

**Kasakambogo Group Limited v Kaitare
and 2 Others (Misc Cause No. 35 of 2021)
[2022] UGHCLD 178 (16 August 2022)**
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- *2. That the Applicant being dissatisfied with the Ruling and orders of the court filed a Notice of Appeal at the High Court and the court of Appeal Kampala which is meritorious and stand high chances of success.*
- *3. That the Applicant will suffer substantial loss if this application or if no order of stay of execution or injunction is granted pending the*

outcome of the appeal and that the Applicant's appeal will be rendered nugatory.

- *4. That the application has been filed before this honourable court without reasonable delay and the applicant is ready and willing to abide by the conditions set by this court for granting the order for stay of execution.*
- *5. That it is in the interest of justice that the orders sought in this application be granted by this honourable court.*
- [3] In the affidavit in reply by the Respondent, **Karamagi Simon** opposed the application contending that there is no evidence that the Applicant has filed an appeal in the court of Appeal, that it will suffer substantial loss or that there is a serious threat of execution from the Applicant to warrant the grant of this application.

Preliminary Objection

- [4] Counsel for the Respondent **Mr. Baryabanza Aaron** raised a preliminary objection that the Applicant in this application, "**Hoima Municipal Council**" is a none entity and that therefore the application is a nullity. However on my part, I find that the issue that the Applicant "**Hoima Municipal Council**" is now a none existent entity effective 1/7/2020 when it changed to "**Hoima City Council**" by virtue of its elevation of status, does not in my view render this application a nullity. The application has maintained the parties' names as per the original proceedings in **Misc. Cause No.001/2020**. Those were and are the rightful and legitimate parties. This preliminary objection is accordingly overruled.

Merits of the Application

- [5] The requirements for stay of execution are set out in **O.43 & 4(3) CPR** as espoused in the case of **Lawrence Musiitwa Kyazze Vs Eunice Businge S. C. Civil Application No.18 of 1990** and **Hon. Theodore Ssekikubo & Ors Vs A. G & Ors Constitutional Application No.03 of 2014** and they include;
- a) The Applicant must show that he lodged a Notice of Appeal.
 - b) That substantial loss may result to the Applicant unless the stay of execution is granted.
 - c) That the Application has been made without unreasonable delay.
 - d) That the Applicant has been given security for due performance of the decree or order as may ultimately be binding upon him.

1. Whether the Applicant lodged a notice of Appeal

- [6] On record, there is a Notice of Appeal dated 25th March 2021 filed in this court on 30/3/21 and received by the Court of Appeal of Uganda on 18th April 2021. In **Equity Bank (U) Ltd Vs Nicholas Were H. C. M. A No. 604/2013**, it was held that a Notice of Appeal is sufficient expression of an intention to file an appeal and that such action is sufficient to found basis for grant of orders of stay in appropriate cases.
- [7] In the premises, I find that the Applicant has satisfied and met the 1st condition for stay of execution.

2. Whether the Applicant is likely to suffer substantial loss unless this application for stay of execution is granted.

- [8] Counsel for the Applicant submitted that the Applicant is currently up graded as a higher Local Government unit that has not received funding to run its activities and that if this application is not granted, it will suffer substantial loss in terms of irregular cash flows. 2ndly, that the amount of money awarded in damages ie **Ugx 20,000,000/=** at an interest rate of 12% per annum is excessive in the circumstances and considering that the Applicant has filed an appeal in the court of Appeal

against the ruling and orders of the learned judge, it has very serious implications to the cash flows of the Applicant and to the tax payer which will affect delivery of services to the public.

- [9] As was observed in **Kyambogo University Vs Prof Isaiah Omolo Ndiege CACA No.341 of 2013** citing **Marine & General Mutual Life Assurance Society Vs Feltwill Feri Second Drainage Board [1945] KB 394**, execution of a court order would not be stayed simply because its execution would make it impossible for the Respondent to carry out their statutory duty.
- [10] Similarly in this case, execution of the court orders would not be stayed simply because the Applicant has not received funding to run its activities or that the orders of court have serious implications to the cash flows of the Applicant and to the tax payer which may affect service delivery to the public. These claims by the Applicant are speculative and lack proof. They cannot be a basis for denying the successful party from enjoying the fruits of his litigation.
- [11] As regards the amount of money awarded in damages being excessive or not, this is a ground of appeal but cannot be a ground for grant of an order of stay of execution. As Lubuva J. A observed in **Tanzania Cotton Marketing Board Vs Cogecot Cotton Co. SA (1995-1999) 1. E. A 312**,

"The word substantial cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence."

[12] In the instant case, the Applicant has not shown that the Respondent is a person who is incapable of refunding any decretal sum if the appeal is successful or if he is paid the sum in execution, the appeal will be rendered nugatory by that fact. I don't see the Applicant suffering any

loss by accepting the Respondent as a **Principal Treasurer** in accordance with the District Service Commission directives or the appeal becoming nugatory merely because the orders of court quashing the decision of the Applicant rejecting the appointment of the Respondent are executed. Once the appeal is successful, the Respondent shall have to definitely face the consequences and if the appeal is unsuccessful, the status quo shall merely be maintained.

[13] In the premises, I am unable to find that surely the refusal to grant the stay would inflict greater hardship than it would avoid. The Applicant has not shown in this case that it will suffer any loss by complying with the High Court orders or that the appeal shall be rendered nugatory if this application is not granted. The alleged imminent threat of execution raised by counsel for the Applicant in his submissions is not a ground for stay of execution pending appeal but an interim order of stay pending a substantive application; **Hwan sung Industries Ltd Vs Tajdin Hussein and Ors [2008] UGSC 17 and Kyambogo University Vs Prof. Isaiah Ndiege Omolo (Supra)**. I find that the applicant has not met the 2nd condition for grant of stay of execution.

3. Whether the application has been made without unreasonable delay.

[14] In the instant case, the impugned Ruling was delivered on 16/3/2021 and the Applicant filed a Notice of Appeal on 21/3/2021 together with the present application. In the premises, I find that the Applicant has filed the present application without any undue delay. The 2 nd condition has been met by the Applicant.

4. Whether the Applicant has a likelihood of success on appeal.

[15] Likelihood and probability of success was found in **Gapco (U) Ltd Vs Kaweesa & Anor H. C. M. A No. 259 of 2013 [2013] UGHCLD 47** to be that,

> "the court must be satisfied that the claim is not frivolous or vexatious and that there is serious question to be tried"

See American Cyanamid Vs Ethicon [1975] ALL ER 504.

For one to ascertain and determine whether the intended appeal is not frivolous and has a likelihood of success has to be guided by the grounds of appeal. In the instant case, it is apparent that the Applicant has not even formulated any grounds of appeal for no draft or intended memorandum of appeal has been attached to the application. As such, I am unable to ascertain the Applicant's claim that the appeal has a likelihood of success.

5. Whether the Applicant has given security for due consideration of the decree or order as may ultimately be binding upon him.

[16] O.43 r.4 CPR provides thus;

- *"4. Stay by High Court*
- *(1) An appeal to the High Court shall not operate as a stay of proceedings under a decree or order appealed from... but the High court may for sufficient cause order stay of execution of the decree*
- *(2) ...*
- *(3) No order for stay of execution shall be made under subrule (1) or (2) of this rule unless the court making it is satisfied-*
- *(a) ...*
- *(b) ...*
- *(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 **Gianfranco Manenthi & Anor Vs Africa Merchant Assurance Co. Ltd [2019] e KLR**, court observed:

"The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security...It is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails... the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of the decree is not a matter of willingness by the applicant but for the court to determine."

- [17] Court further observed that the issue of security is discretionary and it is upon the court to determine the same. It is worth noting that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.
- [18] In the instant case, the Applicant Town Clerk in **paragraph 8** of the affidavit in support committed the Applicant to be ready and willing to abide by the conditions set by this court for granting the order for stay of execution and I believe the conditions include payment of security for due performance of the decree or order. However, I do not find this matter a proper case where I should exercise the discretion of this court of its power to grant stay of execution for it does not appear equitable to do so since no evidence has been led that the

Applicant is likely to suffer any substantial loss unless this application for stay of execution is granted or that the appeal will be rendered nugatory if the application is not granted or that the intended appeal has a likelihood of success. The competing interests of the Applicant in exercising his right of appeal and the winning Respondent/plaintiff who has a right to the

fruits of his judgment in this case, the balance of justice weighs in favour of the Respondent.

- [19] In the case the appeal is to succeed, I find that the Appellant will be able to reap the benefits of the judgment on appeal since the Respondent by virtue of his employment with the Applicant Council is within reach and therefore the judgment sums and costs would be easily recoverable from the Respondent if the appeal succeeds.
- [20] I accordingly decline to grant the application. It is dismissed with costs to the Respondent.

Signed, dated and delivered at Masindi this 7th day of September, 2022.

Byaruhanga Jesse Rugyema JUDGE.

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