THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISC. APPLICATION NO. 70 OF 2021

(ARISING FROM MISC. APPLICATION NO.1148 OF 2020)

(FURTHER ARISING FROM CIVIL APPEAL NO. 100 OF 2017)

(ALSO ARISING FROM COMPLAINT EDT NO. 15 OF 2015)

UMEME LIMITED:: APPLICANT

VERSUS

RURIHOONA ELISAM:: RESPONDENT

BEFORE: HON JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this Application under Section 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act, Cap 71, Order 22 rule 26 of the Civil Procedure Rules SI 71-1, as amended vide SI No. 33 of 2019 for orders that;

a) An order of Stay of execution doth issue restraining the Respondent, its servants/ agents, Garnishee or their agents/ servants or any person acting on their behalf and all banks holding the Applicant's bank accounts from executing and or enforcing the Judgment and Decree of the High Court (Civil Division) of Uganda Holden at Kampala by the Honourable Justice Ssekaana Musa, delivered on the 14th day of April, 2020 *vide High Court Civil Appeal No. 100 of 2017: Umeme vs Rurihoona Elisam,* pending the determination of the appeal in the Court of Appeal.
b) Costs of and incidental to this appeal in the Court of Appeal.

The grounds of this application are specifically set out in the affidavit of **Rogers Mugisha** dated 1st February 2021 which briefly states;

That the Applicant being dissatisfied with the Judgment of the Electricity Disputes Tribunal *vide* Complaint EDT No. 14 of 2015; Rurihoona Elisam vs Umeme Limited, filed an appeal in the High Court *vide* Civil Appeal No. 100 of 2017; Umeme Limited vs Rurihoona Elisam. That the Appeal was dismissed and judgment of the Electricity Disputes Tribunal was upheld *vide* judgment delivered by Hon. Justice Ssekaana Musa on 14th April, 2020. That the Applicant commenced an appeal by filing a notice of appeal dated 20th April, 2020 filed on 23rd April, 2020 and a letter requesting for typed and certified record of proceedings and judgment dated 20th April 2020 filed on 23rd April, 2020.

That the Respondent has commenced execution process by way of garnishee proceedings to wit attaching its bank accounts held in Stanbic Bank (U) Ltd respectively, thus there is an urgency and serious impending threat of execution against the Applicant. As such, this appeal pending determination in the Court of Appeal shall be overtaken by events and rendered nugatory if an order of stay of execution is not granted.

In opposition to this Application the Respondent filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that the Applicant has never served the Respondent with a Notice of Appeal against the decision of the High Court and a letter requesting for the record of proceedings which renders the appeal incompetent. That the law stipulates the various modes of execution which in this case the Applicant hasn't shown any that the Respondent used to commence execution.

That the Respondent instructed his lawyers to file for garnishee to enforce and recover the fruits of his judgment which is provided for under the law and that the said grounds stated therein can stand if the appeal is properly commenced which is not the case here therefore praying for the application to be dismissed for lack of merit and if the court is inclined to grant the instant application, the Respondent

prays that its granted subject to the applicant depositing security for costs in court to a tune of Ugshs. 65,000,000/= (Sixty-Five Million Shilling).

The Applicant was represented by *Kabayo Alex* while the Respondent was represented by *Tusiime Isaac & Okuda Ivan*.

Both parties filed submissions which have been considered by this court.

Counsel for the Applicant submitted that the Applicant lodged a Notice of Appeal in this court on 23rd April 2020 and the same was endorsed by the Deputy Registrar on 24th April 2020. It was subsequently served onto Counsel for the Respondent on 28th April 2020. The Applicant has at all material times been eager to file its memorandum of appeal in the court of Appeal. However, it's hampered by lack of the certified judgement and record of proceedings despite its request vide Annexture "C" to the Affidavit in support of the application. The legal foundation for application for stay of execution pending an appeal is the right of appeal to the proper court and the fact that a Notice of Appeal has been filed in that court.

Counsel for the Respondent submitted that in response to the first ground, that there is a pending appeal in the court of appeal, we submit that there is no appeal formally lodged in the court of appeal. It is the position of the law that the Notice of Appeal should be served onto the opposite party. It was their submission that the said Annexture "B" that's the Notice of appeal, was never served on the Respondent as required by the law. In essence therefore, there cannot be a competent appeal against the Respondent. It's evidence of the Respondent that there is no appeal pending in the court of Appeal as he was never served with either the Notice of Appeal or the letter requesting for certified proceedings.

Applicant's counsel in his rejoinder stated that the Respondent in his submissions relied on a ground of "*whether the Applicant lodged an Appeal in court of Appeal."* We submit that this is not a ground for staying execution pending an appeal. The ground which has been held in a plethora of authorities as already cited in our

earlier submissions is that the Applicant ought to have lodged a Notice of Appeal. See; *Hon. Theodore Ssekikubo &others Vs AG & ors SCCAppn. No.3 of 2014.*

The practice and law that has been established for courts to follow over the years is that an intending Appellant ought to lodge his or her Notice of Appeal within 15 days from the date of receiving the decision. The intending Appellant then proceeds and writes to the Registrar requesting for certified record of typed proceedings. From this point, the Appellant can only wait until the record is ready so as to proceed with the lodging of other documents as required. This is regardless of whether it is 'one page' or 'two' or 'hundreds'. The Appellant can only be faulted if the Registrar had notified the Applicant of the readiness of the record and the Applicant took no steps. That is the case here. The Applicant cannot be held liable in any way for the delay in the processing of the typed record as it the responsibility of court to do so as long as the time stipulated by the law were followed to the dot.

Secondly, counsel for the Applicant further submitted that there is a serious or eminent threat of execution of the decree. The Respondent commenced execution pursuant to an application for a garnishee order nisi vide Misc. Application No. 1148 of 2020 seeking to attach funds held to the Applicant's credit by ABSA Bank (U) Ltd and Stanbic Bank (U) Ltd. This shows that the Respondent has taken over steps to execute the decree in Civil Appeal No. 100 of 2017. The actions already taken by the Respondent clearly exemplifies eminent threat of execution against the Applicant if this application is not granted and once execution commences/ is concluded, the intended appeal will be rendered nugatory.

Counsel for the Respondent submitted that there is lack of a serious and imminent threat of execution. An Order of stay of execution is intended to preserve the status quo, they seem to suggest that it was because of the Respondent's Application for Garnishee Order Nisi that they filed this application as it was glaring that he was going to commence execution process. This in itself is speculative because no

evidence has been adduced to show that it was done and when the threat was issued.

Thirdly, the applicant's counsel submitted that the application has been made without unreasonable delay. The judgement the subject of the intended appeal was delivered on 14th April, 2020 and lodged a notice of appeal on 24th April, 2020. On 29th February, 2021, the Applicant while on a routine follow up learnt that the Respondent had filed an Application for Garnishee Order Nisi and the same was scheduled to be heard on 3rd February 2021, the Respondent conceded to the grant of an interim stay.

Respondent's counsel submitted that to reiterate our submission that the application for stay was filed in February 2021 that's 10 months after the Judgement of this court was delivered. This in our view demonstrates that the said application was filed as an afterthought after the Respondent sought to recover the fruits of the judgement.

Fourthly, counsel for the Applicant submitted that the intended appeal is not frivolous and has a likelihood of success.

Counsel for the Respondent submitted that the pending appeal is frivolous. It is their case that the judgement of the EDT, a body of professionals, and the judgement (on appeal) by this honourable court, upholding the tribunal's judgement, competently addressed the points of law and fact that the Applicant purports to raise and that this intended appeal is a fishing expedition whose sole intent is to further frustrate the Respondent using the courts of law as a ruse. Accordingly, my lord, owing to the Applicant's failure to remit security for due performance, the unreasonable delay in executing its appeal, the intended appeal being frivolous and failure to prove irreparable damage or loss, we pray that this application is dismissed with costs to the Respondent.

Fifthly, counsel for the Applicant submitted that substantial loss may be suffered by the applicant. Its business operations shall be paralyzed and its operations

substantially undermined by attachment of funds on its bank accounts. Suffice to note that the Respondent doesn't controvert or depose contrary to this. That refusal to grant the stay would inflict more hardship than it would avoid. It is equitable for court to stay execution of the Judgement and decree to avoid paralyzing or undermining the business operations of the Applicant especially with regard to fulfilling financial obligations. No inconvenience has been pleaded on the part of the Respondent.

Counsel for the Respondent submitted that this ground relates to irreparable damage or injury which means injury or damage that is incapable of monetary atonement. We submit that the applicant will not in any way suffer loss whether financial or otherwise if the instant application is granted. It's evidence of the Respondent that the Applicant caused financial loss to the Respondent due to the Applicant's unprofessional conduct and if the Respondent goes ahead to execute the decree, he will only be exercising that he is rightfully entitled to under the law. In the case of ***Banashidar vs Pribku Dayal Air 41 1954*** which is cited by Justice Hellen Obura in ***Andrew Kisawuzi vs Dan Oundo, Misc. Application No. 467 of 2013,*** the court observed that "*Substantial Loss*" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and deprived of his property in consequence. It should be something additional to all and different from that. The applicant has not demonstrated any loss that is likely to suffer beyond paying the respondent what he is entitled to under the law and under the contract between the parties which the judgement debtor is ordinarily likely to suffer in the event he also loses the appeal." In light of these facts, its Applicant's assertion that they will suffer substantial loss and damage are without merit. This is because the Applicant is a Multi-Billion company and, in any event, even if execution was to occur but which has not, the Applicant's business operations shall not be paralyzed and its operations shall not be substantially undermined as the Applicant state in their submissions. My lord what we deduce from the conduct of the Applicant is

that the applicant is using the courts to prevent the respondent from enjoying the fruits of his judgement and the Respondent, a man of advanced age, continues to suffer financial loss and hardship in his business if the decree is not executed.

Lastly, counsel for the Applicant submitted that the applicant has given security for due performance of the decree or order as may ultimately binding upon him. Notwithstanding the Applicant's willingness to deposit security for due performance of the Decree as may ultimately be ordered by court, the legal provision on security was never intended to fetter the right of appeal. It was intended to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. According to Justice Flavian Zeija (as he then was) in the case of ***John Baptist Kawanga vs Namyalo Kevina & Anor, Misc. Application No. 12 of 2017,*** the decision whether to order for security for due performance must be made in consonance with the probability of success of the appeal. The Applicant is a public company with enough assets within the jurisdiction of this court to satisfy the decree or order as may ultimately be binding after hearing the appeal. Accordingly, it is not judicious to order a deposit of security for due performance in the instant circumstances. Based on the evidence on record, the applicable principles and case law cited above

Counsel for the Respondent further submitted on the ground whether security for due performance of the decree has deposited by the Applicant seeking stay of execution. The provisions of ***O.43 r 3 (c) of the C.P.R*** relating to security for due performance are couched in mandatory terms and as shown in the authorities cited, security for due performance is a pre- condition for the grant of a stay of execution, short and submissions, there is no mention and proof that they have deposited security for due performance of the decree. In the case of ***Andrew Kisawuzi vs Dan Oundo Malingu, Misc. Application No. 467 of 2013,*** court found that the Applicant had not satisfied the conditions for grant of stay of execution and found that security for due performance is a condition precedent and couched in mandatory terms

wherein court dismissed the application with costs. In its submissions, the Applicant relies on the case of ***John Baptist Kawanga vs Namyalo Kevin & Anor Misc. Application No. 12 of 2017*** which states that the decision whether to order for security for due performance must be made in consonance with the probability of success of the appeal.

Court's 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.

The principles under which an application for stay of execution can succeed are well espoused in a litany of cases but notably in ***Lawrence Musiitwa Kyazze vs Eunice Busingye, SC Civil Application No. 18 of 1990, Kyambogo University vs Prof Isaiah Omolo Ndiege Civil Application No,341 of 2013 (C.A) Justice Kenneth Kakuru JA*** citing various decisions including the Supreme Court decision in ***Lawrence Musiitwa Kyazze vs Eunice Busingye Civil Application No. 18 of 1990*** restated the conditions for a stay of execution order as follows;

I. *That the Applicant must show that he has lodged an appeal which is pending hearing.*
II. *That the said pending appeal is not frivolous and it has a likelihood of success.*
III. *That there is a serious and imminent threat of execution of the decree and if not stayed the appeal will be rendered nugatory.*
IV. *That the application was made without unreasonable delay.*
V. *That the Applicant is prepared to give security due performance of the decree and;*
VI. *That refusal to stay would inflict greater hardship than it would avoid.*
VII. *The power to grant or refuse a stay is discretionary.*

It is evident that there is no memorandum of appeal and the applicant's intention to appeal is still represented by a Notice of appeal. Although, they have tried to set out the grounds of appeal in the affidavit in support of this application.

However, it is trite law that a notice of appeal is not by itself an appeal and cannot stop a successful party's right to enforce a decree obtained, even by execution. An appeal is does not operate as a stay of execution. From the notice of appeal I am unable to tell the intended grounds of appeal and therefore cannot reasonably tell the strength of the appeal and its chances of success or if the application is denied, it will be rendered nugatory.

The nature of the case before this court was an appeal arising from the Electricity Disputes Tribunal. There are no proceedings apart from recording of the parties' attendance and directions of court on how to file written submissions in this matter which is not more than one page or two. Therefore, is it wrong for the applicant to claim that they have not filed a recording of appeal simply because they have not received that one page of the proceedings from court? The conduct of the applicant in taking this long to file an appeal is reason enough to infer that they merely lodged the Notice of Appeal as a 'scarecrow' and do not intend to file an appeal in this matter.

The execution of the decree in this matter will not in my view inflict any serious loss to a company and what the applicant is terming as a loss is an entitlement to the respondent as a successful party before the two courts with an award of 65,000,000/= as granted by the specialised tribunal in Electricity disputes. In the case of ***Pan African Insurance Co. Ltd vs International Air Transport Association HCMA No. 86 of 2006,*** it was held that; the deponent must go a step further to lay the basis upon which court can make a finding that the applicant will suffer substantial loss. That it should go beyond the vague and general assertions of substantial loss in case the order of stay is refused. See ***Andrew Kisawuzi vs Dan Oundo, Misc. Application No. 467 of 2013***

In this case, the Applicant has not demonstrated that the loss (if any) will not be capable of monetary atonement by the Respondent who is a businessman or that it will affect the operations of the company. There seems to be a common thinking among litigants that court can grant a stay of every decree as an automatic right which is wrong. 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.

This application fails and the same is dismissed with costs.

I so order.

Ssekaana Musa
Judge
13th August 2021