

**Okumu and 2 Others v Uganda Electricity
Transmission Company Limited
(Miscellaneous Application 60 of 2021)
[2024] UGHCCD 182 (16 October 2024)
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- a) An order for stay of execution of the decree in HCCS No. 49 of 2014 doth issue against the respondent until the final determination of Civil Appeal No. 18 of 2020 pending in the Supreme Court.
 - b) An order for stay of execution of the decree in HCCS No. 49 of 2014 doth issue against the respondent until the final determination of Civil Appeal No. 209 of 2019 pending in the Court of Appeal.
 - c) The costs of the application be provided for.
- [2] The grounds upon which the application is based are summarized in the Notice of Motion and also set out in the affidavit sworn in support by **Mr. Dison Okumu**, the 1st applicant. Briefly, the grounds are that the High Court

delivered judgment in HCCS No. 49 of 2014 in favour of the respondent, which judgment was upheld on appeal by the Court of Appeal in Civil Appeal No. 28 of 2017. Being dissatisfied with the decision of the Court of Appeal, the applicants filed an appeal in the Supreme Court vide Civil Appeal No. 18 of 2020. The deponent stated that the said appeal has a high likelihood of success as it raises very pertinent legal issues that warrant serious judicial consideration by the Supreme Court and which have significant bearing on Civil Suit No. 49 of 2014.

- [3] The deponent further stated that on 8th of February 2019, the learned taxing officer taxed the respondent's bill of costs and allowed at UGX 1,424,727,300/=. The applicants, being dissatisfied with the ruling of the taxing officer, appealed against the same to the Judge but the taxing master's award was upheld by the trial Judge. The applicants have since appealed the decision to the Court of Appeal vide Civil Appeal No. 209 of 2020. The deponent averred that both appeals have high likelihood of success. He further averred that the respondent had taken out a notice to show cause why execution should not issue creating a serious threat of execution against the applicants. He concluded that if the orders for stay of execution are not granted as prayed, Civil Appeal No. 18 of 2021 and Civil Appeal No. 209 of 2020 pending before the Supreme Court and the Court of Appeal respectively will be rendered nugatory.
- [4] The respondent opposed the application through an affidavit in reply deposed by **Ms. Catherine Wamukota**, the respondent's Principal Legal Officer, who stated that the application by the applicants has no merit and is misconceived. She stated that during the taxation hearing of the respondent's bill of costs on 26th June 2018, the parties agreed and consented to taxed costs amounting to UGX 26,481,000/= and the said sums are not subject of the pending appeal in respect of the taxed costs under HCCS No.49 of 2014. The deponent stated that based on the fact that the High Court and the Court of Appeal dismissed the applicant's claim, there is a high chance that the appeal to the Supreme Court will not be successful. She further stated that the appeal against the taxed costs will most likely be unsuccessful as the award of costs was upheld as reasonable by the High Court. The deponent also stated that in the event that the appeals lodged by the applicants are dismissed, the applicants have no known addresses or assets as to enable the respondent to

recover the taxed costs awarded to it. She concluded that if the court was inclined to stay execution pending determination of the appeals, the sum taxed and allowed as costs or a bank guarantee that is capable of satisfying the same should be deposited into court.

- [5] The applicants filed an affidavit in rejoinder whose contents I have also taken into consideration in the determination of this matter.

Representation and Hearing

- [6] At the hearing, the applicants were represented by **Mr. Bazira Anthony** from M/s Byenya, Kihika & Co. Advocates while the respondent was represented by **Mr. Edwin Ayebare** and **Ms. Specioza Tayebwa** from M/s H&G Advocates. The hearing proceeded by way of written submissions which were duly filed by both parties and have been adopted by the Court.

Issues for Determination by the Court

- [7] One issue is up for determination by the Court namely; *Whether the application raises sufficient grounds for stay of execution pending determination of Supreme Court Civil Appeal No.18 of 2020 and Court of Appeal Civil Appeal No. 209 of 2020?*

Consideration by the Court

- [8] The application was brought in accordance with Order 22 rules 23 and 26 of the CPR. Order 22 rule 23 provides as follows;

"When court may stay execution.

- *(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of the decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution of the decree, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued by the appellate court or if application for execution has been made to it.*
- *(2) ...*
- *(3) Before making an order to stay execution ... the court may require such security from, or impose such conditions upon, the judgment debtor as it thinks fit".*

[9] Order 22 rule 26 provides as follows;

***"Stay of execution pending suit between decree holder and judgment debtor.*"**

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".

[10] It is clear from the above provisions that the power to grant or refuse an order for stay of execution sought by a person against whom a decree or order was passed by the court is discretionary. In line with the decided cases, when exercising such discretion, the court will take into consideration the following factors;

- i) The applicant must show that they have a pending appeal or such other proceeding that is not frivolous and has a likelihood of success;
- ii) That there is a serious and imminent threat of execution of the decree and refusal to stay would inflict substantial loss or greater hardship than it would avoid, or the appeal will be rendered nugatory;
- iii) That the application was made without unreasonable delay;
- iv) That the applicant is prepared to give security for due performance of the decree.

See*: Kyambogo University v Prof. Isaiah Omolo Ndiege CACA No. 341 of 2013; Theodore Ssekikubo & 3 Others v Attorney General & 4 Others, Constitutional Application No. 6 of 2013* and *Gashumba Maniraguha v Sam Nkundiye, SC Civil Application No. 24 of 2015 [2015] UGSC 7 (23 April 2015)*.

[11] Both counsel made their submissions based on the above set out principles. I will deal with each of the principles respectively.

The appeal is not frivolous and has a likelihood of success

Submissions by Counsel for the Applicants

[12] Counsel for the applicants submitted that the applicants had filed an appeal in the Supreme Court vide SCCA No. 18 of 2020 and in the Court of Appeal vide Civil Appeal No. 209 of 2020. Counsel submitted that both appeals have a strong likelihood of success. Counsel stated that the appeal before the Supreme Court raises various evidential and legal issues which merit the court's consideration which include res judicata, non-joinder of parties, procedure and forum of challenging a consent judgment. Counsel further stated that the appeal at the Court of Appeal also raises very pertinent legal issues that warrant serious judicial consideration by the Court of Appeal and has a significant bearing on the taxation award in HCCS No. 49 of 2014. Counsel reasoned that should the Supreme Court find that the grounds of appeal are valid, all taxed costs and pending applications therein would automatically lapse. Counsel prayed that the Court finds that both appeals have a high likelihood of

success.

Submissions by Counsel for the Respondent

- [13] Counsel for the respondents submitted that the key question is whether the applicants have shown that the appeal raises issues which merit judicial consideration by the court. Counsel argued that the appeals are wholly without merit. Counsel stated that HCCS No. 49 of 2014 was rightly dismissed on grounds of locus standi, non-joinder and res judicata; which issues were further completely re-evaluated by a full bench of the Court of Appeal who agreed with the findings of the trial Judge. Counsel further stated that in the taxation appeal, the trial Judge rightly found that the learned Registrar was right to consider the compromised sum in computing instruction fees. Counsel concluded that the only reasonable deduction is that there is a high likelihood of both appeals being dismissed.

Determination by the Court

- [14] The pendency of Supreme Court Civil Appeal No. 18 of 2020 and of Court of Appeal Civil Appeal No. 209 of 2020 respectively is not in dispute. The argument by Counsel for the respondent is that both appeals have no likelihood of success. The test to be considered by the court to gauge the likelihood of success of an appeal was set out in **Junaco (T) Limited & 2 Others v DFCU Bank Limited*, HCMA No. 27 of 2003 [2022] UGCommC 100 (29 March 2022)* wherein the Court stated that 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. It ought to be apparent 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.
- [15] The court in **Junaco (T) Limited (supra)** went on to hold that an 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. If there is strong evidence showing that the appeal has no merit or that it was filed for delay or not in good faith, such an appeal will be considered frivolous. Other circumstances that may indicate a frivolous appeal include the applicant's conduct of prior litigation which may show that the appeal is merely part of a series of suits, applications and appeals over the same subject matter in which the applicant has engaged with no success or no chance of success; which factors could be used to establish the lack of merit in the present appeal or the bad faith of the applicant in filing the present appeal.

- [16] While taking into consideration the above test, the Court at the same time must bear in mind that it is not in the place of the trial court to pre-judge an appeal that validly lies before the appellate court. The trial court ought to be careful and only invoke the test in plain cases where its conclusions do not amount to pre-determining the appeal for the appellate court. It should be in circumstances where the court can see through the appeal and come to a conclusion that the same is frivolous or not brought in good faith and has no likelihood of success. The application of the test should not, in my view, involve assessment as to whether the appeal shall succeed on the merits, as such would amount to the trial court constituting itself as the court on appeal.
- [17] On the case before me, I find that the appeals lying in the Supreme Court and the Court of Appeal respectively have arguable points on appeal; going by the grounds in the memoranda of appeal attached to the affidavit in support of the application. A question could be raised as to why an application for stay of execution pending an appeal lying in the Supreme Court was filed in the High Court (the trial court). I note that none of the parties raised this matter. I however reckon the reason to be that an application for execution had been preferred in the High Court and the decree and order sought to be executed were of the High Court. My conclusion, therefore, is that the application is properly before the court and is capable of establishing that the pending appeals are not frivolous and have a likelihood of success.

There is a serious and imminent threat of execution of the decree and refusal to stay would inflict substantial loss or greater hardship than it would avoid, or the appeal would be rendered nugatory.

Submissions by Counsel for the Applicants

- [18] Counsel for the applicants submitted that it has been shown that there is a serious and eminent threat of execution of the decree in HCCS No. 49 of 2014 and that the applicants will suffer irreparable damages. Counsel stated that the respondent applied for execution of the orders of this court in EMA No. 60 of 2020 by way of attachment of debts and a notice to show cause was served on the applicants who appeared in court on 28th January 2021. Counsel further stated that the respondent seeks to attach UGX 1,424,727,300/= from money belonging to the applicants. Counsel submitted that the money sought to be attached as costs is subject of Civil Appeal No. 18 of 2020 arising from HCCS No. 49 of 2014 in which the applicants were challenging a consent order where by instead of having a taxation by the taxing master in the usual manner, the 5th respondent purported to enter into a consent with the 1st – 4th respondents; leading to a purported agreement for the 5th respondent to deduct an equivalent of 18% from the decretal monies

due to all the persons that were represented including the applicants, as legal fees. Counsel argued that the said order gave the 5th respondent a lifetime stake in the applicant's pension. Counsel further argued that, in any case, the taxed sums of UGX 1,424,727,300/= in favour of the respondent is not final and could be set aside by the court on appeal.

Submissions by Counsel for the Respondent

- [19] Counsel for the respondent submitted that in order for the court to grant an application for stay of execution, the applicant must prove that they will suffer substantial loss if the order was not granted. Counsel cited the case of **Nesco Services Limited v CM Construction (EA) Limited* [2019] eKLR* where the court cited with approval the decision in **Tropical Commodities Suppliers Ltd & 2 Ors v International Credit Bank Ltd (in liquidation)* HCMA No. 379 of 2003* to the effect that substantial loss does not represent any particular mathematical formula rather it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.
- [20] Counsel submitted that the applicants have not led any evidence to prove that if a stay is not granted and the decree is executed, the respondent an established corporation would have no reasonable prospect of satisfying any orders as to costs decreed by the Court of Appeal and Supreme Court in the unlikely event that the appeals succeed. Counsel stated that the applicants have no known address or assets to enable the respondent to fully recover the taxed costs of UGX 1,424,727,300/= should the appeals fail. Counsel further submitted that the applicants did not lead any evidence to show that the pending appeals will be rendered nugatory and prayed that the court finds that the applicants have failed to satisfy this ground of the application.

Determination by the Court

- [21] For the Court to determine whether or not substantial loss will be occasioned to a party, it is necessary to establish what, in law, amounts to substantial loss. It is the true position of the law that substantial loss need not be determined by a mathematical formula whose computation yields any particular amount. See: **Tropical Commodities Suppliers Ltd & 2 Ors v International Credit Bank Ltd (in liquidation)* HCMA No. 379 of 2003.* The Court, in that case, relied on the definition of the term "substantial loss" in Black's Law Dictionary, 6th Edition, page 1428 as "something of real worth and importance, not seeming or imaginary or illusive". The Court concluded that substantial loss does not represent any particular amount or size. It is thus a qualitative concept and refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal.
- [22] It follows, therefore, that determination as to whether a certain loss is substantial is a qualitative test and is to be determined by the context of each case. Also See: **Augustine Kasozi v Arvind Patel Misc. Application No. 503 of 2021**. In **Trans track Ltd v Damco Logistics*, HCMA No. 608 of 2012*, it was held that substantial loss in the context of a particular case must be loss that is not contemplated by the parties.

[23] I have also found as persuasive the holding in the authority I was referred to by learned Counsel for the respondent in **Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997**, cited with approval in **Nesco Services Limited v CM Construction (EA) Limited [2019] eKLR**, wherein the court stated as follows;

"It is a fundamental factor to bear in mind that a successful party is prima facie entitled to the fruits of his judgment; hence the consequence of a judgment is *that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant. ... For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss ..."*

[24] On the case before me, I have given due consideration to the argument by Counsel for the applicants that the money sought to be attached as costs is subject of two appeals; one in the Supreme Court concerning the substance of HCCS No. 49 of 2014 and another in the Court of Appeal concerning the taxation of the very costs that the respondent seeks to recover. The main argument for the applicants is that they are challenging a consent order in which it was purportedly agreed to deduct an equivalent of 18% from the decretal monies due to all persons represented by the beneficiary of the consent including the applicants as legal fees. It is argued for the applicants that the said order gave the said beneficiary a lifetime stake in the applicants' pension.

[25] It is not in my position to assess the merits of this argument as such is within the domain of the appellate court. Nevertheless, it is clear to me that in case of a possibility of success on that argument, refusal to grant the order of stay would occasion substantial loss to the applicants. I envisage that not granting the order would occasion more hardship to the applicants than it would to the respondent and it bears a possibility of rendering the appeals or any of them nugatory. By this finding I have also pronounced myself on the

question of balance of convenience; which I find to lay in favour of the applicants. These grounds are therefore made out and they succeed.

****The applicants are prepared to give security for due performance of the decree.****
Submissions

[26] Counsel for the applicants made no submissions on this ground but in paragraph 7 of the affidavit in rejoinder filed on 2nd June 2022, the deponent (1st applicant) stated that "... following the Supreme Court decision in Civil Application No. 35 of 2020, the applicants were ordered to pay security for costs in the sum of UGX 30,000,000/= before Civil Appeal No. 28 of 2017 could be heard. This money was deposited with the Registrar, High Court". The deponent attached a copy of the transfer form to the affidavit.

- [27] For the respondent, it was submitted by counsel that the respondent has expended huge sums of public funds in engaging lawyers to defend suits brought by the applicants that have all been dismissed with costs yet to be recovered from the applicants. Counsel stated that during taxation of the respondent's bill of costs in HCCS No. 49 of 2014, the parties agreed to and consented to a sum of UGX 26,481,000/=; which sum the applicants have also failed to pay. Counsel relied on the provision under Order 22 rule 26 of the CPR and the decision in **Kisaalu Joseph & Others v Nakitto Mayi & Another*, HCMA No. 105 of 2020* and prayed that the court makes an order for deposit of security by the applicants for due performance of the decree.
- [28] Counsel for the respondent argued that it was imperative in the present case for the applicants to deposit security since they have no known assets to which the respondent would resort if the appeals were dismissed. Counsel further stated that the said sum of UGX 30,000,000/= referred to by the applicants was security solely for the said SCCA No. 35 of 2020 and it is not legally tenable for the applicants to rely on the same sum as security for performance of the decree in HCCS No. 49 of 2014.

Determination by the Court

- [29] It is not in dispute that under the law, already above cited, for an order of stay of execution to issue, the applicant must show that either they have deposited or they are ready and willing to deposit security for due performance of the decree or order that may ultimately be made by the court. In this case, it was averred on behalf of the applicants in paragraph 15 of the affidavit in support of the application that the applicants were ready to comply with such terms as to security or otherwise as the court could impose as conditions for stay of execution. In paragraph 7 of the affidavit in rejoinder, the 1st applicant stated that "... following the Supreme Court decision in Civil Application No. 35 of 2020, the applicants were ordered to pay security for costs in the sum of UGX 30,000,000/= before Civil Appeal No. 28 of 2017 could be heard. This money was deposited with the Registrar, High Court". The deponent attached a copy of the transfer form to the affidavit.
- [30] Although it was argued for the respondent that the said sum was deposited strictly for SCCA No. 35 of 2017 and could not be taken to serve as security in the present matter, I find that the cases pending between the present parties are intertwined. I take the view that the sum of UGX 30,000,000/= already deposited in the court will suffice to meet the ends of justice for purpose of serving as security for due performance of the decree depending on the result of the two pending appeals subject of this application. I have therefore not made any further order for deposit of security.
- [31] The question as to whether **the application was brought without unreasonable delay** was not subject of any contention. I therefore need not dwell on the same as the applicants have shown that they brought this application without any unreasonable delay.

[32] Finally, I note that there was another application on record vide HCMA No. 111 of 2021 filed on 17th February 2021 by the same applicants against *Uganda Electricity Board (In Liquidation)*. The application seeks the same reliefs as the present application. The only differences are the respondent, the sum in costs sought to be recovered in execution and the fact that execution was sought through a different execution file. The appeal said to be pending in the Supreme Court (Civil Appeal No. 18 of 2020) is the same. The other difference is the appeal said to be pending in the Court of Appeal which is Civil Appeal No. 118 of 2019; but it still arises from the same decree in HCCS No. 49 of 2014. I find that the considerations made herein above apply *mutatis mutandis* to the second application. I have therefore determined HCMA No. 111 of 2021 upon the same premises as HCMA No. 60 of 2021.

Decision of the Court

[33] In the circumstances, the applicants have satisfied the Court on a balance of probabilities that sufficient grounds exist for grant of an order for stay of execution of the decree and orders in HCCS No. 49 of 2014 pending the determination of Supreme Court Civil Appeal No. 18 of 2020; the Court of Appeal Civil Appeal No. 209 of 2020 and the Court of Appeal Civil Appeal No. 118 of 2019. The applications (HCMA No. 60 of 2021 and HCMA No. 111 of 2021) have, therefore, succeeded and are allowed with the following orders;

- a) An order doth issue staying execution of the decree and orders in HCCS No. 49 of 2014 pending the hearing and determination of Civil Appeal No. 18 of 2020 by the Supreme Court.
- b) An order doth issue staying execution of the decree and orders in HCCS No. 49 of 2014 pending the hearing and determination of Civil Appeal No. 209 of 2020 and Civil Appeal No. 118 of 2019 by the Court of Appeal.
- c) The costs of the two applications shall abide the outcome of the respective appeals.

It is so ordered.

Dated, signed and delivered by email this 16th day of October, 2024.

Boniface Wamala JUDGE

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