

10

15

MISCELLANEOUS APPLICATION NO. 0610 OF 2023

ARISING FROM HCCS NO. 0826 OF 2021

VERSUS

BEFORE HON. LADY JUSTICE HARRIET GRACE MAGALA

RULING

The Respondent filed ***HCCS No. 0826 of 2021: Eng. Lodu Julius Losuk vs Dr. Drani Joakin*** under Order 36 of the Civil Procedure Rules as amended. The Applicant did not apply for leave to appear and defend the said suit. As such a default judgement was entered against him on the 21st February 2022. The Applicant then filed ***Miscellaneous Application No. 0791 of 2022: Dr Drani Joakin vs Eng. Lodu Julius Losuk*** seeking for orders that the Default Judgement be set aside and the Applicant be allowed to appear and defend the main suit. This honourable court heard and determined MA 0791 of 2022 by granting the Applicant leave to appear and defend the main suit on the following terms:

- a) On condition that he paid the Respondent Ug.Shs. 39,411,100/= within 30 days from 31st March 2023 when the Ruling was delivered; and
- b) He would file his written statement of defence within 10 days from the payment of the decretal amount in (a) above.

The Applicant did not pay the sum of Ug.Shs. 39,411,100/= within 30 days from 31st March 2023 when the Ruling was delivered and the Respondent according to

Neelgagan

5 the Applicant wants to execute the Decree and Orders in Misc. Application No. 0791 of 2022. This is what gave this rise to this application for orders that the execution be stayed pending the determination of an intended civil appeal

Appearance

10 This matter was cause listed for hearing on the 4th December 2023 and a hearing notice was issued on the 19th September 2023. Neither the Applicant nor his legal counsel were present in court. The Respondent was represented by Counsel Gibson Munanura of M/s Lagwic Advocates.

Hearing

15 The Court observed that the Respondent had not filed his affidavit in reply to the Application and there was no affidavit of service on the Court Record. Counsel for the Respondent informed court that they only got to know about the Application upon perusal of the week's cause list. He stated that that notwithstanding, he was ready to proceed because counsel was instructed by the Client/Respondent to enter appearance. He informed court that he would submit in reply to the
20 Application along some points of law.

Firstly, learned Counsel for the Respondent submitted that this was an application for stay of execution based on a notice of appeal which was neither filed in the Court of Appeal nor served onto the Respondent as required by Rule 76 (1) of the Judicature (Court of Appeal Rules) Directions SI 13-10. Counsel cited and relied on
25 the case of ***Industrial Development Corporation of South Africa Limited versus Aya Investments Uganda Limited, Civil Miscellaneous Application No. 1104 OF 2023*** in which the Court of Appeal dismissed an application for stay of execution because the stay was allegedly hinged on application for leave to appeal yet that application was non-existent. The court opined that since there was no
30 application on which the stay of execution was based, the application was incompetent. Learned Counsel therefore submitted that this was application was incompetent because there was no appeal as alleged.

Secondly, counsel for the Respondent argued that this application was filed in contempt of a court order this court issued in Misc. Application No. 0791/2022
35 where the Applicant was ordered to pay Ugx. 39,441,100 as a pre-condition of the grant of an order for leave to appear and defend. The Order was issued in March

5 2023 and the Applicant has never complied with it. He submitted that it was trite law that a party that disobeyed a court order could not seek further assistance from court until it purged itself. He cited and relied on the case of ***Housing Finance Bank Limited & Anor versus Edward Musisi, Civil Appeal No. 22 of 2010*** where the Supreme Court held that one could not get any assistance if they were
10 guilty of contempt. He submitted that the Applicant was guilty because an order was made in Misc. Application No. 0791 of 2022 and he disobeyed it. He concluded this point by stating that unless the Applicant purged himself of the contempt, equity demanded that he should not receive any assistance from Court.

Thirdly, it was argued for the Respondent that there is no threat of execution. The
15 Application did not demonstrate that there was an application for execution filed in this court. The Applicant only relied on a letter from the Respondent's counsel dated 31st March where he was being reminded of this court's decision in Misc. Application No. 0791 of 2022 and asking him to make a payment of Ugx. 39,441.100 as ordered by court. This letter, counsel submitted did not amount to
20 a threat of execution. He concluded his argument by stating that the Application was incompetent and premature.

Lastly, learned counsel for the Respondent argued that the Applicant could not plead substantial loss would be occasioned to him if this application were not granted. Such did not arise in a case like this where the Applicant admitted to a
25 debt.

In summing up his submission, he prayed that this honourable court be pleased to dismiss this application with costs to the Respondent.

Issues

1. Whether the application should be granted
2. What remedies are available to the Parties

The Law Applicable

The principles upon which stay of execution is granted have been well laid out in a number of authorities such as **Lawrence Musiitwa Kyazze versus Eunice Busingye Supreme Court Civil Application No. 18 of 1990, Hon. Theodore Ssekikubo and Others vs The Attorney General Ors. Constitutional Application No. 03 of 2014**



5 **and John Baptist Kawanga vs Namyalo Kevina & Semakula Lawrence MA No. 12 of 2017 (arising from Civil Suit No. 51 of 2012).** These principles 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;
- 10 c) That the application has been made without unreasonable delay; and
- d) That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

15 The Court of Appeal in **Kyambogo University vs Prof. Isaiah Omolo Ndiege, CA No. 341 of 2013** expanded the list of principles to include:

- a) That there is a serious or imminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory;
- 20 b) That the application is not frivolous and has a likelihood of success; and
- c) That the refusal to grant the stay would inflict more hardship than it would avoid.

25 The Court has also relied on provisions of statute law such as the Constitution of the Republic of Uganda, the Judicature Act, the Civil Procedure Act, the Civil Procedure Rules as amended and the Judicature (Court of Appeal Rules) Directions. The provisions relied upon in determining this application have been set out as seen under paragraph 6 of this Ruling.

Rule 6(2)(b) of the Court of Appeal rules states that:

30 *"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."* 20

Rule 42(1) of the Court of Appeal Rules states that:

35 *"Whenever an application may be made either in the court or in the High Court, it shall be made first in the High Court."*

Order 22 Rule 26 of the Civil Procedure Rules states that:

"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

MeDiagawa

5 *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.”*

The import of Order 22 rule 26 is that if there is a pending suit between the parties in the same court or different courts between the same parties, **Order 22 Rule 26** may be relied on to stay execution pending the determination of those matters.

I have made an observation that there is no specific provision of law in the Civil Procedure Rules that provides for stay of execution from decisions of the High Court. However, Rule 42 of the Court of Appeal Rules requires the application for stay to be made first in the High Court. There has been a steady stream of authorities to the effect that the considerations for stay of execution pending an appeal from the High Court are the same as those in Order 43 Rule 4. See **Lawrence Musitwa v Eunice Busingye SCCA 18/1990, Tropical Commodities Supplies Ltd and Others versus International Credit Bank Ltd (In Liquidation) HCMA 379 of 2003, Transtrack Ltd v Damco 15 Logistics (U) Ltd HCMA 608 Of 2012, DFCU Bank Ltd v Ann Persis Nakate Lussejjere HCMA 78 of 2003.**

In other instances, courts have considered applications for stay under the provisions of Order 22 Rule 26. See **UMEME v Irene Nankabirwa HCMA 20 154/2021, Peter Mulira v Mitchell Cotts HCMA 715 of 2009, Rebecca Nabunya Iga v Senteza Kabali Bunya HCMA 948 of 2020**

Whereas Order **22 Rule 26** is a broad provision and Order 43 rule 4 only applies to appeals to the High Court, the decision in **Lawrence Musitwa (supra)** is correct in as far as it finds that the considerations are similar, since a reading of Order 43 Rule 4 and Order 22 Rule 26 show significant similarity of considerations.

Determination

Before I delve into the merits of the Application, I would like to address a preliminary objection raised by learned counsel for the Respondent which is to the effect that the Applicant could not seek any redress from court since he did not comply with the Court Order in Misc. Application 0791 of 2022.

5 This court ordered the Applicant to pay Ugx. 39,441,100/= within a period of
thirty (30) days from 31st March 2023. This Order has never been complied with.
The Applicant therefore is in contempt of Court. In the case of **Housing Finance
Bank Limited & Speedway Auctioneers versus Edward Musisi- Miscellaneous
Application No. 158 of 2010** the Court of Appeal made a decision on a matter
10 with similar facts. In the said case, the Applicants through Miscellaneous
Application No. 0159 of 2010 did on the 15th November 2010 obtain from the
Registrar of the Court of Appeal an Interim Order of Stay of the Orders of the
Court of Appeal made in Civil Appeal No. 25 of 2004 on condition that the
Applicants deposit in Court the Certificate of Title to Block 28 Plot 256 Makerere
15 Kavule within 21 days from the date of the Order. Learned Counsel for the
Respondent opposed the application on the grounds that the Applicants were
fully aware of the Court Order. They neither gave any explanation nor justification
to the Registrar as to why they did not comply with the Order. The Applicants also
did not take any steps to appeal against the Order but chose to or neglected to
20 comply with the Order. The Court in **Housing Finance Bank Ltd. & Speedway
Auctioneers (Supra)** held that:

*"In our considered judgment, this particular matter is of crucial importance.
The principle of law is that the whole purpose of litigation as a process of
judicial administration is lost if orders issued by Court through the set
25 judicial process, in the normal functioning of the Courts are not complied
with in full by those targeted and /or called upon to give due compliance. A
party who knows of an order, regardless of whether, in the view of that
party, the order is null or valid, regular or irregular, cannot be permitted to
disobey it, by reason of what that party regards the order to be. It is not for
30 that party to choose whether or not to comply with such an order. The
Order must be complied with in totality, in all circumstances by the party
concerned, subject to that party's right to challenge the order in issue, in
such a lawful way as the law permits. This may be by review, revision or by
appeal".*

35 The Court of Appeal went on further to hold that:

*"Otherwise to disobey an order of court or offer no explanation for non-
compliance to the issuing court, at any party's choice or whims, on the basis*



5 *that such order is null or irregular, or is not acceptable or is not pleasant to the party concerned, is to commit contempt of court. A court of law never acts in vain and, as such, issues touching on contempt of court take precedence over any other case of invocation of the jurisdiction of court. A party in contempt of court by disobeying existing court order cannot be*
10 *heard in a different but related cause or motion , unless and until such a person has purged himself /herself of the contempt. See **Hadkinson vs Hadkinson [1952] 2 ALL ER 575 and Mawani vs Mawani [1977] KLR 159. See also Court of Appeal Constitutional Court of Uganda Application No. 0019 of 2011: Musisi and Another vs Namugenyi Margaret, unreported***”.

15 The last excerpt of the ruling sums up my decision. This court cannot entertain the Applicant in this matter because he is in contempt of the court order issued in Miscellaneous Application No. 0791 of 2023. The Applicant therefore came to court with unclean hands. For that reason, the court cannot exercise its judicial discretion in the Applicant’s favor unless he has purged himself of the contempt.

20 The finding above, actually disposes of this Application. However, in the interest of putting the entire matter to rest, I have decided to making my findings on whether the Applicant met the criteria for an application such as this.

 The grant of stay of execution pending appeal is discretionary and the High Court is also a court of equity. The purpose of the application for stay of execution
25 pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safe guarded and the appeal if successful, is not rendered nugatory.

 (a) Applicant has lodged a notice of appeal

30 The Applicant has satisfied the requirement laid out in **Rule 76 (1), (2) and (3) of the Judicature (Court of Appeal Rules) Directions**. The Ruling in Misc. Application was delivered on the 31st March 2023 and the Notice of Appeal was lodged in this court on ECCMIS on the 14th day of April 2023. The same was served onto the Respondent.

 (b) Application has been made without unreasonable delay

35 This application was lodged in Court via ECCMIS on the 28th April 2023. This is more than a year from the time the Ruling was delivered. I am however alive to



5 the fact that the alleged threat of execution against the Applicant only came into being on the 31st March 2023 after the Respondent's lawyers by way of a letter reminded the Applicant of his duty to pay the decretal sum as ordered by court. In the circumstances therefore, the application was filed without unreasonable delay.

10 (c) There is serious or imminent threat of execution

Under paragraph 5 of the Applicant's affidavit in support of the Application, he deposed that the Respondent intended to execute the Decree. He attached a letter from the law firm of M/s Lagwic Advocates where the Respondent's legal counsel were demanding for payment of the decretal sum in Misc. Application No. 15 0791 of 2022 within thirty (30) working days from 31st March 2023.

At this point, it was expected of the Applicant to bring to court's attention the execution miscellaneous application number under which the execution proceedings were commenced and at what stage were the execution proceedings at the time of filing this application. Section 101 of the Evidence Act places the 20 burden on the Applicant to prove his case. **Section 101(1) of the Evidence Act** states that:

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist".

25 **Section 103 of the Evidence Act** further states that:

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that that the proof of that fact shall lie on any particular person".

In the case of **Monitor Publications Limited & 4 Others – vs – Pius Bigirimana (Civil Appeal No. 170 of 2022 arising out of HCCS No. 612 of 2017)** where 30 Christopher Madrama, JA (as he then was) in dismissing the Applicant's claim that there was an imminent threat of execution found that:

"No evidence was adduced by the Applicants that the Respondent had filed any application to commence execution of the Court of Appeal Decree. This 35 is just imaginary".



5 I agree with the finding of Hon. Mr. Justice Madrama, JA (as he then was). I wish to add that until the Respondent has filed an execution miscellaneous application and the Applicant is served with a notice to show cause as to why execution should not ensue, it is premature to state that the Respondent intends to execute the Decree by way of an ordinary letter. The **Black's Law Dictionary 11th Edition**
10 **at page 898** defines imminent as:

"a danger or calamity threatening to occur immediately; dangerously impending or about to take place".

Court therefore finds there does not exist a serious or imminent threat of execution of the Decree or orders of the court against the Applicant.

15 (d) The appeal is not frivolous and has a likelihood of success

In the case of **E.L.T Kiyimba Kaggwa -vs- Hajji Katende Abdu Nasser (1985) HCB 43** Odoki, J (as he then was) stated that:

"a prima facie case or a strong prima facie case in the context of the exercise of discretion of any power to grant an interlocutory injunction leads to confusion as to the object of this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious. In other words, that there is a serious question to be tried".

The gist of Misc. Application No. 0791 of 2022 was that the Summons and Specially Endorsed Plaint in the main suit were not effectively served on the
25 Applicant. It was for that reason therefore, that he applied for the default judgement to be set aside and the Applicant be granted leave to appear and defend the main suit. It was never the prayer of the Applicant that the main suit should be dismissed. The Court agreed with the Applicant and set aside the default judgement. The Applicant was granted leave to appear and defend the
30 main suit on condition that he paid a sum of Ugx. 39,441,100 to the Respondent within thirty days from the date of delivering the Ruling. The order to pay the said amount was premised on **Order 36 rule 8 of the Civil Procedure Rules as amended** and the Applicant's admission under paragraph 22 of his affidavit in reply to Misc. Application No. 0791 of 2022 that he had paid the Respondent a
35 substantial amount of the contract sum and was only left with Ugx. 39,441,100/= and not Ugx. 58,241,100/=.



5 I therefore find that the grounds of appeal are frivolous and vexatious and the intended appeal has no likelihood of success. The Applicant made general assertions that the appeal had a likelihood of success and nothing more. **See Gashumba Maniraguha vs Sam Nkudiye SCCA No. 24 of 2015.**

10 (e) The Applicant has given due security for performance of the decree or order

The Applicant did not give due performance for security of the decree. The court shall be guided by the principles laid out in the case of **Lawrence Musiitwa Kyazze (supra)** and the provisions of **Order 43 rule 4 and sub rule 3(c)** in particular which
15 states that:

“No order for stay of execution shall be made under sub rule (1) and (2) of this rule unless the court making it is satisfied 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”.

20 The wording of Order 43 rule 4 sub rule 3 (c) makes it mandatory for the Applicant to furnish security for due performance of the Decree. **See New Vision News Paper vs J.H Ntabgoba High Court Miscellaneous Application No. 243 of 2004.**

The Applicant in his affidavit in support of the Application under paragraph 12
25 stated that he was willing to deposit security for due performance of the decree. He did not make any effort to state what form of security he was willing to deposit to determine its acceptability.

It is perhaps important at this point to state why the issue of security for due performance of the decree always comes up and why it is part of our legislation
30 and courts have pronounced themselves on it.

It is my considered opinion that the Applicant is asked to furnish due security for the performance of a decree so that he/she is inclined to not only institute the appeal but also to take necessary steps to have it heard and determined without delay since he/she is denied use of his/her money. And also seeing that at this
35 point, the Respondent shall be denied from enjoying the fruits of his/her litigation until the appeal is heard and determined.



5 So as long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is least disadvantageous to the party giving the security. The security may take many forms. Bank guarantee and payment into court are just but two of them.

10 In an application for stay pending appeal, the court is faced with a situation where judgement has been given. It is the subject on an appeal. It may be affirmed or set aside. The court should be concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the Respondent while giving no legitimate advantage to the Applicant. It is the duty of court to be even handed without prejudicing the matters pending appeal and that
15 the decretal sum would be available if required.

Court therefore finds that the Applicant failed to furnish security for due performance of the decree as required by the Law.

(f) Substantial loss may result to the applicant if stay is not granted

20 It is trite that *prima facie* an injunction is not issued to restrain actionable wrongs for which damages are an adequate remedy. The onus of demonstrating that substantial loss or irreparable damage shall be suffered if the stay is not granted lies fairly and squarely on the Applicant.

The Black's Law Dictionary 11th Edition at page 993 defines irreparable to mean:

25 *"incapable of being rectified, restored, remedied, cured, regained or repaired; that cannot be made right or good".*

The same dictionary at defines the adjectives substantial at page 1728 as:

"considerable in extent, amount or value".

30 The case of **Pan African Insurance Company (U) Ltd. – vs – International Air Transport Association HCT-00-CC-MA-086-2006** is very instructive on how to plead substantial loss. Lameck Mukasa, J stated:

"The application merely states that if the decree is not stayed, the applicant will suffer substantial loss. The deponent should have gone a step further to lay the basis upon which the court can make a finding that the applicant will

M. Mukasa

5 *suffer substantial loss as alleged. The applicant should go beyond the vague and generalized assertion of substantial loss in the event that a stay order is not granted”.*

The Applicant his affidavit in support of the application did not articulate the nature or extent of the substantial loss or damage that would be occasioned to
10 him if the application were not granted. The Applicant only made mere assertions and regurgitated the wording of the statute provisions that substantial loss would be occasioned if the Applicant were not granted.

In the case of **Tanzania Cotton Marketing Board vs Cogecot Cotton Co. SA (1995-1998) 1 EA 312** where Lubuva, J cited with approval the case of **Bansidhav vs Pribku Dayal AIR 41 1954**, it was found and stated that:
15

“It is not enough to merely repeat words of the code and state that substantial loss will result; the kind of loss must be specified, details must be given and the conscience of the court must be satisfied that such loss will really ensue. The words substantial loss cannot mean the ordinary loss to which every judgement debtor is necessarily subjected to when he loses his case and is deprived of property in the consequence. That is an element that must occur in every case...it is clear that the words substantial loss must mean something in addition to all different from that”.
20

In the case of **American Cyanimide Company Limited vs Ethicon [1975] AC 396**
25 where the decision of the court was to the effect that the harm which the court must prevent by a grant of an application of this nature is not every harm that may possibly be suffered by the Applicant. It is only that harm which cannot be compensated by an award of damages.

I am in agreement with the submissions of learned counsel for the Respondent
30 that no substantial loss shall be occasioned to the Applicant for the payment of a debt he admitted.

The court has already found that there is no imminent threat of execution against the Applicant. The Applicant did not prove to this court that a notice to show cause as to why execution should not ensue was issued and served upon him. I
35 find that the Applicant has failed to show that he shall suffer substantial or irreparable loss which cannot be compensated for by damages should the stay be

Meenagauer

5 denied. It also therefore follows that the intended appeal shall not be rendered nugatory if the stay was not granted.

(g) The refusal to grant stay would inflict more hardship than it would avoid

The Applicant did not prove to court what hardship would be suffered if the stay was not granted.

10 (h) Balance of convenience

After careful consideration of the principles that should guide court before a stay of execution pending appeal is granted, I find that the Applicant has to great extent failed to satisfy them. The only ones he has fully satisfied were filing and serving the Notice of Appeal within the timelines as stipulated under the law and
15 filing the application without delay.

The Applicant's affidavit in support were full of assertions and no evidence was adduced to prove, substantiate or support those assertions.

The balance of convenience therefore lies in favour of the Respondent. An intention to appeal does not automatically give rise a ground for stay of execution.
20 In the case of **Stanbic Bank Uganda Limited vs Atabya Agencies SCCA No. 31 of 2004** where Mulenga, JSC (RIP) held that:

*"I would reiterate here my view expressed in **Wilson Mukiibi vs James Semusambwa Civil Application No. 9 of 2003** where I said – "it is trite that an intention to appeal perse is not a ground for stay of execution and
25 instituting an appeal does not operate as a stay of execution. A party seeking a stay of execution must satisfy the court that there is sufficient cause why the party with judgement should postpone the enjoyment of its benefits. It is not sufficient for the judgement debtor to say that he is vulnerable, because the successful party may take out execution
30 proceedings. it must be shown that if execution proceeds there may be some irreparable loss caused".*

The same view was held by Kakuru, JA (RIP) in the case of **Kyambogo University (supra)** where he held that:

*"In my view, the law recognizes that not all orders or decrees appealed from have to be stayed pending appeal. It also recognizes that a fact that an
35 appeal may be determined without the court having to grant a stay of*

Mulenga

5 *execution. However, court may stay execution where the circumstances of
the case justify such a stay. It is therefore incumbent upon the applicant in
every application of stay of execution to satisfy court that the grounds exist
for a grant of stay of execution. **The assumption that once a party has filed
an appeal a stay of execution must follow as a matter of course has no**
10 **legal basis”.***

I therefore find that applicant is either buying time and or running away from his
obligations by filing applications such as this in court thereby denying the
Respondent the right to enjoy the fruits of his judgement. This Court shall not
condone such behaviour where litigants saddle and clog the court system with
15 such applications. This court, under the provisions of the Judicature Act and Civil
Procedure Act is vested with powers to curtail such conduct.

Section 17 (2) of the Judicature Act states that:

20 *“with regard to its own procedures and those of the magistrates’ court, the
High Court shall exercise its inherent powers to prevent abuse of the process
of court by curtailing delays, including the power to limit and stay delayed
prosecutions as may be necessary for achieving the ends of justice”.*

Section 98 of the Civil Procedure Act states that:

25 *“Nothing in this Act shall be deemed to limit or otherwise affect the
inherent power of the court to make such orders as may be necessary for
the ends of justice or to prevent abuse of the process of the court”.*

I therefore dismiss this application with costs to the Respondent.



30 **Harriet Grace MAGALA**

Judge

Dated and signed at Kampala this 6th day of December 2023.

The Ruling has been delivered electronically on ECCMIS this 7th day of December
2023.