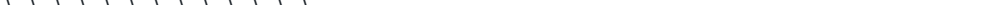


I.T. Office Uganda Limited v Tropical Bank Limited (Miscellaneous Application 617 of 2024) [2024] UGCommC 227 (4 June 2024)
[2024] UGCommC 227

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2 / 11

- [3] Subsequently, the applicant on or about 27th May, 2020 executed a sub-contract with M/s Roko Construction Company, supplemental to the main agreement made on 31st July, 2019 between M/s Shimizu-Kanoike Joint Venture and M/s Roko Construction Company based on *The International Federation of Consulting Engineers* (FIDIC) Agreement and Conditions, for the supply and compaction of natural gravel, being part of the main contract works in the execution of the Kampala Flyover Construction and Road Upgrading Project-Package 2. In order to finance that sub-contract, the applicant applied for further credit, seeking a sum of shs. 10,000,000,000/= At the material time the applicant had an outstanding mortgage obligation of shs. 5,700,000,000/= The respondent advised the applicant that the Regulator would not approve an additional loan to the applicant with an outstanding loan obligation. The respondent advised the applicant to obtain a financier to clear the outstanding loan, in order to pave way for the clearance of the shs. 10,000,000,000/= additional loan sought to refinance the applicant's business.
- [4] Accordingly, the respondent sourced a potential financier, M/s Prime Finance (U) Ltd and following several meetings over the matter, culminated in the respondent's officers issuing an irrevocable undertaking to M/s Prime Finance Company Ltd. on basis of which the latter remitted the sum of shs. 5,700,000,000/= to the applicant's account held with the respondent, which sum was debited by the respondent to retire the outstanding loan obligation, as a condition precedent to the refinancing of the applicant's business with shs. 10,000,000,000/= It is the applicant's case that the prospective sum was not paid by the applicant to the Judgement Creditor due to the respondent's breach of the agreement with the applicant which made it practically impossible for the applicant to pay the said sums whereof the respondent instituted a summary suit i.e. Civil Suit No. 683 of 2021 against the applicant and a decree was entered. There is a pending suit by

the applicant against the respondent in this court, being a Counter Claim in Civil Suit No. 1027 of 2020 in regard to the said claimed breaches by the respondent. In that counterclaim, the applicant, among other orders, seeks an order of specific performance.

The application;

- [5] The application by Notice of motion is made under the provisions of section 98 of *The Civil Procedure Act*, section 33 of *The Judicature Act*, and Order 52 rule 1 of *The Civil Procedure Rules.* The applicants seek orders that; - (i) the proceedings in Civil Suit No. 683 of 2021 and /or execution of the Decree be stayed until Civil Suit No. 1027 of 2020 in this Court is heard and finally disposed of; (ii) alternatively, the respondent be ordered only to attach the applicant's properties that are not in the respondent's possession and thus not part of the subject matter in Civil Suit No. 1027 of 2020.
- [6] It is the applicant's case that the decretal sum was availed to the applicant / Judgement debtor by the respondent /Judgement creditor as partial performance of an agreement whereof the respondent was supposed to remit a loan of shs. 10,000,000,000/= to the applicant, and yet the property sought to be attached in EMA No. 51 of 2024 i.e. Land

Comprised in LRV 3738 Folio 1 land at Makerere North Zone, Kibuga, Block 28 Plot 985 is among the applicant's several properties in possession of the respondent as security for the aforesaid loan on basis of which this court might grant an order of specific performance. Execution of the decree in Civil Suit No. 683 of 2021 directly affects the outcome of the applicant's Counter Claim in Civil Suit No. 1027 of 2020, whereby it collapses the applicant's claim of specific performance.

The affidavit in reply;

- [7] In the respondent's affidavit in reply, it is contended that the land comprised in LRV 3738 Folio 1 Kibuga, Block 28 Plot 985 at Makerere North Zone registered in the names of the Applicant is not the subject of HCCS No. 1027 of 2020, and its attachment in EMA No.0051 of 2024 shall not affect the out of HCCS No. 1027 of 2020. The application has no standing/basis in law, it is frivolous, vexatious and an abuse of court process, because it seeks to stay execution of decree in absence of any pending appeal or application for review. The applicant's alternative prayer is that the respondent should attach other properties of the applicant, other than the land now in issue. However, the applicant has not suggested any such other land, and the respondent is not aware of any such other land. At the moment, the only property available for attachment is the land now in issue.

Submissions of counsel for the applicant;

- [8] M/s Probata Advocates on behalf of the applicant submitted that the respondent seeks to execute a decree in Civil No. 683 of 2021 in respect of a judgment for 4th April, 2022. The respondent applied for attachment and sale of property comprised in LRV 3738 Folio 1 Kibuga Block 28 Plot 985 at Makerere North Zone plot 985, yet that property is the subject of a loan of shs. 10,000,000,000/=

Submissions of counsel for the respondent;

- [9] M/s Kaweesi & Partners Advocates, on behalf of the respondent submitted that the application is frivolous. The land is not security for the pending contract. There is no likelihood of specific performance being ordered. There are two different transactions; one is an overdraft of US \$171,139.20 which the applicant failed to pay leading to the filing of Civil Sui No. 683 of 2021 in respect of which a summary judgment was entered upon dismissal of application for leave to appear and defend. There was another transaction where the applicant owed the bank over 5 billion and they brought in a third party, which transaction failed and is the subject to Civil Sui No. 1027 of 2020. The earlier decree is now due to be executed. On the eve of the proceedings for NTC the application was filed pending 1017 of 2020. The decree has never been appealed as it stands the respondent should not be stopped by reason of the pending suit. There are two contracts in respect of which the applicant seeks specific performance. The land at Makerere is not among them.

The decision.

- [10] According to Order 22 rule 26 of *The Civil Procedure Rules,* where a suit is pending in any court against the holder of a decree of the court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided. A perusal of this rule would reveal that there should be simultaneously two proceedings in one or more Courts. One is the proceeding at the execution stage filed by the decree holder against the judgment debtors and the other proceeding is a suit filed by the judgment debtors against the decree holders. One suit should be proceeding in execution at the instance of the decreeholder against the judgment-debtor and the other suit pending at the instance of the judgment-debtor against the decree-holder. Further, the suits need not be pending in the very same court.
- [11] The stay of execution granted under this rule is directed at allowing for adjustment of claims or prevention of multiplicity of execution proceedings. It is intended to enable the judgment debtor and the decree holder to adjust their claims against each other as well as to prevent the multiplicity of execution proceedings. The grant of stay is discretionary and the same will have to be ordered with due care and caution. The application may be granted subject to conditions such as depositing in court security for due performance of the decree (see *Peter Mulira v. Mitchell Cotts, H. C. Misc. Application No. 715 of 2009*). Execution is stayed so

that the rights of the parties after the determination of the other suit can be adjusted.

- [12] Although in *Iddi Halfani v. Hamisa Binti Athuman [1962] EA 761* it was held that the rule imposes no condition regarding the nature of the pending suit such that all that the rule requires is that there shall be a pending suit, which in the absence of limiting words means any kind of suit, brought by the unsuccessful against the successful party in the earlier suit whose decree is to be execute, "Jurisdiction to stay execution of the decree under Order 21, Order 29 [*in pari materia* with our Order 22 rules 26] has to be exercised with great care and only in special cases" (see Mulla on "The Code of Civil Procedure" 15th Edition (1996), at page 1684). Exercise of the power of stay under this rule depends upon the facts and circumstances of each case.
- [13] The practice is that an order of stay in these circumstances is not granted simply because there is a suit pending in a court against the holder of a decree of the court in the name of the person against whom the decree was passed (see *Burnett v. Francis Industries plc [1987] 2 All ER 323; [1987] 1 WLR 802*). It is justified only where there are "special circumstances" and that it is "inexpedient" that the judgment be enforced, meaning that enforcement would be unjust (see *Canada Enterprises Corp Ltd v. MacNab Distilleries Ltd [1987] 1 WLR 813 at 818C*). Existence of the suit coupled with foreseeable difficulties in enforcing judgment on it if it succeeds, can amount to special circumstances. No hard and fast rule can be laid down in what cases stay would be granted or refused. Although the

power to grant stay is discretionary, yet it should be exercised on certain legal principles; so the question for consideration is not whether the Court has got the power to grant stay, but the manner in which the Court would ordinarily exercise its discretion vested in it by law.

- [14] When adjudicating an application under this rule, the court is required to consider; (i) the nature of the claim in the other pending suit; (ii) the extent of identity between

the defendant and the other party; (iii) the relationship (if any) between the claim giving rise to the judgment and the claim in the other pending suit; (iv) the strength of the claim in the other pending suit; (v) the size of the claim in the other pending suit; (vi) the likely delay before the claim in the other pending suit will be determined; (vii) the prejudice to the judgment creditor if a stay is granted; and (viii) the risk of prejudice to the party making the cross-claim if a stay is refused (see **Burnett v. Francis Industries plc* [1987] 2 All ER 323; [1987] 1 WLR 802*). The discretion must be exercised judicially and in the interests of justice and not mechanically and as matter of course. In general, the discretion to stay execution under this rule should be exercised sparingly, in the clearest of cases, on such terms as are considered just.

i. The extent of identity between the defendant and the other party.

- [15] There should be simultaneously two proceedings in the Courts. One is the proceeding in execution at the instance of the decree-holder against the judgmentdebtor and the other a suit at the instance of the judgment-debtor against the decree- holder. It is not enough that there is a suit pending by the judgment-debtor, it is further necessary that the suit must be against the holder of a decree against the judgment-debtor.
- [16] In High Court Civil Suit No. 683 of 2021 in respect of which a summary judgment was entered upon dismissal of application for leave to appear and defend, the parties are Tropical Bank Uganda Ltd, as plaintiff / Judgment Creditor while IT Office (U) Limited is the defendant/ Judgment debtor. On the other hand, in High Court Civil Suit No. 1027 of 2020 the plaintiff is M/s Prime Finance Company Limited, while both the applicant and respondent in instant application are named as the 1st and 2nd defendants, respectively in addition to two other defendants. The parties in the two suits therefore are not identical.

ii. The nature of the claim in the other pending suit.

- [17] The intended purpose of the rule is the prevention of multiplicity of proceedings and to ensure that the applicant can set off or wipe out any amount due by him or her towards any amount due to him or her from the respondent. This rule is based on the principle that the judgment debtor may not be harassed if he or she has a substantial claim against the decree holder which is pending for decision of the court executing the decree or another court. If the court is of the view that there is some substance in the claim, it may order for the stay of execution filed by the defendant in that case but not otherwise. There should not have been delay in the commencement of the other pending suit. All the circumstances of the case must be considered.

- [18] A paramount factor that the court considers is whether the other pending suit, if successful, would be rendered nugatory if the stay of execution is not awarded. A successful suit rendered nugatory means that the outcome of the suit is essentially not worth anything because the victorious applicant cannot be restored to his or her original position prior to the execution. The respondent's claim in High Court Civil Suit No. 683 of 2021 was premised on an outstanding overdraft in the sum of US \$177,523.10 while the applicant's counterclaim in High Court Civil Suit No. 1027 of 2020 is premised on alleged breach of contract upon the respondent's failure to process a loan of shs. 10,000,000,000/= in favour of the applicant against its irrevocable letter of undertaking to do so. The applicant seeks an order directing the respondent to specifically perform its obligation to the applicant and M/s Prime Finance Company Ltd by paying the latter a sum of shs. 6,800,000,000 and advancing to the former a loan in the sum of shs. 10,000,000,000/= all in performance of the irrevocable undertaking. The applicant further seeks a declaration that the respondent is in breach of contract and irrevocable undertaking, a declaration that the respondent breached its fiduciary duty by caveating the applicant's properties comprised in Busiro Block 550 Plot 628 at Bukerere and Busolo; Busiro Block 427 Plot 206 at Mangulu and LRV KCCA 531

Folio 22 Plot 19 Block Nakawa Division, Ismael Rise, not being part of the mortgage. An order vacating the caveats, an award of general damages, special damages of shs. 1,300,000,000/=: interest and costs.

- [19] I find that in light of the nature of the pending Civil Suit No. 1027 of 2020, the applicant's success therein will not be rendered nugatory or that it will not be possible to restore the applicant to its original position prior to the execution, by way of an award of damages. It is not evident that if successful, the applicant can set off or wipe out any amount due from it towards any amount due to it from the respondent. While the amount sought to be recovered by way of execution is already ascertained by judgment and decree as owing from the applicant, that sought by the applicant from the respondent can only result in creating an additional debt accruing to the respondent, not an offset.

iii. The relationship (if any) between the claim giving rise to the judgment and the claim in the other pending suit.

- [20] The decree sought to be executed ought to have a correlation with the pending suit, otherwise, the primary purpose of the provision will not be satisfied. The decree must be allowed to be executed, and unless an extraordinary case is made out, no stay should be granted. Even if a stay is granted, if there is no relationship between the claim giving rise to the judgment and the claim in the other pending suit, the stay must be granted on suitable terms, so that the earlier decree is not stifled. Where there is a risk that the other pending suit will prove abortive if the applicant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay. When the parties are closely connected and the claims advanced against one another arose out of the same transactions and occurrences and raise common questions of fact and law, the stay is more likely to be

granted. The applicant should be able to demonstrate factors that establish a real and substantial connection between the claims in the decree and those in the other pending suit.

- [21] A stay of execution pending another suit between the same parties will generally be granted where the execution would essentially render the other pending suit moot, or would substantially reduce, or have a material impact on, the issues to be determined in that other pending suit, such as where; it will destroy the subject matter of the proceedings; foist upon the applicant a situation of complete helplessness; render nugatory any order or orders of the Court; paralyse in one way or the other, the exercise by the applicant of his or her constitutional right to sue; or create a situation in which even if the applicant succeeds in his or her suit, there could be no return to the status quo; where the applicant can show that when money is paid, pursuant to a monetary decree, the respondent will be unable to refund it in a case the suit succeeds or; that the suit has great merit and to enforce the decree in the meantime will be ruinous to the applicant.
- [22] The decree sought to be executed herein arose from an overdraft. The other suit pending before this court seeks to secure further credit from the respondent in favour of the applicant. In none of the credit facility letter dated 24th May, 2018 and 27th May, 2020 is the land now in issue specifically mentioned as being security for the applicant's borrowing. Therefore, whether or not the order for specific performance is granted in H. C. Civil Suit No. 1027 of 2020, that order will not have no bearing on the execution of the decree in Civil Suit No. 683 of 2021 by way of attachment of the land at Makerere. I therefore find that securing a judgment in its favour in Civil Suit No. 1027 of 2020 will not be affected by execution for recovery of a purely monetary award in Civil Suit No. 683 of 2021. Execution of the decree will not stifle the applicant's ability to pursue its claim nor compromise the issues to be determined in Civil Suit No. 1027 of 2020.

iv. The strength of the claim in the other pending suit.

- [23] The likelihood or even possibility in law of the claim in the other pending suit being successful, upon the materials before court at the hearing of the application, must be a relevant factor in deciding whether the discretion should be exercised upon terms or at all. Suits of uncertain and speculative character should not be the basis of granting a stay of execution. A person should not be deprived of the fruits of his or her decree merely because suits of frivolous character are instituted and the other party is out after a further series of litigation.
- [24] A judgment creditor intent on frustrating or prolonging, for as long as possible, the execution of a decree, will approach the situation in multiple ways, including the filing of some frivolous claim in which weak, speculative and opportunistic claims are made against the judgment creditor on basis of which a stay of execution may then be sought. The court will not generally speculate upon the applicant's prospect of success, but may make some preliminary assessment about whether the applicant has an arguable case, in order to exclude a suit filed without any real prospect of success simply to gain time.

- [25] In the instant situation, the applicant will have to overcome the respondent's defence to the counterclaim to the effect that its officers acted without the requisite Board knowledge and approval; that they acted fraudulently, without authority and/or mandate when they issued the Letter of undertaking for the said sum in violation of the Bank's prevailing Credit Policy. In any event, it is an established principle of the law that an equitable remedy is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy, such as damages would be adequate to put the plaintiff in the position, he would have been but for the breach (see *Halling Manzoor v. Serwan Singh Baram, S. C. Civil Appeal No.1 of 2001*). There is therefore no prima facie likelihood of the success of the applicant's prayer for specific performance in H. C Civil Suit No. 1027 of 2020. The contract allegedly breached being one whose subject is that of lending money, any damage or loss incurred by reason of its breach once established can be adequately remedied by an award of damages. That remedy will not be compromised if execution of the decree in H. C Civil Suit No. 683 of 2021 goes ahead.

v. The size of the claim in the other pending suit.

- [26] One of the aims of this rule is to prevent the judgment debtor from being compelled to satisfy the decree by providing the sum due when it might be proved (after his or her claim against the decree-holder was finally determined) that on balance, he or she owed the decree-holder less than the decretal sum or nothing at all. The court should be mindful of the importance of the usual practice of staying the execution of judgments pending other proceedings in court where there is a risk that the respondent will be unable to repay the money without difficulty or delay if the other pending suit were to succeed.
- [27] If the applicant can show that the decree holder is insolvent and would fail to reimburse the decretal sum and pay damages to the applicant if the other pending suit were successful, then a stay of execution might be justified. Alternatively, if the monetary decree, if paid, would go to a foreign jurisdiction where recovery of the same might be difficult, that can also amount to special circumstances.
- [28] In the instant case, whereas the amount recoverable under the decree in H. C Civil Suit No. 683 of 2021 is ascertained at US \$ 177,523.10 as at the 31st July 2021 the claim by the applicant in H. C Civil Suit No. 1027 of 2020 is for yet to be ascertained since an award of general damages, is at the discretion of the court. The applicant has prayed for a sum of shs. 6,800,000,000 to be paid to M/s Prime Finance Company Limited and a further loan in the sum of shs. 10,000,000,000/= to be advanced to it. The applicant further seeks special damages of shs. 1,300,000,000/=, but those figures are at this stage speculative in light of the fact that such damages have to be proved and some are assessed by and entirely at the court's discretion. At this stage, the fact that the applicant will eventually be able to adjust his claim against the respondent as decree holder would be highly speculative.

[29] On the other hand, when it comes to decrees involving a pure monetary award, it is often more difficult to argue for a stay of execution of the same. In other words, the court will usually demand that the judgment debtor pays the judgment creditor the sum stipulated in the court judgment. This may be the case even if a large amount of money is involved. There is no evidence to show that the respondent as decree holder is insolvent and would fail to reimburse the decretal sum and pay damages to the applicant if the other pending suit were successful, nor that the monetary decree, if paid, would go to a foreign jurisdiction where recovery of the same might be difficult.

vi. The likely delay before the claim in the other pending suit will be determined.

- [30] A decree passed by a competent court should be allowed to be executed and unless a strong case is made out on a cogent ground no stay should be granted. It is a fundamental consideration that the decree has been obtained by the decree holder who should not be deprived of the fruits of that decree except for good reason. Until that decree is set aside, it stands good and it should not be lightly dealt with on the off-chance that another suit between the same parties might succeed. Such suits are also of a very precarious nature. The conditions preceding the court's order regarding a stay on execution of decree usually are that; the application has been made without unreasonable delay; the applicant might suffer from a substantial loss, unless such stay is granted; and security has been given by the applicant for the due performance of the decree. In the absence of any extraordinary circumstance the extraordinary relief under the provision should not be granted.
- [31] Besides that, the current status of case backlog of this court dictates that the likelihood of disposal of H. C Civil Suit No. 1027 of 2020 taking more than a year is more likely than not. In the event of the decision being appealed, final conclusion of the matter may take even much longer. On the other hand, having been entered

as a summary judgment, the decree sought to be executed is final since it has not been appealed and there are no proceedings pending for its review. By staying execution, the court will have preferred an outcome to be achieved over an indeterminate period in the future, over one that was finalised over two years ago.

- vii. The prejudice to the judgment creditor if a stay is granted.
- viii. The risk of prejudice, in the other pending suit, to the applicant if a stay is refused.
- [32] These two factors will be considered concurrently. The court has a discretion involving the weighing of considerations such as balance of convenience and the competing rights of the parties. By staying the execution of the decree, the decreeholder, has to be deprived of getting his or her fruits and realising the same. The court has to determine whether or not by staying execution of the decree, great injustice would be caused to the decree holder.

- [33] The applicability of Order 22 Rule 26 of *The Civil Procedure Rules* cannot be taken lightly and as a matter of right. Exercise of this power and discretion should be invoked only when an exceptional and extra-ordinary case is made out by the judgment-debtor. The applicant in this case has not demonstrated any foreseeable difficulties in enforcing judgment if it succeeds in the pending suit, yet on the other hand as much US \\$ 177,523.10 which was supposed to have been paid in full as at the 31st July 2021 is to-date still yet to be paid to the respondent. This, in my view, has caused great injustice to the decree-holder in H. C Civil Suit No. 683 of 2021 which will only be exacerbated by a grant of stay pending the disposal of H. C Civil Suit No. 1027 of 2020.
- [34] If at this point in time, the decree holder is still not able to enjoy fully the fruits of the decree and has to wait for a further indeterminate period for the conclusion of the proceedings in the pending H. C Civil Suit No. 1027 of 2020, it would cause grave injustice and constitute a mockery of justice. I have neither found "special

circumstances" nor that it is "inexpedient" for the judgment to be enforced. Enforcement of the decree would not be unjust to the applicant. Therefore, in my considered opinion the application for stay of execution of the decree must fail. It is accordingly dismissed with costs to the respondent.

Delivered electronically this 4th day of June, 2024Stephen Mubiru.....

Stephen Mubiru Judge, 4th June, 2024

Appearances

For the applicant : M/s Probata Advocates.

For the respondent : M/s Kaweesi & Partners Advocates.

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