

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NUMBER 96 OF 2017
(ARISING OUT OF CIVIL APPEAL NO. 63 OF 2017)**

5 **KAMURUNGU PATRICK.....APPLICANT**

VERSUS

BWAMBIZO CHARLES.....RESPONDENT

BEFORE:


10 **HON. LADY JUSTICE SOLOMY BALUNGI BOSSA JA (Sitting as a single Judge)**

RULING OF COURT

Background

15 This is an application for an order for stay of execution emanating from a second civil appeal filed by the applicant in this Court. The applicant initially filed the application for stay of execution (Miscellaneous Civil Application No. 213 of 2016) in the Mbarara High Court, which heard the first appeal from the decision of the Chief Magistrate's Court Ibanda. The
20 application for stay of execution was dismissed, hence the present application in this Court.

The respondent and the applicant give different background facts to the present application. I have gleaned the background facts from the
25 information found in the decisions and judgments the Chief Magistrates' Courts of Ibanda and Mbarara and High Court Mbarara that are on the record.

The applicant sold land to the respondent for shs. 7.5m/= (seven million
30 five hundred thousand only). The respondent paid shs. 5.45m/= (five million four hundred and fourty five thousand only) and remained with a balance of shs. 2.05m/= (two million fifty thousand only). The respondent immediately occupied the land. The applicant sued the respondent in the Chief Magistrate's Court of Mbarara vide *MBR-00-CV-CS-0013-2003 Patrick Kamurungu v. Charles Bwambizo* for the balance of the purchase price. A
35 purported consent judgment was entered in the case. 

The respondent subsequently applied to the court to have the consent judgment entered against him and the ensuing execution set aside for having been fraudulently entered in *MBR-00-CV-MA-0083-2003 Charles Bwambizo v. Patrick Kamurungu*. The learned Chief Magistrate (His
5 Worship Isaac Muwata) set aside the consent judgment and the execution arising from it on 14 January 2006. Nevertheless, execution had ensued based on the consent judgment and a third party (one Andihaihi Geoffrey) purportedly bought the suit land although the respondent remained in occupation of part of the land. Following the purported sale in execution
10 to Andihaihi Geoffrey, and the eviction of the respondent from the land, the applicant rented from Andihaihi the suit land and occupies that part to date as a tenant.

The respondent accordingly sued the applicant for recovery of the suit
15 land in the Chief Magistrate's Court of Ibanda in *IBD-00-CV-22/ 2012 Bwambizo Charles versus Kamurungi Patrick*. A Magistrate Grade 1 (Her Worship Atim Harriet Okello) heard the matter and gave judgment for the respondent on 21 May 2014. She declared that the respondent was entitled to the suit land as purchaser, on the ground that the applicant
20 prevented him from completing the purchase by refusing to accept the balance of the purchase price.

As purchaser of the respondent's land in execution of the consent judgment, Andihaihi Geoffrey lodged Objection proceedings in the Chief
25 Magistrate's Court of Ibanda in *Miscellaneous Application No. 9 of 2017 Adihaihi Geofrey v. Bwambizo Charles and Kamurungi Patrick*. Another Grade 1 magistrate in that court (H/W Muhangi Gibson) dismissed the objection proceedings on 13 September 2017 on the ground that the consent judgment on which they were based had been set aside.

The applicant appealed against the decision of the learned trial Magistrate
30 of Ibanda to the High Court in *HCT-05-CA-0035- 2014 Kamurungi Patrick v. Bwambizo Charles*. The High Court (Matovu J.) upheld the judgment of the learned trial Magistrate and dismissed the applicant's appeal. The
35 applicant therefore filed the present appeal in this Court.

5 The applicant applied for an interim order of stay of execution in the High Court in *HCMA No. 214 of 2016 Kamurungi Patrick v. Bwambizo Charles* and a substantive order of stay of execution in *Misc. Application No. 213 of 2016*. The substantive application (213 of 2016) was dismissed. He therefore filed Civil Application No. 96 of 2017 for stay of execution in this Court.

Submissions of counsel

10 At the hearing of this application, Counsel Wifred Niwagaba appeared for the applicant, while Counsel Johnson Kwesigabo appeared for the respondent.

15 Counsel Niwagaba argued that the applicant satisfied the conditions for an interim injunction order of stay of execution to issue. He submitted that there existed an appeal with a likelihood of success and that the applicant would suffer substantial loss if the application were not granted. Concerning substantial loss, Counsel submitted that the applicant was likely to be evicted from the land he was leasing and also pay damages and costs on the basis of a wrong decision in law and in this regard, would
20 suffer substantial loss.

He further submitted that the applicant submitted the application without unreasonable delay and had pursued his rights with diligence. Counsel invited me to look at a copy of the memorandum of appeal attached to the
25 application and the notice of appeal lodged on 29 November 2016, the same time that the applicant lodged an application for stay of execution in the High Court.

30 Counsel Kwesigabo argued that mere existence of an appeal does not grant an automatic right for stay and the application did not meet the criteria for stay of execution.

Counsel further submitted that the applicant had no proprietary interest in the suit land. Even if he were a tenant, as he claimed to be, that fact should not prevent the respondent from taking possession of his land. He
35 relied on the authority of *Commissioner of Customs Uganda Revenue Authority v. Kirenga Fred Miscellaneous Application Number 91 of 2014* for the proposition that a party seeking a stay of execution must satisfy the


Court that there is sufficient cause why the party with a judgment should postpone the enjoyment of its benefits and should demonstrate special circumstances and irreparable or substantial loss. The applicant was awarded damages and this did not demonstrate irreparable loss even if
5 the applicant were to be successful on appeal.

In order for this Court to make a decision on an application for an order of stay of execution, an appeal should be pending and there should be a serious threat of execution. The burden lies on the applicant to prove on a
10 balance of probabilities that the requisite conditions have been satisfied for the order to issue (see *Hwang Sung Industries Ltd. V. Tajdin Hussein and 2 Others SC Civil Application No. 19 of 2008*).

Further more, a party seeking a stay of execution must satisfy the Court
15 that there is sufficient cause why the party with judgment should postpone the enjoyment of its benefits. It is not sufficient for the judgment debtor to say that he is vulnerable, because the successful party may take out execution proceedings. It must be shown that if execution proceeds, there may be some irreparable loss caused.

20 I have taken the above jurisprudence into account in resolving this application. I have carefully reviewed the arguments of both Counsel and the authorities that they have cited to me. I have also carefully reviewed the pleadings of both parties on record. I observe that this is a second
25 appeal.

On the existence of the Appeal

I also observe that the applicant has attached a letter to his application marked as annexure C. This letter is dated 2 March 2017 from the Deputy
30 Registrar forwarding the lower court record to the Chief Magistrate Ibanda. The Chief Magistrate received the letter and the record on 7 March 2017. The applicant had received the record at least by 12 April 2017, when he filed the affidavit attached to the present application. By this time, almost six months later, therefore, there should have been a
35 memorandum of appeal on record. 

Counsel attached a memorandum of appeal to the application. While the notice of appeal is endorsed with the Court of Appeal stamp, dated 29 November 2015 and signed by the Deputy Registrar, the memorandum of appeal attached to the application as annexure B is neither stamped nor endorsed by the Registry, thus raising the question of the existence of the appeal.

Further still, the alleged warrant to give vacant possession does not bear a court stamp to speak to its authenticity. A court stamp is evidence, coupled with the signature of the Registrar, that the Court has received the document concerned. This lack of authentication is significant in light of the respondent's denial that he has taken out any warrant of execution, and especially through the bailiff Kaahwa, alleged to have been entrusted with the warrant.

On the threat of imminent execution

The applicant has also not demonstrated that there is an imminent threat of execution, which would lead to irreparable loss. He concedes that he is a mere tenant on the land claimed by the respondent. In my considered view, his interest could easily be compensated for by damages, in case the appeal was to be determined in his favour. The matter appears to me to be one of mere vulnerability rather than one of irreparable loss to him. It should not stop the judgment creditor from enjoying the fruits of the judgment.

I therefore find that on a balance of probabilities, the applicant has failed to satisfy me that I should issue an order of stay of execution. In the circumstances, this application is dismissed with costs to the respondent. The appeal should be fixed for hearing as soon as possible.

Dated this ¹³ day of ...December 2017

Signed by:

Solomy Balungi Bossa
Justice of Appeal
Delivered by His Worship Asimwe Tadeo