

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
MISCELLANEOUS APPLICATION NO.604 OF 2013
(Arising from Civil Appeal No. 137 of 2013)
(Arising out of Civil Suit No. 118 of 2010)

EQUITY BANK UGANDA LIMITED:.....

APPLICANT

VERSUS

NICHOLAS WERE:.....

RESPONDENT

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

RULING

The applicant, herein “Equity Bank limited” filed this application by Notice of Motion under Order 43, rule 4(1) (3) (5) of the Civil Procedure Rules SI 71-1(CPR) and Section 99 of the Civil Procedure Act Cap. 71. (CPA). The Application is for stay of execution of the Decree entered in the Entebbe Civil suit No. 118 of 2010 pending hearing of the Appeal and costs of the Application be provided.

The grounds of the Application are that the Applicant being dissatisfied with the Judgment and Decree of the Chief Magistrates Court of Entebbe in Civil Suit No. 118 of 2010, requested for the certified copy of the proceedings to enable it prepare the Memorandum of Appeal. Other grounds are that the Appeal raises substantive questions of law and fact and unless execution is

stayed, the Appeal shall be rendered a nugatory and of no consequence. Further, that substantial loss or great injustice will be suffered by the Applicant if execution is not stayed.

Mr. Edward Ocen, an Advocate and the Head of the Legal Department of the Applicant swore an affidavit in support of the Application and reiterated the grounds.

The Respondent filed an Affidavit in reply deponed by Nicholas Were. Therein, he stated that the Applicant has failed to file a memorandum of Appeal to date whereas the thirty days required for filing an Appeal in the High Court have expired. Therefore, stay of execution cannot issue in lieu of a competent Appeal. He also averred that the Applicant has neither filed any Decree nor paid security for costs. The Respondent also states that there is no intended execution requiring any stay of execution. Further, that the trial Magistrate did not err in law and fact when she ruled that the Respondent was discharged in his role as guarantor on the basis that the Applicant took over from her predecessor UML, without the Respondent's consent.

During the hearing, the Applicant was represented by M/S Mukalazi Joweriya whereas the Respondent was represented by Counsel Semweyaba Justine of Semweyaba, Iga & Co. Advocates. Both parties made oral submissions before Court.

The issue for determination is whether the Application for stay of execution of the Decree entered in the Entebbe Civil suit No. 118 of 2010 should be issued pending hearing of the Appeal.

I have already made reference to the fact that this Application was brought under Order 43, rule 4(1) CPR. It states: *'An appeal to the High Court shall not operate as a stay of proceedings under Decree or Order appealed from except so far as the High Court may order, nor shall execution of a Decree be stayed by reason only of an appeal having been preferred from the Decree;*

but the High Court may for sufficient cause order stay of execution of the Decree. (emphasis added).

The import of this provision is that an Appeal to the High Court does not *per se* operate as a stay of execution of proceedings. Rather, any person who wishes to prefer an Appeal from such a decision shall institute a stay of proceedings on such sufficient cause being shown to Court. "Sufficient cause" under the proviso leaves the High Court with the discretion to determine whether the proceedings fall within the premise.

At the hearing of the Application, Counsel for the Applicant contended that the Chief Magistrates' Court at Entebbe *vide* Civil Suit No. 118 of 2010 entered Judgment against the Applicant. Meanwhile, the Applicant, being dissatisfied with the decision, requested for the record of proceedings in order to be able to file a Memorandum of Appeal. Copies of the letter requesting for the typed record of proceedings are attached on the Applicant's Affidavit in Rejoinder as Annexure 'A' and 'B' dated 29th January, 2014 and 19th November, 2013 respectively. The letter is addressed to the Chief Magistrate, Chief Magistrates' Court of Entebbe. The major reason for this correspondence is that the Applicant should be availed with certified copies of the record of proceedings to *'enable it formulate the grounds of Appeal and accordingly file a memorandum of Appeal.'*

However, the record of proceedings was not availed as stated by Mr. Edward Ocen in paragraph 5 of the Affidavit in Rejoinder. Having conceded that an appeal to the High Court is commenced by a memorandum of appeal, he stated that the Applicant had requested for the record of proceedings from the trial Court to enable it file a memorandum of Appeal but the same has never been availed to them. I take cognizance of the fact that the Respondent did not controvert this fact in his Affidavit in Reply. Therefore, I conclude that it was proved on the balance of probabilities.

This Court is aware of the decision made in ***Commissioner General Uganda Revenue Authority & another V. Kyotera Victoria Fishnet Co. Ltd & another, High Court Miscellaneous Application No. 362 of 2012*** cited by Counsel for the Respondent in this Application. The *ratio decidendi* of that decision is that there must be a memorandum of Appeal presented to Court. It was the Respondent's argument that since there was default in filing a memorandum of Appeal, this Application should be dismissed.

However, I note a contrary view to that decision. My learned sister, Hellen Obura J. observed that Counsel for the Applicant had conceded that, for purposes of Order 43, rule 1 of the CPR, there was no appeal since no Memorandum of Appeal had been filed. She noted, however, that the Applicant's Counsel had relied upon the case of *Alcon International Ltd vs. Kasirye Byaruhanga & Co. Advocates (supra)* to submit that, for the purpose of staying execution, lodging a notice of Appeal is sufficient to commence "a pending appeal". Taking into consideration the above authorities and Article 126 (2) (e) Constitution of the Republic of Uganda 1995 as amended, Hon. Justice Obura held that she would ordinarily be convinced by that argument and hold that 'there was an appeal, if at all, it is proved that the Notice of Appeal was properly filed before this court.' [Emphasis added].

I wish to state that the facts in that decision are distinguishable from the facts in this Application. In that case, the Notice of Appeal was found to be materially defective in that it bore no signature and had no seal of the lower Court, which is not the case in the matter before me. In fact at the conclusion of her Ruling, the learned trial judge observed that '*due to my findings, that no notice of Appeal was filed in this Court, I will not bother to consider the argument on its validity for lack of signature and Court seal as it would only serve academic purpose...*'

In the Application before me, there is a Notice of Appeal on record properly filed dated 12th December, 2013. In the case of ***Attorney General of the***

Republic of Uganda vs. The East African Law Society & Another EACJ Application No. 1 of 2013, it was held that a notice of Appeal is a sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases.

It is my considered view that the Applicant has proved to this Court on the balance of probabilities that a certified record of proceedings was requested for from the lower Court, but it has never been availed.

Furthermore, *as per* paragraph 7 of the Applicant's Affidavit in Rejoinder, it was averred that the Respondent taxed his bill of costs and had gone ahead to fix the date for the hearing in taxation. However, Paragraphs 11 and 13 of the Affidavit in Reply deposed by Nicholas Were refute any claims of an intended execution by the Respondent. Considering the record and according to the evidence adduced on behalf of the Applicant, there is evidence of a 'Ruling Notice' dated 6th February, 2014 in Civil Suit No. 118 of 2010 addressed to 'Equity Bank (U) Ltd putting the Applicant on notice that a Ruling was due on 13th February 2014 at 12:00 or soon after.' I take special note of the fact that the letter does not specify the objective of the ruling. It is apparent, however, that it is a taxation ruling since judgment has already been passed in the main suit. Therefore, I find no merit in the submissions advanced by Counsel for the Respondent that there is no intended execution in the matter.

Counsel for the Respondent also raised an objection to the propriety of this Application on the basis that the Applicant did not pay security for costs whereas this is a requirement under Order 43, rule 4(3) (c) of the CPR. The Respondent has prayed that this Application be dismissed with costs. In paragraph 13 of Nicholas Were's Affidavit in reply, he states that the Applicant has not furnished Court with any form of security for costs whereas the Decretal sum amounts to more than Ug. Shs. 10,000,000/=

In response, paragraph 8 of the Applicant's Affidavit in Rejoinder as well as the submissions by the Applicant's Counsel it is contended that the security for costs is not a condition precedent to granting an interim Order. In any event, they argue that the Applicant is a known organization with assets all over the country, Therefore, the Bank is able to satisfy the decree in the event that the Applicant **loses** the Appeal. Further, Counsel, relied on the case of **Imperial Royale Hotel Ltd & 2 Others vs. Ochan Daniel Misc Application No.111 of 2012**, where it was held that security for costs is not a condition precedent to the grant of stay of execution.

Order 43, rule 4(3) CPR provides: '*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; and

(c) that 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 above provision is structured in directory terms. The word *shall* as used here is not mandatory. Thus, in my interpretation, a Court handling the matter is required to observe the proviso dependant on the circumstances surrounding the case it is handling.

I therefore hold in the Applicant's favour and find that this Application falls within the premise of "sufficient cause" as provided under Order 43, rule 4 (1) CPR. However, the Applicant should furnish Court with security for costs.

I HEREBY ORDER that:-

- 1.** Execution of the Decree entered in the Entebbe Civil suit No. 118 of 2010 against the Applicant be stayed pending hearing of the Appeal;
- 2.** The Applicant shall file a proper Appeal before Court;
- 3.** The Applicant shall furnish Court with security;
- 4.** The Costs of this Application shall be in the main cause.

Signed:.....

Hon. Lady Justice Elizabeth Ibanda Nahamya

J U D G E

18th February 2014