

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)**

MISCELLEANOUS APPLICATION NO. 2374 OF 2016

**(ARISING FROM HCT EMA NO. 1677 OF 2016)
(ARISING FROM HCT COMMERCIAL DIVISION
CIVIL SUIT NO. 275 OF 2014)**

**1) MUKASA FREDRICK
2) NAMULWA ALICE APPLICANTS**

VERSUS

JADE PETROLEUM (U) LTDRESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

By this application made under 0.22 r 23 C.P.R, S.98 CPA and 0.52 r 1 and 3 C.P.R, the Applicants sought orders of this court staying execution of the judgment and decree in Civil Suit 275/2014, to enable the Applicants appeal to the Court of Appeal out of time and to apply for stay of execution.

Costs of the application were also applied for.

The grounds of the application are that:-

- a) The judgment and decree in the civil suit were passed against the Applicants without their knowledge.
- b) Although the Applicants were served with summons and even gave evidence in the suit, they were not notified either by court or their Advocate then of the judgment date.
- c) The Applicants became aware of the existence of the judgment and decree through a Good Samaritan working in the Execution Division of the High Court when the judgment was already at execution stage.

d) Upon perusing the judgment and decree, the Applicants found it very unfair and being aggrieved intend to appeal against the same out of time and have already filed the necessary documents and obtained proceedings.

5 e) If the application is not stayed and the unfair judgment and decree is executed, the Applicants will suffer irreparable loss and gross injustice as they will be forced to pay money they don't owe and their intended appeal will be rendered nugatory.

f) It is in the interests of justice that this application be allowed.

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The application is supported by the affidavit of the First Applicant which was read and relied upon at the hearing.

There is no affidavit in reply.

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The matter was first called for hearing on 28.02.17 in the presence of both Counsel. It was adjourned to 06.03.17 to give the parties a chance to try and settle.

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On 06.03.17 both Counsel were in court but nothing was mentioned about the proposed settlement. Hearing accordingly too off.

Counsel for the Applicant went through the provisions of the law under which the application was made and the grounds thereof.

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He submitted that it is clear from paragraphs 4 and 5 of the affidavit in support that Counsel for the Applicants abandoned them and judgment was delivered in their absence.

Civil Appeal 273/16 was filed on 02.12.16 and the Respondent has been served, however, the Appeal is yet to be validated.

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Referring on 0.22 r 23 C.P.R, Counsel prayed for stay of execution to enable the Applicant file the Appeal and an application for leave to appeal out of time.

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In response, it was contended by Counsel for the Respondent that the application was an abuse of court process and is misconceived. Counsel referred court to the case of **Malinga Noah, Obote Charles and Another vs. Akol Henry C.A Miscellenous Application No. 203/2015** where principles guiding execution were reiterated by the Court of Appeal citing the case of **David Wesley vs. Attorney General Constitutional Application No. 01/14**. These are:-

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- i) Likelihood of success of the Appeal
- ii) Danger of suffering irreparable loss or damage

iii) Balance of convenience.

Further that the Court of Appeal also cited the case of **Kyazze vs. Busingye, Constitutional Application 18/14** for the holding that “*the application has to be made without unreasonable delay.*”

And the case of **National Enterprise Corporation vs. Mukisa Foods Ltd C.A 07/98** where the position of the Supreme Court that “*right of Appeal must exist*” was reiterated.

10 In the case of **Malinga (Supra)**, Counsel contended, the Justices noted that the Notice of Appeal was filed on 17.03.11 and the memorandum of appeal was filed on 23.05.11 and met the requirements of r 76 and r 6(2) (b) of the Court of Appeal Rules.

15 Under Rule 76 of those rules, Counsel stated, the notice of appeal has to be lodged with the Registrar of the High Court within fourteen days of the decision made and which the Applicant desires to appeal from.

However that, in the present case, the notice of appeal was lodged a year later and yet it is the notice that triggers the Applicants’ right to appeal.

20 Also that, the submissions of Counsel for the Applicant are misconceived. It is the Applicant to prove the likelihood of success and yet the judgment of the trial court was not annexed .

25 Providing a copy of the judgment, Counsel for the Respondent referred court to page 3 thereof where it is indicated that, the Defendants’ now Applicants do not deny taking delivery of products of the Plaintiff now Respondent.

And that on Pages 7-9 of the judgment, the trial Judge explained that variation of the agreed position should not be oral.

30 Counsel then argued that there is nothing in the present application to show likelihood of success of the appeal or that the Applicants will suffer irreparable damage. That they should recover the money from the third party, if at all.

35 It was further pointed out that the Respondent delivered properties about four years ago and to date they have not been paid.

And that therefore, the balance of convenience lies in favor of the Respondent who is entitled to get the fruits of its judgment.

40 Counsel then prayed for dismissal of the application for lack of merit.

In rejoinder, Counsel for the Applicant insisted that 0.22 r 23 C.P.R is clear. If the Applicant shows sufficient cause, then execution will be stayed for a reasonable time.

- 5 That the authorities cited by Counsel for the Respondent do not apply to the present case as they would apply in the Court of Appeal.

Also that there was negligence of Counsel in the Civil Suit, that should not be visited on the Applicants. He relied on the case of **Kasaala Growers Coop. Society Ltd vs. Kakooza**
10 **Jonathan and Another SCCA 24/10** to support his submissions.

Counsel also asserted that the Appeal has been filed although the application for leave to appeal out of time is not yet filed, but that the appeal has likelihood of success.

- 15 With leave of court, Counsel for the Respondent referred to the case of **Mugenyi & Co. Advocates vs. National Insurance Corporation** to state that *“court has powers to stay execution under S.101 CPA.”* But that 0.22 r 23 C.P.R is not relevant to the present application as it applies to appeals from the lower courts.

- 20 The issue is **whether this is a proper case for stay of execution.**

It is true as pointed out by both Counsel that decided cases have established what should be considered in applications for stay.

- 25 The conditions include the following:-

- Likelihood of success of the appeal.
- Danger of suffering substantial lose or irreparable damage.
- 30 - Application has been made without unreasonable delay.
- Security for costs has been given by the Applicant.
- 35 - Balance of convenience.

See **C.A Miscellenous Application 203/15 (Supra)** among others.

40 However, it has been explained that *“in applications of this nature, guiding principles would depend on the individual circumstances and merit of each case. The individual circumstances*

of each case would determine whether the case falls within the scope and parameters of any other laid down principles.” – East Africa Development Bank vs. Blueline Enterprise Ltd [2006] 2 EA 51 (CAT).

5 The circumstances of the present case are that the Applicants claim to have learnt of the judgment and decree sought to be stayed at the stage of execution as their Counsel abandoned them and they were not informed of the date of judgment.

The judgment is dated 13.11.15. The typed copy of proceedings was applied for on 30.09.16.
10 The typed and certified copy of the said proceedings was availed on 26.10.16, although the Notice of Appeal was filed with Commercial Court Division on 03.10.16.

Granted, courts have persistently held that *“the omission or negligence of Counsel should not be visited on a party.” – Kasaala Growers Co-op Society (Supra) interalia.*
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But in the present case no appeal has been filed in Court of Appeal since the certified copy of the proceedings were availed to the Applicants.

Considering the time that the judgment was delivered and notice of appeal given, the appeal is
20 certainly out of time and there is no indication from Counsel for the Applicant that leave to appeal out of time has been granted.

Indeed Counsel admitted that no application seeking leave to appeal out of time has been filed.

25 While Counsel argued that the appeal was filed and that it is the practice in the Court of Appeal to validate appeals filed out of time, Counsel cited no law under which such validation is done. This court wonders how the extension within which to file the appeal out of time can be granted /validated without any application seeking to do so.

30 In the case of the **Electoral Commission vs. Nambooze Betty Bakireke Election Petition Appeal No 1/2007** relied upon by Counsel for the Applicant to support the so called impending validation, *“there was an application seeking extension of time within which to pay fees to lodge the Notice of Appeal”*.

35 As already indicated, there is no application for extension of time within which to appeal, that has been filed by the Applicants in the Court of Appeal. And there is no appeal, therefore the Applicants cannot rely on none existent suits as a ground for stay of execution.

Without any appeal having been filed, it is difficult for this court to gauge the likelihood of
40 success or that the Applicants will suffer irreparable damage if they pay the money decreed to the Respondents which has been long overdue.

While court has discretion to grant stay of execution, I am aware that it has been emphasized that *“this power ought to be exercised judiciously and where it appears equitable to do so, with a view to temporarily preserving the status quo. And that as a general rule, the only ground for stay of execution is for the applicant to show that once the decretal property is disposed of, there is no likelihood of getting it back should the appeal succeed.”* – C.A Miscellenous Application 07/98.

In the present case, without any appeal or application for leave to appeal out of time having been filed, it would not be equitable to stay execution.

And as pointed out by Counsel for the Respondent, the money decreed to the Respondents if paid can be recovered from the Respondents if ever the Applicants file an appeal and it succeeds.

I have also noted that most of the grounds relied upon by the Applicants for stay would have best served the Applicants in an application for leave to appeal out of time.

Without likelihood of suffering irreparable loss and without existence of any appeal to be rendered nugatory, the application cannot be allowed.

Even the balance of convenience cannot be tipped in favor of the Applicants given the outlined circumstances of this case.

The application is accordingly dismissed for all those reasons. Since no affidavit in reply was filed, each party should bear its own costs.

FLAVIA SENOGA ANGLIN
JUDGE
15.03.16