

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

H.C.C.S NO.207 OF 1993

NANGUNGA LIVESTOCK CO-OPERATIVE SOCIETY LTD:.....PLAINTIFF

VERSUS

M/S ENERGO PROJECT CORPORATION:.....;.....DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA.

RULING

This application by chamber summons brought under Order 19 Rules 26 and 89 of the Civil Procedure Rules filed by the applicant/defendant against the respondent/plaintiff for an order of stay of execution of the decree passed consequently upon the judgment in the above suit until the determination of the appeal pending before the Supreme Court.

There is an affidavit in support of the application deponed to by one D. Spasojekt the acting area Manager of the applicant company. There is also an affidavit in reply sworn by G.W. Kigozi a member and treasurer of the respondent/ plaintiff society the said decree holder.

The application is founded on the following grounds:-

- (1) That there is a suit (Civil appeal) against the decree holder here in pending in the supreme court of Uganda at Mengo against the decree holder in the name of the person against whom the decree was passed.
- (2) The applicant's defence was interlia denial of the alleged contract and the pending appeal is bonafide.
- (3) That the said pending appeal is likely to succeed.

- (4) Execution will destroy the substratum of the appeal and will cause the applicant irreparable loss.
- (5) That the application is not intended merely to delay court proceedings.
- (6) That the decretal amount is interest earning by decreeing that the applicant pays special damages of 7 million shillings plus general damages for breach of contract fixed at 2 million shillings. The respondent was also granted interest on the decretal sum at court rate from the date of judgment till payment in full.

The applicant was represented by Mr. Byaruhanga of M/s. Byaruhanga and company advocates plot 3/5 Bombo Road whereas Mr. Lutakome from M/s. Lutakome and company advocates appeared for the respondent.

Briefly the background of this application was simply that the respondent/plaintiff filed a civil suit against the applicant/ defendant for special and general damages for breach of contract when they supplied commodities i.e. beans and maize to the tune of 7 million shillings to the applicant/defendant and the latter did not honour the contract. It refused to pay. After a full trial this court pronounced judgment in favour of the respondent. According to the affidavit and submission of the learned counsel appearing for the applicant shows that the applicant denies the contract upon which the respondent obtained the decree and that the applicant has reasonable chance of success on that ground. That if the execution takes place and the appeal succeeds the appeal would be rendered useless. The application is not intended to delay the process of the court but the applicant believes he would succeed. It was also contended that since the decretal sum attracts interest from the date of judgment till payment postponement of payment is not disadvantageous to the decree holder. He would be compensated by interest.

However the affidavit and submission by Mr. Lutakome counsel appearing for the respondent/plaintiff did show that that the application is not maintainable under order 19 Rule 26 on which the application is based. It is irrelevant. The wording of order 19 Rule 26 is very clear. It talks of where a suit is pending against a decree holder. There is no suit pending against a decree holder in the suit that was Nangunga extra. The meaning of the rule has been extensively considered by this court. The civil procedure rules do not lay down what should be done when a

party wants to appeal to the Supreme Court pending a decree here in the High Court. The power of the court to stay execution is only reserved under section 101 of the civil procedure Act. Since there is no proper procedure they were thrown to order 48r1 of the civil procedure rules. Although the court has power to stay execution the procedure applied must be proper. The application should have been brought by way of notice of motion not by a chamber summons and in the open court.

That the interpretation of rule 2 of rules of the Supreme Court is just general interpretation and the notice of appeal lodged in the Supreme Court did not amount to a suit. Many notices of appeal have been thrown out when made out of time on that technical point/procedure the application should be struck out. On the merits of the application the learned counsel maintained that there is no good merit for this court to warrant stay of execution. The counsel for the applicant/defendant submitted there had been a delay in the appeal but it could be observed that the court made the decree on 16.8.94 and up to the present time no appeal had been filed in the Supreme Court. The affidavit in support of the application does not show why the applicant had not filed the appeal in the Supreme Court while the decree was extracted long ago. It was submitted that the application was intended to delay the course of justice and to deprive the successful party/decree holder of the money. As to whether the appeal had reasonable chance to success. It was submitted that there was none because the decree was based on the evidence adduced which was a simple contract of sale of goods which was well processed by the respondent. The applicant failed to challenge the strong evidence adduced by failure to summon their key witnesses. It was prayed that the application be dismissed with costs.

In reply Mr. Byaruhanga submitted that rule 89(1) of order 19 provides that an application under Order 19 Rule 26 of the CPR shall be by chamber summons. The application before the court is proper having been brought under the proper rules. He further submitted that the appeal exists by virtue of the notice of appeal and admitted his memorandum of appeal has been filed and that was why the High Court has not completed preparation of the record of the proceeding which had been applied for.

As to whether the appeal would succeed this court was not got to hear the appeal but should merely rely on the grounds of the appeal. I was referred to a certain authority here. He prayed

that the application be granted. According the application there are about six grounds of appeal as explained above.

There are indeed a number of authorities with regard to applications of this nature. **In George Muhutu .V. Bilasiyo Mpereng** The applicant applied for stay of execution pending an appeal made under order 19 Rule 26 of the civil procedure rules and section 101 of the civil procedure Act. The applicant submitted that there was a pending appeal as contemplated by Order 19 r 26. Since he had filed a provisional memorandum of appeal, he contended that that amounted to a lodging appeal. It was held that the application was misconceived since it was based on a misconception that there was an appeal pending a provisional memorandum of appeal under **order 39 Of the civil procedure rules (s165—3)** consequently there was no appeal pending in court.

In **Kampala City Council vs. National Pharmacy No.13 of 1979 Reported HCB p. 215**. In holding 5 it was held that the court can only grant a stay of execution if is satisfied that there is a good cause to do so and that there are special circumstance or such order. And in the case of **Somali Democratic Republic .V. Ancop civil application No.11 of 1988**. Their lordship had this to say.

“With regard to the applicant’s contention that the appeal in case it succeeds should not be rendered futile we consider that the rule which the court of appeal laid down in the case of Wilson vs. Church No. 2 of 1879 12 ch LR 454 is till good. This is where an unsuccessful party exercising an unrestricted right of the court in ordinary cases to make such order for staying proceedings under the judgment appealed from as will prevent the appeal if successful from being nugatory. The court will not interfere if appeal appears to be bonafide or there are other sufficient exceptional circumstances.”

And in **Lawrence Musitwa Kyazze vs. Eunice Busigye civil application No. 18 of 1990 Supreme Court, Uganda unreported**. Their lordships pointed out that the parties asking for a stay of execution should be prepared to meet the conditions set out in order 39 rules 4 (5) of the CPR. The temporary application may be expert. 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 39 rule 4(3) of the civil procedure rules.**

And in Ujar Singh vs. Rund Coffee Estate 1966 EAP 263 where the Eastern court of Appeal was hearing an appeal from Kenya High Court held that since the High Court had power to order a stay of execution under order DXLI rule 4 of the civil procedure rules 1948 which is equivalent to S 101 CPA it follows that the like jurisdiction was conferred on the CA. By rule 3(2) of the appellate jurisdiction Acts.

In the instant case there was no memorandum of appeal pending in the Supreme Court. The application was therefore misconceived since it was based on a misconception of a pending appeal. In Muntunu's case supra it was argued that there was a provisional memorandum of appeal but in the instant case there was none. In fact on that authority alone the application would have been disposed of. In fact this would dispose of the first ground for this application.

As regards the rest of the grounds of appeal, I will deal with them specifically. This, court heard the parties and pronounced its judgment in favour of the respondent. I do not have to review the Evidence adduced since I am of the view that that is a matter for the Supreme Court but the gist of the judgment is that the parties entered into a contract for the sale of goods commodities which were supplied and the applicant refused to pay the agreed amount. With that background I am of the opinion that the appeal is not bonafide and there are slim chances of its success. This would dispose of grounds 2 and 3. Perhaps I would add here that a stay of the judgment being appealed from would not prejudice the applicant and the same would not render the appeal being nugatory. I do not see how execution would destroy the substratum of the appeal and cause the appellant irreparable damage. The respondent had the means to refund the decretal sum in case the appeal which is not pending in the Supreme Court succeeded.

In the end I see no miscarriage of justice that would be occasioned to the applicant. Also no substantial loss would be occasioned from a refusal to grant the stay of execution and the dictates of justice do not demand so. This reasoning disposes of grounds 4 of the application.

As to the fifth ground that the application is not intended to delay the court process. I was not addressed sufficiently on this ground. However what is apparent was that the judgment in this

case was delivered as far back as 16th August, 1987. The learned counsel explained that he has not got the proceedings so as to file in the necessary papers and there are some of his correspondences on the record. I think he succeeds on this ground.

As regards the sixth ground that the decretal amount was interest earning, I do not agree with Mr. Byaruhanga that because the decretal sum carries interest that is a ground of stay of execution because of the reasons I have endeavored to explain above. First and foremost there is no pending appeal in the Supreme Court and that the applicant will not suffer irreparable damage in case the execution was not stayed. Moreover this court has the inherent jurisdiction to stay execution as per the decisions in **Kaggwa vs. Oliva Kaggwa Administration Cause No. 21 of 1972 ULR p. 12 and Ujar Singh vs. Runda Coffee Estates Limited 1966 p.263.** I am of the view that S.101 of the civil procedure Act cap 65 would have formed part 2 the law under which this application was filed. This in my humble opinion rendered the application defective. And according to decided cases the court would have been moved by notice of motion and not by chamber summons.

In conclusion the applicant would still not be granted stay of execution unless he was prepared to fulfill the conditions under order 39 rule 4 (3) of the civil procedure rules as explained above See **Lawrence Musiwa Kyazze supra.**

In the end the application fails and the suit is dismissed with costs.

I. MUKANZA

JUDGE

6.12 .1995