

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)
MISCELLANEOUS APPLICATION NO. 26 OF 2016
(ARISING FROM HCCS 574 OF 2015)

5

KAMPALA CAPITAL CITY AUTHORITY ----- APPLICANT

VS

MURANGIRA JOSEPH ----- RESPONDENT

10

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This application was brought under S.33 of the Judicature Act, S.98 CPA and 0.52 rr1 and 2 C.P.R.

15 It seeks an order of this court staying execution of the judgment and decree of the High Court delivered on 08.01.16, pending the disposal of the Appeal.

Costs of the application were also applied for.

The grounds of the application are set out in the motion and here is also an affidavit in support deposed by Denis Byaruhanga.

20 The grounds for the application are interlia that the Applicant has filed a notice of appeal against the decision of 08.01.16 and has requested for typed and certified record of proceedings and judgment.

Execution of the decree before hearing of the intended appeal will render the appeal nugatory.

The Applicant is willing to deposit in court security for due performance of the decree.

The application raises triable issues with a probability of success and it is in the interest of substantive justice that it be granted.

There is an affidavit in reply sworn by the Respondent, in which it is stated among other things that the Applicant had no defence in the suit as admissions were made.

- 5 Further that the application is incurably defective as no decree was extracted before the application was filed.

The Respondent ought to be allowed to enjoy the fruits of his judgment which was basically based on the admission of facts by the Applicant.

The Applicant failed to provide any evidence of a pending application to set aside judgment.

- 10 Also that the notice of appeal has never been filed in any court and the Applicant has never bothered to collect the record of proceedings.

The Respondent also raised objection to the application and prayed that it be dismissed with costs.

- 15 An affidavit in rejoinder was filed by the Applicant on 02.03.16 and the Respondent filed supplementary affidavit on 09.03.16.

When the application was called for hearing on 03.03.16, Counsel for the Applicant informed court that Application 1331/15 filed before judgment was entered had been overtaken by events and he prayed that it be withdrawn.

The application was withdrawn and each party was directed to meet its own costs.

- 20 Since the parties indicated willingness to settle the current application, it was adjourned to 09.03.16, with orders that the Applicants file their proposal for settlement by 07.03.16 and serve it on Counsel for the Respondent. Counsel for the Respondent was directed to make response by 09.03.16.

- 25 However, by 09.03.16, Counsel for the Applicant had not made the proposal for settlement to Counsel for the Respondent. But he indicated that he had submitted the proposal to the Executive Director of the Applicant but had not yet got a feedback. He accordingly requested for more time to enable him conclude talks with the Executive Director and thereafter get back to the Respondent.

Although Counsel for the Respondent objected to the adjournment, court allowed it with costs to the Respondent in the spirit of encouraging settlement out of court.

On 16.03.16, Counsel for the Applicant informed court that the Applicant had proposed settlement in the sum of Shs. 50,000,000/- plus compensation and communicated it to
5 Counsel for the Respondent. Upon having a discussion with Counsel for the Respondent, she indicated that she needed to study the offer and make a counter offer.

The application was adjourned to 21.03.16.

On 21.03.16, Counsel was informed that the response to the Applicant's proposal had only been received that morning. Another adjournment was sought to enable Counsel for the
10 Applicant to discuss it with management. Since Counsel for the Respondent had no objection, matter was adjourned to 30.03.16.

On that date however, Counsel for the Applicant submitted that he had not yet received any directions from his superiors in respect of the Respondent's counter proposal as the management meeting had not sat for the last two times.

15 The matter was adjourned to 08.04.16 with costs to the Respondent. It was the last adjournment at the instance of the Applicant.

On 08.04.16, a different Counsel appeared for the Applicant, stating he was holding brief for his colleague who was indisposed. He claimed he had only come to know of the matter that morning and prayed to be allowed to file written submissions by 12.04.16.

20 Counsel for the Respondent vehemently objected to the adjournment. Court agreed with her and since the Applicant had been given last adjournment, directed that the application be heard or be dismissed for lack of prosecution.

Counsel for the Respondent then raised preliminary objections stating that the application was premature as the Respondent has not applied for execution.

25 Secondly that the Applicant had never extracted the decree of the trial court.

The case of **Orient Bank Ltd vs. Zaabwe and 5 Others Miscellaneous Application 19/2007** was relied upon for the holding that *“it is not proper to institute an application for order to stay when there is no evidence of any application for execution of the decree especially*

when no decree embodying the decision has been approved". And that "*a person cannot issue execution before a decree is settled*".

Further that while the Applicant lodged a notice of appeal by way of motion, this was an intended appeal and no appeal had yet been filed. And in any case, without extraction of a
5 decree, no appeal can lie in the Court of Appeal. – The case of **Bank of Uganda vs. Eddy Rodrigues [1987] HCB 36** was relied upon.

And finally that, the application was not accompanied by a summary of evidence, list of documents and list of authorities contrary to 0.6r2 C.P.R.

And was also in contravention with 0.22 r 26 C.P.R – as there should be a pending suit
10 between the parties before execution can be stayed.

Counsel then applied for dismissal of the application for all those reasons.

Counsel for the Applicant sought to be given time to respond to the objection and matter was stood over.

Later he submitted that as to whether there was no appeal is a matter that can only be
15 determined by the Court of Appeal.

- In the respect of lack of summary of evidence, documents and authorities, he stated that application by motion are an exception to the general rule.
- Lack of pending suit – that since Applicant filed a notice of appeal and intends to file a
20 memo after receiving the record of proceedings, it ought to be taken like there is a pending suit between the parties.

In rejoinder, Counsel for the Respondent reiterated earlier submissions.

Court decided that all issues raised would be determined once and for all after hearing the application.

Counsel for the Applicant then went through the motion and the grounds thereof. He relied
25 upon the case of **Hwang Sung Industries Ltd. vs. Jajdin Hussein and Others SCCA 19/08**, where it was held that "*for an interim order of stay to be granted, it suffices to show that a substantive application is pending and there is a serious threat of execution before*

the hearing of the substantive application. It is not necessary to preempt consideration of the matters necessary in deciding whether or not to grant the substantive application”.

Counsel argued that since the Applicant filed a notice of appeal there is a pending suit before court.

5 And if application is not allowed and the decretal sum paid to the Respondent, the Applicant will have great difficulty in recovering the sums.

That it is accordingly in the interest of justice that application be allowed and execution stayed pending the disposal of the intended appeal.

10 Reiterating the issues raised in the preliminary objection, Counsel for the Respondent urged court to take note that this is the main application and not the interim application and therefore case cited referring to interim application is not applicable.

Urging court to note the points raised in the affidavit in reply and rejoinder, Counsel for the Respondent insisted that the application lacks merit and ought to be dismissed.

15 Having gone through the application and the affidavits for and against the application, court proceeds to determine **whether this is a proper case for grant to stay of execution.**

Court wishes to note from the outset that contrary to the submissions of Counsel for the Applicant, the application before court is not for an interim order. It is the main application. The case of **Hwang Sung Industries (Supra)** relied upon by Counsel for the Applicant while it is good law, is not applicable to the circumstances of the present case.

20 Decided cases have established that to obtain a stay of execution **“a party must satisfy three conditions”** namely that:-

- Substantial loss may result unless the order of stay is made.
- The application has been made without unreasonable delay, and
- Security for costs has been given by the Applicant.

25 **“Substantial loss does not represent any particular size or amount but refers to any loss, great or small that is of real worth or value as distinguished from a loss that is merely nominal”**.- See **Tropical Commodities Supplies Ltd and Others vs. International Credit Bank Ltd (in Liquidation) [2004] 2EA 331 CH CU.**

While those guiding principles in applications for stay are well settled, the courts have further stated that ***“application of these 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 of the laid down principles”***.
5

“One of the factors to be considered in an application for stay of execution is whether the outcome of the appeal if successful would be rendered nugatory, if execution is not stayed”. – Refer to **East African Development Bank vs. Blueline Enterprises Ltd [2006] 2EA 51 (CAT)**.

10 Judgment in the present case was given on 08.01.16.

On the same date, the Applicant applied for typed and certified copy of proceedings and judgment. - Annexure B dated 08.01.16.

Notice of Appeal Annexure “A” was issued to be served on the Registrar High Court Nakawa and Counsel for Respondent.

15 The application for stay was filed on 12.01.16. Setting out the three conditions that ought to be satisfied before stay of execution can be obtained.

As pointed out by Counsel for the Respondent, the application was made before the Respondent applied for any execution. It is also true that no decree of the trial court has ever been extracted indeed the principle of case law is that ***“it is not proper to institute an order to stay when there is no evidence of any application for execution of the decree, especially when no decree embodying the decision has been approved”***. - **Orient Bank Ltd vs. Zaabwe and 5 Others (Supra)**.
20

Court also agrees that while the Applicant lodged a notice of Appeal, no appeal has yet been filed and that without extraction of a decree, no appeal can lie to the Court of Appeal. – **Bank of Uganda vs. Eddy Rodgrignes (Supra)**.
25

However, court is constrained to take into account the peculiar circumstances of this case to wit that the Applicant expressed the intention to appeal as soon as judgment was delivered and applied for certified proceedings and copy of the judgment.

There is no indication that the proceedings have been availed. Time within which to file the appeal does not begin to run until proceedings have been availed.

The Applicant in their supporting affidavit contends that the judgment they intend to appeal against was given without any of the parties being heard. – This contention raises issues that
5 can only be properly looked into if the Applicant is given a chance to appeal.

The application was also made without undue delay and the Applicants have expressed willingness to deposit in court security for due performance of the decree.

For those reasons, court finds that it is in the interests of justice to allow this application on the following conditions:-

- 10
- 1) The Applicant deposits Shs 50,000,000/- in court as security for due performance.
 - 2) The Appeal is filed within two weeks from the date of obtaining the typed proceedings of the main suit. The Applicant to take all reasonable steps to obtain the proceedings and extract the decree. – S. 33 Judicature Act.

Costs of the Application are granted to the Respondent.

15 Upon failure to meet any of the conditions, execution will go head.

FLAVIA SENOGA ANGLIN

20 **JUDGE**

29.04.16