THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-MA-0050-2010

(Arising from HCCA No. 0039-2010)

1. **WATULATSU SAMUEL**
2. **DR. WABURKO**
   T/a ST. MARTIN MEDICAL CENTRE
3. **NANYGO NATHAN CEASER………………………….APPLICANTS**
                                             VERSUS
    ZIRIMU HARUNA……………………………………RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

RULING

This is an application for stay of execution brought by way of Notice of Motion under O.43 rr.4(1), 3 and 5 of the Civil Procedure Rules. The applicants are represented by M/s Dagira & Co. Advocates. The respondent Zirimu Haruna appears in person.

The orders sought in the application are that;

1) Execution of the decree in Civil Suit 143/2008 be stayed pending determination of High Court Civil Appeal 0039 of 2010.

2) Costs hereof be provided for.

The grounds of the application are that;

a) The applicants have filed Civil Appeal No.39/2010 against the decree in Civil Suit No.143/2008 against the respondent which has high probability of success.

b) The applicants shall suffer substantial loss if execution of the decree is not stayed.

c) The application has been lodged without any undue delay, and;

d) The applicants are ready and willing to furnish security for the due performance of the said decree.

The application is supported by the affidavit of Watulatsu Samuel on behalf of the applicants. The affidavit reiterates the contents of the application and adds that the decree orders the applicants to pay the respondent 200000= as general damages, 2,000,000= special damages and shs 5,000,000= as punitive/exemplary damages with interest at 12% p.a and costs of the suit. That the applicants are likely to suffer substantial loss if execution is not stayed because the respondent is incapable of refunding the decretal sum if he received it now because he has no capacity to do so as he has no known property and/or known source of income. The applicants are willing to furnish security.

In his affidavit in reply, the respondent, Mr. Zirimu Haruna depons that no justification has been shown by the applicants to prohibit him from receiving the award of the trial court.

That he is entitled to the benefits of the decree of the trial court since he was the successful party. That it is just and equitable that the application be rejected.

Court allowed parties to this application to file written submissions.

I have considered the application and the law applicable. I have taken into account the respective submissions on either side.

Order 43 rr.4 (1) and 3 of the Civil Procedure Rules provides for stay of execution. It is trite law that an appeal to the High Court shall not operate as a stay of proceedings under a decree or order appealed from except so far as the High Court may order. Further it is trite law that execution of a decree may not be stayed by reason only of an appeal having been preferred from the decree. A stay of execution can only be ordered if sufficient cause is shown by the applicant and/or that substantial loss may result to the party applying for stay of execution unless the order is made. The application ought to be made without delay and security for the due performance of the decree or order as will ultimately be binding has to be provided. These conditions must be proved in order for court to grant an order for stay of execution.

As conceded by either side appeal No.0039/2010 has been filed as exhibited in annexture 'A' to the affidavit in support. The memorandum of appeal complains of eight grounds challenging the findings of the trial Magistrate. As rightly pointed out by Mr. Dagira learned counsel for the applicants, the respondent did not rebut the affidavit evidence by the applicant. He simply deponed emphasizing his entitlement to have his decree enforced. Failure by the respondent to sufficiently

rebut the application is detrimental and the law presumes that he admitted the averments as true facts. ***SEM KAGWA V. BEATRICE NAKITYO [2001-2005] 2HCB 120.*** Undoubtedly the respondent is entitled to enjoy the fruits of litigation as he asserts.

It is premature for this court to make a finding of whether the appeal has chances of success. The general principle however is that when a party pursues his/her right of appeal, the appeal if successful should not be rendered nugatory.

Regarding substantial loss because the respondent has no property or known source of income, the respondent contends that this should not be a basis to deny litigants fruits of litigation at the earliest opportunity. This could be true but court must be cautious and determine whether if a monetary decree is enforced, there is a likelihood of recovery of the decretal money should the appeal succeed. It is the respondent to show that even if he/she is paid the money worth of the decree, he/she will be in a position to refund it in case the result of the appeal is against him. I agree with the decision of Kato J (as he was) when he held in ***Ntege Mayambala v. Christopher Mwanje HCMA 72/1991 (1993) 1 KALR 97***, that;

> "*In the absence of any piece of evidence before me as to the financial position of the complainant, I am inclined to accept paragraph 11 of the applicant's affidavit in support of this application as being genuine….. the ground that if payments are effected by the applicant before the appeal, it may be difficult to recover them in the event of a successful appeal is relevant ground which amounts to sufficient cause to stay execution.*"

In the instant application, I find that paragraph 6 is a genuine concern by the applicant and the respondent has not sufficiently allayed the concern. I do not agree with the respondent that this finding will imply he is a pauper. The reverse is true. Justice should be based on broad considerations.

In this case the interests of the respondents would be better served if execution of his decree is temporarily stayed and eventualities cushioned by provision of security for the due performance of the appeal decree as may be binding on the applicants in any event.

I am satisfied that the application under consideration was filed without undue delay.

Regarding the issue of security which is a mandatory requirement, its sufficiency is a matter for the court to determine. The applicants offered a motor vehicle UAE 194 V Toyota Carib as security for the due performance of the decree in any event.

According to the respondent the said security may not be sufficient to cover his claim after the appeal. Secondly, that the 2nd and 3rd applicants have not furnished any security for the due performance of the decree and the attendant costs. Further that there is no valuation report of the security provided. The respondent proposes that in the event of the court granting the application then a sum not less than 20,000,000/= would be assuring.

In reply to this, Mr. Dagira, learned counsel for the applicants urged court to look at the decretal sum of the lower court only and not of the outcome in the appellate court.

On the issue of security, I agree with the respondent that much as the main consideration in this application should be the decretal sum, the result of the appeal should not be overlooked. The matter before court should be looked at as a whole. I also agree that since the applicants are three, they ought to have proposed security to bind them respectively at the end of the appeal.

Without valuation it is difficult to tag value on a Carib vehicle of the UAE registration series. In my consideration view therefore I will allow this application and order that the Carib vehicle produced before the Registrar for viewing with its latest third party insurance cover, and in addition to that security each of the other two applicants will bind themselves respectively in the sum of 5,000,000/= not cash for the due performance of the decree as will be binding on each.

This application is allowed.

Costs shall be in the cause.

Musota Stephen

JUDGE

13.7.2010

13.7.2010

Applicants absent.

Respondent in court in person.

Dagira for Applicants.

Wanale Interpreter.

Dagira: The matter is for ruling.

Court: Ruling delivered.

Musota Stephen

JUDGE

13.7.2010