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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO.223 OF 2021

(Arising from Miscellaneous Application No.222 of 2021)

(Arising from Civil Appeal No.312 of 2018)

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(Arising from Civil Appeal No.021 of 2016)

(Arising from Civil Suit No.KIT-02-CS0014 OF 2014)

1. OGWANG DONASIANO

2. OKWERA MARTINE (AMUKU)

3. OCAN MARCILIANO

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4. OJERA ALEX

5. TABO BOSCO:.....APPLICANTS

6. KILAMA JOHN

7. OYET MICHEAL (OPIO)

8. APIO NARASISA

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9. FAFIYANO ANYING (LUNOO)

10. OLANYA RAY (OTWALA)

VERSUS

REGINA OKOT:.....RESPONDENT

RULING

This application was brought under the provisions of section 98 of the CPA, Order 22 R.26 and 89 of the CPR. It is for orders that:-

- 10 *a. An interim order of stay of execution be issued by the Court pending the hearing and determination of the substantive application for stay of execution and of civil appeal No. 312 of 2018.*
- b. Costs of the application be provided for in the cause.*

The background to the application is that the respondent sued the applicants jointly and severally in the Chief Magistrate's Court of Kitgum holden at Patongo
15 for a declaration that she was the owner of the 56 hectares of land under customary tenure, situated at Koroch Village, Atut Parish, Wol sub-county in Agago District. She sought orders of eviction, a permanent injunction and an award of general damages and special damages for trespass to the land. Her claim was that she inherited the land in dispute from her late husband, Okot
20 Elizeo in 1991 who in turn had acquired it as a gift inter vivos from his late paternal uncle, Sirayo Okwang who opened it when it was virgin land.

Having married her late husband during 1968, they moved and settled onto the land in 1970 and utilised it peacefully until the year 2007 when the first 8
applicants began their encroachment onto the land by undertaking cultivation
25 on a massive scale. The last two applicants followed suit during the year 2013, proceeding further to construct a hut thereon. She sued the first applicant before

5 the L.C II Court which decided in her favour in 2009 and the 1st applicant's
appeal to the L.C Court was dismissed but he refused to vacate the land. The
first eight applicants contended that they had lived on the land in dispute since
1956 and never left it save for the duration of the period of insecurity. The last 2
10 applicants contended that they had lived on the land in dispute since 1965 and
the tenth applicant was born on that land. They therefore refuted the
respondent's claim that they were trespassers on her land, since she occupies
hers and they occupy theirs.

Judgment was given in favour of the respondent and the applicants appealed to
the High Court of Uganda sitting at Gulu where judgment was still given in favour
15 of the respondent.

Being dissatisfied, the applicants filed Miscellaneous Application No.223 of 2021
in which they seek stay of orders of the High Court in Civil Appeal No.0021 of
2016.

The grounds for this application are set out in the motion as follows;

20 *1. That the applicants were the defendants in the original case before the
Magistrate Grade 1 Court of Kitgum Magisterial Area holden at Patongo,
Civil Suit No.014 of 2014 in which the respondent/ plaintiff sued the
Applicants/ defendants herein above mentioned, for which judgment was
passed against the applicants on the 7th of June, 2016, by Her Worship
25 Akello Irene.*

- 5 2. *That the applicants, being aggrieved and dissatisfied with the said judgment, decisions and orders of the Court, instituted the process of an appeal to the High Court of Uganda at Gulu by promptly filing a notice of Appeal in the High Court vide Civil Appeal No.021 of 2016, but the applicants' said appeal was dismissed and judgment passed against the*
- 10 *applicants by Hon. Justice Stephen Mubiru.*
3. *That the applicants, being further aggrieved and dissatisfied with the said judgment or dismissal, decisions and orders of the High Court of Uganda at Gulu again instituted the process of an appeal to the Court of Appeal at Kampala by promptly filing a notice of appeal in Court, vide Civil Appeal*
- 15 *No.312 of 2018, and the applicants' said appeal is now pending hearing and has a high likelihood of success in the appellate Court.*
4. *That the respondent has now threatened to execute the said judgment, decisions and orders of the original Civil Suit No.014 of 2014 and to that effect she has already presented in Court the application for execution proceedings and have extracted a Notice to show Cause why Execution*
- 20 *should not issue and also procured Warrants of Attachment and sale of movable property of the applicants.*
5. *That the respondent will go ahead and make good her threat and execute the judgment of the lower Court despite of the pendency of the appeal in the superior court unless restrained by this Honourable Court, hence the need*
- 25 *for the stay of execution.*

- 5 6. *That the applicants strongly believe that they have good grounds with merits in the pending proposed civil appeal now in this Court with a likelihood of success.*
7. *That it is in the interest of substantive justice and the principles of natural justice of hear one side, hear the other side also, that the application be*
10 *allowed and the execution stayed since the proposed appeal has all the probability and high likelihood of success.*
8. *That no injury, injustice, prejudice, damage or loss will be occasioned to the other party if the application is allowed.*

The motion is supported by the affidavit of the 10th applicant, Olanya Raymond
15 dated 8th June, 2021. The said affidavit repeats and expounds on the notice of motion. I find no reason to reproduce its contents here.

The respondent did not file an affidavit in reply.

At the hearing of this application, Mr. Tooto Oba appeared for the applicants while neither the respondent's counsel nor the respondent were present.

20 The evidence on record shows that the respondent was served through her advocate, Okot Edward of M/S Okot Edward & Co. Advocates who willingly accepted service but declined to acknowledge receipt on the ground that they had no instructions to represent the respondent.

There was no Notice of Change of Advocates on Court record therefore M/S Okot
25 Edward & Co. Advocates was the last known address of the respondent.

5 This amounted to effective service under O.3 R4 of the CPR which provides that any process served on the advocate of any party or left at the office or ordinary residence of the advocate, whether the process is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the advocate represents, and, unless the Court otherwise
10 directs, shall be as effectual for all purposes as if the process had been given to or served on the party in person.

Counsel for the applicant filed written submissions which they adopted at the hearing. The respondent did not file submissions.

Counsel for the applicant submitted that this Court had powers under Rules 6(2)
15 and 42(2) of the rules of this Court to grant interim stay of execution and in order for the applicant to succeed, he or she must have filed a notice of appeal, there must be a substantive application for stay of execution and an eminent threat of execution. Counsel further submitted that the applicants were the unsuccessful parties in both the High Court of Uganda at Gulu and the Magistrate Grade 1
20 Court at Patongo, they have since lodged a Notice of Appeal in this Court vide Civil Appeal No.312 of 2018 which is pending hearing.

Counsel further submitted that the applicants filed a substantive application for stay of execution which is also pending before Court. According to counsel, in order to safeguard the right of appeal, the decisions of the lower Court must be
25 stayed in order for the appeal process to be meaningful. He added that the attempt by the respondent to have the decisions of the lower Courts executed

5 notwithstanding the prompt filing of the appeal and the Notice of Appeal was an attempt by the respondent to frustrate the appeal.

Regarding an eminent threat of execution, counsel submitted that the respondent had filed an application for stay of execution and a notice to show cause why execution should not issue against the applicants. He added that the
10 applicants had been served with the said Notice to show Cause why execution should not issue as well as warrants of attachment of movable property and as such, the applicants are living under fear of execution at any moment. He prayed that the application be granted.

The jurisdiction of this Court to grant a stay of execution is set out in Rule 6(2)
15 (b) and Rule 2(2) of the Rules of this Court which grant the Court power to make any orders necessary to achieve the ends of justice.

In **Civil Application No. 019 of 2008: Hwang Sung Industries Ltd vs. Tajdin Hussein and 2 Others (SC)**, Okello, JSC held that:-

20 *“For an application for an interim stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application. It is not necessary to preempt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.*

25 *Suffice to add that the burden lies upon the applicant to prove to Court on a balance of probabilities the requisite conditions that must be satisfied before an interim order is granted.”* Emphasis added.

5 Further, in ***E.B. Nyakaana and Sons Limited and Beatrice Kobusinge and
16 Others, Supreme Court Misc. App. No.13 of 2017***; Lady Justice Dr. Esther
Kisaakye in her ruling stated that before Court exercises its discretion to grant
an interim order of stay, it must be satisfied that:

- 10 (a) *A Notice of Appeal has been lodged in accordance with Rule 72 of the
Rules of this court;*
- (b) *A substantive application for stay of execution is pending before court;*
- (c) *There is a serious threat of execution before the hearing of the
substantive application; and*
- (d) *The application has been filed without undue delay.*

15 Counsel for the applicants submitted that the applicants had filed a Notice of
Appeal in this Court vide Civil Appeal No.312 of 2018. I note that the applicants
did not avail a copy of the said Notice of Appeal to this Court however the Court
Registry file indicates that a Notice of Appeal was filed on 26th September, 2018
and referenced as Civil Appeal No.312 of 2018.

20 A substantive application for stay of execution referenced as Miscellaneous
Application No. 222 of 2021 was filed on 26th August 2021 and the same is
pending hearing before this Court.

As to whether there is a serious threat of execution before hearing of the
substantive application, the record shows that applicants had been served with
25 the Notice to show Cause why execution should not issue dated 6th April, 2021
as well as a warrant of attachment and sale of movable property. In my view,

5 there is an eminent threat of execution because execution can be commenced
anytime.

Regarding filing this application without undue delay, the judgment of court in
HCCA No. 0021 of 2016 was delivered on 20th September, 2018 and the evidence
on record shows that this application was lodged in this court in August 2021
10 which in my opinion was within a reasonable time considering the busy schedule
of this Court.

I find that the applicants have satisfied the conditions required for grant of an
interim order of stay. I allow the application and make the following orders:-

1. An interim order of stay of execution of the orders of the lower Courts is
15 hereby issued pending the disposal of Civil Application No.222 of 2021 or
until further orders of this Court.
2. The Registrar of this Court is hereby directed to fix Civil Application No.222
of 2021 for hearing in the next 21 days.
3. The costs of this application shall abide the outcome of the substantive
20 application for stay of execution.

I so order

Dated this^{19th}.....day of April.....2022.



**CHEBORION BARISHAKI
JUSTICE OF APPEAL**

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