

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(EXECUTION AND BAILIFFS DIVISION)

MISCELLANEOUS APPLICATION NO. 3091 OF 2015

5 **(ARISING FROM HCMA 1689 OF 2013)**

(ARISING FROM EXECUTION MISCELLANEOUS APPLICATION 366 OF 2013)

(ALL ARISING OUT OF CIVIL SUIT 37 OF 2013)

MAKUBUYA ENOCK WILLIAM T/A POLLA PLASTAPPLICANT

VERSUS

10 **1) BALAIMU MUWANGA KIBIRIGE T/A KOWLOON GARMENT INDUSTRY**

2) MOSES KIRUNDA T/A SPEAR LINKS AUCTIONEERS RESPONDENTS

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

15 By this application made under S.98 CPA, S.33 Judicature Act and 0.43 r 5 and 0.51 rr 1 and
2 C.P.R, the Applicant sought orders of this court staying execution of the decree in C.S.
37/13 and Miscellaneous Application 1689/2013 pending the final determination of Civil
Appeal 01/2015.

Costs of the application were also applied for.

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The application is supported by the affidavit of the Applicant. There are also affidavits in
rejoinder to the Respondent's affirmation in reply and affidavit in reply respectively.

25 The application was called for hearing on 28.04.16, however, Counsel for the Applicant who
had fixed the matter for hearing together with the Applicant were not in court.

Court allowed Counsel for the Respondent to proceed since there was no reason advanced by Counsel for the Applicant for his absence.

5 Going through the application, Counsel for the Respondent contested the prayer for stay of execution in C.S. 37/13 on the ground that it was Res Judicata – she referred to First Respondent’s affirmation in reply paragraphs 9, 16, and 22.

10 She stated that the paragraphs refer to Annexure F of the First Respondent’s affirmation in an application for stay of execution interalia, in C.S. 37/13, between the Applicant and the First Respondent.

It was pointed out that the application was dismissed with costs on 13.05.13 by Justice Kabiito – Annexure “G” First Respondent’s affirmation in reply.

15 Counsel argued that since the Applicant applied for stay of execution of the decree in C.S. 37/13, and the application was dismissed, the matter is Res Judicata and should be dismissed.

20 Regarding Application 1689/13, Counsel stated that she was not contesting the stay, but it ought to be conditional in that the Applicant should furnish security for costs. The Bill of Costs was taxed and allowed at Shs. 5,966,000/-.

In addition to security for costs, it was prayed that the Applicant furnishes security for due performance of the decree within two weeks – Annexure I₂ upon failure of which the order for stay of execution was lapse.

25 Later on Counsel for the Applicant appeared and Counsel for the Respondent returned to court.

30 Counsel for the Applicant argued that the affidavit in rejoinder of the Applicant paragraph 4 thereof shows that the decree in C.S. 37/13 was fully executed over and above what was due to the First Respondent as the decretal sum in C.S. 37/13.

The factory that was attached was valued at about Shs. two billion and yet the decretal sum was Ug. Shs. 112,000,000/-. The Applicant lodged application 1689/13 challenging the

excessive attachment and the matter was heard and dismissed. The Applicant then lodged CA. 01/15 pending in the Court of Appeal.

5 It was contended that the appeal has high chances of success and yet the Applicant was served with notice to show cause on 04.03.15 and hence this application – paragraph 11.

The issue **whether the First Respondent is still indebted to the Applicant in any decretal amount** is still pending determination before the Court of Appeal.

10 The Applicant furnished security for costs in Court of Appeal and it was covering Miscellenous Application 1689/13 as well as Miscellenous Application 124/13 – Annexure K – ruling in respect of security for costs.

15 The Applicant furnished security for costs Shs. 40,000,000/- Annexure B the letter forwarding security for costs was served on the Advocates for the First Respondent and was received.

20 It was asserted that the application arising from C.S. 37/13 is not Res Judicata and a distinction should be made between H.C Miscellenous Application 124/13 which was an application for leave to defend the suit and the application No. 1689 challenging excessive attachment.

25 The issue of Res Judicata was rejected when application 1689 came before Justice Owiny Dollo.

Further that, the matter before court is different from the matter disposed of by Justice Kabiito- Annexure D pages 2 and 3. The matter is not res judicata and the application should be allowed as prayed for.

30 In rejoinder, Counsel of the Respondent insisted that the decree in C.S. 37/13 was executed. The execution proceedings were commenced by the Second Respondent against the Applicant in Miscellenous Application 3661/13. Partial execution was conducted and a return made to court indicating there was a balance of Shs. 37,000,000/-.

Both the interim application for stay No. 125/13 and the main application 124/13 were dismissed with costs.

Costs for both applications were never paid. And when application was made to execute for
5 the balance, the current application was made.

The Applicant also filed another application 1689/13, seeking to reverse the execution. The application was also dismissed with costs, which have not yet been paid.

10 The Applicant appealed against all order in the Court of Appeal. He was required to furnish security for all matters so far dismissed, within thirty days. That is by December 2014. To date, he has never furnished security. The certificate of title presented to the Court of Appeal was rejected as amounting to professional misconduct.

15 It was the submission of Counsel for the Respondent that, the Applicant is using court as an instrument to oppress the First Respondent, abusing court process and hereby accumulating costs he cannot pay, and also putting the First Respondent to further expense in defending the application. - She referred court to Annexure 11 and I to affidavit in reply and Annexure "E" return of execution.

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Counsel reiterated her earlier submissions and prayers insisting that since Miscelleneous Application 124/14 was dismissed and is being brought before court again, the matter is res judicata.

25 After hearing the submissions of both Counsel and going through the Affidavits for and against the application, court formulates the following issues for determination:-

1) Whether the application for stay of execution in C.S 37/13 is Res Judicata.

30 It is not in dispute that there was an earlier application for stay of execution and to set aside decree Miscelleneous Application 124/13. The application was dismissed on 13.11.13 by Justice Kabiito.

However, this fresh application arises out of a notice to show cause, that was issued by the First Respondent to the Applicant to show cause why execution should not issue to enforce payment of the balance on the decretal sum of about Shs. 37,000,000/-.

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Instead of appearing to show cause, the Applicant filed this application, contending that he has appealed.

10 Indeed there is an appeal filed by the Applicant before Court of Appeal and the proceedings indicate that it is at scheduling stage. This court therefore finds that if this application to stay further execution is dismissed, the appeal will be rendered nugatory. More so as it raises issues of over attachment.

15 The issue **whether the Applicant is still indebted to the First respondent is pending determination before the Court of Appeal.** The Applicant therefore, ought to be given a chance to prosecute the Appeal – S. 33 Judicature Act.

As to **whether the Applicant should furnish security for costs and for due performance.**

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Counsel for the Applicant contends that Applicant already furnished security. On the other hand, Counsel for the First Respondent contends that the Applicant failed to furnish the security required in Miscelleneous Application 1689/13 as directed by the Court of Appeal and the certificate of title offered was rejected as amounting to professional misconduct.

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This court is hesitant to go into the issues in matters that are before Court of Appeal. Suffice it to state that the security ordered in Miscelleneous Application 342/14 – was either cash; the Applicant was required to tender in court or to deposit an equivalent security acceptable to the Registrar.

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If it is true as Counsel for the First respondent states that no security was ever deposited, then she can raise the issue as an Objection when the Appeal is called for hearing.

Since Counsel has no objection to the stay of execution in Miscellenuous Application 1689/2013 and the Applicant in his affidavit indicated that he was ready to furnish security, the application will be allowed on condition that Applicant deposits half of the money due from the taxed Bill of Costs as security for costs within two weeks from the date of this
5 ruling.

Courts have established that *“the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals”*. – Refer to **Tropical
10 Commodities Suppliers vs. International Credit Bank.**

Costs of the application are granted to the Respondent.

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**FLAVIA SENOGA ANGLIN
JUDGE**

20 **05.05.16**