



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC. NO. 96 OF 2014**

**IN THE MATTER OF FOREIGN JUDGEMENT (RECIPROCAL ENFORCEMENT) ACT (CAP 43)**

**AND**

**IN THE MATTER OF THE JUDGEMENT DELIVERED ON THE 7<sup>TH</sup> DAY OF JULY 2010 AT THE HIGH COURT OF UGANDA AT KAMPALA, CIVIL SUIT NO.143 OF 2008 (BEFORE THE HON. LADY JUSTICE M.S ARACHAMOKO)**

**BETWEEN**

**ELIZABETH NAMUTEBI.....RESPONDENT**

**VERSUS**

**THREWAYS SHIPPING SERVICES (K) LTD....APPLICANT**

**RULING**

**1. Introduction**

The Applicant herein filed an application dated 12th May 2015 seeking for orders that this Honourable Court be pleased to grant a stay of execution of the Judgment herein pending the hearing and determination of the appeal filed being Civil Appeal No. 6 of 2012, 1. Threeways Shipping Services (Group) Limited & 2. Threeways Shipping Services (K) Limited Vs Namutebi Elizabeth and the costs of this application be in the cause. The Respondent herein has opposed the Application by filing their Grounds of Opposition dated 27th June 2015 as well as their Replying Affidavit sworn on the same date

2. The application is anchored on the provisions of Order 22 Rule 22, Order 42 Rule 6 and Orders 51 Rule 1 CPR and S 1A, 1B, 3A and 63e of the Cap 21.L.O.K.

3. The application is based on the grounds that, proclamation and attachment has been done and sale of the applicant goods is imminent. The execution will render the appeal nugatory as it will have been overtaken by the event by the time of the hearing if execution is carried out. The Applicant may never recover the decretal amount and thus the applicant will suffer substantial loss. The Applicant is ready to furnish security.

4. The application has been presented within a reasonable time. The application is supported by

the Affidavit of DAVID MUGARAMA sworn on 12.5.2015. The Respondent has filed grounds of opposition to the effect that, the application does not lie and has been overtaken by events. The court jurisdiction to grant the Orders sought is denied by the respondent. The procedure of approaching court is also impugned. The Respondent has also filed Replying Affidavit sworn by ELIZABETH NAMUTEBI on 27.6.2015.

5. The Applicant case is that, the judgment subject herein was entered in HC UGANDA against the applicant herein who was the second Defendant in the Ugandan case. Being aggrieved by the said judgment, the applicant appealed in Court Appeal vide civil appeal No.6/2012 in Uganda. However the Respondent has moved the High Court in Kenya to execute the same judgment and a proclamation has been issued.

6. The Applicant is apprehensive that the execution will render the pending appeal nugatory and the decretal amount may never be recovered thus the applicant will suffer substantial loss. The Applicant has undertaken to provide security as a condition for stay.

7. The Respondent case is that the Applicant had filed Misc. Application No.602/2011 at court of appeal in Uganda seeking Stay of the Execution but withdrew the same. The judgment herein was adopted by the High court in Kenya and Execution process has commenced.

8. The Applicant is accused of delaying the matter and thus occasioning the Respondent financial loss both in legal fees and auctioneer charges. The Respondent also state that the court cannot issue stay in a matter pending appeal in Uganda court of appeal as it is outside its territorial jurisdiction. Alternatively the respondent avers that, if the court is inclined to grant stay, the decretal amount be deposited in interest earning account.

9. After going through the application, affidavits and parties submissions, I find the following issues arising;

- a. Whether the court has jurisdiction to entertain the application?
- b. Whether the threshold for granting stay of execution pending appeal has been met under **Order 42 Rule 6 CPR Cap 21?**

10. The Applicant submit that since the judgment of the High court in Uganda was adopted as High court of Kenya judgment, the same is amendable to be stayed by the High court in Kenya. Thus the court has jurisdiction. The applicant further submit that, the ruling delivered by Honourable Justice Gikonyo in this suit on the 23rd day of February 2015, pursuant to the Respondent's Application dated 12th June 2014, the Judgment delivered in High Court of Uganda at Kampala, in Civil Suit number 143 of 2008 by Honourable Lady Justice M. S. Arach Amoko became registered and thus capable of being executed as a judgment of the High Court of Kenya. Indeed the Foreign Judgments (Reciprocal Enforcement) **Act, Cap 43 of the Laws of Kenya within Section 8(1) provides that:**

***“Subject to this Act, a registered judgment shall, for the purposes of execution, be of the same force and effect as a judgment of the High Court entered at the date of registration.”*** In addition to that the Respondent has proceeded to extract a decree and a warrant of attachment of movable property (Applicants annexure marked as “DM-4”) in attempts to satisfy that decree.

11. The Respondent on its part submit that the High Court of Kenya lacks jurisdiction to grant Stay execution pending appeal in Uganda court of appeal because it has no territorial jurisdiction over proceedings ongoing in the court of appeal in Uganda.

12. In a ruling adopting the judgment as High Court of Kenya judgment, the court ordered **“The judgment be registered for the purposes of execution and to be of the same effect as a**

**judgment of the High court entered at the date of registration”.** The court understanding of the aforesaid Order is that same judgment can be executed within the High Court of Kenya jurisdiction. **Order 42 Rule 6 CPR 2010** is to the effect that “...*the court appealed from may for sufficient cause order Stay of Execution of such an Order or Decree...*”

13. The High court steps in on adoption of the judgment as the court from which the appeal is proceeding from. This is because it is the executing court as if it made the judgment. In absence of any provision of law or a binding authority to the contrary, this court is prepared to hold that upon adoption of a foreign judgment for execution, the High Court can stay same pending appeal under the provisions of Order 42 Rule 6 CPR 2010. Thus the court holds that the court has jurisdiction to entertain the application.

14. On the issue of whether the application has merit, the applicant submits that, considering the fact that the Judgment delivered in High Court of Uganda at Kampala, in Civil Suit number 143 of 2008 by Honourable Lady Justice M. S. Arach Amoko is a registered judgment by this Honourable Court, it goes without saying that it is the right of the litigants thereon to take any relevant steps pursuant thereto for the ends of justice to be met. The Civil Procedure Rules, 2010 within Order 42 Rule 6 empowers the aggrieved party to a decision of the Court to make an application for stay of execution of the Judgment or Ruling there from.

15. The applicant herein has annexed pleadings from the **Court of Appeal in Uganda in Civil Appeal No. 6 of 2012, (1) Threeways Shipping Services (Group) Limited & (2) Threeways Shipping Services (K) Limited Vs Namutebi Elizabeth**. This fact is uncontroverted by the respondent. Moreover the applicants have averred within their supporting affidavit that the appeal raises arguable issues for determination, that notwithstanding, the Applicant has further stated that they are willing to furnish security for the due realization of the orders of stay of execution sought herein.

16. The applicant cited the case of Chris **MUNGA N. BICHAGE v RICHARD NYAGAKA TONGI & 2 OTHERS [2013] eKLR**, which deals with the conditions for stay of execution under rule 2 b of the court of appeal rules.

17. Under order **42 Rule 6 CPR**, the Applicant has to demonstrate the presence of the 2 conditions for stay of execution pending appeal under **Order 42 Rule 6**. First, it will suffer substantial loss if Order of stay is not granted and application was filed without unreasonable delay; two, undertake to provide security. As for condition No.2 the Applicant is ready, able, and willing to offer the same. As for the first condition for stay pending appeal, the Applicant avers that the decretal amount may never be recovered if decretal amount is paid to the Respondent and thus it will suffer substantial loss.

18. The respondent submits that the conditions for grant of stay of execution have not been met. The Respondent submits that, it is not enough to allege the respondent lives outside Kenya and her means are unknown. The respondent relies on the case of **MACHIRA VS EA STANDARD 2(2002) KLR 63**. The respondent also cites **KENYA SHELL LTD VS WIRIMU AND ANOTHER (1982 -1988 ) 1 KLR 1018** which held that there must be evidence of substantial loss to be suffered.

19. The amount recoverable is over Ksh.5.5million or thereabout and the Respondent has not shown whether it can be able to refund the same. The Respondent is a foreigner and may be out of the courts by the time the appeal is heard and thus impede the recovery of the amount in event the appeal succeeds. The Respondent has averred that she is amenable to keeping the money in a joint account and the auctioneer’s costs to be paid by the Applicant. The court finds that in the interest of justice although there was some delay in filing the instant application, a conditional Stay should be allowed in the circumstances of the case.

20. The court thus makes the following Orders;

1. There will be a Stay of Execution of the Judgment herein within Kenya on condition that the decretal amount is deposited in an interest earning account in the joint names of the parties advocates pending hearing and disposal of the appeal.
2. The deposit is to be done within 60 days.
3. The applicant to pay auctioneer charges which are to be agreed or assessed by Deputy Registrar and paid within 30 days of assessment or agreement thereof.
4. In default of the above 1, 2, and 3, the application will stand dismissed and Execution to proceed.
5. Costs to the Respondent.

**Dated, signed and delivered in court at Nairobi this 25<sup>th</sup> day of September, 2015.**

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**C.KARIUKI**

**JUDGE**