

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

5 **MISCELLANEOUS APPLICATION NO. 2656 OF 2016**
(ARISING FROM EMA NO. 2452 OF 2016)
(ARISING FROM MISCELLENOUS CAUSE 128 OF 2016)

1) **UGANDA MEDICAL & DENTAL PRACTITIONERS COUNCIL**
10 2) **DR. KATUMBA SENTONGO ----- APPLICANTS**
VS.
SSENTONGO HENRY ----- RESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

15 **RULING**

This application was made under Article 126 (2) (e) of the Constitution, S.33 Judicature Act, S.98 CPA and 0.43 r 4 (1) (3) and (5) of the C.P.R.

The Applicant seeks an order of this court staying enforcement/execution of the orders made in High Court Miscellenous Cause 128/2016, pending the determination of the Applicant's
20 substantive Appeal.

Costs of the application to be in the main case.

The grounds of the application are that:-

- a) The Applicants are dissatisfied with the ruling, decree and orders of the High Court in Miscellenous Cause 128/16 of 14.10.16.
- 25 b) The Applicants have since filed a notice of Appeal against the whole decision and orders of the said court and requested for a record of proceedings.
- c) There is a real threat of execution as the Applicant has since filed Miscellenous Application 2452/16 where notice to show cause has been issued for 30.11.16.
- d) The Applicants shall suffer substantial loss if the order for stay of execution of the decree
30 and order of Miscellenous Cause 128/16 is not granted.

- e) The application has been made without delay.
- f) The Applicants are willing to abide by any reasonable condition that may be imposed by Court as security for performance of the orders as may ultimately be binding upon it.
- g) The Appeal has a very high likelihood of success as it raises serious points of law.
- 5 h) It is just, fair and equitable that the application is granted pending the determination of the appeal.

The application is supported by the affidavit of the Second Applicant, Dr. Katumba Ssentongo which was read and relied upon at the hearing.

10 There is an affidavit in reply filed by the Respondent. The Respondent was not represented by a lawyer.

When the application was called for hearing on 07.12.16, parties were in court together with Counsel for the Applicant.

Counsel for the Applicants informed court that all talks between the parties with a view to settling the matter amicably had failed. Hearing proceeded.

15 Counsel for the Applicants then went through the provisions of the law under which the application was made, referred to the supporting affidavit and the grounds for the application.

She emphasized that there was a real threat of execution as the Applicants appeared before the Registrar in answer to the notice to show cause on 30.11.16.

20 Further that, the application had been made without unreasonable delay and if execution goes ahead, the intended appeal which raises significant points of law would be rendered nugatory.

And that if appeal is lost, the First Applicant would be able to settle the claim of the Respondent.

The case of **Hwang Sung Industries Ltd vs. Tajdin Hussein and 2 Others SCCA 29/2008** was relied upon for the holding that ***“once an appeal is pending and there is a serious threat of execution before hearing, the appeal court intervenes to serve substantial justice”***.

25 And the case of **Alcon International Ltd vs. Kasirye Byaruhanga & Co. Advocates** where it was held that ***“for purposes of stay of execution, lodging of notice of appeal is sufficient to commence pending appeal”***.

- Article 126 (2) (e) of the Constitution was also relied upon.

It was pointed out that there is a notice of appeal in the present case that was filed on 27.06.16 within the time allowed by the rule.

Certified copies of the proceedings together with the ruling were also requested for.

Therefore, that since there is a pending appeal, the application ought to be allowed and
5 execution stayed pending appeal.

In reply, the Respondent relied upon his affidavit in reply. He argued that the Applicants admit that the ruling and orders were made against them interparties on 14.10.16. And though they claim to have filed an appeal the notice thereof was not served on the Respondent. Relying on
10 Judicature Act of Appeal rules r 76 (1) (2) and 0.43 r 4 (1) and (2) C.P.R, the Respondent argued that the notice of appeal is incompetent and it should be struck off the record.

Further that once execution has commenced, it cannot be halted. Since the Applicants disobeyed Court order, the Respondent had a right to apply for execution to enforce his rights and be able to practice his profession and obtain a livelihood.

Also that the proceedings are in the possession of the Applicants and they have not been denied
15 by court. And to apply for proceedings was meant to cover up the failure to file the memo of appeal. And without the memorandum of appeal, the merits of the intended appeal become hearsay. The case of **Kyambogo University vs. Ndiege [2013] UG CA 8-9 at P.14 and 14** was cited in support.

No substantial loss will be occasioned to the Applicant, who have no difficulty with complying
20 with the court orders but have deliberately denied the Respondent his core rights and are liable for contempt it was argued.

It was also not proved that the Applicants would suffer irreparable or irreversible damage that would render the Appeal nugatory.- See **Commissioner of Customs Uganda Revenue Authority vs. Kirenga [2015] UGCA 3** because if the Applicants win, all orders against them
25 can be reversed. Whereas if stay is granted, it is the Respondent who will suffer gross injustice and irreparable damage.

And that security for due performance on the decree will not be useful as the Applicants are not remorseful and are not capable of performing court order.

The Respondent prayed court to disallow the application with costs.

In rejoinder, it was stated by Counsel for the Applicants that, notice of appeal was filed on 27.10.16 within the time allowed for appeal.

That the Respondent evaded service of the same until he commenced execution proceedings.

There was no delay in filing this application as execution was applied for on 30.11.16 but was served on the Applicants on 25.11.16 and this application was filed on 29.11.16.

The proceedings applied for have not yet been provided. And while the Applicants have no difficulty in complying with court orders, the execution would render the appeal nugatory.

The Applicants are in a position to fulfill court orders if appeal is lost.

Earlier prayers were reiterated.

10 **Whether this is a proper case for stay of execution.**

While it has been established that court has discretion to grant stay of execution, it should be borne in mind 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”***.

In deciding whether to grant a stay of execution or not, the following guiding principles among others, should be considered:-

- 1) Likelihood of success of an appeal/application.
 - 2) Danger of suffering substantial loss or irreparable damage.
 - 3) The application has been made without unreasonable delay.
 - 4) Security for costs has been given by the Applicant.
 - 20 5) Balance of convenience.
- Refer to **Malinga Noah & 2 Others vs. Akol Henry CAMA 203/15** and **David Wesley vs. Attorney General Constitutional Application 61/14**.

However, courts have emphasized 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”***. – See **East African Development Bank vs. Blueline Enterprise Ltd [2006] 2 EA 51 CAT**.

The application in the present case arises out of an application for orders of mandamus, where the court directed the Applicants to fully register the Respondent as a Medical Practitioner.

The Respondent, a qualified Medical Doctor, did his internship with Mbarara University from August 2014 – August 2015. He is on the list of medical professionals certified as having
5 completed their internship in 2015.

However, the Applicants' refused to register him claiming he had failed to produce a form indicating he had completed internship in Pediatrics and Child Health.

The order of court to register the Respondent was issued on 14.10.16; and he was also awarded general damages of Shs. 5,000,000/- with interest at the rate of 12% from date of ruling until
10 payment in full.

Costs were also awarded to him.

The ruling was delivered interparties. The Respondent in a bid to enforce the orders of court applied for notice to show cause to issue to the Applicants.

However, the Applicants filed notice of appeal on 27.10.17 and it was received in the Court of
15 Appeal on 01.11.16.

On the 24.10.16, they also applied for typed and certified copies of the proceedings and ruling in the matter.

The court directed that the proceedings be availed.

As already indicated in this ruling, it is the contention of the Applicants that the appeal has a
20 high likelihood of success as it raises points of law.

And that they will suffer substantial loss or irreparable damage unless the stay is granted.

Without a memorandum of appeal filed, this court is not in a position to determine whether the appeal has a high likelihood of success. The Applicants simply state that the appeal raises serious points of law as the Trial Judge erred significantly in her ruling.

25 The Applicants claim that they will suffer substantial loss unless the order of stay is granted, but do not state what kind of loss will be suffered. Courts have repeatedly emphasized that ***“it is not enough to merely repeat the words of the code and state that substantial loss will result; the kind of loss must be specified, details must be given and the conscience of the court must be satisfied that such loss will really ensue. The words “substantial loss” cannot mean the***

ordinary loss to which every judgment debtor is necessarily subjected when they lose a case and is deprived of property as a consequence. That is an element that must occur in every case..... It is clear that the words “substantial loss” must mean something in addition to or different from that”. – See **Tanzania Cotton Marketing Board vs. Cogecot Cotton Co. SA**
5 [1995-98] EA 312.

In the present case, the Applicants have not indicated how they will suffer substantial loss by registering the Respondent as directed by court and also paying him Shs. 5,000,000/- general damages plus the accumulated interest.

10 Their claim that the Respondent has no known means and capacity to refund and that he is a stranger to the claim cannot be sustained; as it can be reasonably concluded that the Respondent’s unfortunate circumstances are as a result of the Applicants’ refusal to obey the court order. It is also not indicated how the Respondent is a stranger to the claim when he is a party to this application, which arises out of application filed by him against the Applicants.

15 And indeed the continued disobedience of the court orders by the Applicants amounts to contempt of court orders. And there is no evidence adduced by the Applicants to satisfy court that if the stay is not granted, the appeal will be rendered nugatory.

20 Instead of depositing security for due performance of the decree, the Applicants are better off settling the Respondent’s claim, as they clearly indicate in paragraph 10 of their affidavit in support, that the First Applicant is able to settle the claim, even without having to deposit any security in court, even if were to lose the appeal.

If the court orders are obeyed, the Respondent registered and also paid the general damages he will be in a position to refund the money if the appeal is won by the Applicants as he will be practicing his profession until then.

25 It might help the Applicants to note that **“pending of an appeal is not a bar to a successful party’s right to enforce a decree obtained even by execution.”** – See **Uganda Revenue Authority vs. Tembo Steel Ltd HCMA 0521/2007.**

The application is disallowed for all those reasons with costs to the Respondent to be paid by the First Applicant.

FLAVIA SENOGA ANGLIN
JUDGE
16.05.17