

hearing and final determination of Civil Appeal No.154 of 2020 in the Court of Appeal.

- c) All execution commenced and/ or completed against the applicant be set aside and the garnishee order nisi or absolute that was issued by this court be accordingly vacated and the applicant's accounts be released from attachment.
- d) Costs of and incidental to the application abide the result of the appeal.

The grounds supporting this application are contained in the affidavit of the applicant Rogers Mugisha attached to the application. Briefly, the in 2016, the respondent instituted Civil Suit No. 310 of 2016 against the applicant. The court entered judgement in favour of the respondent for a sum of Ugx. 145,777,400 in special damages, Ugx. 20,000,000/= in general damages, interest and costs of the suit. The respondent taxed her bill of costs at Ugx. 13,561,947. The applicant being dissatisfied with the whole decision and orders of the High court file Civil Appeal No.154 of 2020 in the Court of Appeal to set aside the judgement and decree. The respondent thereby commenced execution proceedings against the applicant and the High court issued a Garnishee order nisi against the applicant hence this Application.

The respondent filed an affidavit in reply and deponed opposing this application where she stated that the applicant neglected to pay the decretal sum, interests and costs awarded by court whereby her investigations revealed that it holds accounts with Citibank. She therefore applied for and obtained a garnishee order nisi as a way realizing her fruits of judgement and restore her coffee factory which was destroyed by fire as a result of the applicant's negligence.

The applicant was represented by Mr. Kaweesi Paulo whereas the respondent was represented by Mr. Nerima Nelson.

The parties were directed to file written submissions which they accordingly filed.

Both parties' submissions were considered by this court.

Analysis:

The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his/ her undoubted right of appeal are safe guarded and the appeal if successful, is not rendered nugatory. **See: Lawrence Musiitwa Kyazze vs. Eunice Busingye SCCA NO. 18 of 1990 [1992] IV KALR 55.**

The general rule is that an appeal does not operate as a stay of execution. The court does not deprive a successful litigant of the fruits of litigation, and lock up funds which prima facie he/ she is entitled, pending an appeal. If however, the appellant (who is seeking the stay) can persuade the court that he will not be able to recover the sums he is required to pay if his appeal succeeds, this may be a basis on which to order a stay.

Order 22, Rule 26 provides 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.

Order 26 as relied on by the applicant provides that court may order for security for the costs in any suit.

It is a settled position of the law that court has inherent power to stay execution and that stay of execution is considered to be discretionary. The court weighs the circumstances of each particular case and exercises discretion whether to stay execution or grant the order sought. The principles under which an application for stay of execution can succeed are well espoused in a litany of cases but notably in *Lawrence Musiitwa Kyazze vs Eunice Busingye; SC Civil Application No. 18 of 1990*, *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 vs Eunice Busingye Civil Application No. 18 of 1990* restated the conditions for a stay of execution order as follows;

- a) *The Applicant must show that he has lodged an appeal which is pending hearing.*
- b) *The said pending appeal is not frivolous and it has a likelihood of success.*
- c) *There is a serious and imminent threat of execution of the decree and if not stayed the appeal will be rendered nugatory.*
- d) *The application was made without unreasonable delay.*
- e) *The Applicant is prepared to give security due performance of the decree and;*
- f) *The refusal to stay would inflict greater hardship than it would avoid.*
- g) *The power to grant or refuse a stay is discretionary.*

In the present case, the circumstances are well laid out in the grounds for the application and the supporting affidavit of the Applicant, earlier set out in this ruling.

The applicant submitted that this court having issued an interim stay of execution, it had a duty to issue a substantive order for the stay of execution pending the appeal.

It is indeed true that the applicant as seen from the evidence on the court record that the applicant filed its Memorandum of Appeal before the Court of Appeal vide Civil Appeal No. 154 of 2020.

The applicant further submitted that it will suffer irreparable damage and substantial loss if its appeal succeeds when the decretal sums were already paid to the respondent as means of recovering such monies from the respondent are minimal and almost non-existent.

On security for costs, the applicant while relying on the case of *Tropical Commodities Supplies Ltd & Ors vs International Credit Bank Ltd (In Liquidation)* submitted that it is ready and willing to deposit security for costs as opposed to security for performance of the decree with cost.

I am inclined to believe that this application is premised on the substantial loss that will be suffered by the Applicant if this said order is not granted. However, the execution of the decree in this matter will not in my view inflict any serious loss to Applicant and what it is terming as a loss is an entitlement to the respondent as a successful party before the court. In the case of *Pan African*

Insurance Co. Ltd vs International Air Transport Association HCMA No. 86 of 2006, it was held that; the deponent must go a step further to lay the basis upon which court can make a finding that the applicant will suffer substantial loss. That it should go beyond the vague and general assertions of substantial loss in case the order of stay is refused. **See *Andrew Kisawuzi vs Dan Oundo, Misc. Application No. 467 of 2013***

This Court in the case of *Global Capital Save 2004 Ltd & Anor vs Alice Okiror & Anor Miscellaneous Application No. 485 of 2012* while relying on the case of *Tropical Commodities Suppliers Ltd and Others vs International Credit Bank Ltd (In Liquidation) [2004] 2 EA 331* noted that substantial loss does not represent any particular amount or size, it cannot be quantified by any particular mathematical formula. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without a value or a loss that is merely nominal.

Furthermore, the Court of Appeal in *P.K Sengendo vs. Busulwa Lawrence & Another CACA 207/14* noted that, “if what was sought to be executed was payment of a sum of money, generally courts will deny stay. Reason being that money can always be returned. But where the subject matter was property capable of permanent alienation and therefore capable of causing the appeal preferred to be nugatory, for example, transfer, then court will exercise its discretion in favor of the Applicant, so as to give benefit to the appeal to be attended to on its merits”.

In this case, the Applicant has not demonstrated that the loss (if any) will not be capable of monetary atonement by the Respondent who seeks to fully restore her coffee factory or that it will affect the operations of the Applicant company.

There seems to be a common thinking among litigants that court can grant a stay of every decree as an automatic right 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.

As 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.

This application fails and the same is dismissed with costs.

I so order.

SSEKAANA MUSA

JUDGE

11th April 2022