THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE MISCELLANEOUS APPLICATION NO.036 OF 2022
(Arising from Execution Application No. 30 of 2022 and Labour Dispute Reference No. 12 of 2018)

SECURITY GROUP UGANDA LTD:::APPLICANT

VERSUS

KIGOZI SAMUEL::RESPONDENT

BEFORE

THE HON. JUSTICE ANTHONY WABWIRE MUSANA,

PANELISTS:

1. Mr. JIMMY MUSIMBI,
2. Ms. ROBINAH KAGOYE &
3. Mr. CAN AMOS LAPENGA.

RULING.

Introduction

1.0 This ruling is in respect of an application brought under Section 98 of the Civil Procedure Act Cap.71 Section 33 of the Judicature Act and Orders 22 and 52(1) and (2) of the Civil Procedure Rules S.I 71-1. The Applicant is seeking an order for stay of execution of the award/decree in Labour Dispute Reference No. 12 of 2018 pending the hearing and determination of the Applicants' intended appeal at the Court of Appeal of Uganda. The Applicant also seeks costs of the application.

2.0 The grounds in support were set out in the chamber summons and elaborated in the affidavit of Ms. Winifred Akello. It was her deposition that the Applicant had preferred an appeal against the award of the Industrial Court by filing a notice of appeal and requested for typed proceedings from this Court. She also deposed that the Applicant had no control of the appeal process and the Respondent had made a demand and applied for execution of the Decree. She

averred that the Applicant had raised very fundamental points of law with a likelihood of success and that if execution proceedings are not stayed, the applicant will suffer substantial loss and the appeal will be rendered nugatory.

3.0 The Respondent opposed the application. In his affidavit in reply he suggested that the Applicant's lawyers did not have instructions to represent the Applicant in both this application and the intended appeal. That Ms. Akello did not have authorization to make depositions on behalf of the Applicant, that the Applicant had the capacity to pay the decretal sum and in the event that the Court was inclined to grant the application, the Applicant ought to deposit a performance or bank guarantee until the appeal is determined.

4.0 In rejoinder, Ms. Akello deposed that she held the position of Human Resource Manager and Administration Manager of the Respondent and 4 of its sister companies with knowledge of the labour dispute at hand. She rejoined that the Applicant's Counsel M/S Engoru, Mutebi & Co Advocates had a retainer with the Applicant. She averred that the Respondent had filed a notice of cross-appeal on the matter of costs, that the decree in main reference was irregularly extracted and it was in the interests of justice that execution of the decree be stayed.

5.0 Counsel were invited to file written submissions limited to 5 typed pages. The Applicant complied but the Respondent's Counsel took the liberty to exceed the stipulation by 12 pages. Counsel would be minded to adhere to the directions and guidelines of the Court.

Preliminaries

6.0 Mr. Engoru, Counsel for the Applicant raised two preliminary issues. Counsel argued that paragraph 6 of the Respondent's affidavit was false and this rendered the affidavit defective. He also suggested that the decree in the main reference was irregularly obtained.

7.0 Mr. Rwambuka, Counsel for the Respondent countered by raising two preliminary points. These were that the Applicant's Counsel did not have instructions and Ms. Winnifred Akello's affidavit in support was defective. He posited that the process of extracting the decree was procedurally correct.

8.0 Consideration of preliminary points

8.1 Lack of Instructions

8.1.1 Counsel for the Respondent suggested that no board resolution was registered instructing Messrs Engoru Mutebi and Co Advocates to file the present application and the intended appeal. He cited Section 150(1) of the Companies Act, 2012 in support of this proposition. It was his submission that the absence of a resolution contravened Order 3 Rule 1 of the Civil Procedure Rule S.I 71-1(hereinafter "CPR"). In support of this proposition, Counsel also relied on the case of **Kabale Housing Estate Tenants Association Ltd vs Kabale Municipal Local Government Council**[1]**.** In rejoinder, Counsel for the Applicant contended that instructions to represent a company can be issued by a person with managerial authority.

8.1.3 Under Order 3 Rule 1 of the CPR, it is provided that a party may appear in court in person or by an advocate duly authorized. Counsel for the respondent suggested that the appointment of an advocate is solely by way of a board resolution and cited the **Kabale Housing Estate case**(ibid). We find it necessary to visit the facts of the case. From our reading of the case note, a dispute arose as to which lawyer was duly instructed to represent the Kabale Housing Estate Tenants Association Limited(the applicant). Both Mr. Henry Rwaganika and Mr. Arthur Mwebesa, recorded appearances for the applicant. At the hearing, Mr. Mwebesa contested Mr. Rwaganika's instructions. He presented a letter authored by the applicant's Chairman withdrawing instructions from Mr. Rwaganika. Mr.Mwebesa also presented minutes of a meeting withdrawing the instructions and a resolution certifying the said minutes. Her Lordship, the Hon. Lady Justice Christine N.B Kitumba J.S.C (as she then was) found that Mr. Rwaganika did not have instructions and held that a suit brought without instructions is incompetent in law.

8.1.4 In the case before us, the Respondent cited the case of **Jules Joseph Delanhaije Geertruda and 8 Others vs Kasolo Robin Ellis**[2] where a similar objection was raised. The Honourable Lady Justice Anna B. Mugenyi found that while **Kabale Housing Estate** case was still good law, it was not applicable because in the Kabale case the directors did not agree on who should represent them. In the case before her Lordship, the view was that the directors did not seem to have a dispute as to who would represent them. She held that the action need not have been commenced by a board resolution.

[1] Supreme Court Civil Application No. 15 of 2013
[2] H.C.M.A No. 1221 of 2017

8.1.5 In a more recent case of **Moneylenders Association of Uganda Limited & Mk Financiers Limited Vs Uganda Registration Services Bureau**[3] the Honourable Mr. Justice Richard Wejuli Wabwire after examining a plethora of decisions on the point concluded that it is settled law that a board resolution is not a prerequisite to commencing legal action in this jurisdiction.

8.1.6 In the matter before us, the Applicant's Counsel did not produce a board resolution authorizing them to commence the application for stay of execution and the intended appeal against the decision of this Court in LDR No. 12 of 2018. The Applicant suggested that it was improper for the Respondent, a stranger to the workings of the Applicant, to raise this point. We think that this reasoning is consistent with the authorities cited above. In the Kabale case, different sets of directors had instructed two different lawyers. In both the Geetruda case and the Moneylenders Association case, the High Court distinguished the facts in the Kabale case. In the Geetruda case, Her Lordship emphasized that the respondent need not give his consent as to who should appear on behalf of the individual applicants. We agree with this reasoning. It would not be up to the Respondent in the application before us, to determine the legal representation of the present applicant. Of note is that the Applicant's Counsel alluded to the existence of a retainer agreement but did not produce it before the Court. The Respondent, who raised the objection was a stranger to the workings of the Applicant. These twin matters raised were therefore bar claims. However, the record reflects that M/S Engoru Mutebi Advocates appeared for the Applicant in LDR 322 of 2017. It is therefore much more believable that they have been retained for the application for stay and the appeal. It is not fathomable that they do not have instructions as the Respondent would have us believe. For these reasons, we do not find merit in the preliminary objection and it is overruled.

8.1.7 We are minded though that Section 20 of the Labour Disputes (Arbitration and Settlement) Act 2006 provides that in any proceedings before this Court, a party may appear by themselves or by agent, or may be represented by an advocate. Under **Regulation 2(1) of the Advocates (Professional Conduct) Regulations** provides that no advocate shall act for any person unless he/she has received instructions from that person or his/her authorized agent. It follows that Advocates appearing before this Court would do well to have in their possession, duly executed instruments of appointment.

[3] H.C.M.A No. 001 of 2019

8.1.8 We also find the discourse on capacity of a deponent of an affidavit on behalf of a company in the case of **MHK Engineering Services (U) Ltd vs Macdowell Limited**,[4] very instructive. In that case, an affidavit of an Accountant/Administrator was objected to. The Honourable Mr. Justice Boniface Wamala posited that for a person to represent a company over a court matter, that person must be a director, secretary or other principal officer of the company**.** Citing the case of S**pencon Services Ltd Vs Onencan Habib**[5], where the Honourable Mr. Justice Stephen Mubiru, while assigning meaning to the phrase "principal officer of a corporation" as used under Order 29 Rule 2 of the CPR held that the determination of who in the corporation qualifies as such must be determined on basis of the nature of the duties the person performs in the corporation. To his Lordship, it is a functional determination and includes such persons in the corporation who are authorised to exercise substantial executive or managerial powers, such as signing contracts and making major business and administrative decisions as distinguished from regular employees. We find these decisions particularly instructive. The deponent in the matter before us is Human Resource and Administration Manager of the Group Company consisting of 4 Companies. The functional role of this position entails, in our view, attends to matters of all group employees and she would therefore be categorized as a principal officer for the purposes of the case before us.

8.2 Defective Affidavits

8.2.1 It was submitted for the Applicant that the Respondent's affidavit was defective in as far as Paragraph 6 contained falsehoods. It was argued that the statements contained therein are neither facts within the knowledge of the Respondent and are an opinion whose source is not named. Counsel asked Court to strike out or expunge the affidavit from the record.

8.2.2 Counsel for the Respondent in turn submitted that Ms. Winifred Akello's affidavit was riddled with conjecture, hearsay and falsehoods and is incurably defective. As such the application is unsupported. It was also submitted that Ms. Akello is not a director of the Applicant, does not sit on the Applicant's board and is not privy to the workings of the board. Counsel cited the provisions of Order 29 Rule 1 of the CPR in support of the proposition that Ms. Awino was not a proper party to depose the affidavit in support.

[4] H.C.M.A 825 of 2018

[5] H.C.C.A No. 092 of 2016

8.2.3 The Courts have adopted a liberal approach to defective affidavits. [6] This approach enjoins Courts to sever those parts of the affidavit that contain falsehoods, if it is established that there are indeed false.[7] This Court is bound by the decisions of the Supreme Court and we shall now consider the said affidavits:

8.2.3.1 The Respondent suggests that paragraphs 3, 4 and 7(ii) of Ms. Akello's affidavit in rejoinder are false. Paragraph 3 is based on her knowledge. We do not find falsity of fact. The Respondent asserts that the said statement is false on account of there being no resolution to file the suit. In view of our finding in paragraph 8.1.6 above, we find no merit in this objection.

8.2.3.2 Paragraphs 4 and 7(ii) would also fall within the ambit of our finding in paragraph 8.1.6 above.

8.2.3.3 Paragraph 6 relates to the cross-appeal and does not suggest the Respondent has appealed against the whole appeal. Conversely, the deponent refers to the cross-appeal on the failure of this Court to award the Respondent costs and;

8.2.3.4 Paragraph 8 relates to information obtained from the Applicant's Counsel in regard the entire award/decree in LDR 12 of 2018.

We do not find any falsehood in order to invite severing the said falsehoods.

8.3 Irregularly extracted decree

8.3.1 Counsel for the Applicant submitted that the sharing of a draft decree with all parties to a suit is mandatory under Order 21 Rule 7 of the CPR. It was Counsel's contention that the Respondent had deliberately ignored the law and sought to invoke Article 126(2)(e) of the 1995 Constitution as a magic wand. He cited the case of Mulindwa George William vs Kisubika Joseph[8] in support of his

[6] See **Banco Arabe Espanol versus BOU, Civil Appeal No. 8 of 1998;** *"...a general trend is towards taking a liberal approach in dealing with defective affidavits. This is in line with the Constitutional directive enacted in article 126 of the Constitution that courts should administer substantive justice without undue regard to technicalities Rules of Procedure should be used as handmaiden of justice but not to defeat it."*

[7] See **Sam Aniagyei Obengi & Anor v MTL Real Properties Ltd & Anor (Miscellaneous Application 198 of 2011) [2011] UGCommC 51 (05 June 2011)**

[8] Supreme Court Civil Appeal No.12 of 2014

submission. Counsel asked that the Court directs the Registrar of this Court to ensure that the provision is complied with in future matters.

8.3.2 Counsel for the Respondent countered that a decree was a formal expression of an adjudication. In his view, the provision of Order 21 Rule 7(2) of the CPR is intended to ensure that the decree is consistent with intention of the judicial officer who delivered it and not the parties to the suit. He argued that all the terms of the decree as extracted were a reflection of the decision of the Court and no miscarriage of justice was occasioned.

8.3.3 It is now the established practice of the Industrial Court to apply the Civil Procedure Rules where there is a lacuna in the Labour Dispute(arbitration And Settlement) Rules 2012. There is no provision for extraction of decrees in the said Rules. Recourse must be had to the CPR. Under Order 21 Rule 7(2) of the CPR, it is provided as follows:

> ***"*** *It shall be the duty of the party who is successful in a suit in the High Court to prepare without delay a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it without undue delay. If the draft us approved by the parties, it shall be submitted to the registrar who, if he or she is satisfied that is drawn up in accordance with the judgment, shall sign and seal the decree accordingly. If all the parties and the registrar do not agree upon the terms if the decree within such time as the registrar shall fix, it shall be settled by the judge who pronounced the judgment, and the parties shall be entitled to be heard on the terms of the decree if they so desire"*

It is also a very clear and plain rule. The rule provides that a successful party shall draft a decree and share it with the other parties for approval. This is couched in mandatory terms. From the rule we derive that:

(i) After the pronouncement of a judgment, all parties are expected to participate in drawing up the formal expression of the judgment.

(ii) The rule also provides for the registrar to consider the draft and establish if it reflects the judgment so delivered.

(iii) In the event that the parties and registrar cannot agree on the terms of the decree, then it would be placed before the judge who pronounced the judgement.

(iv) The parties are entitled to be heard on the terms.

8.3.4 From a plain reading of this rule, the law envisages disputations as to the contents of a decree arising from the parties' individual interpretations of the judgment. For this reason, the law provides a tripartite mechanism to ensure consistency and conformity between the decree and judgment of the Court. We think that the rationale is that there must be clarity in the formal expression of the Court's decisions. The first step is for the parties to agree on the content and terms of the decree. The second step is for the registrar of the court to examine the decree for consistency. If the registrar and parties do not agree, then the decree is placed before the judge who pronounced judgment for settlement. The law also provides for the parties to be heard.

8.3.5 In the matter before us, whilst there has not been a contestation of the terms of the decree in LDR 012 of 2018 and no miscarriage appears to have occurred from the Respondent's unilateral extraction of a decree, rules of court are to be obeyed. The safeguards are material to the course and delivery of justice. We are of the persuasion that the procedure of extraction of decrees as set out in the CPR ought to be adhered to in the Industrial Court. In arriving at this conclusion, we are anchored in the decision of the High Court in **Dairy Development Authority v Balikowa**[9] where the Hon Lady Justice Eva Luswata **(**as she then was)cited passage by Justice Owiny Dollo(as he then was) in the decision of **Uganda Bus Operators Association Investment Ltd Vs Kampala Capital City Authority &Anor**[10] gave wise counsel on this principle that a decree and warrant must reflect the decision of the court. His Lordship stated that:

> *"Nowhere at all, is it stipulated in the consent Judgment that any of the parties to the suit should be evicted from the suit property……..Court Registrars have the bounden duty to ensure that a warrant issued for execution reflects the clear letter and purpose of the decree, which itself must strictly embody the*

[9] High Court Miscellaneous Application 202 of 2016 [2020] UGHC 194

[10] HCMA No.87 of 2012 {[2013] UGHCLD 98

decision of the court as is contained in its Judgment in the suit. Since this warrant was issued in contravention of the court decree which it purported to execute, the applicant's grievance in this regard is well founded. I find as fact that the execution complained against was unlawful, as it was emanated from a warrant that was wrongfully issued contrary to the decree of the court…….''

While this decision relates to a consent judgment and execution, the principle is applicable to decrees. Any errors in a decree have the capacity to occasion a miscarriage of justice, to affect the rights of either a decree holder such as the Respondent in the present case, or an Appellant, such as the Applicant in the present case. Our counsel is for parties to adhere to the law and procedure in extraction of decrees.

Consideration of the merits of the application

9.0 The principles governing a grant of stay of execution have been very well settled and for exactitude, are that the Applicant must establish that:

(a) his appeal has a likelihood of success; or a prima facie case of his right of appeal.

(b) he will suffer irreparable damage and that the appeal will be rendered nugatory if a stay is not granted.

(c) If (a) and (b) have not been established, Court must consider where the balance of convenience lies.

(d) the Application was instituted without undue delay.[11]

(e) there is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nurgatory.

(f) the application is not frivolous and has a high likelihood of success and

(g) the refusal to grant the stay would inflict more hardship than it would avoid.[12]

10.0 It was submitted for the Applicant that there was a status quo to preserve. Counsel for the Applicant also posited that the Industrial Court had granted a remedy of aggravated damages which is a contested area in disputes of this nature. The Applicant avers that a decision of the court of appeal will be a public good and of good jurisprudential value. For his part, the Respondent suggested that the grounds of appeal were general (a fishing expedition) and did not

[11] Supreme Court Constitutional Application No. 06 Of 2013 Hon. Theodore Ssekikubo And 3 Others Vs Ag And 4 Others

[12] John Baptist Kawanga Vs Namyalo Kevina & Anor H.C.M.A No. 12 Of 2017

disclose a likelihood of success of the appeal. Counsel for the Respondent invited this Court to find that the grounds of appeal were poorly drafted. We think the matter of the grounds of appeal is not within our remit. It is a matter for the Appellate Court.

11.0 A review of the pleadings and submissions in the present case, establishes prima facie, the question of the award of aggravated damages, which may, in our very humble view, merit further judicial consideration. The questions of what damages are awardable by the Industrial Court attract possible consideration of the common law position on damages viz a vis the statutory damages under the Employment Act, 2006. This, in our view, may require further judicial consideration and result in a contribution to labour jurisprudence.

12.0 As to the status quo, the record reflects that the Respondent has commenced execution of the said award by way of a demand dated 21st March 2022 and taking out an application for execution in Execution Application No. 30 of 2022. This application was filed on the 23rd March 2022, about 5 days after the award. The Notice of Appeal was dated 21st March 2022 and the memorandum of appeal was filed on 15th September 2022. It appears from the record that the Applicant is taking steps to progress its appeal.

13.0 In regard to paragraphs 11.0 and 12.0, we are satisfied that the Applicant has met the threshold for a grant of the orders sought.

14.0 However it is our considered opinion that such a grant is not to be unconditional. This Court has adopted a rationale for conditional grants of stay of execution. In the case of **Sanyu Fm (2000) Limited Vs Ben Kimuli**[13]the Court sought to balance the fear of substantial loss if it is impossible to recover money after execution, with the delay in enjoying the fruits of litigation if the appeal were to delay**.** This rationale has also been expressed by this Court in several other cases. [14] In each of these cases, the Court has granted a conditional stay of execution and we have not been persuaded to depart from this approach.

15.0 We would add that a party seeking remedial action before an appellate court would be interested in a speedy disposal of the appeal in order to access the

[13] LDMA 248 of 2019

[14] LDMA. No. 005 Of 2020 Absa Bank (Formerly Barclays Bank Of Uganda) Vs Aijukye Stanley, LDMA No 008 Of 2021 Busoga Forestry Company Vs Batabane Anatole and LDMA No. 170 Of 2019 Stanbic Bank (U) Ltd Vs Okou R. Constant.

monies deposited as a security. Similarly, a respondent would be assured of a safety net in the form of security for the award, the imponderables notwithstanding. We are of the considered view that a deposit of the decretal sum or part thereof as security is helpful in expediting the prosecution of an appeal in the Appellate Courts as well providing some form of guarantee to a decree holder.

16.0 In assessing the quantum of the security deposit, we note that the Applicant also made the point that the Respondent had also filed a Notice of Cross-Appeal against **part** of this Court's award. The Application for Execution under Appendix D of the CPR, requires a disclosure whether any appeal has been preferred. The requirement for disclosure might be intended to guard against abuse of court process by electing to appeal concurrently with executing the decree. In the case of **John Baptist Kawanga v Namyalo Kevina and Ssemakula Laurence**[15] the Honorable Dr. Justice Flavian Zeija observed that,

> *"…The objective of 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 filling vexatious and frivolous appeals. Therefore, the decision whether to order for security for due performance must be made in consonance with the probability of the success of the appeal and on the facts of each case as the situations vary from case to case.*

The circumstances of the present case are that the Respondent also seeks to appeal against part of the award of this Court. For this reason, we think it would be unfair to subject the Applicant to a deposit of the full decretal sum because the Respondent would also be pursuing a cross-appeal. The grant, under Order 22 Rule 26 of the CPR is discretionary. The court may grant the order if it sees fit and on such terms as to security as the Court thinks fit.

17.0 The Applicant proposed a figure of **UGX 5,000,000/=(Five Million Shillings)** but did not give a foundation for this figure. In light of the decretal amount, the Applicant's proposed sum is inordinately low. In granting this application, we order that Applicant deposits in Court one half of the decretal amount being the sum of **UGX 82,567,452/=(Eighty Two Million Five Hundred Sixty Seven Million Four Hundred Fifty Two Million Shillings Only)** by way of a bank

[15] HCMA 12 of 2017

guarantee from a reputable bank. The same shall be deposited in Court within 30 days of this order. There shall be no order as to costs.

Dated, delivered and signed at Kampala this 13th day of January, 2023

ANTHONY WABWIRE MUSANA, Judge _____

PANELISTS

1. Mr. JIMMY MUSIMBI, _____
2. Ms. ROBINAH KAGOYE & _____
3. Mr. CAN AMOS LAPENGA. _____

Ruling delivered in open Court in the presence of:

1. Mr. Ivan Engoru, Counsel for the Applicant.
   In the absence of the Respondent and his Counsel.

Court Clerk Mr. Samuel Mukiza