THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

MISC. APPLICATION NO. 02/2016

(ARISING FROM MISC. CAUSE NO. 02/2016)

TIME TRADER TRANSPORTERS……..……..APPELLANT

VERSUS

1. **PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY**
2. **BUSIA MUNICIPAL COUNCIL..…….……RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING

Applicant brought the application under Section 98 of the Civil Procedure Act, and O.43 rule 4 of the Civil Procedure Rules and Rule 42 (1) of the Judicature (Court of Appeal Rules) Directions Seeking orders that this Court do issue a stay of execution of the orders of this court of 1st March 2016 under Misc. Cause No. 08/2015 and that costs be provided for.

The grounds upon which the application is grounded are supported by the affidavit of **Odeke Ismail**.

The main grounds are that he has filed a notice of appeal challenging the decision in HCMC.08/2015.

That the appeal has a likelihood of success and if stay is not granted the appeal will be rendered nugatory.

Respondent opposed the application and filed affidavits by 1st Respondent- **Uthman Segewa** and **Godfrey K. Kateeba** for the 2nd Respondent.

Both applicants and Respondents addressed court through written submissions.

This application raises a number of arguments revolving around the legal principles which govern the grant of stay of execution.

The position of the law governing this type of application has been extensively discussed by the superior courts in a number of cases. Applicant's counsel referred to the case of the Supreme Court in ***Theodore Sekikubo and Ors v. AG & Ors SCMA 03/2014***, for the position that it was held that an applicant must first show that he has lodged a notice of appeal, that the appeal may have a likelihood of success, that the application has been made without reasonable delay and if the stay were not granted substantial loss may result to the applicant.

This is the law, and that has been the guidance of courts in other cases like ***Kyambogo University v. Prof. Isaiah Omolo Ndiege Civil App. No. 34 of 2013 AC***; and ***Hwang Sung Industries Ltd v. Tajdin Hussein and Others SCA.19/2008***.

The Respondents while agreeing to the above, noted that applicants do not qualify for a stay on grounds that:

1. The application is defective being accompanied by a defective affidavit.
2. That applicant's bid expired in July 2015- hence the application is overtaken by events.
3. There is no justification for stay as there is no imminent danger or threat of execution and the application is frivolous with no likelihood that the appeal would succeed.
4. The applicant would suffer loss by the refusal to grant the application yet the Respondent would suffer, grave damage if the application is granted.

Having considered the said arguments and having regard to the submissions by both parties and to the law applicable, I now find as follows:

Regarding the question of the affidavit in support having no jurat; I find that the affidavit lacks a seal of the Magistrate or Registrar of the High Court. It is not clear who signed it, whether a Magistrate or a commissioner for oath.
Counsel for Respondents referred to section 4 (1) and Section 5 of the Commission for Oaths Act, to propose that the above omissions rendered the affidavit incurerably defective.

In response applicants relied on the case of ***Saga versus Road Master Cycles (U) Ltd (2002) EA 258***, and ***State Concrete Ltd versus jubilee Insurance Co. Ltd Misc. App. No. 117/2010***.

Counsel argued that the holding in ***Saggu v. Road Master Cycles (U) Ltd (2002) 1 EA 258***, holds that a defect in the jurat or any irregularity in form of the affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (2) (e) of the Constitution which stipulates that substantive justice shall be administered without undue regard to technicalities.

I have looked at the affidavit in support of the application. The affidavit bears a signature and is silent on the names, title or designation of the person before whom the attestation was done. It does not bear the seal of the Commissioner for Oaths or the Magistrate before whom the attestation was done.

The Commissioner in the case before me is not identified. There is no seal, or name which can enable the court to be sure that the person who purported to conduct the oath was a duly appointed Commissioner for the purpose in accordance with the Rules. Section 6 of the Act punishes any such offender with Criminal sanctions. This is not therefore merely a technicality of the law as argued by Counsel for the applicant curable under Article 262 of the Constitution. For someone to administer oath, and fail to comply with the requirement to fill in the names of the Commissioner, sign and seal the document goes to the root of the matter. In my opinion, the only way court can rely on the said document as an "affidavit" is when the Commissioner for Oath signs and seals it as such.

When the document is properly sworn and sealed before a commissioner for oath, or a magistrate, that is the stage at which it can now be dealt with and be liable for examination by

court for minor irregularities as Court dealt with in the ***Saggu v. Roadmaster Cycles U Ltd*** (supra) case.

In the case before me, it is difficult to assign the signature that appears on the affidavit to any particular Commissioner for Oath or to any particular Magistrate. Who signed it? Who administered the Oath? Was it a Magistrate? Of what Grade? Where? In which court? These questions go to the root of this case and are not merely technical. They render the document unfit to be called an affidavit. I do not agree with applicants that this is curable under Article 262 of the Constitution. The affidavit is incurably defective.

The attached annextures were all not serialized and marked with the seal of the Commissioner for Oath. All the above omissions were contrary to section 5, 6, and Rule 8 of the Oaths Act.

The cases discussed by the applicant all referred to omissions that were procedural, minor and of no fatal effect in the sense that those omissions did not go to the root of the matter.

I however must distinguish the facts in this case from the facts of the cases discussed. The deponent who swears an affidavit must show that he has a valid affidavit which contains "sworn evidence." The form of that evidence is contained in the requirement under Rule 9 of Schedule the Act- Cap.5, that the jurat should be able to show before whom it was declared, the date and the signature/Seal /or identification of the Commissioner.

The effect of an affidavit which is incurably defective was discussed by **Hon. J. Kiryabwire** in ***Simon Tendo Kabenge Advocates versus M/s Minteral Access Systems (U) Ltd HCMA 565/2011***, citing ***Banco Arabe Espanol v. Bank of Uganda SCCA 08/98*** affirming that an affidavit sworn by Counsel for respondent was defective and should not have been allowed in evidence.

Hon. J. Madrama, following similar reasoning, in the case of ***Mugoya Construction v. Central Electricals International Ltd MA 699 of 2011***, also struck off an affidavit sworn by counsel for being false.

It is my finding that the affidavit which does not disclose the Commissioner who administered the oath, the place where it was administered, the designation, of the Commissioner, does not satisfy the conditions for taking oath under section 5 of the Commissioner for Oaths Act, and goes to the root of the matter. It is not a mere defect in the jurat or irregularity in form of the affidavit. It erodes the entire frame of the affidavit as it leaves court in doubt as to whether the deponent ever took oath before a Commissioner for Oath or not. The entire affidavit is hence defective and cannot be severed.

In the case of ***Allen Isingoma v. Alex Muhairwe & 2 Others Cv. Case 39/92- Kla***, **Hon. J. Okello** (as then), found an affidavit accompanying the originating summons incurably defective. He held that:

> " *I agree with Mr. Muhwezi that the originating summons is now hanging without an affidavit setting forth concisely the facts upon which the rights of relief sought by the summons is founded. Without those facts the originating summons is incompetent….*"

Similarly in this case, without the supporting affidavit, I agree with the submissions of the 1st Respondent that the Notice of motion stands unsupported by any evidence and therefore it should be struck out with costs.

Given the above position, I would have struck off the motion. However the court in ***Saggu v. Roadmaster Cycles*** (supra), following ***Re Christine Namatovu Tebajjukira (1992-93) HCB 85*** guided that:

> "*The administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and errors and lapses should not necessarily debar a litigant from the persuit of his rights.*"

In view of the need to give justice a chance, this court will condemn the applicant to pay costs for the defective motion and proceed to determine the matter as if the affidavit was rectified.

I will not determine the other issues raised in opposition to the motion by Respondents.

In an application of this nature the applicant has the burden to prove that:

1. He has lodged a notice of appeal.

This ground is proved as a notice of appeal was filed.

2. That appeal has a likelihood of success.

The Respondent argues that no evidence is on record to prove this fact. However the applicant argues that the memorandum of appeal shows that they will succeed.

What amounts to proof that there is likelihood of success?

The Supreme Court in ***Theodore Sekikubo & Ors v. A.G*** (supra) discusses the said fact.

Also **Hon. J. Kakuru** in ***Commissioner Customs Uganda Revenue Authority v. Kayimba CACA 62/2014*** quoted a number of decided cases including ***Teddy Sseezi Cheeye and Anor. V. Enos Tumusiime CA No. 21/1996*** and pointed out that court while considering circumstances it should take into account before granting a stay of execution, discussed that;

> "*these circumstances include where the subject of a case is in danger of being destroyed, sold or in any way disposal of.*"

Having that in mind, there is a need to examine if there is merit in the application. There is a notice of appeal and a memorandum, which show that the applicant wishes to appeal the decision. The evidence to show the merits of this appeal is only in paragraph 3 of the affidavit. It is shown that the appellant has "*intentions to rely on more binding decisions of superior courts….*" The evidence of perceived success is glaringly missing.

That be as it is, decided case law has further guided that the grant of stay of execution pending appeal is in the discretion of the court, but the guiding principle should be the equitable desire to preserve the status quo.

This position was held in ***National Enterprise Corp v. Mukisa foods Misc. App. 7 of 1998 (CA)***, where the Court of Appeal held:

> "*the court has power in its discretion to grant stay of execution <u>where it appears</u> to be equitable to do so with view <u>of temporarily preserving the status quo</u>.*
> *As a general rule the only ground for stay of execution is for the applicant to show that once the decretal property is disposed of there is no likelihood of getting it back should the appeal succeed*."

In this case the status quo to preserve is the intended tender. However from evidence from defendants(respondent) it has been shown from affidavit evidence of both 1st and 2nd Respondents that the status quo has changed.

In submission it was shown by reference to the affidavits in support that the applicant's bid expired in July 2015. The Respondents argue that technically applicant is no longer a bidder and therefore the application is nugatory. (pages 3 of Respondent's submissions).
The applicant never addressed the above revelations in rejoinder.

I note that this application arises from an appeal which was also considering an application for review. The matters before court were not considered and were referred to the appellate process as under the PPDA Act. It is now revealed that the process was completed and that there is no longer a "status quo" to protect. Given the peculiar subject matter being a bidding process which is time bound; this court agrees with submissions by the Respondents that there is no risk or danger that applicant seeks to be protected from since the same subject matter has expired by passage of time.

The court has to weigh the balance of convenience in a case of this nature. The court has to consider whether if the stay was not granted it would lead to substantial loss to the applicant.

From what I have so far discussed, arising from the fact that the subject matter of this claim is a "bid" which is subject to the PPDA time frames, and aware that the 2nd Respondent is a Statutory Government Municipal Authority whose operations are governed by financial standing orders, this court takes Judicial Notice of the fact that these "bids" are time bound. Government

entities operate budgets and conduct bids within such government financial regulations. This court cannot therefore sanction a scenario where it stays the process, in which applicant suffers more than the Respondents. A stay would inflict greater financial and economic consequences to the 2nd Respondent, rather than to the applicant. Applicant can always be compensated or resubmit the bid, yet 2nd Respondent would lose out on funding, and might be sued by other beneficiaries who miss out on the non provided services during the period of stay.

In the case of ***Akright Project v. Executive property holding and 12 others SCA.3/2011*** the Supreme Court held that:

> "*the Court in addition to considering that a notice of appeal has been filed and that there is a substantive application has to consider whether there are special circumstances to warrant an interim order*."

In this case I do not find any special circumstances to warrant this application for a stay. There would be no status quo to stay. I therefore agree with submissions of counsel for Respondents that this application should fail on grounds that:

1. It is defective having been founded on a false affidavit.
2. The status quo has changed and hence there is no danger of execution.
3. The application is nugatory having been overtaken by passage of time.
4. The grant of stay would inflict greater hardships to the Respondent than the applicants.

I therefore find no merit in this application. The application is dismissed. Each party bears its own costs.

I so order.

Henry I. Kawesa

JUDGE

08.11.2016

Right of appeal explained.