

THE REPUBLIC OF UGANDA
IN THE HIGHCOURT OF UGANDA AT MASAKA
MISC. APPLICATION NO. 23 OF 2021
(ARISING FROM MISCE. CAUSE NO. 16 OF 2017)

RUTH ASIIMWE KANYARUJU APPLICANT

VERSUS

MUHANGI FRED,

DITRICT CHAIRPERSON,

LYANTONDE DISTRICT LOCAL GOVERNMENT RESPONDENT

Before; Hon Justice Victoria Nakintu Nkwanga Katamba

RULING

This application was brought under Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act and Order 43 Rule 4 of the Civil Procedure Rules for orders that;

- a. The execution and enforcement of the orders in HCMC No. 16 of 2017 be stayed until the hearing and disposal of the appeal;
- b. Costs of the application be provided for.

The grounds of the application as contained in the affidavit of Ruth Asimwe Kanyaruju, the Applicant, are briefly that;

- a) The Applicant filed HCMC No. 16 of 2017 seeking among others an order of certiorari to quash the decision of the Respondent that disregarded the recommendation of the Applicant to be representative on the District Service Commission;
- b) The application was dismissed on a preliminary point of law and the Applicant lodged an appeal against the decision;

- c) The appeal has a likelihood of success and the Applicant will suffer gross injustice if the application is disallowed;
- d) There is an eminent threat of execution as the Respondent has already filed a bill of costs which has been fixed for taxation;
- e) The Respondent shall not be prejudiced by the grant of an order for stay of execution;

In his affidavit in reply, Muhangi Fred, the Respondent opposed the application and averred that HCMC No. 16 of 2017 was dismissed after the trial Judge found that it was time barred. He stated that a bill of costs has been filed but there is no application for execution. He further stated that the appeal has no possibility of success and the appeal cannot be rendered nugatory if this application is granted since he is entitled to costs which he incurred. The Respondent further stated that he is in position to pay back the costs if the Applicant eventually succeeds on appeal.

Both Parties filed written submissions and I will consider them in my consideration of the application.

The grounds for the grant of an order for stay of execution are provided for under ***Order 43 Rules 1 and 4 (3) of The Civil Procedure Rules*** that;

The High Court may for sufficient cause order stay of execution of a decree pending an appeal before it where;

- 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; and
- c) security has been given by the applicant for the due performance of the decree.

The above grounds have been expounded further by the Court of Appeal in *Kyambogo University v. Prof. Isaiah Omolo Ndiege, C. A. Misc. Civil Application No 341 of 2013* to include: -

- d) there is serious or eminent threat of execution of the decree or order if the application is not granted, the appeal would be rendered nugatory;
- e) that the appeal is not frivolous and has a likelihood of success;
- f) that refusal to grant the stay would inflict more hardship than it would avoid.

Proof of substantial loss

The Applicant contends that if the application is not granted, the Respondent will proceed with taxation proceedings for the bill of costs in MC No. 16 of 2017 thereby prejudice the Applicant.

The Respondent indeed does not contest that he has filed a bill of costs but he argues that he is entitled to costs and that he is in position to refund the costs if the appeal succeeds and he is ordered to do so.

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 (*see Tropical Commodities Suppliers Ltd and others v. International Credit Bank Ltd (In Liquidation) [2004] 2 EA 331*).

The matter for which the Applicant seeks to appeal was for judicial review and from the careful perusal of the record, the application was dismissed after the court found that the same had been filed out of time. The matter was dismissed and the Applicant was condemned in costs.

Save for the costs, there is no other order that stands to be executed. I therefore find that the Applicant will not suffer substantial loss if the taxation of the bill of costs proceeds. The

Respondent would be in position to pay costs for any such loss that may be suffered by the Applicant and therefore, there is no substantial loss that might be suffered.

As to whether the appeal has a likelihood of success, the Applicant seeks to challenge the whole decision of this court and contends that the appeal will be rendered nugatory if this application is not granted. To determine when the appeal has a likelihood of success, this court does not need to inquire into the substantial aspects of the appeal but rather from the face of the appeal/memorandum of appeal, the appeal should raise arguable grounds.

The intended memorandum of appeal seeks to challenge the court's finding that the application was filed out of time. I have carefully considered the record of the lower court and the judgment of the trial Judge. The issue in contention relates to dates as to when the cause of action in judicial review arose. To address this issue would be an appeal against this court's decision since it would mean for this court to interpret the documents adduced by the Applicant in confirmation or as against the interpretation of this court in its judgment.

I therefore find the questions raised in the memorandum of appeal warrant consideration on appeal.

Security for due performance

The condition requiring an applicant to deposit security for due performance is established under *Order 43 Rule 4 (3(c) of the Civil Procedure Rules*.

Security for due performance has been interpreted to mean the entire decretal sum and it is intended to protect the judgment creditor in the event that the appeal is unsuccessful. Courts though have been reluctant to order security for due performance of the decree. Rather Courts have been keen to order security for Costs because the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals. (*see Tropical Commodities Supplies Ltd and others v. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 and DFCU Bank Ltd v. Dr. Ann Persis Nakate Lussejere, C. A Civil Appeal No. 29 of 2003*),

In the cases of *John Baptist Kawanga Vs Namyalo MA No. 12 of 2017 and Margarete Kato Vs Nalwo MA No. 11 of 2011*, security for due performance is not a condition precedent for the grant of an order of stay of execution.

This court has discretion to grant an order for stay of execution without security for due performance. Some courts have taken the view that the provisions of *Order 43 rule 4 (3) of the Civil Procedure Rules* must be obeyed and the application for stay of execution pending appeal must be accompanied by payment of security for due performance of the decree (see *DFCU Bank Ltd Vs Dr. Ann Persis Nakate CACA 29/2003, Lawrence Musiitwa Kyazze v Eunice Busingye S.C Civil Appeal No.18 of 1990*).

As I have already observed, the Applicant seeks to bar the taxation hearing from proceeding thereby staying her payment of costs until the appeal is disposed of.

The Respondent clearly stated that he is not a pauper although he is entitled to costs. The Applicant's right to be heard on appeal has to be balanced with the Respondent's right to costs.

The instant appeal arises from a matter that was dismissed on a preliminary point of law and costs were awarded to the Respondent herein. The subject matter of the application from which the intended appeal arises is judicial review and I have already found that the Applicant has triable issues in regard to the substantive issues of the judicial review application appealed against.

However, in regards to the costs awarded in Miscellaneous Application No. 16 of 2017, the intended appeal would not affect the award and even if the appeal ultimately succeeds, the costs would be decided upon by the appellant court whose orders would bind the Respondent herein. The Respondent stated that he would be in position to refund the costs if the appeal succeeds and the award of costs is overturned.

I therefore find that the taxation hearing does not affect the status quo of the substantive areas of the application from which the intended appeal arises. Furthermore, if the appeal

succeeds, allowing this application would not occasion damage that cannot be atoned by costs. Therefore, it would be just and equitable for the taxation hearing to proceed while the Applicant pursues the appeal to address the substantive merits of the judicial review application. The Respondent is entitled to the costs awarded and as such, the taxation hearing should proceed.

The application from which the intended appeal arises was dismissed and the only orders to be enforced therein are orders relating to costs. Having found that the appeal does not affect the award of costs and that granting this application would not occasion any irreparable damage to the Applicant, this application is hereby disallowed.

No order is made as to costs.

I so order.

Dated at Masaka this 17th day of January, 2022

Signed;  _____

Victoria Nakintu Nkwanga Katamba

Judge