

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(CIVIL DIVISION)

MISC. APPLICATION NO. 530 OF 2020  
(ARISING FROM CIVIL SUIT NO. 117 OF 2016)

MABU COMMODITIES LIMITED:.....APPLICANT

VERSUS

SOPHIE NAKITENDE:.....RESPONDENT

*BEFORE: HON JUSTICE SSEKAANA MUSA*

RULING

The Applicant brought this Application under Section 64(e) and 98 of the Civil Procedure Act, Cap 71, Order 52 rules 1 and 3 of the Civil Procedure Rules SI 71-1 for orders that;

1. An order of Stay of execution doth issue staying the execution of the Decree of the High Court in Civil Suit No. 117 of 2016 until the hearing and determination of the Appeal.
  
2. The Respondent pays costs of this application.

The grounds of this application are specifically set out in the affidavit of **Stuart Mabirizi**, the Managing Director of the Applicant dated 4<sup>th</sup> September 2020 which briefly states;

That Civil Suit No. 117 of 2016 was heard and allowed and the orders and Declarations sought by the Respondent were granted, the Applicant being dissatisfied with the entire judgment and decision of the trial Judge in Civil Suit No. 117 of 2016 has filed a Notice of Appeal that has merit and high likelihood of success. That there is a serious threat of execution of the Decree in Civil Suit No. 117 of 2016 and this application has been made without unreasonable delay, however the intended Appeal will be rendered a nugatory if this Application is not granted since the since the Applicant is

prepared to deposit Security for Costs as the Court may deem fit. That the applicant shall suffer substantial loss if this Application is not granted.

In opposition to this Application the Respondent filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that the Judgment in H.C.C.S No. 117 of 2016 was delivered on 15<sup>th</sup> May 2020 wherein court awarded a sum of Ug. Shs. 50,000,000/= as general damages, Ug.shs. 74,608,800/= as special damages with interest thereon at a rate of 15% from the date of filing the suit and 10% from the date of judgment respectively which brings the total decretal sum more than Ug. Shs. 170,000,000/=. That the Respondent's Bill of costs in the main suit were taxed and allowed at Ug.shs. 14,596,908/= and that the Applicant's Appeal has no high likelihood of success and this Application is only intended to deny the Respondent the fruits of her success in the main suit.

The Applicant was represented by *Eric Oloket* while the Respondent was represented by *Kassim Muwonge*.

Both parties filed submissions which have been considered by this court.

#### ISSUES

1. *Whether the Applicant satisfies the conditions for the grant of the Order for stay of Execution of the Decree in Civil Suit No. 117 of 2016?*

2. *What remedies are available?*

#### DETERMINATION

Counsel for the Applicant submitted that the provisions of *Order 52 Rules 1& 3 of the Civil Procedure Rules S.1 71-1, Sections 64(e), and section 98 of Civil Procedure Act* give this Honourable court inherent power to take decisions which are pertinent to the ends of justice; an order for stay of execution is such one. (see the case of *Singh v Runda Coffee Estates Ltd [1966] EA*). In the case of *DR AHMMED MUHAMMED KISUULE vs GREENLAND BANK (IN LIQUIDATION) S.C.C.A No. 7 of 2020*, the court noted;

*"for an application in this court for stay of execution to succeed the applicant must first show subject to order facts in a given case that he/ she has lodged a notice of appeal... the other facts which lodgement of the notice of appeal is subject vary from case to case but include the fact that the applicant will suffer irreparable loss if a stay is not granted, that the appellants appeal has a high likelihood of success."*

In the case of **KYAMBOGO UNIVERSITY vs PROF. ISALAH OMOLO NDIEGE C.A.C.A NO.341 OF 2013**, the court expanded the conditions for the grant of the order of stay of execution to include;

*“There is a serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory, that refusal to grant the stay would inflict more hardship than it would avoid. That the application was made without unreasonable delay”*

Counsel submitted that the applicant has demonstrated that there is a pending appeal. The Deponent in paragraph 3 of the affidavit in support of the application testifies that he being aggrieved by the decision of the trial judge filed a notice of appeal and a letter requesting for a certified copy of the record of proceedings and Annextures “C” and “D” are attached to prove that it. In addition, in the supplementary affidavit in support of the Application, Paul Kuteesa testifies in paragraph 3 that whereas the Applicant filed a notice of appeal and a letter requesting for a record of proceeding, the Applicant has since filed his Appeal vide Civil Appeal No. 50 of 2021. He attaches a copy of the record and memorandum of Appeal marked as Annexture “A” to the supplementary affidavit in support. The Respondent in her affidavit in reply does not in any way dispute this evidence.

In **JOHN BAPTIST KAWANGA v NAMYALO KEVIRA AND ANOTHER MISC. APPLICATION NO. 12 OF 2017**; the court found that the Applicant in that case had satisfied to court of pendency of appeal by proving that a notice of appeal had been filed in time and in the circumstances, the court held that the Applicant had satisfied the requirement. In the instant case, the Applicant has in fact filed his appeal and even served the Respondent with the same. It is therefore our submission that the Applicant satisfies the requirement to have an appeal pending. We invite the court to find so. We submit that the Applicant will suffer irreparable damages if the Order is not granted. In **TROPICAL COMMODITIES SUPPLIES LTD & 2 OTHERS v INTERNATIONAL CREDIT BANK LTD (IN LIQUIDATION) [2004] 2 EA 331**, Ogoola J in describing what amounts to Substantial loss held that;

*“The Substantial loss does not represent any particular amount or size. It cannot be qualified by any mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or loss that is merely nominal.”*

The deponent testifies in his affidavit in support of the Application in paragraph 6.2 that it shall suffer substantial loss. The Applicant Company will suffer a great deal if it required to pay the entire decretal sums and yet it has a pending appeal. This will affect its operation as a company and the effect cannot be easily quantified.

Counsel further submitted that there is imminent threat of execution of the Decree and that if this Application is not granted, the Respondents will proceed to execute the Decree and by so doing, it will render the Appeal nugatory. The Applicant testifies in paragraph 4 of his affidavit in support of the Application that there is imminent threat of execution of the decree and that by letters dated 26<sup>th</sup> August 2020 and 20<sup>th</sup> July 2020, she has threatened to execute the Decree and that the bill of costs has since been taxed. He attaches a Certificate as Annexure "E". In the case of *DFCU Bank vs Dr. Anne Nakate CACA 29/03* the court of Appeal emphasised;

*"..... that it is the paramount duty of court to which stay is filed pending an appeal to ensure that appeal if successful is not rendered nugatory."*

It was further contended that that failure to grant the Order of stay of execution will cause the Respondent to proceed with the execution process and ultimately render the Appeal nugatory as the same will be disposed.

We submit that the Application was made without unreasonable delay. The Applicant testifies that in paragraph 6.3 of the Application the Application has been made without undue delay and this court should grant it. The Judgment in Civil Suit No. 117 of 2016 was delivered on the 15<sup>th</sup> day of May 2020. The Application was filed on the 4<sup>th</sup> day of September 2020. In the premises, the instant application was made without undue delay and we invite court to find so.

We submit that the appeal has merit and high likelihood of success. The Deponent testifies in paragraph 5 that he is advised by his Advocates that the intended appeal has merit and a high likelihood of success. In the supplementary affidavit in support of the Application, the Deponent attaches issues that required court's attention. See Annexure "A" to the supplementary affidavit in support of the Application. *JOHN BAPTIST KAWANGA v NAMYALO KEVIRA AND ANOTHER MISC. APPLICATION NO.12 OF 2017*, the court held that in determining whether the Appeal has merit and a high likelihood of success, it is sufficient to establish that there are

pertinent appealable grounds of appeal with a probability of success that require Court's attention. In the premises we invite the court to find that the Applicant has discharged this burden on this ground.

Counsel for the Respondent submitted that in *Lawrence Musiitwa Kyazze vs Eunice Busingye S.C.C.A No. 18 of 1990*, the Supreme Court stated that; *"the parties asking for a stay should be prepared to meet the conditions set out in Order 39 Rule 4(3) of the civil procedure Rules."*

*Order 43 Rule 4(3) of the CPR states thus;*

*"(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; 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."*

Below we will demonstrate that the Applicant has not made out the grounds provided under *order 43 Rule 4(3) of the Civil Procedure Rules* and as such not entitled to a stay of execution order.

The Applicant has not demonstrated that it will suffer irreparable injury that cannot be atoned for in damages if the decree in H.C.CS 117 of 2016 is executed and the Applicant's appeal succeeds. In the case of *Sewankambo Dickson vs Ziwa Abby, HCMA 178 OF 2005*, the High Court held on the issue of substantial loss stated that;

*"substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value as distinguished from a loss without value or a loss that is merely nominal"*

The Applicants have failed to show that they will suffer substantial loss that is real worth or value if this Application is not granted.

Counsel for the Respondent further submitted that the Application has been without unreasonable delay. This court delivered judgement in H.C.C.S No. 15<sup>th</sup> May 2020. The Respondent extracted the Decree on 28<sup>th</sup> July 2020 and 24<sup>th</sup> August 2020, the Respondent's bill of costs was taxed. The Applicant filed the Application on 4<sup>th</sup> September 2020 which was done belatedly as an

afterthought and therefore it was indeed filed with unreasonable delay and this Application is merely an abuse of court process.

Finally the Respondent's counsel submitted that security for due performance of the Decree, under paragraph 5 of her Affidavit states that the Applicant has never deposited security for due performance of the Decree and the Application seeking orders to stay the same is therefore fatally flawed. The respondent will have no recourse to any security if the Applicant's Appeal fails and needless to add that the depositing of security for due performance ought to secure both the Applicant's Appeal and the Respondent's right to the decretal sum if the Appeal fails. In the case of *Kampala Bottlers Ltd vs Uganda Bottlers Ltd S.C.C.A No. 25 of 1995*, the Supreme Court in granting a stay of execution held as follows;

*"the matter is clearly governed by O.39r4(3) of the civil Procedure Code (Now Order 43r3(4) of the CPR). The applicant must show that substantial loss may result to the applicant unless the order of stay is made, that the application has been made without unreasonable delay and that security for costs has been given by the applicant.... Once the above three conditions are fulfilled by the applicant the order of stay ought to be granted, regardless of whether the appeal will fail or succeed"*

The Applicant has thus failed to satisfy the requirements for grant of stay of execution as sought in this Application. We accordingly pray that this application be dismissed with costs to the Respondent.

### **Court's Analysis**

The principles under which applications of this nature are determined were well set out in the case of *Kyambogo University vs Prof Isaiah Omolo Ndiege Civil Application No. 341 of 2013 (C.A) Justice Kenneth Kakuru JA* citing various decisions including the Supreme Court decision in *Lawrence Musiitwa Kyazze V s Eunice Busingye Civil Application No. 18 of 1990* restated the conditions for a stay of execution order as follows;

- I. *That the Applicant must show that he has lodged an appeal which is pending hearing.*
- II. *That the said pending appeal is not frivolous and it has a likelihood of success.*

- III. *That there is a serious and imminent threat of execution of the decree and if not stayed the appeal will be rendered nugatory.*
- IV. *That the application was made without unreasonable delay.*
- V. *That the Applicant is prepared to give security due performance of the decree and;*
- VI. *That refusal to stay would inflict greater hardship than it would avoid.*
- VII. *The power to grant or refuse a stay is discretionary.*

It is trite law that the duty and burden of proof lies on the Applicant because they are the ones who seek to get a decision of this court in their favour. *See Sections 101 and 102 of the Evidence Act. O.43 r 4(2) of the Civil Procedure Rules S1. 71-1* under which this application was filed provides thus;

*“Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing from the decree, the court which passed the decree may on sufficient cause being shown order the execution to be stayed.”*

No order for stay of execution shall be made under sub rule (1) unless the court 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.*

In the case of *Kyambogo University vs Prof. Isaiah Omolo Ndiege Civil Application No. 341 of 2013 (C.A)* Justice Kenneth Kakuru J.A held as follows; *“there is no evidence whatsoever that there is an impending or imminent threat of execution, no such evidence was provided. No warrant of execution has been issued or even applied for....”*.

In this case, the Applicant has not demonstrated that the loss (if any) will not be capable of monetary atonement by the Respondent who is a businesswoman or that it will affect the operations of the company. There seems to be a common thinking among litigants that court can grant a stay of every decree as an automatic right by alleging substantial loss which is wrong. While exercising the discretion conferred under the law of stay of execution, the court should duly consider that a party who has obtained a lawful

decree/order is not deprived of the fruits of that decree except for good and cogent reasons.

The substantial loss must be proved with cogent evidence in order for the court to be able to assess the impact and potential loss or handicap the company will suffer. In absence of any books of accounts of the applicant this court is not persuaded by mere statements that the company will suffer any substantial loss. The applicant failed to show that they will not be able to recover the said monies if they succeeded in the appeal.

So long as the decree/order is not set aside by a competent court, it stands good and effective and should not be lightly dealt with so as to deprive the holder of the lawful decree/order of its fruits. Therefore a decree/order passed by a competent court should be allowed to be executed unless a strong case is made out on cogent grounds no stay should be granted. Otherwise every judgment debtor would file an appeal as a way of stopping the successful parties from enjoying the fruits of litigation.

With the evidence adduced by the both parties, it's evident enough to confirm that the Applicant filed this Application as an afterthought having failed to prove the substantial loss that they would incur. Secondly, they have not presented any security for due performance of the decree in order to cushion the respondent as a successful party.

With the above analysis, I hereby dismiss this application with costs.

I so order.

*Ssekaana Musa*

*Judge*

*18<sup>th</sup> March 2022*