

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**MISCELLANEOUS APPLICATION NO.491 OF 2022**  
**(ARISING FROM CIVIL SUIT NO.167 OF 2016)**

**WALUSIMBI SAMUEL**  
**T/A KAWALA PARKING YARD:.....APPLICANT**

**VERSUS**

- 1. BUKONKON TRADERS & TRANSPORT BUS COMPANY LTD**
- 2. SPEAR MOTORS LIMITED:.....RESPONDENT**

**BEFORE: HON. JUSTICE SSEKAANA MUSA**

**RULING**

The applicant brought this application under Section 98 of the Civil Procedure Act and Order 52 RULE 1, 2, & 3 of the Civil Procedure Rules for orders that;

- a) The execution of a decree arising out of Civil Suit No. 2016 be stayed and/or set aside.
- b) Costs of the application be provided for.

The grounds supporting this application are contained in the affidavit of the applicant-Walusimbi Samuel. Briefly, the in 2016, the respondents instituted Civil Suit No. 167 of 2016 against the applicant and others. The court entered judgment in favour of the respondents for a sum of Ugx. 165,000,000 as the value of the motor vehicle Registration No. UAF132Y and interest, Ugx. 30,000,000/= in

general damages and lost income, interest and costs of the suit. The respondent taxed her bill of costs at Ugx. 24,745,300. The applicant being dissatisfied with the whole decision and orders of the High court file Civil Appeal No.185 of 2020 in the Court of Appeal to set aside the judgment and decree. The respondent thereby commenced execution proceedings against the applicant and the High court issued an interim order by consent of the parties until 21/03/2023.

The respondent filed an affidavit in reply through Bukonko Wilberforce Baliraine-Director of 1<sup>st</sup> respondent and deponed opposing this application where she stated that the applicant neglected to pay the decretal sum, interests and costs awarded by court and that this application is an afterthought. The applicant has taken no step towards prosecuting their appeal for nearly 2 years and six months. This is a clear disinterest in the matter and making of this application is intentionally to frustrate the respondents from getting their fruits of litigation.

The applicant was represented by *Mr. Kikomeko Saul* whereas the respondents were represented by *Mr. Bitebekezi F. Titus*.

The parties were directed to file written submissions which they accordingly filed.

Both parties' submissions were considered by this court.

### **Analysis:**

The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his/ her undoubted right of appeal are safe guarded and the appeal if

successful, is not rendered nugatory. **See: Lawrence Musiitwa Kyazze vs. Eunice Busingye SCCA NO. 18 of 1990 [1992] IV KALR 55.**

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. 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.

**Order 22, Rule 26** provides 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 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.

It is a settled position of the law that court has inherent power to stay execution and that stay of execution is considered to be discretionary. The court weighs the circumstances of each particular case and exercises discretion whether to stay execution or grant the order sought. 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;

- a) The Applicant must show that he has lodged an appeal which is pending hearing.*
- b) The said pending appeal is not frivolous and it has a likelihood of success.*
- c) There is a serious and imminent threat of execution of the decree and if not stayed the appeal will be rendered nugatory.*
- d) The application was made without unreasonable delay.*
- e) The Applicant is prepared to give security due performance of the decree and;*
- f) The refusal to stay would inflict greater hardship than it would avoid.*
- g) The power to grant or refuse a stay is discretionary.*

In the present case, the circumstances are well laid out in the grounds for the application and the supporting affidavit of the Applicant, earlier set out in this ruling.

It is indeed true that the applicant as seen from the evidence on the court record that the applicant filed its Memorandum of Appeal before the Court of Appeal vide Civil Appeal No. 185 of 2020.

The applicant further submitted that it will suffer substantial loss if the stay of execution is not granted in order not to render the appeal nugatory.

On security for due performance, the applicant citing the case of *John Baptist Kawanga v Namyalo HCMA No. 12 of 2017* contended that security for due performance of the decree is not a condition precedent for the grant of an order of stay of execution.

I am inclined to believe that this application is premised on the substantial loss that will be suffered by the Applicant if this said order is not granted. However, the execution of the decree in this matter will not in my view inflict any serious loss to Applicant and what he is terming as a loss is an entitlement to the respondent as a successful party before the court. 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*

This Court in the case of *Global Capital Save 2004 Ltd & Anor vs Alice Okiror & Anor Miscellaneous Application No. 485 of 2012* while relying on the case of *Tropical Commodities Suppliers Ltd and Others vs International Credit Bank Ltd (In Liquidation)* [2004] 2 EA 331 noted that substantial loss does not represent any particular amount or size, it cannot be quantified by any particular mathematical formula. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without a value or a loss that is merely nominal.

Furthermore, the Court of Appeal in *P.K Sengendo vs. Busulwa Lawrence & Another CACA 207/14* noted that, “if what was sought to be executed was payment of a sum of money, generally courts will deny stay. Reason being that money can always be returned. But where the subject matter was property capable of permanent alienation and therefore capable of causing the appeal preferred to be nugatory, for example,

*transfer, then court will exercise its discretion in favor of the Applicant, so as to give benefit to the appeal to be attended to on its merits”.*

In this case, the Applicant has not demonstrated that the loss (if any) will not be capable of monetary atonement by the Respondent who seeks to fully restore its lost bus which was wrongly/illegally sold by the applicant. 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.

This application fails and the same is dismissed with costs.

I so order.

**SSEKAANA MUSA**  
**JUDGE**  
**14<sup>th</sup> July 2023**