

SUPREMECOURT OF SEYCHELLES

Reportable

[2022] SCSC 18

MA 34/2021

(Arising in DC NO. 45/2015)

In the matter between:

Roland Young Kong
(represented by Mr. C. Lucas)

Applicant

V/S

Efna Vidot
(represented by Ms. A. Benoiton)

Respondent

Neutral Citation: *Young Kong Roland v Vidot* (MA 34/2021) [2022] SCSC 18 (17 January 2022)

Before: ANDRE J

Summary: Ruling– Stay of execution pending Appeal– Section 203 of the Seychelles Code of Civil Procedure (Cap 213)

Heard: 10 November 2021

Delivered: 17 January 2022

ORDER

The Motion for stay of execution is dismissed with costs to the Respondent.

RULING

ANDRE J

Introduction

[1] This Ruling arises out of a notice of motion filed by Roland Young Kong filed on the 1st March 2021 and supported by an affidavit signed by Roland Young Kong on 1st February 2021 (“*the Applicant*”).

[2] The notice of motion seeks for a stay of execution on the Judgment delivered in DC No. 45 of 2015, delivered on 18 January 2021 (“*the impugned Judgment*”).

[3] Efna Vidot (“*the Respondent*”) vehemently objects to this application as per the response affidavits filed on 12th May and 3rd November 2021.

Applicant’s grounds for stay of execution application

[4] In summary, the grounds for the stay of execution as averred by the Applicant are namely that:

- (1) *the applicant has filed an appeal against the whole decision in the judgment before the court of appeal;*
- (2) *the notice of appeal contains grounds of appeal which raise serious and substantial questions of law and procedure, unfairness and bias during the hearing, their interpretation and other matters relating to his entitlement as claimed and that he verily believes that the appeal has a very good chance of success;*
- (3) *that it is in the interest of justice, fair and equitable that the stay of execution be granted pending the hearing of the appeal and that he shall be prejudiced and his claim in the matrimonial priority shall be compromised should a stay of execution be refused in the circumstances.;*
- (4) *that he verily believes that it is just, fair and equitable that the order of stay of execution be granted in the interest of justice pending the determination of the appeal.*

[5] It is to be noted that written submissions were also filed in support of the application to the above-effect by the applicant of August 2021 of (***which the court has duly scrutinized for the purpose of this ruling***). (Emphasis is mine).

Respondent's objections to staying of execution

[6] On her part, the Respondent filed two affidavits on 12th May 2021 and 3rd November 2021 respectively objecting to the application.

[7] In the 12th May 2021 affidavit, the Respondent avers in objection to the application that:

- (5) *the applicant’s application and averments therein are scant and that she is objecting to the prayers in the notice of appeal of the reversal*

of the orders of the impugned judgment (supra) and the award granted and for the case be re-heard.

- (6) that there is no substantial question of law to be adjudicated upon at the hearing of the appeal. That the grounds of appeal are vague and general in terms and do not state whether the learned judge erred in law or facts or that the decision is unreasonable or cannot be supported by the evidence. That 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.*
- (7) that the applicant has not provided in his affidavit any special circumstances as to why the execution should be stayed.*
- (8) that the applicant does not address proof of any substantial loss that may otherwise result and does not address that point either by the crux of the applicant's prayer is that his share of the property is to be increased, not that the sale is prohibited. That this would allow for the property to be sold by licitation in any event and only the distribution if funds being affected. Hence it is averred that there is no substantial loss claimed hence the argument that should the stay not be granted the appeal would be rendered a nugatory in untenable in the circumstances.*

[8] In the 3rd November 2021 affidavit, the Respondent avers further in addition to the averments in the 12th May 2021 in objection to the application that:

- (1) the practice direction referred to by the applicant in his counsel's submissions which was reversed was in PD 3/2017 and the practice direction that Twomey-CJ (at the time) dismissed the application was 1/2017 and that alternatively under the Seychelles code of civil procedure section 67 provides that 'if on the day as fixed in the summons, when the case is called on, the defendant appears and the plaintiff does not appear or sufficiently excuse her absence, the plaintiff's suit shall be dismissed.' In any event, that the arguments raised by the respondent do not canvass those issues.*
- (2) That the stay of execution test of Elmasry and Anor v Hua Sun (SCA 28/2019) [2020] SCCA 2 are threefold namely, in that a substantial question of law is to be adjudicated upon at the hearing of the appeal; that where special circumstances so require or where there is proof of substantial loss that may otherwise result; and thirdly, that where if*

the stay is not granted the appeal if successful, would be rendered nugatory and if a stay is granted, and the appeal fails, what are the risks that the respondent will be unable to enforce the judgement.

- [9] I will now move on to address the legal standards applicable in this case in light of the highlighted salient facts.
- [10] Section 230 of the Seychelles Code of Civil Procedure (“*the Code*”) applies in these circumstances and provides that an appeal shall not operate as a stay of execution unless the Court so orders and subject to such terms as it may impose. ***It is to be noted further in that light in this case, that there is no filed notice of appeal but an unnumbered and unfiled notice of appeal signed only by counsel Charles Lucas of the 8th February 2021 in support of the above-mentioned motion and affidavit of the applicant (supra). Hence this occurrence begs the question as to whether there in an intention to appeal or an appeal filed which latter is not certain before this court for reasons given.*** (Emphasis is mine).
- [11] The Authorities in this Jurisdiction has confirmed that ***it is entirely in the discretion of the Court to grant a stay of execution***(See: **Pool v William (1996) SLR 206**), **Chang-Tave v Chang-Tave (2003) SLR 74**), (**Avalon v Berlouis (2003) SLR 57**) and (**Faye v Lefevre (2012) SLR44**).
- [12] The consideration for granting a stay of execution includes the weighing of the interests of the parties to establish whether the appeal has some chance of success, the balance of convenience, hardship, and irreparable damage that may be suffered by the appellant, and the concern that unless a stay was ordered the appeal would be rendered nugatory (**See: Alexander v Cambridge Credit Corp Ltd (1985) 2 NSWLR 685**), (**Choppy (Pty) Ltd v NJS Construction (Pty) Ltd (2011) SLR 215**).
- [13] The Court when hearing a stay of execution application does not examine the merits of appeals or likely chances of its success, it has to examine if the appeal has some prospect of success or if there is a substantial question of law to be adjudicated.
- [14] The current application refers to an appeal before the Court of Appeal and as indicated at paragraph [10] above, there is a copy of an unfiled and unnumbered notice of appeal

indicating possible grounds of appeal, five in number, which this Court has had the opportunity to peruse through and to examine the considerations it ought to take for the purpose of such application. I note that the affidavit of the Applicant is unsupported by substance, it should include substantial averments supporting its case, rather than having supporting arguments in the written submissions of Counsel Charles Lucas of the 14 July 2021, which are not evidence before the court. Accordingly, all the substance in support of the application ought to have been legally incorporated in the affidavit in support of the application. In that respect I refer to the case of **(Banane v Banane (SCA 29/2018) [2020] SCCA 40 (18 December 2020))**, wherein **Dingake JA** ruled that *submissions of entitlement are not evidence and that they are simply what they are: submissions.*

[15] I have taken the time to scrutinize anew the impugned Judgment delivered by this Court and as pointed out earlier, ***this Court at this stage is not to examine the merits of intended appeals or likely chances of its success, it has to examine if the appeal has some prospect of success or if there is a substantial question of law to be adjudicated.*** (Emphasis is mine).

[16] Bearing the above in mind, I find that the grounds of appeal in the intended notice of appeal, the affidavit in support of the application and the explanations given in the written submissions in support of the same, are insufficient to fulfil the conditions as set out in the case-law mentioned at paragraph [14] above, and additionally in the *Elmasry case* as cited by both parties in their submissions.

[17] I further find that many of the explanations provided in the Applicant's and Respondent's submissions were not part of the evidence in the court below, and have thus not been considered by this court for the simple reason that they are beyond the scope of proceedings.

[18] Accordingly, I find that in addition to the absence of a properly filed notice of appeal in support of the application, the affidavit in support of the motion does not contain any substantial legal grounds on both the law and facts on record to be adjudicated upon by the Court of Appeal.

[19] Further, in exercising this Court’s discretion and weighing such considerations on a balance of convenience against the competing rights of the parties, in line with the evidence filed by both parties, I am of the view that it would be unfair to allow the Applicant a stay of execution, pending an intended appeal before the Court of Appeal, in effect denying the Respondent, the fruits of a judgement in her favour.

[20] In the light of the above, it is to be noted that the constitutionally guarded right of appeal ***should be substantiated and supported by evidence rather than mere allegations of impropriety and irremediable prejudice and injustice.***(Emphasis is mine).

[21] In the circumstances, the Application for stay of execution is dismissed with costs to the Respondent.

Signed, dated and delivered at Ile du Port Victoria on the 17 January 2022.

ANDRE J