

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

MISC.APPLICATION NO. 02 OF 2014

(ARISING FROM CIVIL SUIT NO. 53 OF 2011)

1. GAAGA ENTERPRISES LTD

----- APPLICANTS

2. TBAJJANGA SEEMU

VS

MPINDI MUHAMADI BOSSI

----- RESPONDENT

**Before: HON. MR. JUSTICE WILSON MASALU MUSENE**

**RULING**

The applicants, Gaaga Enterprises Ltd and TebajjangaSeemu filed this application under Section 98 of the civil procedure Act and Order 52 Rules 1, 2, and 3 of the Civil Procedure Rules for Orders that execution of a decree arising out of Civil Suit No. 53 of 2011 be stayed. And that, costs of the Application be provided for.

The Respondent is Mpindi Muhamed Bossi, represented by M/S KMT Advocates and M/S Kanuba & Co. Advocates. The Applicants were on the other hand represented by M/S Alaka & Co. Advocates.

When the Application came up for hearing, both sides were asked by this court to file written submissions. And indeed they are on record. This court has also studied the grounds of the Application and the affidavit in support by M/S Namuwaya Hadijah, the legal officer of the 1<sup>st</sup> Applicant. Also on record and considered by this court is the affidavit in reply sworn by the Respondent, Mpindi Muhamed Bossi.

The law relating to stay of execution in the High Court is set out under O.43 of the Civil Procedure Rules. O.43 Rule 4 specifically states:-

**(3) No Order for stay of execution shall be made under sub rule**

**(1) or (2) of this rule unless the court making it is satisfied**

- a) that substantial loss may result to the party applying for stay of execution unless the Order is made.**
- b) that the application has been made without unreasonable delay.**
- c) that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding on him or her.**

In their submissions, Counsel for the Applicants stated that neither the Applicant nor Applicant's Counsel were aware of the striking out of the Applicant's defence and that, the ex- parte Judgment. They added that they only came to know of the Developments when steps had been taken to be executed.

It was further submitted by the Applicants that they have applied to set aside the ex-parte Judgment, and for extension of time within which to Appeal against the Order striking out the written statement of Defence. It was stated as general ground **No. 1** in support of the Notice of Motion that:-

**“1. That sometime on the 29<sup>th</sup> day of October 2012, the Hon. Lady Justice Faith Mwendha delivered a ruling in Misc. Application No. 167 of 2012 by which the Applicant's defence in High court Civil Suit No. 53 of 2011 was struck out.”**They added that they were not given Notice of the Ruling and were not aware till the time to appeal run out.

Under paragraphs 4 and 5, it is stated that the Applicants feel aggrieved by the decision of the Learned Judge of striking out their defence and have filed an Application for Extension of time to file Notice of Appeal against the Order striking out the Appeal and the ex- parte Judgment. They quoted the case of **Somali Democratic Republic VS Anoop Sunderlal Trean, Civil Application No. 11 of 1988**, where it was held that an unsuccessful party has unrestricted right of Appeal and that in such instances, it is the duty of the court to make such Orders for staying proceedings under Judgment appealed from so as to prevent the appeal from being nugatory if successful.

Counsel for the Respondent on the other hand submitted that **Misc. Application No. 167 of 2012** was heard inter-parties and the Ruling was delivered inter-parties as the court record shows. They added that Counsel for the Applicants should not allege or feign ignorance about the Ruling which was inter-parties. They contended that before Judgment was entered and the matter set down for formal proof, the Applicants were heard and the Ruling striking out their defence was delivered with Applicants knowledge.

Counsel for the Respondent further quoted the case of **SDV Transami (Tanzania) LTD VS MS STE DATCO Civil Application No. 97 of 2004** where it was held that suspension or stay of execution applies where there is an appeal. And that since the present Application is for **extension of time within which to appeal** then the same is misconceived and not applicable as there is no pending appeal. They also added that there is no law that provides for stay of execution pending hearing of an Application to set aside a decree.

Counsel for the Respondent also submitted that the Applicant has not demonstrated how the Application to file an appeal out of time will be rendered nugatory. The case of **Uganda Revenue Authority VS Golden Leaves Hotels and Resorts LTD & Another, HCCS.M.A NO.783 OF 2007**, was cited. Egonda Ntende J (as he then was) held that mere statement that the appeal has high chances of success was not good enough without providing proof to support it.

They further submitted that the Applicants have not adduced any evidence to show that the Respondent cannot restore them their status in the event of the appeal being successful. They added that the Applicants have not described the purported loss it is likely to suffer other than ordinary loss which every Judgment debtor is bound to suffer in fulfillment of the Judgment against him or her.

Counsel for the Respondent further submitted that that the case of **Humprey Nzeyi VS Bank of Uganda & Another, Constitutional Application No. 01 of 2012** relied on by Counsel for the Applicant was quoted out of context because that case was dealing with a grant of injunction and not stay of execution which is governed by a different legal regime.

As already noted, this court has considered the submissions on both sides and the pleadings on record. **Ground No.7** of the Application is that the Applications have high chances of success as failure to take the necessary steps to appeal by filing Notices of Appeal was caused by lack of knowledge of the proceedings in court and that the ex-parte Judgment arose out of the Ruling to strike out the defence of the Applicants. And under **paragraph 12** of the affidavit in support by M/S Namuwaya Hadijah, it is stated :-

**“12. That as such, if execution is not stayed pending the hearing of the Application for setting aside the ex-parte Judgment and disposal of the Applications for leave to file Notice of Appeal out of time , the 1<sup>st</sup> Applicant shall suffer grave and irreparable injury to reputation”**

The finding and holding of this court is that the Applications are too omnibus, seeking leave to appeal against the Order striking out the defence out of time and then Application to set aside the ex-parte Judgment. It is over one year since the Application to strike out Applicant’s defence was delivered by my predecessor, Justice Mrs. Faith Mwodha (as she then was) in October, 2012. Today is 2014 and in view it is too late for Equity helps the vigilant. The question is what has the Applicant or their Counsel been doing all along. How can they sit back for over one year, only to be awakened by execution proceedings when the Applicants knew or were aware of the suit

against them, **Civil Suit No. 53 of 2011** and **Misc. Application No.167 of 2012**. And moreover the Applicants have not refuted the submissions by Counsel for the Respondent that the Ruling in Misc. Application 167 of 2012 was heard inter-parties and delivered inter-parties.

I have perused or studied the court record and I do hereby confirm that **Misc. Application No.167 of 2012**, arising out of the **Civil Suit No. 53 of 2011** was inter-parties and the Applicants now were represented by the same firm of M/S Alaka & Co. Advocates as Respondents /Defendants then.

They filed an affidavit in reply which was received by this court on the 20<sup>th</sup> day of August 2012 in which they opposed the Application to strike out their defence. Both sides filed written submissions and their written statement of defence was struck out on 29<sup>th</sup> day of October, 2012. That was the time when the Applicants would have filed a Notice of Appeal and consequently the Appeal against the Ruling of my predecessor, Justice Faith Mwendha, as she then was.

Almost one and a half years down the road, since October 2012, they did nothing. In my humble view, they slept on their rights and so I entirely agree with Counsel for Respondent that it is false for the Applicants to allege in **paragraph (5)** of the affidavit of Namuwaya Hadijah that upon perusal of the record is when they established there was a prior Ruling striking out the Applicant's defence. The feigning of ignorance about a Ruling which resulted from an Application inter-parties in 2012 cannot in the circumstances be allowed by this court. And as already noted, the Applications are omnibus, not only to set aside the ex-parte Judgment but extension of time within which to Appeal the Order of striking out.

That is an uphill task because as I indicated at the beginning of this ruling, that under Order 43 of the Civil Procedure Rules provides for stay of execution in High Court pending Appeal. There is no such Appeal now. And for this court to circumvent the clear provisions of Order 43 under the pretext of inherent powers under Section 98 of the Civil Procedure Act would be an abuse of court process. The Appeal should have been done in November or December 2012 and not now. It is too late.

And as Counsel for the Respondent has submitted, apart from stating that there is an Application for extension of time, there is no copy of such Application on record. This court cannot be taken for a ride and rely on mere speculation. And general statements like **paragraph 13** of the supporting affidavit. It states:-

**“13. That as well if execution is not stayed, the Applicant's Applications shall be rendered nugatory** “where are the Applications? They are not on record. In such circumstances, this court must ensure that a successful litigant should not be deprived of the fruits of his Judgment in his favour without a just cause.

In **Pan African Insurance Co. (U) Ltd. VS. International Air Transport Association, Misc. Application No.086 of 2006 arising out of HCT-00-CC-66-2003**, my brother Justice Lameck

Mukasa emphasized that court can only grant a stay of execution if there are special circumstances and a good cause to justify stay. I entirely agree with my learned brother above, and do hereby reject the submissions by Counsel for the Applicant that court cannot condone impunity. I do not understand any impunity on the part of Respondent, who has won a case resulting from the striking out of Applicant's defence way back in October, 2012.

Lastly, in **Massa Vs Achen (1978) HCB 297**, It was held that if the Applicant's Appeal is successful, it will not be rendered nugatory because the Respondent will be able to restore it to the status **Quo ante**.

In the present case, the contrary has not been proved by the Applicant as against the Respondent whom his Advocates have submitted that he is not a man of straw.

Finally, it has been submitted by the Applicants that the move to attach and sell the property will greatly inconvenience the 1<sup>st</sup> Applicant and its customers.

However, mere inconvenience is no ground for stay of execution as it does not amount to substantial loss. That is a generalized assertion of substantial loss without specifying what actual loss it is and so this court will not allow such generalized statements. **In Transami (Tanzania) LTD VS MS STE DATCO Civil Application No. 97 of 2004(supra)**, the court of Appeal of Tanzania held that loss of business good will is just an ordinary loss to which every Judgment debtor is necessarily subject to when he loses his case. I respectfully agree with the above decision of the court of Appeal of Tanzania and hold that the same is applicable in this case.

The Application for stay of execution is in the premises hereby dismissed. Since the Applicants are already burdened by the Judgment and previous costs, I shall exercise this court's discretion under Sect. 98 of the Civil Procedure Act to exonerate them from costs of this Application.

I order that each party meets their own costs.

.....  
**WILSON MASALU MUSENE**  
**JUDGE**  
**03/02/2014**

