

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT)
MISCELLANEOUS APPLICATION NO. 379 OF 2003
(Arising out of HCCS No. 132 of 1998)

1. TROPICAL COMMODITIES SUPPLIERS LTDAPPLICANTS
2. COUNTRY AGENCIES LTD APPLICANTS
3. ATEKER EJALU

VERSUS

INTERNATIONAL CREDIT BANK LTD..... RESPONDENT
(IN LIQUIDATION)

BEFORE: THE HONOURABLE MR. JUSTICE JAMES OGOOLA

RULING

1. The Applicants seek a court order to stay execution of this Court's judgment pending the Applicants' appeal to the Court of Appeal. The background to this application is quite convoluted. A consent judgment was entered against the Applicants for Shs.200m/-. The Applicants proceeded to pay a part of that decretal amount- to the tune of Shs.72m/-. Thereafter, the Applicants appear to have totally changed their mind one hundred and eighty degrees around. They applied to Court for a review of that consent judgment, on the grounds that their lawyer had no instructions to enter a consent judgment. On 21/05/03, this Court refused to review the consent judgment, whereupon the Applicants filed an appeal to the Court of Appeal against the decision of this Court not to review the consent judgment. It is in these circumstances that the Applicants now come to this Court seeking a stay of execution against the consent judgment. On 22/07/03, the Registrar of this Court granted an interim stay of execution pending the conclusion of this application.

2. It is noteworthy that the application was brought under the former section 101 (now section 98, Cap. 71) of the Civil Procedure Act. This is noteworthy in as much as the Applicants saw it fit not to apply under 0.39, rule 4(3) of the Civil Procedure Rules. Instead, the Applicants resorted to the inherent powers of this Court under section 98 of Cap. 71. Counsel for the

Respondent submitted that 0.39 is the applicable law on the point; and that that Order establishes three basic criteria for applications of this kind. In support of his submission, learned counsel cited the case of **Kampala Bottlers Ltd v Uganda Bottlers Ltd, S. Ct. Civil Application No. 25 of 1995**. In that application, the Supreme Court held that:

“The matter [of stay of execution] is dearly governed by 0.39 r 4(3) of the Civil Procedure Code (sic).”

Similarly, the Court of Appeal delivered an identical decision in **DFCU Bank Ltd v. Dr. Ann Persis Nakate Lusejjere, Civil Application No. 29 of 2003** affirming the applicability of 0.39, r. 4(3) to applications for stay of execution.

3. While the above must be the law — coming as it did from the highest courts in the land — the matter is not entirely without difficulty. In particular, as the heading to that Order clearly indicates, 0.39 applies only to *“Appeals to the High Court.”* Indeed, rule 1 (1) of that Order states as much. It says:

“Every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the court or to such officer as it shall appoint in that behalf” [emphasis added].

4. Similarly, rules 2,4,5,8,9,10,12,16,18,19,20,21,22,23,24,26,27,28,29,30 and 31 of Order 39 make it absolutely clear that the appeals contemplated in that Order are only appeals to the High Court from lower courts; and not appeals from the High Court itself to the higher courts. After all, the higher courts have their own rules. The question therefore remains as to whether the rules in 0.39 are appropriate for appeals (such as the appeal lodged in the instant matter) from the High Court to the Court of Appeal

5. The answer to the above question would on the face of it appear to have been firmly adjudicated and settled once and for all by the Supreme Court itself in **Lawrence Musiitwa Kyazze v Eunice Busingye, S. Ct. Civil Application No. 18 of 1990**. In that application, the Court first dealt with a careful analysis of the different provisions of the Civil Procedure Act which provide for appeals from or

to the High Court — namely:

- Section 68, which provides for appeals from original decrees and orders of the High Court to the [then] Supreme Court (now Court of Appeal);
- Section 74, which provides for appeals from appellate decrees of the High Court to the [then] Supreme Court;
- Section 77, which provides for appeals from orders given under original jurisdiction in a number of stated instances as of right, and subject to the Civil Procedure Rules.
- Order 40 of the Civil Procedure Rules, whose combined effect with sections 68 and 77 above is to provide for appeals as of right from certain orders, and appeals with leave in the case of other orders.

6. After setting forth the above lucid analysis, their Lordships of the Supreme Court then stated quite categorically that:

“There is no provision in any of the legislation for a stay of execution, and when one looks at Order XXXIX one finds with some surprise that those rules only govern appeals the High Court and not from the High Court. This is made more poignant because there are the usual Rules concerning a stay of execution relating to appeals the High Court,”

7. Accordingly, the omission of a specific Rule in this behalf is a glaring lacuna in the law. It was seen as a problem by the Supreme Court itself. In this regard, their Lordships vented their frustration thus:

• “Why was provision not made for a stay of execution in appeals from the High Court? The main reason seems to have been the statutory power of granting a stay of execution given to the Supreme Court in Rule 5(2)(b) of the Court of Appeal Rules. In that case, why make provision for the High Court to hear applications first in Rule 41?”

Had the legislation wished to make provision for a stay of execution in the High Court that could have been done as UJJAGAR SINGH v RUNDA COFFEE ESTATES LTD (1966) EA 263 will illustrate, such provision having been made in Kenya. For some reason similar

provision was not made in Uganda. It is also significant that power to grant a stay of execution is given to the High Court in cases of appeals to the High Court [but not from the High Court].”

8. The one firm conclusion to be drawn from the above is that 0.39 does not apply to appeals from the High Court to the higher courts, but only to appeals from the lower courts to the High Court. The Supreme Court has recognized this anomaly in the statutory law of the land. It is to be emphasised, however, that the anomaly or lacuna exists only in one respect (i.e. in the statutory rules of procedure only). Otherwise, as so ably stated by WAMBUZI P. (as he then was) in **Mugenyi & Company Advocates v National Insurance Corporation, S.Ct. Civil Application No 13/84:**

“It is well established that the High Court has inherent jurisdiction to stay any of its orders, see Joanita Kaaggwa v Olive Amelia KawaIya-Kaggwa administration Cause No. 21 of 1972 (1972) L/LR 129; tar Ujagar v Runda Coffee Estates Ltd 1966 EA 263.”

9. To fill the statutory lacuna then, the Supreme Court in **Kyazze’s case** (*supra*) proceeded to enunciate certain procedures, principles and practices, as follows:

“The practice that this Court should adopt, is that in general application for a stay should be made informally to the judge who decided the case when judgment is delivered. The judge may direct that a formal motion be presented on notice (Order XL VIII rule 1.), after notice of appeal has been filed. He may in the meantime grant a temporary stay for this to be done. The parties asking for a stay should be prepared to meet the conditions set out in Order XXXIX Rule 4(3) of the Civil Procedure Rules. The temporary application may be ex parte. If the application is refused, the parties may then apply to the Supreme Court under Rule 5(2) (b) of the Court of Appeal Rules where again they should be prepared to meet conditions similar to those set out in Order XXXIX Rule 4(3).”

10. The above are rules of practice. Indeed, even though they are derived from 0.39, they are only rules of practice. They are not a statutory edict or enactment. That being the case, it is extremely perplexing then that the same Supreme Court in the **Kampala Bottlers** case (*supra*) — which was heard and decided in 1995 (i.e. some 5 years after the **Kyazze** case) —

came out boldly to declare quite emphatically that:

“The matter is c/early governed by O.39 r 4(3) of the Civil Procedure Code (sic).”

11. To compound matters, the **Kampala Bottlers** case, as well as the **Lusejjere** case (*supra*) went even a step further to categorically assert that O.39 4(3)(c) requires the Applicants to deposit in court security “for costs” only — yet the plain, unequivocal language of that paragraph (C) requires the Applicants to give:

“ . . .Security, for the due performance of such decree or order as may ultimately be binding upon him.” [emphasis added]

12. Thus the above two Supreme Court decisions give rise to a patent conflict and contradiction. Either O.39 applies (as contended in **Kampala Bottlers**), or it does not (as positively affirmed in **Kyazze**). Moreover, either the security required to be deposited in court during a stay of execution is only security for costs (as asserted in **Kampala Bottlers**), or it is security of the whole decretal amount (as plainly stated in O.39 r 4 (3) (c).

13. It is quite evident, given all the above difficulties that the position on these points is badly and urgently in need of a clear restatement of the law. This could possibly be done by the Supreme Court itself, at the earliest available opportunity, in order to straighten out this area of our jurisprudence. Conversely, the Civil Procedure Rules could be expressly amended (at the behest of the Honorable the Chief Justice, through the Rules Committee). The aim of such an amendment would not only be to iron out the rough edges discussed above, but also to generally enrich and update this area of our Rules of Procedure. In this connection, I wholeheartedly endorse the sentiments expressed by my brother, LUGAYIZI J, in the similar ruling that his Lordship delivered only one week ago in **Tahar Fourati Hotels Ltd v Nile Hotel (Int’l) Ltd, High Court Misc. Application No. 614 of 2003**, to the effect that the Rules Committee should take its responsibility to attend to this clear gap in our Rules of Civil Procedure.

14. Be that as it may, this Court must abide by the above decisions of the Supreme Court and of the Court of Appeal, which have established three conditions for the determination of applications for stay of execution, namely:

- (a) that substantial loss may result to the Applicants unless the order of stay is made,*
- (b) that the application has been made without unreasonable delay, and*
- (c) that security for costs has been given by the Applicants.*

15. In the instant application, the Applicants averred that substantial loss may result if execution proceeds in as much as the appeal would be rendered nugatory. As the Court of Appeal emphasized in **Lusejjere’s** case (*supra*):

*“It Is the paramount duty of a Court to which an application for stay of execution pending an appeal is made to see that appeal, if successful, is not rendered nugatory: See **Wilson v Church (1879) 12 Ch.D 454.**”*

In this regard, the Applicants noted that the Respondent, who is the judgment creditor, is already in liquidation. Therefore, if the entire decretal amount is now recovered through execution of the decree, and if the Applicants then succeed on appeal, they would find it extremely difficult to recover that money from the liquidation. I wholly agree that by reason of the Respondent Bank closure for solvency and its ongoing liquidation the situation is rendered dicy for the Applicants.

16. Nonetheless, the Applicants’ difficulties in recouping their money from the liquidated bank is only one consideration. The other consideration is whether the loss, if any, arising from those difficulties would be substantial. Hence, the question needs to be asked as to what in law constitutes “substantial loss”. In my view, substantial loss need not be determined by a mathematical formula whose computation yields any particular amount. Indeed, **Jowitt’s Dictionary of English Law (2’ Edn.) Vol. 2, p.1713**, carefully defines the analogous concept of “substantial damages” as:

“damages which represent actual loss, whether great or small, as opposed to nominal damaqes.” “[emphasis added]

17. In similar vein, **Black’s Law Dictionary (6th Edn.) at p.1428**, defines the word “substantial” as, inter alia:

*“of real worth and importance, not seeming or imaginary or illusive - **Seglem v Skelly Oil Co., 145 Kan. 216 P.2d 553, 554.** Something worthwhile as distinguished from something without value or merely nominal — **In Re Krause’s Estate, 173 Wash. 1, 21 P. 2d 268.**”*

The conclusion is inescapable. Substantial loss does not represent any particular amount or

size. It cannot be quantified by any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal.

In the light of the above definitions, and given the fact that the Respondent is in liquidation, there can be no doubt but that the Applicants are likely to suffer substantial loss if execution of the decree is not stayed pending disposal of the appeal.

18. As regards the criterion of delay, I am equally satisfied that the Applicants have been extremely diligent in lodging the appeal, and in prosecuting this application. The Court's ruling (in Misc Application No. 67/2002) against which the Applicants have now appealed was delivered on 21/05/03. The Applicants then applied for and were granted an interim stay of execution on 22/07/03. Thereafter, the appeal was filed on 30/09/03 as Civil Appeal No. 96/2003, and was promptly served on the Respondent's counsel. I am thus satisfied that the application has been made without unreasonable delay.

19. That leaves only the third criterion — namely payment of security. The Applicants did not offer any security. The Respondent for its part sought security of Shs.137.Sm/-, representing the entire balance of the decretal amount. Here again, as discussed elsewhere in this Ruling, we are faced with yet another difficulty from the **Kampala Bottlers** case (*supra*). In that case, their Lordships of the Supreme Court talked in terms of “security for costs”. Similarly, in the **Lusejjere** case (*supra*) the Court of Appeal made the categorical statement that:

‘Under Order 39 r 4(3) of the CPR an application for stay of execution pending an appeal must be accompanied by payments of security for costs.’

Yet, 0.39 r 4(3) talks generally in terms of “security”, without qualification or limitation as to “costs”, etc. Indeed, 0.39 r. 4(3) (c) requires payment of

“Security” by the Applicants for the due performance of such decree or order as may ultimately be binding upon him.” [emphasis added]

20. The above quoted language seems to embrace security for the entire decretal amount —

rather than merely security for the costs of the appeal. This conclusion is fortified further by the existence of such other rules (particularly rule 9 of the same O.39) which explicitly confer on the Court a discretionary power to “*demand from the appellant security for the costs of the appeal*.” It is quite evident then that the security mentioned elsewhere (especially in rules 4 and 5 of that same Order) cannot be security for costs. Yet their Lordships of the Supreme Court in the **Kampala Bottlers** case (*supra*) categorically held that:

“Under [O.39, r. 4(3)] the Applicants must show

(a)...

(b)...

(c) that security for costs has been given by the Applicants.”

[emphasis added]

21. Again, regarding this particular difficulty, this Court must abide by the holding of the Supreme Court. Accordingly, in the instant case, for the application to succeed the Applicants must be willing to give security for costs — rather than security for the entire decretal amount as pressed by the Respondent’s learned counsel. In my view that requirement is eminently more just. Insistence on a policy or practice that mandates security for the entire decretal amount is likely to stifle possible appeals — especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts. In the circumstances of this case a figure of about 10% of the decretal amount (of Shs.200m/-) would appear to be quite adequate — if the Applicants are willing and ready to pay it.

22. The application is hereby granted, on condition that the Applicants must pay into Court a total sum of Shs.20m/- as security for the costs of his appeal. That amount is to be paid into this Court not later than 14/12/2003. In the meantime, the interim stay of execution that was granted by the Registrar of this Court will continue in force (until that date).

Ordered accordingly.

James Ogoola

JUDGE

13/11/03

DELIVERED IN OPEN COURT, BEFORE:

Masembe Kanyerezi, Esq — Counsel for the Respondent

Mr. Ateker Ejalu 3rd Applicant, and 1st Applicant's Managing Director

J.M. Egetu — Court Clerk

James Ogoola

JUDGE

13/11/03