

THE REPUBLIC OF UGANDA
COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION No. 366 OF 2015
(Arising from Civil Application No. 365 of 2015)
(Arising from Civil Suit No. 62 of 2013)

1. LAILA KAKA WALLIA

2. THE ADMINISTRATORS OF THE ESTATE OF :::::::::: APPLICANTS
THE LATE SUNDER KAKA WALIA

VERSUS

1. ZUBEDA MOHAMMED

2. SADRU MOHAMMED

::::::::: RESPONDENTS

BEFORE: HON. MR. JUSTICE CHEBORION BARISHAKI, JA (SINGLE JUSTICE)

RULING

This is an application for an interim order of stay of execution pending the hearing and determination of the substantive application of stay of execution, arising from the judgment of the High Court of Uganda at Mbarara in civil suit no. 62 of 2013.

The application is brought under Rules 2(2), 6(2)(b), 43 and 44 of the Judicature (court of Appeal Rules] Directions SI 13-10. The grounds of the application are set out in the notice of motion as follows;

1. The applicants have lodged a notice of appeal against the decision of the High Court No.062 of 2013 delivered on 18/8/2015 by his lordship Justice David Matovu.
2. The applicants have applied for and requested for a certified copy of the proceedings to enable it lodge an appeal and served a copy thereof on counsel for the respondents.
3. That the applicants have lodged the main application for stay of execution which is pending hearing.

4. That the applicants have been served with the decree and there is threat of execution before the hearing of the main Application as the Respondents have lodged a warrant of attachment and sale of immovable property belonging to the Applicant and execution may take place any time if this application is not granted.
5. There are special circumstances warranting the grant of an interim stay of execution.
6. There is a possibility of success on appeal in that the learned trial judge never considered at all the preliminary objection raised by the counsel to the effect that money was paid to the company and not the applicants and the applicants were wrongly sued.
7. That the estate of late Kaka and Laila Wallia who were shareholders in the company were not personally liable for debts of the company.
8. That the learned Judge erred in law when he based his argument on the so called pre-incorporation contract, which was not raised by parties in their pleadings nor argued at trial.
9. That the applicant's intended appeal will be rendered nugatory and the applicant shall suffer substantial loss if the interim stay is not granted which loss cannot be compensated for in damages.
10. That the respondents will not be prejudiced by the interim stay.
11. That it is fair, equitable and in the interest of justice that the orders sought are granted as it has been made without delay.

The above grounds are supported by the affidavit of one Jonny Wallia who is stated to be one of the administrators of the estate of the late Kaka Wallia the defendant in High Court civil suit no. 62 of 2013, and the affidavit expounds on the grounds set out in the Notice of Motion.

A supplementary affidavit was also sworn by Nyamwija Mary, an advocate with Butagira and Co. Advocates and filed in this court on 1st December 2015. The supplementary affidavit gives reasons why Civil Applications No. 77 of 2015 and 78 of 2015 for stay and interim stay of execution of orders in Civil Suit no. 62 of 2013 respectively have not been heard.

In paragraph 3, Ms. Nyamwija deponed that the Assistant Registrar lost his father and he has not been able to handle the applications. As a result, there is likely to be a delay in hearing and determining the applications in the High Court. Further, that execution of the decree in civil suit no. 2 of 2013 is at an advanced stage as a warrant of attachment and sale has been lodged with Court. A copy of the warrant was attached as annexure "B". In addition to the above, taxation of costs had been concluded and that if this Application is not heard and determined by this court, execution of the decree will take place and the applicants' substantive application and the appeal will be rendered nugatory.

At the hearing of this application, Mr. Butagira appeared for the Applicants. Neither the Respondents nor their counsel were present because they had not been served. Mr. Butagira applied to court for the application to be heard *ex parte*. He referred to the supreme court decision in. **Lawrence Musiitwa kyazze vs. Eunice Businje [supreme court civil application no. 18 of 1990]** which was cited with approval by this Court in **Miscellaneous Application No. 105 of 2014 Haji Ali Cheboi vs Kiroko Mesulamu** at page 5 thus ;

*"The practice that this court should adopt, is that in general application for a stay should be made informally to the judge who decided the case when judgment is delivered. The judge may direct that a formal motion be presented on notice [or under O XLVIII rule 1.], after notice of appeal has been filed. He may in the meantime grant a temporary stay for this to be done. The parties asking for a stay should be prepared to meet the conditions set in order XXXIX rule 4[3] of the civil procedure rules. The temporary application may be *ex parte* 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 XXXIX Rule 4]3]. However, there may be circumstances when this court will intervene to preserve the status quo. In cases where the High court has doubted its jurisdiction or has made some error of law or fact, apparent on the face of the record which is probably wrong, or has been unable to deal with the Application in good time to the prejudice of the Parties in the suit property, the application may be made direct to this court. It may however be that this court will direct that the high court would hear the application first, or that an Appeal be taken against the decision of the High court, bearing in mind the interests of the Parties and the costs involved. The aim is to have the application for stay speedily heard and delays avoided”.

Counsel submitted that this was an urgent matter where court should exercise its discretion and proceed ex parte. The urgency of the matter was the eminent danger of execution as evidenced by the warrant of arrest and imprisonment served upon the applicants herein.

I accept the submission by Counsel for the Applicant's that this matter requires urgent attention. The applicants first filed the applications for stay of execution in the High court in Mbarara; one for stay of execution and the other for an interim order of stay. Before they could be heard, the registrar who was to handle the same lost his father. The respondents were then on the 15th December 2015 served with a notice to show cause why a warrant of arrest and imprisonment should not be issued against them. The said notice is signed by the Assistant Registrar. It would have been prudent for the Assistant Registrar to fix the application for an interim stay of execution to be heard soon instead of issuing the Notice to show cause why arrest and imprisonment should not be ordered.

Rule 2(2) of the rules of this court gives court discretion to make such orders as may be necessary to achieve the ends of Justice see **Civil**

Application No.48 of 2015 Mayimuna Muye Amin vs. Metropolitan Properties.

In the present case, It was my finding that the applicants application was not heard at the High Court for unavoidable circumstances that were not within the control of the applicants. There is now an eminent danger of execution and the applications have not yet been heard and disposed of. In my opinion, it was in the interest of justice that the interim application should be heard immediately.

For the reasons above, I allowed the applicants to proceed with the application for interim stay of execution *exparte*.

It was the submission of counsel for the applicants that while the applicant had filed applications for stay of execution in the High Court at Mbarara and the applications had not yet been fixed for hearing, the same Court had on 15th December 2015 issued a Notice to show cause why warrant of arrest and imprisonment should not be issued and the applicant was ordered to appear in Court on the 17th December, 2015.

Counsel further submitted that a Notice of Appeal had been filed and a copy was attached to the application and marked "H". The applicants had also subsequently filed a substantive Application for stay of execution No. 365 of 2015.

Counsel contended that there was an imminent threat of execution as evidenced by the Notice to show cause why execution should not issue, served upon the applicants. Counsel relied on the decision of Justice Okello, JSC in ***Supreme Court Civil Application No. 19 of 2008 Huang sung Industries Ltd vs Tajdin Hussein & 2 Others*** and Court of Appeal ***Civil Application No.62 of 2014 Commissioner of Customs and Uganda Revenue Authority vs Kayumba Entity Ogane.***

He further submitted that the purpose of an interim order of stay was to preserve and protect the Applicants right of Appeal so that it is not rendered nugatory if the execution proceeds.

The law regarding stay of execution has been variously discussed in the Supreme Court and in this Court. ***In Huang Sung Industries Ltd vs. Tajdin Hussein and others Supreme Court Civil Application No. 19 of 2008*** , Court stated as follows;;

"For an application for 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. It is not necessary to pre-empt consideration of the matters necessary in deciding whether of not to grant the substantive application for stay"

In the case of ***Akright projects vs. Executive Property holdings and 12 others [supra]***, Justice Kitumba [JSC] held that:

"The court in addition to considering that a notice of appeal has been filed and that there is a substantive application has to consider whether there special circumstances to warrant such an interim order. An example of that would be the immediate destruction of the suit property"

In this particular Application, I am satisfied that the Applicant lodged a notice of appeal and requested for a record of proceedings. From the affidavit evidence on record, I am satisfied that there exists serious issues of law to be determined by this court on appeal.

The way in which this matter was handled by the High Court Registry in Mbarara did not only create delay but was peculiar. After obtaining Judgment the judgment creditors extracted the decree in civil suit No.62 of 2013, lodged a warrant of attachment and sale. The applicants then

- 7. applied for a temporary stay and interim stay of execution. Before the applications could be heard the Respondents then obtained a Notice to show cause why arrest and imprisonment should not be issued. In my opinion, it would have been prudent for the Court to first dispose of at least the application for interim stay of execution before issuing the notice to show cause why execution should not issue against the applicants.

Although the application for stay of execution had been filed, they were not heard. Had this been done, the notice to show cause could probably have not have been necessary.

I am therefore satisfied that there is a real threat to execute the decree before the disposal of the substantive application pending before this Court. If this is done, then the substantive application will be rendered nugatory.

For the reasons above, I allow the application and order that:

1] Execution of the decree in High Court Civil Suit No. 62 of 2013 is stayed pending the hearing and disposal of the main application for stay pending in this court.

2] Costs of this Application abide the results of the substantive Application.

Dated this ^{16th}.....day of December 2015


Hon. Justice Cheborion Barishaki, JA