THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

Coram: Irene Mulyagonja, JA (Single Judge)

CIVIL APPLICATION NO. 1268 of 2023

ARISING FROM CIVIL APPEAL NO. 1533 OF 2023

(Arising from High Court (Commercial Division) Miscellaneous Application No. 217 of 2020 & Civil Suit No. 88 of 2020)

YUNUS SAMSUDIN SAVANI:::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. **RAJESH KUMAR BHAMANI**
2. **TOURAMA TOURS & TRAVEL :::::::::::::::::::::::: RESPONDENTS**

REASONS FOR THE DECISION

When this application came up for hearing on 19th March 2024, I granted an order to stay execution of the judgment and decree of the lower court in Civil Suit No 88 of 2020, until final disposal of the appeal that is now pending hearing in this court.

At the hearing, the applicant was represented by Mr Roger Mugabi, while the respondent was represented by Mr Robert Kirunda. Both Counsel filed written submissions that I perused before the hearing. They were both allowed to highlight certain aspects of their submissions orally before I rendered my decision. I undertook to provide comprehensive reasons in writing upon which the order was granted, and I now hereby do so.

The grounds upon which the application for an order to stay execution was based were stated in the Notice of Motion and repeated in the affidavit in support that was deposed by Yunus Samsudin Savani, on 30th November 2023. They were briefly that HCCS No 88 of 2020 was

brought against him for a claim of US$ 500,000. That he filed HCMA No 217 of 2020 for leave to appear and defend the suit but on 1st October 2020, the application was denied. The court entered a decree against him to pay US$ 500,000 together with the costs of the application and the suit.

He further averred that his application to appeal against the order was granted. He thus filed a notice of appeal in the High Court and requested for the typed record of proceedings. The grounds upon which the appeal is premised were that:

i) The agreement upon which the plaintiffs' claim was based was illegal, null and void and unenforceable for lack of consideration from the respondents.
ii) The agreement was procured with duress, undue influence and misrepresentation.

He further averred that the respondent's claim was without basis and unsupported. No reconciliation was done and the amount claimed, had never been earned by the 2nd respondent company and if put to task the respondents would not be able to prove it. That the claim that they reconciled accounts with the applicant before arriving at the amount claimed was untrue. He further averred that he adduced before the trial court copies of the 2nd respondent's audited books of account demonstrating that the amount claimed had never been earned as profit as alleged, but this was not considered by the court.

The applicant further averred that he stands to suffer substantial loss if the order for stay of execution is not granted because the respondents commenced execution proceedings on 26th February 2021. That his application for stay of execution in the High Court was denied but there was an imminent threat of execution because a warrant of arrest was

issued against him on 23rd February 2021. Finally, that the application was brought without delay.

In his affidavit in reply Rajesh Kumar Bhamani, the first respondent stated that the applicant's intended appeal does not raise pertinent or arguable issues. That he should have raised the issues stated here as grounds in his defences in his application for leave to appear and defend. That he simply denied indebtedness to the respondents but produced no evidence to substantiate it. That the High Court did not canvass the issues raised in this application that the money claimed in the suit had never been earned by the 2nd respondent.

He further averred that the applicant and he being directors in the 2nd respondent, the applicant misappropriated colossal sums of money given to him to invest in the company and diverted them to his own personal use without the 1st respondent's consent or knowledge. That by written agreement the applicant undertook to the 1st respondent to pay US$ 500,000. In reply to the averment that the books of the 2nd respondent were not audited, he stated that the monies claimed were given to the applicant in person and would not be included in the company's audited books of account. That the applicant feigns ignorance of his misappropriation of funds which prompted a reconciliation process, which resulted in an agreement for him to pay US$ 500,000, but he knows full well the basis and premise of his indebtedness.

Further that any likely loss that the applicant may suffer if the order is not granted can be atoned by an award of damages in the event that the appeal before this court is successful. That the respondents stand to lose more than the applicant from the prolonged and numerous, frivolous and vexatious litigation that is intended to delay recovery of the money.

The applicant filed an affidavit in rejoinder on 9th February 2024. He asserted that the grounds of appeal raised in this court were pleaded in the application for leave to defend in the lower court. He attached a copy of that application and the affidavit in support to the affidavit in rejoinder. He further averred that he attached the 2nd respondent's most recent audited accounts for the years 2015-2017, showing that no profits from the company were misappropriated as alleged. The said report was attached to the affidavit as Annexure "B". The particulars of the alleged duress and misrepresentation under which the agreement upon which the claim was based were also stated in the said affidavit in support of the application for leave to appear and defend, in paragraph 8 thereof.

Further that though the 1st respondent claimed that there was a reconciliation of accounts done before the agreement that was the basis of the suit was signed, there was none. That the company's audited accounts, Annexure "B" to the affidavit in support of the application for leave to appear and defend showed that he was not indebted to the company.

Determination

I considered the submissions of counsel for both parties in this application both in court and those that were filed before the hearing of the application. The power of this court to grant orders for stay of execution is found in rule 6 (2) (b) of the Judicature (Court of Appeal Rules) Directions which provides that:

> **(2) Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may—**
>
> **(a) ...**

(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.

The criteria for the grant of applications for stay of execution were stated in **Theodore Ssekikubo & 3 others v. Attorney General, & Others, Civil Application No 6 of 2013**, as follows:

i. The applicant must establish that his/her appeal has a likelihood of success
ii. The applicant will suffer irreparable damage or that the appeal will be rendered nugatory if the stay is not granted;
iii. If the conditions in i) and ii) have not been established, court must consider where the balance of convenience lies; and
iv. The application was filed without delay.

I will consider these criteria as the issues that have to be decided in order to dispose of this application.

It is not contested that the applicant filed a notice to appeal against the order of the lower court on 13th October 2022. The Notice was lodged in this court as Civil Appeal No 1533 of 2023. The application therefore satisfied the requirements of rule 6 (2) (b) of the Rules of this Court.

As to whether the appeal has a likelihood of success, the applicant filed with his affidavit a draft memorandum of appeal in which the proposed grounds of appeal including that the learned trial judge erred in law and fact when she found that: (i) the purported agreement between the applicant and the respondents was validly executed; (ii) she failed to considered the appellant's arguments and the evidence that raised bona fide triable issues of law and fact; iii) the purported agreement was based on and procured by undue influence, duress and misrepresentation, and was illegal because of want of consideration.

I perused the ruling of the trial judge in which she found that the applicant was liable, by virtue of an agreement, to pay the sum of US$ 500,000 to the respondents. I found that though the applicant claimed in his application before her that the amount in that agreement was not subjected to reconciliation of accounts, and produced the accounts of the company before the court as part of/or the basis of his defense, the trial judge did not consider them. The trial judge focused exclusively on the agreement to the exclusion of other evidence that was adduced by the applicant in his application, contained in his affidavit in support thereof.

Order 36 rule 4 of the CPR provides as follows:

> **4. Application to be supported by affidavit and served on plaintiff.**
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> **An application by a defendant served with a summons in Form 4 of Appendix A for leave to appear and defend the suit shall be supported by affidavit, which shall state whether the defence alleged goes to the whole or to part only, and if so, to what part of the plaintiff's claim, *and the court also may allow the defendant making the application to be examined on oath. For this purpose the court may order the defendant, or, in the case of a corporation, any officer of the corporation, to attend and be examined upon oath, or to produce any lease, deeds, books or documents, or copies of or extracts from them.* The plaintiff shall be served with notice of the application and with a copy of the affidavit filed by a defendant.**
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> *{Emphasis added}*

In this case, the defendant, now the applicant objected to the amount that was contained in the agreement upon which the respondents based their claim. He stated in his affidavit in support of the application and the one in rejoinder that the claim was not based on the books of account of the company from which it was claimed he misappropriated money. He produced the statement of account in evidence, even before the court ordered that he does so, and rightly so in my view, for he

claimed that the amount that was included in the agreement had no basis.

The applicant further stated in paragraph 14 of the affidavit in support of the application for leave to defend the suit that if the court required confirmation of the company's financial status, it could at the earliest opportunity order for a fresh and conclusive audit of the company accounts. The court did not avail itself of this opportunity. Neither did it examine the applicant on his assertions yet he was the only officer of the company present and carrying on its business.

Further to that, the applicant claimed that the agreement that was the basis of the suit was obtained by undue influence and misrepresentation and the facts were stated in the affidavit in support of his application, now attached to the affidavit in rejoinder to this application. The particulars were stated in paragraphs 8 (e) to (g) of the affidavit in support of the application, that owing to pressure from creditors of the company, and the dues required to renew the license for the tour and travel business, and a promise that the 1st respondent would sign a guarantee to secure money to meet these operations, the applicant signed the agreement in issue. However, the 2nd respondent who operated independently from the company and only once in a while came by to collect profits, did not sign the guarantee.

In my view, this could, if proved, render the agreement illegal or viodable by virtue of the alleged misrepresentation. This too was a triable issue not considered by the court and now stands as one of the grounds for this court to consider. The two issues, in my view, constitute triable issues that would be considered in the appeal that is proposed to be filed by the applicant, indicating that it has a likelihood of success.

As to whether the applicant would suffer irreparable damage if the application is not granted, the applicant has shown that the respondents obtained a Notice to Show cause why a warrant of arrest should not issue against him in Annexure E to his affidavit in support of the application. It was issued for him to appear in court on 23rd March 2021. That was about two years ago and he has not been arrested yet in execution.

However, it cannot be put past the respondents to take out further orders to execute against the applicant in the absence of an order to stay execution. I say so because Order 22 rule 19 of the CPR provides for notice to show cause against execution in certain cases as follows:

> **19. Notice to show cause against execution in certain cases.**
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> **(1) Where an application for execution is made—**
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> **(a) more than one year after the date of the decree; or**
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> **(b) against the legal representative of a party to the decree, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him or her to show cause, on a date to be fixed, why the decree should not be executed against him or her; *except that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution,* or in consequence of the application being made against the legal representative of the judgment debtor, *if upon a previous application for execution against the same person the court has ordered execution to issue against him or her.***
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> ***{Emphasis added}***

However, the court may also issue orders to execute without issuing notice to show cause as it is provided for in rule 19 (2) as follows:

> **(2) Nothing in subrule (1) of this rule shall be deemed to preclude the court from issuing any process in execution of a**

decree without issuing the notice prescribed in that subrule if, for reasons to be recorded, it considers that the issue of the notice would cause unreasonable delay or would defeat the ends of justice.

Nothing would therefore preclude the respondents from obtaining further orders to execute against the applicant under the provision above, without any notice first being given to him.

That the respondents did not seek to execute against the property of the applicant to recover US$ 500,000 is also telling. Most likely, there is nothing to execute against so that the applicant would be taken to civil prison, making it difficult for him to prosecute any appeal against the orders now standing against him. There is also no doubt in my mind that if the order that is sought here is not granted, it will render any appeal that may be filed nugatory, for it would facilitate the respondents' to execute the decree of the lower court.

Having found so, I see no reason to consider where the balance of convenience falls in this application.

In conclusion, an order to stay execution of the decree in **Commercial Court HCCS No 88 of 2020** shall issue and remain in force till final disposal of the appeal. The applicant is also hereby ordered to file his memorandum of appeal and the record of proceedings in this court within 30 days from the date of delivery of this ruling, failing which the order will lapse.

Dated at Kampala this 26th day of March. 2024.

Irene Mulyagonja
JUSTICE OF APPEAL