IN THESUPREME COURT OF UGANDA

HOLDEN AT MENGO

Before: J.N. Mulenga J.S.C, sitting as a single judge.

CIVIL APPLICATION No. 31 of 2004

BETWEEN

STANBIC BANK UGANDA LTD = = = = = = = = = = = = = = = = = = **APPLICANT**

AND

ATABYA AGENCIES LTD= = = = = = = = = = = = = = = = = = = = **RESPONDENT**

RULING:

This is an ex parte application for an interim order to stay execution of a High Court decree which was upheld in the Judgment of the Court of Appeal in Civil Appeal No. 59/2004 dated 7th December 2004. The application is brought under r. 1(3) of the Rules of this Court. It is by Notice of Motion supported by Affidavit. In his submission to me, Mr. Kategaya counsel for the appellant intimated that he also relies on rr. 5(2) (b) and 46 (2) of the said Rules.

The back ground to this application is as follows:
In HCCS No. 1197/99, the respondent successfully sued Uganda Commercial Bank (UCB) for special and general damages. UCB lodged a Notice of Appeal and at the same time applied for stay of execution pending appeal. The stay was granted upon the applicant executing a guarantee to pay the decretal amount if the intended appeal is decided and determined in favour of the respondent. The applicant purporting to have merged with UCB instituted Civil Appeal No. 69 of 2003 against the decision in HCCS No. 1197/99. The appeal was struck out as incompetent. Thereupon the respondent moved the High Court for an order compelling the applicant to honour its guarantee and effect payment. The High Court granted the order, against which the applicant appealed to the Court of Appeal, in Civil Appeal No 59/04. Apparently, the applicant was again granted a stay of execution pending the appeal, on condition that it deposited into court a bank draft for the sum of Shs. 1,001,742,124/=. It deposited a draft dated 19.5.04

On 7.12.04 the Court of Appeal dismissed that appeal. On 8.12.04 the applicant lodged a Notice of Appeal against that decision. On the same day, the respondent's advocates wrote to

the applicant's advocates intimating that upon dismissal of the appeal, the Commercial Court Registrar had released the bank draft to them but that upon presenting it for banking the draft was rejected for being stale. They demanded a replacement draft and gave the following notice -

> "**Unless we receive the same within 24 hours from 4.30 p.m. today, we shall enforce the guarantee dated 24.7.03 against the bank at its further cost and expense."**

On 9.12.04 the applicant filed Civil application No. 30/04 seeking an order of this Court to stay execution of **"the decree in Court of Appeal Civil appeal No. *59* of 2004"** pending appeal. On 10.12.04 the applicant filed this ex-parte application for an interim order for stay of execution of **"the decree of the High Court, Court of Appeal (sic) in Civil Appeal No. 59 of 2004.** Clearly, what the applicant needs is a stay of execution of the decree in HCCS No. 1197/99.

In presenting this application before me, Mr. Kategaya submitted that the applicant filed the application after lodging a Notice of Appeal in conformity with r. *5* (2) (b) of the Rules of this Court, and that pursuant to r.46 (2) of the same Rules, a certificate of urgency was filed with this application. He argued that the threat by the respondent's advocates to enforce the guarantee made this application urgent. He also argued that because the decretal amount is colossal, there is danger that if it is paid the applicant may suffer irreparable loss, because in the event of the appeal succeeding, the applicant would most probably fail to recover the amount from the respondent whose whereabouts are not known. He relied on the decision in ***HORIZON COACHES LTD Vs. PAN AFRICAN INSURANCE LTD, Civil Application No. 20 of 20 2002,*** where my learned brother Kanyeihamba, JSC, held that

> " **where a Notice of Appeal, or an application or indeed an appeal is pending before the Supreme Court, it is right and proper that an interim order for stay of execution either in the High Court or any court, be granted in the interest of injustice and to prevent the proceeding and any order therefrom of this court**

being rendered nugatory." (emphasis is added)

I respectfully agree with that holding. I made a similar decision in ***HORIZON COACHES LTD Vs. FRANCIS MUTABAZI & OTHERS, Civil Application No. 21/01.*** Those decisions, however, should not be construed as authority for the view that an interim order for stay will always be granted whenever a Notice of Appeal is pending in this Court. Such an interim order is granted under r. 1 (3) of the Rules of this court, on the grounds set out in that rule, namely if it is necessary for achieving the ends of Justice or to prevent abuse of the process of court.

I would reiterate here my view, expressed in ***WILSON MUKIIBI Vs. JAMES SEMUSAMBWA Civil Application No. 9 of 2003 where*** I said -

> "**It is trite that an intention to appeal *per se* is not a ground for stay of execution and instituting an appeal does not operate as a stay of execution. A party seeking a stay of execution must satisfy the court that there is sufficient cause why the party with judgment should postpone the enjoyment of its benefits. It is not sufficient for the judgment - debtor to say that he is vulnerable, because the successful party may take out execution proceedings. It must be shown that if execution proceeds there may be some irreparable loss caused. Secondly, it is a cardinal principle of our judicial procedure that, save in exceptional circumstances, every party to a dispute before court for hearing, must be given notice thereof and opportunity to be heard before the court adjudicates on the dispute. The court will proceed *ex parte* only when it is satisfied that proceeding inter partes is likely to defeat the ends of justice, or when the party given notice fails to avail itself of the opportunity to be heard"**.

In that case I went on to hold that although r. 49 (2) of the Rules of this Court excludes applications for stay of execution from applications that may be heard by a single judge, application for an interim order was not excluded, But I hastened to add that –

" invoking that interim procedure must neither be taken as an alternative to, or substitute for, the procedure for obtaining a stay, which is envisaged under sub-rule (2), nor should it be used to negative the import of that sub-rule. The interim order ought to be made only in compelling circumstances, to prevent defeat of justice, and strictly pending ascertained hearing of a substantive application by the full Court".

I am still of the same view.

In my opinion, the applicant in the instant application has not satisfied the conditions for being heard and granted the interim order ex parte. Much as there may be grounds to fear that execution proceedings may be eminent in view of the haste with which the respondent's advocates acted to obtain the bank draft, this application appears to me to be premature. I have not been shown that if the respondent is given opportunity to be heard in this application the objective will be defeated. I do app'eciate that in view of the Court's calendar it may be several months before Civil Application No. 30/04 is heard by a full bench. That however, is not ground for this application to be heard ex parte. On the contrary it makes it more prudent that the respondent should be heard, not only on the merits but even on possible conditions for an interim order if deemed necessary.

I have considered if I should adjourn the application to be heard inter partes but have concluded that the better order is to dismiss the application and leave it to the applicant to elect between filing an inter partes application for the interim order and pursuing Civil Application No. 30/04, having regard to the circumstances that may develop hereafter. Accordingly I dismiss this application but make no order as to costs.

DATED at Mengo this 14th day of December 2004.

J.N. Mulenga
Justice of the Supreme Court