

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

**MISCELLANEOUS APPLICATION NO. 292 OF 2021
(ARISING FROM MISCELLANEOUS CAUSE NO. 185 OF 2020)**

- 1. UGANDA DEVELOPMENT CORPORATION**
- 2. DR. PATRICK BITONDER BIRUNGI.....APPLICANTS**

VERSUS

TUMUHMBISE HELLEN HANNAH.....RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application by Notice of Motion under section 98 of CPA, CAP 71, section 33 Judicature Act Cap 13, O.43 rule 4(3) and 4(3) and O. 52 of the CPR SI 71-1 seeking for the following orders that;

1. Execution of the ruling and orders of the high Court in Miscellaneous Cause 185 of 2020 be stayed, pending the disposal of the intended appeal to the Court of Appeal.
2. The costs of this application be provided for.

This application is supported by the affidavit of Hope Kisitu, the Corporation Secretary of the 1st Applicant in this application and the grounds briefly are;

1. That the applicants intend to appeal against the ruling and orders in Miscellaneous cause No. 185 of 2020 to the court of Appeal.

2. That in the event that the application is not granted the appeal will be rendered nugatory.
3. The applicants will suffer substantial loss if the ruling and orders in Miscellaneous Cause No. 185 of 2020 are executed while the appeal is pending disposal.
4. That the said orders if not stayed, impact on the rights of innocent third parties including a number of the 1st applicant's employees' who are the subject of the impugned promotions and external hiring and whose employment status is now in jeopardy.
5. The application has been made without unreasonable delay.
6. The applicants undertake to provide security for the satisfaction of orders should this Honourable court so order.

Ms. Tumuhimbise Hellen Hannah the respondent filed an affidavit in reply. In her view, the application is an abuse of court process, incompetent, misconceived, vexatious and bad in law. The averments in the affidavit of the applicant are mere speculations and threats only intended to mislead court and do not satisfy this courts as grounds for stay of execution.

The applicants were represented by *Senior Counsel James Mukasa Ssebugenyi* assisted by *Micheal Mafabi* while the respondent was represented by *Siraj Kakeeto and Isaac Kugonza*. The parties filed written submissions which I have considered in this ruling.

Analysis

The general rule is that an appeal does not operate as a stay of execution. The general preposition is that "the court does not deprive a successful litigant of the fruits of litigation, and lock up funds which prima facie he is entitled, pending an appeal. If however, the appellant (who is seeking the stay) can persuade the court

that he will not be able to recover the sums he is required to pay if his appeal succeeds, this may be a basis on which to order a stay.

If, the government or a department or the concerned official fails to comply with the court order then it commits contempt of court for which, in suitable cases, can be punished by the concerned court. Punishment may amount to fine, imprisonment of the concerned government official, attachment of government property. Wilful disregard or disobedience, or non-compliance, of a court order constitutes contempt of court.

In case of ***Lawrence Musiitwa Kyazze vs. Eunice Busingye SCCA No. 18 of 1990[1992] IV KALR 55*** it was held that an application for stay of execution pending appeal is designed to preserve the subject matter in dispute so that the right of the appellant who is exercising his/her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

The authorities provided by both the applicants' and respondent's counsel summarize the principles to be considered before allowing an application for stay of execution. In the case of ***Hon. Theodore Ssekikubo & others vs. The Attorney General and Another, Constitutional Application No. 06 of 2013*** the Constitutional Court re-stated the principles as follows:

1. The applicant must establish that his appeal has a likelihood of success;
2. It must also be established that the applicant will suffer irreparable damages or that the appeal will be rendered nugatory if stay is not granted.
3. If 1 and 2 above have not been established, court must consider where the balance of convenience lies.
4. That the applicant must also establish that the application was instituted without delay.

The appeal which is the subject of this application is against the decision (ruling) of High Court. The peculiarity of this application is that, it is an appeal arising out of a judicial review matter where the court must exercise extreme circumspection in staying orders against abuse of power or actions found to be illegal, irrational or procedurally improper since the stay would mean a continued illegality or

perpetuating wrongful exercise of power or legitimizing abuse of authority until the appeal is determined after about 4 or 5 years at the bare minimum and thus technically defeating the orders of court.

The refusal to respect orders of court like a *Mandamus/Certiorari* is automatically punishable by contempt of court proceedings to force a public servant to do what the law compels him to do instead of procrastinating on endless appeals in defiance of the lawful orders of court. The principles set out in the different decisions must be appreciated in the circumstances of cases where orders of stay of execution have been issued.

The court which has found an illegality or abuse of power may be constrained to allow the party (public body or officer) any further delay in continuing to act illegally or contrary to the law for which they have been found to be in breach unless there are 'special circumstances' which would justify suspending the successful litigants rights or allowing the continued breach of the law.

There must be a balancing act in ensuring that the orders of court in judicial review are not rendered nugatory, the same way the applicants (appellants) have argued that the appeal should not be rendered nugatory. Whereas the prospects of any success at appeal are speculative, the ruling made by the court has already found some wrongdoing on the part of the applicants and has vested some rights to the respondent. This must be preserved in order to ensure the rule of law flourishes and is not strangled through endless appeal litigation. The court must assess the relative risks of injustice in not staying execution of the orders granted by court as against putting right what was done wrongly or maintain status quo which is premised on abuse of authority or misinterpretation or misapplication of the law.

An appeal is does not operate as a stay of execution. The applicants have duly lodged the appeal by filing a Memorandum of Appeal. The applicants' seems to be aggrieved by the entire decision of court and the orders given therein. The only ground of appeal that would have been persuasive to court is; *That the said orders if not stayed, impact on the rights of innocent third parties including a number of the 1st applicant's employees' who are the subject of the impugned promotions and external hiring and whose employment status is now in jeopardy.*

According to the ruling of this court, a declaratory order was given in respect of the 2nd respondent's decision (now 2nd applicant) or acts of automatic activation and filling vacancies at the levels of managers of Departments, subsequent promotions and external hiring without involvement of and the approvals from the Executive Committee of the 1st respondent (now 1st applicant) and adherence to Human Resource Manual was illegal irrational and irregular.

The ruling did not quash or make any coercive orders that would affect the rights of third parties. The court had an option of issuing an order of *certiorari* (to quash) but purposely gave declaratory orders to avoid what is now termed as jeopardy of the employment of other persons to the said position. A declaration by court declares rights of parties without giving further relief. It has no coercive force as such nor does it quash any decision which may have been taken by an administrative authority. The purpose was to make it known that there was a breach of the law and the same ought to be avoided in future without affecting the existing rights.

Most importantly is the fact that the application is pre-mature. There is no proof that an application for execution has been filed or approved. The respondent's counsel has written a letter to the applicants' and this according to court is not part of an execution process known in law. The modes of execution available to the successful parties are known and the application should not be premised on speculation and fears that are yet to be set in motion under the known rules of procedure for execution. The general rule is that courts should not order a stay where there is no evidence of any application for execution of the decree. (***See Orient Bank Ltd vs. Zaabwe & others M/A No. 19 of 2007***)

The applicant did not adduce any evidence to show that the respondent had done any act to execute the orders of court. The respondent has not applied for a warrant of execution. There is no evidence that there is an imminent threat of execution and yet this is one of the most important conditions to be proved because if it is true, it renders the appeal nugatory.

The orders granted under judicial review are normally enforced through an application for contempt of court with exception of damages. A delay in obeying the court order is an act of defiance of court order and the court would use its power to punish for its contempt. This court emphasizes that in a government of

laws and not of men, such as exists in Uganda; the Executive branch of the government bears a grave responsibility for upholding and obeying judicial orders. Using judicial process through appeals to delay obedience of the court order in judicial review is abhorred and should be discouraged as much as possible except in the rarest of the cases that justify and uphold the rule of law.

While exercising the discretion conferred under the law of stay of execution, the court should duly consider that a party who has obtained a lawful decree/order is not deprived of the fruits of that decree except for good and cogent reasons. So long as the decree/order is not set aside by a competent court, it stands good and effective and should not be lightly dealt with so as to deprive the holder of the lawful decree/order of its fruits.

Therefore a decree/order passed by a competent court should be allowed to be executed unless a strong case is made out on cogent grounds no stay should be granted. Where the stay is to be granted, the court must be mindful of the time frame within which the final orders shall be made so as not to defeat judicial review orders ineffective or become overtaken by events due to lapse of time.

In summary and for the reasons herein above, I am not persuaded that the applicants have satisfied grounds to warrant a stay of execution.

The application therefore fails and is dismissed with costs to the respondent.

I so order.

SSEKAANA MUSA
JUDGE
4th June 2021