documents on record, is still in its infancy and is likely to take some time. This will likely avert any challenges to the Respondent's business operations while not unduly constraining the Applicant's operations and mandate.

Accordingly, I find that once security is provided, the balance of convenience favours the Respondent.

Conclusion

In sum, the Applicant's application succeeds and I make the following orders

(a) The Applicant is granted a stay of execution against the enforcement of judgment and orders in HCCA 20/2021 conditional on compliance with the condition in (b) below.

(b) The Applicant shall make payment of 70% of the sum collected, to wit UGX 1,057,100,188.2 which for the avoidance of doubt is UGX 739,970131.74 as security for the performance of the judgment within sixty (30) days from the date of this ruling.

(c) In the event that the Applicant does not comply with the condition in (b) above within the stipulated timeframe, the stay of execution granted shall immediately lapse.

(d) Costs of this application shall abide the outcome of the Applicant's appeal.

I so order.

Delivered electronically this 23rd day of January 2024 and uploaded on ECCMIS.

Ocaya Thomas O.R

Judge

23rd January 2024