

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)**

MISCELLENOUS APPLICATION NO. 1620 OF 2016

**(ARISING FROM EMA NO. 3116 OF 2015)
(ARISING FROM MISC. APPLICATION. NO. 162 OF 2014)
(ARISING FROM ELCTION PETITION 43OF 2011)**

KADDU SSOZI MUKASA APPLICANT

VERSUS

**TEBUSWEKE MAYINJA
OKELLO & CO. ADVOCATES RESPONDNETS**

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

By this application, the Applicant sought orders of this court staying execution of the warrant of arrest issued against the Applicant in EMA 3110/2015, pending the hearing and disposal of the application filed by the Applicant in the trial Court to set aside the taxation of the Bill of Costs.

Costs of the application were also applied for.

The application was made under Article 126 of the Constitution, S.33 of the Judicature Act, S.98 CPA, 0.22 r 3 and 0.52 rr 1 and 2 of the C.P.R.

The grounds of the application briefly are that:-

- 1) The Respondents were formerly the Applicant's lawyers in Election Petition 43/2011 and other matters related thereto.
- 2) The Respondents jointly with another firm of lawyers successfully argued the case until its completion and were remunerated by the Applicant as agreed.
- 3) The Respondent and the Applicant's other lawyer recovered Shs. 40,000,000/- and Ug. Shs. 23,000,000/- in costs from the Respondent in the Election Petition but did not release the same to the Applicant.
- 4) The Respondent has chosen to dishonestly claim money from the Applicant despite having been paid. The Applicant always paid the Respondent but the latter declined to issue receipts to him among other things.

The application is supported by the affidavit of the Applicant.

There is an affidavit in reply deponed by Tebusweke David Mayinja, a Managing Partner of the Respondent firm.

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There is also an affidavit in rejoinder filed by the Applicant.

When the application was called for hearing on 12.07.16, Counsel for the Respondent stated that he had a few questions to raise in cross examination but that the preliminary objection could be made an issue in the application.

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The issues raised are:-

1) Whether or not the application is properly before court.

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2) Whether the application should be granted.

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Counsel for the Applicant then went through the motion and the orders sought emphasizing that the Applicant had filed an application seeking leave to appeal against the taxation which was done on 18.11.15. He pointed out that the affidavits of the Applicant put across evidence supporting the application.

Counsel further submitted that the conditions required by law for an application for stay to be granted are:-

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I. Pending appeal with a high likelihood of success, raising serious questions of law.

II. If execution proceeds, the appeal would be rendered nugatory.

It was contended that there is a pending appeal against the decision of the Taxing Master. The taxation of the Bill of Costs was done exparte without the Applicant's input.

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The Applicant was represented by M/S Kizito LUMU & CO. Advocates during the taxation. The amounts awarded in taxation were astronomical and not based on the rules that govern Advocates fees.

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The Applicant has therefore opted for a reference to have the award set aside.

It was pointed out that Shs. 50,000,000/- was awarded as legal fees, yet Counsel for the Respondent had already consented to Shs. 40,000,000/- as legal fees and the consent still stands. Therefore that, it is seeking that the Taxing Master awarded much more than what was agreed upon at settlement, yet the same Taxing Master noted in his ruling that the matter was conducted by two lawyers and the work had reduced.

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Further that, it is clear from the Applicant's affidavits that before the Respondent took out the Advocates Client Bill of Costs against the Applicant, Richard Lumu, joint Counsel in the Petition

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had recovered payment of Shs. 40,000,000/- as legal fees. The money was meant for two Counsel.

5 The same lawyers defended the Applicant in the Taxation proceedings before the Trial Court. From the affidavit of the Respondent, the same lawyer did not appear for several times in the lower court thereby denying the Applicant a fair hearing.

10 The lawyer did not communicate effectively the proceedings in that Court to the Applicant, thereby denying the Applicant effective representation by letting the matter proceed exparte.

It is on those premises, Counsel argued, that the Applicant deserved a chance to present his case before the trial court.

15 The case of **Emin Sheik Dawood vs. B.G Keswaral & Sons M/A 629/11**, Justice Helen Obura granting a stay of execution cited the case of **Wilson vs. Church** where it is stated that ***“as a matter of justice.... Stay of execution is granted to prevent appeal from being nugatory”*** was cited in support.

20 So was also the case of **DFCU Bank vs. Dr. Anne Nakate CA 29/03** – ***“where the Court of Appeal emphasized that it is the paramount duty of court to which stay is filed pending an appeal to ensure that appeal if successful is not rendered nugatory.”***

25 Asserting that the Applicant is interested in getting justice, Counsel submitted that it is imperative that the proceedings before this court give him that chance.

Further that the Applicant has a high likelihood of success an appeal since an excessive sum was awarded in exparte proceedings.

30 That substantial loss may also result if stay is not granted. The Applicant, Counsel argued, has shown through his affidavits that there is a warrant of arrest issued by this court and there is an urge by the Respondents to arrest and humiliate him.

35 It is also agreed by both parties that Shs. 40,000,000/- was agreed as costs and has already been paid. Yet an innocent litigant has been caught in the crossfire between his 2 former lawyers who have failed to agree on how to share the money.

Before court is one of lawyers seeking further payment and yet he consented to the Shs. 40,000,000/-.

40 If court does not grant stay of execution to enable the Applicant set aside the Bill of Costs, Counsel contended, it will amount to double jeopardy as the Applicant will in essence be compelled to pay twice for the same case.

45 There was no certificate granted for two Counsel therefore both cannot be paid separately; Counsel argued and cited the case of **Emin Sheik (Supra)** where substantial loss was defined to include ***“mere payment of moneys” P.8.***

It was also the contention for the Applicant that, the application was brought without unreasonable delay.

5 The Applicant got to know of the warrant of arrest and certificate of Taxation on 18.05.16 when he instructed other lawyers to file this application and also filed an application seeking to set aside the taxation on 19.05.16 and filing Miscellenous Application 520/16 in the Civil Division seeking leave to extend time within which to appeal the taxation. That the matter is fixed for hearing on 22.06.16.

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The present application is meant to protect and preserve the status quo form being altered and thereby avoiding substantial loss to the Applicant.

15 That it is only fair and just that the order for stay be granted as the affidavits in rejoinder indicate that the Respondent was the lawyer of the Applicant from the time the petition was filed up to the end, contrary to the claim of the Respondent that Applicant removed instructions from him.

The case of **Dr. Kisuule vs. Greenland Bank Ltd MA 03/12** was relied upon.

20 In reply, Counsel for the Respondent relied upon the affidavit in reply of Counsel Tebusweke. He contended that the application is bad in law for the following reasons:-

1) The application is hanging in space – referred court to paragraph (a) of the same.

25 The Applicant in paragraph 16 of application refers to a taxation reference. In paragraph 24 of the supporting affidavit he refers to an appeal against taxation bill of costs.

In the affidavit in rejoinder, Applicant refers to an application for leave to appeal against the taxation.

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Further that, the leave to appeal was filed after this application for stay and before leave to appeal was filed.

35 It was then argues that the application cannot stand for not being clear which remedy the Applicant is seeking that is whether reference, appeal or leave to appeal. And that even if there was an application in the trial court setting aside the Bill of Costs, it would be untenable in law, since under S.62 (1) Advocates Act, **“all appeals in matters arising out of taxation of the Advocates Bill of Costs can only be filed within thirty (30) days and courts have held that, the time cannot be extended.”** The case of **National Social Security Fund (NSSF) vs. Dr. Joseph Byamugisha CA 13/13** was cited in support. Court confirmed in that case that **“appeals have to be within thirty days.”**

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In the present case, taxation was done on 18.11.15 and there was therefore inordinate delay in filing application in trial court and there is no likelihood of success.

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It was prayed that the application be dismissed with costs to the Respondent.

Further that the issue as to whether or not the Respondent was entitled to Shs. 55,000,000/- was concluded by the Taxing Master and the Applicant was represented by Kizito Lumu who had full instructions.

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Also that the Applicant concedes that Shs. 40,000,000/- was taken by Kizito Lumu who was his Counsel but never passed on the money to the Respondent. Therefore, Counsel argued, court should find that the Respondent is entitled to his fees as taxed.

10 That the Applicant cannot be heard to claim that he will suffer irreparable damage when he got legal services from the Respondent in 2011, and has been in Parliament as a result. Yet no evidence of paying the Respondent was adduced by the Applicant.

It was prayed that application be dismissed and Applicant pays taxed costs.

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In rejoinder, Counsel for the Applicant reiterated earlier submissions and asserted that the application has merit and is tenable before this court.

20 Referring to the objections raised by the Respondent, Counsel argued that it is clear from the affidavits in rejoinder that this is an application for leave to extend time within which to appeal against the Taxation of the Registrar.

25 That the Applicant seeks to set aside the taxation by way of Miscellenous Application 520/16 which is pending hearing. And the Respondents objection is trivial and misplaced.

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Court was urged to note that what is pending hearing is an application for extension of time within which to appeal.

30 In regard to the objection in respect of the date on which the Application was filed, Counsel stated that the month of June was stated in error as the correct month is May and this was brought to the notice of court in the proceedings that were before the Registrar.

35 That, that is a mere technicality outlawed by Article 126 (2) 9e) of the Constitution. The error in the month is one of form and does not go to the root of the matter as it can be rectified. Court was urged to ignore it and decide the matter on merit.

As to whether the application is bad in law by virtue of S.76 Advocates Act, is prematurely brought out at this stage as it can only be determined by the Appellate court.

40 The merits of the said application cannot be delved in at this stage where court is only meant to determine whether to stay execution and maintain the status quo. That the case of **NSSF vs. Byamugisha** (Supra) was an appeal and is therefore distinguishable from the present case where an application for leave to extend time is before another court.

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Those issues should be left for the Appellate Court.

5 The likelihood of success is not based on the merits of the case but rather on the grounds of appeal. Counsel reiterated that there are serious issues to be considered by the Appellate Court that is the astronomical award made by the Taxing Master disregarding that the Respondent had settled for Shs. 40,000,000/-.

10 Insisting that the award by the Taxing Master was clearly at variance with the guiding principles set down in decided cases e.g. in the case of **Kabale Kwagala and Another vs. Beatrice Zirabamuzale and Another Miscellenous Application 034/201.**

Also that the requirement of likelihood of success is not mandatory for stay of execution. The most important condition is that the application was brought without undue delay and the likelihood of the Applicant suffering substantial loss if order is not stayed.

15 Where there is a pending appeal, courts have observed that **“a stay of execution would serve better justice for both parties.”** – **Joyce Mbagua vs. Idah Iterara SCCA 09/2006.**

20 Attempts by the Respondent to have the application dismissed when the pending application for leave has not been determined is a ploy meant to stifle the Applicant’s right to be heard and to render the intended appeal/ application nugatory.

Referring to the case of **Nalwoga Gladys vs. Edco Ltd and Another MA 07/2012**, Counsel stated that it clearly sets out the conditions necessary for grant of stay of execution.

25 And that since the Applicant has fulfilled all the conditions necessary for stay, Court should grant the application.

30 On security for due performance of the decree, Counsel submitted that O.22 r 23 C.P.R does not require the Applicant to give security for sue performance, but that if court is inclined to exercise its discretion in that respect, then the Applicant should be allowed to deposit a duplicate certificate of title in court as security.

Whether this is a proper application for stay of execution.

35 Courts have established principles to be considered in determining whether execution should be stayed or not. These include:-

- Likelihood of success of the appeal.
- 40 - Imminent danger of suffering substantial loss or irreparable damage.
- Application was made without unreasonable delay.
- Security of costs has been given by the Applicant.
- 45 - Balance of convenience.

- Refer to the case of **Malinga Noah and 2 Others vs. Henry Akol CA MA No. 203/2015.**

5 However that, ***“the guiding principles would depend on the individual circumstances and merit of each case. The individual circumstances of each case would determine whether the case falls within the scope and parameters of any other laid down principles.”*** – East African Development Bank vs. Blueline Enterprise Ltd [2006] 2 EA 51 CCAT.

10 The Applicant in the present case sought orders of this court staying execution pending the hearing and conclusion of an alleged application filed by him in the trial court seeking to set aside the taxation of the Bill of Costs and or a tax reference.

15 No copy of such application was attached to this application and there is no indication when it was filed or that it has ever been given a date for hearing.

Indeed a careful perusal of the file indicates that no such application exists as none has been filed as the submissions in rejoinder, filed by the Applicant on 14.07.16 clearly state that what is before court is **an application for leave to extend time within which to appeal against the Taxation of the Registrar.**

20 The submissions were made without the application being amended or any leave sought to amend the same to indicate that the Applicant also seeks leave to extend time.

25 It follows that the Applicant cannot rely on a none existent application as a ground for stay of execution. Decided cases have established that, ***“an application for stay of execution is to be made to the High Court if sufficient cause is shown before time within which to appeal expires.”*** – See **Sandi and Another vs. Ali Mukenya [1987] HCB 51.**

30 Although it is trite law that ***“court has discretion to grant stay of execution, this power has to be exercised judicially and where it appears equitable to do so, with a view to temporarily preserve the status quo”*** - CA MA 07/98

The Applicant claims in this case that he had already paid the agreed taxed costs to the Respondent and another law firm which represented him in the petition.

35 But available documents and evidence show that the said sum of 40,000,000/- was paid to Lumu & Co Advocates and that by then the Applicant had withdrawn instructions from the Respondent Company.

40 The Respondent filed a Bill of Costs which was taxed in absence of Counsel for the Applicant, but which the Applicant never appealed against.

This court is aware that ***“an order for stay of execution must be intended to serve a purpose and a legitimate one for the matter.”*** – Refer to **Tahar Fourati Hotels Ltd. vs. Nile Hotel 9Int) Ltd Miscellenous Application 614/2003.**

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This court finds that no legitimate purpose for stay of execution has been established by the Applicant. It would seem from the conduct of the Applicant that the purpose of this application is merely intended to further delay the matter and prevent the Respondent from accessing the fruits of its labour. The application amounts to abuse of court process.

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No security for due performance of the decree was offered by the Applicant, who seems to be seeking a blanket stay of execution.

15 Since courts have decided ***that “even pendency of an appeal is not a bar to a successful party’s right to enforce a decree obtained, even by execution.”*** – Refer to **Uganda Revenue Authority vs. Tembo Steel Mills Ltd HCT MA 0521/2007.** It follows therefore that just an intended appeal or an intended application to extend time within which to appeal are not sufficient grounds for stay of execution.

20 In the circumstances, not even the balance of convenience can be tilted in the Applicant’s favor.

The application is accordingly dismissed for all those reasons with costs to the Respondent.

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30 **Flavia Senoga Anglin**
JUDGE
04.05.17