

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISCELLANEOUS APPLICATION NO. 544 OF 2016

ARISING FROM CIVIL SUIT NO. 14 OF 2013

V.G. KESHWALA & SONS LIMITED:..... APPLICANT

VERSUS

RONALD MUSISI:.....RESPONDENT

RULING

BEFORE: HER LORDSHIP HON. JUSTICE EVA K. LUSWATA

1.0 Introduction and brief facts

1.1 The applicant proceeded by motion under section 98 of CPA and O. 52 rr 1 and 2CPR to seek an order for stay of execution of the decree and orders in Civil Suit No. 14 of 2013, pending determination of the appeal before the Court of Appeal and for costs to abide the result of the appeal. The grounds advanced are that judgment was delivered without notice to the applicant and that the respondent has already filed a notice of appeal to contest the decision of the learned Judge.

1.2 The parties were represented by Nambale, Nerima & Co., Advocates and M/S ABMAK Associates, Advocates & Legal Consultants respectively. Both counsel filed written submissions which I will put under consideration in this decision.

1.3 Keshwala V.G. the Managing Director of the applicant filed an affidavit in support of the application whose contents are noted and will be considered in my decision. No affidavit was filed in response to the application.

2.0 The law

2.1 The general principle is that where an unsuccessful party is exercising their unrestricted right to appeal, it is the duty of the Court to make such order for staying proceedings in

the judgment appealed from as will prevent the appeal from being rendered nugatory. See **Wilson Vrs Church (1879) Vol. 12 CH D 454** followed in **Global Capital Save 2004 Ltd & Another Vrs Alice Okiror & Another HCMA No. 485/2012,**

2.2 In **Lawrence Musiitwa Kyazze Vs. Eunice Busingye SCCA NO. 18 of 1990 (1992) IV KALR 55**, it was held that an application for stay of execution pending appeal is designed to preserve the subject matter in dispute so that the right of the appellant who is exercising his/her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

2.3 According to Order 43 rr.2 CPR, my Court being the Court that issued the decree, has powers to stay execution of an appealable decree if sufficient cause is shown and the time allowed for appealing against the decree has not expired. Conditions the Court should consider before allowing an application to stay execution, are given under Order 43 rr.4 (3) i.e-;

(i) That substantial loss may result to the applicant unless the order is made

(ii) That the application has been made without unreasonable delay and,

(iii) That security has been given by the applicant for due performance of the decree or order as may ultimately be binding upon him or her.

2.4 The Constitutional Court in her decision in **Hon. Theodore Ssekikubo & Others Vs. The Attorney General and Another, Constitutional Application NO. 06 of 2013** added other useful principles applicable to that Court. That the applicant must establish that their appeal has a likelihood of success and has presented the application with no undue delay. Court added that if the applicant has not shown an appeal with a likelihood of success which will be rendered nugatory or that they will suffer irreparable loss, then a consideration ought to be made where the balance of convenience lies

2.5 On the issue of whether there is an arguable appeal, Hon. Justice Mulangira J, in **Nalwoga Vs. Edco Ltd & Anor MA. NO. 07 of 2013** observed that; in such applications, the Court ought to review the proceedings but desist from prejudging the appeal or

interfering with the order of the court. That is the correct position for the purpose is only to preserve the status quo so that the appeal if successful, will not be rendered nugatory.

3.0 My decision

- 3.1** The main ground advanced by the applicant appears to be that they had no knowledge of the judgment. According to Keshwala, the applicant was never served with notice of the judgment and only received a letter from plaintiff's counsel dated 28/10/16, informing him of the decision. He immediately instructed his counsel to lodge an appeal which they did by lodging a Notice of Appeal on 9/11/2006. That in the meantime, the respondent applied for execution by attaching the applicant's motor vehicle which will be impossible to recover in the event the appeal is successful.
- 3.2** It was submitted for the applicant that the application was made within reasonable time from when they came to learn of the judgment. Also that, the decretal sum and likely costs are substantial, the appeal has a likely hood of success and since execution is imminent, there would be no means from recovering from the respondent in the event the appeal succeeds since he stated to be unemployed.
- 3.3** In response, Ronald Musisi stated that on 13/10/2016, judgment was entered in his favour for a sum of shs. 46,240,000/= and admitted that the applicant was notified of it on 28/10/16 and a demand made for payment, but ignored. That execution proceedings commenced on 9/11/2016 but the applicant sat on their rights and took no step to avert it, filling this application after inordinate delay. That the notice of appeal was filed out of time and as such, there is no arguable appeal on record, the applicant has neither deposited security for due performance of the decree nor shown that they will suffer irreparable damage. He confirmed that he has waited long to realize the fruits of his judgment, and there being no award of interest, the award will continue to lose value.
- 3.4** It was also submitted in response that the notice of appeal was filed out of time and thus offends the provisions of Rule 76 of the Judicature Court of Appeal Rules SI 13-10 (Court of Appeal Rules) and no extension was ever sought. The applicant has not satisfied the conditions under Order 43 CPR, they have not demonstrated how payment of

the award will occasion substantial loss to them, and the claim that the applicant will not be able to refund the money in case the appeal succeeds, is only speculative.

- 3.5** The established rule under Order 43 rr. 1 and 2 CPR that both counsel appear to agree with is that an appeal shall not operate as a stay of execution except where otherwise ordered by the Court. However I see nothing in the CPR or the Court of Appeal Rules that seems to suggest that jurisdiction of the High Court to stay execution can only be exercised where the applicant has filed a notice of appeal in accordance with Rule 76 of the Judicature (Court of Appeal) Rules (herein after referred to as the Rules). That rule would certainly apply to the Court of Appeal and not the High Court. That notwithstanding, according to Order 43 rr2 CPR my powers to stay execution of a decree can only be exercised if the application is filed before time allowed to appeal the decree has not expired. I am persuaded that the provisions of Order 43 CPR if not mandatory should be strictly followed. That position is grounded on the principle that the successful party should not without good reason be deprived of the fruits of a judgment in their favour.
- 3.6** Judgment in the matter was delivered on 30/9/2016 and the applicant had up to least 30/11/16 to have filed this application, which they did. There would be merit in the arguments that the notice of the appeal was filed outside the statutory period allowed in Rule 76(2) of the Court of Appeal Rules and the applicant did not seek an extension. In essence, there would be no substantive appeal upon which this application is based.
- 3.7** The above notwithstanding, the provisions of O.43 CPR do not appear to make the presence of a valid appeal a precondition for High Court to exercise its powers to stay execution. It is enough that the decree in question is one that is appealable and, the application is filed within the prescribed time. Again, it is not for this Court to pronounce herself on the validity (or lack of it) of the notice of the appeal. Under the Court of Appeal Rules, the mandate of the High Court is restricted to receiving, endorsing and then transmitting the notice to the Court of Appeal. The powers to strike out the notice are under Rules 82 of the Rules restricted to the Court of Appeal upon application of the respondent. There is no evidence here that such application has been made by the respondent. I would with respect therefore reject the corresponding arguments made for

the respondent and consider the merits of the application. The respondent is of course at liberty to challenge the notice of appeal at an appropriate time.

3.8 The mere absence of the applicant when the judgment was read, cannot be the basis to exonerate them from reacting to it in time. However, it is stated and not contested that the application had no knowledge of the judgment date and there would be credence to that allegation because it is shown in Annexure A to Keshwala's affidavit that, it is the respondent's counsel that notified them of the decision and made a demand for payment of Shs. 46,240,000/= in general damages. That being so, filling the application six days after the warrant of attachment was issued by the Learned Registrar, would not be unreasonable delay.

3.9 I am not prepared and in fact have no power to descend into the merits of the appeal. Further, the argument that the sum the subject of execution is not substantial could be negated. **In Tropical Commodities Suppliers Ltd and Ors Vs International Credit Bank Ltd (In Liquidation) (2004)2 EA 331**, Justice Ogola (as he then was),held that substantial loss does not represent any particular amount or size for it cannot be quantified by any particular mathematical formulae. It refers to any loss, great or small that is or real worth or value as distinguished from loss without a value or that which is merely nominal. It is shown in the application for execution filed by the respondent and part of the main record that the motor vehicle attached was valued at Shs. 55,000,000/=. That sum in comparison to the amount being claimed in execution would be a substantial loss in the event that the appeal succeeds after this application is denied.

3.10 It is my considered view therefore that the interest of this Court should be to preserve the status quo pending a decision on the intended appeal. In doing so, I am conscious of the fact that the respondent as the successful party and one who has waited since September 2016 to realize the fruits of his judgment should be equally protected in the event that the appeal fails. This can be achieved through enforcement of the mandatory requirement under Order 43 that execution is stayed only on condition that the applicant has before or

at the filing of the substantive application for stay, furnished due performance of the decree.

- 3.11** However, I am persuaded to take the liberal view taken *Tropical Commodities Suppliers Ltd & Others (supra)* that the security should be determined by the Court. Further, the comprehensive observations of by Justice Hellen Obura in her decision of **Global Capital Save 2004 Ltd & Another Vs. Alice Okiror & Another HCMA No. 485/2012**, is quite instructive. She made the observation that the more recent decisions appear to have modified the condition to mean furnishing security for costs only. See **Kampala Bottlers Ltd Vs Uganda Bottlers SCCA No. 25/1995** followed in **Global Capital Save 2004 Ltd & Another (supra)**. The reasoning being that the latter is more just and avoids the likelihood of stifling appeals, which are in general, rights created by Statute. Having said so, those decisions should not fetter the discretion of the Judge to allow the stay of execution with conditions that suit the circumstances of each case.
- 3.12** I perceive from the record that this application was filed before the bill of costs was formerly taxed. I would therefore have no basis on which to base an order for security for costs. However, it is indicated in the decree that an award of Shs. 46,240,000 was made and it is for that sum that execution was sought. Previous authorities seen indicate orders ranging between 10% to 14% of the decretal sum. See for example **Tropical Commodities Suppliers Ltd & Others (supra)** and **Global Capital Save 2004 Ltd & Another (supra)**. I am inclined to raise that percentage to accommodate a portion of the decretal sum and the costs that the respondent may stand to gain in the event that the award of the High Court is maintained, or for any other reason, the appeal fails.
- 3.13** I accordingly allow the application on condition that the applicants deposits a sum of Shs. 20,000,000/= in Court as security for costs to be payable within 14 days of the date of this order. Failing to do so, my order will lapse and the respondent shall be at liberty to proceed with execution of the decree.
- 3.14** Before I take leave of this matter, I note that the record of appeal is now ready (see Registrar's notice of 10/1/2018). Therefore, the applicant should have no excuse not to pursue their appeal, if they have not yet done so.

4.0 The costs of this application are awarded to the respondent in any event.

I so Order

EVA K. LUSWATA

JUDGE

06/7/2018