

UGANDA / JUDGMENT

Falcon Estates Co. Ltd and Another v Hussein Bukenya and Others (Miscellaneous Application 112 of 2022) [2025] UGHCCD 79 (20 June 2025)

[2025] UGHCCD 79

COURT

HC: Civil Division (Uganda)

BEFORE

Acellam, J

CASE / FILE NUMBER

Miscellaneous Application 112 of 2022

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⁵ THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(civil Division)

MISCELLANEOUS APPLICATION NO. 112 OF 2022

AND

(ARISING FROM CIVIL SUIT NO. 93 OF 2017)

1. FALCON ESTATES CO. LTD

2. ZIZI NGAMUHAMED N KALU

BO ::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

- 1. HUSSEIN BUKENYA
- 2. HAMISTAKWA 15
- 3. HUSSEIN MUSOKE RESPONDENTS

RULING

BEFORE HON, JUSTICE COLLINS ACELLAM.

Brief Introduction.

The Applicant brought this application under section 98 of the civil Procedure Act, Order 52 Rule 1 Of the civil Procedure Rules and under section 33 Of the Judicature Act, cap. 13 (as amended) for an order for stay of execution of the judgment and decree of the High court delivered electronically on 21st February, 2022 and for costs of the Application. The Application is supported by the Affidavit of Hassan Alwi, a director in the 1st Applicant company containing the grounds of the application. 20 25

^G rounds of the Application'

The grounds in support of the Application as contained in the Affidavit in support of HASSAN ALWI dated 14th of March, 2022 and are as follows.

- 7) That judgment in H.c.c. S No. 93 of 2017 was delivered electronically by email on 27th February, 2022 and the counsel for the Applicant was as a consequence thereof not accorded an opportunity to instantly seek leave of court to appeal the said judgment and has therefore filed on 30

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application for leave to Appeal formally as required by law and a notice of appeal was also filed on 24th February.

- 2) That the Applicants are aggrieved by the judgment and orders made which did not put into consideration the Applicant's evidence tendered in court against the Respondents for contributory Negligence for which the court | appeal will be required to evaluate and arrive at a just decision and therefore court should grant an order staying the execution of the judgment and decree to preserve the Applicant's right of appeal'
- 3) That the Applicants are appealing against the judgment in H'C'C'S' No' 93 of 2017 which dismissed the counter claim and gave an excessive award of special damages, general damages and costs for which the Applicants feel aggrieved and if the order of stay of execution is not granted the Applicants will lose their right of appeal' 15
- 4) That the intended Appeal has arguable grounds that merit serious judicial consideration by the Appellate court and the grounds have high chances of success and therefore the status quo should be maintained pending hearing of the intended Appeal.
- 25

- 5) That this Application has been brought within reasonable time and the Applicants are not guilty of dilatory conduct.
- 6) That it is fair and equitable that the Application for an order of stay of execution be granted pending hearing of the Appeal'

Representation.

The Applicants were represented by Richard Mugenyi from M/S Kosolo & Khiddu Advocates.

I observe that this is an uncontested Application, an Interim Order of Stay of Execution was granted on the 17/7/2023, when the matter came up on 16/6/2025, counsel for the Applicants addressed this court orally and stated that the purpose of this Application is to preserve the status quo so that the Appeal is not rendered nugatory. That the Appeal has a high chance of success as

of Appeal will be asked to review the evidence as this was a case of Negligence where the Applicant's lorry was knocked from behind when stationary on Gulu - Kampala highway. Counsel prayed that the Applicants' right of appeal be preserved and this Application is granted.

Parties to this application were notified of the hearing of the application through ECCMIS on 15th May, 2025. However, at the hearing of the application on 16th June 2025, only counsel for the Applicant was present. The hearing proceeded in the absence of the Respondents and their counsel. Nevertheless, court will proceed to determine the application. 10

Issue,

whether the Applicants have satisfied all grounds to warrant the grant of the order sought.

Determination of Court.

Order 43 Rule 4 of the Civil Procedure Rules provide for stay by the High Court. Subrule (1) provides as follows.

- "An appeal to the High Court shall not operate as a stay of proceedings under a decree or order appealed from except so far as the High Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the High Court may on sufficient cause order stay of execution of the decree" 20
- Order 43 Rule (2) of the Civil Procedure Rules provide as follows' 25

"Where an application is made for stay of execution of an appealable decree before the expiration of 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,"

This Order presupposes that the court which passed the decree may for sufficient cause being shown order the execution to be stayed. In this case, the decree/order was passed by the High court at Kampala' 30

The law S

Every Judgment or decree of a court of competent Jurisdiction takes effect immediately upon pronouncement and every court has an inherent power to proceed to enforce such judgment or decree at once. A successful party is entitled to enjoy the fruits of justice immediately upon pronouncement. Courts

of law should not without good reason delay a successful party from enjoying the fruits of his or her judgment. However, the court may be moved by a party to halt the execution of the said decree.

The general principle is that where an unsuccessful party is exercising their unrestricted right to appeal, it is the duty of the Court to make such order for staying proceedings in the judgment appealed from as will prevent the appeal

from being rendered nugatory. (See for example, Wilson Vs. Church (1879) Vol. 12 CH D 454 followed in Global Capital, 2004 Ltd & Another Vs. Alice Okiror & Another HCMA No. 485/2012).

In 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.

I do agree with the Supreme Court decision in Francis M. Micah vs. Nuwa

Walakira (1992-93) HCB 88 that there is no specific provision enabling the High Court to grant a stay of execution of its decree pending an appeal.

The same Court advised however that such mandate is present through the inherent powers of Court, for example to preserve the status quo pending an appeal. In my view, that decision is reflected in Order 43 rule 4(2) in which every

court to which an application for stay of execution is filed, powers to stay execution of its decree is allowed, if sufficient cause is shown.

The conditions that the Court should consider before allowing an application to stay execution are given under Order 43 rule 4(3) as follows:

- (a) That substantial loss may result to the applicant 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 due performance of the $\$ \backslash \mathrm{mathsf{S}} \$$ decree or order as may ultimately be binding upon him or her or as the case maybe.

The Constitutional Court in Hon. Theodore Ssekikubo & Others Vs. The Attorney General and another, Constitutional Application NO. 06 of 2013 added another principle that the applicant must establish that their appeal has a likelihood 10 of success. That decision is instructive.

On the issue of whether there is an arguable appeal, Hon. Justice Mulangira J, in Nalwoga Vs. Edco Ltd & Anor MA. NO. 07 of 2013 observed that; in such applications, the Court ought to review the proceedings but desist from prejudging the appeal or interfering with the order of the court. That is the

15 correct position for the purpose of an order of stay is only to preserve the status quo so that the appeal if successful, will not be rendered nugatory.

I shall therefore go ahead to consider if each of the requirements in O.43 r 3 and the authority above have been complied with.

1) Whether the Applicant has lodged a notice of appeal.

In the case of Attorney General of the Republic of Uganda versus The East African Law Society & Another EACA Application No.1 of 2013, it was held that.

'A notice of appeal or memorandum of appeal is a sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases.

However, it is trite law that a notice of appeal is not by itself an appeal and cannot stop a successful party's right to enforce a decree obtained, even by 30 execution. An appeal is and does not operate as a stay of execution.

According to the instant Application, Judgement in H. C. C. S No. 93 of 2017 was delivered electronically on 21st February 2022. I observe that evidentially, there is a Notice of Appeal filed and received by court on the 24 /Feb/2022, there is also a Memorandum of Appeal received on court record on the 17/03/2022 clearly stating several grounds upon which they base their Appeal. Civil Appeal No. 72 of 2022 has been lodged thus this ground has been satisfied.

That the appeal is not frivolous and has a Likelihood of Success. S

The ordinary rule is that an execution of the decree need not be stayed pending an appeal unless the appellant shows good cause. A presumption lies in favour of the integrity of the proceedings of any court of general jurisdiction. The administration of justice rests largely upon the presumption of the law that a court, acting within its jurisdiction, has acted impartially and honestly, and with integrity such that a final judgment of a court of general and competent jurisdiction is always presumed to be right.

The court must be satisfied that the prospects of the appeal succeeding are not remote but that there is a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There should be a sound, rational basis, founded on the facts and the law, and a measure of certainty justifying the conclusion that the appellate court will differ from the court whose judgment has been appealed against. 20

The appeal will be considered frivolous if prima facie the grounds intended to be raised are without any reasonable basis in law or equity and cannot be supported by a good faith argument.

The applicants have provided court with a draft memorandum of appeal of the intended appeal to the Court of Appeal filed on the 17th/03/202 clearly showcasing the several grounds they base on to appeal against the whole decision of the High Court. Accordingly, I find this requirement satisfied.

Whether the Applicant will suffer substantial loss or that there is serious or imminent threat of execution.

Imminent threat means a condition that is reasonably certain to place the applicant's interests in direct peril and is immediate and impending and not merely remote, uncertain, or contingent. An order of stay will issue only if there is actual or presently threatened execution. There must be a direct and immediate danger of execution of the decree. There should be unequivocal evidence showing that unconditional steps as to convey a gravity of purpose and imminent prospect of execution of the decree, have been taken by the

respondent. Steps that demonstrate a serious expression of an intent include S extracting the decree, presenting and having a bill of costs taxed, applying for issuance of a warrant of execution and issuing a notice to show cause why execution should not issue. See Junaco (T) Limited & 2 others Vs DFCU Bank Ltd, Misc. Application No. 0027 of 2023

The applicants have not adduced evidence of this in the application.

The Court of Appeal in *Kyambogo University vs Prof. Isaiah Omolo Ndiege* Court of Appeal Civil Application No. 341 of 2013, held that one of the conditions to be satisfied in an application for stay of execution pending appeal is whether or not an Appeal will be rendered nugatory if a stay is not granted 15 and this depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible, whether damages will reasonably compensate the party aggrieved, or it is in the public interest to grant a stay.

- I have perused through the record; there is no evidence that the Respondents 20 have applied to court to execute the decree. There is no unequivocal evidence showing that unconditional steps conveying a gravity of purpose and imminent prospect of execution of the partial decree, have been taken by the respondents.
- Nonetheless, this court has to balance the interest of the applicant who is 25 seeking to preserve the status quo pending the hearing of the appeal so that his or her appeal is not rendered nugatory and the time that would take place when the actual threat arise in execution, there is an interim order already pending in court and as such, there must have been imminent threat of execution to warrant the Applicant to rush to court to obtain the order. It's on this basis that 30 I find this requirement satisfied.

The applicants have given security for due performance of the decree or order.

In granting an order of stay of execution pending an appeal, the court has to balance the need to uphold the respondent's right to be protected from the risk 35 that the appellant may not be able to satisfy the decree, with the appellant's right to access the courts. It is the reason that courts have been reluctant to order security for due performance of the decree. This requirement has been interpreted as not operating as an absolute clog on the discretion of the Court

⁵ to direct the deposit of some amount as a condition for grant of stay of execution of the decree in appropriate cases.

The applicants have not undertaken to furnish such security, yet the court has ^a duty in exercise its discretion to grant stay of execution of a money decree, to

balance the equities between the parties and ensure that no undue hardship is caused to a decree holder due to stay of execution of such decree. However, this being an uncontested Application, I see no reason to deny the Applicants this order as they are distinct entities that can furnish costs in case the Appeal is not in their favo u r. 10

In conclusion, the applicants have satisfied the majority of the essential requirements for the grant of an order of stay of execution pending appeal' consequently, the application succeeds and is granted with the following orders;

- 7. Execution of the judgment and Decree of the High court delivered electronically on 27th February, 2022 is hereby stayed pending the hearing and determination of the intended appeal' 20
- 2, No orders are made as to costs'
- 25 ISOORDER,

Dated this 2nd day of June 2025

30 COLLINS ACELLAM JUDGE

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