

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

MISC APPLICATION NO. 942 OF 2022)
(All Arising from Miscellaneous No. 167 of 2020)

KAGORO EPIMAC:.....APPLICANT

VERSUS

SAMALIEN PROPERTIES LTD& 4 ORS:.....RESPONDENTS

BEFORE: HON. MR. JUSTICE TADEO ASIMWE

RULING

This Application was brought under Order 22 rules 23, 26, Order 52 rules 1, 2 & 3 & order 36 rule 36 rule 11 of the Civil Procedure Rules (CPR) and Section 98 of the Civil Procedure Act (CPA).

The Applicant is seeking for an order for stay of execution pending the disposal hearing and determination of misc. Application no. 949 of 2022. The Application is supported by an affidavit sworn by Bakundane Esther, an advocate.

The grounds of the Application as contained in the notice of motion and affidavit in support are that;

1. That the Applicant is a judgement creditor in Civil Suit No. 59 of 2010.



2. That the Applicant has a pending Miscellaneous Application no. 943 of 2022 seeking to set aside the exparte dismissal order in miscellaneous Application no. 740 of 2021 and pending the hearing in the High Court.
3. That the said misc. Application seeks to set aside orders for costs which the respondents have since gone ahead to apply for execution vide EMA NO. 167 of 2020, arising from taxation Application no. 48 of 2021 arising from MA no. 578 of 2019, execution no. 628 of 2018 all arising from Civil suit no.59 of 2010.
4. That the Applicant however has sufficient cause as to why the execution should be stayed.
5. That as a result, the Applicant is in imminent danger of being executed against without the issues at hand being determined.
6. That therefore any attempt to execute shall lead to a serious miscarriage of justice.
7. That it is in the interest of justice that this Application for stay of execution be granted against the respondents.
8. That it would be just and equitable if this honorable Court allows this Application.

On the other hand, the respondents did not file an affidavit in reply of the Notice of Motion.

At the hearing of this Application, Counsel Kamusiime Bright represented the Applicant while Counsel Musa Nsumbe and Counsel Felix Kintu represented the 5th and 2nd respondents respectively.



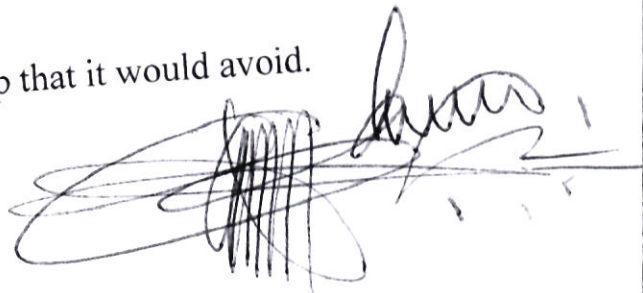
Both counsel were directed to file written submissions which I shall consider in this ruling.

In his submissions the Applicant's counsel referred on the relevant laws as cited in the pleadings and a case of **Honorable Theodore Sekikubo and others vs AG Constitutional Application no. 3 of 2014** which laid down the principles under which an Application for stay of execution can succeed to include;.

1. The Applicant must show that he lodged a notice of appeal
2. That substantial loss may result to the Applicant unless the stay of execution is granted.
3. That the Application has been made without unreasonable delay.
4. That the Applicant has given security for due performance of the decree or order.

He further argued that the above list was expanded in the case of Kyambogo University against Professor Asiih Omolo Ndyege in Civil Appeal no. 341 of 2013.

5. That there is a serious or eminent threat of a decree or order and that if the Application is not granted the appeal will be rendered nugatory.
6. That the Application and appeal are not frivolous and has a likely hood of success.
7. That refusal would inflict more hardship that it would avoid.

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I have considered the grounds of this Application, the supporting affidavit and its attachments. I have also considered the arguments for and against this Application by the respective counsel for the parties.

The brief background to this Application as gathered from the pleadings is that the 2nd respondent was awarded costs of 89,962,014/= in misc. Application 578 of 2019 and 628 of 2018 at execution division. The Applicant then filled an Application for review vide HCMA NO. 740 of 2021 which was dismissed for non-appearance of counsel. The Applicant then filled HCMA NO. 0943 OF 2022 for reinstatement of HCMA 740 OF 2022 and HCMA 943 for stay of execution.

It is now a well-established practice that where an unsuccessful party is exercising his or her right of appeal it is the duty of the appellate Court to make such order for staying proceedings in the judgment appealed from as will prevent the appeal if successful from being rendered nugatory. See: **Wilson v Church (1879) Vol. 12 Ch D 454** which was cited with approval by Madrama, J in **Souna Cosmetics Ltd v The Commissioner Customs URA & Another Misc. Application No. 424 Of 2011 (Arising From Civil Suit No. 267 Of 2011)**, **G. Afaro vs Uganda Breweries Ltd SCCA No. 11/2008** as per GM Okello JSC and **Idah Iterura vs Joy Muguta [2007] HCB Vol. 1 42**.

However, the party seeking for stay of execution must meet the conditions set out in Order 43 r 4 (3) of the CPR namely; (a) that substantial loss may result to the Applicant unless the order of stay is made; (b) that the Application has been made without unreasonable delay; and (c) that security for due performance of the decree has been given by the Applicant.



Further, Court in the case of Kyambogo **University vs prof. Isaiah Omolo Ndiege CA NO.341 OF 2013** expounded on the above to include.

1. That there is a serious or eminent threat of a decree or order and that if the Application is not granted the appeal will be rendered nugatory.
2. That the Application and appeal are not frivolous and has a likely hood of success.
3. That refusal would inflict more hardship that it would avoid.

I agree with the above requirements as set out by both counsel and various precedents.

From the pleadings on record, this Court is satisfied that this Application was brought without unreasonable delay. However, there is no pending appeal. The Applicant seeks stay of execution of costs in MA no. 740 of 2021. The decision of the taxing master for the taxed bill of costs has not been appealed against. This stay is rather premised on an Application for restatement of a dismissed Application for review of a decision in HCMA NO 90 OF 2020 which equally dismissed an earlier Application.

In my view, an Application to reinstate a matter cannot be rendered nugatory if execution resulting from a taxed bill of costs proceeds. My decision would have been different if the threatened execution was an eviction.

Besides even if there was a pending appeal that has high chances of success the position of Courts is that an appeal or its high chance of success cannot be used to bar a successful party from exercising his or her right to enforce a decree in

his favor. **See: National Pharmacy Ltd vs Kampala City Council (1979) HCB 132 and Uganda Revenue Authority vs Tembo Steels Ltd HCT Miscellaneous Application No. 521 of 2007.**

This notwithstanding, I shall therefore go ahead and assess whether other requirements as set above were satisfied or met by the Applicant.

1. That substantial loss will result if this Application is not granted

The Applicant submitted that the Applicant is a judgement creditor and a holder of a decree against the SAMALIEN PROPERTIES LTD to a tune of UGX 1,173,328,737/= which the Applicant has sought to execute but due to the fraudulent actions orchestrated by the 2nd and 5th respondents as well as SAMALIEN PROPERTIES LTD, BAKIJULULA COFFEE FACTORY LTD AND GWENDIDDE MIXED FARM NAGALAMAM LTD, the said order is yet to be executed to recover the decretal sums due to the Applicant. That it is the evidence of the Applicant that the respondents stealthily transferred the only known property with the intent of frustrating the Applicant from realizing his fruits of judgement. That the Applicant has been trying to execute his said decree in vain and that if this Application is not granted, and he is arrested or otherwise subjected to execution by the respondents, the execution will keep him from pursuing his said execution against the respondents.

In response, the 2nd respondent submitted that an Applicant should go a step further to lay a basis to prove irreparable or substantial loss rather than vague assertions. Further that the Applicant here in will not suffer substantially if execution issues against him and that the Applicant has failed to prove irreparable and substantial loss as required by law.

Court in the case of *Pan African Insurance Company (U) Ltd vs International Air Transport Association High Court Misc. Application No. 86 of 2006* where the Applicant merely stated that if the decree is not stayed the Applicant will suffer substantial loss and stated:

"The deponent should have gone a step further to lay the basis upon which Court can make a finding that the Applicant will suffer substantial loss as alleged. The Applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is not granted."

The Learned Judge also cited the case of *Banshidar vs Pribku Dayal Air 41 1954* where it was stated:

"It is not merely enough to repeat the words of the code and state that substantial loss will result, the kind of loss must be given and the conscience of Court must be satisfied that such loss will really ensure"

In the same case it was further observed:

"The words 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case...substantial loss must mean something in addition to all different from that."

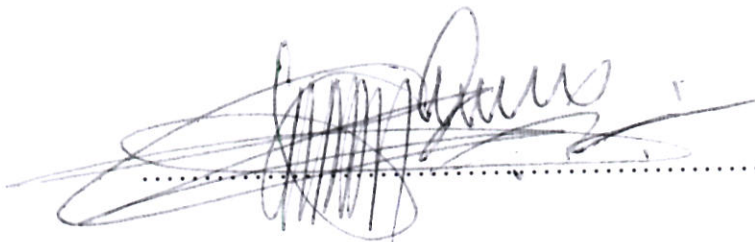
In this case, the Applicant intimated that if execution is not stayed, the Applicant risks being jailed and that in the event the Applicant is jailed he will fail to pursue his other Applications.

However, I wish to state that costs of whatever amount are recoverable in damages. Further the Applicant has lawyers pursuing his Application and therefore a mere excuse that he would not be able to pursue his matters if arrested does not suffice.

Be that as it may, the Applicant failed to prove this condition.

For the above reasons, this Application fails and it is dismissed with costs.

I so order.

A handwritten signature in blue ink, appearing to read 'Tadeo Asiimwe', is written over a horizontal dotted line.

TADEO ASIIMWE

JUDGE

24/10/2022.

