THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 1030 OF 2023
(ARISING FROM HCCS NO. 542 OF 2017)
AND
(COURT OF APPEAL CIVIL APPEAL NO. 551 OF 2023)

1. MAKERERE UNIVERSITY
2. MAKERERE UNIVERSITY COUNCIL :::::::::::::::::::::::::::::: APPLICANTS
VERSUS
1. NDAGIRE JOYCE
2. NANSUBUGA NOELINE
3. KYARISIMA PAULINE :: RESPONDENTS
(Suing on their behalf and on behalf of 20 Others)

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Chamber Summons under Section 98 of the CPA, Order 22 rules 23, 26 & 89 of the CPR seeking orders that;

a) The Court be pleased to grant an order of stay of execution of the judgment and decree issued in Civil Suit No. 542 of 2017 pending hearing and final determination of Civil Appeal No. 551 of 2023.
b) The Costs of the application be provided for.

[2] The grounds upon which the application is based are summarized in the Chamber Summons and also set out in the affidavit in support of the application deposed by **Mr. Yusuf Kiranda**, the University Secretary. Briefly, the grounds are that the Applicants were the unsuccessful parties in HC Civil Suit No. 542 of 2017 and being dissatisfied with the judgment and decree filed a notice of appeal and applied for a record of proceedings. Upon receipt of the record of proceedings, the Applicants have since filed Civil Appeal No. 551 of

2023 in the Court of Appeal which is pending hearing and has a high likelihood of success on the merits. On 6th October 2023, the Applicants were served with an application for execution of the decree claiming a sum of over two billion shillings which the Respondents seek to recover through sale of the Applicants' property comprised in Kyadondo Block 250 Plot 57 Makerere. The deponent stated that there is imminent threat of execution of the decree which would render the Applicants' appeal nugatory if the application is not granted. He further averred that the Applicants will suffer irreparable loss if the stay of execution is not granted and the Respondents are allowed to proceed with execution of the decree. He concluded that the application has been made without undue delay on the part of the Applicants and it is in the interest of justice that it is allowed.

[3] The Respondents opposed the application through an affidavit in reply deposed by **Ndagire Joyce**, the 1st Respondent. She stated that no appeal had been filed at the time of filing the application, that the application was brought with unreasonable delay since it was over a year since the time of filing a notice of appeal and the letter requesting for proceedings; and the Applicants had taken no further step in prosecuting the appeal. The deponent stated that the Applicants having complied with part of the decree, they have brought this application as an afterthought and are estopped from approbating and reprobating. She further stated that the appeal filed at the Court of Appeal does not raise any serious and substantial grounds and is devoid of merit. She also averred that the execution would not render the appeal nugatory, that there is no eminent danger and neither would it cause the Applicants any substantial loss since execution relates to recovery of money that can be refunded through deductions from their salaries and personal assets. She concluded that the grant of an order of stay of execution cannot be exercised in favor of the Applicants who are already in contempt of court and it is in the

interest of justice that the application for stay of execution be denied and dismissed with costs.

Representation and Hearing

[4] At the hearing, the Applicants were represented by **Mr. Hudson Musoke** from the Legal Department of Makerere University while the Respondents were represented by **Mr. Alex Kamukama** from M/s Lutaakome & Co. Advocates. It was agreed that the hearing proceeds by way of written submissions which were duly filed and have been taken into consideration in the determination of the matter before Court.

Issues for Determination by the Court

[5] One issue is up for determination by the Court, namely; *Whether the application raises sufficient grounds for stay of execution of the judgment and decree in HCCS No. 542 of 2017?*

Consideration by the Court

[6] The position of the law regarding stay of execution is set out under Order 43 rule 4 of the CPR. Under rule 4(3) thereof, it is provided that;

"*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 due performance of the decree or order as may ultimately be binding upon him or her."*

[7] The power to grant or refuse to grant a stay of execution pending appeal is discretionary. When exercising such discretion, the court will take into

account a number of factors upon which the applicant is required to satisfy the court, namely that;

i) the applicant has lodged an appeal which is pending hearing;
ii) the said appeal is not frivolous and it has a likelihood of success;
iii) there is a serious and imminent threat of execution of the decree and refusal to stay would inflict greater hardship than it would avoid;
iv) if the order is not granted, the appeal will be rendered nugatory;
v) the application was made without unreasonable delay; and
vi) the applicant is prepared to give security for due performance of the decree.

See*: Kyambogo University v Prof. Isaiah Omolo Ndiege CACA No. 341 of 2013*.

[8] On the case before me, both counsel addressed their minds to the above cited principles and tailored their submissions along them. I will adopt the same approach in determining the matter before me.

The Applicant has lodged an appeal that is pending hearing.

[9] It was submitted by Counsel for the Applicants that the judgment that is contested in the instant case was passed on 31st August 2022 and the Applicants lodged a Notice of Appeal on 13th September 2022 and paid the requisite fees, which was done within time. The Applicants have gone further and lodged the Record of Appeal in the Court of Appeal.

[10] In reply it was submitted by Counsel for the Respondents that although they acknowledge that a notice of Appeal was filed and served, the mere filing of a notice of appeal is not a compelling reason for the grant of this application. Counsel argued that an applicant seeking an order for stay of execution must satisfy court that there are compelling reasons as to why the judgment creditors should postpone the enjoyment of their benefits under the decree.

[11] Under rule 76(1) of the Judicature (Court of Appeal Rules), appeals from the High Court to the Court of Appeal are commenced by lodgment of a notice of appeal with the Registrar of the High Court. The appellant would then be required to file a memorandum of appeal within 60 days from the date of lodging the notice of appeal. Where a party who desires to appeal has applied for a certified copy of proceedings and the decision of the trial court, the time taken for the preparation of the said record shall be taken into account when computing the time within which to file the memorandum of appeal. See: *Rules 83(1) and (2) of the Court of Appeal Rules*.

[12] It follows, therefore, that where a party has lodged a notice of appeal in accordance with the law, and has applied for a certified record of the trial court, and the record has not yet been provided; such a party is deemed to have filed an appeal to the court of appeal and has a right to apply for stay of execution of the judgment or decree of the High Court. In the instant case, it is not disputed that the Applicants lodged a notice of appeal within time. The notice of appeal and the letter requesting for a record of proceedings was attached to the Applicants' affidavit in support as Annexure B showing that it was lodged on 19th September 2022. This ground is therefore made out.

The appeal is not frivolous and has a likelihood of success.

[13] It was submitted by Counsel for the Applicants that the University Council Resolution affecting the Secretaries was a conditional resolution that had to be presented to the Ministry of Public Service who would in turn consult the Ministry of Finance, Planning and Economic Development and the mother Ministry of Education and Sports, to devise how to accommodate the changes in terms of wage. Counsel stated that once the wage has been identified, then the change would be approved and would thus become implementable. Counsel argued that the resolution of the Council was not an open directive but a proposal that awaited another approval in terms of

availability of funds in order to be implemented. Counsel concluded that the appeal reveals a plausible case with high chances of success.

[14] Counsel for the Respondents relied on the case of *Formula Feeds Ltd & Others v KCB Bank Ltd HCMA No. 1647 of 2022* for the submission that an appeal will be considered frivolous if prima facie the grounds raised are without any reasonable basis in law and cannot be supported by a good faith argument and in presence of a strong argument showing that the appeal has no merit. The court must be provided with the Memorandum of Appeal. Counsel submitted that in the instant case, much as the Applicants have averred that they filed Civil Appeal No. 551 of 2023, no Memorandum of Appeal was attached to the affidavit in support. Counsel argued that the Applicants have not demonstrated legal and evidential flaws in the judgment of the trial court which would, prima facie, demonstrate that the decision of the High Court is unsustainable on appeal. Counsel further argued that the trial Judge made findings premised on unequivocal resolutions of the Applicants and no amount of submission on appeal can salvage the situation. Counsel concluded that the appeal has no likelihood of success and the application for an order for stay of execution is clearly intended to stifle the Respondents' right to enjoy the benefits of the decree.

[15] It has already been underscored that an appeal to the Court of Appeal is commenced by way of a notice of appeal. That being the case, the absence of a memorandum of appeal by the time a party seeks for an order of stay of execution cannot be used against the applicant. In any case, it would not be proper for this Court to assess the merits of an appeal that lies before the Court of Appeal. In the case of an appeal such as the present one, this requirement can only be invoked by the Court in very plain cases; for instance, where a party that purports to have filed an appeal has no right of appeal or where the appeal is filed in the wrong forum. In such a case, the Court can see

through the appeal and come to a conclusion that the same is frivolous and has no likelihood of success. Otherwise, it is not open to a trial court to assess whether the appeal to the Court of Appeal shall succeed on the merits. In the present case, there is nothing to show that the appeal is frivolous and unlikely to succeed. This ground of the application is also made out.

There is a serious or imminent threat of execution of the decree; refusal to grant the stay would inflict more hardship than it would avoid and that the appeal would be rendered nugatory.

[16] Counsel for the Applicants submitted that the execution was to recover a total sum of UGX 2,168,258,812/= by way of attachment and sale of the Applicants' property comprised in Kyadondo Block 250 Plot 51 at Makerere. Counsel stated that the threat of execution is imminent since the application for execution came up before the Deputy Registrar on 20th October 2023. Counsel stated that the appeal lodged by the Applicants was to prevent the implementation of the court orders. Counsel submitted that one of the orders is to appoint the Respondents to the new positions and once the Respondents are appointed to those positions, the Applicants would not later, after succeeding on appeal, reverse or withdraw the appointments without attracting serious adverse consequences.

[17] Counsel further submitted that if the execution is carried out, public property held by the Applicants would be sold off and the sale would not be reversible. Counsel also stated that the Applicants are a public University which depends on periodic financial releases from the Government Treasury and the total sum claimed and the wages have not been provided for nor catered for by the Government Treasury. The Applicants are thus unable to meet the commitment without having to sell off property of the University.

[18] In reply, it was submitted by Counsel for the Respondents that there is no threat as alleged. Counsel stated that the Respondents are enforcing the ordinary obligations that flow from a judgment and the Applicants have voluntarily complied with part of the decree and paid the costs, and have overtime expressed willingness to comply with the other orders in the decree. Counsel further argued that there is no imminent danger since the execution applied for is for recovery of money which can be refunded through deductions from the Respondents' salaries and the appeal cannot be rendered nugatory.

[19] There is evidence that the Respondents have applied for execution of the judgment and decree seeking recovery of a total sum of UGX 2,168,258,812/= by way of attachment and sale of the Applicants' property comprised in Kyadondo Block 250 Plot 51 at Makerere, among other orders. The application for execution filed on 6th October 2023 came up before the Deputy Registrar on the 20th October 2023. This constitutes sufficient evidence of an imminent threat of execution. For reasons given by the Applicants showing the difficulties that will be faced by the University if execution is left to proceed, I am satisfied that the appeal may be rendered nugatory if execution of the decree is not stayed.

Substantial loss may result to the Applicants unless the stay of execution is granted.

[20] Counsel for the Applicants submitted that the Applicants challenge, among others, orders of the trial court directing the appointment of the Respondents to the new positions for which they were qualified with effect from 2017 and payment of salary arrears since that date together with general damages to each. Counsel submitted that the University Council has a process it has to undertake before changing the employment structure of the University and the execution of the court orders would result in a situation whereby the University will be running an employment structure that is not

properties, which are public properties accumulated over time, with no chance of replacement.

[21] In reply, Counsel for the Respondents submitted that although the Applicants stated that they are likely to suffer significant loss if execution is not stayed, they do not state or explain how they will suffer significant financial loss. Counsel argued that it is not stated anywhere in the affidavit in support that the decreed sums or any part thereof are incapable of being recovered from the Respondents in the unlikely event that the appeal or part thereof succeeds. Counsel stated that the Respondents are staff of the Applicants, and that the Applicants can always recover the monies paid through salary deductions or withhold their terminal or retirement benefits.

[22] For the Court to determine whether or not substantial loss will be occasioned to a party, it is necessary to establish what, in law, amounts to substantial loss. The position of the law is that substantial loss, for purpose of determining whether or not to grant an order of stay of execution, need not be determined by a mathematical formula whose computation yields any particular amount. See: *Tropical commodities Suppliers Ltd & 2 Others v International Credit Bank Ltd (in liquidation) HCMA No. 379 of 2003*. The Court relied on the definition of the term "substantial" in Black's Law Dictionary, 6th Edition, page 1428 as "something of real worth and importance, not seeming or imaginary or illusive". The court concluded that substantial loss does not represent any particular amount or size. It is thus a qualitative concept and

refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal. As such, determination as to whether a certain loss is substantial or not is qualitative and is to be determined by the context of each case. Also See: *Augustine Kasozi v Arvind Patel HC Misc. Application No. 503 of 2021*. In *Trans track Ltd v Damco Logistics, HCMA No. 608 of 2012*, it was held that substantial loss in the context of a particular case must be loss that is not contemplated by the parties.

[23] I have given due consideration to the argument by Counsel for the Applicants to the effect that the execution of the decree would result in a situation whereby the University will be running an employment structure that is not approved by the responsible Ministries of Education and Sports, Public Service and Finance, Planning and Economic Development and that such would be contrary to the laws governing Public Service. It is not in my position to assess the merits of this argument as such is within the domain of the appellate court. Nevertheless, it is clear to me that in case such a possibility exists, it would occasion substantial loss to the Applicants. I will, therefore, give a benefit of doubt to the Applicants. I thus find in the affirmative on this ground.

The application has been made without unreasonable delay.

[24] It was submitted by Counsel for the Applicants that the Respondents applied for execution of the decree in Civil Suit No. 542 of 2017 on 6th October 2023 and that is when the actual threat of execution of the decree arose. The Applicants then promptly filed this application for stay of execution on 18th October 2023 without unreasonable delay. Counsel stated that the Applicants could not bring this application much earlier, before the Respondents had applied for execution. Counsel concluded that the application therefore satisfies this requirement.

[25] In reply, Counsel for the Respondents cited the case of *Kabiito Karamagi & Another v Yanjian (U) Company Limited & Anor, HC Miscellaneous Application No. 1274 of 2023* to the effect that the reckoning of time to determine if a delay is unreasonable begins at the time the decree or order is sealed and becomes enforceable. Counsel submitted that the application for stay of execution ought to be made within reasonable time and reasoned that the question of whether the delay is unreasonable, will depend on the peculiar facts of each case and must be assessed according to the circumstances of each case. Counsel argued that the Applicants in the instant case paid the taxed costs of the suit, without seeking to stay the decree and it was upon failure to settle the decretal sums and being warned of contempt of court that the Respondents swung into action by commencing execution proceedings.

[26] Owing to the legal requirement that a judgment debtor must be faced with an imminent threat in order to be entitled to an order of stay of execution, I agree with the submission of Counsel for the Applicants that they needed not to have filed the application earlier than they did. It was shown by the Applicants in the affidavit in support of the application that the Respondents applied for execution of the decree on 6th October 2023. The Applicants filed this application on 18th October 2023, twelve days later. The Applicants therefore brought this application without unreasonable delay. This requirement is satisfied.

The Applicant has given security for due performance of decree.

[27] It was submitted by Counsel for the Applicants that the Applicants are a Public University, the largest and oldest in the country, which was formed by an Act of Parliament with a permanent home at Makerere Hill. Counsel stated that the Applicants are ready and willing to provide security for due performance of the decree, once it has been ordered so by the Court.

[28] Counsel for the Respondents submitted that government agencies have before furnished security for due performance of the decree in applications of this nature and the Applicants cannot be exempted from paying the same. Counsel cited the case of *Uganda Post Ltd v Magezi, HC Miscellaneous Application No. 88 of 2012* where the court applied the principle of payment of security for due performance despite the applicant having been a government agency and ordered the applicant to pay 40 % of the decretal sum. The court emphasized that the percentage payable is dependent on the circumstances of the case. Counsel submitted that this is a unique case that involves huge sums of money and in which the Applicants should deposit security for due performance. Counsel further submitted that the court has a duty in exercising its discretion to grant stay of a money decree to balance the equities between the parties and ensure that no undue hardship is caused to a decree holder due to stay of execution of such a decree. Counsel concluded that should the Court be inclined to grant the application and the orders sought, that the Applicants should deposit 50% of the decretal sum as security.

[29] Considering the facts and circumstances of this case, I take cognizance of the fact that the decree in issue is largely for recovery of money. The Court is told that the University largely depends on a budget and periodic releases from the Government and the Applicants will face hardship if execution for the total decretal sums is enforced. I note that in the event that the appeal is unsuccessful, there is a possibility that execution will be delayed by the fact that there will be no budget or release to cater for the same. The Applicants ought not to have the liberty to pay as and when they desire to, to the detriment of the judgment creditors. Since the Applicants have expressed readiness to deposit security for the due performance of the decree in the case of an unsuccessful appeal, I find that it is just and equitable that security is deposited in this matter as a condition to issuance of an order for stay of execution.

[30] In the circumstances, given that the sum claimed by the Respondents is said to be in the region of over UGX 2,000,000,000/= (Uganda Shillings Two Billion only), I will order the Applicants to deposit a sum of UGX 500,000,000/= (Uganda Shillings Five Hundred Million only) which is approximately 25% of the decretal sum. The sum ordered as security shall be deposited in the security account of the Court within 60 (sixty) days from the date of this order. In case the deposit is not made within the stated time, the order for stay of execution shall lapse.

[31] In all, therefore, the application has been conditionally allowed with orders that;

a) An order doth issue staying execution of the judgment and decree in HCCS No. 542 of 2017 pending the hearing and determination of Court of Appeal Civil Appeal No. 0551 of 2023.

b) The order in (a) above is made on the condition that the Applicants shall deposit a sum of UGX 500,000,000/= (Uganda Shillings Five Hundred Million only) into the security account of the Court being security for due performance of the decree; to be deposited within 60 (sixty) days from the date of this order.

c) In case of default by the Applicants on the condition in (b) above, the order for stay of execution shall lapse.

d) The costs of this application shall abide the outcome of the appeal.

It is so ordered.

Dated, signed and delivered by email this 17th day of May, 2024.

Boniface Wamala

JUDGE