

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. APPLICATION NO. 092 OF 2023

(ARISING FROM HCCS NO. 432 OF 2018)

STANBIC BANK UGANDA LIMITED.....APPLICANT

VERSUS

CHRISTIAN RURAL EYESIGHT PROMOTION LIMITED.....RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This is an application by Notice of Motion under section 98 of Civil Procedure Act Cap 71, section 33 Judicature Act Cap 13 and O. 52 of the CPR SI 71-1 seeking for the following orders that;

- a) The execution of the judgment of court in HCCS 432 of 2018 be stayed pending the hearing of the Appeal filed in the Court of Appeal.
- b) The costs of this application be provided for

This application is supported by the affidavit of Priscilla Nakalembe, the Applicant's Legal Manager in this application and the grounds briefly are that;

1. That the applicant filed an Appeal to the Court of Appeal against the Judgment in HCCS No. 432 of 2018.
2. That the applicant shall suffer irreparable damage/loss if the Judgment is executed, and its appeal shall be rendered nugatory.

3. That the applicant is ready and willing to abide by the terms of the stay of execution of the Judgment that the court may impose.
4. That application has been brought without any unreasonable delay and is in interest of justice.

The respondent opposed the application through an affidavit of Waburoko Kizito Micheal contending that;

1. The application stay of execution filed by the applicant is without merit and is intended to further delay the respondent's access to money intended to offer a service to the vulnerable community in whose eye sight is deteriorating each day they are not attended to.
2. That the applicant is guilty of dilatory conduct and has simply been awakened by the process commenced by the respondent to realize fruits of her Judgment.
3. That the decree against the applicant is a return of funds to the respondent which was wrongfully dealt with by the applicant and therefore the applicant is not likely to suffer any loss.

The applicant was represented by *Rodney Nganwa* while the respondent was represented by *Pius Olaki*.

DETERMINATION

Whether the court should stay the execution of the decree?

The applicant's counsel argued that the grounds for grant of an order of stay are set out in Order 43 and the same grounds are re-affirmed in the case of **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.

The applicant contended that it will suffer substantial loss if the order of stay is not stayed and that the application has been brought without any unreasonable delay and that the applicant is willing to provide security for due performance of the order.

The applicant further argued that the appeal will be rendered nugatory if the application is not granted.

The respondent's counsel argued that the grant of stay of execution pending appeal is upon discretion of judge and the judge does so upon being satisfied that sufficient reasons/cause has been disclosed for stay of execution. Counsel cited the case of *Kyambogo University v Prof Isiah Omolo Ndiege* Court of Appeal Civil Application No. 341 of 2013 where court observed that; *In my view the law recognizes that not all orders or decrees appealed from have to be stayed pending appeal. It also recognizes a fact that an appeal may be determined without having to grant a stay.*

The respondent's counsel submitted that execution is a legal process and it cannot on the face of it be said to cause substantial loss. Substantial loss should only be taken to be loss cannot be set back.

The applicant has shown any substantial loss it will suffer apart from stating that it will suffer irreparable damages if the stay is not granted.

Analysis

The appeal which is the subject of this application is against the decision of High Court. In his decision, the trial judge decreed that the applicant erroneously paid out the money which was intended for the respondent organization without establishing the correctness of the person receiving the money.

It is the position of the law that once an appeal is pending and there is a serious threat of execution before hearing the appeal, the court intervenes to serve substantive justice. (See **HWANG SUNG INDUSTRIES LTD vs. TADJIN HUSEIN & OTHERS SCCA No. 79 of 2008**)

It is also true that not every decision of court ought to be stayed unless a substantial loss will occur. The appeal can be determined without the court having to grant a stay of execution. The exception should be only in circumstances where there is substantial loss that is irreversible. In this case I do not see how payment of money decreed by court would amount to a substantial loss. The nature of the loss which may be substantial would be such loss which may not be recoverable or reversed or would change the nature of the subject matter.

The nature of the loss the applicant alludes to is recoverable once the appeal succeeds in their favour. The applicant has not shown that the respondent organization is not able to pay back the said amount if succeeds on appeal. Therefore, whatever rights or money paid in execution is recoverable from the respondent and thus no substantial loss is likely to occur. Justice Madrama noted in the case of ***Transtrack Ltd v Damco Logistics (U) Ltd Miscellaneous Application No. 608 of 2012*** that “*substantial loss in the context of the applicant’s case must be loss that is not contemplated by the parties’*”

Secondly, this court does agree that the appeal will be rendered nugatory once execution is completed. The applicant can still argue their appeal successfully and will be able to recover any money paid in execution of the decree from the respondent unless they prove that the money once paid would never be recoverable which they have not pleaded or alleged. The appeal will not be dependent on whether the money has already been paid or not. But rather on serious points of law of whether the respondent had proved that their money had been wrongly intercepted, converted or diverted. An appeal does not operate as a stay of execution.

The party intending to appeal and is applying for a stay of execution should be able to persuade court that he will be unable to recover the sums he is required to pay if the appeal succeeds and this is major consideration upon which the court may order stay. ***See Baguma Paul T/A Panache Associates v Eng Karuma Kagyina HCMA No. 460 of 2020***

While exercising the discretion conferred under the law of stay of execution, the court should duly consider that a party who has obtained a lawful decree is not deprived of the fruits of that decree except for good and cogent reasons. So long as the decree is not set aside by a competent court, it stands good and effective and should not be lightly dealt with so as to deprive the holder of the lawful decree of its fruits.

Therefore a decree passed by a competent court should be allowed to be executed unless a strong case is made out on cogent grounds no stay should be granted. Where the stay is to be granted, it must be on such terms as to security so that the earlier decree is not made ineffective due to lapse of time.

In summary and for the reasons herein above, I am not persuaded that the applicant has satisfied grounds to warrant a stay of execution.

The application therefore fails and is dismissed with costs to the respondent.

I so order.

SSEKAANA MUSA
JUDGE
16th June 2023