

UGANDA / JUDGMENT

Nzeyi v Menna (Civil Application 544 of 2024) [2025] UGCA 21 (29 January 2025)

[2025] UGCA 21

COURT

Court of Appeal of Uganda

BEFORE

Cheborion-Barishaki, JA

CASE / FILE NUMBER

Civil Application 544 of 2024

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 544 OF 2024

(Aising from High C S. No. 288 of 2011 and Misc Application No. 802 of 2024)

AMOS NZEYI APPLICANT

VERSUS

MENNA TEWAHADE. RESPONDENT

MR. JUSTICE CHEBORION BARISHAKI, JA

(SINGLE JUSTICE)

RULING

- [1] The Applicant brought this application under Rules 2, 6(2) (b) and 42(21 of the Judicature (Court of Appeal Rules) seeking for a stay of execution of the decree in HCCS 288 of 2011 and that the costs of this application be provided for.
- [2] The Applicant, Amos Nzeyi filed an affidavit in support of the Notice of Motion sworn on the 16th of September, 2024 amplifying the grounds upon which the application is premised. The grounds are briefly as follows;
 - a. The applicant filed an appeal raising substantial issues of law and fact with a high likelihood of success.

- b. The respondent is domiciled in the United States of America with no assets or business in jurisdiction.
- c. The respondent has threatened to execute the decree. If the execution of the decree is not stayed, the appeal will be rendered nugatory.
- d. The applicant's application for stay of execution before the High Court was dismissed on 9th September, 2024.
- e. This application has been hld promptly with sufficient cause and its grant will not occasion any prejudice to the Respondent.
- [3] The Respondent filed an affidavit in reply deponed by Menna Tewahade dated 7th October, 2024. T}e grounds in opposition briefly state;
- 1. That the underlying suit arose out of a share agreement pursuant to which I sold a-11 my shares in Innscor Uganda Limited to the Applicant at an agreed sum of US\\$ 450,000 (United States Dollars Four Hundred Fifty Thousand Only) out of which an initial payment of us \\$ 50,000 (United States Dollars Fifty Thousand) was made to me by the applicant.
- 2. That immediately prior to the sale, I was the Managing Director of the said company which inter a-lia run the Nandoo's Franchise in Uganda pursuant to a Franchise agreement.
- 3. That at the time of the saie of the shares, the Applicant was the majority shareholder in Innscor Uganda Limited and accordingly had the controlling authority.
- 4. That upon the sale I resigned as a Maraging Director of the said Company, a role which was taken up by Humphrey Nzeyi, son of the

Applicant, upon appointment of the same by his father the Applicant. At that time, the Company still held the Nando's franchise, and the company was a vibrant going concern.

- 5. That subsequent to selling the shares. I left Uganda and relocated to the United States of America on account of my sick wife who needed specialized treatment a fact which was known to the Applicant. The sale of my shares was principally to raise funds for my wife's treatment.
- 6. That I made demalds for payment of baiance oi the purchase price for the shares which the Applicant refused to pay.
- 7. That on the back of the applicart's refusal to settle the balance of the purchase price, I instituted Civil Suit No.288 of 201 1 seeking for the ba-lance of the purchase price. In his defense, the Applicant alleged that his refusal pay the balance was by reason of the franchise agreement being terminated by Nandos.

- 8. That by the time I sold my shares the Nando's franchise was still running and in any event Nandos was never a party to the Share Sale Agreement, and the franchise agreement was never cited in the share sale agreement. Accordingly, these are two independent agreements and completely unrelated.
- 9. That I am not aware of any proceedings, whether in Court or in arbitration between Nandos and Inscoor over the termination of the franchise agreement.
- 10. That the termination of the franchise agreement was way after I had left the Company and was, as set out in the letter of termination which was tendered in evidence by the Applicant, due to alleged material breaches by Inscoor. As above stated, the company was at the time being run by the Applicant's son.
- 11. That during the course of the proceedings in Civil Suit No.288 of 2011, the Applicant paid me an additional sum of US\$ 50,000 (United States Dollars Fifty Thousand) for the shares.
- 12. That the suit was determined on its merits, the Court finding the Applicant liable to pay me a sum of US\$ 230,000 (United States Dollars Two Hundred Thirty Thousand) and costs as set out in the Judgement.
- 13. That as a judgment creditor I am entitled to the fruits of my judgment which the applicant has at all times been determined not to pay.
- 14. That both this application and the appeal were filed mala fide as the Applicant's interest is in ensuring that I do not receive payment for the sale of my shares owing to the fact that under his watch, the company was way after my departure run down by his son Humphrey Nzeyi.

Representation

- [4] At the hearing of this application, Mr. Nelson Nerima appeared for the Applicant while Mr. Ernest Sembatya Kaggwa appeared for the Respondent. Both counsel filed written submissions which they adopted at the hearing.

Applicant's submissions.

- [5]. Counsel for the Applicant submitted that the appeal was filed without delay and it raises substantive grounds.

He further submitted that the applicant will suffer substantial loss since the Respondent by his own admission is an alien domiciled in Aurora, Colorado USA. That he has no assets within the jurisdiction of this court and no means of refunding the decretal sum if the appeal is successful. He added that the respondent was the registered owner of the shares and director in the Company. That the respondent has never transferred the suit shares to him despite receiving a substantial US\$ 100,000 deposit from the applicant. Further that costly proceedings will have to be filed to compel the respondent execute a transfer of the 1,710 shares paid for by the money decree, yet the respondent is an alien permanently domiciled out of jurisdiction.

[6]. Counsel further submitted that the appeal will be rendered nugatory if execution issues arise and that the remedy of restitution if the appeal is successful is not available because subsequent proceedings would have to be instituted against the respondent in the United States of America Courts to recover the decretal sum. He emphasized that there is no treaty between the USA and Uganda on reciprocal recognition and enforcement of judgments enabling recovery.

- [7]. On the issue of balance of Convenience, counsel submitted that the applicant has never taken the benefit of the respondent's shares and has no use for them. [8]. That it is unjust enrichment for the respondent to execute a money decree being payment for shares not transferred, not desired, and without underlying value of the Nandos Franchise. He added that the respondent was at liberty to sell his shares to a third party or deal with them in any manner he deems fit and that he was also entitled to, and had received dividends on his shares when the company returned a profit.
- [8] Regarding public policy, counsel submitted that if execution issues, the following travesties of justice will irredeemably occur; abuse of court process to evade tax due on the impugned sale of shares with no recourse for the public purse, evasion of VAT on costs, the applicant will be liable to stiff penalties for non-payment of the said taxes.
- [9] He emphasized the willingness to furnish further Security and prayed that the reliefs be granted.

Respondent's Submissions

[10] Counsel for the respondent submitted that for an application for stay of execution to succeed, the applicant must first show that he/she has lodged a notice of appeal in accordance with rule 72 of the Rules of this court. The other fact to which lodgment of the notice of appeal is subject, varies from case to case but include the fact that the applicant will suffer irreparable loss if a stay is not granted and that the applicant's appeal has a high likelihood of

success. He relied on Laurence Musilwa Kagame a Eunice Busungu, Civil Application No.78 of 1990 and China Hendi International Cooperation Ltd vs Insttts Kgabahua Court, OJ Appeal Civil Application No.700 of 2027 for the conditions required before an application of such nature can be granted.

- [11] Counsel for the respondent submitted that the applicant does not suggest, whether directly or remotely that the respondent wouldn't have the means to repay the Judgement monies in the unlikely event that the appeal succeeds. That in any event the appeal is frivolous and unlikely to succeed, secondly the Respondent not being a Ugandan is not something the Applicant has just discovered. He has known this for over 30 years and lastly that the Respondent is the holder of a decree in his favor and there is no suggestion in the Applicant's affidavit that the Respondent is impecunious and would not be in a position to refund the monies in the unlikely event that his frivolous appeal succeeds.

- [12] Counsel further submitted that in the unlikely event that this court is inclined to grant this application, the Respondent prays that the Applicant be ordered to deposit into Court the entire decretal amount being sum of US \$ 230,000 (United States Dollars Two Hundred Thirty Thousand Only) together with the taxed costs of UGX 25,000,000/= (Uganda Shillings Twenty-Five Million) within 7 days from the date of the Order
- [13] Counsel emphasized that the appeal is frivolous and unlikely to succeed for the reasons highlighted in the grounds above. He added that the balance of

convenience clearly lies in favour of the respondent who has deprived of the use of the purchase price for over a decade and who has pursued justice before the Court whose judgment has confirmed his entitlement to balance of monies owed.

[14] Counsel prayed that this honorable Court dismisses this Application with costs.

Applicant's submission's in Rejoinder

- [15] Counsel for the applicant emphasized the merits of the appeal and added that the respondent had not rebutted having already taken benefit of US \$ 100,000 from the applicant for no consideration. This represents 43% of the decree, a hefty sum constituting sufficient security for due performance of the decree. Further that there was no need for further security and that the applicant nevertheless undertakes to comply with any order to furnish security.

Court's Consideration

[16] I have carefully studied the Notice of Motion and the supporting affidavit and the affidavit opposing the application. I have also considered the submissions of both counsel and the authorities availed to this Court.

- [17] The jurisdiction of this court to grant a stay of execution is set out in Rule 6 (2) (b) of the Rules of this Court which provides that;

- 6. Suspension of sentence and stay of execution.
- (2) Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend an sentence or to stay execution, but the court may-
 - (b) 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.

- [18] The Rule gives this Court the discretion, to grant a stay of execution, however the discretion must be exercised on well-established principles.

The Supreme Court in *Hon Theodore Ssekikubo & Others os. The Attorneg General and Another*, Constltutlonal Appllcation No O6 oJ 2073 clearly re-stated the principles to consider before granting an order of stay of execution pending Appeal as follows:

"In order for the Court to grant an application for a stoA of exeantion;

- (1) The application must establish that his appeal has a tikelihood o1f success,' or o pimo facie case of his right to appeal
- (2) It must also be established that the Applicant u-till suffer ineparable damage or that the appeal u.till be rendered nugatory if a stay is not granted.
- (3) If 1 ond 2 aboue has not been establi.shed, Court must consider where the balance of conuenience lies.
- (4) That the Applicant must also establish that the application uas instituted tuithout delag. "

[19] The issue for determination by the Court is whether the Applicant has adduced sufficient evidence to justify the grant of a stay of execution.

Prima facie case with likelihood of success

12ol The Applicant stated in paragraph 6 of his affidavit in support of the application that the appeal raises serious triable issues that merit consideration by this Court. The Applicant attached the Memorandum of Appeal to his affidavit in support of the application, marked as annexure'A'.

[21] It is not the duty of t]ris court to pre-empt considerations of matters for the full bench in determining the appeal, but to determine whether the appeal is frivolous. In the instant case, the Applicant not only attached the Memorandum of Appeal but also laid out the questions for this court to determine in the appeal.

[22] It is therefore my considered view that the applicant has established that he has a prima facie case pending determination before this court.

Irreparable damage

[23] On whether the Applicalt will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted, the applicant averred in paragraph 8 of his affidavit in support of the motion that if execution is not

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stayed, he will suffer unrecoverable loss, and his appeal will be rendered nugatory.

pal h a persuasive decision of Ogoola, J (as he then was) in *Tropical Commodities Supplies Ltd & Others V International Credit Bank Ltd* (tn Llquidation), (2004) 2 EA 337, Court held as follows;

'Substantial loss though cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicants as the successful parties in the appeal. The loss ought to be of a nature which cannot be undone once inflicted.'

[25] The applicant averred in paragraph 7 of his affidavit in support of the motion that the respondent was an Ethiopian domiciled in the United States of America and has no assets within the jurisdiction of this Court. In counsel's view, the respondent will have no means of refunding the decretal sum if the appeal is successful.

[26] I note that the respondent is the holder of a decree in his favor, therefore, in the event that the appeal is successful, the respondent shall be in position to refund the monies.

[27] I agree with counsel for the respondent that payment of a judgment sum would not lead to any loss, substantial, or otherwise as to date the applicant

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remains in full control of the company and would have the shares the subject of the Share Sale Agreement.

[28] The applicant argued that the Respondent has no assets within the jurisdiction of this honorable Court, however, in paragraph 5 of his affidavit in support of the motion, he deposed that he was advised by his lawyers and verily believe them that execution for payment cannot issue when the suit shares are not transferred to him. This in my view would only mean that the applicant will have an alternative of taking these very shares in the event that the appeal is successful.

I am therefore, not satisfied that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.

The balance of convenience

[29] Counsel for the applicant submitted that the applicant had never taken the benefit of the respondent's shares and has no use for them. That it was unjust enrichment for the respondent to execute a money decree being payment for shares not transferred, not desired and without underlying value of the Nandos franchise.

[30] Having found above that the applicant will not suffer irreparable damage, I find that the balance of convenience lies in favor of the respondent who should not be deprived of the fruits of his judgment.

In the result, I decline to grant the stay of execution sought by the applicant in HCCS No.288 of 2011.

The application is dismissed with costs to the Respondent.

I so order

2-g ^u Dated at Kampala this day of 2025 ffigj

orion Barishaki

JUSTICE OF APPEAL

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