

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

MISCELLANEOUS APPLICATION NO.214 OF 2021

(Arising from Misc. Cause No.082 of 2019)

1. ATTORNEY GENERAL

2. PUBLIC SERVICE COMMISSIONAPPLICANTS

VERSUS

JUMA NKUNYINGYI SSEMBAJJARESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This was an application brought by notice of motion under section 98 of the CPA, Order 43 Rule(1) (3) (5) and Order 52 Rules 1,2,3 of the Civil Procedure Rules Seeking for orders for stay of execution of judgment in Misc. Cause No. 082/2019, pending the determination of an Appeal and an order as to costs of the application.

The Respondent was charged with offences relating to abuse of office on 16th of October 2012 and was convicted.

Following the charges, He was removed from office and on payroll. He continuously demanded that his name be reinstated on pay roll which the applicants did not, until he filed a case for judicial review before this court and got judgment in his favor.

The applicants through an affidavit deponed by **NABBASSA CHARITY** state attorney appearing for the AG, stated that they intend to appeal the decision of this court and filled a notice of appeal of 7th May 2020.

That they wrote to the registrar of this court requesting proceedings of court to enable him file a memorandum of appeal. That the applicants are going to suffer irreparable injury that cannot be atoned by damages if an order for stay of execution is not granted.

In response to the Applicants case, the Respondent noted that, the application is brought belatedly, an afterthought and it is a scheme intended to defeat justice.

That they have only filled the application after being notified about the notice to show cause why execution should not issue and that there is no substantive appeal since the notice was filled on the 7th day of may 2020 and no memorandum was filled after.

The applicant was represented by *Natuhwera Johnson* and *Kabega Musa* represented the respondent.

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

Determination

An application for stay of execution is such of a nature as described in the case of *Hon Theodore Ssekikubo and Others vs Attorney General and others Constitutional Application No.03 of 2021*, which has grounds to be fulfilled by the Applicant as follows:

1. The Applicant must show that he lodges a notice of appeal.
2. That substantial loss may result to the applicant unless the application is granted.
3. That application has been made without unreasonable delay.
4. That the applicant has given security for due performance of the decree or order as may unlimitedly be binding upon him.

The applicants lodged a notice of appeal and the letter requesting proceedings of court on the 7th of May 2020 according to the Affidavit **Nabbassa Charity** and attachments of thereon,

The Respondent however contends that much as the notice was filled, it was not served onto them within 7 days as per rule 78 of the Judicature (court of Appeal Rules) Directors) SI 13-10, and that was only served upon them, on the 12th of May 2020,

However, there is no record of evidence, supporting their assertion. They did not attach any copies of the letter and the notice of appeal they purport to have reviewed on 14th of May 2020, probably were they endorsed acknowledging receipt.

The general rule is that an appeal does not operate as a stay of execution. The court does not deprive a successful litigant of the fruits of litigation, and lock up funds which prima facie he/ she is entitled, pending an appeal.

Secondly, the applicants submitted that there is substantial loss which is Irreparable and cannot be atoned in damages.

In the case of *James Wangalwa and Anon vs Agnes Nalaika Cheseto (2011) e KLR court* held that “*Substantial loss entails establishment of other factors which show execution will create a state of affairs that will irreparably affect the applicants position in case the appeal is successful*”

In the present matter, the applicants just mentioned the fact that government will suffer substantial loss if the order for stay is not granted, in paragraph 3(2) of their Affidavit in support , but as to what exactly the government will suffer as substantial loss when the appeal is successful, is not clearly stated.

I don't see any damage that cannot be atoned in damages if the appeal becomes successful:

In agreement with the Respondent I find that there will be no substantial loss if the respondent is reinstated and his emoluments paid to him if the appeal succeeds.

Thirdly, the applicant contended that the application was brought without unreasonable delay.

This ground is determined based on the circumstances of the case i.e. on case by case basis. If there is any delay in bringing the application, there should be an explanation for the delay.

In the case of *Joseph Odide vs David Mbaddi Okello Miscellaneous Civil App No.E041 of 2021*, which was a matter on determination of what amounts to delay where the applicant had delayed to take a step on a judgment, for 8 months.*Held:* That there was inordinate delay in the case which delay was not explained and the attempted explanation was false.

In the circumstances the period of 10 months between the date of judgment between April 2020 and The date when an application for stay was filed o 18th March 2021, which period (delay) was not explained. I believe that would amount to unreasonable delay thus this ground also fails.

Fourthly, the applicant should provide security for due performance of the device.

I believe the applicants have capacity to satisfy the decree, however it is useless in the circumstances to dwell so much on this ground yet the two above grounds have already failed including the most fundamental one of proving a substantial loss which an order for stay is ideally supposed to avoid.

A court has unimpeded discretion to grant or refuse a stay of execution of judgment. The court however is bound to exercise its discretion not only judicially, but judiciously as well. The discretion of the court must not be exercised capriciously or erratically. The stay of execution is dependent on

the circumstances of each particular case and the court is entitled to arrive at a just and equitable conclusion.

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.

As 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.

I therefore find no merit in the application for stay of execution. This application fails and it is dismissed with costs to the Respondent.

I so Order

Ssekaana Musa

Judge

10th March 2023