

UGANDA / JUDGMENT

**Sanlam General Insurance Uganda
Limited v Finance Trust Bank Limited
(Miscellaneous Application No. 03 of
2024) [2024] UGIAT 6 (4 October 2024)
[2024] UGIAT 6**

COURT

Insurance Appeals Tribunal (Uganda)

BEFORENangono Namakiika, chairperson, Mayinja. Panel
Member, Okoth, Panel Member, Mayanja,
Nabasirye - Panel Member**CASE / FILE NUMBER**

Miscellaneous Application No. 03 of 2024

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**THE REPUBLIC OF UGANDA THE INSURANCE APPEALS TRIBUNAL OF UGANDA
MISCELLANEOUS APPLICATION NO.03 OF 2024 (ARISING OUT OF APPLICATION
NO. 04 OF 2024)**

**SANLAM GENERAL INSURANCE UGANDA
LIMITED:.....APPLICANT**

VERSUS

**FINANCE TRUST BANK
LIMITED:.....RESPONDENT**

RULING

This application is for a stay of execution brought under S.98 of the Civil Procedure Act, Order 52 of the Civil Procedure Rules SI 71-1. Seeking Orders;

- 1. That the execution of the decree and judgment in Application No. 4 of 2024 dated 1st August, 2024, be stayed pending the hearing and determination of the Applicant's appeal to the High Court
- 2. Costs of the application be provided.

Grounds And Evidence in Support of The Application:

The grounds of the application are contained in Mr. Warren Sserwanga's affidavit dated 24th September 2024 and are that:

- 1. The Insurance Appeals Tribunal passed a decision on 1st August 2024 wherein it upheld the decision of the Insurance Regulatory Authority.
- 2. The Applicant being dissatisfied with the decision lodged a notice of appeal before the High Court of Uganda on 30th August 2024, however the same was pending admission on ECCMIS.
- 3. That the Applicant's appeal not only raises serious questions of law for determination, it also has a high likelihood of success.
- 4. That the Respondent despite being aware of the process of appeal has also commenced execution proceedings before the Honourable Tribunal and has filed an application to that effect.
- 5. That the balance of convenience weighs in favour of this Application.
- 6. The Applicant will suffer substantial loss if this application is not granted as the appeal would be rendered nugatory.
- 7. The application has been made without undue delay.
- 8. It is just, equitable and in the interest of justice that this application be granted.
- 9. That the applicant is willing to abide by reasonable orders of the Honourable Tribunal with regards to security, if found necessary and issued.

The Respondent's Reply.

The Application was opposed by the Respondent through Emmanuel Ssemanda's affidavit in reply dated 4th October 2024 stating;

- 1. That the alleged notice of appeal filed on ECCMIS in the High Court is not admitted due to the Applicant's failure to cause its admission. Failure on their part cannot be used to deny the Respond the fruits of litigation.
- 2. That the alleged notice of appeal, with the intended grounds of appeal do not state any matter of law that the insurance appeals tribunal erred.
- 3. That the intended appeal does not have any chance of success given the factual grounds raised.

- 4. That the applicant has severally stubbornly refused to honor the decisions of both the Insurance Regulatory Authority and the Appeals Tribunal to the detriment of the Respondent who continues to suffer irreparable loss.
- 5. That should the Tribunal be inclined in granting the order of stay, given the mulish and pertinacious character of the applicant, it should be ordered to deposit the full decretal amount with the Tribunal until disposal of the intended appeal.
- 6. That the balance of convenience is in favor of the Respondent who lost depositors money in matters that the Applicant had genuinely issued insurance indemnity cover.

Representation And Appearance

At the hearing, the Applicant was represented by Counsel Ernest Kalibala from AF Mpanga appearing jointly with Shafir Yiga from Yiga Advocates while the Respondent was represented by Counsel Friday Kagoro from Muwema & Co Advocates.

Issues

- 1) Whether execution of the Tribunal's decision dated 1st August 2024 should be stayed?
- 2) What are the remedies available to the parties?

Applicant's Submission

Counsel submitted that the notice of appeal annexed to the application as annexure 'A' was filed on the 30th of August 2024 within the 30-day period required by the law to be filed.

On substantial loss, Counsel submitted that Ugx. 1.9 billion was not a small amount of money and could not be described as pocket change by any measure. Allowing execution through garnishee would have a substantial effect on the day-to-day operations of the Applicant.

He further averred that there was no delay in filing of the application and there was eminent execution as there was a garnishee application before the Tribunal.

Counsel expressed the Applicant's willingness to comply with reasonable terms needed by the Tribunal by way of security. He suggested that the Tribunal considers security that did not require cash to be deposited such a bank guarantee or escrow account.

Counsel further submitted that there were substantive legal issues especially with regard to the interplay between third parties for an insurance contract and section 12 of the Insurance Act and therefore the appeal was not one that was frivolous and vexatious thus there was a high likelihood of success on the interpretation of section 12. There were also issues around interpretation of certain exclusions on the policies.

Counsel submitted that the Applicant's application proved the grounds for stay of execution as laid out in the case of **Lawrence Kyazze Versus Eunice Busingye SCCA NO.18 of 1990**.

Respondent's Submissions

The Respondent opposed the application for stay, on grounds that the intended appeal had no likelihood of success.

Counsel also argued that the Respondent was entitled to the amount of 1.9 billion because it originated from money that was received by the Applicant as premiums for the covers it issued.

On the issue of security, Counsel submitted that the Applicant had shown stubbornness in honouring their obligations previously and that if the Tribunal was inclined to stay execution, then the full amount should be deposited on the account of the Tribunal.

Citing the case of **Wandera Micheal versus Baguma Samali H. C Misc app NO.036 2021**, Counsel argued that security for costs or due performance of the decree operates as an insurance cover that is meant to indemnify the judgement debtor if the appeal fails without recourse to vigorous processes of recovering such costs.

Ruling of the Tribunal.

Order 43 r 4(1), (2) and (3) of the CPR states that;

- *1) An appeal to the High Court shall not operate as a stay of proceedings under a decree or an order appealed from except so far as the High Court may order, nor shall execution from a decree be stayed by reason only for an appeal having been preferred from the decree, but High Court may for sufficient cause order stay of execution of the decree*
- *2) Where an application is made for a stay of execution of an appealable decree before the expiration of the 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.*
- *3) No order for a stay of execution shall be made under sub-rule (1) or (2) of this rule unless the court making it is satisfied;*
- *a) That substantial loss may result in the party applying for a stay of execution 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 decree or order as may ultimately be binding upon him/her.*

Justice Elizabeth Ibanda Nakamya, in the case of ***Equity Bank Uganda Ltd v Nicholas, Were M. A No.604 of 2013***, while explaining the above-cited order noted that;

"*The import of this provision is that an appeal to the High Court does not perse operate as a stay of execution of proceedings. Rather, any person who wishes to prefer an appeal from such a decision shall institute proceedings on such sufficient cause being shown to the court. "Sufficient cause" under this provision, leaves the high court with the discretion to determine whether the proceedings fall within the premises*"

The above is to the effect that unless a party desirous of a stay of execution applies for the same, an appeal does not itself operate as a stay of execution. The high court may upon proof of sufficient cause stay of execution of the decree pending its determination.

In *Lawrence Musiitwa Kyazze v Eunice Busingye Civil Application No.18 of 1990,* the Supreme Court considering order 43 r 4 of the civil procedure rules, observed that parties seeking a stay of execution should prove the following grounds;

- 1) That a substantial loss may result to the applicant unless the order is made
- 2) That the application has been made without unreasonable delay
- 3) The applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

Further, in the case of *Dr. Ahmed Muhammed Kisule v Greenland Bank (in liquidation)*, *S. C. C. A N0.7 of 2010*, the Supreme Court added that there must be proof of lodgment of an appeal in the appellate court.

Additionally, In *Kyambogo University v Prof. Isaiah Omolo Ndiege C. A. CA No. 341 of 2013,* Justice Kakuru observed that in an application for a stay of execution the applicant must prove in addition to other grounds;

- That there is a serious and imminent threat of execution of a decree or order and
- That refusal to grant the stay would inflict greater hardship than it would.

We will therefore rely on the above principles in determining this application.

1) Proof of lodgment of an appeal.

It was averred for the Applicant under paragraph 3 of the affidavit in support that it appealed to the High Court and a copy of the Notice of Appeal lodged in High Court was attached as proof of lodgment of an appeal.

Although the Respondent challenged the fact that an appeal was ever lodged in the High Court since the same was pending admission on ECCMIS, the Applicant gave proof by providing a copy of the admitted notice of appeal (AX.2) and the same clearly indicated that it was filed on 30th August 2024 at 09.06am. The notice was approved in the system and the same was served upon the Respondent.

It was held in **Attorney General of the Republic of Uganda vs. The East African Law Society & Another EACJ Application No. 1 of.....** that a notice of appeal properly filed is sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis of grant of orders of stay in appropriate cases.

It is our considered view that in the Application before us, there is a Notice of Appeal on record properly filed dated 30th August 2024. The Applicant has proved to this Tribunal on the balance of probabilities that an appeal was lodged in the appellant court.

This ground is satisfied by the Applicant and is allowed.

2) Substantial loss may result to the applicant unless the order is granted;

It is trite law as was emphasized by the Court of Appeal **in DFCU Bank Ltd v Dr. Ann Persis Nakate Lusejjere; Civil Application No. 0029 of 2003** that, "it is the paramount duty of the Court to which an application for stay of execution pending an appeal is made to see that the appeal, if successful, is not rendered nugatory"

In **Tropical Commodities Suppliers Ltd & 2 Ors v International Credit Bank Ltd (In Liquidation) [2004] 2EA* 331, Ogoola J (as he then was) held that **"the phrase substantial loss doesn't represent any amount or size; it cannot be quantified by any mathematical Formula. It refers to any loss, great or small that is of real worth or value or that which is merely nominal.*

The Applicant contended that the decretal sum of Ugx.1,905,148,996 was a colossal amount and requiring it to be paid would cripple the activities of the Applicant and it would occasion substantial loss if the execution was not stayed.

The court must balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his or her appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his or her judgment (see **Alice Wambui Nganga v. John Ngure Kahoro and another, ELC Case No. 482 of 2017 (at Thika); [2021] eKLR**).

It Is our opinion that Ugx.1,905,148,996 is indeed a substantial amount to any insurance company and paying it out would affect the Applicant's operations. This is because insurers must take reinsurance and part of this money is most likely going to be paid by a reinsurer to whom the insurer transferred part of this risk as per regulatory requirements. An order to execute the Tribunal decision would cause significant disruption and would likely inflict greater hardship.

This ground is satisfied by the Applicant and is allowed.

3) The application has been made without unreasonable delay.

According to S.79 (1) of the Civil Procedure Act, Cap 71 is to the effect that an appeal shall be filed within 30 days from the date of the decree or order of the court.

Further, S.137 (5) of the Insurance Act, 2017, a party aggrieved by the decision of the Tribunal may within 30 days of the date of communication of the decision, lodge a notice of appeal with the High Court.

Regulations 27 of the Insurance Appeals Tribunal Regulations 2019 "A party to the proceedings before the Tribunal may, within 30 days after being notified of the decision of the Tribunal or within which such further time as the High Court may allow, lodge a notice of Appeal with the High court".

Further, order 43 r 4(2) of the CPR provides that; "*where an application is made for stay of execution of an appealable decree before the expiration of the 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*." The above order is to the effect that, an

application for a stay of execution must be brought before the time within which to appeal expires.

The Applicant filed the instant application for stay of execution on the 27th September 2024 and the notice of appeal was lodged on 30th August 2024. The law as stated above provides for within 30 days from the date the decision was delivered to lodge a notice of appeal and within this period, the applicant is required to make an application for stay.

The instant application was filed on 27th September 2024, almost a month after the notice of appeal was filed but only 3 days after the application for garnishee was made by the Respondent. The Tribunal finds that although a vigilant litigant should have acted expeditiously in filing the stay of execution within the time for appeal, the delay was not unreasonable

The applicant has satisfied this requirement too.

4) Serious and imminent threat of execution of the decree or order.

It is not enough to merely allege an imminent threat. An imminent threat is one that is yet to occur or is set to happen. There must be a likelihood of having the order executed.

The Applicant in paragraphs 6 and 7 of its affidavits aver that the Respondent has issued the Applicants with a demand letter for award, and has commenced execution proceedings before the Tribunal.

We find that there is a threat of execution against the Applicant since the Respondent commenced garnishee proceedings.

Therefore, we find that this condition has been met.

5) That the Applicant has given security for due performance of the decree or order.

It is a requirement Under **Order 43 r 3(4) (c)** of the Civil Procedure Rules that a party seeking to secure a stay of execution must be willing to deposit in court security for due performance of the decree.

The Hon. Lady Justice Victoria Nakintu Nkwanga Katumba, in **Kisaalu Joseph & 10rs v Nakintu May & anor Misc. Application no.105 of 2020**

"The **condition requiring an applicant to deposit security for due performance is established under Order 43 r 4(3)(c). The security for due performance has been interpreted to mean the entire decretal sum and it is intended to protect the judgment creditor if the appeal is successful.**

Security for costs or security for the due performance of a decree operates as an insurance cover that is meant to indemnify the Judgment Debtor in the event the appeal fails without recourse to vigorous processes of recovering such costs. **In Wandera Michael v Baguma Samalie HCT-01-CV-CS-M. A 036 OF 2021.**

The requirement to deposit security for costs shouldn't be a punishment to the applicant or used as a mechanism to frustrate his appeal by ordering security for costs that the applicant may not be able to pay. The court must make an independent assessment of the facts and the parties before it before ordering security for costs as observed in the case of **The New Vision Publishing Corporation & 2 Ors v Peter Kaggwa, HCMA 127 of 2006**

In granting an order of stay of execution pending an appeal, the court must balance the need to uphold the respondent's right to be protected from the risk that the appellant may not be able to satisfy the decree, with the appellant's right to access the courts (**see Formular Feeds & Ors versus KCB Bank Limited M. A. No. 1647 OF 2022 (Arising from Civil Suit No. 0289 of 2014*)*)

It is the reason that courts have been reluctant to order security for due performance of the decree.

(*see *Tropical Commodities Supplies Ltd and others v. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331* and *DFCU Bank Ltd v. Dr. Ann Persis Nakate Lussejere, C. A Civil Appeal No. 29 of 2003**), because the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals.

This Tribunal in making an order for security for costs will ensure that a balance is struck between the right of a litigant to access justice and ensure no hardships and the right of the opposing party to the fruits of its litigation.

For that reason, the applicants have to some extent, satisfied this requirement by agreeing to abide by the reasonable orders of this Tribunal on security for costs

The Tribunal makes the following orders:

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Harriette Nabasirye Paminda Kasirye **MEMBER**

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