

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

**MISCELLEANOUS APPLICATION NO. 1921 OF 2016**

**(ARISING FROM EMA NO. 2852 OF 2016)  
(ARISING FROM CHIEF MAGISTRATE COURT MENGGO  
CIVIL SUIT 1575 OF 2014)**

**KAYIZZI GODFREY ..... APPLICANT/JUDGMENT DEBTOR**

**VERSUS**

**OSMAN TOM ..... RESPONDENT/ JUDGMENT CREDITOR**

**BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

**RULING**

By this application made under S.98 C.P.A, O.22 RR 23, 26 AND 89 C.P.R. The Applicant sought orders of this court staying execution of the decree in Civil Suit No. 1575/14 of Chief Magistrates Court Menggo, pending the determination of Miscellenous Application 633/16 filed in Menggo seeking to set aside/ vacate the said decree.

Costs of this application were also applied for.

The grounds for the application briefly are that:-

- 1) The Applicant was surprised to learn of the default judgment and attendant decree and has filed an application to have it set aside.
- 2) There are meritorious grounds for setting aside default judgment and decree as the Applicant has never dealt with the Respondent in any way. The alleged acknowledgment of receipt of summons and the document alleged to be of the transaction between the parties are not in the handwriting of and signature of the Applicant.
- 3) Committing the Applicant to Civil Prison in execution of the decree will cause him irreparable loss.
- 4) The stay of execution will not prejudice the Respondent/Judgment Creditor and it is therefore just and equitable that stay is granted.

The application is supported by the affidavit of the Applicant.

There is an affidavit in reply deponed by the Respondent/Judgment Creditor where he insists that the Applicant ran to Masaka to avoid arrest, is well known to the Respondent but simply wants to avoid payment of the money borrowed.

5 Further that, the Applicant is simply trying to deny the Respondent enjoyment of the fruits of the decree as he was duly served with summons.

Failure to commit the Applicant to Civil Prison does not mean that Applicant does not owe the money.

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Asserting that the Applicant is a liar, the Respondent contends that the judgment was not fraudulently secured.

15 Further that, the Applicant has several signatures in attempt to defraud people and a case of obtaining money by false pretences was opened up against him- Annexure A. The Respondent then prayed court not to allow the application.

20 There is an affidavit in rejoinder of the Respondent essentially reiterating what is in his affidavit in support adding that he is willing to submit his hand writing and signature to the handwriting expert to determine if he authored the documents the Respondent attributes to him.

Parties were urged to try and settle the matter but failed to do so.

25 Hearing took off on 03.11.16. Counsel for the Applicant went through the grounds of the Application, the supporting affidavit and affidavit in rejoinder. He pointed out that if execution is not stayed, there is no guarantee that the money demanded by the Respondent will ever be recovered as he is a South Sudanese National and the Applicant's application at Mengo will be rendered nugatory.

30 It was then prayed that the application be allowed and the filed returned to Mengo for the pending application to be heard.

In reply, Counsel for the Respondent argued that the Applicant had not addressed court on the law regarding stay of execution.

35 He cited 0.43 r3 C.P.R stating that stay of execution is not to be made unless court is satisfied that substantial loss will result to the party.

40 - The application has been made without unreasonable delay and that security has been given by the Applicant for due performance of the decree or order that may automatically be binding upon him. – Case of **Uganda Commercial Bank vs. Sanyu and Another HCMA 1042/1998** by Justice Akiiki Kiiza was cited in support – contending that the Applicant had failed to satisfy the requirements for stay of execution as laid down by law.

The application was delayed and was only fixed by the Respondent, implying that the Applicant was not interested. Execution was applied for in August, 2016, and the application was filed on 08.09.16.

5 Further that, there is no application pending before the lower court as no evidence of such application was attached by the Applicant. And since courts of law do not deal in speculation, a stay cannot be granted on the basis of a nonexistent application.

10 The case of **Baguma vs. State** was relied upon, pointing out that the principle was upheld in the case of **Hussein Badda vs. Iganga District Land Board and Others Miscellenous Application 478/2011** arising from **Civil Suit 160/2011**. – Justice Zehurikize held that **“for an application to be valid, it should be fixed, signed and sealed by the court.”**

15 Insisting that the Respondent is entitled to the fruits of his decree, Counsel applied for dismissal of the application with costs.

In rejoinder, Counsel for the Applicant relied on the case of **KCCA vs. Mulangira Joseph EMA 26/16** arguing that there is an application pending before Mengo Court – No. 633/16.

20 Also that security is not mandatory and court has discretion under S.33 of the Judicature Act to order stay without security. – He relied on the case of **Kengazi Angella EMA 2179/15**.

25 Further that the application is made under 0.22 C.P.R and court has power to stay execution of the decree. Concluding that the authorities cited by Counsel for the Respondent about sealing, signing and fixing application are not applicable to this case.

Counsel maintained his earlier prayers.

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

30 To obtain a stay of execution, courts have stated **“a party must satisfy three conditions”** to wit:-

- 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 to the Applicant.

40 It has been clarified that **“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.”** – **Tropical Commodities Supplies Ltd and Others vs. International Credit Bank Ltd (in Liquidation) [2004] 2EA 331 CH CU.**

I have given the submissions of both Counsel the best consideration I can in the circumstances, and also bear in mind the principles laid down by decided cases.

5 The matter in the present case involves money which the Respondent contends he lent to the Applicant. Judgment was entered against the Applicant upon his failure to file a defence within the prescribed time.

10 However, since the commencement of execution proceedings, the Applicant has filed Miscellaneous Application No. 633/16 at Mengo Court seeking to set aside /vacate the exparte decree.

The Applicant's contention is that he learnt of the decree on 23.08.16 filed application on 08.09.16, and he raises issues of lack of proper service of summons.

15 Those are issues that can only be properly determined in the application that is pending before the Court at Mengo.

The Applicant further raises issues of fraud on the part of the Respondent denying ever having been advanced the money claimed by the Respondent.

20 Decided cases have established that ***“where a party alleges fraud, he/she ought to be given a chance to try and prove it.”***

25 In the particular circumstances of this case, the Applicant can only get a chance to try and prove the alleged fraud if execution is stayed and he is allowed to prosecute the application that is pending before Mengo Court, seeking to set aside the exparte judgment and attendant decree.

Since the Respondent also alleges that the Applicant is a dubious person only seeking to avoid payment of the funds decreed to him, it is only fair that the parties be heard before the lower court so that issues raised by their allegations can be properly determined.

30 If execution is not stayed, the outcome of the application pending in the lower court may be rendered nugatory and the Applicant might suffer substantial loss.

35 Courts have established 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 Enterprises Ltd [2006] 2EA 51 (CAT).**

40 In staying execution, the court has also borne in the principle that ***“to deny a party a hearing should be the last resort of a court.”***

The application is accordingly allowed for all those reasons.

The costs will abide the outcome of the application in the lower court, which the Applicant is urged to fix for hearing without further delay.

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**Flavia Senoga Anglin**

**JUDGE**

**27.02.17**