

(Arising from HCT-05-CV-CA-0043-2016)

## VERSUS

**BEFORE: HON LADY JUSTICE JOYCE KAVUMA**

## Introduction.

1. The execution of the decree in HCT-05-CV-CA-0043-2016 be stayed pending the disposal of the appeal commenced in the Court of Appeal.
2. Costs of this application be provided for.

1. That an appeal has been commenced against the judgment of this court in HCT-05-CV-CA-0043-2016 delivered on 16<sup>th</sup> August 2021.
2. That the decree was extracted from HCT-05-CV-CA-0043-2016 by the Respondent and the same is being appealed by the Applicant, the Applicant herein having filed a Notice of Appeal.

3. The Respondent has so-far taken steps to execute the aforementioned decree and yet the execution of the said decree would inevitably render the appeal nugatory.
4. That the Applicant will suffer substantial loss if execution is not stayed.
5. That the application has been made without delay.
6. That security for due performance of the decree will be provided by the Applicant.
7. That it is in the interests of justice that this application be allowed.

The summons was supported by an affidavit sworn by **Kabarema Adonia** the Applicant. The record has no reply from the Respondent. I have considered the content of the Applicant's affidavit in coming up with this ruling.

### **Representation.**

**[2]**The Applicant was represented by M/s Birungyi, Barata & Associates.

On **22<sup>nd</sup>/09/2022** this court gave counsel directions on filling submissions but the same were not followed by close of the timelines set by this court. By the time this ruling was made, no submissions had been filed.

The discretion is with the court on how to proceed where a party has not made submissions as and when ordered to do so.

**Order 17 rule 4** of the Civil Procedure Rules gives guidance in this regard. It provides that,

*“Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other necessary act to the further progress of the suit, for which time has been allowed, the court may, notwithstanding the default, proceed to decide the suit immediately.”*

Having found no submissions from both counsel and being guided by **Order 17 rule 4**, I will decide the application on its merits as filed.

#### **Analysis and decision of court.**

**[3]**Although the court will not without good reason delay a successful party in obtaining the fruits of his or her judgment, it has power to stay execution of its orders if justice requires that the judgment debtor should have this protection. (See **Livingstone Nsumba Membe vs Fibiano Mayoga [2009]1 HCB 82.**

It should be noted from the onset that there is no specific statutory law governing applications of this nature for stay of execution of decrees arising from this court to the Court of Appeal. (See **Francis M. Micah vs Nuwa Walakira (1992-93) HCB 88 and Tropical Commodities Suppliers Ltd and Ors vs International Credit Bank Ltd (In Liquidation) (2004) 2 EA 331 per Ogoola J at pages 332 to 335).**

However, the Supreme Court and Court of Appeal in a plethora of decisions has laid down the following as the considerations for the determination of applications like the instant one. (See for example



Kaggwa vs Kawalya-Kaggwa Administration Cause no. 21 of 1972, Kyazze vs Busingye [1990] LLR 190 (SCU), Hon. Theodore Ssekikubo & Others vs. The Attorney General and Another, Constitutional Application No 06 of 2013, Gashumba vs Nkudiye (Civil application No. 24 of 2015) [2015] UGSC 7 and Dr. Ahmed Mohhamad Kisule vs Greenland Bank (In liquidation) SCCA No. 7 of 2010). These considerations are derived from **Order 43** of the Civil Procedure Rules. For a party to succeed, they must satisfy court that;

- i. Substantial loss may result to the party applying for stay of execution unless the order is made;
- ii. The application has been made without unreasonable delay;
- iii. The applicant must establish that their appeal has a likelihood of success.
- iv. Security has been given by the Applicant for the due performance of the decree or order as may ultimately be binding upon him or her.

The issue for determination by the court in such applications is whether the applicant has adduced sufficient reasons to justify the grant of a stay of execution.

In DFCU Bank Ltd vs Lusejjere Court of Appeal Civil Application no. 29 of 2003, it was emphasized by the Court of Appeal that;

*"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 vs Church [1879] 12 Ch D 454"*

Upon careful consideration of the affidavit of the Applicant on record and the law, the following need to be pointed out:

**[4]** The Applicant deposed under **paragraph 7** of his affidavit that the Respondent upon receipt of the Appeal documents has taken steps to enforce the judgment and also execute the decree from the appeal. Under **paragraph 8** the Applicant continues that he has noticed that the Respondent has taken steps to enforce the judgment. Under **paragraph 9** the Applicant deposes further that he has discovered that the Respondent is in the process of carrying out execution proceedings against him which execution would greatly prejudice his appeal.

I noticed that the Applicant did not provide any proof of the above averments in his affidavit. However, in the interests of justice, I decided to examine the record of HCT-05-CV-CA-0043-2016 and that of the trial court to ascertain whether indeed the said averments were true or not.

**[5]** It is now a settled law that execution is a process that is commenced in the court which passed the decree and it is that same court with the mandate to determine any question relating to the execution, discharge or satisfaction of the decree that may arise. **(See Sections 30 and 34 of the Civil Procedure Act).**

It has been the practice of our courts that before execution proceedings are commenced, a prudent judgment creditor issues the judgment debtor with a notice to satisfy the decree or suffer execution



proceedings. Where the judgment debtor fails to comply with the notice, then the judgment creditor will be at liberty to commence execution proceedings against them.

According to **Order 22 Rules 7 and 8** of the Civil Procedure Rules, the process in court is commenced by an application in writing to the court that passed the decree. This application is generally not ex-parte in nature but inter-parties; meaning that both the judgment creditor and debtor participate in it. (**See Order 22 rule 19 ad 34 of the Civil Procedure Rules**).

In the instant case, I have not found any scintilla of commencement of execution proceedings as deposed by the Applicant in **paragraphs 7,8 and 9** of his affidavit in support of this application. This leads me to the conclusion that they are false.

[6] The law on falsehoods in affidavits has been settled by superior courts in this jurisdiction. Where a court finds paragraphs in an affidavit that it believes are falsehoods, the right thing for the court to do is to sever those paragraphs and rely on the remaining paragraphs in the affidavit. (**See Baryaija vs Kikwisire and another CACA no. 324 of 2017**). Similarly, I have severed **paragraphs 7,8 and 9** of the affidavit and will proceed with the remaining paragraphs in the affidavit.

[7] Under **paragraph 12** of his affidavit, the Applicant deposes that the fact that he lives on part of the suit land and he has his crops thereon from which he derives his livelihood, any execution of the subject judgment before hearing of his appeal would greatly lead to great disruption of his family hence suffer substantial loss.

There is no agreed definition of what amounts to substantial loss. In **Tropical Commodities Suppliers Ltd and Ors vs International Credit Bank Ltd (In Liquidation) (2004) 2 EA 331** this court opined that substantial loss does not represent any particular amount or size for it cannot be quantified by any particular mathematical formulae. It refers to any loss, great or small that is of real worth or value as distinguished from loss without a value or that which is merely nominal.

The **Blacks law dictionary (6<sup>th</sup> Edition)** at **page 1428** defines substantial loss to be something of real worth and importance, not seemingly or imaginary or illusive.

I find that the Applicant has satisfied this ground.

**[8]** The Applicant further under **paragraph 15** that this application has been made without delay and that he was willing to provide security for due performance of the decree if so ordered.

I have examined the record of HCT-05-CV-CA-0043-2016, the decision of the court was made on 16<sup>th</sup> August 2021 and the instant application was lodged in this court on 8<sup>th</sup> October 2021. I am satisfied that the application was indeed brought without reasonable delay.

This leaves only the fourth ground given the fact that under **paragraphs 5 and 6** of the Applicant's affidavit, the Applicant deposed that he had applied for a certified record of proceeding from this court and was yet to be availed the same. Therefore, the third ground would be out of question.



The applicant offered to pay security for the due performance of the decree should he be ordered to do so.

**Order 43 rule 9(1)** of the Civil Procedure Rules provides for security for costs or due performance of the decree. It provides that;

*“(1) The High Court may in its discretion, at any time after an appeal is lodged, demand from the appellant security for the costs of the appeal; except that the court shall demand the security in all cases in which the appellant is residing out of Uganda and is not possessed of any sufficient immovable property within Uganda other than the property, if any, to which the appeal relates.”*

The wording of the above statutory provision makes the order for payment of security for costs an exercise of discretion which like all judicial discretions ought to be exercised judiciously. I am fortified in this by the various decisions of the apex court in this jurisdiction such as: **GM Combined (U) Ltd, SC Civil Appeal No. 34 of 1995; Noble Builders (U) Ltd and anor vs Sadhu [2004] EA 228; Goodman Agencies SC Civil Reference No. 01 of 2011, and Kakooza Jonathan & ANOR V Kasaala Cooperative Society Ltd SC Civil Application No. 13 of 2011.**

This power to order for security of costs must be used sparingly. (See **UCB vs Multi Constructors Ltd Civil Appeal No. 29 of 1994 (unreported)**).

[9] The purpose of an order for security for costs is to protect the defendant from situations in which he or she is dragged to court and made to lose even the costs of litigation. It is meant to prevent frivolous



and useless litigation. Courts are however required to ensure that parties with just claims are not prevented from accessing the seat of justice for their claims to be determined. (See Paul Nyamarere and 3 ors vs Dison Okumu and 6 ors SC Civil Application no. 35 of 2020).

In Namboro vs Kaala [1975] HCB 315, cited with approval in Paul Nyamarere and 3 ors vs Dison Okumu and 6 ors (supra), it was held that the main considerations to be taken into account for security for costs are (a) Whether the Applicant is being put to undue expenses by defending a frivolous and vexatious suit. (b) Whether he has a good defence to the suit and is likely to succeed and (c) that mere poverty of the Plaintiff is not by itself a ground for ordering security for costs or if it were so, poor litigants would be deterred from enforcing their legitimate right through the legal process.

[10] I must confess that the nature of the instant application makes it hard for this court to apply the above considerations given the fact that the Respondent made no reply to the instant application. However, in the interest of justice and given the nature of the suit and the fact that the Applicant was on their own willing to pay the security for costs, I shall make no order for payment of security for due performance of the decree.

For the reasons above, I find that the Applicant has made out a proper case for the grant of a stay of execution of HCT-05-CV-CA-0043-2016. Accordingly, this application succeeds. The costs of this application shall abide the outcome of the appeal.

I so order.

Dated, delivered and signed at Mbarara this.....15<sup>th</sup>.....day of .....Decemb2022.



Joyce Kavuma  
Judge