

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS APPLICATION NO. 0440 OF 2022
(Arising Out of Civil Suit No. 480 OF 2016)

UGANDA REVENUE
AUTHORITY:.....APPLICANT

VERSUS

MOHAMMED
TUMUSIIME:.....RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This is an application brought under Section 98 of the Civil Procedure Act, Cap. 7; Section 33 of the Judicature Act, Cap. 13 and Order 43 Rule 4 (2) & (4) of the Civil Procedure Rules, S.I 71-1, seeking orders that an order for stay of execution be issued against the respondent and her agents staying execution and or any enforcement against the applicant in respect of the judgment in HCCS No. 480 of 2016 delivered on 12th July 2019 and ruling vide the Taxation Application No. 176 of 2019 (arising out of HCCS No. 480 of 2016) delivered on 13th April 2022 by this Honorable Court, until an appeal of the same is disposed and that costs of this application be provided for.

The application was supported by the affidavit of Bakanansa Hilda Walaga, an advocate in the applicant's legal department whose grounds were briefly that the applicant filed an appeal that was pending hearing and that the applicant would suffer irreparable loss and the appeal rendered nugatory if the same was not granted.

The respondent opposed this application on grounds that it was incompetent, vexatious, and frivolous and filed to frustrate him from harvesting the fruits of his judgment and prayed that the same be dismissed with costs.

The parties filed submissions that were considered by this court.

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.**

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 and conferencing notes before the Court of Appeal and the appeal has a high likelihood of success. In opposition, counsel for the respondent submitted that a mere glance at the memorandum of appeal showed that the appeal had no merit and no chance of success because the criminal charges brought against the respondent were dismissed for a lack of merit, and the state never appealed.

In the assessment of whether the appeal has a likelihood of success, this court ought not to delve into the merits of the appeal that is; prejudge the appeal but rather determine whether the appeal raises arguable points to be determined by

the court of appeal. The applicant raises grounds of appeal that show that a prima facie case has been established.

The applicant pleaded that it would suffer irreparable loss and that the appeal would be rendered nugatory if this application was not granted. The applicant contended that the respondent has no known source of income or assets equivalent to the sums awarded and that the respondent's whereabouts were unknown to the applicant which would make it hard to recover the amounts once the appeal was successful.

Counsel for the respondent denied these contentions and submitted that the applicant had not proved the respondent's incapacity to repay the monies to the satisfaction of the court.

Analysis

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.*

It is trite law that the duty and burden of proof lies on the Applicant because they are the ones who seek to get a decision of this court in their favour. **See Sections 101 and 102 of the Evidence Act. O.43 r 4(2) of the Civil Procedure Rules S1. 71-1** under which this application was filed provides thus;

“Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing from the decree, the court which passed the decree may on sufficient cause being shown order the execution to be stayed.”

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 the case of ***Kyambogo University vs Prof. Isaiah Omolo Ndiege Civil Application No. 341 of 2013 (C.A)***_Justice Kenneth Kakuru J.A (RIP) held as follows;

“there is no evidence whatsoever that there is an impending or imminent threat of execution, no such evidence was provided. No warrant of execution has been issued or even applied for....”.

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 respondent provided his address in paragraph 11 of the affidavit in reply which he stated was the same since the commencement of the head suit. By so doing, the respondent rebutted the applicant's allegation that they did not know his whereabouts. 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.

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
24th April 2023