

**IN THE SEYCHELLES COURT OF APPEAL**

**Before: Justice A. Fernando  
(President)**

**Civil Appeal SCA MA 37/2019  
(arising in SCA 28/2019)**

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Dr Ashraf Elmasry

1<sup>st</sup> Applicant

Elena Kozlova

2<sup>nd</sup> Applicant

Versus

Margaret Hua Sun

Respondent

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Heard: 23 June 2020

Counsel: Mr. F. Elizabeth for the Applicants

Mr. B. Hoareau for the Respondent

Delivered: 30 June 2020

**RULING ON APPLICATION FOR  
A STAY OF EXECUTION OF JUDGMENT**

**A. Fernando (President)**

1. This was an application filed on the 20<sup>th</sup> of November 2019, by the Applicant-Appellants (Defendants before the Supreme Court, and hereinafter referred to as the Applicants) for a Stay of Execution of part of a judgment of the Supreme Court pending appeal, wherein the learned Trial Judge had dismissed the Applicant's Counter-Claim and awarded moral damages in the sum of SCR 100,000.00 in favour of the Respondent (Plaintiff before the Supreme Court) against the Applicants, as per the grounds of appeal set out in the Notice of Appeal dated 17<sup>th</sup> June 2019.

2. The Supreme Court decision was to the effect that:

“(a) the defendants shall jointly and/or severally pay the sum of \$660,428/- with interest at the legal rate of four percent from the 16 January 2014, until the day of payment of the entire sum of \$660,428/-.

(b) the defendants shall jointly and/or severally pay moral damage to the plaintiff in the sum of 100,000/- rupees plus interest at the rate of 4 percent thereon, from the date of judgment until payment of the entire sum of 100,000/- rupees.

(c) The counter claim is dismissed.”

3. The Stay of Execution is sought under **section 230 of the Seychelles Code of Civil Procedure (SCCP)** and **Rule 20(1) of the Seychelles Court of Appeal Rules, (CA RULES)** which provide:

**Section 230 of the Seychelles Code of Civil Procedure** states:

*“An appeal shall not operate as a stay of execution or of a proceedings under the decision appealed from unless the court or the appellate court so orders and subject to such terms as it may impose. No intermediate act or proceeding shall be invalidated except so far as the appellate court may direct.”*

**Rule 20(1) of the Seychelles Court of Appeal Rules, (CA RULES)** provides:

*“An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from:*

*Provided that the Supreme Court or the Court may on application supported by affidavits, and served on the respondent, stay execution on any judgment, order, conviction, or sentence pending appeal on such terms, including such security for the*

*payment of any money or the due performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment, order, conviction, or sentence, as the Supreme Court or the Court may deem reasonable.”*

The wording “*unless the Court or the Appellate Court so orders*” in section 230 of the SCCP and “*Court may on application supported by affidavits*” in rule 20(1) of CA Rules shows that a stay of execution is a discretionary remedy. I am of the view that all that the Court has to ensure is that it exercises that discretion judiciously. Insofar as the applicable rules of the High Court of England are concerned, a stay of execution is a discretionary remedy and the general rule is to decline a stay, unless solid grounds are shown. A stay is therefore an exception rather than the rule. In **Leicester Circuits Ltd v Coates Brothers plc [2002] EWCA Civ 474 Potter L.J.** stated that, “*The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal.*”

4. Neither section 230 of the Seychelles Code of Civil Procedure nor Rule 20(1) of the Seychelles Court of Appeal Rules provide any guidance as to the criteria to be used in granting of a Stay. We therefore have to look for the procedure, rules, and practice of the High Court of Justice in England in that respect relying on **Section 17 of the Courts Act** which provides:

*“In civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable.”* (emphasis placed by me)

5. An affidavit in writing according to the interpretation section 2 of the Evidence Act is evidence. Section 12 of the Evidence Act states:

*“Except where it is otherwise provided in this Act or by special laws now in force in Seychelles or hereafter enacted, the English law of evidence for the time being shall*

*prevail.”*

6. According to the Application for Stay of Execution the grounds upon which the application is based are contained in the affidavit attached to the Application. This is in view of the provision in **rule 25 (3) of CA Rules** that *“Interlocutory matters shall be brought by way of notice of motion which shall be...supported by affidavit.”* The instant application is interlocutory according to **rule 25(1) of CA Rules** because the decision pertaining to it will not involve the decision of the appeal, although arising from a pending appeal. In my view the affidavit should develop the substantial issues raised in the application for stay and the grounds of appeal set out in the Notice of Appeal.
7. The law pertaining to affidavit evidence is to be found in **sections 168-171 of the Seychelles Code of Civil Procedure.**

**Section 168** states: *“The court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit...”*. (emphasis by me). To prove one must demonstrate the truth or existence of (something) by evidence or argument. A mere statement does not suffice.

**Section 170** states: *“Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory applications, on which statements as to his belief, with the grounds thereof, may be admitted.”*

8. The Affidavit had been signed by one Mr. Nabil Elmasry, on behalf of or as representing both Applicants, individually and separately. At the commencement of the Affidavit it is stated:

*“We, Dr. Ashraf Elmasry and Elena Kozlova herein represented by Mr. Nabil Elmasry by virtue of a power of attorney dated 20<sup>th</sup> August 2015, electing our legal domicile in the Chambers of Mr. Frank Elizabeth of Suite 212B, Premier Building, Albert Street, Victoria, Mahe, Seychelles hereby make oath and say as follows:”* (emphasis by me)

The averment in paragraph 1 of the Affidavit however is to the effect: “We are the deponents above-named and we are duly authorized to swear this affidavit being the Applicants in this case and the Appellants in a connecting case.” It is therefore not clear as to who is the deponent to the Affidavit, namely the Applicants or Mr. Nabil Elmasry. This offends **Order 41, rule 1 (4) of the White Book (R.S.C. 1965)** which can be made use of in the Seychelles in accordance with **Section 17 of the Courts Act** referred to at paragraph 4 above and **section 12 of the Evidence Act** referred to at paragraph 5 above; since Seychelles laws on the format of an affidavit is silent. However, it is noted that in view of the decision in **Kimkoon & Co Ltd V R (1969) SCAR 60** we can only follow the procedure, rules, and practice of the High Court of Justice in England prior to Seychelles gaining independence in 1976. **Order 41, rule 1 (4) of the White Book** which sets out the form of affidavits states: “*Every affidavit must be signed by the deponent...*”

9. The Power of Attorney has not been attached to the Affidavit. I am of the view that the Power of Attorney had necessarily to be attached as this Court is unable to know otherwise in which capacity the Applicants are before the Court. A mere statement that the Applicants are represented by Mr. Nabil Elmasry does not suffice. Counsel for the Applicants tried to argue that the Power of Attorney had been filed before the Supreme Court. This Court does not know whether Mr. Nabil Elmasry has been authorized to represent the Applicants in the appeal case since the power of attorney as stated at paragraph 8 above bears a date 4 years prior to the filing of the application. It is not stated in **rule 25** which deals with ‘Interlocutory matter’ that the Registrar shall undertake the preparation of the record after an application for stay of execution is lodged, unlike in the case of the preparation of the record of appeal after the notice of appeal is filed in accordance with **rule 23**. In the case of **D.L. de Charmory V P.L. de Charmory, SCA MA 08/2019 (17 September 2019)** this Court stated: “*In Re Hinchliff, A person of Unsound Mind, Deceased, [1895] 1 Ch 117, the Court of Appeal held that any document to be used in combination with an affidavit must be exhibited. In the same light any document to be used in combination with an affidavit in support of an application to stay execution must be exhibited to and filed with it. Counsel for the applicant should be*

*mindful that the affidavit stands in lieu of the testimony of the applicant.”* **Re Hinchliff** had been quoted with approval in the cases of **Trevor Zialor V The Republic SCA MA 2017 (unreported 17 October 2017)** and **Marie-Therese Boniface V Maxime Marie SCA MA 01/2019 (unreported 28 May 2017)**.

10. All the averments in the Affidavit start with the phrase “We are” or “We aver” save at paragraph 6 where the word “I” is used and the concluding paragraph is to the effect: “That all the statements contained herein are true and correct to the best of our information, knowledge and belief.” I wish to state at the outset that I agree with the argument put forward by the Counsel for the Respondent that the Affidavit is defective since a person signing an Affidavit on behalf of or representing another should have made the averments in his personal capacity and not as those made by who he represents. How could Mr. Nabil Elmasry state that that all the statements contained in the affidavit are true and correct to the best of the Applicants information, knowledge and belief since according to **section 170 of the Seychelles Code of Civil Procedure** referred to at paragraph 7 above: “*Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory applications, on which statements as to his belief, with the grounds thereof, may be admitted*”. Counsel for the Respondent has also argued that there has not been any differentiation in the affidavit between the statements based on the deponent’s own knowledge and those based on his belief. I do not agree with this submission as I find that this differentiation has been made in the affidavit.

11. The form of the affidavit filed in the case also offends **Order 41, rule 1 (4) of the White Book (R.S.C. 1965)** which states: “*Every affidavit must be expressed in the first person...*” Mr. Nabil Elmasry has made averments in this affidavit not from his point of view or perspective but from the perception of the Applicants. In this case the deponent and the signatory to the affidavit are not the same person in view of the phrases “We are” or “We aver” or “our” as sated at paragraph 10 above.

12. According to **Order 41, rule 1(1) of the White Book (R.S.C. 1965)**: “...every affidavit sworn in a cause or matter must be entitled in that cause or matter.” Counsel for the Respondent argued that the affidavit filed in the case is in breach of this Order as there is no title to the affidavit and does not state in respect of which cause or matter it has been sworn or filed. At the commencement of the affidavit, the word ‘Affidavit’ and what is referred to at paragraph 4 above is stated. Counsel for the Applicants argued that the Notice of Motion pertaining to the Application for Stay of Execution was entitled, and the Notice of Motion did state “The grounds upon which this application is based are contained in the affidavit attached herein.” Paragraphs 2, and 3 of the affidavit makes it clear that the affidavit has been filed as the applicants in the Miscellaneous Application for a Stay of Execution made to this Court arising out of Civil side No 13/2014, that an appeal had been filed against the judgment in Civil side No 13/2014 which was against the Applicants. I am of the view that although it would have been preferable if the affidavit itself was entitled but in view of the statement in the Notice of Motion referred to earlier and the averments in paragraphs 2 and 3 there is no breach of Order 41, rule 1(1) of the White Book.

13. The defects in the Affidavit highlighted above is sufficient to dispose of this application, but I have decided to examine the case further at the request of Counsel who have sought guidance from this Court as to the grounds upon which a Stay of Execution may be sought and granted by a court.

14. The circumstances a court would consider in granting a stay of execution have been stated as follows in earlier Seychelles authorities:

- i. Where there is a substantial question of law to be adjudicated upon at the hearing of the appeal,
- ii. Where special circumstances so require,
- iii. Where there is proof of substantial loss that may otherwise result,

- iv. Where if the stay is not granted the appeal if successful, would be rendered nugatory,
- v. If a stay is granted, and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment,
- vi. If a stay is refused, and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being unable to recover the subject matter of execution (in a money judgment that has been paid to the respondent)?

15. The grounds upon which the instant application for a Stay has been sought have incorporated most of the circumstances mentioned in paragraph 13 above, save for the circumstance set out at (i); and may be summarised as follows:

- i. That the Appellants have an arguable case and the appeal filed has some prospect of success and that it is therefore just and necessary that a Stay be granted,
- ii. That it is practical and in the interests of justice for the Court to make the order sought,
- iii. That if a stay is granted and the appeal fails, the Respondent would still be able to enforce the judgment as the funds are still in our possession and thus no prejudice will be caused to the Respondent,
- iv. That if a stay is refused, and the appeal succeeds, and the judgment is enforced in the meantime, the judgment of the Court of Appeal will be rendered nugatory and the Appellants will not be able to recover the subject matter of execution,
- v. That the balance of convenience lies in favour of the Applicants.

16. The sine qua non or the most important element that needs to be satisfied in seeking a Stay is to aver in the application and satisfy the Court prima facie that there are substantial questions of law and facts to be adjudicated upon at the hearing of the appeal. Merely stating that the applicants have an arguable case and the appeal filed has some



prospect of success, is not sufficient. The affidavit filed in this case does not state why the Applicants believe that they have an arguable case or has some prospect of success. An appeal arises from a trial that has already taken place and a judgment that has been delivered by the original Trial Court. In a civil case the Trial Court decides the case on the basis of the pleadings, the issues, and the evidence both oral and documentary that had been led before the Court. An appeal shall succeed before an appellate court where the Trial Court had erred in law or facts in rendering its judgment and not on the issue of prejudice that will be caused to either party. Undoubtedly in any proceedings before a court one party succeeds and the other fails unless a consent judgment has been entered into. Issues such as prejudice to parties and the balance of convenience come in for consideration only where the Court hearing a Stay of Execution application is prima facie satisfied that there are substantial questions of law and facts to be adjudicated upon at the hearing of the appeal, that the applicant has an arguable case and the appeal filed has some prospect of success. This necessitates that the Notice of Appeal filed should in stating the grounds of appeal, at its bare minimum disclose the questions of law and facts upon which the Trial Judge erred and thus has to be adjudicated upon at the hearing of the appeal. This does not mean that there needs to be an elaborate discussion of the law or facts. In the Sri Lankan case of **KARUNASEKERA v REV. CHANDANANDA (2004] 2 Sri L.R** it was stated: *“The court is not expected to go into the intricacies of the question of law to be decided in the appeal: it is sufficient if the court is satisfied that it prima facie appears that there is a substantial question of law to be decided in the appeal.”* It is only then that the prejudice to the applicant and or respondent becomes relevant for consideration. If the Applicant fails at this hurdle, in my view, the rest of the grounds that are considered in granting a Stay need not be looked into. There is no averment in the application for Stay that there are substantial questions of law and facts to be adjudicated upon.

17. It is clear from the Sri Lankan decisions in **Saleem v Balakumar - (1981) 2 SRI LR 74; Mack v Shanmugam Sri Kantha Law Reports - Vol. III - 89 at 95.; Kandasamy v Gnanasekeram CALA 78/81 - CAM 17.7.81; Charlotte Perera v Thambiah (1983) 2 Sri LR 352 Cooray v Illukkumbura (1996) 2 SRI LR 263 (SC) and Sideek v Fuard**

(1997) 1 SRI LR 42 that the principle execution pending appeal may be stayed if there is a substantial question of law to be decided in appeal is well established even in situations where there is no proof before court to show substantial loss to the judgment debtor if execution pending appeal is allowed. This would then be in the interests of justice for the Court to make the order. In the case of **Mack v Shanmugam Sri Kantha Law Reports - Vol. III - 89 at 95** the Court held : *“In the exercise of his discretion the trial Judge must consider whether in the given circumstances the appeal is a frivolous one designed to stall the decree or one that contains substantial questions of law for determination by the ‘Court of Appeal’.”*

18. In the Australian case of **Vaughan v Dawson [2008] NSWCA 169** it was held that it is appropriate to consider first whether the appeal raises a serious question to be tried, in the sense of arguable grounds. Again, in **Lawrence v Gunner [2015] NSWCA 322** it was held that it is appropriate to first consider whether the appellant has arguable grounds of appeal. A detailed examination of the merits of the appeal is neither necessary nor appropriate.
19. In the Kenyan cases of **Regnoil Kenya Limited vs Winfred Njeri Karanja, Nai of 329 2018 (UR 266 Of 2018); Stanley Kang’ethe Kinyanjui vs. Tony Keter & 5 Others, Civil Application No. Nai 31/2012; and Housing Finance Company of Kenya –vs- Sharok Kher Mohamed Ali Hirji & Another [2015], eKLR.** in dealing with applications for stay of execution in civil proceedings under section 6 (2) (b) of the Judicature Act which specifies that the institution of an appeal shall not operate to stay execution the Court exercises original and discretionary jurisdiction; it has been held that the first issue for consideration is whether the intended appeal is arguable and that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous.
20. As Jones JA stated for the Court of Appeal of **Trinidad and Tobago in National Stadium Project (Grenada) Corporation v NH International (Caribbean) Limited Civil Appeal No 48 of 2011, 28 July 2017, “It is trite law that an appeal does not**

*operate as a stay of the judgment or order appealed. The basic rule is that a successful litigant is entitled to enjoy the fruits of its success. The onus therefore is on the applicant for a stay to satisfy the court that, having regard to all the circumstances of the case and the risk of injustice, a stay ought to be imposed.”* In support, Jones JA relied upon a statement of Rajnauth-Lee JA in **Andre Baptiste v Investment Managers Ltd, Trinidad & Tobago Civil Appeal No 181 of 2012** applying the view of the English Court of Appeal in **Hammond Suddard Solicitors v Agrichem International Holdings Ltd, [2001] All ER (D) 258** and cited by the Company’s counsel. In Hammond, under the English Civil Procedure Rules 52.3 and 52.6, permission to appeal is required to have been granted before an appeal can proceed, and such permission requires there to be a *“real prospect of success of the appeal.”*

21. The grounds of appeal in the Notice of Appeal are:

- i. The learned Judge erred when she dismissed the Appellant’s counter-claim.
- ii. The learned Judge erred when she awarded moral damages in the sum of SCR 100,000.00 in favour of the Respondent against the Appellants.”

The said grounds of appeal do not conform to and are contrary to **rule 18(7) of the Seychelles Court of Appeal Rules** which state:

*“No ground of appeal which is vague or general in terms shall be entertained, save the general ground that the verdict is unsafe or that the decision is unreasonable or cannot be supported by the evidence.”*

The grounds of appeal in the instant case are not only vague and general in terms but do not even state whether the learned Trial Judge erred in law or facts or that the decision is unreasonable or cannot be supported by the evidence. They do not show or indicate that there are substantial questions of law and facts to be adjudicated upon at the hearing of the appeal. Every disgruntled litigant with the outcome of a case will say that the judge erred, that he has an arguable case and he has some prospect of success. This does not suffice to grant a Stay against a litigant who has succeeded in the Trial Court from enjoying the fruits of his judgment.

22. At the commencement of the hearing I asked Counsel for the Appellants and the Respondent whether the judgment of the Trial Court in respect of the claim in the Plaintiff and the counter-claim in the Defence was based on the same oral and documentary evidence led before the Court to which the reply was in the affirmative. I am therefore in a difficulty to understand the prospect of the success of an appeal that is limited to challenging the dismissal of the Applicant's Counter-Claim and the award of moral damages in the sum of SCR 100,000.00 in favour of the Respondent as against the Applicants, in light of the above position which the Appellant's Counsel did not seek to clarify.

23. In the case of **Chang-Tave V Chnag-Tave (2003) SLR 74** the Supreme Court held that: *“Under the English principle, even if the appellant had some prospects of success in his appeal, for that reason alone no stay will be granted unless the appellant satisfies the Court that he will be ruined without a stay of execution.”* In **Atkins V Great Western Railway Co. (1886) 2 TLR 400** the court held: *“As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable possibility of getting them back if the appeal succeeds.”* This in my view has to be subject to the condition that the applicant has been able to first satisfy the Court prima facie that there are substantial questions of law and facts to be adjudicated upon at the hearing of the appeal, that he therefore has an arguable case and the appeal filed has some prospect of success. I find that the affidavit filed in this case does not contain any material which can serve as a basis for the assessment of the arguability of the grounds of appeal or grounds (iii), (iv) and (v) referred to at paragraph 15 above in the application for stay of execution. In the case of **D.L. de Charmory V P.L. de Charmory, SCA MA 08/2019 (17 September 2019)** this Court stated: *“...that those who apply for a stay of execution, must come before the Court prepared with all the necessary materials.”* In the Ruling by the Supreme Court when a stay of execution was sought in this same case before the **Supreme Court (2019) SCSC 962 MA 195/2019** the Court stated: *“Moreover, in applications for stays, the Applicant must make full, frank and clear statements of the irremediable harm to her/him if no stay is granted. This is primarily to*

*ensure that a successful party is not denied the fruits of a judgment. The present matter concerns payment of money. It has not been shown that the Respondent is impecunious and will not be able to return the money if the Court of Appeal were to reverse the Supreme Court decision. In the circumstances I do not find that the Applicant runs the risk of a decision in its favour on appeal being rendered nugatory.”* I concur with this finding and am surprised why the Applicants having been shown the defects in the affidavit filed before the Supreme Court seeking a Stay did not correct the mistake when filing their affidavit before this Court. It must also be stated that when seeking a discretionary remedy as that of a stay of execution of judgment the applicant should make a full and frank disclosure in respect of the steps he had taken after judgment had been pronounced. The Applicants in this case had failed to disclose the fact that they had earlier sought a stay from the Supreme Court which had been dismissed.

24. For the reasons set out above I dismiss the application for a stay of the execution of the judgment.

25. I have as requested by Counsel at the hearing of this application, set out guidelines for a decision on a stay of execution of a money judgment taking into consideration the provisions of Section 230 of the Seychelles Code of Civil Procedure and Rule 20(1) of the Seychelles Court of Appeal Rules referred to at paragraph 3 above:

**C** has obtained a money judgment against **D** who appeals and applies for a stay of execution. **C** objects. The Court must ask the following questions:

**Q1** Has **D** satisfied me that there is a substantial question of law to be adjudicated upon at the hearing of the appeal and that his appeal has a good prospect of success?-

If yes, proceed to Q2. - If no, a stay should not be granted.

**Q2** Has **D** satisfied me that he will be ruined, or his appeal otherwise be stifled if forced to pay **C** immediately instead of after the (unsuccessful) appeal? –

If yes, a stay can be granted subject to considering the answers to Q4. - If no, a stay

should not be granted unless a positive answer is given to Q3.

**Q3** Has **D** satisfied me that there is no reasonable probability that **C** will be able to repay the monies paid to **C** by **D**? –

If yes, a stay should be granted, subject to considering the answers to Q4. - If no, a stay should not be granted.

**Q4** What are the risks that **C** will be unable to enforce the judgment if the stay is granted and **D**'s appeal fails? Depending on the extent of that risk and other relevant circumstances can there be a compromise solution: payment of all or part of the relevant sum into court to await determination of the appeal; a stay only of part of the judgment sum; provision of security for part of **C**'s payment to **D**? A compromise solution should be a last resort, the basic rule being that a money judgment must be complied with, so that a claimant is entitled to recover the money straightaway and not to suffer further losses or lost opportunities in the period till the appeal is heard.

**A. Fernando (President)**

Signed, dated and delivered at Palais de Justice, Ile du Port on 30 June 2020