THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: TSEKOOKO JSC).

CIVIL APPLICATION NO. 19 OF 2007

BETWEEN

ORIENT BANK LTD. :::::::::::::::::::::::::: APPLICANT

AND

1. FREDRICK J. K. ZAABWE
2. MARS TRADING CO. LTD. } **::::::: RESPONDENTS**

[Application arising from Judgment of Court dated 10th July, 2007 in Civil Appeal No. 4 of 2006]

RULING

The Orient Bank Ltd, the applicant instituted an exparte application by notice of motion under Rules 2(2), 6 and 42 of the Rules of this Court. The applicant is seeking for an interim order for stay of execution of the judgment and the various orders of this Court delivered on 10th July, 2007 until the disposal of Civil Application No. 17 of 2007 between the same parties. The notice of motion is supported by an

affidavit sworn by Mr. Dick Omara who is the Head of the Credit And Risk Department of the applicant Bank. He enumerated grounds to support the application.

The application is based on three grounds namely that-

1. *The applicant has filed an application, Civil Appeal No. 18 of 2007 seeking to stay execution to the judgment of this Honourable Court dated 10th July, 2007.*

2. *The 1st Respondent is likely to seek execution of the said judgment pending the determination of the said application.*

3. *It will be just and equitable for execution of the judgment and orders to be stayed pending the determination of the substantive application for stay of execution.*

The application was initially sought to be heard exparte. After I realised that there was no application made yet by the decree-holder to carry out execution, I directed that both parties should be served so that they attend Court for purposes of hearing both sides. In other words I didn't see any evidence of urgency necessitating exparte hearing of the

notice of motion. After the first respondent, Mr. Fredrick Zaabwe was served for hearing, he filed an affidavit in reply to that of Mr. Dick Omara and in it he objected to the competence of this application. Mr. Omara filed a rejoinder affidavit.

I should briefly give a background to this application.

Mr. Zaabwe instituted a suit against the applicant, the second respondent and four other persons in the High Court. The High Court, after hearing the suit, dismissed it. The Court of Appeal upheld the dismissal of Mr. Zaabwe's suit whereupon he appealed to this Court. This Court reversed both the dismissal of the suit by the High Court and the decision of the Court of Appeal. This Court awarded to Mr. Zaabwe shs. 200 million as aggravated damages and made other various consequential orders. Mr. Zaabwe then drafted a proposed decree to embody the decision of this Court and sent that draft decree to counsel for the present applicant, namely, Messrs Shonubi, Musoke & Co. Advocates, for approval. Those advocates were not happy with some aspects of the judgment of the Court so they did not approve the entire draft decree. Meantime the

advocates filed an Application No. 18 of 2007 seeking for stay of execution of the judgment and also they seek for rectification of some aspects of that judgment. At the same time the applicant Bank instituted this application seeking for the orders mentioned earlier in this ruling.

When counsel for the applicant and Mr. Zaabwe appeared before me yesterday for purposes of hearing this application, I asked counsel for the applicant whether this application has been properly instituted under **Rule 6** of the **Rules** of this Court since there is no appeal pending in this Court in which case the Rule would be applicable. I then stayed the hearing for a short while to allow counsel to consider that point. Upon resumption of the hearing, Mr. Bwanika, lead counsel for the applicant, conceded that applications for stay under Rule 6 would normally be made if there is an appeal pending in this Court. He, however, argued that the application is properly before me by virtue of Sub Rule (2) of Rule 2 of the Rules of this Court. I decided to hear the application so that whatever will be the results of the application I will indicate my views on the appropriateness of this application.

Mr. Bwanika and his colleague, Mr. Tuma, cited two decisions of the High Court supporting the view that applications for stay of execution of this type can be entertained. They cited the case of **T. M. K. Vs. Jack Businge and 2 others** (Fortportal High Court Civil Misc. application No. DR. MFP 2 of 1992 in which the late Mukanza, J., relied on my decision when I was Judge of the High Court in the case of **Design Group Association Vs. Bank of Uganda** HCC No. 34 of 1990 where I considered Order No. 18, Rule 2(1) of the CPR and Section 101 of the CPA and held that an application for stay can be made before an application for execution is made. Mukanza J. (RIP) followed my decision. Unfortunately learned counsel did not provide full rulings in the two cases. In **Businge** case, a copy provided is extracted from Kampala Law Reports, an un-official report, and it is incoherent. My ruling in **Design Group Association** was not available.

I may mention that recently there have been some applications made to this Court calling upon single Judge to make interim orders for stay of execution. However all, if not most, of these exparte applications were in respect of applications to stay execution of judgments or orders of the

courts below and where there were notices of intended appeal or actual appeals pending in this Court. I am not aware of any application for stay similar to this application.

I refer to **Horizon Coaches Ltd. Vs. F. Mutabazi and 3 others** (Supreme Court Civil Application No. 21 of 2001), **Wilson MUkiibi Vs. James Semusambwa** (Supreme Court Civil Application No. 9 of 2003), **Stanbic Bank (U) Ltd. Vs. Atabya Agencies Ltd.** (Supreme Court Civil Application No. 31 of 2004) to mention but three. In either of all those application, there was a real likelihood that injustice could be meted out before the hearing of a pending appeal.

The above authorities suggest that applications based on a bonafide urgent necessity of real possibility of execution and consequential injustice can be granted.

Both Mr. Bwanika and Mr. Tuma endeavored to explain that because their client is a Commercial Bank which is keeping money for its customers it is prudent for their client to make this type of application in order to preempt the possibility of the decree holder suddenly carrying out execution which can

disrupt the transactions of their customers. Learned counsel provided some seven rulings as authorities of this Court. These are **Haji J. Acbikule Vs. A. R. Nakaye** (Civil Application No. 27 of 1994); **Kampala Bottlers Ltd. Vs. Uganda Bottlers Ltd.** (Civil Application No. 25 of 1995); **Francis Sembuya Vs. All Port Freight (U) Ltd.** (Civil Application No. 15 of 1998); **Idah Iterura Vs. Joyce Muguta** (Civil Application No. 2 of 2006); **Zaituna Kawuma Vs. G. Mwaluram** (Civil Application No. 3 of 1992); **Adam Vassiliadis Vs. Libya Arab (U) Bank For Foreign Trade And Development Ltd.** (Civil Application No. 28 of 1992) and **Salim Jamal & 2 Others Vs. Uganda Oxygen Ltd. & Another** (Civil Application No. 13 of 1997). All these rulings are of this Court. The first four rulings concern application for stay of execution where appeals were pending hearing in Court while the last three are rulings in respect of applications to recall and correct Judgments of the Court. None of them is really relevant to the matter before me.

After the hearing of the application learned counsel for the applicant sent me the ruling in the case **Lawrence Musiitwa Kyazze Vs. Eunice Businghye** (Supreme Court

Civil Application No. 18 of 1990) to support the proposition that application can be made before execution proceedings commence. Counsel referred to the following passage which appears at page 8 of the ruling.

The practice that this Court should adopt, is that in general application for a stay should be made informally to the Judge who decided the case when judgment is delivered. The Judge may direct that a formal motion presented on notice (Order XLVIII rule 1.), after notice of appeal has been filed. He may in the meantime grant a temporary stay for this to be done. The partied asking for a stay should be prepared to meet the conditions set out in Order XXXIX Rule 4(3) of the Civil Procedure Rules. The temporary application may be exparte. If the application is refused, the parties may then apply to the Supreme Court under Rule 5(2) (b) of the Court of Appeal Rules where again they should be prepared to meet conditions similar to those set out in Order XXXIX Rule 4(3).

This was by way of guidance

The Kyazze case essentially concerns a situation where there is an appeal or where the party in a trial Court intend to appeal. Reading the ruling shows that the Kyazze case present special facts.

Mr. Zaabwe opposed the application and submitted that it is incompetent and is not properly before Court and therefore should be dismissed with costs. In his view Rule 6 is not applicable. He argued that the draft decree has not been approved nor have costs been taxed. He further submitted, inter alia, that Mr. Omara's affidavit contains hearsay evidence which does not support the application and that the affidavit does not point out errors to be corrected in the judgment of the Court. This last argument should await the pending application to recall our judgment.

I have perused the affidavit in support of the application, the affidavit of Mr. Zaabwe in opposition to the application and a rejoinder affidavit by the same Mr. Dick Omara. I have looked at the authorities cited by Mr. Bwanika and Mr. Tuma. I am not persuaded that there is justification for bringing this notice of motion. From submission of Mr. Bwanika, this application is based on speculation. Even if I

assume that our judgments which we delivered on the 10th July, 2007 may contain errors rendering them liable for our review under Rule 2(2) and modified as suggested by counsel for the applicant, I do not, with respect accept that it is proper to institute this type of application when there is no evidence of any application for execution of a decree of this Court especially when no decree embodying the decision of the Court has been approved. I cannot foresee a Registrar of this Court issuing execution order before a decree is settled. I think that this application is 3premature and has no basis. I am not persuaded that Kyazze case is applicable. Learned counsel contended that this is matter where Article 126(2) (e) is applicable. On the facts I do not agree. I think that this application is not proper. I dismiss it with costs to the respondent.

Delivered at Mengo this 2nd day of August 2007.

J. W. N. TSEKOOKO
JUSTICE OF THE SUPREME COURT.

Mr. Tumma present
Mr. Zaabwe present