

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS APPLICATION NO. 0221 OF 2022
(Arising Out of Civil Suit No. 445 OF 2014)

STIRLING CIVIL ENGINEERING LTD:.....APPLICANT

VERSUS

CHARLES BESIGWA:.....RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This is an application brought under Section 98 of the Civil Procedure Act, Cap. 71; and Order 43 Rule 4 (3) & (5) of the Civil Procedure Rules, S.I 71-1, seeking orders that Execution of the Judgment/Decree in civil suit No. 445 of 2014 or any other order therein or arising therefrom be stayed pending the disposal of the applicant's intended appeal to the Court of Appeal against the whole of the said Judgment/decree and that costs of this application be provided for.

The application was supported by the affidavit of Hasib Ur Rahman, a Senior Administrative Officer of the applicant whose grounds were briefly that the applicant intends to file an appeal and has since requested for the record of proceedings which have not yet been availed. The applicant would suffer irreparable loss since they will have nowhere to find the respondent refund the money. The applicant is ready and willing to furnish the court with security as will be imposed upon it by the court for the performance of the decree.

The respondent opposed this application on grounds that it was incompetent, bad in law, and abuse of court process. The applicant does not offer the applicant a valid basis for the grant of the orders of stay of execution and that the application does not meet any of the grounds for the grant of the orders of stay of execution.

The parties filed submissions that were considered by this court.

The applicant was represented by *Geoffrey Mutawe* while the respondent was represented by *Dr Akampumuza James*.

Whether the court should issue orders staying execution of the Judgment in Civil Suit No. 445 of 2014?

The purpose of an application of this kind is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his/her undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. See *Lawrence Musiitwa Kyazze vs. Eunice Busingye SCCA NO. 18 of 1990 [1992] IV KALR 55: DFCU v Dr. Ann Persis Nakate Lusejjere Civil Application No. 29 of 2003*

The conditions for granting a stay of execution pending appeal are mainly two;

- a. Whether there is an arguable appeal.
- b. Whether the appeal would be rendered nugatory if such application is not granted.

Order 43 Rule 4(3) of the Civil Procedure Rules provides the following conditions before an order for stay of execution is granted;

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
- (b) that the application has been made without unreasonable delay; and
- (c) that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her

Counsel for the applicant submitted that the applicant had already filed an appeal Civil Appeal No. 366 of 2022 before the Court of Appeal. Secondly the applicant contended that the respondent is a person from Ntugamo district of simple means with no capacity refund the money once execution issues or may not be traceable and the appeal may be rendered nugatory. The applicant also contended that the respondent has not made any professional undertaking to recover the decretal sum from the respondent in case the matter is overturned.

Analysis

The general rule is that an appeal does not operate as a stay of execution. The court does not deprive a successful litigant of the fruits of litigation, and lock up funds which prima facie he/ she is entitled, pending an appeal.

The principles under which applications of this nature are determined were well set out in the case of ***Kyambogo University vs Prof Isaiah Omolo Ndiege Civil Application No. 341 of 2013 (C.A) Justice Kenneth Kakuru JA (RIP)*** citing various decisions including the Supreme Court decision in ***Lawrence Musiitwa Kyazze vs Eunice Busingye Civil Application No. 18 of 1990*** restated the conditions for a stay of execution order as follows;

- I. That the Applicant must show that he has lodged an appeal which is pending hearing.*
- II. That the said pending appeal is not frivolous and it has a likelihood of success.*
- III. That there is a serious and imminent threat of execution of the decree and if not stayed the appeal will be rendered nugatory.*
- IV. That the application was made without unreasonable delay.*
- V. That the Applicant is prepared to give security due performance of the decree and;*
- VI. That refusal to stay would inflict greater hardship than it would avoid.*
- VII. The power to grant or refuse a stay is discretionary.*

No order for stay of execution shall be made under sub rule (1) unless the court is satisfied –(a) that substantial loss may result to the party applying for stay of execution unless the order is made;(b) that the application has been made without unreasonable delay; and (c) that security has been given by the Applicant for the due performance of the decree or order as may ultimately be binding upon him or her.

In this case, the Applicant has not demonstrated that the loss (if any) will not be capable of monetary atonement by the respondent. There seems to be a common

thinking among litigants that court can grant a stay of every decree as an automatic right by alleging substantial loss which is wrong. 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/order is not deprived of the fruits of that decree except for good and cogent reasons.

The substantial loss must be proved with cogent evidence in order for the court to be able to assess the impact and potential loss or handicap the organization will suffer. The applicant failed to show that they will not be able to recover the said monies if they succeeded in the appeal.

The inability of the victorious party to be able to refund the decretal amount in the event of a successful appeal is one of such special circumstances if proved. See ***Pan African Insurance Company (U) Ltd v International Air Transport Association [2008] UGCommC 24***

The applicant merely stated that the respondent lacked the capacity to refund the monies if the appeal was successful but led no evidence to prove the same. The nature of the appeal does not intend to overturn the entire judgment but rather disputes the award and intends to have the award reduced. The applicant ought to have led evidence to show this court that the respondent indeed lacks the capacity to refund the monies if the appeal is successful and that the said amount if paid to the respondent would affect the applicant's financial position in its business.

In the case of ***James Wangalwa and Anon vs Agnes Nalaika Cheseto (2011) e KLR court*** held that *"Substantial loss entails establishment of other factors which show execution will create a state of affairs that will irreparably affect the applicants' position in case the appeal is successful"*

The applicant has therefore failed to prove that irreparable loss will be suffered and the appeal rendered nugatory if the application is not granted. The applicant has not adduced any evidence to show that the respondent will not be able to restore it to the status quo ante if its appeal succeeds.

So long as the decree/order 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/order of its fruits. Therefore a decree/order 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. Otherwise every judgment debtor would file an appeal as a way of stopping the successful parties from enjoying the fruits of litigation.

With the above analysis, I hereby dismiss this application with costs.

I so order.

Ssekaana Musa
Judge
30th June 2023