

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

5 **MISCELLANEOUS APPLICATION NO. 2351 OF 2015**
(ARISING FROM EMA NO. 2185 OF 2015)
(ARISING FROM COURT CIVIL SUIT NO. 339 OF 2012)

K. ROGERS LTD -----APPLICANT

10 **VS.**

SPEDAG INTERFREIGHT (U) LTD ----- RESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

15 This application was brought under S.32 of the Judicature Act, S.98 C.P.A and 0.43 r 4
C.P.R, seeking orders of this court to:-

20 1) Stay execution of the judgment in Commercial Court Civil Suit 339/2012 pending
determination of the appeal.

2) Costs of the application were also applied for.

25 The grounds of the application are that:-

i) The Applicant filed Civil Suit 339/12 against the Respondent Company, seeking for the
release of eighteen cartons of granite tiles and 1250 cartons of glass blocks.

30 ii) The Respondent counter claimed for the sum of Shs. 28,736,300/- as money allegedly
paid out to Uganda Revenue Authority (URA) on behalf of the Applicant in taxes due on
the granite and glass blocks.

iii) The Applicant's suit was dismissed on 13.03.15 and judgment was entered against the
Applicant on the counter claim for payment of the Shs. 28,736,300/-.

35 iv) Being aggrieved by the judgment and intends to appeal to the Court of Appeal, filed a
Notice of Appeal and a letter requesting for proceedings.

40 v) The Applicant stands to suffer substantial loss if execution is not stayed as there is danger
that, in event of the appeal being successful, the Applicant will not be able to recover the
decretal sum from the Respondent and the Appeal will be rendered nugatory.

vi) The Applicant is willing to provide security for due performance of the decree.

vii) The application has been made without unreasonable delay

5 viii) And it is just and equitable that the order of stay be granted.

The application is supported by the affidavit of Rogers Kakooza, the Managing Director of the Applicant Company.

10 There is an affidavit in reply deposed by Juliet Kembabazi, the Legal Manager of the Respondent Company.

15 She contends that the application is bad in law and the Applicant is guilty of dilatory conduct of a gross nature and is merely litigating with the sole aim of frustrating the Respondent from realizing the fruits of its judgment.

The motion was signed on 17.04.15 and filing fees paid in that date, however, the same was filed in court on 17.09.15 after an inordinate lapse of five (5) months.

20 Even then the Applicant did not bother to prosecute the same and only served it on the Respondent on 23.11.16, a year and two (2) months from the date of filing.

25 That this is a clear demonstration of the Applicant's desire to frustrate or delay the Respondent from realizing the fruits of its judgment and is an abuse of court process.

Judgment was given on the counter claim with interest at the rate of 21% per annum from the date of filing the counter claim and the interest has accumulated since then.

30 The costs were also taxed and allowed and the amount due and owing including the taxed costs have kept on accumulating.

The Respondent is entitled to security for due performance of the decree for payment of money due.

35 The Respondent is in possession of a container of assorted ceramic tiles and sanitary ware belonging to the Applicant of a forced sale value of Shs. 46,943,400/-.

40 Since the goods are non perishable, the Respondent can deliver them to court or at any court appointed storage facility for safe keeping. However, it is the Respondent's prayer that the court directs the goods to remain with the Respondent as to partial security for due performance of the decree.

45 And that court should direct the Applicant to furnish additional security in the form of a Bank guarantee of Ug. Shs. 15,700,000/-.

50 However that, if the Applicant desires to take its assorted goods from the Respondent's premises, then the Applicant should provide security in the form of a Bank guarantee for the whole decretal sum of Shs. 62,680,413/- in which case the goods remain at the Respondent's premises until the guarantee is presented and is verified by the Respondent.

There is an affidavit in rejoinder deponed by David Mukiibi, An Advocate in the firm instructed by the Applicant.

The deponent disputes the interest rate that had accrued as by December, 2016.

5

Further that it was illegal for the Respondent to impound the Applicant's container of goods and hold on to it despite being served with the interim order of stay.

10 That the Respondent is in contempt of court orders as the requirement for provision of security is to be made to the court and not to the Respondent. And it is therefore illegal for the Respondent to withhold the Applicant's goods under the false belief that security is to be made to it.

15 When the application was called for hearing, Counsel for the Applicant went through the grounds of the application, and the supporting affidavit. He submitted that stay of execution is granted were a party will suffer substantial loss if stay is not granted. The case of **Kampala Bottlers Ltd vs. Uganda Bottlers Ltd. Civil Application 25/95** was cited in support.

20 Asserting that the application before court meets the criteria for grant of stay, Counsel prayed that the application be allowed and the Applicant granted thirty (30) days to deposit the security in court.

The application was opposed on three main grounds.

25

- That an appeal is not by itself sufficient reason to stay execution. There has to be demonstration by the Applicant that irreparable that cannot be compensated for will occur.

30 - While stay of execution is always at the discretion of the court, there should be no unreasonable delay or dilatory conduct on the part of the Applicant.

Security for due performance can also be considered by the court.

35 Commenting about the affidavits of the Applicant, Counsel contended that they only indicate pursuance of an appeal. And apart from alleging substantial loss, there is no indication of what the substantial loss is.

40 Further that the Applicant has to show that the Respondent is not in a position to refund the money in case the appeal succeeds.

45 Arguing that an appeal by itself is not ground for stay of execution, Counsel cited the case of **Etop Francis vs. Rev. William Pashi** where Justice R. Kasule stated that ***"a party seeking to stay must establish sufficient cause to postpone the enjoyment of the benefits of that judgment and that if execution proceeds, there may be some irreparable loss caused"***.

The case of **Sengendo vs. Busulwa & Another C.App. 207/14 C.A** was relied upon for the holding that ***"not all orders appealed have to be stayed pending appeal. An appeal may be determined without the court having to grant a stay of execution...."***

50

It was then stated that, the Applicant had not demonstrated that substantial loss will result if the decree is executed.

5 Court was referred to the paragraphs in the affidavit in reply where it is contended that the Applicant delayed in bringing this application.

And further that, since Applicant is willing to deposit security, Shs. 61,300,000/- is the proposed sum.

10 And while the Respondent is holding the Applicant's container, that status quo should be maintained as the Respondent is entitled to exercise a lien over the property pending payment of the decretal sum. And that exercise of lien does not require a court order.

The interim order did not order release of the security but preserved the status quo.

15

Court was also urged to consider the alternative proposal for security.

Finally, it was the contention of Counsel for the Respondent that the Application is defective as it was made under 0.43 r 4 C.P.R. The order concerns appeals from Magistrates Courts. Counsel argued and the application ought to have been brought under 0.22 C.P.R. And that citing S.98 CPA and S.33 Judicature Act does not substantiate the written law.

20

It was prayed that the Applicant furnishes bank guarantee of Shs. 61,380,000/- if its goods are to be released or the goods be put in a warehouse appointed by court pending appeal.

25

Counsel emphasized that, if the goods remain as security, the Applicant should deposit further security of 15,000,000/- as a top up to cover the decretal sum of Shs. 61,300,000/-.

Costs, it was prayed, should be in the cause.

30

In rejoinder, it was stated that the application was signed by court on 21.11.16 while it was prepared in April, 2015, it was filed in September, 2015, since in April, there was no threat of execution. It cannot therefore be said that the application was late.

35

Counsel insisted that the basis for grant of stay had been established. – Substantial loss likely to result. Also that, there is no proper lien on the goods of the Applicant as they were impounded by the Respondent on the basis of the judgment.

And that Applicant is ready to abide by the orders of the court relating to security.

40

The issues for the court to determine are:-

1) Whether the application is improperly before court.

45

2) Whether the Respondent has a lien over the goods of the Applicant.

3) Whether execution should be stayed.

The issues will be dealt with in that order.

50

Whether application is properly before court:

As already indicated in this ruling, the application was made under S.98 C.P.A, s.33 Judicature Act and 0.43r4 C.P.R.

5

0.43 C.P.R refers to appeals to the High Court where under r 4 thereof, the High Court may for sufficient cause order stay of execution of the decree.

10 The suit out of which the present application arises having been determined by the High Court, the appeal arising therefore is to the Court of Appeal. 0.43 C.P.R is therefore not applicable.

15 However, it has been established by decided cases that, the citing of a wrong law does not vitiate proceedings, as the right law can only always be inserted. – Refer to the case of **Boyes vs. Gathure [1969] IEA 385 Saggi vs. Road Master Cycles (U) Ltd [2002] IEA 258.**

20 The right law in the present case would have been 0.22 r 23 C.P.R which provides for when court may stay execution. That is, the court to which a decree has been sent for execution.

The citing of 0.43 (4) C.P.R did not in any way prejudice the Respondent who was given a chance to be heard.

25 In any case, the Applicant also relied upon S.98 C.P.A – which grants court **“inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court”**.

30 While S.33 Judicature Act empowers the High Court **“to grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a case or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning those matters avoided”**.

35 For all those reasons, this court finds that the application is properly before court. And the objection of Counsel for the Respondent is accordingly overruled.

Whether the Respondent has a lien over the Container goods of the Applicant.

40 **“A possessory lien is a common law remedy in rem exercisable upon goods, and its exercise requires no intervention by the courts, for it’s exercisable only by an artificer who has actual possession of the goods subject to the lien. Since, however, the remedy is the exercise of a right to continue an existing actual possession of the goods, it necessarily involves a right of possession adverse to the right of the person who, but for the lien would be entitled to immediate possession of the goods. A common law lien although not enforceable by action, thus affords a defence to an action for recovery of the goods by a person who, but for the lien, would be entitled to immediate possession”**.

50 Since a common law lien is a right to continue an existing actual possession (That is to say, to refuse to put an end to a bailment) **it can only be exercised by an artificer if his/her possession was lawful at the time at which the lien first attached. To entitle him/her to**

exercise a right of possession under this common law lien adverse to the owner of the goods, he/she must thus show that his/her possession under the original delivery of the goods to him was lawful. See **Tappenden vs. Artus & Another [1963] 2QB 185 at P. 195.**

5 In the present case, the goods in issue were taken over by the Respondent without the authority of the Applicant and without a court order. It is apparent that the goods were not in possession of the Respondent but with the Applicant, when they were taken over by the Respondent in satisfaction of execution of its judgment.

10 The Respondent in the circumstances described, cannot be heard to claim that it has possession over the original delivery of the goods to it was lawful. The lien could only be exercised if the Respondent's possession was lawful at the time at which the lien first attached. There was no authority given by the Applicant or court to hand over the goods to the Respondent.

15

And since the Respondent did not have possession at the timer of attaching the goods, it needed at least a court order to that effect. The Respondent has therefore no lien over the goods that were unlawfully obtained.

20 The second issue is thus answered in the negative.

What is left for court to decide is **whether execution should be stayed and the goods handed over to the Applicant.**

25

In determining this issue, ***“court bears in mind that it has discretion to grant stay of execution but that this power ought to be exercised judicially and where it appears equitable to do so, with a view to temporarily preserving the status quo”.***

30 The guiding principles for determining whether or not to stay execution include:-

1) Likelihood of success of an appeal.

2) Danger of suffering substantial loss or irreparable damage.

35

3) Application has been made without unreasonable delay.

4) Security for costs has been given by Applicants.

40 5) Balance of convenience.

- See **Malinga Noah and 2 Others vs. Akol henry CAMA 203/15.**

45 It is also borne in mind that, it has been stated by courts 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 laid down principles”.*** – Refer to **East African Development Bank vs. Blueline Enterprise Ltd [2006] 2EA 51 CAT.**

The current application arises as a result of an attempt by the Respondent to execute the decree in Civil Suit 339/2012.

5 The Applicant filed a notice of appeal and also applied for proceedings. While the application for stay of execution was filed earlier, it was not signed by the Registrar until 17.09.15 when execution proceedings had been set in motion. Hence its late service on the Respondents.

10 The Applicant offered to provide security for due performance of the decree and also wants its goods held by the Respondent to be returned to him.

15 The Respondent acknowledges being in possession of the goods but insists that if they are to be returned to the Applicant, then the security for due performance should be for the whole decretal sum including costs, and interest that was due and owing as of 08.12.16 when the application was heard.

20 But that even if the goods remain as security, the Applicant ought to deposit a further Shs. 15,000,000/- as a top up of the Shs. 46,943,400/-, the alleged forced sale value of the goods. The deposits to be made by way of Bank Guarantee.

In those circumstances, it is apparent that the Respondent also agrees that the balance of convenience demands that stay of execution should be granted. Court is only left to determine how much the Applicant should deposit given the circumstances already stated above.

25 According to both Counsel, the principle sum owing on the counter claim is Shs. 28,736,300/-. Rate of interest is 21% per annum. The interest on the Principle sum has been owing since 06.09.12 to date 29.05.17 (that is, 4 years and 8 months).

30 One year's interest is arrived by $28,736,300 \times 21\% = 6,034,623/-$ per annum. Divide that by 12 months to get monthly interest that is, $6,034,623/12 = 502,885/-$ per month.

Shs. $502,855 \times 4 \text{ years and } 8 \text{ months (58) months} = 28,161,560/-$.

35 Therefore the total debt due and owing from the Applicant is Shs. 65,697,723/- arrived at as follows:-

40 Principle Sum Shs. 28,736,300/-
Interest Shs. 28,161,560/-
Taxed Costs Shs. 8,799,863/-

45 However, the Applicant cannot be expected to deposit the whole amount of Shs. 65,697,723/- as security for due performance of the decree. Decided cases have established that, to do so would tantamount to enforcing payment of the whole decretal sum which the Applicant is trying to stay.

50 The Applicant in the present case will therefore deposit half of that amount that is Shs. 32,848,861/- by way of Bank Guarantee within three weeks from today.

Costs will abide the outcome of the appeal.

The application is allowed on those terms and the following orders are given:-

5

1) The Applicant to deposit Shs. 32,848,861/- by way of Bank Guarantee as security for due performance of the decree within three weeks from today.

10

2) The goods of the Applicant held by the Respondent to be released to the Applicant.

3) Costs of the application to abide the outcome of the appeal.

15

FLAVIA SENOGA ANGLIN

JUDGE

20 **29.05.17**