

4. That it is in the interest of justice that this application is allowed.

Mr. Charles Wambi swore an affidavit in reply rebutting all averments by **Kemba Mustafa's** affidavit in support the motion.

I have gone through the application and the submissions by both counsel and find as follow;

The law on Grant of an order of stay of Execution:

Order 22 Rule 26 of the Civil Procedure Rules provided that:

“ Where a suit is pending in any court against the holder of a decree of the court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided.”

This provision must be read together with Order 43 Rule 4 of the Civil Procedure Rules, under which the application was made.

“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 that;

- a) Substantial loss may result to the party applying for stay of execution unless the order is made.*
- b) The application has been made without unreasonable delay.*
- c) 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.*

This court will examine the application to determine if the law as above has been duly complied with by the applicants.

a) Substantial loss:

The applicant's counsel by his submissions relied on the affidavit of **Kemba**, in paragraph 2,3,4,5 and argues that the respondent has filed a bill of costs that may be taxed anytime and execution may issue which shall prejudice the applicant's appeal yet the appeal has a high probability of success. He referred to the case of

Tropical Commodities Suppliers Ltd & Ors V. Credit Bank (in liquidation) (2004) 2 EA 331;

where **J. Ogoola** (as then) held that:

“Substantial loss does not represent any particular amount or size and cannot be quantified by any particular mathematical formula.”

He argued that if the stay is not granted it would render the appeal nugatory.

In response respondent’s counsel argues that applicant has not shown any substantial loss.

Has the applicant shown any substantial loss? From paragraph 4, 5 and 6 of **Kemba’s** affidavit he states under paragraph 5 *“ the respondent filed a bill of costs that may be taxed anytime and execution may issue which shall prejudice my appeal yet the appeal has a high probability of success.”*

He then states under paragraph 6:

“ The appeal at the court is based on the Trial Judge’s misdirection on the law in regard to the payments of costs where the advocate who prosecuted the matter was found not to possess a valid practicing certificate....”

The respondent by affidavit in reply of **Charles Wambi** under paragraph 5 rebuts the above and states:

“the Judge properly directed himself on the position of the law regarding the payment of costs because the advocate had been found by court to have been practicing without a valid practicing certificate”

From evidence, it is not clear what substantial loss the applicant is likely to suffer. The matter he has taken on appeal is on a point of law which has no bearing at all to the intended execution, or subject matter which took parties to Court. He has not sufficiently laid before court any evidence to satisfy that substantial loss will occur to him.

In the case of **Kyambogo University V Professor Isaiah Omolo Ndiege Court of Appeal Civ. App. No. 341/ 2013**, it was observed that:

“it is incumbent upon the applicant in every application if stay of execution to satisfy court that grounds exist for grant of a stay of execution. The assumption that once a party has filed an appeal a stay of execution must follow as a matter of course has no legal basis..”

It is therefore not enough just to file an application with skeleton references to the notice of appeal and then assume that sufficient ground is placed before court. There must be proof that indeed substantial loss would occur.

In the case of ***PK Sengendo V. Busulwa Florence and Male Abdu Court of Appeal Civil Appeal 207/ 2014, J. Kakuru***, referred to ***National Enterprise Corpn V Mukisa Foods (Msc App N0. 7/ 1998)*** of Court of Appeal; which held that:

“The court has power in its discretion to grant stay of execution where it appears to be equitable so to do with a view to temporarily preserving the status quo. 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.”

J. Kakuru then added that in the case before him it had been conceded by counsel for the applicant that the stay of execution was in respect of payment of Shs 10,905, 000/= being taxed costs of the suit in the High Court.

He then held that *“Such an execution would not render the appeal nugatory neither would it cause the applicant substantial loss”*.

The above scenario is as the case before me. I do not see how the taxing of the bill would prejudice the applicant or cause them substantial loss.

This ground is not proved.

b) Undue delay

I notice from the submission that counsel refers to paragraphs 2, 3, 4 and 5 of the affidavit in support of the motion to argue that applicant acted without undue delay. However he conceded

that though Judgment was delivered on 25th November 2015, he only filed the application on 20th April 2016 and there is a likelihood of the applicant suffering an execution.

I am not very sure from the records whether there is actually an appeal. There is on record a letter requesting for certified copies in HCCA No. 161 of 2014 of 27th November 2015 and two received stamps are photocopied of 27th November 2015 and two received stamps one photocopied of 27.11.2015, one original of 20.04.2016. The same notice bears a received stamp of Court of Appeal of 22. December 2015. It is therefore very difficult to conclude that there was undue delay.

From the above documentation I cannot rule out the rebuttals by Charles Wambi under paragraph 4 in reply, that the alleged appeal in Court of Appeal could be nonexistent.

From the position as above the applicant has not proved that the appeal exists and was filed with undue delay.

c) Security for due performance of the decree

The applicant does not mention the fact that he shall deposit any security for the due performance of the decree as per Order 43 Rule (3) (3) of the Civil Procedure Rules.

The aim of that security is to prevent the matter on appeal being rendered nugatory.

I have not been able to see from the proceedings and pleadings how the failure to stay the proceedings would render the appeal nugatory.

The quoted cases of *Lawrence Musitwa Kyaze Vs. Eunice Busingye SCC No. 18/1990*, *Kampala Bottlers Ltd V Uganda Bottlers Supreme Court Civil Application No. 25/ 1995*, *UCB Ltd V. Sanyu & Ors (1999) KALR*, *Tropical Commodities Suppliers Ltd & Others Vs. Credit Bank (in liquidation) (2004) 2 EA 331*, all support the need to provide security for the performance of the decree before the stay is granted. This was not done by the applicants.

The sum total of the above findings are that the applicant has failed to prove the grounds for which an order of stay of execution have not been proved.

This application is not granted. It is dismissed with costs.

Henry I. Kawesa

JUDGE

13.03.2017