

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)**

MISCELLANEOUS APPLICATION NO. 89 OF 2017

**(ARISING FROM EMA NO. 18 OF 2017)
(ARISING FROM MISC. APPLICATION 759 OF 2016)
(ARISING FROM CIVIL SUIT NO. 156 OF 2015)**

ANATOLIA ENTERPRISES LTD APPLICANT

VERSUS

**1) KIRAN DAYALJI GAJJAR
2) TWEYAMBE ESSAU t/a CRANE FORCE AUCTIONEERS
..... RESPONDENTS**

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This application was made under S.98 C.P.A, 0.22 r23 (1) and 0.52 r1 and 2 C.P.R. It seeks orders of this court staying execution against the Respondents.

Costs of the application were also applied for.

The grounds for the application are that:-

1) The Applicant applied for an interim injunction and temporary injunction in Miscellaneous Application 760 and 759/2016 respectively.

The main application for injunction was subsequently dismissed with costs.

The First Respondent filed a bill of costs for taxation claiming costs for both the interim and main application.

The Bill of Costs was taxed exparte and allowed at Shs. 8,653,360/-.

The First Respondent then sent a demand notice to the Applicant seeking payment of the said sum, but with threat to execute in case of failure to pay.

However that, the Applicant had instituted C.A 260/16 after the dismissal of the main application for injunction, against the ruling and orders of the Trial judge.

The appeal is pending before the Court of Appeal and the Applicant contends that it has merit.

It is therefore in the interests of justice that execution is stayed pending the disposal of the said appeal, contends the Applicant.

5 The application is supported by the affidavit of Tayeb Maradi, a Director in the Applicant Company.

There is an affidavit in reply deponed by Pecos Mutatina, an Advocate of the High Court.

10 He admits that the applications were filed by the Applicant as stated. In the interim application which was granted, the costs were to abide the outcome of the Temporary Injunction.

Therefore that, when the main application was dismissed with costs, the Respondents filed Bills of Costs for the two applications.

15 It was after the Bills of Costs were filed that the Applicant went to the Court of Appeal to challenge the Trial Judge's decision in the main application.

20 The appeal did not seek for stay of execution of the taxed bill of costs, but only to restrain the First Respondent from evicting the Applicant from the suit premises.

The interim order obtained by the Applicant from the Court of Appeal restrained the Respondent together with agents from evicting the Applicant and /or continuing to trespass and or in any way interfere with the property business, located at 7th Street, Industrial Area.

25 The said order did not in any way stay execution of the taxed costs.

Further that there is no application before Court of Appeal seeking to stay execution to recover the taxed Bill of Costs.

30 That an appeal not being an automatic stay of execution proceedings, a separate application for stay to recover costs has to be filed.

35 Whatever interim protection the Applicant desired has been issued by the Court of Appeal and therefore this court cannot issue another order and to do so would amount to abuse of court process.

40 Further that, the appeal is incompetent as it was filed out of time and the Respondents intend to challenge the same. There is therefore no merit in the appeal Counsel argued, and it has no chance of success.

This application is a result an abuse of court process and ought to be struck out with costs.

The application was called for hearing on 22.02.17 in the presence of both Counsel.

45 Counsel for the Applicant referred to the grounds of the application and the paragraphs of the supporting affidavit.

He submitted that, it is not true as stated in the affidavit in reply that the appeal is directly connected to this application.

The orders granted by the Court of Appeal is specific that is **“stops interference with the premises”** therefore that this application should be decided on its own merits.

5 Also that, the competency of the appeal will be determined by the Court of Appeal.

And since the appeal has triable issues, it is not frivolous or vexatious and will be rendered nugatory if the stay is not granted.

10 He then prayed court to allow the application.

In reply, Counsel for the Respondent gave background to this matter.

15 He stated that the First Respondent filed for distress against the Applicant, on account of unpaid rent.

Distress was granted and the Applicant then Respondent filed application to set aside the distress. The application was dismissed.

20 Later the Applicant filed a suit seeking among other things to set aside the distress. The First Respondent also filed a suit seeking to recover property on account of unpaid rent.

25 The applications were merged into Civil Suit 156/15. The Applicant then filed the two applications already referred to herein, seeking injunctions temporary and interim pending determination of the main suit.

The application for temporary injunction was dismissed and Applicant filed appeal against the dismissal.

30 The Respondent filed a Bill of Costs for both interim and temporary injunction which were taxed and resulted into execution proceedings.

35 The Applicant got an order from the Court of Appeal maintaining them in the premises pending determination of Miscelleneous Application 319/16 before the Court of Appeal. The Respondent contends they have never been served with the application and which at the time of this application had not been fixed for hearing.

40 At the same time, the Applicant is before this court seeking stay of execution, which according to Counsel for the Respondent amounts to abuse of court process. It is seeking orders which are already sought before the Court of Appeal and which have not been served on the Respondents.

The interim order secures the Applicant in the premises without paying rent. The only protection sought here is to stop the Respondent from realizing their costs.

45 It was argued that the application is not necessary because costs follow the event and therefore application should be dismissed to allow the Respondent realize its costs that were debarred by the interim order of the Court of Appeal.

The case of **Andrew Kisawuzi vs. Dan Oundo HC MA 467/13** was relied upon for the grounds upon which such orders ought to be granted. These include:-

- 1) Likelihood of substantial loss.
- 2) Application made without unreasonable delay.
- 3) Security for due performance of the decree given by Applicant.
- 4) It is not sufficient to merely state substantial loss without showing how it will occur.

Counsel then contended that the Respondent does not see how the Applicant will suffer substantial loss by paying costs to the Respondent arising out of applications lost.

- By seeking relief in the Court of Appeal, the Applicant is forum shopping contrary to S.6 CPA – which stops proceedings in different courts dealing with the same subject matter.

Further that, it would be sad if contradictory orders are issued by the Court of Appeal and this court in respect of stay of execution.

Inviting court to look at the order dismissing application of the Applicant – Annexure A dated 20.10.16; the notice of appeal lodged on 17.11.16 without extension of time, Counsel argued that appeal has no reasonable chances of success.

- Adding that the application is without merit, is an abuse of court process and only meant to deny the First Respondent costs of the applications won, even as they continue to be deprived of property without pay.

Counsel then prayed that the application be dismissed and execution issues to recover costs awarded and taxed. And that costs of the present application also be granted to the Respondent.

In rejoinder, Counsel for the Applicant stated that, the suit in contention is a pending appeal as evidenced by annexures to the application. The merits cannot be determined at this stage, he argued. He cited the case of **Nalwoga vs. Bidco & Another MA 07/___** to emphasize that if the application is not granted, the appeal will be rendered nugatory.

Counsel pointed out that the costs the Respondent seeks are from the main application being challenged in the Court of Appeal.

- The grounds of the interim application in the Court of Appeal are different from prayers sought here. That is, stay of execution pending determination of the appeal.

Earlier prayers were reiterated.

- The issue is **whether this is a proper case for grant of stay of execution.**

Decided cases have established guiding principles to be taken into account in determining whether to grant a stay of execution or not.

The principles are the following:-

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

- Refer to the case of **David Wesley vs. Attorney General – Constitutional Application 61/14.**

However, I wish to bear in mind that it has been emphasized that ***“in applications of this nature, the 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”***. – See **East African Development Bank vs. Blueline Enterprise Ltd [2006] 2 EA 5 (CAT)**.

However, court has the discretion to grant stay of execution, although ***“the power ought to be exercised judiciously and where it appears equitable to do so, with a view to temporarily preserving the status quo”***.

The execution proceedings in this matter arise out of the dismissal of an application for temporary injunction that was filed in the Civil Division by the Applicant. The interim order was granted by the Registrar but the main application was dismissed with costs to the Respondents.

The Applicant filed an appeal against the orders of the Judge dismissing the application for temporary injunction. The appeal is pending before the Court of Appeal.

The Respondents after taxation of the Bill of Costs sought to recover the costs granted by the dismissal hence this application for stay by the Applicant, contending that stay should be granted otherwise the appeal will be rendered nugatory. The costs for the interim order are also claimed by the Respondent.

There were also the civil suits pending determination which were ordered to be consolidated by the order of the judge when she dismissed the application for temporary injunction. While the order of court indicates that the suits were fixed for 27.10.16, the outcome thereof was not brought to the notice of this court.

The appeal against the dismissal of the temporary injunction was filed in the Court of Appeal on 21.11.16. It is not indicated whether it has been heard or not.

Decided cases have established that ***“the filing of an appeal is sufficient ground for grant of orders of stay in appropriate cases; to prevent the appeal from being rendered nugatory”***.

In the present case, apart from the appeal pending, the main suit still appears to be pending.

While the Respondents are claiming taxed costs arising out of the dismissal, which has been appealed, to deny the stay will render the appeal nugatory as the issue of the costs granted will also be dealt with on appeal together with other orders sought by the Applicant.

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This court finds that, in the circumstances of this case, the balance of convenience demands that the application be allowed. However, it is only just and proper that the Applicant be required to deposit the sum of the taxed costs amounting to Shs. 8,653,360/- in court as security for due performance of the decree, pending the hearing and determination of the appeal before the Court of Appeal.

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The money should be deposited in court within two (2) weeks from the date of this ruling. Upon failure to deposit the said sum, within the time provided, execution will issue to recover the sum.

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Costs of this application will abide the outcome of the appeal.

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Flavia Senoga Anglin
JUDGE
27.07.17