

(Arising Out Of Misc. Application No. 306 of 2015)

(Arising Out of Civil Appeal No. 43 of 2011)

(Arising From HCC No. 0022 of 2010 at Soroti)

(Arising From Civil Suit No. 24 of 2010 at Bukedea)

1. MALINGA NOAH

2. OBOTE CHARLES

3. EMONG ROBERT ::: APPLICANTS

VESUS

AKOL HENRY ::: RESPONDENT

(Under Rule 2(2), 43(1) of the Judicature (Court of appeal Rules) Directions SI 13-10)

CORAM: HON. JUSTICE KENNETH KAKURU, JA HON. JUSTICE HELLEN OBURA, JA HON.

JUSTICE CHEBORION BARISHAKI, JA

RULING

The applicants seek through this application for an order of stay of execution of the orders of the High Court in Civil Appeal No. 22 of 2010, which is pending hearing before this court.

The conflict in this matter arises from ownership of customary Land located in Kachumbala sub-county in Bukedea District. It is alleged that Iriget Zedekia, the father of the respondent, secretly sold land to the Applicant in 2001. As a result, the respondent sued Iriget Zedekia and Odeke John before G.11 Magistrate in Bukedea but lost the case and then appealed to Soroti Chief Magistrates court in Civil Appeal No 38 of 2003. The Chief Magistrate referred the matter to the High Court for revision orders of the Magistrate G .11 decision. In his order, Justice Musota ruled that the action of visiting locus in quo after delivering judgment by the trial Magistrate and thereafter varying his orders was irregular, illegal and caused injustice to the parties. He quashed and set aside the said orders but maintained the original order granting the applicants 13 acres of land.

In a separate suit, the respondent filed a case against the Appellant in this Appeal claiming that they had encroached on his land. He lost the case and on being dissatisfied, the respondent filed Civil Appeal No. 22 of 2010 and in her one page order dated 28/2/2011, the Learned Judge held that the respondents were bound by the Judgment of the Chief Magistrate dated 13/7/2007 and the revisional order of 7/11/2007.

Being dissatisfied with the order, the applicant filed Civil No. 43 of 2011 and applied for stay of execution in the High Court which stay was not granted.

We have deemed it necessary to give this lengthy background because we expect the Judge who heard Civil Appeal No. 22/2010 to have written a reasoned Judgment in view of the checkered background of the case.

The grounds upon which the Application is based are more particularly explained in the affidavit in support of the Application sworn by Emong Robert but briefly that;

- i. The applicants were the successful party in Civil suit No. 24 of 2010 at Bukedea G 1 Court.
- ii. The respondent was successful in civil Appeal No.22 of 2010
- iii. The applicants have filed Civil Appeal No 43 of 2011, which is pending hearing.
- iv. The applicants have been served with execution notice.
- v. There is need for an order of Court restraining the respondent from executing the Court Order pending disposal of the appeal.
- vi. If execution is not stayed the applicants will suffer irreparable damage.
- vii. The suit land is family land with crops and burial grounds which shall suffer irreparable loss to the applicants.
- viii. The application has been made without unreasonable delay and the Appeal has high chances of success.
- ix. It is the intent of justice that an order of stay of execution be granted pending determination of the Appeal.

Miss. Pricilla Agoe appeared for the applicants. The respondent neither filed a reply to the Application nor appeared during the hearing.

There was evidence that the respondent had been served and the applicant was allowed under Rule 56 sub rule 2 of the Rules of this Court to proceed with the case in the absence of the respondent.

Miss Agoe in her submission reiterated the grounds in the Notice of Motion that after losing the case, applicant applied for stay of execution but the Application was dismissed.

That the parties were related as the respondent is a son of their brother and appellants are claiming the benefit of the land for their father.

She submitted that the applicants were in possession of the land and were using it for cultivation and the status quo should be maintained so that nothing changes until the Appeal is heard and the: rightful owner is determined.

Presently they were under threat from the police and the respondent who wants to evict the Applicants.

She further submitted that the appeal has a likelihood of success because the trial Judge bound the parties to a decision in the lower court in a suit where they were not parties. Civil Suit No. 21 of 2001 was between Akol Henry and Odeke John which the Judge ordered that it should be upheld and implemented immediately.

She submitted that this court has powers to grant any of the orders sought and referred to the decision of Justice Okello in Supreme Court Civil Application No. 19 of 2008 Hwang Sung 10 Industries Ltd Vs. Tajdin Hussein and others Civil Application No 19 of 2008.

Lastly, she prayed that the application for an interim order pending; before this court be granted pending the decision of the Court in this Application.

We have carefully studied the pleadings in the Magistrate Courts, High Court and in this Court, considered the submissions of learned counsel as well as the applicable law and authorities cited.

This court is vested with powers under rule 6(2) (5) of the Judicature (Court of Appeal Rules) Directions 13 -10 to grant stay of execution.

Courts have developed guiding principles that have become pre-requisites, which ought to be pertaining before a grant of stay of execution can be made. **In Davis Wesley Tusingwire Vs Attorney General Constitutional Application No. 1 of 2014**, it was stated by their Lordships that, "in this type of application, it has to be shown that there is a like hood of success in the appeal , there must be danger of irreparable harm being suffered by the Applicant if the order sought is not granted, and the balance of convenience must favor the Applicant **In Lawrence .Musitwa Kyazze Vs Busingye [Supreme Court Civil application No. 18 of 1990]**, the court held that the Application should also be made without unreasonable delay. In **National Enterprise Corporation Vs Mukisa Foods Ltd Misc. Civil Application No. 7 Of 1998**, The Supreme Court emphasized that where the right of Appeal exists, the Court as a general rule ought to exercise its best discretion in a way so as not to prevent the Appeal if successful, from being rendered nugatory.

In the present case a Notice of Appeal was filed in this Court on the 17/03/2011 and a Memorandum of Appeal was filed on the 23/5/2011. This meets the requirements of Rule 76 and 6(2)(b) of the rules of this Court.

Although the order appealed against was made in February 2011, we are satisfied with explanation of Counsel on cause of the delay.

The appeal seeks to resolve the issue as to where a court order that binds person(s) not party to a suit is lawful. The appeal would deal with the issue of ownership of customary land. For the above we find that there are triable issues worthy of investigating by Court. We note that at this stage we are not expected to go into the merits of the case but it suffices to establish that a *prima facie* case with probability of success exists. **See American Cyanamid Co Vs Ethicon Ltd (1975) WCR 316**

There is evidence to the effect that the applicants are in possession of the suit land which the family is using for cultivation and as burial grounds. This averment in the affidavit in support of the application was not controverted. It is important that the family continues to use the suit land for cultivation so as to maintain its livelihood. This status quo ought to be maintained until the appeal is determined.

Where the court is undecided on the above principles, it may then consider the matter on the balance of convenience. In this application we have found that there was prima facie case with triable issues in the appeal and secondly that the Applicants are in possession of the suit land which it uses for cultivation. It is therefore, not necessary to delve into the issue of balance of convenience.

We therefore, find that a case has been made for this Court to exercise its discretion and grant the sought order for stay of execution.

The applicant had also filed COA Misc. Application No. 204 of 2015 seeking for an interim stay of execution of High Court Civil Appeal No. 22 of 2010 pending the disposal of the main application No. 203 of 2016 (this application). The determination of this application has also disposed of that application. Costs of this application shall abide the result of the Appeal.

In the result, a Stay of Execution is granted staying the Orders in the High Court Civil Appeal No.22 of 2010 until disposal of Civil Appeal No. 43 of 2010 pending before this Court.

Dated this 15th day of January 2016.

Signed by

Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Lady Justice Hellen Obura, JA

Hon. Mr. Justice Barishaki Cheborion, JA