

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

Civil Application No.93 of 2021
(Arising from Civil Application No.82 of 2021)
(Arising from Civil Appeal No.74 of 2021)

(All Arising from High Court Miscellaneous Application No.167 of 2020 and High Court Civil
Suit No.46 of 2010)

Michael Mukhono Applicant

Versus

Alice Kimono KimaswaRespondent

RULING

Before:

Hon. Justice Remmy Kasule, Ag. JA, sitting as a Single Justice



Introduction

This is an application for an interim order of stay of execution pending the hearing and determination of the substantive application for stay of execution of an order of the High Court in **High Court Miscellaneous Application No.167 of 2020** and **High Court Civil Suit No.46 of 2010**.

The application is brought under *Sections 10 and 12 of the Judicature Act, Cap.13*, and *Rules 2, 6(2) and 44 of the Judicature (Court of Appeal Rules) Directions S1 13-10*.

The grounds of the application are expounded in the supporting affidavit of Michael Mukhono dated 12.04.2021, the appellant herein. The respondent opposes the application in her affidavit in reply dated 11.06.2021.

Legal Representation

At the hearing of the application, the applicant was represented by Learned Counsel Enoth Mugabi, while Learned Counsel Kisaalu Henry and Richard Bitale represented the respondent.

Submissions of Counsel for the Applicant

Learned Counsel for the applicant relied on *Rule 2(2) and 6(2) of the Judicature Court of Appeal Rules*, and the case authorities of **Hwang Sung Industries vs Tajdin Hussein; Supreme Court Civil Appeal no.19 of 2008** and **Patrick Kaumba Wilshire vs Ismael Dabule: Supreme Court Civil Appeal No.03 of 2018**, as well as **David Lubuuka vs Fred Joel Nsohya, Court of Appeal Miscellaneous Application No.358 of 2016**.



He urged that the applicant had lodged a substantive application to stay execution, that is **Civil Application No.82 of 2021**. There is also a serious threat of execution before the hearing of the substantive application. If execution is carried out then the appeal, **Court of Appeal Civil Appeal No.74 of 2021** will be rendered nugatory.

Counsel maintained that applications of this nature must be made without unreasonable delay, which the applicant had done as he lodged the Notice of Appeal on 22.12.2020 against the High Court decision (Namundi, J.) delivered on 16.12.2020 in High Court **Miscellaneous Application No.167 of 2020**. He had also lodged the record of Appeal on 16.03.2021.

Counsel further argued that the substantive application and the appeal are not frivolous, and have a likelihood of success. This is because pursuant to the consent Decree entered in the original **High Court Civil Suit No.46 of 2010**, the applicant had taken possession, constructed and put to use the building at Plot 9, Pallisa Road, Mbale City from which he stands to be evicted, before the appeal he has lodged is heard and determined on its own merits.

Learned Counsel for applicant then prayed that the application be allowed.

Submissions for Counsel for the Respondent

Learned Counsel for the respondent, in opposition to the application contended that the consent Decree dated 26.11.2012 was no longer relevant as the same had since been set aside on grounds of illegality. Thus the ownership of the property comprised in LRVHQT1248 Folio 22 Plot 9, Pallisa Road Mbale



was no longer a subject of challenge by the applicant or any other person, given those circumstances.

Counsel for the respondent also contended that the applicant had not in any way provided to court any documentary evidence to prove any threat of execution proceedings going on in court against the applicant.

Learned Respondent's Counsel further contended that on 01.04.2021, the High Court at Mbale ordered for the eviction of the applicant from the suit land. Therefore the ownership of the land property comprised in LRVHQT1248 Folio 22, Plot 9, Pallisa Road, Mbale, is no longer in dispute before any court of competent jurisdiction, as alleged by the applicant.

In reply to paragraphs 9 and 10 of the applicant's affidavit in support of the application, Learned Counsel for the respondent contended that the applicant's Counsel could not orally apply for stay of execution on 01.04-2021 as alleged by the applicant therein, when at the same time and date, the same applicant appeared in the same court to receive a ruling in **Miscellaneous Applications Nos. 272 and 273 of 2020** which were themselves seeking stay of execution.

In response to paragraphs, 11 and 12 of the applicant's affidavit, Learned Counsel for the respondent contended that the grounds of appeal in the Memorandum of Appeal dated 10.03.2021 and lodged in this Court on 16.03.2021, in **Civil Appeal No.74 of 2021** do not at all question the ownership of the suit property comprised in LRVHQT1248 Folio 22, Plot 9 Pallisa Road, Mbale.

As to paragraph 13 of the applicant's affidavit, Learned Counsel for the respondent contended that **Miscellaneous Application**



No.82 of 2021 and Civil Appeal No.74 of 2021 all arise from **High Court Miscellaneous Application No.167 of 2020** in which the consent Decree in **High Court Civil Suit No.46 of 2010** was reviewed and set aside on grounds of illegality. The issue therefore of rendering nugatory the stated application and the appeal by the absence of an order to stay execution does not arise at all.

Further, Learned Counsel for the respondent submitted that the principle of law governing illegality is that once illegality is brought to the attention of the court of law, then that court cannot sanction what is illegal. Illegality overrides all questions of pleading including any admissions made thereon.

Therefore, since the consent Decree in **Civil Suit No.46 of 2010** was set aside in **Miscellaneous Application No.167 of 2020** on the ground of illegality, all subsequent actions, in respect of the same illegal consent Decree, are considered null and void and not enforceable. Therefore the applicant's application is an abuse of Court process.

Learned Counsel for respondent further contended that the respondent was the registered proprietor of the property comprised in LRVHQT1248 Folio 22, Plot 9 Pallisa Road, Mbale, before having it transferred by way of sale to M/S. Word Paid Credit Finance (U) Ltd. Hence the balance of convenience was, for all intents and purposes, in favour of disallowing the applicant's application, since to allow it will cause much inconvenience to the now innocent stated purchaser of the said property. He referred to the Supreme Court decision of **Wilson Mukiibi vs. James Semusambwa; Civil Appeal No.09 of 2003** and **Stanbic Bank (U) Ltd. Vs. Atabya Agencies Ltd; Civil**



Appeal No.31 of 2004 where the Supreme Court held that an intention to appeal per se is not a ground for stay of execution and instituting an appeal does not operate on its own as a stay of execution.

He submitted that the above cited decisions equally applied to the facts of this application, and prayed this Court to be guided by them.

Learned Respondent's Counsel finally contended that this application did not establish any grounds for stay of execution and thus prayed that the same be dismissed with costs.

Decision of Court

The jurisdiction of this Court to grant a stay of execution is set out in **Rule 6(2)(b)** of the *Rules of Court* which provides that:

"2. Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or stay execution but the court may:

- a)
- b) In any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 76 of the Rules of Court, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just."

The above Rule gives this Court, the discretion, to grant a stay of execution even on an interim basis. However, it must be exercised on well-established principles. It is the paramount duty of Court determining such an application to see to it that the appeal, if successful, is not rendered nugatory. See: **Hon. Theodore Ssekikubo and Others vs. The Attorney General and Another**, (~~supra~~) [2014] UG SC 11



I have carefully considered the pleadings for the parties and the submissions of both Counsel. I am satisfied that the applicant filed this application for interim stay, an application for stay of execution vide the substantive **Civil Application No.82 of 2021** and an appeal vide **Civil Appeal No.74 of 2021**, which are all pending determination in this Court.

As to the existence of a threat of execution before the determination of the substantive **Civil Application No.82 of 2021** for stay of execution. Counsel for the respondent contended that there is no serious threat of execution as the orders of the High Court had already been implemented. The applicant on the other hand maintained that the consequential orders of eviction, vacation of the suit property, removal of the caveat and payment of costs, all remained to be executed to completion. The threat to execute was therefore still there. A stay of such was necessary.

Black's Law Dictionary 2nd Edition defines "execution" as:

"The completion, fulfillment or perfecting of anything, or carrying it into operation and effect".

See also: Court of Appeal of Kenya case of **Exclusive Estate vs. Kenya Posts and Telecommunication Corporation and Another [2005]1 EA53**.

A serious threat of execution connotes a weighty moment to execute.

In this application, I am not satisfied that there is no longer in existence any threat of execution against the applicant, as the respondent has submitted. To the extent that the determination of **Civil Appeal No.74 of 2021** will, in one way or another, affect



the consequential orders issued by the High Court in **Miscellaneous Application No.04 of 2021**, then there is still a serious threat of execution against the applicant. I therefore find that the applicant has established the existence of a threat to execute against him.

In the result, I allow the interim application for stay of execution of the Decree and Orders of the High Court in **Miscellaneous Application No.167 of 2020** and **Civil Suit No.46 of 2010**. It is accordingly so ordered.

The stay shall remain operative for the next three (3) months from the date of delivery of this Ruling, within which period the Registrar of this Court and all the parties to this Application are to take steps, as a matter of urgency, to fix **Civil Application No.82 of 2021** and/or **Civil Appeal No.74 of 2021**, for hearing and due determination. Should the three (3) months of interim stay expire before the substantive application and/or the appeal is determined, then this Court will be free to make appropriate orders in the case.

As to costs of this application, the same shall abide the outcome of the substantive **Civil Application No.82 of 2021** and/or **Civil Appeal No.74 of 2021**, whichever shall be determined first.

It is so ordered.

Dated this^{23rd}..... day of.....^{July}..... 2021


Remmy Kasule

Ag. Justice of the Court of Appeal