

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. APPLICATION NO 492 OF 2008

(Arising from High Court Misc. Application Cause No. 112 of 2008)

AYA INVESTMENTS (U) LTD:..... APPLICANT

VERSUS

M/S KIBEEDI & CO. ADVOCATES:..... RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This application was brought under 0. 22 rr. 26 and 52 (1) and (2) of the Civil Procedure Rules; Section 98 of the Civil Procedure Act, Articles 126 (2) (e) and 128 (1) of the Constitution; and Section 39 of the Judicature Act. It is for orders that:

1. An order doth issue staying and setting aside the taxation order, the Garnishee order (Nisi), together with the warrant of attachment and all other execution orders granted against the applicant.
2. Costs of this application be provided for.

The major ground of the application is that the taxation of Advocate - client Bill of costs in H.C Misc. Cause No. 112/2008 which gave rise to the garnishee proceedings and order nisi and subsequently Warrant of Attachment of the Land and development thereon comprised in LRV 3556 folio 8 at Nakasero Hill, Kampala City, dated 21st October, 2008 were irregular, bad in law, and null and an application has been filed seeking to set aside the proceedings.

When the suit came up for hearing on 03-11-2008, Mr. Lule for the applicant moved court for a stay of execution. The applicants want the status quo preserved pending determination of the application to set aside the proceedings.

According to counsel, there is a warrant of attachment which the applicant thinks was improperly obtained, in breach of the most fundamental principles of law, the principle being that no person be condemned unheard in defence of property.

The application is objected to by learned counsel for the respondent, Mr. Walubiri. According to counsel, the application is defective in that although it is headed Notice of Motion to stay Execution, it also seeks setting aside of the taxation order, the garnishee order nisi together with the Warrant of Attachment. In other words, the application seeks final orders as well as temporary orders. According to counsel, the order to set aside is incompatible with the intended appeal, the subject matter of **HCMA No 491 of 2008.**

Further, counsel argues that if there was an appeal, the instant application would be governed by 0.43 r. 4. Under this law, security has to be given by the applicant for the due performance of the decree or order as may ultimately be binding upon him/her. Counsel is of the view that if stay is to be granted, an order ought to be made by this court for the applicant to deposit in court by way of security for costs the decretal sum herein that is, USD 2,448,500.

I have very carefully addressed my mind to the able arguments of counsel, both for and against the application.

At the very heart of this matter is an Advocate — Client bill of costs which the Registrar of this Court taxed and allowed ex-parte on 20-05-2008. Following the ex-parte taxation, the respondent proceeded to extract a decree and to seek enforcement thereof by way of execution. The applicant has since resisted the execution process arguing that the decree was irregularly obtained. The initial attempt to have the decree set aside by the Registrar who made it suffered a set back because the Registrar, very correctly in my view, decided that he had no jurisdiction in the matter.

Clearly, what the applicant wanted in that application was High Court's review of its own decree. The power to review judgments or orders of the High Court (including those entered by Registrars) is not among the powers delegated to the Registrar: **Attorney General & anor Vs James Mark Kamoga & Anor SCCA No. 8 of 2004.** (unreported).

The applicant has since filed **HCMA No. 491 of 2008** seeking leave to be granted to the applicant to file an appeal to the Judge of the High Court of Uganda out of time against the decision of the Taxing Officer made on 20- 05-2008 taxing the respondent's Advocate — Client Bill of Costs ex-parte and allowing it at USD 2,448,500.

As to whether the instant application is defective, I notice that it is headed: "Notice of Motion to stay Execution". However, for reasons best known to the applicant and/or its counsel, the application also seeks an order to set aside the taxation order itself, the Garnishee order (nisi) and the Warrant of attachment and other execution orders granted against the application, remedies which in my opinion are inconsistent with the application itself. I say so because the applicant cannot be heard to apply for leave to file an appeal to the Judge of the High Court under **HCMA NO. 491 of 2008** and before leave is granted have the impugned orders set aside. Court can utmost order stay of execution of the impugned order pending determination of the application for leave to file an appeal. To this extent, Mr. Walubiri's argument is valid.

Having said so, would court reject the application on account of misjoinder of reliefs?

In my view, to do so would be to trivialise the applicant's complaint in the whole saga. What learned counsel has pointed out to court is an adoption of a wrong procedure as to the other reliefs. This would not invalidate proceedings where:

- (a) it did not go to the question of jurisdiction; or
- (b) no prejudice was caused to the opposite party.

None of those two essential elements pertain in the instant application in as far as I am able to ascertain.

Moreover, it appears to me that even Article 126 (2) (e) of the constitution would be appropriately invoked in a situation such as this. Since the applicant's complaint relates to alleged violation of a fundamental right, that is, their right to be heard before its property can be taken away, a liberal approach would be taken when considering procedural technicalities or rules that tend to reduce on the guaranteed unhindered access a person has to this court. Substantive justice must be administered without undue regard to technicalities.

As regards the issue of security for costs, this application was brought under 0. 22 r. 26. This law provides for stay of execution pending suit between decree holder and judgment debtor.

It provides:

“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”.

Learned counsel for the applicant appeared to suggest that there is no suit before court. I am unable to accept that argument. The law (S.2 of the Civil Procedure Act) defines ‘Suit’ to

mean 'all civil proceedings commenced in any manner prescribed'.

The applicant seeks a remedy under HCMA NO. 491 of 2008. It has moved this court by way a Notice of Motion under 0. 51 r. 6 and 0. 52 rr. (1) and (2). Until that matter is determined, it is a pending suit in the context of 0. 22 r. 26.

As regards payment of security, 0. 43 r. 4 cited to me by learned counsel for the respondent is inapplicable herein. While I must reserve my own comments on the impropriety of the proceedings brought under 0. 51 r. 6 aimed at setting aside the decree of this court through its Registrar, until such time as circumstances will warrant, payment of security under O.22 r. 26 is discretionary. As a general rule, the only ground for stay of execution is for the applicant to show that once the property in issue is disposed of, there is no likelihood of getting it back should the appeal succeed. As I have already stated herein, what is at stake herein is a decree that was obtained exparte. If at the end of the day court finds that the applicant was never served for the hearing of the application for the taxation of the respondent's bill of costs, the decree will be nullified. Once it is nullified, every proceeding founded on it will follow suit.

It is not necessary at this stage to consider whether the applicant will succeed in HCMA No. 491 of 2008. The applicants have only to present such facts as would satisfy court that a prima facie case exists for court to exercise its discretion in their favour pending determination of the issue as to alleged service of process on them.

They have shown that they stand to lose vast business interests in the suit property if the intended sale is not put on hold pending determination of their complaint. Considering all the facts and circumstances as presented to court, it is my sincere and honest opinion that the interests of justice herein demand that the garnishee order nisi, together with the warrant of attachment and all other execution orders granted against the applicant be stayed pending investigation and remedial action of this court in HCMA No. 491 of 2008. There shall be no order as to payment of security for costs as what is in issue is exercise of court's power to review its own order. The second objection shall also be disallowed.

In the result, the two objections are disallowed. Execution of the court's order shall be stayed pending determination of HCMA NO. 491 of 2008 unless court for a good cause orders otherwise.

Yorokamu Bamwine

JUDGE

10-11-2008

10-11-2008

Mr. Lule. G

Mr. Nkurunziza. D - for applicants

Mr. Walubiri for Respondent

Respondent's Mr. Kibeedi present

Court: Ruling delivered

Yorokamu Bamwine

JUDGE

10-11-08