

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION No. 225 OF 2023
(Arising from Civil Application No. 247 of 2023)
(Arising from Civil Appeal No. 020 of 2023)

RWAVIRA PATRICKAPPLICANT

VERSUS

KUTEASA RICHARD..... RESPONDENT

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.

RULING

INTRODUCTION.

This is an Application brought under Rules 2 (2), 6(2), 43 (1) and (3) of the Judicature (Court of Appeal Rules) Directions (hereinafter referred to as the “Rules of this Court”).

The Application seeks Orders that: -

- a) An interim order staying execution of the Judgment and Decree in HCCS No. 049 Of 2012 be issued pending hearing and determination of substantive application pending before this Court.
- b) Costs of the Application be provided for.

BRIEF FACTUAL BACKGROUND.

The Applicant lost Civil Suit No 49 of 2012 delivered at the High Court at Masaka in favour of the Respondent. Among the Orders of the made against the Applicant was to vacate the suit.

The Application is supported by the affidavit of the Applicant, Rwavira Patrick which briefly states: -

That the Respondent filed High Court Civil Suit No 049 of 2012 against the Applicant for trespass and also sought compensation for loss of property. Judgment was rendered in favour of the Respondent and the costs therein were taxed. Dissatisfied with the Decision of the High Court, the Respondent appealed the said Decision to this Court.

It is further deponed that the Respondent has applied for the execution of the Decree and Orders by way of warrants of arrest and eviction from the Suit land. There is as a result imminent threat of execution against the Applicant as well as eviction and demolition of the Suit property.

Furthermore, the Applicant has filed a substantive Application of stay of the High Court Decision now pending before this Court. The Applicant states that this application has a high likelihood of success.

That the Applicant in Miscellaneous Application No 139 of 2017 applied to the trial Court for stay of execution which was granted with Conditions. The Applicant then filed in the trial Court an Application for Review of the said conditional grant of stay of execution in Miscellaneous Application No 272 of 2017 which was dismissed and execution was Ordered to continue.

It is further pleaded that it is just and equitable that this application be granted.

The Respondent opposed this Application and filed an Affidavit in Reply. The Respondent deponed that whereas the Applicant filed a Notice of Appeal in this Court on the 15th May 2017, the said Notice was not served on the Respondent.

The Respondent further depones that the Record of Proceedings of the trial Court was certified on the 19th September, 2022 but that the Applicant did not file the Memorandum of Appeal and Record of Appeal within thirty days as required by law. The Respondent has therefore failed to take an essential step in the prosecution of his proposed appeal and therefore has no valid Appeal on Record.

Furthermore, the Application is brought after a significant delay of six years after the determination of Miscellaneous Application No. 139 of 2017. That if this Court is inclined to grant this Application then it should be on the condition that the Respondent should pay the entire amount of damages and costs due to the Respondent.

HEARING

This Application is determined solely on the basis of the written submissions filed by the Parties this Court having read them and found no area for further clarification necessitating the Parties physical appearance.

APPLICANT'S SUBMISSIONS

For the Applicant, it is submitted that the Applicant is in occupation of the suit land and it is this state of affairs that the Applicant wants to preserve. If the interim stay is not granted, then the Applicant's substantive Application and Appeal shall be rendered nugatory.

That the Applicant has filed a Notice of Appeal and has since Filled Civil Appeal No 020 of 2023. Counsel also argued that the Applicant has filed a substantive Application for stay of execution in Civil Application No. 248 of 2023 which is pending in this Court.

It is also argued that there is an imminent serious threat of execution as a warrant was issued to Bailiffs to possession of the suit land and carry out demolitions thereon.

Counsel referred me to the cases of **Hwang Sung Industries Limited V Tajdin Hussein & Ors** CA No 19 of 2008 (SC) and **Zubeda Mohammad & Anor V Laila Kaka Wajja & Anor** Civil Reference No 07 of 2016 (SC) as authority that this Application should be granted.

Counsel also prayed for costs.

RESPONDENT'S SUBMISSIONS

It is the case for the Respondents that this Application is incompetent. It is also argued that this Appeal has been filed out of time and yet no application has been made for the enlargement of time. Counsel submitted that the Appeal should

therefore be struck out and relied on the case of Mayende V Ochieng Election Petition Application No 33 of 2012.

It is further argued that a substantive application for stay at the trial Court was dismissed and therefore this application is superfluous. Counsel referred us to the case of Hon. Anifa Kawooya V Attorney General CAMA No 479 of 2011 where it was held: -

“...in conclusion, we strongly reiterate the provision of the law that an interim order should only be granted subject to well settled conditions, for a short time until a named day or further order of the Court, pending the determination of the main Application...”

It is further argued that the Applicant does not stay at the suit land and that there are no developments on the suit land. In any case it is further argued that the Applicant has not shown this Court any evidence of execution.

Counsel submitted that it is the practice of Court that judgment debtors should provide security for costs and referred us to the decision of **Amon Bazira V Maurice Peter Kagimu** Miscellaneous Application No 1123 of 2016 where Henry Kaweesa J. held: -

“...it has been trite that due performance of the decree can only be secured by the provision for security for costs...”

The respondent prayed that this Application be dismissed with costs.

RESOLUTION BY THE COURT.

THE PRINCIPLES

Rule 6 (2) (b) of the Rules of this Court provides: -

“... in any civil proceedings where a Notice of Appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just...”

The Supreme Court [vide **The Judicature (Supreme Court Rules) Directions SI 13-11** has Rule 6 (2) (b) which is in pari materia with the above Court of Appeal Rule. In this regard, the Supreme court in the case of **Theodore Ssekikubo and 3 others vs The Attorney General and others Constitutional Appeal No. 01 of 2015** held that: -

“...Considerations for the grant of an interim order of stay of execution or interim injunction is whether there is a substantive Application pending and whether there is a serious threat of execution before hearing of the substantive Application. Needless to say, there must be a Notice of Appeal...”

In **Alcon International VS New Vision Newspaper SCCA No. 4 of 2010 Okello JSC** held that: -

“...Upon being satisfied that the notice of Appeal has been lodged in accordance with Rule 72 of the Rules of this court, it is only necessary for the court to satisfy itself, on evidence, that a substantive Application is pending and that there is a serious threat to do the act complained of before the substantive Application is heard and determined. Lodgment of the notice of Appeal in accordance with Rule 72 ensures the competence of the pending

substantive Application. There is therefore no need to pre-empt consideration of matters of substance, necessary for the success of the substantive Application...”

The Supreme Court further held in the cases of **Yakobo Ssenkungo and others vs Crenzio Mukasa** Civil Application No. 5 of 2013 and **Guilliano Gariggio vs Claudio Casadio** Civil Application No. 2 of 2013 held that;

“the granting of interim orders is meant to help parties to preserve the status quo and then have the main issues between them determined by the full court as per the Rules.”

It would therefore appear to me that the grant of an interim Order is a matter of judicial discretion the purpose of which is the preservation of the Status quo pending the hearing of the substantive application. The main test to be met by the applicant is that there is a serious threat to do the act complained of before the substantive Application is heard and determined. The onus of proof in this regard lies squarely with the applicant.

Consideration of the merit of the Application

I have read the Motion in this Application and the Affidavits for and against it. I have also addressed my mind to the submissions of both Counsels and the authorities supplied to Court for which I am grateful.

I have noted that at the Trial Court in Miscellaneous Application No 139 of 2017, the Judge found that the *“...anticipation that execution may ensue therefore is not farfetched...”*.

The Trial Judge then made the following Orders: -

“a. Execution of the decree in this matter will be stayed pending the determination of the appeal;

b. The Applicant shall deposit 20,000,000/= (twenty Million Shillings) as security for due performance of the decree within 30 days from the date of issue of this Order

c. Costs of this Application will abide the outcome of the Appeal...”

This Order was made on the 29th September 2017. That is six years ago. There is no evidence that the Applicant deposited the money so Order. The Applicant does not even specifically protest this amount in the Motion or its supporting affidavit.

An attempt to vary the above Order under Miscellaneous Application 272 of 2017 was dismissed with costs to the Respondent. That was on the 30th November, 2021. Again this was two years ago. Evidently this is a long time without execution.

From the Affidavit in Reply (Annexure “C”) there is evidence from the Registrar of the trial Court that the Record of Appeal was ready and certified on the 13th September 2022. That is one year ago.

A review of this present Motion shows that it was filed on the 6th June 2023 (three months ago) but does not attach the alleged filed Appeal. Perhaps that may give credence to the submission of the Respondent that if the Appeal was filed, then it was out of time. The onus is on the Applicant to prove that his paperwork is in order. The Applicant has not done so.

I have also perused the Motion and sighted the warrant referred to in para 7 to the affidavit in support of the affidavit (supposed to be marked as “A” but is not). The said

warrant is not dated nor signed. An unsigned and undated warrant cannot be evidence of an imminent or serious threat of execution.

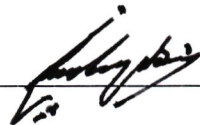
Looking at the above findings as a whole I find it difficult to exercise my discretion and grant the application for an interim stay.

I am therefore not satisfied that a case has been made for the grant of an interim Order. Given my findings above I hereby Order and Direct as follows: -

1. An interim Order staying the execution of the Judgment and Decree in HCCS 049 of 2012 is denied.
2. Costs to the Respondent.

I so Order.

Dated at Kampala this.....17th.....day ofOctober..... 2023.



JUSTICE GEOFFREY KIRYABWIRE, J.A.