



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO.050 OF 2023
(Arising from Labour Dispute Claim No. 039 of 2015)

NATIONAL WATER & SEWERAGE CORPORATION.....APPLICANT

VERSUS

HILLARY BIRUNGI.....RESPONDENT

Before:

The Hon. Mr. Justice Anthony Wabwire Musana,

The Panelists:

1. Hon. Can Amos Lapenga,
2. Hon. Robina Kagoye &
3. Hon. Jimmy Musimbi.

Representation:

Mr. Brian Kajubi of M/s. MMAKS Advocates for the Applicant

Mr. Federico Ahimbisibwe of M/s. A.N Kigozi & Co. Advocates for the Respondents

RULING

- [1] On the 14th of April 2022, the Industrial Court¹ found that the Respondent had been unlawfully terminated and awarded him UGX 35,000,000/=. Dissatisfied, on 19th April 2022, the Applicant lodged a notice of appeal. The Applicant has also filed an application seeking an extension of time and validation of its record of appeal, pending before the Court of Appeal. The Applicant now seeks a stay of execution by motion under Sections 33 of the Judicature Act Cap. 13, Section 98 of the Civil Procedure Act Cap.71, (*from now CPA*) and Orders 52 Rule 1 and 3 of the Civil Procedure Rules S.I 71-1(*from now CPR*) pending the hearing and determination of the appeal.

¹ Per Ntengye H.J, J.A Bwire, J. Nyachwo and P. Katende in LDR 141 of 2015 H. Birungi v NWSC Corp

- [2] The grounds in support of the motion were contained in the supporting affidavit sworn by Mr. Aloysious Kaijjuka, Manager Legal Services of the Applicant. He deposed to the Applicant being aggrieved by the decision of the Industrial Court, the filing of a notice of appeal and a letter requesting proceedings, the possible execution of the decree rendering the appeal nugatory, the lack of known assets of the Respondent in the event of a successful appeal, the Applicant's willingness to deposit security for due performance of the decree and the interests of justice in a grant of stay.
- [3] The Respondent opposed the application averring that there was no application or warrant issued against the Applicant and no competent pending appeal with any likelihood of success before the Court of Appeal. He further deposed that the application attached does not show payment of court fees and is likely false.
- [4] In rejoinder, Mr. Eriya Mikka, Advocate, deposed that Civil Appeal No. 144 of 2023 is pending hearing at the Court of Appeal and the Applicant had filed Civil Application No. 0207 of 2023 for validation. He also deposed that on 14th March 2023, the Respondent issued a demand indicating execution proceedings. Mr. Mikka finally deposed to the Applicant's meritorious appeal against the judgment and orders of the Industrial Court.
- [5] In the written submissions, Counsel for the Applicant framed two issues for determination. First, whether the execution of the decree and orders of the court should be stayed pending the determination of the Applicant's Appeal and Application to validate the said Appeal and secondly, what remedies are the parties entitled to.

Resolution of Issue 1

Whether the execution of the decree and orders of the court should be stayed pending the determination of the Applicant's Appeal and Application to validate the said Appeal

- [6] The threshold for a grant of stay of execution is set out in the case of **Lawrence Musiitwa Kyazze v Eunice Busingye**² which we cited in the case of **Law Development Centre v Asiimwe Apollo and 4 Others**.³ The considerations are as follows:
- (a) The Appellant must show that their appeal is not frivolous or has a likelihood of success,
 - (b) That they will suffer substantial loss/irreparable damage,

² S.C. Civil Appeal No. 18 of 1990.

³ LDMA 013 of 2023



- (c) That the appeal will be rendered nugatory if a stay is not granted,
- (d) That the application was instituted without undue delay.⁴
- (e) That there is a serious or imminent threat of execution of the decree and
- (f) That the refusal to grant the stay would inflict more hardship than it would avoid.⁵

We propose to consider the present application on these guiding principles.

- [7] On existence of the intended appeal, it was submitted for the Applicant that it has filed a notice of appeal, an application to extend the time for filing the record of appeal and a memorandum of appeal, which was attached as Annexure C to the affidavit in rejoinder. In the case of **Equity Bank Uganda Ltd versus Nicholas Were** ⁶ it was held that '*A notice of appeal is a sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases*'. We are satisfied from attachments A and C to Mr. Mikka's affidavit in rejoinder and annexures A1, A2 and B of Mr. Kaijuka's affidavit in support, that there is a pending appeal. The application to extend time to validate and file the record of appeal lends credence to the principle that a stay of execution is intended to preserve the right of appeal.⁷ The application meets the threshold in respect of a valid notice of appeal.
- [8] That the intended appeal has a high chance of success. In his reply, Counsel for the Respondent submitted that there was no appeal and did not make any substantive arguments on the possible merits of the appeal. The memorandum contained five grounds of appeal. In the **Law Development Centre case (supra)** we adopted the approach of delving into some skeletal arguments on the appeal's success as enunciated in the case of **Diamond Trust Bank (U) Ltd and Anor v Ham Enterprises Ltd & 2 Ors**,⁸. We have no reason to depart from this approach.
- (i) The first ground of appeal questions the basis for the finding that the Respondent was unlawfully terminated. The Applicant contends financial impropriety on the part of the Respondent, which was not considered by the Industrial Court. Perhaps, this calls for a re-evaluation of the evidence by the Court of Appeal which is the basis of

⁴ S.C Constitutional Application No. 06 of 2013 Hon. Theodore Ssekikubo and 3 Others Vs AG & 4 Others

⁵ H.C.M.A No. 12 Of 2017 John Baptist Kawanga Vs Namyalo Kevina & Anor

⁶ H.C. M.A No.604 of 2013

⁷ Per Stella Arach Amoko JSC (as she then was) in S.C.C. Application No. 14 of 2021 Remegio Obwana v The Registered Trustees of Tororo Dolcese

⁸ Per the Hon. Justice Dr. Flavian Zelja P.J in H.C.M.A No. 846 of 2020

Ground 5 of the intended appeal. In our view, this might be a reasonable ground for appeal.

- (ii) The second ground of the intended appeal relates to a statutory provision on ½ pay during the suspension. We are not entirely persuaded that there is a meritorious argument faulting the conclusion of the Industrial Court on this point.
- (iii) The third and fourth grounds of the intended appeal relate to remedies granted by the Industrial Court. We do not see the juridical import of the challenge on the award of general damages, given that such an award is discretionary.

- [9] On the whole, we are of the persuasion that there is at least one ground of appeal with a likelihood of success.
- [10] Regarding irreparable or substantial loss, the Applicant submits that it is a Government Agency sustained by taxpayer's money and the Respondent has no known assets should the appeal be successful. We agree that the possibility of refund would be useful consideration in determining the substantial loss and find that the Applicant has established this point.
- [11] Regarding applying without undue delay, the Respondent made a demand on 14th of March 2023 and the Applicant filed this application one month later. In the case of **Ejulu Martin v Itobu Margret**⁹ the Honourable Justice Dr. Henry P. Adonyo found a period of 4 months between a notice to show cause why execution should not issue and the filing of an application for stay not to be unreasonable. In the case before us, we are satisfied that the Applicant filed this application without undue delay.
- [12] On security for the due performance of the decree, the Applicant offers to deposit the same in paragraph 8 of Mr. Kaijuka's affidavit in support and paragraph 16 of its written submissions. In the case of **Security Group Uganda Ltd v Kigozi Samuel**¹⁰ this Court observed the dicta in the case of **Sanyu Fm (2000) Limited v Ben Kimuli**,¹¹ where 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.¹² Similarly, to the SGA case, in the matter before us, the Applicant submits that the Respondent does not have any known assets should the appeal succeed. At

⁹ Per Justice Dr. Henry P. Adonyo in H.C.M.A No. 0160 of 2022

¹⁰ LDMA 036 of 2022 We opined that a party seeking remedial action before an appellate court would be interested in speedy disposal of the appeal to access the monies deposited as security. Similarly, a respondent would be assured of a safety net in the form of protection for the award, the imponderables notwithstanding.

¹¹ LDMA 248 of 2019

¹² This Industrial Court has maintained this rationale in several other cases. See 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.

paragraph 12 of his affidavit in reply, the Respondent avers that this application is disguised as a delaying tactic to deny him the fruits of judgment. This is a mislaid argument because the Respondent has not sought to execute the decree and orders. He cannot, in good conscience, suggest that the Applicant is delaying or frustrating his enjoyment of the fruits of his litigation when he has not exercised his right to execute. We would find that the offer of deposit of security for due performance, satisfactory.

- [13] Regarding the imminent threat of execution, the Respondent argues that there is no threat of execution. The Applicant relied on a demand letter by the Respondent's Advocates for the proposition that the Respondent was minded to execute the decree and orders of the Court. In the case of **Uganda Revenue Authority v East Africa Property Ltd**¹³ on an application for an interim order of stay of execution, the Court of Appeal did not find two letters requesting payment to be a serious threat of execution. For this reason, the application was dismissed. Similarly in **Zubeda Mohamed & Anor V Laila Kaka Wallia & Anor**¹⁴ the Supreme Court of Uganda found that *"the evidence of eminent danger of execution was not strong enough to justify the grant of an interim order in the absence of a warrant of execution or a Notice to Show cause why execution should not issue from the executing court. There was only a demand letter from the applicants' lawyers"*.
- [14] Further, in the case of **Ejulu Martin v Itobu Margret**¹⁵ an application for stay of execution was held to be premature on the ground that execution proceedings had not commenced. In that case, the Applicant had been issued with a notice to show cause why execution should not issue. The Honourable Justice Dr. Peter Henry Adonyo held that the Applicant had to show cause why execution should not ensue, and if his reasons were refused, an application for stay could then be made.
- [15] We are bound by these decisions on what constitutes the imminent danger of the threat of execution. We hold that the letter of A.N Kigozi & CO Advocates dated 14th March 2023 does not constitute imminent threat of execution. The condition would not be satisfied. The import of the jurisprudence on the point is that letters of demand do not constitute imminent threat of execution. This renders the application for stay of execution premature.
- [16] As to whether the refusal to grant the stay would inflict more hardship than it would avoid, the parties made no submissions on the point.
- [17] On the whole, the Applicant establishes four grounds in support of the application. However, it does not demonstrate an imminent threat of

¹³ Per Butera JJA (as he then was) in Civil Appeal No. 144 of 2014

¹⁴ Supreme Court Civil Reference No.07 OF 2016

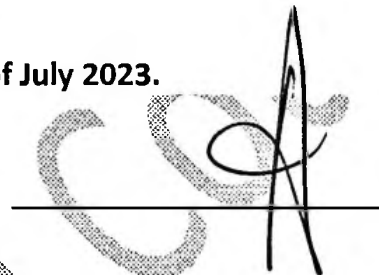
¹⁵ Per Justice Dr. Henry P. Adonyo in H.C.M.A No. 0160 of 2022

execution. The grant of an order of stay of execution pending appeal is an exercise of discretion. Judicial discretion is to be exercised on well-established principles.¹⁶ Objectively considering the absence of an imminent threat of execution vis a viz the other grounds in support of the application, leads us to the conclusion that this application must, as it now does, fail. In short, there is no indication that the Applicant faces a serious threat of execution to invoke this Court's discretionary power to grant an order of stay. In other words, there is nothing to stay.

[18] We, therefore, hold this application to be premature. In view of this resolution, it is unnecessary to consider the second issue of remedies. The application is dismissed with no order as to costs following the dicta of this Court in Joseph Kalule v GIZ.¹⁷

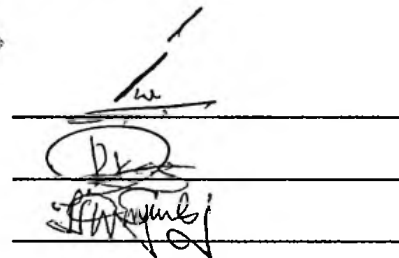
It is so ordered at Kampala this 5th day of July 2023.

Anthony Wabwire Musana,
Judge, Industrial Court



The Panelists agree:

1. Hon. Can Amos Lapenga,
2. Hon. Robina Kagoye &
3. Hon. Jimmy Musimbi.



Ruling delivered in open Court this 5th day of July 2023 at 9:59 a.m in the fore noon in the presence of:

1. For the Applicant: **Mr. Daniel Muyambi**
2. For the Respondent: **None.**

Court Clerk: **Mr. Samuel Mukiza.**

Anthony Wabwire Musana,
Judge, Industrial Court

¹⁶ Per Dr. Justice Esther Kitimbo Kisaakye J.S.C in S.C. Civ Application No. 22 of 2016 Katayira Francis v Rogers Bosco Bugembe. See also M.S Arach Amoko J.S.C(as she then was) In S.C. Civ Application No. 30 of 2021 China Henan International Cooperation Group v Justus Kyabahwa

¹⁷ LDA 109 of 2020