

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 227 OF 2017
(Arising out of Civil Application No. 226 of 2017)

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KERILEE INVESTMENTS LIMITED ::::::::::: APPLICANTS
VERSUS
KRONE (U) LIMITED ::::::::::: RESPONDENTS

10 **CORAM: HON. JUSTICE S.B.K KAVUMA, DCJ** ✓

RULING OF COURT

15 This Application was brought under Section 12 of the
Judicature Act Cap. 13 (Laws of Uganda), Rules 2(2) and
6(2) (b), 42(2) and 44 of the Judicature (Court of Appeal
Rules) Directions SI 13-10.

20 The applicant seeks an order that an interim order of stay
of execution/enforcement of the ruling and or orders made
by his Lordship Hon. Mr. Justice Godfrey Namundi on the
27th day of July 2017 vide High Court Misc. Application No.
823 of 2017, be granted pending the determination of Civil
Application No. 226 of 2017 on stay of execution.

The grounds of this Application are set out in the affidavit
of Kwesiga Ronald and are briefly that;

25 1. The Applicant being dissatisfied with the ruling and
orders of His Lordship, the Hon. Justice Namundi.

Godfrey made on the 27th day of July 2017 vide High Court Misc. Application No. 823 of 2017 filed a Notice of Appeal and have applied to be availed with typed and certified copy of the record of proceedings to enable it file a Memorandum of Appeal.

2. The intended appeal raises triable and arguable issues requiring the interpretation by a superior court.

3. The respondent has extracted the court order and has instructed their Bailiff to execute the same to the detriment of the Applicant and about 15,000 persons who are currently under the employment and management by the Applicant.

4. That unless an order of interim stay is granted, the main application for stay of execution together with the main appeal will be rendered nugatory. (Sic)

Background

The respondent filed Miscellaneous Application No. 823 of 2017 in the High Court for a temporary injunction ordering the applicant herein to vacate Nyamuliro Mines and that the respondent takes possession and management of the mine which was granted by Hon. Namundi J. It was also ordered that the applicant company be restrained from further management of the mine for the duration of the head suit and also removes its employees from the site and thereafter the respondent replaces its security personnel on the suit land.

Representation

When the application came up for hearing, Mr. Gad Batana (counsel for the applicant) appeared for the applicant while

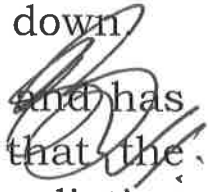
Mr. Geoffrey Ntambirweki Kandeebe and Mr. Brian Kilema (counsel for the respondent) appeared for the respondent.

Submissions of counsel

Submissions of the applicant

5 Counsel for the applicant submitted that the Application is premised on the affidavit in support sworn by Mr. Kwesiga in which he stated that the respondent is at the verge of enforcing the said orders of the court before the disposal of the main application for stay of execution. He further states
10 that the suit mine employs close to 15000 people who derive a livelihood from the said mine and should the order be enforced, it will have adverse effect on 15000 people. That the lower court order was made when there was no eminent threat of closure of the mine from the
15 Commissioner of Mines and the applicant had invested more than 2 million US dollars in the mine as per the specifications of the agreement between the applicant and the respondent.

In addition, counsel submitted that the nature of the
20 agreement between the parties was that the applicant invests in the suit mine and the mode of recovery was that the applicant had to go into management of the suit mine and recover its investments through sale of the minerals from the mines to third parties. The applicant has since
25 made the payment to the respondent however the respondent has not shown any willingness to pay the applicant in the event that the suit mine is closed down

That the respondent has extracted a court order  and has instructed its bailiffs to execute. In addition, that the
30 respondent is violating and abusing all efforts of mediation

and amicable resolution of the disputes at hand. Counsel cited **Civil Application No.62 of 2014 Commissioner Customs Uganda Revenue Authority vs. Kayumba Emily Ogenyi, trading as ETS Ogenyi Company**, and the Supreme Court's decision in **Hwang Sung industries Limited Vs. Tajin Hussein and Others Supreme Court Civil Application No.19 of 2008** in which it was stated that "for an application for an interim order, it suffices that a substantive application is pending and that there is some threat of execution before the hearing of the pending substantive application that it is not necessary to pre-empt consideration of matters necessary to decide whether or not to grant the substantive application for stay."

In conclusion, counsel prayed that this application be granted staying the enforcement of the lower court's order under Miscellaneous Application No.823 of 2017 pending the determination and disposal of Civil Application No.226 of 2017.

Submissions for the respondent

In reply, counsel for the respondent opposed the application and submitted that the applicant has failed to show that there is any threat of execution and has not named the alleged court bailiff that is in the process of execution. That it is not the respondent that appoints court bailiffs, it is the court that appoints bailiffs to execute executable orders. That the order in this case is not an executable order. It is an order of a temporary injunction that is self-executing and takes immediate effect as soon as it is pronounced by court and whoever goes against such an order is in contempt of court.

That the learned trial Judge found that in the circumstances of this case, it should go to arbitration and ordered as such but instead of the applicant submitting to arbitration as ordered by the court, the applicant has preferred to make this Application so that it can continue in contempt of court. For the applicant to come before this court and state that the interim order should not be enforced because there are 15000 members of the community who are deriving benefit is not a ground for making an application like the instant one for this court.

Counsel argued that the applicant is in breach of the agreement as it has purported to take over the daily operations of the company to allow a third party or the community members to enter the mine contrary to the lease granted by the Government and do activities not authorised by the lease between the Government and the respondent. That KI3R minerals limited which is in possession of the mines is not known to the respondent and the mining lease granted to Krone is currently under possession of another party that is undertaking mining operations.

In addition, that the applicant is neither a mineral dealer nor investor and was not a licensed mineral dealer or investor in Uganda at the time of inducing the respondent to enter the agreement. It was only registered in Uganda as a company on 4th July 2017. The commissioner and the Regional manager have shown in their two letters that Kerilee who is purporting to mine in Nyamuliro is not known to them and they are imploring Krone Uganda LTD to keep its obligation under the lease agreement. That the learned trial Judge, having looked at all these, made a decision to issue a temporary injunction to stop the

applicant or anybody purporting to be its agent or employee from carrying out the illegal operations on the mine. Also, that these so called 15,000 people are illegal miners that the applicant is seeking to protect for its illegal operations and stealing of the mineral from the applicant and in those 5 circumstances, considering that he who comes to equity must come with clean hands, the applicant if he was to come here for an order he must come with clean hands.

Counsel Kilema cited the authority of **Joel Kato and Margrate Kato Vs Nalulu Nalwoga, Supreme Court authority civil application number 12 of 2011** where 10 the Ruling of Kitumba (JSC) dismissed an Application for failure to attach a copy of the judgment and there was no substantive Application for Stay and the learned Judge 15 concluded that such an Application was brought in bad faith and an abuse of process. An Application for an Interim Order of Stay of Execution presupposes that there is an imminent threat of execution which does not exist here. There must at least be an Application for execution or even 20 a warrant to enforce the orders of Court.

Counsel also cited **URA Vs East African Property Holdings LTD Court of Appeal of Uganda Civil Appeal Number 144 of 2014** in which this Court dismissed an Application for an Interim Order for Stay Of Execution for 25 reasons that there was no eminent threat of execution as there was neither an Application For Execution nor a warrant in place to enforce the orders of Court.

Lastly, counsel submitted that this Application is brought by the applicant with very unclean hands and this being an 30 equitable remedy, if you must come to equity, you must

come with clean hands yet the applicant wants this Court to allow it to continue mining in contravention of the law as they have no license.

Court's consideration of the Application

5 I listened to the submissions of both counsel and carefully considered the evidence on record together with the law governing Applications of the nature of the instant one.

The principles upon which an application for an interim order for stay of execution are granted were clearly stated
10 by the Supreme Court in **Civil Application No. 19 of 2008 Hwang Sung Industries ltd vs Tajdin Hussein and 2 others** in which Okello JSC (as he then was) stated that:

*“For an application for an interim order of stay, it suffices to show that a substantive application is pending and that
15 there is a serious threat of execution before the hearing of the pending substantive application. It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.”*

The most important consideration for a Court to grant an
20 interim order of stay of execution is to stop execution and ensure that an Appeal, if successful, is not rendered nugatory. There must be established by evidence a serious and imminent threat of execution of the decree or order and evidence should be adduced to show that if the Application
25 is not granted, the main Application and the Appeal will be rendered nugatory.

In the instant case, the applicant seeks to stay an interlocutory order of the High Court. However, the applicant has not, in my view, adduced convincing evidence

of a serious threat of execution. See **Uganda Revenue Authority Vs East Africa Property Holdings Ltd Court of Appeal Civil Appeal No. 144 of 2014**. No evidence was adduced to show that a warrant of execution had been issued or had even been applied for. I accordingly find no justification for granting the order applied for. The Application is accordingly dismissed with costs to the respondent.

10 Dated at Kampala this^{5th} day of December 2017

Signed



15 **HON. JUSTICE S.B.K KAVUMA, DCJ**

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of a no. 227/17

REFRIGERATION INVESTMENT

Khode (U) LTD

- Annex of Journal

- GAD Balala a for

~~the application for~~
the registration

- Brian Kimmer for the

best of Supazora, a
- Rose director reports
the food company