THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE S.G. ENGWAU, JA

HON. JUSTICE A. TWINOMUJUNI, JA

HON. JUSTICE S.B.K. KAVUMA, JA

CIVIL APPLICATION NO. 65 OF 2005

BETWEEN

DFCU LTD:: APPLICANT.

AND

BEGMOHAMED LTD:::::::::::::::::::::::::::::::::::::: RESPONDENT.

(Arising out of civil appeal No. 45 of 2004.)

RULING OF THE COURT.

This is an application by a Notice of motion brought under section 226 (a) of the companies Act (CAP 110), rules 1 (3), 42, 43 and 52 of the Rules of this court. It is supported by an affidavit of one Willie Ogule, the Corporation Secretary of the applicant bank, deponed on 7/7/2005. The application is seeking an order that the proceedings in Civil Appeal No.45 of 2004 pending in this court and the respondent's HCCS No.272 pending at High Court be stayed. The applicant filed a winding up petition against the respondent company vide company's cause No. 16 of 2005 and the same is pending in the High Court of Uganda, Commercial Division.

The brief background of this application is that the applicant bank had given the respondent company some loan facilities. In High Court Civil Suit No.272 of 2003, the respondent is asking the High Court to ascertain the level of its indebtedness to the applicant. By consent of both parties, the trial Judge made an order that an independent auditor be appointed to establish indebtedness of the respondent to the applicant. Further, they agreed that the findings of the auditor would be binding on them.

In their pleadings, both parties agreed that the respondent operated two accounts with the applicant which accounts were consolidated. The trial Judge appointed Bahemuka, Johnson, Nyende & Co as the auditors to the agreement of both parties. The auditors presented to the court two scenarios: First, when the respondent's accounts were consolidated, its indebtedness to the applicant would be in the region of US$ 43,000. Secondly, if the accounts were not consolidated, indebtedness would be in excess of US$ 70,000. It was upon these reports that the applicant sought leave of the trial court to amend its written statement of defence. The learned trial Judge rejected the application on the ground that both parties were bound by their pleadings to the effect that the respondent's accounts were consolidated.

The applicant lodged an appeal to this court vide Civil Appeal No. 45 of 2004 and the same is still pending against the trial Judge's refusal to allow the applicant to amend its written statement of defence. The applicant again filed a winding-up petition in the Commercial Division under company's cause No. 16 of 2005. The central issue for determination is whether this court should entertain and grant the application for stay of proceedings where the High court Civil Suit No. 272 of 2003 and the present Civil Appeal No. 45 of 2005 in this court are still pending.

Mr. Masembe Kanyerezi appearing with Mr. Karamagi Kabito for the applicant submitted that the respondent company is indebted to the applicant bank but there is a dispute as to quantum of that debt. The applicant has instituted winding-up proceedings against the respondent vide company cause No. 16 of 2005 in the High Court, Commercial Division in relation to that debt. The court has already made an order whereby an interim liquidator was appointed. In his view, the High Court Civil Suit No. 272 of 2003 and the present Civil Appeal No. 45 of 2005 both of which are sill pending in the High Court and the Court of Appeal respectively, should be stayed pending, the outcome of winding-up petition in the Commercial Division of the High Court. In support of his

argument, counsel relied on the provisions of sections 226, 231 of the Companies Act and the decision in **Re Tweeds Garages Ltd [1961] 1 ch Divison 406 and Re Welsh Brick Industries Ltd [1946] 2 ALLER 197.** It seems to counsel that it would be quite unjust to refuse this application merely because there is a dispute pending in the High Court or an appeal pending in this court. According to counsel, all these matters will be addressed during the winding-up proceedings. Therefore, these proceedings should be stayed.

Mr. Barnabas Tumusingize, learned counsel for the respondent did not agree. He submitted that the current respondent and the applicant and the report of auditors bound the parties. In its written statement of defence, the applicant admits the consolidation of accounts. Mr. Willie Ogule, the Corporation Secretary of the applicant, also admitted that there had been consolidation of accounts (see paragraph 4 of his affidavit).

The application to amend the defence to remove admission of consolidation was rejected by Lugayizi, J. It is upon that rejection that prompted the applicant to lodge Civil Appeal No. 45 of 2005 in this court. As the appeal awaits hearing, the applicant files winding-up proceedings. According to counsel, it is not in the interest of justice for the appeal here or the suit in the High Court to be stayed. He also pointed out that in the winding-up proceedings, more money is being asked for than what was admitted in the pleadings.

Learned counsel further submitted that it is not mandatory upon this court to make an order for stay of proceedings. In support of this argument, counsel relied on the decision of **Re David Lloyd & Co [1877] 6Chd 340** where it was held, interalia, that an application for stay of proceedings is not automatic. He also pointed out that section 226 of the Companies Act upon which this application is brought, the word *"may"* is used for a stay upon considering the circumstances of the case. The application is not

brought under section 231 of the Act as counsel for the applicant would like this court to invoke on the matter.

Mr. Tumusingize wondered why rule 1 (3) of the Rules of this Court is being applied to this application! He submitted that this Court should use its inherent power to restrain the applicant which has unfinished proceedings in this Court and in the High Court from prosecuting its winding-up petition because that is an abuse of court process.

Turning to **Re Welsh Brick Industries Ltd** (supra), counsel submitted that this case is distinguishable from the present case. In that case, the company was insolvent but that is not the case here. In **Re Tweeds Garage Ltd** (supra), counsel also pointed out that the company was insolvent and failed to pay debts and these were the considerations. In the present case, the respondent is willing to pay its debt except it wants to know the precise amount it owes the applicant and that is what the High Court must resolve. Mr. Tumisingize submitted, therefore, that it was improper for the applicant who filed an appeal here and before prosecuting it, to persue winding-up proceedings. In counsel's view, endless litigation will make the respondent incur insurmountable costs for nothing. The application lacks merit and should be dismissed with costs to the respondent.

In his reply, Mr. Kanyerezi pointed out that the auditor's report is unequivocal in that the two reports were inconsistent and that was why the applicant rejected the same. The applicant then engaged another firm of auditors in the names of Price Water Cooper whose report is agreeable to the applicant. He further stated that this application is neither an abuse of Court process nor is it trying to avoid the appeal here or the High Court proceedings. This court has discretion to stay these proceedings under section 226 of the Companies Act. However, under section 231 of the Companies Act, an order for stay is mandatory except by leave of

court. As there is no abuse of court process, counsel submitted the applicant wants an orderly conduct of the case.

Mr. Musingizi in reply argued that the application is under section 226 of the Companies Act and not section 231 of the Act. It is within the power of this court to consider the circumstances of the case. He further pointed out that Price Water Cooper was never appointed by court and the respondent never made any representation. Price Water Cooper were auditors of the applicant at the time. Bahemuka, Johnson, Nyende & Co was appointed by the court and counsel for both parties made representations and bound themselves with the report made by that firm. The matters raised by both parties on 18/9/2003 regarding the 1st report brought about the 2nd report and that explains why there was variance.

This application is brought under section 226 of the Companies Act, which states:

> **"226. Power to stay or restrain proceedings against a company.**
>
> ***At any time after the presentation of a winding-up order has been made, the company or any creditor or contributory, may –***
>
> **(a)** ***where any suit or proceeding against the company is pending in the High Court or Court of Appeal apply to the court in which the suit or proceeding is pending for a stay of proceedings therein;***
>
> **(b)** ***Where any other suit or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceeding, and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit."***

It is clear to us that the above provisions empower the High Court or the Court of Appeal to exercise its discretion to stay or restrain the proceedings before it on such terms as Court thinks fit. It is not mandatory upon the High Court or the Court of Appeal to exercise that power. The High Court or the Court of Appeal before exercising its discretion has to consider the circumstances of the case. In the instant case, the respondent company is not insolvent. It is willing to pay its debt. The only missing factor is that the respondent wants to know the level of its indebtedness to the applicant. The High Court in HCCS No. 272 of 2003 must be given a chance to resolve this scenario by investigating the matter.

Further, the applicant has instituted Civil Appeal No. 45 of 2005 before this Court and this appeal is still pending. The appeal is against the refusal by the High Court to allow the applicant to amend its written statement of defence against admission that the respondent had consolidated its accounts with the applicant bank. It seems from the pleadings that if the accounts were consolidated that would reduce the level of indebtedness but if not consolidated, indebtedness would be high. In our view, the High Court must investigate that scenario. As regards the appeal pending before this Court, it is up to the applicant/appellant either to prosecute or withdraw it. We are uncomfortable to stay the proceedings, as that would increase backlog of cases in this Court.

In his submission, Mr. Kanyerezi asked this Court to invoke the provisions of section 231 of the Companies Act. We are unable to do so on the ground that the application is not on the basis of that section of the Act. In any case the applicant has not sought leave of Court.

All in all, the circumstances of this case are that both HCCS No. 272 of 2003 and Civil Appeal No. 45 of 2005 are still pending. Before they are disposed of, the applicant has instituted winding-up proceedings in the Commercial Division of the High Court and the same is also pending. This

kind of endless litigation, in our view, is an abuse of court process. The applicant must be firm on what to do and do it in an orderly manner in the interest of justice. We are, therefore, unable to make an order for stay of the proceedings both in HCCS No. 272 of 2003 and Civil Appeal No. 45 of 2005.

In the result, this application lacks merit and it is dismissed with costs to the respondent.

Dated at Kampala this ……18th ……day of ……January……. 2005.

S.G. Engwau
Justice of Appeal

0 Twinomujuni
Justice of Appeal

S.B.K. Kavuma
Justice of Appeal