THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA

MISC. APPLICATION NO. 88 OF 2012
ARISING FROM CIVIL SUIT NO. 94 OF 2003

UGANDA POST LTD. :: APPLICANT

VERSUS

ANNA MAGEZI :: RESPONDENT

BEFORE THE HON. LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This Application was made under sections 96 and 98 of the C.P.A and O.51 r. 6 and O.52 rr.1 and 3 of the C.P.R, seeking the following orders:

(1) Extension of time to be granted to the Applicant within which to file a Notice of Appeal and effect service thereof on the Respondent/Defendant.

(2) That the appeal be filed out of time.

(3) Execution of the Judgment in High Court Civil suit No. 94/2003 be stayed pending the outcome of the appeal.

(4) Costs be provided for.

The grounds of the Application were supported by the affidavit of one Deborah Kituyi, the Manager Legal Services of the Applicant Company. The affidavit was relied upon at the hearing.

Counsel for the Applicant submitted that in order for Court to allow extension of time, the Applicant must satisfy the Court that the required step was not taken at the right time due to sufficient reason.

She narrated that the Judgment sought to be appealed against was delivered on 28/11/2011. Before it was delivered, the trial Judge was transferred to the Commercial Court.

When the Judgment was delivered the Applicant was not notified of the date for delivery of the same. It was not until April, 2012 when the Applicant discovered that the Judgment was already delivered; which was about 6 months later.

Referring to paragraph 3-5 of the supporting affidavit, counsel pointed out that by then, the 14 day period within which to file the notice of appeal had expired; thereby making it impossible for the Applicant to meet the requirement.

The omission to notify the Applicant was attributed to the Registry staff of the Court, it was therefore prayed that court finds it sufficient cause and grants the extension as the omission was not due to any fault of the Applicant. The case of **Godfrey Magezi & Another vs. Sudhir Ruparelia C.A. 10/2002 SCU** was relied upon to support the argument that errors of Court are sufficient grounds for extension of time –Page 14 and 15 of the Judgment.

For stay of execution, the Applicant again relied on the 2 supporting affidavits of the Legal Manager of the Applicant company dated 12/04/2012 and the rejoinder of 15/04/2012, and relied upon the case of **Dr. Ahmed Muhammed Kisuule vs. Greenland Bank C.A 11/10** which sets out the conditions to be satisfied if an Application for stay of execution is to be granted. They are:

(1) The Applicant will suffer irreparable damage if the order is not granted.

(2) The Application was made without unreasonable delay.

(3) Security has been given for due performance of the decree.

Counsel contended that the above conditions were satisfied in paragraphs 3a-f of the affidavit in rejoinder.

These include the Judgment on the counter-claim against the Applicant in excess of shs.100,000,000/= together with accrued interest which by then stood over shs.53,000,000/=. This according to Counsel would require the Applicant to sell off assets.

It was also pointed out that the Applicant has other huge debts and cash flow problems in excess of its annual budget – Paragraph 3c.

Being a Government Institution, the Applicant would have to go through lengthy procedures under the P.P.D.A Act.

That unless stay is granted, repayment of the Judgment sum by the Respondent in case the appeal is successful may be almost impossible, more so since under section 283 of the Succession Act, payment of the deceased's debts is subject to prioritization and rating. And repayment of the sum might not take priority over other debts.

It was prayed that the Application be allowed and the Applicant would offset on the amount due, as security for costs. Adding that the Application was filed immediately the Applicant discovered Judgment had been delivered.

To set the record straight Counsel for the Respondent pointed out that Judgment was delivered on 24/01/2012 and not 28/11/2011 as alleged by the Applicant. The record indicates so.

While regretting the failure of Court to notify the Applicant when Judgment was delivered and also agreeing with the principles set out in the case of **Dr. Ahmed Muhammed Kisuule (supra)** Counsel for the Respondent contended that an important factor had been omitted. To wit: **"likelihood of success of the appeal."**

He asserted that though it is mentioned in the supporting affidavit Paragraph 8 where it is deponed that there was a lawful re-entry, the Respondent terms it an illegal seizure or conversion of property. Yet there is no rebuttal in the affidavit in rejoinder and Counsel for the Applicant did not address it in her submissions.

The said seizure of the property was the subject of the Counter-claim but the Applicant does not indicate anywhere in its affidavit that the purported re-entry entitled them to seize the property of the tenant.

For those reasons, Counsel submitted that the intended appeal was frivolous and had no likelihood of success, and that the Application was only intended to buy time and was a deliberate omission.

To support this argument the case of **Elizabeth Nakanwagi vs. Sterling Civil Engineering Ltd [1995]4 KLR 27** was relied upon. An Appeal was denied in that case for failure to show possibility of success although the Applicant had shown Court that a stay was necessary in order not to render the appeal nugatory and that irreparable damage would occur.

Referring to the other grounds, like the likelihood of selling assets in order to raise the amount due, it was stated that it would have been more acceptable if the Applicant had instead requested time within which to pay.

Asserting that, the impecuniousty of a Judgment debtor is not sufficient ground to stay of execution he relied upon the case of **Teddy Seezi Cheeye & Another vs. Enos Tumusiime C.A. 21/96 [1997]6 KLR 101-105.**

Further that, if payment would involve vigorous procedure, time can be granted to the Applicant to go through the procedures and make the payment.

Commenting about the security for performance of the decree, it was submitted that the offer of Shs.7.7million was grossly inadequate and not commensurate with the decretal sum and the interest.

However, Counsel was quick to add that, if Court was inclined to grant the stay of execution then the Applicant ought to be required to furnish reasonable security. The case of **Lawrence Musitwa Kyazze vs. Busingye SCU C.A. 18/90** cited in the case of **Nambusu vs. Energo Project [1995]5 KLR 6-11 at page 10** was relied upon.

In that case, O.39 r.4 (3) C.P.R currently O.43 r.4 (3) C.P.R was discussed and conditions for security for due performance of a decree were laid down.

It was further submitted for the Respondent that in case of success of the appeal, she would be able to refund the money as there was no evidence that she would be unable to pay. And there was no likelihood of the appeal being rendered nugatory if Application was disallowed.

Section 283 Succession Act was cited to support the contention that all creditors of an estate rank the same. It was then prayed that the Application be dismissed.

In rejoinder, the Applicant's Counsel insisted that the likelihood of success of the appeal had been pleaded and the Respondent's claim of illegal seizure responded to, plus the likely irreparable loss. She argued that the merits would be dealt with on appeal considering that the Respondent had prior to the suit not paid rent for 6 months.

Also that, in practice security for performance is normally 10% of the decretal sum. And if coupled with the Shs.2million damages, it would be sufficient security if only the Application would be allowed.

Upon hearing the submissions of both counsel and going through the pleadings on record, the issues for Court to determine are whether the extension of time in which to file notice of appeal and effect service thereof upon the Respondent should be granted; whether the appeal should be filed out of time and whether execution of the Judgment should be stayed pending the disposal of the appeal.

It is apparent from the record of proceedings that the judgment sought to be appealed against was dated 28/11/2011 by the trial Judge, but it was delivered on 24/01/2012 by the Registrar in the absence of both parties and Counsel for the Plaintiff but in the presence of Counsel for the Defendant.

Apart from the comment of the Registrar that both Counsel were informed, there is nothing else on record e.g. an affidavit of service to indicate that that was indeed the case.

Indeed Counsel for the Respondent/then Defendant acknowledges that Counsel for the Applicant was not served as in his opening remarks in reply to the submissions of Counsel for the Applicant, he regrets the failure of Court to notify the Applicant when Judgment was delivered. I therefore find as a fact that the Applicant was not notified of the date of Judgment, and in those circumstances could not take the right step at the right time in processing the intended appeal against this Judgment.

The Applicant states and it is not disputed by the Respondent that they got to know of the Judgment in April, 2012 which was a period of 3 months after the fact.

Both Counsel agree that the omission to notify the Applicant was the fault of the Court Registry staff and that the decided cases more so the case of **Godfrey Magezi & Another vs. S. Ruparelia (supra)** cited by Counsel for the Applicant are to the effect that errors of Court are sufficient grounds for extension of time.

The Applicant has therefore established sufficient cause for extension of time within which to appeal. However in the same Application, they also applied for stay of execution pending appeal. And in this respect, it is the argument of Counsel for the Respondent that the Applicant failed to show that the intended appeal is likely to succeed which is one of the conditions to be satisfied if an Application for stay of execution is to be granted. See the case of **Dr. Ahmed Muhammed Kisuule (supra).** And that therefore the intended appeal was frivolous and only intended to buy time for the Applicant and should therefore be dismissed as per the case of **Elizabeth Nakanwagi vs. Sterling Civil Engineering Ltd (supra).**

Nevertheless, am not persuaded by the argument of Counsel because other decided cases are to the effect that **"an Application for stay of execution has to establish <u>any</u> of the three circumstances to enable Court to grant an order of stay."** See the case of: **Mangungu vs. National Bank of Commerce Ltd [2007]2 EA 285 CAT.** Though this is a case of the Court of Appeal of Tanzania it is of persuasive value. And apart from the likelihood of success any of the other grounds to be relied upon are, likelihood of substantial or irreparable injury to the Applicant; and balance of convenience.

And contrary to the submissions of Counsel for the Respondent, the likelihood of success of the appeal is indicated in paragraph 8 of the supporting affidavit which was relied upon, although this ground may not have been specifically mentioned by Applicant's Counsel in her submissions.

The Applicant also referred to the substantial questions of law and fact that would require determination of appeal. This not being the appellate Court, the merits of these issues can only be determined upon hearing the appeal.

And even if it were to be believed that the appeal has no likelihood of success, the Applicant pleaded likelihood of substantive and irreparable injury to the Applicant which is one of the

circumstances upon which Court can grant stay; in addition to which security for the performance of the decree was offered.

Granted Counsel for the Respondent has misgivings concerning those two circumstances, stating that it would have been preferable or more acceptable if the applicant had requested time within which to pay as impecuniousty would not earn the Applicant a stay.

But I am of the view that considering the sums involved, the balance of convenience demands that stay be granted upon condition that the Applicant gives security for performance of the decree.

Am in agreement with Counsel for the Respondent that the offer of Shs.7.7million proposed by Counsel for the Applicant as security is extremely inadequate and not commensurate with the decretal sum, taking into account the circumstances of this particular case.

Justice demands that the Applicant be required to furnish reasonable security.

Counsel for the Applicant contends that the Courts have established that such security should be 10% of the entire decretal sum. In the present case, Counsel offered to add Shs.2,000,000/= granted to the Applicant as general damages to the sum of 7.7m= offered earlier. But the decision availed to Court in support shows that in arriving at the 10% the trial Judge took into account **"the circumstances of the case"**, in determining what he considered adequate – See **Tropical Commodities Suppliers ltd. & 2 Others vs. International Credit Bank Ltd (in Liquidation); Misc. Application No. 379/2003.** That case was decided about 9 years ago and a lot of water has flowed under the bridge since then.

As already mentioned earlier, I find that the particular circumstances of this case require that a higher percentage be considered (applied) in determining the security for due performance of the decree.

A figure of 40% of the decretal sum amounting to Shs.51,000,000/= would be more reasonable.

The Application is accordingly granted on condition that the Applicant deposits into Court the sum of Shs.51,000,000/= as security for performance of the decree. The amount to be paid into Court not later than 26/10/2012.

The execution is stayed in the meantime. And the notice of appeal and the appeal to be filed and served upon the Respondent within 2 weeks from the date hereof.

Half of the costs of the Application are granted to the Respondent.

Flavia Senoga Anglin
JUDGE
26/09/2012