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**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPLICATION NO.191 OF 2020**

*(Arising from Miscellaneous Application No. 190 of 2020)*  
*(Arising from Civil Appeal No.136 of 2020)*

10 **SURE TELECOM UGANDA LIMITED:.....:APPLICANT**

**VERSUS**

**BRIAN AZEMCHAP:.....:RESPONDENT**

**CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA**

**(SINGLE JUSTICE)**

15 **RULING**

This is an application for an interim order of stay of execution and effecting of the decision and orders of the Industrial Court made in Industrial Court Labour Dispute Appeal No.5 of 2017, which followed the dismissal of the Applicant’s Application for review in Miscellaneous Application No.165 of 2019. The interim order sought is to subsist until the final determination of the main Application for stay of execution. The application is brought by way of Notice of Motion under Rules 2(2), 42, 43(1), 50 and 51 of the Rules of this Court.

The applicant, a telecommunications services provider licensed to operate in Uganda, recruited the respondent on the 1<sup>st</sup> day of June 2012 as its Chief Consumer Officer in charge of marketing, on a four year contract which provided for early termination upon notice. The Respondent’s employment was terminated

5 on the grounds of unsatisfactory commercial performance. Being aggrieved, the Respondent sought legal redress from the Industrial Court which found in his favor. He was awarded USD 450,000 as general damages. The applicant applied for review of the decision of the Industrial Court and the same was dismissed. He then lodged an appeal in this Court against the said decision vide Civil Appeal  
10 No.136 of 2020, filed an application for stay of execution and this application.

The grounds in support of the application are contained in the Notice of Motion of the applicant and affidavit in support deponed by Ahamed Nkono, a Legal Officer of the Applicant. He also swore a supplementary affidavit on 10<sup>th</sup> September, 2020. Briefly, the grounds are that;

- 15 1. *The applicant on the 20<sup>th</sup> day of August, 2020 filed before this Court an application vide Civil Application No.191 of 2020, seeking for an interim order staying execution and effecting of the decision and orders of the Industrial Court in Industrial Court Labour Dispute Appeal No.5 of 2017, following the dismissal of the applicant's application for review in  
20 Miscellaneous Application No.165 of 2019 by the Industrial Court on the 13<sup>th</sup> day of March 2020 until the final determination of the main application vide Miscellaneous Application No.190 of 2020 for stay of execution.*
- 25 2. *Civil Application No.191 of 2020 is pending hearing and determination before this Honorable Court.*

- 5 3. The industrial Court on the 8<sup>th</sup> day of September, 2020 issued a Notice to show cause why execution should not issue arising from the Labour Dispute Appeal No.5 of 2017.
- 10 4. The applicant is now faced with imminent threat of execution as the respondent has continued and proceeded to take out execution proceedings against the applicant during the pendency of Civil Application No.191 of 2020.
- 15 5. Unless the orders prayed for by the applicant in Civil Application No.191 of 2020 are issued the respondent is likely to continue with the execution process it has commenced against the applicant.

15 The respondent opposed the application and filed an affidavit deponed by Brian Azemchap on 1<sup>st</sup> September, 2020. The grounds in opposition as set out in the affidavit of Azemchap are as follows;

- 20 1. That the notice to show cause why execution should not issue was fixed for the 19<sup>th</sup> day of July, 2019 and as such, there is no eminent danger of execution since no recent notice to show cause why execution should not issue has not been extracted.
- 25 2. That by 25<sup>th</sup> August 2020, the applicant had approximately six months in which they could have sought leave to amend the application for stay of execution or to have withdrawn the same and filed another relying on the notice of appeal but they chose not to do so.

- 5 3. That this application is a deliberate move by the applicant to deprive the  
respondent from realizing the fruits of the award in Labour Dispute Claim  
No.05 of 2017
- 10 4. The respondent is aware that Miscellaneous Application No.166 of 2019  
referred to as the substantive application was filed on the 9<sup>th</sup> day of July  
2019 pending determination of Miscellaneous Application No.165 of  
2019 and the same was fixed for hearing on various dates to with 14<sup>th</sup>  
August 2019, 22<sup>nd</sup> October 2019, 6<sup>th</sup> November 2019, 7<sup>th</sup> April 2020, 22<sup>nd</sup>  
July 2020 and 25<sup>th</sup> August 2020.
- 15 5. The aforementioned application was filed pending determination of the  
Applicant's Miscellaneous Application No.165 of 2019 for review of the  
award in Labour Dispute Appeal No.05 of 2017 that was fixed for hearing  
on 18<sup>th</sup> September, 2019
- 20 6. At the hearing of Miscellaneous Application No.165 of 2019, parties were  
given timelines within which to file their respective submissions to wit;  
Applicant by 27<sup>th</sup> September 2019 which they did not do until 6<sup>th</sup>  
December 2019 after the respondent had filed his on 19<sup>th</sup> November,  
2019.
- 25 7. Given the said series of events, the applicant was always reluctant to  
expeditiously prosecute her applications to attain her desired intentions;  
and it's further important to note it was the respondent's initiative to have  
the miscellaneous application No.166 of 2019 fixed for hearing on the  
25<sup>th</sup> day of August 2020.

5 8. That the applicant has not proved any damage they will suffer or that they are likely to suffer any irreparable damage.

9. That it is in the interest of justice that this Court dismisses the application with costs against the applicant owing to the fact that it is a mechanism meant to delay the respondent from executing a decree granted by Court.

10 At the hearing of the application, Mr. Livingstone Ojaku appeared for the applicant while the respondent was represented by Mr. Alex Baguma holding brief for Mr. Steven Mwanje. Counsel filed written submissions.

Counsel for the applicant submitted that the instant application satisfies the conditions required for the grant of an application for interim order which include that the applicant must have filed a competent notice of appeal, there must be a substantive application and a serious threat of execution. He referred to **Zubeda Mohamed & Anor V Laila Kaka Walia & Anor, Supreme Court Civil Reference No.07 of 2016**. He further submitted that there is a competent appeal and invited Court to look at annexure D1. As to whether there was a substantive application filed, he referred to Miscellaneous Application No.190 of 2020 for stay of execution.

Counsel submitted that following the award of USD 450,000 by the Industrial Court, the respondent commenced execution proceedings against the applicant by issuance of a notice to show cause as evidenced by annexure "B" to the affidavit in support of the motion. That the said process of execution was stayed in the interim pending the determination of the substantive application for stay

5 of execution but this order lapsed on the 25<sup>th</sup> day of August 2020 when the main application for stay of execution was dismissed having been overtaken by the decision of the Industrial Court when it dismissed the application for review. For this he argued that there was eminent threat of execution.

10 He submitted that there were exceptional and special circumstances which merited the application for stay being filed in this Court for example the applicant had already lodged a substantive appeal in this Court, secondly, the applicant had earlier filed an application for stay of execution before the Industrial Court but the Industrial Court instead of determining the substantive application for stay of execution of its orders, fixed the application for review of its decision and  
15 determined the same.

In reply, counsel for the respondent raised 2 preliminary objections to the application. Firstly, he contended that the application was improperly before this Court because Rule 42(1) of the Rules of this Court provides that whenever an application may be made either in the Court or in the High Court, it shall be  
20 made first in the High Court. He added that the appeal emanated from the Industrial Court which has concurrent jurisdiction with the High Court and no application for stay of execution pending appeal had been filed in the Industrial Court. Further that the affidavit in support of the application did not contain any exceptional circumstance justifying why the application was not first made in  
25 the High Court. He relied on ***Aids Health Foundation V Dr. Stephen Mirembe Kizito Civil Application No.147 of 2014*** for the proposition that applications of this nature should be brought before the High Court first.

5 Secondly that this application was incompetent because the affidavit in support  
of the application was commissioned by an advocate one Asodio Jordan Paul  
who had not renewed his practicing certificate. He relied on ***The Returning  
Officer of Iganga District & Anor V Haji Muluya Mustaphar Civil Appeal  
No.13 of 1997*** where Court held that an affidavit sworn before an advocate not  
10 in possession of a valid practicing certificate is invalid.

On the merits of the application, counsel contended that the applicant had not  
satisfied the grounds for grant of an interim order for stay of execution because  
there was no evidence that a substantive application had been filed. He further  
stated that there was no date for hearing the substantive application and a copy  
15 of the said application was never attached to the affidavit in support. He relied  
on ***Hon. Anifa Kawooya V Attorney General CAMA No.479 of 2011*** where  
Court stated that an interim order should be granted for well settled conditions  
and for a short time until a named day or further order of Court.

He argued that the applicant had not shown a real and imminent danger of  
20 execution because he relied on an old notice to show cause why execution should  
not issue which was not evidence of imminent threat of execution. He referred to  
***Mohammed Mohammed V Roko Construction Ltd, Supreme Court Civil  
Application No.23 of 2017***, where it was held that there must be actual threat  
of execution for an interim order of execution to be granted. He prayed that this  
25 Court dismisses the application.

5 In rejoinder, counsel for the applicant rejoined that the applicant had provided evidence showing existence of exceptional circumstances and sufficient cause for making and maintaining this application before this Court. He relied on **Yoramu Kasinde & Anor V Kihonde Samuel, Court of Appeal Civil Application No.259 of 2018** where Court stated that where there are exceptional cases, a  
10 direct application to this Court would be justifiable.

On incompetence of the affidavit in support of the application, counsel submitted that this issue was never pleaded by the respondent in his affidavit in reply and the same is not a point of law as envisaged by the law. According to counsel, such allegations by the respondent can only be ascertained by way of adducing  
15 documentary evidence that is not before this Court and Court cannot take judicial notice of the same. He relied on **Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (1968) EA 696** to say that preliminary objections cannot be raised in cases where a fact has to be ascertained.

On the contention that the applicant is not faced with imminent threat of  
20 execution, counsel submitted that the respondent in paragraph 14 of his affidavit in reply deposed that he was desirous of executing the decree and orders of the Industrial Court in Labour Dispute Appeal No.5 of 2017. Counsel invited Court to look at the decision of **SBI International Holdings AG (U) Limited V COF International Co. Limited, Court of Appeal Misc. Application No.183 of**  
25 **2018** to the effect that an interim order of stay of execution can be granted even where no execution has been commenced to protect the applicant's right of appeal.



5 The jurisdiction of this Court to grant a stay of execution is set out in Rule 6(2)  
(b) and Rule 2(2) of the Rules of this Court.

**Rule 6(2) (b)** provides that:

10 *“Subject to sub-rule (1), the institution of an appeal shall not operate to  
suspend any sentence or stay execution but the Court may in any civil  
proceedings, where a notice of appeal has been lodged in accordance with  
rule 76 of these Rules, order a stay of execution, an injunction, or a stay of  
proceedings on such terms as the court may think just”*

**Rule 2 (2)** of the Rules of this Court give this Court inherent powers to do  
whatever is necessary to attain the ends of justice and prevent abuse of process.

15 The respondent raised two preliminary objections.

He contended that the application was improperly before this Court because the  
applicant ought to have first made the application to the Industrial Court which  
has concurrent jurisdiction with the High Court and **Rule 42 (1) of the Rules  
of this Court** which is to the effect that whenever an application may be made  
20 either in the Court or in the High Court, it shall be made first in the High Court.

It is now settled law that this court and the High Court have concurrent  
jurisdiction in applications of this nature. The applications should first be filed  
in the High Court but where exceptional circumstances exist, they can be filed

5 straight in this Court. **See Kyambogo University v Prof. Isaiah Omolo Ndiege CACA No. 341 of 2013.**

The Supreme Court in **Lawrence Musiitwa Kyazze versus Eunice Busingye Supreme Court Civil Application No.18 of 1990** stated that for an application of this nature to be entertained directly by this Court without first being heard  
10 by the High Court, the following conditions must exist;

1. *There must be substance to the application both in form and content;*

*This Court would prefer the High court to deal with the application for a stay on its merits first, before the application is made to the Supreme Court. However if the High Court refuses to accept the jurisdiction, or  
15 refuses jurisdiction for manifestly wrong reasons, or there is great delay, this Court may intervene and accept jurisdiction in the interest of justice*

2. *This Court may in special and probably rare cases entertain an application for a stay before the High Court has refused a stay, in the interest of justice to the parties. But before the Court can so act it must  
20 be apprised of all the facts*

In **Yoramu Kasinde & Anor V Kihonde Samuel & Anor, Court of Appeal Civil Application No.259 of 2018**, it was held that Court must be supplied with all the necessary information if it had to allow the application being made first in this Court.

5 The reasons counsel for the applicant advanced as why he filed the instant application in this Court before the High Court were that the applicant had already lodged a substantive appeal in this Court vide Civil Appeal No.136 of 2020 and secondly, the applicant had earlier filed an application for stay of execution of the award and orders in Labour Appeal No.5 of 2017 before the  
10 Industrial Court vide Miscellaneous Application No.166 of 2019, pending the determination of the application for review of the said orders vide application No.165 of 2019. He added that instead of the Industrial Court determining the substantive application for stay of execution of its orders, the Court fixed the application for review of its decision and determined the same on 13<sup>th</sup> March,  
15 2020 and fixed the substantive application for stay for the 25<sup>th</sup> day of August 2020. As a result of fixing the substantive application for stay of execution beyond the date of the application for review, the disposal of the application for review rendered the substantive application for stay nugatory and moot.

20 These are exceptional instances which warranted a direct application to be made to this Court.

I therefore find that exceptional circumstances exist which permit this Court to hear and determine this application before the High Court does so.

Counsel for the respondent further submitted that the application was incompetent because the affidavit in support was commissioned by an advocate  
25 who had not renewed his practicing certificate.

5 In ***Bakunda Darlington V Dr. Kinyatta Stanley, Civil Appeal No.27 of 1997 (unreported)***, this Court while considering the provisions of section 2 of the Commissioners for Oaths (Advocates) Act stated that;

10 *“The Act itself states in clear terms that the commission must be issued to a person who is a practicing advocate which means a commission can only be in existence when the particular advocate to whom it was granted is in possession of a valid practicing certificate as required by section 10 of the Advocates’ Act.”*

The respondent did not provide evidence to enable Court satisfy itself on the claim that advocate Asodio Jordan had no practicing certificate.

15 **Rules 6 (2), 42 (2) and 43** of the rules of this court give wide discretion to this Court to grant interim or substantive orders of stay of execution for purpose of preserving the right of appeal.

In ***Zubeda Mohamed & Sadru Mohamed V Laila Kaka Wallia & Anor, Supreme Court Civil Reference No.07 of 2016*** which cited with approval  
20 ***Hwan Sung Industries Ltd vs. Tajdin Hussien and 2 others SCMA No. 19 of 2008***, the Supreme Court stated as follows;

25 *“Considerations for the grant of an interim order of stay of execution or interim injunction are whether there is a substantive application pending and whether there is a serious threat of execution before hearing of the substantive application. Needless to say, there must be a Notice of Appeal.*

5 See ***Hwan Sung Industries Ltd vs. Tajdin Hussien and 2 others SCMA***  
**No. 19 of 2008.**

In summary, there are three conditions that an applicant must satisfy to justify the grant of an interim order:

1. A competent Notice of Appeal;
2. A substantive application; and
3. A serious threat of execution.”

10 From the record, it is evident that the applicant has lodged a notice of appeal marked as “D1” attached to the affidavit in support of the motion. Secondly, the applicant filed a substantive application vide Misc. Application No.190 of 2020  
15 pending hearing and determination by this Court.

Counsel for the applicant submitted that following the award of USD 450,000 by the Industrial Court, the respondent applied for and commenced execution process against the applicant by way of issuance of a notice to show cause why execution should not issue against him. Further that the said process of  
20 execution was stayed in the interim pending the determination of the substantive stay of execution and the application for review of the award in the Industrial Court which interim order of stay lapsed on the 25<sup>th</sup> day of August, 2020 when the main application for stay was dismissed having been overtaken by the decision of the Industrial Court when it dismissed the application for review.

25 In paragraph 14 of the respondent’s affidavit in reply, he stated that he was desirous of executing a decree granted by Court. He went further and issued a

5 Notice to Show Cause why execution should not issue. The applicant attached a copy of the notice to the application as annexure "B".

I therefore find that the applicant is facing an eminent threat of execution of the decree.

I am therefore satisfied that the applicant has satisfied the conditions required  
10 for grant of an interim order of stay. I allow the application and make the following orders:-

1. An interim order is hereby issued staying the execution and or effecting of the decision and orders of the Industrial Court vide Industrial Court Labour Dispute Appeal No.5 of 2017 pending disposal of Miscellaneous  
15 Application No.190 of 2020 pending before this Court.
2. The Registrar of this Court is hereby directed to fix Miscellaneous Application No.190 of 2020 for hearing in the next 14 days.
3. The costs of this application shall abide the outcome of the substantive application for stay of execution

20 I so order

Dated at Kampala this 27<sup>th</sup> day of Oct.....2020.

  
**HON. MR. JUSTICE CHEBORION BARISHAKI**

**JUSTICE OF APPEAL**

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