THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 1767 OF 2022

(ARISING FROM HCCS NO. 0409 OF 2013)

M & D TIMBER MERCHANTS

& TRANSPORTERS LTD :: APPLICANT

VERSUS

1. **HWAN SUNG LTD**
2. **KAMPALA DISTRICT LAND BOARD :: RESPONDENTS**

BEFORE: HON JUSTICE DR. FLAVIAN ZEIJA

RULING

The Applicant herein brought the instant application by way of Chamber Summons under section 33 of the Judicature Act Cap 13, section 98 Civil Procedure Act and Order 22 Rule 26 Civil Procedure Rules S.I 71-1 as amended, for orders that;

a) The Applicants be granted an order for stay of execution restraining the Respondents and their agents from executing and or enforcing the Judgment and Decree of the High Court vide HCCS No. 0409 of 2013 until the hearing and final determination of Court of Appeal Civil Appeal No. 0559 /2022
b) Costs of this application be in the cause.

The grounds in support of this application are set out in the affidavit deponed by Ddungu Ivan, the Applicant's Director, briefly that;

1. *There is a pending Civil Appeal No. 0559 /2022 before the Court of Appeal which is pending hearing.*
2. *The Applicant has a plausible Appeal on merits which raises serious questions with a high likelihood of success.*

3. *There is a serious and imminent threat to execute the decree in HCCS 0409 of 2013 which may render the Applicant's Appeal before the Court of Appeal nugatory.*
4. *This application has been made without unreasonable delay.*
5. *The refusal to grant an Order of stay of the judgment and decree in HCCS 0409 of 2013 would inflict greater hardship to the Applicant which has heavily invested in the development of the suit land since 1989.*
6. *It is in the interest of justice that a stay of execution be granted pending the hearing of the appeal.*
7. *It is just fair and equitable and the dictates of natural justice would demand that the application be granted.*

The grounds in opposition to the application are contained in the affidavit in reply affirmed by J.B Ahn, Managing Director of the 1st Respondent. Briefly, they are that;

1. *The court, at the instance of the 1st Respondent, issued a Notice of Eviction dated 15th September, 2022 against the Applicant who continues to be in wrongful occupation of the suit land when the Court has already declared it a trespasser on the suit land.*
2. *The Applicant continues to use the suit land as a car bond and is earning income from it.*
3. *The Applicant has since 2014 not been able to pay the 1st Respondent the agreed costs of UGX. 30,000,000 (Uganda Shillings Thirty Million only) arising from its withdrawal of the two suits i.e HCCS No. 82 of 2000 and HCCS No. 467 of 2003, previously filed against the 1st Respondent and the then City Council of Kampala.*
4. *Given the Applicant's inability to pay the 1st Respondent the said UGX. 30,000,000 (Uganda Shillings Thirty Million) for more than eight years, it is unlikely that the Applicant will be able to pay the decretal sum in HCCS No. 409 of 2013. Moreover, the monetary awards against the Applicant carry interest at court rate from the date of judgment till payment in full.*
5. *The 1st Respondent's Bill of Costs in HCCS No. 409 of 2013 has since been taxed and allowed by court in the sum of UGX. 399, 921, 420 (Uganda Shillings Three Hundred Ninety-Nine Million Nine Hundred Twenty-One Thousand Four Hundred Twenty only).*
6. *The 1st Respondent's Bill of Costs in SCCA No. 2 of 2018 has also since been taxed and allowed at UGX. 95, 635, 500 (Uganda Shillings Ninety-Five Million Six Hundred Thirty-Five Thousand Five Hundred Shillings)*

7. That as at 31st October 2022 the accrued interest so far on the decretal sum at court rate stands at UGX. 80, 500,000.
8. The total decretal sum, costs and accrued interest so far excluding costs for the Court of Appeal due to the 1st Respondent is UGX. 2,906,056, 920 and the Applicant has to-date not paid the same or any part thereof to the 1st respondent.
9. The Applicant has not demonstrated sufficient grounds for the stay of execution to be granted, in particular it has not deposited in court security for due performance of the decree in HCCS No. 0409 of 2013.
10. The Applicant's continued unlawful occupation of the suit land has caused the 1st Respondent further loss yet the court already found the 1st Respondent to be the owner of the suit land.
11. The Applicant has a track record of not paying its litigation costs as demonstrated by refusal to pay the 1st Respondent's costs arising from the withdrawn suits.
12. However, should the court be inclined to grant this application, the Applicant should be ordered to deposit in court of UGX. 2, 906, 056,920 (Uganda Shillings Two Billion Nine Hundred Six Million Fifty-Six Thousand Nine Hundred Twenty Only) being; all decretal sums in HCCS No. 409 of 2013 plus taxed costs, taxed costs in SCCA No. 2 of 2018, taxed costs of the withdrawn suits and accrued interest as at October, 2022.
    b) An additional UGX. 150,000,000 per month being the average monthly earnings received by the Applicant from its use of the suit land.

In rejoinder, the Applicant's Director Ddungu Ivan maintained the averments set out in the affidavit in reply and added that;

a) The Applicant is a going concern with capacity to pay all its creditors and that the sums claimed by the 1st Respondent arising out of the judgment and decree of court in HCCS No. 0409 of 2013 are subject of the Applicant's Civil Appeal No. 0559 of 2022 pending before the Court of Appeal.
b) That the Applicant is also aggrieved by the Orders of the Taxing Master vide Taxation Application No. 0175-2020 on grounds that the figure was manifestly excessive and has since appealed.
c) The Applicant is ready, able and willing to abide by the conditions of stay of execution that may be imposed by this court including but not limited to depositing in court security for due performance of the decree in H.C.C.S 0409 of 2013

Representation

The Applicant was jointly represented by M/s Kavuma Kabenge & Co. Advocates and M/s Kintu Nteza & Co. Advocates whereas the 1st Respondent was jointly represented by M/S GPA advocates and M/S J.B Byamugisha Advocates. The 2nd Respondent was not represented and filed no affidavit in reply nor written submissions. There is no affidavit of service on record to indicate that the 2nd Respondent was effectively served with this application.

Preliminary points of law

It was argued for the 1st Respondent that this application is defective in that the Applicant used a wrong procedure to apply for a stay of execution when it proceeded by way of Order 22 Rule 26 of the Civil Procedure Rules instead of Notice of Motion under section 98 of the Civil Procedure Act. While citing a number of authorities including; ***Francis Drake Corporation & Anor vs. Uganda Railways Corporation (High Court Miscellaneous Application No. 386 of 2005)*** and the case of ***Peter Mulira vs. Mitchell Courts Ltd HCT - 00-CC-MA -715 of 2009,*** Counsel for the 1st Respondent advanced the proposition that Order 22 Rule 26 can only apply where there is a pending suit filed against a decree holder in the same court by the unsuccessful party in the earlier suit and it is that court which may on terms as it thinks fit stay execution of the decree until the pending suit has been decided.

I have had occasion to look at the authorities cited by Counsel for the 1st Respondent. In Francis Drake Corporation (supra), court declared the application for stay of execution defective and a non-starter for being brought by way of Chamber Summons under Order 19 Rules 23 and 26 instead of Notice of Motion.

The facts in the case of Peter Mulira vs. Mitchell Cotts Ltd (supra) are a fitting example of the application of Order 22 Rule 26 of the Civil Procedure Rules. There, the Applicant had instituted another suit against the decree holder, involving the same parties in the same court to set aside a previous consent decree which had allegedly been procured fraudulently. The Applicant in that instance had rightly proceeded under Order 22 Rule 26.

I am therefore in agreement with Counsel for the 1st Respondent that Order 22 rule 26 applies to situations where there is a pending suit, which means any kind of suit brought by an unsuccessful party against a successful party in the earlier suit whose decree is to be executed. However, more recent authorities postulate that procedural defects can be cured

under article 126 (2) (e) of the Constitution. The exercise of power to stay execution is based on court's inherent judicial discretion exercisable as a pivotal test of meeting ends of justice on one hand and abuse of the process of court on the other hand. The present application was not only brought under Order 22 Rule 26 of the Civil Procedure Rules but also under Section 33 of the Judicature Act Cap 13 and Section 98 of the Civil Procedure Act, Cap 71. The said provisions of the Civil Procedure Act and the Judicature Act cloth court wide powers to wink at a procedural mishap in favor of administering substantive justice. Section 98 CPA particularly provides:

> ***"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."***

It therefore appears to me that justice will be better served if this application is determined on its merits. Consequently, the preliminary point of law fails.

I now proceed to determine the merits of this application.

The Law

The principles upon which stay of execution can be granted are captured in a number of authorities, notably is the case of **Lawrence Musiitwa Kyazze Vs. Eunice Businge SCCA 18-1990, Theodore Sssekikubo & ors Vs AG & ORS Constitutional Application No. 3 of 2014** which set out the grounds to be satisfied by any Applicant seeking a stay of execution;

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 as may ultimately be binding upon him.

The court of appeal in **Kyambogo University Vs. Prof. Isaiah Omolo Ndiege Civil Appeal No. 341 of 2013** expanded the list to include;

5. There is serious or eminent threat of execution of the decree or order and if the application is not granted the appeal would be rendered nugatory.

6. That the appeal is not frivolous and has a likelihood of success.
7. That refusal to grant the stay would inflict more hardship than it would avoid.

1ST principle. The Applicant must show he has lodged a Notice of Appeal. Looking at annexture 'B' to the affidavit in support of the application, I am satisfied that the Applicant has not only lodged a Notice of Appeal but has gone an extra mile to also file a Memorandum of Appeal which is on court record. However, filing an appeal does not imply that that a stay of execution must issue as a matter of course.

2nd principle. That substantial loss may result to the applicant unless the stay of execution is granted. One of the most enduring legal authorities on the issue of substantial loss is the case of **Kenya Shell Ltd v Kibiru & Another [1986] KLR 410**. **Hancox JA** in his ruling, while following passage of Cotton L J in Wilson -Vs- Church (No 2) (1879) 12ChD 454 at page 458 observed that;

> ***"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory."***
>
> ***As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."***

The Court is therefore, duty bound to balance the interest of the Applicants and the interest of the Respondents who are seeking to enjoy the fruits of their judgment. In other words, the Court should not only consider the interest of the Applicant but has also to consider, in all fairness, the interest of the Respondent who has been denied the fruits of their Judgment.

In this application, the Applicant averred that if stay of execution is not granted, it will suffer irretrievable and substantial loss since it acquired its interest in 1989 and has heavily invested in the development of the suit land including back filling, completing the wall fence, completing and building additional storied structures. That this would also have the effect of inflicting

greater hardship to the Applicant who is in occupation of the suit property and has invested a lot of money in its development. It was however this court's firm finding in Civil Suit No. 409 of 2013 that when a temporary injunction was issued against the 1st Applicant vide HCMA -478-2005 arising from HCCS -82-2000 and HCCS -475-2003 restraining it from carrying out any developments on the land, the Applicant continued with the construction in total violation of the court injunction. Many of the developments were established by the Applicant during the course of litigation, having had notice of a disputing interest by the 1st Respondent. This having been a finding of fact, I am inclined to hold that substantial loss (if any) would in the circumstances be self-inflicted as a result of the Applicant's blatant disregard of court Orders. Moreover, I am not persuaded that the loss that would likely be suffered is incapable of being atoned for in monetary terms.

3rd principle: That the application has been made without unreasonable delay. Judgment in HCCS No. 1767 of 2022 was delivered on 1st April 2022. The Applicant filed a Notice of Appeal and Memorandum of Appeal almost 6 months later on 20th September 2022 five days after being issued with a Notice of Eviction. This application was filed on 11th October 2022 more than 6 months from the date of judgment. In the absence of any explanation from the Applicant to justify why it waited to act after being served with an Eviction Notice inclines me to find such conduct to have been dilatory.

4th principle. That the applicant has given security for due performance of the decree or order as may be ultimately be binding upon him.

Whether or not to order for security for due performance to be made depends on the circumstances of each particular case. I have always held the view that the objective of the legal provisions on security for costs was never intended to fetter the right of appeal. It was intended to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In essence, the decision whether to order for security for due performance must be made in consonance with the probability of the success of the appeal.

It was argued for the 1st Respondent that the Applicant has a history of not honoring its monetary obligations leveled against it by courts of law. That as a result, it is unlikely that the Applicant will furnish any security for due performance of the decree if ordered to do so. The

uncontroverted evidence on record is that the Applicant has since the year 2014 not been able to pay the 1st Respondent the agreed costs of UGX. 30,000,000 arising from its withdrawal of the two suits i.e HCCS No. 82 of 2000 and HCCS No. 467 of 2003. In my view, a party that has been unfaithful in the little cannot be expected to be faithful in much. A period of over 8 years is manifestly too long for the Applicant not to have honored such a small monetary obligation which was moreover as a result of consent of both parties.

5th principle. There is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory.

The Court of Appeal in **RWW vs. EKW (2019) eKLR** addressed itself on this as hereunder: -

> ***"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.***
>
> ***Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."***

This Court found the 1st Respondent to be the rightful owner of the suit land and it remains so until otherwise found by the Appellate Court. It is therefore no justice for the Applicant to remain in possession and utilization of the suit land while the rightful owner continues to languish in deprivation. It is trite that unless otherwise overturned or set aside, a decision of court is binding upon the parties. As it stands, the 1st Respondent and not the Applicant should be in possession. In my view, any loss or damage that the Applicant may incur is capable of being atoned for, should the appeal succeed. This also answers the 7th principle.

6th principle: The application is not frivolous and has a likelihood of success. At this stage, what suffices is to examine whether there are serious questions meriting consideration by the Court of Appeal. It is not for this court to descend into determining the merits of the appeal.

The Applicant attached a Memorandum of Appeal to its application setting out 7 grounds of appeal.

Nevertheless, skeletal arguments should be made in support of the application by showing that the pending appeal is not frivolous and has a likelihood of success. It apparent that this matter initially was dismissed by the High Court. The 1st Respondent appealed to the Court of Appeal which also dismissed the appeal. It was not until it appealed to the Supreme Court that it got reprieve. The matter was returned to the High Court for trial. The Applicant has started a full circle of another process of appeal as it enjoys occupation of the premises. That notwithstanding, it was my finding that the Applicant was never allocated this land in the first place by the 2nd Respondent's predecessor KCC. The Applicant indicated it derived its interest from Hussein Abdi who was allocated the suit land formerly described as M249 by Kampala City Council *(KCC) (as it was then called)* for a period of two years expiring on 29th November 1980. Following the allocation, Hussein Abdi applied for and was granted several extensions of the said lease with the last extension running from 30th November 1988 and set to expire on 29th November 1990. On the 14th March 1989, by an ordinary meeting, the defendant/counterclaimant in main suit (Applicant herein) passed a resolution appointing Hussein Abdi as a director of its company, and in return, the latter would assign the suit land to the defendant (Applicant herein) to carry out construction and developments thereon. On the 30th March 1989 before the expiration of the lease the said Hussein Abdi sought consent from KCC to effect the transfer of the suit land to the defendant (Applicant herein). The application was subsequently granted on the 18th July 1989 subject to the condition that; Hussein Abdi pays transfer fees to the tune of UGX. 1,000,000= within 30 days of the offer plus, the transferee (applicant herein) pays fresh premium and ground rent which would be worked out by the Commissioner for Lands. This payment was not done in 30 days as conditioned. The attempt to pay was made 6 years later after the land was allocated to the 1st Respondent. The Applicant was therefore not allocated the suit land as it failed to honour the simplest condition of paying within 30 days. For this reason and other mentioned in the judgment and without delving into the merits of the appeal, I find that the pending appeal is frivolous and has no likelihood of success.

The 1st Respondent has endured more than 20 years of dispossession due to legal gymnastics. This cannot continue. In the whole, the balance of convenience tilts in favor of the 1st Respondent who has been deprived of costs of the suits withdrawn by the Applicant

since the year 2014 without any plausible explanation and is likely not to enjoy the fruits of its judgment for another prolonged period of time. Therefore, given the Applicant's previous record of not honoring monetary obligations, the 1st Respondent will likely find it even more difficult to recover bigger decretal sums if the appeal is unsuccessful. The court cannot look on for another unstipulated number of years as the Applicant continues to enjoy rent free possession of the suit premises while the 1st Respondent who is the already adjudicated owner languishes.

In the result, this application is dismissed with costs to the 1st Respondent.

I so order.

Dated at Kampala this 14th day of March 2023.

Flavian Zeija (PhD)

PRINCIPAL JUDGE