

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 086 OF 2024
(ARISING FROM CIVIL APPLICATION NO. 081 OF 2024)
AND
(ARISING FROM MBALE CIVIL SUIT NO. 006 OF 2018)

UGANDA NATIONAL ROADS AUTHORITY:.....:APPLICANT
VERSUS
ROBERT OKALANG :.....: RESPONDENT

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA, JA

Brief Facts

- 1] The applicant proceeded on a motion under Sections 12 and 33 of the Judicature Act and Rules 2, and 6 of the Judicature (Court of Appeal Rules) Directions. They seek an order for an interim stay of execution pending the decision of this Court in Civil Application No. 086 of 2024, the substantive application for a stay of execution. The applicant in addition prays that costs of the application be provided for.
- 2] The application filed by the Directorate of Legal Services of the Uganda National Roads Authority (hereinafter UNRA) is premised upon eight grounds which are contained in the notice of motion. It is contended for the applicant as follows:

- i) The trial Judge in Mbale High Court Civil Suit No. 0006 of 2018 (hereinafter the suit) delivered judgment against the applicant on 20th December 2022 in the absence of the parties.
- ii) Upon perusal of the judgment, the applicant was dissatisfied with parts of the decision of the trial Court and filed a notice of appeal to the Court of Appeal and a letter requesting for a record of proceedings.
- iii) The applicant got to know of the decision of Court when the time for filing a notice of appeal had lapsed and accordingly filed an application **COA-00-CV-CL-0112-2023 Uganda National Roads Authority versus Robert Okalang** for leave to file the appeal out of time which is still pending hearing before this court.
- iv) While the applicant is pursuing the appeal, the respondent commenced execution proceedings against the applicant and has obtained a garnishee nisi.
- v) The applicant applied for a stay of execution vide **High Court Miscellaneous Application No. 465 of 2023 Uganda National Roads Authority versus Robert Okalang** but the application was dismissed on the ground that the applicant did not furnish security for due performance of the decree.
- vi) The applicant has filed a main application for stay of execution pending the hearing and determination of the intended appeal.
- vii) The main application for stay will be rendered nugatory if an interim stay of execution is not granted.
- viii) That it is in the interest of justice that this application is granted.

- 3] Bruce Nahamya an advocate attached to the applicant's legal department deposed to the facts in an affidavit in support of the application. He repeated much of what is presented as the grounds and then attached the documents mentioned, including the proposed memorandum of appeal.
- 4] Robert Okalang the respondent opposed the application. He deposed to the facts in the affidavit in reply to submit that the applicant had not fulfilled the mandatory requirements required for an order of an interim order. He agreed that the judgment was read in the absence of the applicant and their counsel but out of their choice since the judgment date was fixed inter parties. Further that the application lacks *locus standi* because there is no valid notice of appeal filed in court and the applicant has not provided any evidence of urgency to merit an interim stay. He then charged that by filing their notice late, the applicant is guilty of dilatory conduct without good cause, and therefore the application is filed in bad faith. He stated further that the applicant will not suffer substantial loss since the respondent seeks to recover monetary sums that can be easily atoned for and repaid. In his view, it was not judicious to allow the application since the applicant has held onto his land for long without paying adequate compensation in contravention of the Constitution.
- 5] In an affidavit in rejoinder, Bruce Nahamya stated and provided evidence to show that when judgment was read on 20/12/2022, no party was present, and for that reason, the applicant filed an application for leave to file their notice of appeal out of time. He

asserted that the applicant has never contested to pay the agreed compensation for the respondent's land and as such, the appeal is in regard to what they consider excessive damages and interest made without conducting a trial. In his view, those are serious questions that require further investigation by this Court. Lastly that in the event the appeal succeeds, the funds the applicant seeks to recover by garnishee are public funds that may prove difficult to recover from the respondent.

Representation.

6] At the hearing of this application, the applicant was represented by Mr. Henry Muhanji, while the respondent was represented by Mr. Allan Ogoi and Mr. Viany Sewanyana. Both counsel filed submissions which I have considered when resolving the application. Their submissions raised only one issue for determination; i.e. whether the instant application meets the threshold for grant of an interim order for stay of execution by this Court.

Applicant's submissions

7] Applicant's counsel begun by giving a brief background of the dispute stating that the judgement was delivered in favour of the respondent against the applicant in the suit. The judgment was read in the absence of the applicant who came to know about it after the time within which to lodge the appeal had lapsed. They still proceeded to file a notice of appeal and an application for leave to appeal out time, the latter which is due for conferencing on 5/03/2024. In the meantime, the respondent commenced

execution proceedings whereby he obtained a garnishee nisi attaching money on the applicant's account held in the Stanbic Bank and Bank of Uganda. The garnishee absolute is pending a ruling.

- 8] With respect to the application, counsel cited the decision in **Bindeeba Jacob versus Rwantebe Yofasi & Anor, CA Civil Application 1005 of 2023**, to submit that an appellate court should readily issue orders of stay of execution so that an unsuccessful party exercising his right of appeal is able to do so when the subject matter in dispute is preserved and the right of appeal is safe guarded, and if successful, is not rendered nugatory. He in addition relied on the Supreme Court decision of **Hon. Ssekikubo and 3 Others versus Attorney General & Ors, Constitutional Application No.6 of 2013**, in which principles to be considered when granting a stay of execution were discussed. Using those principles, he argued that this was deserving case for this Court to grant the orders sought.
- 9] With regard to the first principle counsel submitted that the Court should be satisfied that the claim is not frivolous or vexatious and that there are serious questions to be tried. He then argued that some of the matters on appeal are that the trial court delivered a judgment without conduction of a trial, interest was awarded on the compensation sum from a date preceding the valuation. In addition, it is contested that interest was wrongly awarded on general damages from the date of filing the suit rather than date of judgment. Counsel considered those as serious procedural

irregularities which resulted into an astronomical award of UGX 389,979,392/= counsel cautioned that the court should not at this point deal with the merits of appeal but only the fact that there are demonstrable *bonafide* triable issues.

- 10] That ancillary to the above, the applicant had filed a notice of appeal which demonstrates that they have a right of appeal and in addition Civil Application No. 112/2023 for leave to appeal out of time. Counsel then relied on the Supreme Court decision in **G and C SC Civil Application No. 3/2013** cited in **Haruna Sentongo versus I & M Bank Ltd, CA Civil Application No. 1069 /2023** to argue that once a notice of appeal and an application for validation of the notice of appeal are filed, the applicant met the threshold of a competent notice of appeal in light of that Supreme Court decision.
- 11] Counsel submitted in addition that the applicant will suffer substantial loss and the appeal will be rendered nugatory if a stay is not granted. He explained that the respondent has already initiated execution proceedings and obtained a garnishee nisi. Further that the applicant pleaded that the account which is the subject of the garnishee, is an escrow toll revenue collection account which money is part of the consolidated fund that can only be spent through appropriation by parliament. That without a stay of execution, the garnishee nisi may be made absolute and the funds paid to the respondent yet the applicant challenges part of the decree on appeal.

- 12] Citing the Decision in **Tropical Commodities Supplies Ltd and Ors versus International Credit Bank (In Liquidation) [2004] 2 EA 331**, counsel reiterated his submission that the applicant stands to suffer substantial loss because the applicant as an agency of government, draws its funding entirely from the consolidated fund, from which the decretal sum will be defrayed. Conversely, that the respondent is a private individual from whom recovery may prove very difficult in case the appeal succeeds, thereby rendering it nugatory.
- 13] Counsel argued further that the balance of convenience lies in favour of his client if the application is allowed. He explained that the applicant has always been ready and willing to pay the value of the suit land which is the uncontested portion of the judgement as well as the costs awarded. That being so, the respondent would at least receive the sum covering the value of the appropriated land pending resolution of the contested matters on the appeal. Conversely, that if the execution is not stayed, the respondent may draw from the consolidated fund before any appropriation by Parliament, coupled with the hardships the Government of Uganda will face when trying to recover from a private individual.
- 14] Finally, that the applicant being an agency of government and whose activities are funded entirely by that entity, they cannot be compelled to furnish security for due performance of the decree. Counsel based that reasoning on Order 43 Rule 6 CPR. He then concluded that the applicant meets all the conditions for an order to stay of execution, pending disposal of the appeal.

15] He prayed that the application be allowed.

Respondent's submissions

- 16] Respondent's counsel made a brief reply in which he raised an objection to the application. He argued that the application is incompetent and bad in law because it is not supported by a valid or competent notice of appeal. He referred to the Supreme Court decision of **Remegio Obwana versus The Registered Trustees of Tororo Diocese S.C.C.A No 14 of 2021** in that regard. Counsel noted that although the applicant is expected to have filed their notice of appeal within fourteen days from the date the judgment was delivered, he did so on 20/3/2023, ninety days later.
- 17] Counsel also submitted that the applicant had failed to demonstrate any imminent threat of execution which is a mandatory requirement. That in the application, it is stated that the ruling for the garnishee absolute was fixed for 19/2/2024, now passed, meaning that this application has been over taken by events. Therefore, that the Court should consider it a moot and dismiss it with costs.

Submissions in rejoinder

- 18] In rejoinder, applicant's counsel made substantial reference to the decision of **Remegio Obwana versus The Registered Trustees of Tororo Diocese** (supra). He contested the submissions that the notice of appeal is incompetent and suggested that the facts in the above case are distinguishable because in that case, the intending

appellant had no right of appeal in law. That in this case the applicant has an automatic right of appeal against the judgment and order of the trial Judge in Mbale. That a notice of appeal was filed in this Court outside the mandatory fourteen days, because as explained in their affidavit, the applicant was not aware of the judgment in time. Further that the inherent right to appeal is not lost by virtue of a late notice under circumstances where the intending appellant explains the delay, as is the case here.

19] Counsel responded further that the ruling in the garnishee proceedings although slotted for 19/2/2024, was not delivered. That the undisputed fact is that on 21/2/2024 this Court issued an order to stay further execution of the decree of the High Court. The garnishee nisi for the decretal sum is still in place and therefore, the threat of execution exists.

Analysis and Decision of Court

20] I have carefully considered the Notice of Motion, the attendant affidavits together with the submissions and cited authorities by both counsel, and those not cited but are relevant to this application. I choose to consider the objection raised by the respondent together with the application. Should I find it to have merit, then this application would be rested, and vice versa.

21] The powers of this Court to grant an order to stay execution is provided for in Rule 6(2)(b) of the Rules of Court. It is provided that:

“Subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may-

b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just”

22] The purpose of an order to stay execution whether in the interim or as a substantive action, is to preserve the status quo until the main issues are determined in the appeal. See for example, **Yakobo Senkungu & Ors versus Cerencio Mukasa, SC Civil Application No. 5 of 2013**. In the decision of **Remegio Obwana versus The Registered Trustees of Tororo Diocese** (supra) that was well followed by both counsel, Justice Arach-Amoko (as she then was) followed previous authorities of her Court to give an overview on what the Court should consider in this type of application. It was for example stated in **China Henan International Cooperation Group Co. Ltd versus Justus Kyabahwa, Misc Application No. 30/2021** which followed **Hon. Theodore Ssekikubo & 3 Ors versus The Attorney General & Ors, (Supra)** that:

“The consideration for the grant of an interim order of stay of execution or interim injunction is whether there is a substantive application pending and whether there is a serious threat of execution before the hearing of the substantive application. Needless to say, there must be a notice of appeal.”

Also see: Hwang Sung Industries Ltd versus Tadjin Hussein & Ors, SC Civil Application No19/2008 and Katayira Francis versus Rogers Bosco Bugembe, SC Civil Reference No.23 of 2016.

23] Stemming from the above authorities, is a list of conditions that can be used as a guide for any court considering staying execution pending the resolution of a substantive application for stay of execution. The applicant should as show that:

- a) They have on record a competent notice of appeal
- b) They have on record a substantive application for stay of execution and,
- c) There is a serious threat of execution.

24] I would consider valid the submission that the Court may not grant a stay of execution for an applicant without a valid notice of appeal on record, because without a subsisting appeal, an application for stay of execution would have no substantive action on which it is based. However, I am not persuaded as submitted for the respondent that the other conditions are mandatory. Those conditions are at best a long developed guide and should not oust the discretion of Court to grant an interim stay in deserving cases. The list is not even exhaustive. However, I hasten to add that in all cases, the concerned Court must take caution to first ascertain that such applications are not merely a ploy to stall the proceedings but that the applicant merits consideration. There must be always be a fair balance to achieve the primary purpose

for such an order which at the same time, serves the ends of justice.

25] According to Rule 76(1) of the Rules of Court, the intending appellant must file their notice of appeal. It is trite that filing of such a notice, indicates the intending appellant's intentions to appeal. The respondent admitted that their notice was filed late. They gave reason for this. Mr. Nahamya explained that the applicant was absent when the matter was called up for judgment on 20/12/2022. The respondent countered that the judgement date was fixed in the presence of both parties and as such, the applicant knew and should have attended Court on that day, much as the respondent did. They furnished no proof of that statement. Conversely, the applicant provided a certified copy of part of the record. The last hearing date seen is 9/11/2022 and both parties were present. A valuation report was tendered by the applicant after which a judgment on admission on part of the claim was entered. The parties agreed that the issue of general damages be left to court to decide. The Judge reserved his decision for 20/12/2022. There is no indication when the judgment was actually delivered and as such, the Court would have no reason not to believe the applicant that they were not present or represented when it was read. In any case, they have filed an application for extension of time within which to file the notice of appeal. Should the respondent have any evidence to the contrary, they would have opportunity to contest that application with more

detail. For now, I am satisfied that the first condition has been fulfilled.

26] There is no contest that the applicant has filed in this court a substantive application for stay of execution vide Civil Application No. 81/2024. The second condition is also fulfilled.

27] On the other hand, the applicant's submission that there is an imminent threat of execution has been contested. Mr. Nahamya stated and it was not denied that the respondent has already set into motion the execution process by way of garnishee proceedings for a certain sum and a garnishee nisi against the applicant's accounts with the Bank of Uganda and Stanbic Bank is already in place. The applicant's first attempt to stay proceedings was denied by the High Court. Mr. Okalang himself stated in his affidavit in reply that since his is an ascertainable monetary claim, the applicant stands to suffer no irreparable damage because it can be recovered from him in the event the appeal succeeds. It is my considered view and indeed there is authority to that effect, that a judgment creditor who has taken tangible steps to realize the judgment, in this case, by obtaining a garnishee decree nisi, they have serious intentions to execute and collect the decretal sum. In this case, should the decree absolute be granted, then the respondent would have no recourse than to wait out their appeal and if successful, pursue the respondent for some refund.

28] I am persuaded more by the applicant's submission that being a public institution, the decretal amount sought to be recovered is

to be drawn from the consolidated fund. It is of utmost public interest that this Court re-evaluates whether the damages and interest awarded were within what the law allows. Again, although the respondent is a well known senior advocate with an established law firm, he is a private individual. Procuring a refund from him if the appeal succeeds, may pose some difficulty. A quotation from a decision of the Supreme Court of Ghana is instructive: Justice Akuto-Addo JSC held that:

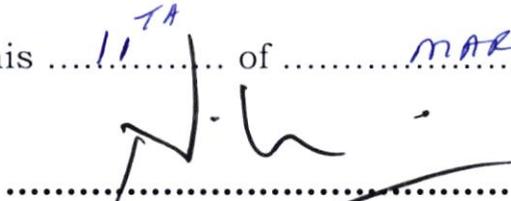
“While we do not wish to say anything that may be interpreted as a fetter on the exercise of the discretion of a trial judge when he considers an application for stay of execution pending appeal, we think it necessary in the interest of justice, to say generally that when such an application is considered in a case involving, inter alia, the payment of money, the main consideration should be not so much that the victorious party is being deprived of the fruits of his victory, as what the position of a defeated party would be who had to pay up or surrender some legal right only to find himself successful on appeal. In this respect, it is wholly immaterial what view a trial judge takes of the correctness of his own judgment or of the would-be appellant's chances on appeal, if the position..... is that the victorious party is unlikely to be able to refund the amount paid to him, or the defeated party to be restored to the status quo ante, in the event of a successful appeal..... then it would be palpably unjust to refuse stay of execution,”

Joseph versus Jebeile (1963) IGLR 387 followed in **DFCU Bank Ltd versus Dr. Anne Persis Nakatte Lusejjere CA Civil Application No. 29/2003. [UGCA 10 (10 July 2003)].**

29] Consequently, I am persuaded that the facts here merit the grant of an interim order for the stay of execution of the Decree in Mbale High Court Civil Suit No. 0006/2018, pending the hearing and determination of the main application for stay of execution. It is granted.

30] Therefore, the application succeeds and the costs shall abide the outcome of the main application now pending before this Court.

Dated at Kampala this ^{TA} 11th of ^{MARCH}, 2024.


.....
EVA K. LUSWATA
JUSTICE OF APPEAL