THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 815 OF 2022

(ARISING FROM HCCS NO. 721 OF 2020)

CHINA HENAN INTERNATIONAL

COOPERATION GROUP CO. LTD :: APPLICANT

VERSUS

JUSTUS KYABAHWA :: RESPONDENT

BEFORE: HON JUSTICE DR. FLAVIAN ZEIJA

RULING

The Applicant herein brought the instant application by way of Chamber Summons under Order 22 Rule 23(1), Rule 26 of the Civil Procedure Rules S.I 71-1 for orders that;

a) The Applicants be granted an order for stay of execution of the decree of this court in High Court Civil Suit No. 721 of 2021.
b) Costs of this application be provided for.

The grounds in support of this application are set out in the affidavit in support deponed by Zhang Jianwein the Country Manager of the Applicant, briefly that;

1. *The Respondent obtained a judgment and decree against the applicants in High Court Civil Suit No. 721 of 2021.*
2. *The Applicant being dissatisfied with the whole judgment, declarations and orders issued by His Lordship Duncan Gaswaga in Civil Suit No. 721 of 2021 filed a notice of appeal and later lodged an appeal in the Court of Appeal vide Civil Appeal No. 304 of 2021.*

3. *The pending Appeal filed by the Applicant is awaiting hearing before the Court of Appeal and the parties already completed conferencing.*
4. *There is a serious threat of execution of the decree in civil suit No. 721 of 2021 as the Respondent has already taxed the bill of costs and has previously applied for execution of the same decree wherein he obtained a sum of* ***USD.950, 000 (Nine Hundred Fifty Thousand Dollars)*** *through garnishee orders absolute and now seeks to execute the balance of* ***USD. 400,000 (Four Hundred Thousand Dollars) plus taxed costs.***
5. *That substantial loss / irreparable harm that cannot be compensated in monetary terms may result to the Applicant if execution is not stayed.*
6. *The appeal raises serious issues that have high chances of success as can be seen from the Memorandum of Appeal.*
7. *That if execution is not stayed, the Applicant will suffer substantial loss /irreparable harm because the Respondent will take monies that are meant to execute its contract with the Government of Uganda and this could potentially lead to failure to meet its contractual obligations of constructing the road in accordance with the terms of the contract.*
8. *The Applicant has given security for costs in the Court of Appeal as may ultimately be binding on him.*
9. *This application has been brought without unreasonable delay.*
10. *The Respondent's previous conduct of applying for execution through garnishee proceedings raises a high probability that the Applicant will seek to attach the Applicant's bank account that receives project funds hence frustrating the government project of constructing Rukungiri - Kihihi and Kanungu road.*
11. *It is in the interest of justice and public interest that an order of stay of execution is granted.*

The grounds in opposition to the application are contained in the affidavit in reply deponed by the Respondent. Briefly, they are that;

1. *The instant application is res judicata in so far as:-*
   a) *The same application for stay of execution of the decree in Civil Suit No. 721 of 2020 was heard on merits inter-parties and dismissed by the High Court vide Miscellaneous Application No. 467 of 2021.*

b) *Dissatisfied by the decision of the aforementioned application, the Applicant filed Civil Application No. 100 of 2021 in the Court of Appeal for stay of the decree in Civil Suit No. 721 of 2020. The Court of Appeal heard the parties on merit and dismissed the application.*

c) *The Applicant being unhappy with the decision of the Court of Appeal applied to the Supreme Court Vide Civil Application No. 30 of 2021 for stay of the decree of the High Court in Civil Suit No. 721 of 2020. The Supreme Court equally heard the parties on merit and dismissed the application*

2. *The total sum outstanding on the decree is* ***USD 892, 419 (United States Dollars Eight Hundred Ninety-Two Thousand Four Hundred Nineteen)*** *and* ***UGX. 187, 287, 140 (Uganda Shillings One Hundred Eighty-Seven Million, Two Hundred Eighty-Seven Thousand One Hundred Forty Only)***

3. *All the applications for stay of execution filed by the applicant and dismissed in all the superior courts of record were against the execution of the whole decree including costs in Civil Suit No. 721 of 2020.*

4. *That in enforcement of purely monetary decrees, no question of irreparable harm arises. Furthermore, there cannot be irreparable harm in paying money lawfully adjudged by a court of law as this is a lawful duty anticipated by the Applicant at the end of the litigation process.*

5. *Money previously attached was not money belonging to the Government of Uganda and /or development funds but money belonging to, worked for and paid and /or pending to be paid to the Applicant.*

6. *Averments relating to the alleged failure to execute a government road construction project upon execution are misleading as indeed, since the last execution, the road construction project never stopped.*

7. *It is mockery of this Honorable court for the Applicant to suggest that out of the total sum outstanding on the decree, the sum of* ***UGX. 200,000 (Uganda Shillings Two Hundred Thousand)*** *would be sufficient security for its due performance.*

8. *The interest of justice and fairness demand that this application is dismissed with costs.*

In rejoinder, it was deponed for the Applicant that the Respondent's plea of res judicata is misconceived for the reason that the issues for determination in the instant application are distinct from the cause of action, facts and issues that were canvassed in Miscellaneous Application No. 467 of 2021, Court of Appeal Civil Application No. 100 of 2021 and Supreme Court Civil Appeal No. 30 of 2021. That this Honorable court vide Miscellaneous Application No. 922 of 2021 found that the Respondent had acted fraudulently in attempting to recover more money than it was owed thus unjustly enriching himself. It was further deponed that the Applicant will suffer substantial loss if the order for stay is not granted given that that the Respondent will most likely attach the Applicant's interim certificates hence halting operational and project funds meant for the construction of the Rukungiri –Kihihi-Ishasha road and thereby stalling a Government project. The Respondent may not be able to refund the monies so far recovered in the very likely and imminent event that the appeal in the Court of Appeal is successful mindful that he has already recovered over USD 950,000 (Nine Hundred Fifty Thousand Dollars) which more than principle sum awarded in the decree. The only sums the Respondent now seeks to recover are damages and interest which are very excessive, illegal and a ground for determination in the Applicant's appeal.

Representation

During the hearing of this application the Applicant was represented by M/s Lawgic Advocates whereas the Respondent was represented by M/s Crane Associated Advocates. Both parties filed written submissions which are on record.

Preliminary point of law

It was deponed by the Respondent that this matter is *res judicata* and should not be re-litigated on the basis that a similar application has already been handled by all the superior courts of record in favor of the Respondents. In his submissions, Counsel for the Respondent cited section 7 of the Civil Procedure Act and a line of authorities to wit; the supreme court decision of ***Mansukhlala Ramji Karia & Crane Finance Co. Ltd vs Attorney General, Makerere Properties Ltd & Amin Mohamed Pirani SCCA No. 20 of 2002,*** *the Tanzania*

High Court decision ***of Kotak Limited vs. Kooverji & Anor (1969) EA 295,*** *and the Kenya Court of Appeal decision of* ***Uhuru Highway Development Limited vs Central Bank of Kenya & Ors; Civil Appeal No. 36 of 1996*** to fortify the proposition that a litigant should not be allowed to refile similar applications desiring a different result from the same court. Counsel for the Respondent invited this court to examine similar applications which are attached to the affidavit in reply to wit; Miscellaneous Application No. 467 of 2021 consolidated with MA. No. 481 of 2021 arising from M.A No. 392 of 2021 also arising from Civil Suit No. 721 of 2020 delivered on 9th April 2021 by the High Court, Court of Appeal Civil Application No. 100 of 2021 arising from High Court Civil Suit No. 721 of 2020, and Supreme Court Civil Application No. 30 of 2021 arising from Civil Application No. 29 of 2021 arising from Court of Appeal Civil Application No. 100 of 2021 arising from High Court Civil Suit No. 721 of 2021. According to Counsel for the Respondent, parties in all these applications are the same and so is the subject matter. In all superior courts of record, the applications for stay of execution filed by the Applicant were dismissed after being heard on merit.

In response to the preliminary point of law, Counsel for the Applicant submitted that the facts and grounds relied upon in High Court Miscellaneous Application No. 467 of 2021 and Court of Appeal Civil Application No. 100 of 2021 are different from the facts and grounds in the current application. In the earlier applications, the facts relied upon were that; firstly, the Applicant had filed a Notice of Appeal but had not filed a Memorandum of Appeal. Secondly, the applications for stay of execution in all applications were dismissed because execution of the decree had already been completed by the issuance of the garnishee orders absolute. Thirdly, the earlier applications failed on the sole ground that a record of appeal had not yet been filed to enable the court ascertain if the appeal had any chances of success. Fourthly, the application for stay of execution in the Supreme Court was disposed of on a preliminary point of law and was not determined on its merits and therefore not falling under the scope of res judicata. In a nutshell, Counsel for the Applicant submitted that the new facts on which the instant application is premised are that the Applicant has since filed a Memorandum of Appeal and held a Conferencing – therefore this Honorable Court has a chance to determine whether the appeal has a chance of success, a fact which was not present in all the previous applications for stay of execution. Further, that vide MA No. 922 of 2021 the Respondent was found to have acted fraudulently in execution of the decree passed by court in HCCS No. 721 of 2021 and he is still perpetuating his fraud in trying to take more money than was ordered by court. The other new fact being that the Respondent has now taxed his bill of costs

meaning that he has taken a step in the execution process. It was Counsel for the Applicant's contention that all these are new facts which arose after the determination of the previous applications and they constitute an entirely new cause of action including fraud. In support of his arguments, Counsel for the Applicant made reference to a thread of authorities which he attached to the Applicant's submissions in rejoinder to wit; **Gurbachan Singh Kalsi vs. Yowani Ekori (1958) EA 450, Mulla- the code of civil procedure 17th Edition at page 201, Uhuru High Development Limited vs. Central Bank of Kenya & Ors (Civil Appeal No. 36 of 1996), Sentamu vs. Kikonda Kyaterekera Growers Coop Society (1996) 1 KALR 160, Mansukhala Ramji Karia & Crane Finance Co. Ltd vs Attorney General, Makerere Properties Ltd & Anor SCCA No. 20 of 2002, Kotak Limited vs. Kooyerji & Anor (1969) EA 295, China Communications Constructions Company Ltd vs. Justus Kyabahwa (Miscellaneous Application No. 484 of 2019)**

I have had the opportunity to examine the rulings of the High Court, Court of Appeal and Supreme Court attached to the affidavit in reply and marked 'A' 'B' and 'C' respectively. The first annexure 'A' is a ruling of the High Court in Miscellaneous Application No. 467 of 2021 consolidated with MA. No. 481 of 2021 arising from M.A No. 392 of 2021 also arising from Civil Suit No. 721 of 2020 delivered on 9th April 2021. It was an application for stay of execution of the decree in HCCS No. 721 of 2020 and setting aside of a garnishee order nisi issued under M. A No. 392 of 2021. There, the learned trial judge faulted the Applicant for failure to indicate the questions of law and or fact intended to be raised on appeal so as to give an idea of the seriousness of the appeal and came to the conclusion that from the face of the application, supporting affidavits and judgment, there was nothing to show any likelihood of success of the appeal. The Learned judge also condemned the application for failure to demonstrate the irreparable or substantial loss that would be suffered if execution was not stayed and in the end found the application meritless. Dissatisfied by that decision, the Applicant under rules 6(2), 43 (1) and 44 (1) of the Judicature Court of Appeal Rules applied to the Court of Appeal vide Civil Appeal No. 100 of 2021 arising from HCCS No. 721 of 2020 for orders of stay of the decree in Civil Suit No. 721 of 2020 pending the determination of the Appeal. The Court of Appeal dismissed the application on the ground that at the time of hearing the application, the Applicant had not yet filed a record of appeal as a result of which the issue of probability of success could not be ascertained by the court given that the Applicant had simply vaguely stated that the appeal had a likelihood of success without demonstrating the evidential foundation for such an assertion. In addition, the Court of Appeal

found that the Order Nisi which the Applicant sought to stay had already been turned absolute and there was therefore nothing left to stay. Still dissatisfied, the Applicant filed in the Supreme Court a Notice of Appeal and a fresh application for stay of execution of the same High Court Orders. On 22nd June 2021, the Supreme Court dismissed the application for being incompetent and advised the Applicant that its remedy was in applying to the High Court under Order 23 Rule 7 of the Civil Procedure Rules to set aside the Order Absolute for convincing reasons. Subsequently, the Applicant applied to the High Court vide Miscellaneous Application No. 922 of 2021 arising from Miscellaneous Application No. 451 of 2021 arising from HCCS No. 721 of 2021 to set aside the Garnishee Order Absolute issued by the learned Deputy Registrar in Miscellaneous Application No. 451 of 2021 and for orders as to costs. This court found that the Respondent had fraudulently endeavored and succeeded in recovering more money than he was actually owed in the judgment debt. In the premises, the Garnishee proceedings in Miscellaneous Application No. 451 of 2021 were set aside and the Orders arising therefrom quashed. In my view, the net effect of setting aside the garnishee proceedings and quashing the orders therefrom was that execution is deemed not to have happened in the first place. If that be the case, it follows that if the dismissal of the Applicant's earlier applications for stay of execution had solely been based on the fact that the garnishee Orders absolute had already been issued leaving nothing to stay, then by setting aside the garnishee proceedings and orders arising therefrom would mean that dismissing the Applicant's applications for stay of execution on that ground was misconceived and the plea of *res judicata* cannot arise on that issue. In other words, execution is now deemed not to have taken place.

When it comes to the doctrine of *res judicata* which is embodied in section 7 of the Civil Procedure Act and whose spirit is succinctly expressed in the maxim: ***nemo debt bis vexari pro una et eada causa**' (No one should be vexed twice for the same cause).* The minimum requirements for the application of the doctrine of res judicata were stated by the Supreme Court in ***Karia and another v. Attorney General and others [2005] 1 EA 83*** to be that; (a) there has to be a former suit or issue decided by a competent court (b) the matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar and (c) the parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title.

To give effect to the plea of *res judicata*, the matter directly and substantially in issue must have been heard and finally disposed of in the former suit. **See: the case of *Lt David***

Kabarebe v. Major Prossy Nalweyiso C.A Civil Appeal No.34 of 2003*).** For the doctrine to apply there must have been a decision on the merits of the case. Therefore, where the decision was not made on the merits of the suit, the matter cannot be *res judicata*. See also; ***Bukondo Yeremiya v. E. Rwananenyere [1978] HCB 96). Therefore, in ***Busulwa Isaac Bob v. Kakinda Ibrahim [1979] HCB 179***, where the earlier suit had been dismissed on a preliminary point, such a dismissal was found not to be a bar to a subsequent suit between the same parties on the same subject matter.

Consequently, it suffices to say that the Supreme Court decision in Civil Application No. 30 of 2021 as far as it relates to the matter at hand does not act as a bar to subsequent proceedings for stay of execution since it was determined purely on a point of law. What then remains is a determination as to the decisions of the High Court and Court of Appeal in High Court Miscellaneous Application No. 467 of 2021 and Court of Appeal Civil Application No. 100 of 2021 both of which arose from applications for stay of execution. As I have already found, these two applications for stay of execution failed firstly on the ground that a record of appeal had not been filed to enable the court ascertain if the appeal had any chances of success. Secondly because execution had already been completed and therefore, there was nothing to stay (The Garnishee had been made Absolute).

In my view, all the earlier applications for stay of execution in essence have their foundation in the execution proceedings and the consequent orders that arose therefrom. It is these same proceedings and Orders that this court respectively set aside and quashed in Miscellaneous Application No. 922 of 2021. In essence, it would therefore suffice to say that the said applications for stay of execution crumbled with the setting aside of the garnishee proceedings and quashing of the irregular orders emanating therefrom. If that be the case, all orders that arose from the prosecuting these applications suffer the same fate. They are inoperative. As such, the plea of res judicata should not even arise in this application.

Moreover, it is now an undisputed new fact worthy of this court's consideration that the Applicant has since filed Memorandum of Appeal and held conferencing and therefore this Court has a chance to determine whether the appeal has a chance of success. I have had the opportunity to look at the Memorandum of Appeal annexed as 'B2' to the Applicant's affidavit in support of this application. It raises 9 grounds of appeal which fault the trial judge in HCCS No. 304 of 2021 for;

a) *Purporting to hear and determine the suit without conducting the mandatory scheduling conference and without the mandatory summons for directions having been taken out.*
b) *Ignoring that the agreement in question had an arbitration clause*
c) *Failing to hold that the contractual obligation between the parties ceased to exist when UNRA cancelled the bidding process in which the Appellant had participated and re-advertised the road construction works for fresh bids.*
d) *In relation to the deed of variation, wrongly finding that there was fraudulent misrepresentation on the Appellant's part, failing to apply the principles of approbation against the Respondent and holding that the deed of variation did not fall within the exceptions to the rule in Pinnel's case.*
e) *Failing to hold that the Respondent was estopped from denying the validity of the variation agreement after fully receiving all the money under the agreement.*
f) *Failing to subject the evidence adduced to an exhaustive scrutiny and thereby wrongly holding that the 1st and 3rd bids were the same, the Respondent had performed his part of the contract when he prepared the 1st bid and that the Respondent had participated in the third bid.*
g) *Holding that the Appellant was under an obligation to disclose the Respondent's consultancy agreement.*
h) *Awarding the Respondent, a highly excessive sum by way of damages and an extremely high interest rate on damages.*
i) *Declining to grant the Appellant leave to reopen her case and adduce her evidence thereby occasioning a miscarriage of justice.*

These grounds of appeal in my view merit determination by the appellate court. At this stage, it is of definitely not necessary for me to look at the merits of the Appeal substantively as this is a preserve of the Appellate Court. It suffices that there are grounds of Appeal meriting adjudication by the Court of Appeal.

In any case, I am also of the considered view that since garnishee proceedings in Miscellaneous Application No. 451 of 2021were set aside and the orders arising therefrom quashed, it is in the interest of justice that this application be determined on merit to bring finality the numerous applications at High Court level. Besides, I have previously found in MA No. 922 of 2021 that the Respondent's hands are not clean in as far as he dishonestly recovered and continues to pursue recovery of more money than owed. It is now trite that a court of law cannot sanction what is illegal, an illegality once brought to the attention of court,

overrides all questions of pleading, including any admission thereof and court cannot sanction an illegality. ***See; Makula International Ltd Versus His Eminance Emmanuel Cardinal Nsubuga and Rev. Fr. Dr. Kyeyune, CACA No. 4 of 1981 or 1982 HCB 11***

In the circumstances therefore and for reasons herein given, the plea of res judicata must fail.

I will now consider the substantive question in this application which is; Whether the Applicant has adduced sufficient reasons to justify a grant of a stay of execution.

The law on stay of execution

The principles upon which stay of execution can be granted are captured in a number of authorities, notably is the case of **Lawrence Musiitwa Kyazze Vs. Eunice Businge SCCA 18-1990, Theodore Sssekikubo & ors Vs AG & ORS Constitutional Application No. 3 of 2014** which set out the grounds to be satisfied by any Applicant seeking a stay of execution;

1. The applicant must show that he lodged a notice of appeal.
2. That substantial loss may result to the applicant unless the stay of execution is granted.
3. That the application has been made without unreasonable delay.
4. That the applicant has given security for due performance of the decree or order as may be ultimately be binding upon him.

The court of appeal in **Kyambogo University vs. Prof. Isaiah Omolo Ndiege Civil Appeal No. 341 of 2013** expanded the list to include;

5. There is serious or eminent threat of execution of the decree or order and if the application is not granted the appeal would be rendered nugatory.
6. That the appeal is not frivolous and has a likelihood of success.
7. That refusal to grant the stay would inflict more hardship than it would avoid.

1ST principle. The Applicant must show he has lodged a Notice of Appeal. Looking at annextures 'B1' and 'B2' to the affidavit in support of the application, I am satisfied that the Applicant has not only lodged a Notice of Appeal but also filed a Memorandum of Appeal articulating the grounds of appeal.

2nd principle. That substantial loss may result to the applicant unless the stay of execution is granted. According to the case of **Steve Sahabo v. Larissa Kaneza HCMA No. 524 of 2019** wherein Justice Ketrah Katunguka cited with approval Justice Ogola's decision in **Tropical Commodities Supplies Ltd & 2 Others v International Credit Bank (in Liquidation) [2004] EA** 331, substantial loss can be defined in the terms that:

"The term substantial loss doesn't represent any particular amount or size; it cannot be quantified by any particular mathematical formula. It refers to any loss great or small, of real worth or value as distinguished from a loss that is merely nominal." Similarly, substantial loss has been defined in several other English authorities as something of real worth and importance, not seeming or imaginary or illusive. Something worthwhile as distinguished from something without value or merely nominal".

See also: **Seglem v Skelly Oil Co., 145 Kan. 216 P.2d 553, 554, and the case of; In Re Krause's Estate, 173 Wash. 1, 21 P. 2d 268**

Counsel for the Applicant submitted that if execution is not stayed, the Respondent will inevitably attach project funds meant to facilitate the construction of Rukungiri – Kihihi – Ishaha Road. Further, that the Applicant stands to lose a contract and business repute and the Respondent has not adduced any evidence to show that he has the ability to adequately compensate the Applicant in damages for irreparable harm. On the other hand, Counsel for the Respondent in his submissions acknowledged that the Applicant is a multinational company involved in huge infrastructure projects in this country and the project in dispute is worth over 200 billion shillings and therefore executing against the Company for the meagre sum of 3.8 billion shillings cannot possibly stop construction works. By this argument, Counsel for the Respondent appears to insinuate that attachment is to be done on a fraction of the entire project sum. I have before held that attachment of any fraction of money meant for the project is inappropriate and what should ordinarily be attached is a fraction due to the contractor. Doing otherwise would amount to punishing the client especially where the project contract is not Design-Finance- Build in which case any money paid to the contractor would be a refund and therefore liable for attachment. However, in situations where money is advanced to the contractor in stages, one risks attaching funds earmarked for a particular stage of the project. The legal doctrine of "common good" comes into play here. Given the Respondent's acknowledgment that the Applicant is a multinational company involved in huge infrastructure projects in this country, I am inclined to find the balance of convenience in favor

of the Applicant with the view of its credit worthiness to pay in the event that the appeal is determined in the Respondent's favor. This also answers the 7th principle in the affirmative.

3rd principle: That the application has been made without unreasonable delay. Looking at the ruling allowing the taxed costs marked 'C1' attached to the affidavit in support of the application delivered on 28th June 2022, and this application having been subsequently filed on 30th June 2022, I am satisfied that this application was brought without unreasonable delay. The Respondent did not dispute this fact.

4th principle. That the applicant has given security for due performance of the decree or order as may be ultimately be binding upon him.

Whether or not to order for security for due performance to be made depends on the circumstances of each particular case. I have always held the view that the objective of the legal provisions on security for costs was never intended to fetter the right of appeal. It was intended to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In essence, the decision whether to order for security for due performance must be made in consonance with the probability of the success of the appeal. I have already made a finding that the appeal is not frivolous and has considerable grounds meriting determination by the appellate court. In effect I shall not order for security for due performance. A road project is not a project that ends very quickly. Even when a project ends, there is always money reserved by the client to cater for the "The defect liability Period." If the respondent feels that there is eminent danger of the project closing suddenly, he can always come back.

5th principle. There is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory. I have already made a finding that the Respondent already lodged bills of costs which have been taxed. It therefore goes without saying that execution shall follow as a result. I have also already applied the balance of convenience in favor of the Applicant. The Respondent has had a history of overzealously acting as his own taxing master and executing before due process of taxation of the bill of costs is done. He is also reputable for dishonestly endeavoring to recover more money than he was owed in the judgment debt, an attempt that he is still pursuing even in

this application. This kind of conduct raises uncertainty as to whether recovery from him would not come with many difficulties in the event that the appellate court does not hold in his favor. The balance of convenience therefore still lies in favor of the Applicant. He who seeks a remedy from court must do so with clean hands!

6th principle: The application is not frivolous and has a likelihood of success. I have already held that the appeal raises questions meriting consideration by the court of appeal.

In the total sum, I therefore grant this application and make the following orders;

a) Execution of the decree of the High Court in Civil Suit No. 721 of 2021 is hereby stayed until the final determination of the substantive appeal.

b) Costs of this application are awarded to the Applicant.

Dated at Kampala this 31st day of October 2022.

Flavian Zeija (PhD)

PRINCIPAL JUDGE