

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)**

MISCELLANEOUS CIVIL APPLICATION No. 1053 OF 2020

(Arising from Civil Suit No. 0829 of 2018).

1. MUGISHA BENON GRACE }

2. GARETH STUPPLE }

3. HELLEN CLAIRE STUPPLE }

T/a HIGHWAY SOLUTIONS } APPLICANTS

4. JOHN MUSIIME }

VERSUS

CHWEZI PROPERTIES LIMITED RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The appellants sued the respondent seeking recovery of a sum of money and damages for breach of contract relating to the sale of land located at Nakiwogo Close. The suit was filed under summary procedure whereupon the respondent applied for unconditional leave to appear and defend. Whereas the respondent described the transaction as an outright sale the applicants described it as a sale coupled with a vendor financing arrangement involving a third party, a commercial bank. The suit was prompted by the respondent's breach of its obligations to the third party.

Sometime during May, 2019 the third party, in exercise of its powers as mortgagee and with the applicants' consent, sold the land comprised in the agreement forming the subject of the suit, to a person not party to the proceedings. The applicants' attorney on 20th May, 2019, about a year and two months before the ruling was delivered, wrote to the court notifying it of this development and thereby asking the trial Judge to grant the respondent leave to appear and defend the suit. The respondent's advocates too approximately a year before that ruling was delivered, on 20th July,

2019 wrote to the court notifying it of the same development, contending that it altered the prayers the respondent had sought in the summary suit. They sought a date to be fixed for the suit to be mentioned so that the court would be fully appraised of the impact of that development on the matters pending before court. The trial Judge, without adverting to the said correspondences, and
5 having found no merit in the application for unconditional leave to appear and defend, dismissed it and entered judgment in favour of the applicants on 13th July, 2020 nearly a year and a half after the close of submissions on 6th February, 2019.

The applicants being dissatisfied with the decision, applied for its review on 28th July, 2020 on
10 ground that it was “just and equitable” in light of the changed circumstances from what they were at the time of application and as at the time the ruling was delivered. The application was heard and considered by a successor Judge who in a ruling delivered on 2nd October, 2020 allowed it, and granted the respondent unconditional leave to appear and defend the suit, thereby practically setting aside the judgment and decree of his predecessor brother Judge. The applicant’s filed an
15 appeal that is now pending before the Court of Appeal, seeking to reverse the orders of the successor Judge, contending that they are the result of an improper exercise of the power of review.

b. The application.

20 The application is for stay of execution of the orders made on review, pending the hearing of the appeal. It is made under section 33 of *The Judicature Act*, section 98 of *The Civil procedure Act*, Order 43 rules 3 and 4; and Order 52 rules 1 and 2 of *The Civil Procedure Rules*. It is contended that the pending appeal raises serious questions of law, it has a high likelihood of success yet it shall be rendered nugatory and the applicants stand to suffer substantial loss if the order of stay is
25 not granted.

c. The affidavit in reply

The respondent’s Managing Director averred that the application for stay of the orders of this court
30 on review has been overtaken by events since the respondent has already filed a written statement of defence to the suit and the applicants have filed a reply thereto. The applicants are not likely to

suffer any prejudice if the suit is heard and determined on the merits since in their own correspondence of 20th May, 2019 they had indicated to court that the respondent should be granted leave to appear and defend the suit in light of the changed circumstances. The pending appeal will only result in unjustifiable delay in disposal of the suit.

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d. Submissions of counsel for the applicant

M/s Kirunda and Wasige Advocates submitted that a stay of the suit is sought. Inherent powers of the court are invoked alongside O. 43 rule 4 (3) of *The Civil Procedure Rules*. They cited the
10 decisions in *Musiitwa Kyazze's Case* emphasising the need to save the subject matter of appeal or of the right of the appeal. The applicants were judgment creditors. They appeal a decision which took away their right. They were entitled to receive funds from the respondent by virtue of the decision of Justice Wangutusi. The 4th applicant was dragged in by the decision of Justice Adonyo in review. He used the review to re-examine the facts of the case, which was outside the scope of
15 section 82 of *The Civil Procedure Act*, and Order 46 of *The Civil procedure Rules*.

The other fault is that the court was *functus officio*. The scope of review is so narrow. It could not re-open the decision. The decision of Justice Adonyo caused substantial loss to the 3rd applicant who was a party to the suit and the 4th applicant who was joined after the decision on review. The
20 4th applicant is a donee of powers of attorney. There is a potential abuse of process. The applicants have an automatic right of appeal. The parties will be put to great cost when the appeal is heard and determined reversing the order made on review. There is a possibility for two decision on the same subject matter that are inconsistent. The application for review cited section 82 of *The Civil Procedure Act* and Order 46 of *The Civil Procedure Rules* yet the respondent was unable to point
25 out any error or mistake apparent on the face of the record. The successor Judge speculated that the predecessor Judge had not seen the two correspondences. There was a year between the letters and the decision. If the respondent felt so strongly about the importance of that evidence they should have filed a motion. The *Apollo Wasswa case* should be relied on as well.

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e. Submissions of counsel for the respondent.

M/s MMAKS Advocates submitted that annexure “A” to the affidavit in reply is the plaint. In that claim what was sought was specific performance. The agreement for sale stated the purchase price and a mortgage amount. Two months later, the applicants wrote the letter notifying the court of the sale. Audience was not granted. The letter was quickly followed by another written by the respondent. Section 82 of The Civil Procedure Act is wider and includes information that comes to court by a letter. The ruling was delivered a year after those letters. The only way the decision could be revisited was by way of review. These were developments after close of submissions but before the ruling was delivered.

The remedy is available to any “person aggrieved,” as per page 5 of the *Metha Case*. It is intended to address a situation that is not covered under Order 46 of *The Civil procedure Rules*. Conveyance and specific performance cannot be granted in respect of the same subject matter. This allows the applicants to get the value of the property and yet they cannot deliver the property. The appeal will not be rendered nugatory. A judgment procured by fraud on the court should not stand. The Court of Appeal cannot avoid the fact that there was a sale. It is therefore not an arguable appeal. The trial of the merits will not be effected by the outcome of the appeal. The 4th respondent, Ivan, is a buyer who took the furniture from the respondent’s business, which was not the subject of the sale. He is sued as a tortfeasor. The 5th respondent participated in taking the moveable property. The claim against them is for conversion. It is the same transaction. We pray that the suit should not be stayed.

f. The decision.

According to Order 43 rule 4 (1) of *The Civil Procedure Rules*, an appeal to the High Court does not operate as a stay of proceedings under a decree or order appealed from except so far as the High Court may order. Similarly Rule 6 (2) (b) of *The Judicature (Court of Appeal Rules) Directions* provides that the institution of an appeal does not operate to stay execution, but the court may in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of the Rules, order a stay of proceedings on such terms as the court may think just. When

a party is appealing, exercising his or her undoubted right of appeal, the court ought to see that the appeal, if successful, is not rendered nugatory (see *Lawrence Musiitwa Kyazze v. Eunice Busingye, S. C. Civil Application No. 18 of 1990*). A stay only operates to freeze the inter parties proceedings which are the subject of the order.

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Key among the justifications for the grant of an order of stay in situations like this is that the appeal should not be rendered nugatory. The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. As a matter of practice, where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings in the judgment appealed from as will prevent the appeal if successful from being rendered nugatory (see *Wilson v. Church (1879) 12 Ch D 454* and *Somali Democratic Republic v. Anoop Sunderial Trean, C.A. Civil Appeal No 11 of 1988*).

The applicant who would succeed upon such an application must persuade the court on two limbs, which are; - first, that his or her appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory (worthless, of no value or importance or having no force). These two limbs must both be demonstrated and it would not be enough that only one is demonstrated (see *Atkins v. Great Western Railway Co. (1886) 2 T.L.R 400*). There must be good reason to deprive a successful party of the right to enforce his judgment and the mere existence of an arguable ground of appeal is not by itself such a reason.

In considering whether or not the appeal is frivolous, plainly one must consider the claims of both parties. The thrust of the applicant's contention on appeal is that this court exceeded its powers of review when it set aside its own decision on account of developments that occurred after the close of submissions but before delivery of the ruling on an application for leave to appear and defend, events that occurred a year apart. While it is trite that the power of review cannot be used as a cloak of an appeal in disguise or to reappraise the evidence, on the other hand court is mindful of the principle that the parties must be accorded the opportunity to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision (see *Secretary of State for the Home Department v. MB, [2008] 1 AC 440; [2007] 3 WLR 681*).

While it is a well settled doctrine that it is not the responsibility of the Court to resort to a cloistered justice by embarking on a voyage of discovery or enquiry in the case outside the open Court, not even by examination of documentary exhibits which were in evidence, but not duly examined in open Court, on the other hand it is the practice of courts to grant the parties audience when developments of this nature occur before the decision. The appeal therefore raises pertinent and arguable issues by both parties. The appeal therefore is not frivolous.

In considering whether or not if the appeal were to succeed it would be rendered nugatory, it is difficult in the instant case to see this as a possible result. In the event that the appeal succeeds, the effect would be to nullify the order made on review which set aside the ex-parte judgment in favour of the applicants and gave the respondent the opportunity to proceed with the trial *de novo*. It is instead the respondent that stands the danger of the new trial being rendered nugatory by the outcome of the appeal.

The other consideration is the fact that it is undesirable to have multiple proceedings before different courts or parallel court proceedings, which involve contests between the same parties on issues which are essentially the same. Where the appeal is challenging an interlocutory decision, if there is a genuine and sufficient overlap in the matter before the trial court and that on appeal, an application to stay certain proceedings before one of the courts may be made by one or both parties. Thus, ordinarily having the appellate process concluded prior to the one at the trial level will avoid duplication of effort and waste of re-sources, and therefore supports a stay of the trial proceedings.

The basic purpose then is to prevent the trial court and the appellate court from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief, where the matter in issue before the trial court is directly and substantially in issue before the appellate court. It is also aimed at protecting the defendant from multiplicity of proceedings.

The test is whether the applicant can secure a relief in the appellate court that would result in the dismissal or termination of the pending suit. There need not be a complete identity of issues between the two sets of proceedings, nor is it essential for one to be determinative of the other. Nevertheless there must be a real prospect that the stay would avoid additional and otherwise unnecessary expense and the waste of judicial time. A stay will not be desirable when the decision on appeal will impact only a few of the matters in issue before the trial court, but might be imperative when there is a real and appreciable risk that the trajectory of the entire subject matter in controversy before the trial court will be affected by the decision on appeal. An order of stay should therefore be granted in a case of an exceptional nature, such as where the parallel proceeding before the trial court are brought in a bad faith or in an attempt to defeat the appeal, and in circumstances where the delay on account of stay will not prejudice the interest of a speedy trial. Absent special circumstances, both cases will probably proceed.

On the other hand, it is pertinent that plaintiffs also have a legitimate interest in the expeditious resolution of their cases. The order granting stay must show application of mind as the power to grant stay is coupled with accountability. In the determination of civil rights and obligations, a person is entitled to a fair, speedy and public hearing (see article 28 (1) of *The Constitution of the Republic of Uganda, 1995*). Entailed in that right to a “speedy hearing” is the right to a trial within a reasonable time, often termed the right to be a trial without undue delay or the right to a speedy trial. For the realisation of this right, all parties, including the courts, have a responsibility to ensure that proceedings are carried out expeditiously, in a manner consistent with this article. The overriding objective under article 28 (1) of *The Constitution of the Republic of Uganda, 1995* and *The Civil Procedure rules* in general is that courts should deal with cases justly, in a way which is proportionate to the amount of money involved, the interests and rights involved, the importance of the case, the complexity of the issues and the financial position of each party.

The overriding objective of the right to a speedy trial is to enable courts to deal with cases justly, where dealing with a case justly includes, so far as is practicable; - a) ensuring that the parties are on an equal footing; b) saving expense; and c) dealing with the case in ways which are proportionate in terms of the amount of money involved relative to the importance of the case, the complexity of the issues and the financial position of each party; d) ensuring that cases are dealt

with expeditiously and fairly; and e) allotting to each case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. The ultimate objective is to ensure that there should be a fair trial according to law, which involves fairness to both parties and that court process is not misused or misapplied or an end other than that which it was designed to accomplish.

Public interest emphasises efficiency and economy in the conduct of litigation, in that the courts' resources should be used in such a manner that any given case is allocated its fair share of resources, the most important of which in civil litigation is time. Each case whose trial is unduly prolonged deprives other worthy litigants of timely access to the courts. Courts must ensure that each suit is dealt with expeditiously and fairly, allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. Litigants and their counsel should realise that the Court ethos has changed enormously in these modern times of increased litigation. There is a significantly reduced margin of tolerance of litigants who delay and dilly-dally because of the noticeable slack that has hitherto existed in the system. All of that has now gone. There is greater emphasis on measures to prevent the litigation system being overwhelmed. There are now fewer resources available. We no longer have the luxury of being able to schedule repeat performance of hearings because the parties are not ready. It is a much harder game to play.

Unduly prolonged delay poses the risk of impacting upon the quality of the parties' evidence. Witness testimony is likely to be more detailed and accurate closer in time to an alleged incident as memory tends to fade with time. Like old photos, memories fade over time. The parties and their witnesses' ability to recall the details of the matters in dispute at trial can be severely affected by delay. In turn this may influence perceptions of credibility as a witness, which is particularly important in such cases where there are rarely any other witnesses.

It is well accepted that delay in all trials has a deleterious effect on the administration of justice in which the society has a vital interest. Delay in trials affects the faith in Rule of Law and efficacy of the legal system. It affects social welfare and development. The power to grant stay therefore has to be exercised with restraint and that there being a mere *prima facie* case on appeal is not

enough. The party seeking stay must be put to terms and the stay should not be an incentive to delay the proceedings.

A plaintiff having commenced proceedings, should not be deprived of the right to continue those proceedings in the absence of very good reasons. A stay should not cause an injustice to the plaintiff, therefore an applicant for stay must satisfy the court that continuing the proceedings would be unjust to him or her to an extent greater than what would be occasioned to the plaintiff. The court must consider what would serve the ends of justice between the parties to the litigation and the administration of justice generally.

The court will need to examine the effect the delay will have on the parties before it makes a decision whether or not to stay the suit (see *Altaff Hussein and two others v. Eguma Blasio T.A Zebra Hotel Arua, H.C. Misc. Civil Application No. 47 of 2017*). The acceptable period of institutional delay is the period that is reasonably required for the court to be ready to hear the case once the parties are ready to proceed, and is determined in accordance with the administrative guidelines for institutional delay. For the purposes of determining what constitutes unreasonable delay, this court takes the current standard of two or more years from the date of filing, because this is the point at which a case is considered backlogged. This presumptive ceiling is probably inspired or informed by Order 17 rule 6 of *The Civil procedure Rules* which empowers courts to disencumber themselves of suits in which the parties appear to have lost interest, evinced by being inactive for over two years. The rationale is that inordinate delay is likely to obstruct the just disposal suits.

The alternative is to grant an order of stay for a specified period so that on expiry of that period, proceedings can commence unless an order of extension is made. To do so, the applicant may be required to establish that he or she took meaningful steps that demonstrate a sustained effort to expedite the proceedings on appeal. Unless extension is granted for good reason, upon the expiry of such a specified period, the court may then set a date for the trial and go ahead with the same. However, making a reasonable estimate of the period in the current circumstances is impracticable. The Court of Appeal is yet to establish a consistent pattern of disposal rates to enable this court make an informed assessment of what time it may take to dispose of an appeal of this nature.

Unfortunately, the appellate process can be embarrassingly delayed. For example In the case of *Jane Nyiha Ndichu v. Uganda, C. A. Criminal Appeal No.81 of 2013*, in an appeal against conviction and sentence for the offence of manslaughter, the Court of Appeal heard the appeal on 16th July, 2018 but delivered its judgment on 7th April, 2021, two years after the convict had completed serving a nine-year-jail sentence and had left prison (see *The Daily Monitor Newspaper* of Thursday 8th April, 2021). In *Kato Lubwama v. Buwembo C.A Election Petition Application No. 2 of 2017*, the Court of Appeal delivered its ruling on 13th October, 2020 concerning an order of stay of execution that had been granted by the High Court on 19th December, 2016. This was barely four months to the end of the five year term of office of the Member of Parliament whose election was being challenged. Similarly in *Herbert Tom Kinobere v. Wairagala Godfrey Kamba, C. A. Election Appeal No. 53 of 2016*, following a number of setbacks in the constitution of its coram, the Court of Appeal finally delivered its decision on 4th December, 2020 months to the close of the five year election period in which the cause arose, when nominations for the next election cycle had been completed and campaigns were already underway. Cases of a similar nature involving excessive delay abound in our appellate process at that level.

The lived reality therefore is that the appellate process in its current state is pervaded by delays. The systemic delay problems that have pervaded the appellate system at that level in recent years cannot justify a grant of an order of stay of the nature that is sought by the applicant. The court's rationale for denying a stay is that the appellate process may take years. In the meantime, the quality of evidence may be adversely affected if the parties are forced to wait for conclusion of the appellate process. The prospect that an eventual successful appeal might reverse the decision of this court on the merits is no answer to the actual danger which endures until then, that delay will be a violation of the right of the plaintiff to a speedy trial and endangers the ability of the court to do justice to the substance of the dispute. A stay might be only temporary in nature, but its effect could be ominous and permanent considering the wider scheme of the administration of justice.

Even where there is no evidence of dimming of memories (the inability to recall entirely accurately what happened a long time ago), in a suit like the one at hand, absence of actual prejudice or the argument that the unfairness caused could be cured, cannot convert an unreasonable delay into a reasonable one. Once the presumptive ceiling is breached, prejudice does not have to be shown, it

can be inferred since keeping a suit in court indefinitely with no intention of bringing it to a conclusion, is an abuse of process which should be stopped regardless of whether a fair trial of the action remains possible (see *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd* [1998] 1 WLR 1426 at 1436; *Summers v. Fairclough Homes Ltd*, [2012] 1 WLR 2004, para 35; and *Michelle Hepburn v. Royal Alexandria Hospital NHS and Glasgow Infirmary*, 2011 SC 20, Para 47; 2010 SLT 1071; [2010] CSIH 71). It simply will not be the same quality of trial that the parties would have had and are entitled to, if it had been concluded in a timely manner.

No doubt it would be wrong to order a stay of proceedings pending appeal where the appeal is frivolous or where such order would inflict greater hardship than it would avoid (see *Erinford Propertied Ltd. v. Cheshire County Council* [1974] 412 All ER 448). It is my considered view that our civil litigation system should cease to be used as a warehouse or repository for storage of moribund disputes that clog and suffocate it to the detriment of those with genuine controversies that require expeditious resolution. Being too liberal with adjournments is what has largely landed us in this situation. The culture of delay and complacency during litigation must not be encouraged. In the instant case, it is more likely that not that the trial, if it commences now, will be concluded long before the pending appeal from the order of review will have been heard and determined.

In the final balancing, while a delayed trial fundamentally threatens this court's ability to do justice to the case, an appellate process reversing the order of review on the other hand will only impact on the costs of parties in pursuing the annulled trial. The order would inflict greater hardship than it would avoid, hence the balance favours not granting the order of stay. The application is accordingly dismissed. The costs of the application shall abide the result of the suit whose hearing date the parties should now proceed to fix.

Dated at Kampala this 22nd day of April, 2021

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Stephen Mubiru
Judge,
22nd April, 2021.