

c) The said payment was expressly stated to be subject to conditions precedent, which conditions have to date never arisen and or been performed by the concerned parties.

5 d) In the circumstances, the Respondent is not entitled to execution of the decree and accordingly, the application for execution filed by the Respondent is premature.

e) The application and the notice to show cause why execution should not issue, which has been issued hereunder are incurably defective.

10

f) It is in the interests of justice that the orders sought be granted.

The application was supported by the affidavit of the Applicant.

15 There is an affidavit in reply deposed by the Respondent where it was alleged among other things that the application is a nullity at law, tainted with falsehoods and ought to be rejected and dismissed with costs.

20 That there is a signed consent which is executable without relying on any condition precedent or basing on matters in respect of Civil Suit 110/09.

The Applicant was obliged under the said consent decree to pay money from the proceedings of the guarantee opened in favor of his creditors in Civil Suit 126/2009 between the Applicant and another party.

25 The Applicant failed to secure the bank guarantee and the money remains due and owing to date.

The Respondent is not a party to the proceedings the Applicant claims to be the source of the would be payment and has no control over it.

30

The Title deed was always ready for collection but the Applicant refused to collect it.

The Respondent cannot wait to be paid when CACA 83/15 is determined as to do so would be involving him into a matter whose outcome is not under his control.

35

That he is entitled to execute the decree since there is no impediment whatsoever to stop him from doing so.

That the Applicant will not suffer any irreparable damage as compared to the Respondent given the circumstances of the case.

40

The application was called for hearing on 26.10.16 in presence of both Counsel but in absence of the parties.

45 Counsel for the Applicant went through the orders sought in the motion and the grounds thereof. Contending interalia that since the Respondent has never deposited the certificate of title of unit 76 - part of Plot 2 Colville Street that is, Blacklines House with the Applicant immediately upon signing the consent. The title has never been delivered. In the circumstances, the Respondent cannot execute the consent.

50

Further that, the Respondent's right to payment while not disputed, was payment of a commission for introducing a buyer for the property, yet the buyer breached the contract of sale unilaterally. The money claimed was mentioned in Civil Suit 126/09 – where judgment was given in favor of the Applicant and there is an appeal.

5

Partial consent was entered in Civil Suit 126/09 and the agreement was that the commission should be paid directly to the Respondent Shumuk, the Defendant in Civil Suit 126/09 refused to honor the terms of the consent.

10 And since the eventual consent between the Applicant and the Respondent was conditioned upon the payment, it cannot be enforced until Applicant has received payment and failed to hand it over.

15 Also that, the terms of the consent tied the current suit to Civil Suit 126/09 and therefore the Respondent cannot maintain that he is not bound by the other suit.

Further that, the Respondent's refusal to handover the certificate of title to the condominium was used as a pretext by Shumuk to refuse to pay.

20 The application for execution contains glaring errors:-

- It mentions to Judgment Debtors whereas the suit was between Applicant and Respondent.

25 - The immovable property sought to be attached and sold is not described anywhere.

- The warrant of attachment Annexure II is for arrest of the Judgment Debtors (Individuals and a Company) it is an extremely irregular process.

30 The Respondent was given a remedy he had not sought.

The Applicant, Counsel contended, is seventy (70) years of age. He is ill and on constant medication and it would be improper and unjust to arrest him.

35 He is also a Diplomat. And under the Vienna Convention of Diplomatic Relations, to which Uganda is a party, Diplomats and Consular Agents are not liable to arrest.

40 Emphasizing that the Respondent was not entitled to apply for execution and that the warrant of arrest issued and the application are incurably defective, Counsel applied for the warrant to be set aside, execution stayed and the declarations sought made; with costs to the Applicant.

Counsel for the Respondent opposed the application; stating that the law under which it should have been brought that is O.22 r 23 C.P.R was not mentioned anywhere.

45 That the Applicant admits there is a consent judgment between him and the Respondent and that the decretal sums are due to the Respondent.

Referring to paragraph 18 of the supporting affidavit, Counsel argued that the payment of the Respondent cannot be based on the Appeal before the Court of Appeal; more so as the Respondent is not a party to the said Appeal. And that to do so would make this court delve into matters where it does not have jurisdiction.

5

Further that, the parties never agreed for payment to be stayed until after determination of the said appeal, as a non-party to a suit cannot in anyway get involved therein.

10 And since decrees have timelines for executions, the Respondent has a right to execute the decree.

While conceding to errors in the application for execution, Counsel argued that those were typing errors that can always be rectified by the Registrar.

15 Further that the Applicant being of advanced age does not mean that he should not pay his debts. And because he entered willingly in the consent, he cannot then turn around and raise issues of being a diplomat.

Court decrees, Counsel asserted, are not issued in vain and should be executed.

20

The Respondent has never refused to handover the certificate of title. He has been waiting for the Applicant to pick it.

25 The declarations sought by the Applicant cannot be granted by this court as they are also the subject of appeal.

Counsel then prayed for dismissal of the application with costs.

30 In rejoinder, Counsel for the Applicant argued that it is the Respondent who hinged payment on another suit. It was agreed that there would be no commission unless the sale went through and the sale is being challenged.

And that execution for a commission against a seller who never received payment would be the height of injustice.

35

The declarations can be issued under S.33 Judicature Act – where court is empowered to make orders necessary for the ends of justice. The declarations would not go into the merits of the appeal.

40 The issues for determination:-

1) Whether the application is wrongly before court for failure to file the right law under which it should have been brought.

2) **Whether this is a proper case for grant of stay of execution.**

3) **What remedies are available to the parties.**

5 - **Wrong law or failure to file the right law:**

The submissions of Counsel for the Respondent on this issue cannot be sustained. Decided cases have repeatedly stated that the citing of the wrong law or failure to cite the right law under which an application is made does not vitiate the proceedings because the right law can always be cited. – Refer to **Saggu vs. Road Master Cycles (U) Ltd [2002] IEA 258** and **Christine Namatovu Tebajjukira [1992-93] HCB 85**

Therefore the objection of Counsel for the Respondent in this respect is overruled. The application is properly before court.

Whether execution should be stayed:

In determining this issue, I wish to bear in mind that while *“court has discretion to stay execution, this power ought to be exercised judicially and where it appears equitable to do so, with a view to temporarily preserving the status quo”*.

Courts have set down guiding principles to consider when deciding whether to grant a stay of execution. These include the following:-

- 1) Likelihood of success of the appeal/application.
- 2) Danger of suffering substantial lose or irreparable damage.
- 3) Application for stay was made without unreasonable delay.
- 4) Security for costs has been given by the Applicant.
- 5) Balance of convenience.

- Refer to the case of **Malinga Noah and 2 Others vs. Akol Henry CA MA 203/2015** and **David Wesley vs. Attorney General Constitutional Application 61/14.**

However, it has been emphasized that *“in applications of this nature, guiding principles would depend on the individual circumstances and merit of each case. The individual circumstances of each case would determine whether the case falls within the scope and parameters of any other laid down principles”*. – Refer to **East African Development Bank vs. Blueline Enterprise Ltd [2006] 2EA 51 CAT.**

In the present case, the parties entered into a consent where the Applicant undertook to pay a certain amount of money in Us Dollars.

5 However that, the payment was subject to certain conditions which have not yet been fulfilled by concerned parties and that therefore the Respondent is not entitled to execution.

10 It is also the contention of the Applicant that the Respondent cannot claim payment of money which the Applicant has never received and the Respondent has also never delivered certificate of title to a property- Blacklines House – which was used as an excuse by the buyer not to pay the money.

15 The sale itself is being contested on appeal and therefore the Respondent’s payment is pegged on the outcome of the said appeal; more so as payment cannot be enforced until the Applicant received it and fails to pass it on to the Respondent, among other things.

The age of the Applicant was another factor that could not be ignored plus the application of the Vienna Convention to which Uganda is a signatory.

20 While the Respondent contested all the claims of the Applicant for reasons already stated herein, it is apparent that the Balance of Convenience demands that execution be stayed, to give the Applicant a chance to prosecute the appeal which he contended will also resolve the issues between him and the Respondent.

25 Sadly, the Applicant has since the hearing of the application passed away and execution cannot issue against the estate of the Applicant until after an Administrator or Executor of the Estate has been duly appointed by court.

30

Remedies:

35 The following remedies sought by the Applicant are hereby granted:-

- 40 1. A declaration that the Respondent’s right to enforce the decree in HCCS 110/2009 is dependent on the outcome of HCCS 126/2009 and CACA 83/15 arising there from, and now pending before the Court of Appeal.
- 45 2. A declaration that the Respondent’s application for execution of the decree in HCCS 110/09 is premature.
3. An order staying execution is stayed.
4. Each party should bear its own costs of the application.

50

FLAVIA SENOGA ANGLIN
JUDGE
29.05.17