**THE REPUBLIC OF UGANDA,**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(EXECUTIONS & BAILIFFS DIVISION)**

**MISCELLANEOUS APPLICATION NO 2129 OF 2016**

**(ARISING FROM EMA NO 2128 OF 2016)**

**(ARISING FROM COMMERCIAL COURT MA NO. 260 OF 2016)**

**(ARISING FROM CIVIL SUIT NO. 232 OF 2016)**

**INFINITY TELECOM UGANDA LTD}.......................................................APPLICANT**

**VS**

**ECO BANK UGANDA LTD}**

**AFRICELL UGANDA LTD}.................................................RESPONDENTS**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant applied for an order of stay of execution restraining the Respondents, their agents and or servants from executing the ruling and orders and warrant in execution in Miscellaneous Application No. 260 of 2016 pending disposal of the intended appeal from the said the judgement/decree in the Court of Appeal.

One of the grounds of the application is that the Applicant is dissatisfied with the ruling and orders of the trial judge in Miscellaneous Application No. 260 of 2016.

When the application came for hearing, the Applicant was represented by Counsel Tumuhimbise Johnson Njoki while Counsel Andrew Mauso represented the Respondent.

On perusal of the application, I noted that the attached order signed on 29th September 2016 does not have any order capable of execution and I requested Counsel to make comments about this fact. The Applicant’s Counsel submitted that the court has inherent powers under section 98 of the Civil Procedure Act, section 33 of the Judicature Act cap 13 laws of Uganda and article 126 of the Constitution of the Republic of Uganda to make such orders as are necessary for the Applicant to enjoy a stay of execution pending appeal. The Respondent’s Counsel opposed the application and submitted that the court has no jurisdiction to grant an order of stay of execution when the powers being exercised by the Respondents are under a mortgage deed and not pursuant to an order of foreclosure by a court.

I have carefully considered the order of honourable Lady Justice Jane Alividza in Miscellaneous Application Number 260 of 2016 arising from High Court civil suit number 332 of 2016 between the same parties. The order was issued on 29th of August 2016 and reads as follows:

1. The injunction automatically lapses on 30th September, 2016 at 5 PM.
2. Joint scheduling memorandum to be filed by 30th September, 2016.
3. Mediation report to be filed by 30th of September 2016.
4. Hearing of the suit is adjourned to 13th of January 2017 at 10 AM.
5. The parties should file their respective witness statements by 13th of January 2017."

By 30th of September 2016, it is clear from the above order that the injunction lapsed. The Applicant’s application was filed on 5th October 2016 after the injunction had lapsed. There is therefore no order that is capable of execution in the above order and the court cannot act as an original court to grant a fresh order. The execution and bailiffs division of the High Court ordinarily implements or deals with matters arising out of execution of court orders or decrees which are capable of execution. The injunction was moreover in favour of the Applicant and lapsed. There is no order of judgment against the Applicant.

The Court has no jurisdiction to stay any action by private juridical persons unless there is a positive order of court for something to be done or enforced. Even if the injunction was refused, the court has no power to stay a negative order of dismissal of the injunction. In **Exclusive Estate Limited vs. Kenya Posts and Telecommunications Corporation and Another [2005] 1 EA 53 (CA)** it was held by the Court of Appeal of Kenya that stay of execution envisaged under rule 5 (2) (b) of the Court of Appeal Rules of Kenya is the execution of a decree capable of execution in any of the methods stipulated under the equivalent of our section 38 of the Civil Procedure Act. The Court further held that a decree holder as defined under the Civil Procedure Act means a person in whose favour a decree capable of execution has been passed. In that case the order which had been made dismissed the suit and was a negative order in that it was not capable of execution. It was held that a negative order can only be set aside by the appellate court. Section 38 of the Civil Procedure Act provides for the various modes of execution in the following words:

“

1. by delivery of any property specifically decreed,
2. by attachment and sale, or by sale without attachment, of any property,
3. by attachment of debts,
4. by arrest and detention in prison of any person,
5. by appointing a receiver,
6. in such manner as the nature of the relief granted may require.”

It envisages an order which is not yet implemented or executed and which is capable of execution. For the order or decree to be satisfied, the judgment creditor or an officer of the court such as a bailiff must force or compel the judgment debtor or 3rd party such as the Garnishee using any of the modes provided for under section 38 of the Civil Procedure Act to implement the order or decree. In the case of **Mugenyi and Co. Advocates vs. National Insurance Corporation Civil Appeal No 13 of 1984 Reported in [1992 – 1993] HCB 82,** the Court of Appeal held inter alia that under Section 2 of the Civil Procedure Act an order of dismissal of a suit for default is not a decree and accordingly the Respondent who was the Applicant in the High Court was not a decree holder and thus there was a valid objection to an order for stay of execution pending hearing a suit. Similarly an injunction can only be set aside by an appellate court since its operation commences immediately it is issued or notified and cannot be stayed as it can only in effect be set aside by a court having jurisdiction on appeal.

Lastly, where there is no order, the court has no jurisdiction to apply any of the modes of execution or stay the execution.

In the premises there is no order of court that is capable of execution and the application for stay of execution lacks merit and is accordingly struck out with costs.

Ruling delivered on 27th of September 2017

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Counsel Tumuhimbise Johnson Njoki

Basil Bataringaya Director of Applicant in court

Counsel Andrew Mauso for the Respondent

Rose Obote: Court Clerk

**Christopher Madrama Izama**

**Judge**

**27th September 2017**