

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

MISC. APPLICATION NO. 66 OF 2021

(ARISING FROM CIVIL APPLICATION NO. 17 OF 2020)

MASINDI MUNICIPAL COUNCIL:.....APPLICANT

VERSUS

KWESIGA SALIM KAAHWA:..... RESPONDENT

RULING

BEFORE: Hon. Justice Byaruhanga Jesse Rugyema

[1] This is an application for stay brought under **order 43 rules 3 and 5 of Civil Procedure Rules, Section 33 of the Judicature Act and Section 98 of Civil Procedure Act** seeking for orders that an order for stay of execution of the judgment, orders and decree in **Masindi High Court Misc. Cause No. 17 of 2020** be stayed pending the hearing and determination of the appeal and also costs be provided for.

[2] The application is supported by the affidavit sworn by **Kabugo Deo** the applicant's town clerk. The grounds of the application are contained in the affidavit in support but briefly they are;

a) The Applicant was the Respondent in Masindi High Court Misc. cause No. 17 of 2020 and shall appeal the judgment,

decree and orders of his Lordship Gadenya Paul Wolimbwa handed down on the 12th day of July 2021.

- b) The Respondent has filed and served a Notice of Appeal and requested for the record.*
- c) In the meantime there is serious about execution and has fixed the matter for taxation on 15th September 2021 at 9:00am.*
- d) The Applicant will suffer substantial loss in case this application is denied or even delayed.*
- e) The Applicant is ready and willing to comply with any conditions imposed by this honorable court attendant to the stay of execution and/or provision of security for the due performance of the decree.*
- f) That the application has been brought without inordinate delay.*
- g) That there is sufficient cause to warrant a stay of execution.*
- h) That it is fair, just and equitable that this application be allowed in all the terms prayed for.*

[3] The Respondent **Kwesiga Salim Kaahwa** filed an affidavit in reply and deponed as follows;

- 1) That judgment in **Misc. Cause 17 of 2020** was delivered on **12th July 2021** and the applicant has since then never filed any appeal to the court of appeal and that there is no valid appeal pending against the judgment and orders of this court since the notice of appeal is not an appeal in the eyes of the law.

- 2) That if there was an appeal by the Applicant, it has no likelihood of success since the Applicant has not applied for leave to appeal as required by law.
- 3) That the instant application is premature and an abuse of court process, there is no pending execution it seeks to stay as there is no attempt so far to execute the judgment of this court.
- 4) That there is no imminent threat of execution and that this application is redundant in court, brought in bad faith and thus amounts to an abuse of court process which should be dismissed with costs forthwith.
- 5) That the applicant does not meet the conditions for the grant of an order of stay of execution as inter alia, the applicant has inordinately delayed in bringing the instant application.

Counsel Representation

- [4] The Applicant was presented by **Counsel Ian Musinguzi of Musinguzi & Co. Advocates, Masindi** while the Respondent was presented by Counsel **Kasangaki Simon of Kasangaki & Co. Advocates, Masindi**. Counsel for the Respondent filed submissions for court's consideration while determining this application.

Preliminary objection

- [5] Counsel for the Respondent raised a preliminary point of law which this court has to first determine. The preliminary objection is to the effect that prerogative orders are self-

executing and that an application for stay is therefore untenable. That there is no right of appeal against orders in judicial review, that this appeal was commenced without seeking leave.

[6] In reply counsel for the Applicant submitted that illegal orders of court granted before a decision for judicial review cannot be upheld as self-executing and there is an automatic right of appeal for the instant judicial review. Counsel argued that the Respondent did not exhaust all remedies available to him before filing for judicial review application since a decision had not yet been taken. Counsel referred to **Section 36 of the Judicature Act and Section 66 of the Civil Procedure Act**. That when orders given by the court amounts to a decree determining rights of parties in the entirety, the same is appealable as of right.

[7] In **Denis Bireije vs Attorney General, Civil Application No. 31 of 2005 (CA)** court considered the provisions of **Section 10 of the Judicature Act** which provide that “*an appeal shall lie to the court of appeal from decisions of the High Court prescribed by the constitution, this Act or any other law,*” and **Section 66 of the Civil Procedure Act** which provides that “*unless otherwise expressly provided in this Act, an appeal shall lie from the decrees or any part of the decrees and from the orders of the High Court to the court of appeal*” and concluded that **appeals are a creature of statute** and following **Makula International Ltd vs His Eminence Cardinal Nsubuga and Another (1982) HCB**, when an order is

made by the High Court on a matter brought before it by some statutory provision other than the Civil Procedure Rules, it is appealable as of right unless the appeal is specifically excluded by law. In the instant application, the application for Judicial Review was brought under **Articles 28, 42, 44 and 50 of the Constitution, Section 36 and 38 of the Judicature Act (as amended) and Rules 3-7 of the Judicature (Judicial Review) Rules 2009** which are other than the Civil Procedure Act or Rules. Therefore the appeal to the court of appeal is of right. In conclusion therefore, this application is not misconceived and I proceed to determine it on merit.

Determination of the Application

- [8] The application is confined in the provision of **Order 43 rule 4 of Civil Procedure Rules** which provides

An appeal to the High Court shall not operate as a stay of proceedings under a 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.

- [9] In this application the Applicant is applying for stay of execution. Court may stay execution where the circumstances of the case justify such a stay. It is therefore upon the Applicant in every application of stay of execution to satisfy court that the grounds do exist for the grant of the same.

[10] **Order 43 r 4 (3) of the Civil Procedure Rules** provides for the grounds of stay of execution which must be satisfied by the Applicant and these are;

- 1) *That substantial loss may result to the party applying for stay of execution unless the order is made.*
- 2) *The application has been made without any reasonable delay and*
- 3) *That security has been given by the Applicant for due performance of the decree or orders as may ultimately be*
Whether the Applicant lodged an appeal.

[11] In his affidavit evidence under paragraph 2, the Applicant deponed that it shall appeal against the judgment and orders of **HCMC No. 17 of 2020** and attached a Notice of appeal and a request for a certified copy of the court record and court orders. The Respondent on the other hand, in his affidavit in reply under paragraph 5 stated that there is no valid appeal pending against the judgment and orders of the court since a Notice of appeal is not an appeal perse in the eyes of the law.

[12] In the case of the **Attorney General of the Republic of Uganda vs. the East African Law Society & another, EACA 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 case.

[13] In the instant application, it is true the applicant filed a Notice of appeal and requested for certified court record and orders from this court which has never been availed. I find the foregoing sufficient proof that the Applicant having lodged a Notice of appeal intended to appeal and is only awaiting certified copies of the record and orders to file the appeal. Hence this condition has been satisfied.

whether the application was made without unreasonable delay

[14] In the instant application, Judgment was entered on the **12th day of July 2021** and on the **16th day of July 2021** the Applicant lodged a Notice of appeal in this court and on the **13th day of August 2021**, this application was filed in court (within 30 days). The applicant filed this application after the Respondent had filed a bill of costs and the same was fixed for taxation on the **18th of September 2021**. In my view I find that this application was filed without undue delay. Therefore this condition has also been satisfied.

Whether the applicant has given security for due performance

[15] Counsel for the Applicant argued that the Applicant shall deposit in Court of Appeal the mandatory security for costs after receiving the decree, certified record and orders. The applicant in its affidavit evidence stated that it is ready and willing to comply with any condition to be imposed by this court in respect to provision for the due performance of

the decree. I find that the applicant is ready to meet this condition and this court shall consider payment of security for due performance, if this application is to be granted.

Whether the Applicant will suffer substantial loss

[16] In his submission counsel for the Applicant argued that there is a likelihood of substantial loss being suffered as it was stated in **paragraph 8** of the affidavit in support for stay of execution. That applicant raises serious questions for the court of appeal to determine. Counsel for the Respondent submitted that the Applicant has neither stated nor demonstrated any loss that it will suffer beyond the decretal sum and costs which the Applicant as the judgment debtor is ordinarily subject to pay. Counsel relied on the case of **Kisawuzi vs Dan Oundo Malingu HCMA NO. 467 OF 2013**.

[17] In the case of **Cotton Marketing Board vs Cogecot Cotton Co. S.A (1995-1998) E.A 312** it was observed that,

“.....the word “substantial loss cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses the case and is deprived of his property in consequence. That is an element which must occur in every case and since the code expressly prohibits stay of execution as an ordinary rule, it is clear the words “substantial loss” must mean something in addition to and different from that.”

In the instant case, I find that the Applicant has not adduced any evidence whatsoever to show that it will suffer substantial loss. The Applicant stated in its affidavit evidence that it will suffer substantial loss but did not indicate the kind of loss it will suffer. I do find that the applicant has not demonstrated substantial loss it will suffer if the order sought is not granted.

[18] For the reasons above, I find that this application has no merit. It is accordingly dismissed with costs.

I so order

Dated at Masindi this 22nd day of April, 2022

Justice Byaruhanga Jesse Ruyema