THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

Miscellaneous Civil Application No. 10 of 2020

(Arising from Miscellaneous Application No. 414 of 2019)
(Arising from Civil Appeal No. 24 of 2018 (COA))
(Arising from High Court at Mbarara Civil Suit No. 036 of 2014)

1. Gumizaho David
2. Twimukye Alex :: **Applicants**

Versus

1. Mazimba Kezekia
2. Apollo Atwongyere :::::::::::::::::::::::::::::::::::: **Respondents**

Coram: Hon. Justice Remmy Kasule, Ag. JA sitting as a single Justice

Ruling of the Court

This application is for an interim order to stay execution of the decree in High Court at Mbarara Civil Suit No. HCT-05-CV-CS-036

of 2014 pending hearing and final determination of the main Miscellaneous Application No. 414 of 2019 for stay of execution.

The application is brought under Rules 6(2)(b), 43(1)(2),44(1) and 50(2) of the Judicature (Court of Appeal Rules) Directions, SI 13-10. It is supported by the affidavit of the 1st applicant dated 19.12.2019 and another one in rejoinder of 02.03.2020. It is opposed by the affidavit in reply dated 20.02.2020 by the 2nd respondent.

It is an admitted fact that as at the time of lodging this application in this Court on 20.02.2020 the 2nd applicant had passed on 08.01.2018 and the 1st respondent on 28.12.2017.

At the hearing, learned Counsel Kentaro Speciosa was for the 1st applicant while Mukwatanise Arthur was for the 2nd respondent.

The background to this application is that both applicants, who were biological sons of the 1st respondent, sued through High Court at Mbarara Civil Suit NO. HCT-05-CV-CS-0036 of 2014 their stated biological father, the 1st respondent and the 2nd respondent who was a grandson of the 1st respondent, being a son of another biological son of the 1st respondent.

The subject of the dispute in the Civil Suit was land situate at Gabarungi, Kazo, Kiruhura District, registered as LV-99-Folio 14 Block 46 Plot 1 Nyabushozi, of which the 1st respondent was the original registered owner.

During the period 1990-1995, the 1st respondent distributed part of the suit land amongst all his children. Each one of his children, including the father of the 2nd applicant, got a share and took occupation of the portion given. The distribution was reduced in writing in the form of minutes at a meeting that took 5 days. The 1st applicant was the secretary of the meeting.

In 2013 the 1st respondent sold to his grandson, the 2nd respondent, two pieces of the land out of what he retained as his own land, after distributing to his children. These two pieces were known as *"Akabaati"* and *"Kamukalazi"*. The 1st and 2nd applicants resisted the occupation of these two pieces of land by the 2nd respondent, asserting that the *"Kamukalazi"* land belonged to the 1st applicant and the *"Akabaati"* piece of land belonged to the 2nd applicant. Hence the lodgement of the **Civil Suit No. 036 of 2014** in the High Court at Mbarara for the Court to determine who is the lawful owner of the suit land.

The High Court at Mbarara (Hon. Justice Dr. Flavian Zaija, J) delivered Judgment in the said suit on 30.11.2017. He dismissed the plaintiffs', now applicants, case by holding that both of them were illegally occupying the disputed land. The learned Judge then allowed the counter-claim of the defendants, now respondents, by holding that the suit land lawfully belonged to them and awarded special and general damages, interest thereon as well as costs of the suit and those of the counter-claim.

The applicants, having been dissatisfied with the High Court Judgment, lodged to this Court Civil Appeal No. 24 of 2018. The appeal is pending determination in this Court.

In the meantime, the respondents as the successful party in the High Court, filed in the High Court, Mbarara, the bill of costs of the High Court suit and counter-claim, had the same taxed and took out execution process against the now surviving 1st applicant, as the Judgment debtor. They prayed the High Court to commit him to civil prison for failure to satisfy the High Court decree in the suit.

On 23.05.2019, the 1st applicant filed in the High Court, Mbarara, Miscellaneous Application No. 127 of 2019 for stay of execution.

The High Court (Dr. Flavian Zeija, J.) dismissed the same on 17.12.2019.

The said applicant then lodged in this Court on 20.12.2019 the main **Application No. 414 of 2019** to stay execution and then on 16.01.2020 lodged this application for an order of interim stay.

It is submitted for the applicant that the application be allowed and an interim order of stay be issued because the applicant's **Civil Appeal No. 24 of 2018** is pending determination by this Court. The hearing of the appeal just awaits the appointment by the appropriate Court of the administrators to the respective estates of the deceased 2nd applicant and 1st respondent to this application.

Further, the 1st applicant contends that while the said appeal is still pending, the 2nd respondent is carrying on threats of executing the decree of the original **Civil Suit No. 036 of 2014** by taking out Court process of issuance of warrant of arrest and committal to civil prison of the 1st applicant.

The 1st applicant had also already filed in this Court the substantive **Application No. 414 of 2019** for stay of execution and the same also awaits determination by this Court.

It was thus prayed that this application be allowed by this Court issuing an interim order to stay execution.

The 2nd respondent's Counsel submitted, in opposition to the application, that since the 2nd applicant was dead, the 1st applicant had no instructions, let alone authority, to oppose execution of the decree against the 2nd applicant.

It was also further submitted for the 2nd respondent, that the filing and prosecution by the 1st applicant of **Civil Appeal No. 24 of 2018** and the substantive **Application No. 414 of 2019** of for stay of execution, as well as this application for interim stay, were all intended by the 1st applicant to cause delay of justice. The 1st applicant had no chances at all of succeeding in **Civil Appeal No. 24 of 2018.** At any rate the 2nd respondent had already taken occupation of the suit land.

2nd Respondent's Counsel also contended that the 1st applicant was settled in his part of the land given to him by his father, the 1st respondent. The said 1st respondent had even built a house for the 1st applicant where he was now staying while carrying on cattle grazing and cultivation of crops, activities from which the 1st applicant got food and other income to meet school fees for his children. Accordingly the 1st applicant was suffering no

irreparable damage, or any damage at all, as a result of the execution process being carried out by the 2nd respondent.

Counsel for the 2nd respondent also contended that the 1st applicant, as Judgment debtor, was under obligation to provide for security for costs and that he had failed to do so. As such a Court of law should not exercise any mercy towards him. Counsel prayed for the application to be disallowed with costs to the 2nd respondent.

In rejoinder, Counsel for the 1st applicant submitted that even though the 2nd applicant was dead, an execution of the decree of the High Court in **Civil suit No. 036 of 2014** would involve executing against the interests of the deceased applicant's estate. As a co-judgment debtor to the suit, the interests of the deceased 2nd applicant's estate in the suit closely inter-twined with his interests as the 1st applicant. As such, his prosecution of the application had to involve the interests of the estate of the deceased 2nd applicant. At any rate, the 2nd respondent, in an attempt to carry out a threat of execution of the decree in the suit, had included the 2nd applicant, though deceased, in the application for such execution.

It was re-asserted on behalf of the 1st applicant that he, the 1st applicant, was still in occupation and use of the suit land, contrary to the assertion of the 2nd respondent that he, the 2nd respondent, had taken over occupation and use of the same.

1st Applicants' Counsel prayed for allowing the application and granting an interim order of stay of execution.

The law, as to successfully apply for an interim order of stay of execution, is for the applicant to show to Court that a substantive application to stay execution is pending in Court. The applicant has to prove to Court that there is a serious threat of execution before the determination of the pending substantive application for stay. It is not necessary of the applicant, at this stage of application for interim stay, to pre-empt considerations necessary in deciding the substantive application for stay of execution. See: **Supreme Court Civil Application No. 19 of 2008: Hwang Sung Industries Ltd vs Tajdin Hussein & Others: [2008] HCB 57-58.**

It is not disputed that the 1st applicant has pending in this Court for due determination a substantive application for stay of execution, that is Miscellaneous Application No. 414 of 2019, filed in this Court on 20.12.2019.

As to the threat of execution, the 1st applicant has the burden to satisfy this Court with convincing evidence, that there is imminent danger that the subject matter of the dispute might suffer irreparable harm or damage in the period before the main application for stay, or indeed before the actual appeal is heard and determined, by this Court. The Court must be convinced that such harm or damage is capable of rendering the main application or the appeal itself nugatory. See: **Court of Appeal of Uganda Civil Application No. 266 of 2019: National Forestry Authority vs The Omukama of Bunyoro Kitara, Hoima Sugar Ltd and the Uganda Land Commission (unreported).**

In **Supreme Court of Uganda Constitutional Petition No. 3 of 2014: Sekikubo vs Attorney General**, the Supreme Court stressed the further requirement that an application for interim stay must be made without unreasonable delay and that the applicant has to give assurance of the performance of the Court decree as may ultimately be made binding upon him or her.

The 2nd respondent in this application has not rebutted the assertion of the 1st applicant supported by the Court record of the High Court at Mbarara in Civil Suit No. 036 of 2014, which shows clearly that on 06.07.2018 the deputy Registrar of that Court,

issued a Notice to show cause against the applicants, of which the 1st applicant was the one still alive, as to why execution should not be issued against them. On 27.07.2018 an application was filed by the respondents, of which the 2nd respondent was the one still alive, for the execution by way of recovery of the sums awarded in the High Court decree of Civil Suit No. 036 of 2014 as special and general damages as well as accrued interest.

The resistance by the 1st applicant to the said application for execution was dismissed by the High Court Mbarara on 22.05.2019.

The 2nd respondent pursued the threat of execution by having a bill of costs taxed and allowed by the High Court on 10.05.2019.

The 1st applicant further resisted the threat of execution by lodging in the High Court, Mbarara, Miscellaneous Application No. 127 of 2019 to stay execution of the suit decree, but this application was dismissed by the High Court (Dr. Flavian Zeija, J.) on 17.12.2019.

Learned Counsel for the 2nd respondent whereupon applied for a warrant of arrest of the 1st applicant, but the Deputy Registrar, High Court, Mbarara, adjourned the matter to 10.01.2020 for due consideration. On that day a warrant of arrest to recover the

special and general damages, interest thereon and costs of the suit was issued against the 1st applicant by the Deputy Registrar.

The 1st applicant thus lodged to this court of Appeal the substantive **Application No. 414 of 2019** for stay. On 16.01.2020, this application for interim stay was lodged in this Court, as due to too much work at this Court, the substantive application to stay, could not be fixed for hearing before a Coram of three Justices. This was due to the fact that, until recently when this Court made the decision that a single Justice of this Court can determine a Substantive Application for stay all such applications had to be determined by a Coram of three Justices of this Court. See: **National Forestry Authority vs the Omukama of Bunyoro Kitara & Others (Supra).**

The 2nd respondent has not rebutted the assertions of the 1st applicant, as to the stated steps and actions taken by the 2nd respondent, to execute the High Court decree in the **Civil Suit No. 036 of 2014** against the 1st applicant. Indeed this very Court itself had to issue on 12.02.2020 an order of stay of execution of the decree in the very same Civil Suit from which **Civil Appeal No. 24 of 2018** arises, pending the determination of this interim application to stay.

On the basis of the evidence set out above, this Court holds that the 1st applicant has satisfied this Court that there is a great threat of the execution of the decree in High Court **Civil Suit No. 036 of 2014** against the Judgment debtors in that suit, who include the 1st applicant and the estate of the 2nd applicant.

With regard to delay, this Court notes that Judgment in High Court at Mbarara Civil Suit No. 036 of 2014 was delivered on 30.11.2017 and on 05.12.2017, within a week, the applicants had lodged the Notice of Appeal at the High Court Civil Registry, Mbarara. By 02.02.2018 a Record of Appeal had been filed in this Court and the Appeal registered as Civil Appeal No. 24 of 2018. The delay in not having the said appeal fixe for hearing is due to the fact that the administrators of the estate of the 1st respondent and those of the estate of the 2nd applicant, have not been appointed by the High Court at Mbarara due, to the Court applications for such appointment in respect of both estates being caveated, thus delaying the High Court to make the necessary decisions of appointing administrators to the respective estates.

The 1st applicant, has otherwise, acted with speed by filing the High Court application to strike out the Notice to show cause on 07.08.2018, applying for stay execution on 23.05.2019, and

lodging to this Court on 20.12.2019 the Substantive Application No. 414 of 2019 for stay and lodging this application for interim stay in this Court on 16.01.2020.

This Court, given the above stated facts, is unable to accept the submission for the 2nd respondent, that the 1st applicant, as the surviving judgment debtor to the suit, has acted with delay and that all that he aims at is to cause as much delay as possible, thus disabling the 2nd respondent from enjoying the fruits of the court decree in Civil Suit No. 036 of 2014.

I accordingly hold that the 1st applicant has not acted with unreasonable delay, or at all, in pursuing this application for interim stay.

As to the damage to be suffered if execution is to be carried out, most probably the 1st applicant will solely meet the obligations to pay out of his resources the total sums of special and general damages as well as interest thereon and the costs of the suit, since he is the only surviving judgment debtor, the 2nd applicant having passed on and no administrator of his estate been appointed, or if appointed, has been made a party to this application.

Further, were the 1st applicant to be arrested and committed to Civil prison as a Civil Prisoner, which application the 2nd respondent has tried to pursue, he will have suffered prison life, without any compensation at all, should it turn out that on appeal he is successful in Civil Appel No. 24 of 2018.

As to the use and occupation of the suit land, the 1st applicant and the estate of the 2nd deceased applicant, would suffer being evicted from the suit land where they have stayed and used the same since 1990 for cattle grazing, agriculture and which land has been a source of income for meeting financial needs such as school fees for their children. Should the 1st applicant and the estate of the 2nd applicant be successful in the Appeal and regain the said land, there is no guarantee that they will be compensated adequately or at all for the loss they will have suffered.

This Court is thus satisfied that the 1st applicant has made out case that, if stay of execution is not granted, the possibility of the 1st applicant and the estate of the 2nd applicant suffering substantial irreparable loss, should **Civil Appeal No. 24 of 2018** be later on determined in their favour, is a very real one.

As to the performance of the court decree, that may ultimately be issued by the Courts as relate to the dispute at hand, the 1st

applicant and the estate of the 2nd applicant, may be evicted from the suit land, however painful such a process will be. There are also pieces of land, in the very area of and/or neighbouring the suit land, that the 1st applicant and the estate of the 2nd applicant own, and which may be attached and sold under Court execution process, to recover the decretal sums that the Courts may order as due, depending on how the applicant's **Civil Appeal No. 24 of 2018** will be resolved.

Having considered all the above aspects of this application, this Court allows this application and orders that the execution of the decree in High Court **Civil Suit No. 036 of 2014** be stayed until the determination of the Substantive Application to stay execution No. 414 of 2019 and/or **Civil Appeal No. 24 of 2018.**

This Court has restrained itself from disposing of this application for interim stay together with the substantive application No. 414 of 2019 for stay at one go and at the same time, pursuant to Section 12(1) of the Judicature and the authority of: National Forestry Authority vs The Omukama of Bunyoro & 2 Others (Supra). The restraint is to give room to the administrators of the estates of the 2nd applicant and the 1st respondent to join by substitution in the substantive **Application No. 414 of 2019** for

stay of execution so that both estates are effectively represented not only in the said substantive **Application No. 414 of 2019** for stay of execution, but also in the actual **Civil Appeal No. 24 of 2018.** When this has been done, the parties may find that proceeding with resolution of the substantive appeal No. 24 of 2018 will save time and resources other than pursuing the substantive **Application No. 414 of 2019** for stay, on its own.

As to costs of this application, it is ordered that the same shall follow the event of the Substantive **Application No. 414 of 2019** and/or **Civil Appeal No. 24 of 2018** whichever shall be pursued first.

It is so ordered.

Dated at Kampala this 13th day of July **2020**.

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Remmy Kasule
Ag. Justice of Appeal