THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

MISCELLANEOUS APPLICATION NUMBER 2 OF 2020

ARISING FROM MISCELLANEOUS APPLICATION NO. 29 OF 2018

ALL ARISING FROM CIVIL SUIT NO.008 OF 2018

ASABA GEORGE (THROUGH HIS ATTORNEY RUGUMAYO WILLIAM SETH) ==========APPLICANT

VERSUS

KASANGAKI SIMON ==========RESPONDENT

RULING BY JUSTICE GADENYA PAUL WOLIMBWA

This application is brought under Order 43 rule 4 (2) and 3, Order 52 rule 1 1nd 2 of the Civil Procedure Rules, section 98 of the Civil Procedure Act and section 33 of the Judicature Act. The application seeks orders that the execution in HCCS 008 of 2018 be stayed pending determination of an appeal filed against in the Court of Appeal. The application also seeks costs. The grounds of the application are that:

1. The applicant has initiated steps to appeal against the decision of the trial judge and that the appeal has high chances of success.
2. That the applicant's appeal will be rendered nugatory if the execution is not granted
3. That unless a stay of execution is granted the respondent will levy execution against him;
4. That the Applicant is willing and able to abide by any conditions and terms as the court may deem fit to impose;
5. That substantial loss will result to the applicant unless orders sought are granted; and
6. That the application has been made without delay.

The application is supported by the affidavit of Rugumayo Seth William, the attorney of the Applicant. In summary, Rugumayo deponed that:

1. The application for stay of execution was filed on 16th January 2020 two days after the High Court dismissed an application for leave to appear and defend HCCS 8 of 2018.
2. The applicant is dissatisfied with the unsatisfactory decision to enter summary judgment against him without being accorded the right to be heard.

3. That there is a high likelihood that the respondent will execute the decree since he has taken out court process for taxation of costs. The applicant attached a copy of the bill of costs and a hearing notice for taxation of costs scheduled for 16th of January 2020.
4. That the applicant is ready to furnish security for the due performance of the decree
5. That it is just and fair that execution be stayed pending the hearing of the appeal or else the appeal would be rendered nugatory.
6. The applicant has filed a Notice of Appeal that was received by the Registrar of the court of appeal on 15th January 2020, a day before this application was filed.
7. The applicant attached a draft memorandum of appeal founded on seven grounds of appeal, which are for brevity that the judge did not give him the right to be heard, ignored the need to adhere substantive justice over technicalities and erred in law in arriving at the decision to enter judgment against him.

The respondent filed an affidavit in opposition of the application.

1. He deponed that he sued the Applicant to recover a commission of UGX 184,080,000 arising out of the sale of land comprised in LRV 2433 Folio 10 Buruli Block 2 plot 46 measuring about 554 hectares. That the applicant's application for leave to appear and defend the suit was dismissed on 14th January 2020, entitling him to judgment.
2. He deponed that the applicant's appeal has no merits and that the applicant has therefore brought this application to defeat his judgment.
3. That the applicant will not suffer prejudice or loss as he can easily recover money from him should his appeal be successful.
4. That he is prepared to promptly refund any such monies as may be recovered in the process of execution should the applicant's appeal succeed.

At the hearing of the application, the Applicant raised two preliminary objections regarding the respondent's affidavit in reply. Firstly, that although the applicant served the respondent with the application on 16th January 2020, the respondent only managed to serve the applicant with the affidavit in reply on 27th February 2020. This was more than the 15 days required under Order 12 rule 3(2) of the Civil Procedure Rules and as guided in the decision of **Stop and See (U) Limited vs. Tropical African Bank Limited Misc. Application 333 of 2010**. In this application Justice

Madrama, as he then was, held that service of an application to the opposite party should be effected within 15 days from the date of filing the reply.
The applicant submitted that since the Respondent had offended this rule then his affidavit in reply should be struck off the record.

Secondly, the Applicant submitted that the respondent did not pay court fees on filing of the affidavit in reply contrary to rule 6 of the **Judicature (Court Fees, Fines and Deposits) Rules**. Rule 6 is to the effect that no document in respect to which fees has not been paid shall be used in the proceedings. The Applicant's counsel prayed that the affidavit in reply be struck off the record for failure to pay the requisite fees.

Before considering the application, I have to deal with two preliminary objections that the Applicant raised – that the Respondent filed the affidavit in reply after more than 15 days and that the Respondent never paid the requisite court fees on filing the affidavit in reply. I will start with the last objection. Every court document that is taxable or that attaches fees, must be filed after payment of court fees or else the document becomes worthless unless the court directs the defaulting party to pay the fees. In this case, I have not seen evidence that the Respondent paid the fees for the affidavit in reply. That being the case, I order the Respondent to pay the requisite fees for filing an affidavit in accordance with section 97 of the Civil Procedure Act.

With regard to the late service of the affidavit in reply on the Applicant, I note that the Respondent filed the affidavit in reply on the court record on 16th January 2020, within the 15 days required by Order 12 rule 3(2) of the Civil Procedure Rules. It is alleged that the Respondent, failed to serve the Respondent within 15 days. I do not think so because there is no affidavit on record by the either the Applicant or Respondent that the Respondent served the affidavit in reply on the Applicant, after 15 days except a statement from the bar from the Applicant's advocate. Even if, the Respondent had been in default in serving the Applicant this court as a court of justice, would have treated the error as minor and therefore, curable under article 126 (2) (e) of the Constitution, which emphasizes that substantive justice shall be done over technical justice, especially in a case like this one, where the respondent filed the affidavit on the court record in time. I do not therefore find merit in this objection.

In the result, both preliminary objections are disallowed. I will now deal with the merits of the application.

Merits of the application.

The applicant submitted that the application for stay of execution was made without unreasonable delay as required under Order 43 (4) (3) (b) of the Civil Procedure Rules. The applicant filed the application within two days after the decision of the High Court. The applicant relied on **Mugume Ben and Another vs. Akankwasa Edward (2008) HCB 159, 160**, where Justice Arach Amoko as she then was held that: **An application for execution must be made timely and without inordinate delay**.

With regard to substantial loss under Order 43rule 4(3) (b) of the Civil Procedure Rules, the applicant submitted that the sum awarded is colossal and that the Applicant who is not a company and has only a home, that will be sold in execution if the court does not halt the process. He submitted that the lives in South Africa and has only one property in Uganda, - a family home in Fort Portal, Kabarole District, which he holds very dear. He also submitted that it would be unfair for the Applicant, who is not a company to be ordered to pay security for due performance of the decree. He relied on the case of **Margaret Kato vs. Nuulu Nalwoga Misc. Application 11 of 2011** where the Supreme Court held that:

> **"We are not persuaded by counsel for the Respondent's argument that the Applicant would not in any way be prejudiced by the order to deposit security for due performance of the decree. .... The Applicants being individual litigants and not a corporate entity, would most certainly find it onerous if they were required to deposit the said security".**

The Applicant submitted that he would be greatly inconvenienced if he loses this sole property in Uganda, if the respondent executes the decree against him.

With regard to imminent threat to execution, the Applicant's advocate submitted that there is a real threat of the Respondent executing the decree against the Applicant as he is actively taking steps to recover the decretal sum as evidenced by the proposed taxation and the respondent's own affidavit in reply that the applicant will suffer substantial loss if execution is levied against him.

On security for due performance of the decree, counsel for the applicant argued that it is not mandatory to give security for the due performance of the decree. He submitted that the Supreme Court reiterated that security for costs is not mandatory for stay of execution to be granted. He relied on the case of **Margaret Kato vs. Nuulu Nalwoga M.A 11 of 2011** where the court held that:

> **"Considering that the court may reach a contrary decision when it finally hears the intended appeal on its merits, the interests of justice would better be served if the status quo was maintained as opposed to the court ordering the Applicant to deposit a substantial amount of money for the due performance of the decree".**

In addition, the Applicant submitted that in this case since the respondent had not stated what kind of security for due performance he wants, a full stay of execution be ordered without an order to deposit security should be made and a stay of execution ordered. He said this will serve the Applicant well, who lives in South Africa and has only a family home in Fort Portal, Kabarole.

In reply, the Respondent, submitted that a stay of execution is meant to ensure that the appeal is not rendered nugatory. He however, hastened to add that a party seeking a stay of execution must meet the conditions set out in Order 43 rule 4(3) of the Civil Procedure Rules. These conditions are that: that substantial loss may result to the applicant unless the order of stay is made (b) that the application has been made without unreasonable delay; and (c) that the applicant has provided or offered security for due performance of the decree or order.

The Respondent submitted that it is trite law that an appeal does not operate as a stay of execution. He submitted that the applicant has not demonstrated that he will suffer substantial loss if execution was levied against him. He said that on the contrary he is prepared to promptly refund the monies should the appellate court order him to pay if the appeal succeeds.

With regard to substantial loss, the Respondent submitted that substantial loss cannot mean ordinary loss of the decretal sum or costs, which must be settled, by the losing party but it should

mean more than that. See: **Rolling Mills Limited and another vs. Gestation Economique Des Mission Catholique and Another (High Court Misc. Application No. 529 of 2009)**
He submitted that the Applicant should have gone a step further to lay the basis upon which court can make a finding that he will suffer substantial loss if execution is ordered. He hastened to add that the applicant should go beyond the vague and general assertions of substantial loss in the event a stay order is not granted. He relied on **Banshididar vs. Pribku Dayal Air 41 1954**, where the court observed that:

> **"The words substantial cannot be mean the ordinary loss which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in in consequence. That is an element, which must occur in every case ...substantial loss must mean something in addition to all different from that".**

In conclusion, the Respondent submitted that the applicant has not satisfied court that he will suffer beyond the decretal sum and the costs, which he is ordinarily subject to pay.
With regard to security for due performance of the decree, the Respondent submitted that the applicant has not provided security for the due performance of the decree, which is mandatory. The Respondent cited the case of **International Credit Bank Limited (in liquidation) vs. Tropical Commodities Supplies Limited and 2 others**, it was held that it is mandatory for the respondents to give security for the due performance of the decree.

He also submitted that the applicant has not demonstrated that if he succeeds on appeal the respondent will not be able to pay UGX 184,080,000 to him if his appeal succeeds. The Respondent in winding up his response referred court to a Ghanaian decision, for persuasive reasons for guidance on dealing with stay of execution of decrees pending appeal. In **Joseph vs Jebeile (1963) 1 GLR 387** Akuto Addo (JSC)

> **"While we do not wish to say anything that may be interpreted as a fetter on the exercise of discretion of a trial judge when he considers an application for stay of execution pending appeal, we think it is necessary in the interest of justice, to say generally that when such an application is considered in a case involving inert alia the payment of money, the main consideration should be not so much that the victorious party is being deprived of the fruits of his victory, as what the position of**

a defeated party would be who had had to pay up or surrender some legal right not only to find himself successful on appeal. In this respect it is wholly immaterial what view a trial judge takes of the correctness of his own judgment or of the would be appellant's chances of success on appeal, if the position (it is not of course suggested that that it is the position in the case before us) is that the victorious party is unlikely to be restored to the status quo ante, in the event of a successful appeal (and it should not be difficult to determine the likelihood of such an event), then it would be palpably unjust to refuse stay of execution, or, when stay of execution is refused , not to order the judgment creditor to give good, substantial and realizable security for the refund of the money involved.

Generally speaking it is not our view that the policy of law in this country should be against staying execution pending appeal especially where large sums of money are involved, and we should urge that when execution is stayed it should, where the circumstances permit, be on the condition that the judgment debtor pay into court the amount of money involved, or when refused, on the condition that the judgment debtor gives security as aforesaid and approved by the judge.

Any situation created by a judicial act , done either inadvertently or callously, which makes it impossible for a successful appellant to recover money paid , or any interest in property or other legal rights surrendered, under a judgment vacated on appeal does a disservice to the course of justice, if only because it undermines public confidence in the administration of justice".

In conclusion, the respondent submitted that the total justice in this matter weighs in court refusing to stay execution as the application for stay of execution lacks merit.

Consideration of the application

The law regarding stay of execution in Uganda is well settled. In the case of ***Lawrence Musiitwa Kyaze Vs Eunice Busingye SCCA No. 18 of 1990)***

L.M. Kyaze vs. E. Busingye (Supreme Court Civil Application No. 18 of 1990). The latter case sets out three principles, which an application for stay of execution should fulfill. These principles have been applied in the decisions cited above. These are —

1. That substantial loss may result to the applicant unless the stay of execution is granted.
2. That the application has been made without unreasonable delay.
3. That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

In this matter, the applicant has satisfied the following conditions for the grant of stay of execution and I do not need to overelaborate them suffice to mention them in precise terms. These conditions are that the application for stay of execution was filed promptly, just after two days from the decision of Justice Rugadya. Secondly, the Applicant has filed a notice of appeal and accompanied the same with a draft memorandum of appeal, that I am sure is only awaiting the record of the High Court so that the final memorandum of appeal is filed. Thirdly, the applicant has established that the Respondent has taken steps to realize the fruits of his judgment by setting in motion processes such as taxation of costs that precede execution. While the Respondent denied this, the record bears the applicant that the Respondent is moving at great speed to give effect to the decree in HCCS 08 of 2018, through execution. I cannot blame the Respondent for being vigilant in pursuing his right to property because he has every right to enjoy the protection of the Constitution in enjoying the fruits of this judgment, which constitute property.

I will now consider the other grounds for stay of execution that are less than straightforward. I will start with whether the Applicant will suffer substantial loss if execution is not granted.
The phrase substantial loss was considered in **Banshididar vs. Pribku Dayal Air 41 1954**, where the court observed that:

> **"The words substantial cannot be mean the ordinary loss which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in in consequence. That is an element, which must occur in every case ... substantial loss must mean something in addition to all different from that".**

In **Nganga vs. Kimani [1969] EA page67 the court held that in applications for stay of execution, court should consider whether substantial loss would arise from not granting the same and whether the dictates of justice demands so.** Substantial loss is loss that causes great injustice to the Applicant and cannot be adequately compensated for in monetary terms. In this

matter, the Applicant told court that he fears that the Respondent will sell a family house in Fort Portal, being the only property that he own in Uganda as he is resident in South Africa and I suppose, may not easily be reachable by the legal system of Uganda. I do appreciate the value and sentiments that many people attach to family houses in this part of the world. Family houses are normally treasures of history with many memories that the owners seek to preserve. They are also a source of attachment and belonging especially for those that do not live here like the applicant and therefore, they consider such property as a valuable source of pride and belonging. But the arguments rendered by people like the applicant are one sided as they do not take into account the obligation of the legal system to assist those who have won judgment to enjoy the fruits of their hard earned labor. The arguments of these segments of society, who hold family houses so dear, do not also recognize the obligations, the Bill of Rights places on individuals to enjoy their rights while taking into account the rights of others as no man or woman, however, great or miniature can live in isolation of the others. Therefore, while, I have great sympathies for the applicant for wanting to secure his family home from execution, the court cannot be blind to its obligation to help those who have won judgment to enjoy the fruits of their judgments, which in my view goes beyond the sentiments people attach to family homes. I am therefore not persuaded that if execution was levied against the Applicant by selling the family house in Fort Portal, the Applicant would suffer substantial loss beyond the loss someone suffers by paying their debts. The Applicant can build another alternative family home in the same way he has found a livelihood in South Africa.

Will execution render the applicant's appeal nugatory?

Courts have an obligation to ensure that appeals are not rendered nugatory by execution. See: **Afaro vs. Uganda Breweries SCCA 12 of 2008,** where Okello JSC held that:

> **"It is important that when a party pursues his/her right of appeal, the appeal if successful, should not be rendered nugatory".**

The caveat to this obligation lies in the applicant presenting credible arguments / reasons that show that he or she has an arguable appeal, whose outcome on appeal may overturn the decision of the lower court thus inviting the court's protective power to protect the right to appeal, which is provided by the law. In this matter, the Applicant paid lip services in convincing the court that he

has an arguable appeal. The Applicant laid out grounds of appeal in the draft memorandum of appeal, which rotate around none compliance of procedural justice by the trial judge. The Respondent on his part did not address this matter. Nevertheless, the court has to address its mind on the issue of whether the Applicant has an arguable appeal that must be preserved by staying execution. I have reviewed the proposed grounds of appeal vis a vis the record of the lower court and there appears to be some arguable grounds that may have some implications on the decision of the High Court. All matters remaining constant, there is some merit in preserving the applicant's right of appeal by staying execution of the decree.

Has the applicant rendered security for due performance of the decree?

The Applicant argued very strongly that the Supreme Court in **Margaret Kato vs. Nuulu Nalwoga M.A 11 of 2011** held that depositing security for due performance of the decree is not mandatory before stay of execution can be granted . For ease of reference, the Supreme Court in this case ruled that:

> **"Considering that the court may reach a contrary decision when it finally hears the intended appeal on its merits, the interests of justice would better be served if the status quo was maintained as opposed to the court ordering the Applicant to deposit a substantial amount of money for the due performance of the decree".**

The Respondent argued otherwise, insisting that security was mandatory. I have reviewed the case of **Margaret Kato vs. Nuulu Nalwoga** (supra) where the Supreme Court waived the obligation of the Applicant to deposit security for due performance of the decree. The Supreme Court waived the obligation to furnish security for due performance of the decree because the Respondent had implemented more than 80% of the decree by taking over possession of the land and receiving a certificate of title in respect of the suit land from the Registrar of the High Court, at Nakawa. This had left an ancillary order of UGX 100 million that the Supreme Court, said it would be just and equitable that the Applicants should not be ordered to furnish security for the due performance of the decree. Therefore, this authority, does not make furnishing of security for due performance of the decree as decided by the case of Lawrence Musiitwa Kyaze (supra). I am sure that the Supreme Court would have ruled differently if the Respondent had not partially executed the decree. I am aware that the Supreme Court had sympathies for the Applicants, like the Applicant who were living abroad and were not a company in inter alia waiving the obligation to pay security for the

due performance of the decree but this was done against the background of the Respondent having partially executed the decree. The law as it is today is that an Applicant, who is desirous of getting a stay of execution must render security for due performance of the decree that in essence balances the right of the Respondent to enjoy the fruits of his judgment vis a vis the obligation of the court not to render the Applicant's appeal nugatory . In taking this position, I am persuaded by a Ghanaian decision in **Joseph vs Jebeile (1963) 1 GLR 387 Akuto Addo (JSC)**, where the Chief Justice held that:

> **"While we do not wish to say anything that may be interpreted as a fetter on the exercise of discretion of a trial judge when he considers an application for stay of execution pending appeal, we think it is necessary in the interest of justice , to say generally that when such an application is considered in a case involving inert alia the payment of money, the main consideration should be not so much that the victorious party is being deprived of the fruits of his victory, as what the position of a defeated party would be who had had to pay up or surrender some legal right not only to find himself successful on appeal. In this respect it is wholly immaterial what view a trial judge takes of the correctness of his own judgment or of the would be appellant's chances of success on appeal, if the position (it is not of course suggested that that it is the position in the case before us) is that the victorious party is unlikely to be restored to the status quo ante, in the event of a successful appeal (and it should not be difficult to determine the likelihood of such an event), then it would be palpably unjust to refuse stay of execution, or, when stay of execution is refused , not to order the judgment creditor to give good, substantial and realizable security for the refund of the money involved.**
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> **Generally speaking it is not our view that the policy of law in this country should be against staying execution pending appeal especially where large sums of money are involved, and we should urge that when execution is stayed it should, where the circumstances permit, be on the condition that the judgment debtor pay into court the amount of money involved, or when refused, on the condition that the judgment debtor gives security as aforesaid and approved by the Judge.**
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> **Any situation created by a judicial act , done either inadvertently or callously, which makes it impossible for a successful appellant to recover money paid , or any interest**

in property or other legal rights surrendered , under a judgment vacated on appeal does a disservice to the course of justice, if only because it undermines public confidence in the administration of justice".

In this case, the decretal amount is approximately 184 million shillings plus the costs that are yet to be taxed. Considering that the parties had a commercial transaction where after the Respondent had sold, a dispute developed as to the right to his commission, it is only fair that the Applicant furnishes security for due performance of the decree by depositing the decretal sum in the court as security for due performance of the decree, which shall be held as security until the appeal is decided. In taking this decision, I have taken into account the fact that the Applicant received all the money from the sale of the property, out of which the commission might be due. It is therefore important that this portion of the money is preserved until the court determines the dispute between the parties. Moreover, this deposit, will keep the delicate balance between the right to property on the side of the Respondent and the obligation to preserve the remedy of appeal on the part of the Applicant.

The Applicant is given thirty days to deposit the money on the account of the Registrar of the High Court and failure of which, the Respondent will be free to execute the decree. The costs of this application will abide the outcome of the appeal. It is so ordered.

Decision

In the result, I allow the application with the following orders:-

Execution is granted on condition that the Applicant deposits the decretal amount on the account of the Registrar of the High Court within thirty days from the date of this ruling.

The costs of this application will abide the outcome of the Applicant's appeal in the Court of Appeal.

Gadenya Paul Wolimbwa

JUDGE

17/06/2020

Gadenya Paul Wolimbwa
Judge

Mr. Kasangaki for respondent

Applicant absent

Mr. Brian Serujongi is counsel for the applicant absent

Court:

Ruling read in the presence of the respondent and Mr. Kamuhanda Court clerk.

Gadenya Paul Wolimbwa

JUDGE

17/06/2020

Gadenya Paul Wolimbwa
Judge