

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA; AT KAMPALA
(EXECUTION DIVISION)

MISCELLANEOUS APPLICATION No. 2067 OF 2014
(Arising from EMA No. 1956 of 2014; arising from H.C. (Fam. Div.) Misc. Cause No. 3 of 2014)

NEVILLE JAMES STEVENS..... APPLICANT

VERSUS

SANDRA STEVENS..... RESPONDENT

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

RULING

This application is brought under the provisions of section 98 of the Civil Procedure Act, section 33 of the Judicature Act, and 0.52 rr. 1,2,&3 of the Civil Procedure Rules. It is for staying the execution order made by the Registrar Execution in Misc. Application No. 1956 of 2014; which was for the execution of the orders made by Bamugemereire J., in High Court (Fam. Div.) Misc. Cause No. 3 of 2014, which is the head-suit herein, compelling him to pay the Respondent the various sums of money specified therein for her maintenance. The application seeks the relief of stay of execution as the Applicant intends to appeal against the orders made in the head-suit; and for which he has sought such leave vide Misc. Applica. No. 160 of 2014.

The grounds the Applicant has raised in the application are mainly that the learned Judge made an illegal order, in making the maintenance orders complained of; and yet she had declared the marriage between the Applicant and Respondent null and void. Second, is that the learned trial Judge's order for security for costs in the event of an appeal, was a fetter on the Applicant's right to appeal against the order made by Court. As can be garnered from the extracted order, and the application for execution, the order for maintenance of the Respondent covers various items for upkeep, such as rent, food and clothing, medical care, and security; and this was covering the sixteen months the Applicant defaulted in doing so, up to the date the Court made the order. This came to a total of USD 116,800 (One hundred and sixteen thousand, eight hundred only).

The Respondent has, in her affidavit in reply, countered the Applicant's contention stating that the maintenance order made by the trial Court are for her basic necessities in life. She has alternatively prayed that if Court is inclined to grant the order of stay of execution sought, then it should be conditional on the Applicant depositing security for due performance in Court. In her further affidavit in reply, she adduces evidence that the Applicant withdrew all the monies they had in their joint account, and transferred them beyond her reach. She has attached evidence of her having a serious gynecological complication, which requires periodic review. She has defaulted in rent payment; for which the land-lord has levied distress, but still leaving an outstanding balance. She fears that the Applicant, who is not a Ugandan national, may flee the jurisdiction of this Court.

In his affidavit in rejoinder, the Applicant contends that he set up two businesses for the Respondent, a restaurant and boutique, both of which she is running; and can adequately sustain her. He points out that he has a two-yearly rental arrangement with his land-lord; and makes an undertaking that he will not abscond from the jurisdiction of this Court, as he desires to see the appeal through to the end. He blames Court movement for the delay in having his application for leave to appeal fixed for hearing. He thus contends that the application by the Respondent to have him committed to civil prison in execution of the order of maintenance would have the effect of disabling him from pursuing his appeal, or render the appeal nugatory in the event that he his successful therein.

An order for stay of execution is a discretionary order; hence, it has to be exercised judiciously. The Court looks at a whole range of factors before deciding whether to grant such an order, or not. The beginning premise is that the Respondent is a successful litigant who is entitled to the fruits of his or her success; and this proceeds from the basis that an order or decree of a competent Court must be given effect to, unless there is good reason for delaying the realisation of the order made in such decree. True, where there is an appeal, and unless the appeal is on the face of it an outright abuse of the due process, although the appeal by itself does not afford a ground for stay of execution, nevertheless, the Court must examine other factors that come into play by reason of the appeal.

In *Ntege Mayambala vs Christopher Mwanje H.C. Misc. Applica. No. 72 of 1991, [1993]1 KALR 97*, Kato J., (as he then was) pointed out that: –

"In the absence of any piece of evidence before me as to the financial position of the complainant, I am inclined to accept paragraph 11 of the applicant's affidavit in support of this application as being genuine ... the ground that if payments are effected by the applicant before the appeal, it may be difficult to recover them in the event of a successful appeal is relevant ground which amounts to sufficient cause to stay execution."

While this is certainly good law, it is important to note that each case has to be examined and treated on its peculiar facts. In the matter before me, the Applicant himself reveals that he and the Respondent are no longer staying together. Albeit that he has provided two businesses, which he contends are sustaining the Respondent, this does not answer two very important matters. First, is that the Court order for maintenance of the Respondent is for necessities of life. Second, this is for the period the Applicant commenced the default in his obligation up to the date of the Court order for maintenance. In effect, the order has not catered for the period after the issuance of the order; meaning that the Respondent has naturally had to depend on the businesses to cater for such needs.

No wonder then that the Respondent, according to her deposition, has had to dispense with the restaurant business to make ends meet. Since by his own account, he has put up a business for the Respondent, this in effect places the Respondent outside of the category of persons against whom a successful appellant would not realise recovery of monies paid to, in the event of a successful appeal. Furthermore, the nature of the ailment she suffers would naturally eat up the capital meant to sustain her business if the Applicant's obligation to her prior to the Court order were to be recovered from the business; as the distress for rent seems to have occasioned. Conversely, spouses who have separated from each other, as is the case here, have to adopt a less expensive lifestyle.

In the event, I find I have to indulge in a balancing act. Therefore, taking cognisance of the fact that the Applicant has established a going business for the Respondent, which is not denied, I hereby grant the order of stay of execution sought; but only on condition that the Applicant pays the Respondent 50% of the amount ordered by the trial Court for her maintenance. The remaining 50% shall be deposited in Court either in cash or by way of an acceptable bank guarantee, as security, pending the outcome of the appeal the Applicant is pursuing. Should the Applicant not meet both conditions within sixty days of this order, then execution of the maintenance order issued by the trial Court shall proceed forthwith. Costs of this application shall abide the outcome of the appeal in issue.

A handwritten signature in black ink, appearing to read 'Alfonse Chigamoy Owiny'. The signature is fluid and cursive, with a large, sweeping flourish at the end.

Alfonse Chigamoy Owiny – Dollo
JUDGE

02 – 10 – 2015