THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0587 of 2021

(Arising from Civil Suit No. 0063 of 2018)

1. SOLOMON CHAMPLAIN LUI } …… APPLICANTS
2. HAMIDAH KOBUSINGYE }

VERSUS

1. STANBIC BANK UGANDA LIMITED } …… RESPONDENTS
2. SEKAJJA CHRISTOPHER AMOOTI }

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

During the year 2012 and 2013 respectively, the applicants jointly obtained two loan facilities from the 1st respondent for purposes of purchasing and developing multiple plots of land at Munyonyo, Kampala. The loans were repayable within a period of ten years at the rate of interest of 12.5% and 13.5% per annum, respectively. Both loans were secured by a mortgage. The applicants having defaulted on both loans, the 1st respondent foreclosed and sold off the mortgaged property to the 2nd respondent. Being aggrieved by the process of foreclosure and sale of the property, the applicants sued the respondents jointly and severally seeking declarations that the 1st respondent had breached its statutory duties owed to the applicants, that the sale was fraudulent, an order that the property be valued by an independent valuer, the sale be set aside, an award of general damages and costs. The respondents denied the allegations and in its defence the 1st respondent counterclaimed for US $ 883,551.14 with interest at the rate of 13% per annum from 1st January, 2018 until payment in full.

In the judgment delivered on 16th April, 2021 the court found that; the two mortgages were valid and the sale was lawful. It however directed the 1st respondent to pay the applicants the difference in price between the forced sale value and the actual sale price, a sum of shs. 621,600,000/= within

a period of one month failure of which the amount was to attract interest at the rate of 18% per annum until payment in full. Judgment was entered in favour of the 1st respondent against the applicants on the counterclaim in the sum of US $ 883,551.14 as the amount due as at 24th May, 2017. The applicants therefore were directed to pay the respondent that amount, less the amount decreed to them in the main suit. The 1st respondent was granted leave to evict the applicants from the property comprised in Kyadondo Block 257 plot 944 and sell it off within one month of the judgment, in order to recover the amount outstanding due. The applicants were directed to vacate the property within fourteen (14) days of the judgment. All encumbrances lodged by the applicants on the land mortgaged to the 1st respondent were consequently cancelled. The costs of the suit and counterclaim were awarded to the respondents in equal shares.

The applicants were dissatisfied with the judgment and filed a notice of appeal on 19th April, 2021. They as well applied for a certified copy of the record of proceedings. Both documents were served on counsel for the respondents on 22nd April, 2021. On 4th May, 2021 counsel for the 1st respondent submitted a draft bill of costs to the applicants. The applicants filed a memorandum of appeal in the Court of Appeal on 19th May, 2021. The applicants raise a total of sixteen grounds of appeal. The applicants extracted the decree which was then sealed by this court on 7th July, 2021.

b. <u>The application</u>.

The application is made under section 98 of *The Civil Procedure Act*, section 33 of *The Judicature Act*, Order 52 rules 1 and 2 of *The Civil Procedure Rules*, and Rule 2 (2) of *The Judicature (Court of Appeal Rules) Directions*. The applicants seek an order of stay of execution of the decree, pending the disposal of the appeal. The grounds are that the applicants have filed an appeal against the decision of this court, which is still pending in the Court of Appeal. One of the orders challenged on appeal is that directing the eviction of the applicants from the property in issue. The property constitutes the matrimonial home and residence of the applicants. There is a real danger that the applicants will be evicted from that property before disposal of the appeal thereby rendering it nugatory yet it has a very high likelihood of success.

c. The affidavits in reply

In its affidavit in reply the 1st respondent avers that although the judgment appealed was partly in favour of the applicants, they have since filed an appeal that challenges the entire decision. The applicants do not refute the fact that they borrowed money from the 1st respondent which they have not paid to-date, hence the appeal has no merit. The applicants have for a long time ceased servicing the loan. The 1st respondent only presented a draft bill of costs which it has never signed and filed in court. The applicants secured an interim stay of execution granted by the Registrar of this court. The application should therefore be dismissed with costs.

In his affidavit on reply, the 2nd respondent avers that although he is the current registered proprietor of the property occupied by the applicants and has been so since the year 2018, he has not commenced the process of evicting the applicants. In the event that the court is inclined to grant the order sought by the applicants, it should be conditioned on the applicants depositing security of at least 80% of US $ 240,000 being the price at which he purchased the property.

d. Submissions of counsel for the applicants;

Counsel for the applicant, M/s Katende Serunjogi and Co. Advocates appearing together with M/s Wakabala and Co Advocates, submitted that the applicants have satisfied all legal requirements for the grant of an order of stay of execution. They have filed a notice and memorandum of appeal, there is an imminent threat of execution of the decree, the application has been made without undue delay, they stand to suffer substantial loss if the stay is not granted, and it is unnecessary to provide security for due performance of the decree since the respondents were ordered to pay the applicants shs. 621,600,000/= within a period of one month, which they have never complied with. This amount can be deemed to satisfy the requirement of security for due performance of the decree.

e. Submissions of counsel for the respondents;

Counsel for the 1st respondent, M/s Arcadia Advocates appearing together with S & L Advocates submitted that the applicants have not provided any security for due performance of the decree.

The applicants cannot rely on the sum decreed to serve as security when they at the same time are challenging the entire decree. The applicants do not contest having borrowed the amount in dispute and the fact that it is due and owing from them. The applicants are therefore unlikely to suffer substantial loss. The application ought to be dismissed with costs.

Counsel for the 2nd respondent, M/s Mbeeta, Kamya and Co. Advocates submitted that the property in respect of which the applicants seek an order of stay of execution is registered in the 2nd respondent's name. The 2nd respondent acquired the property by purchase from the 1st respondent upon the applicants' default on their loan obligations to the 1st respondent. The applicants were directed to vacate the property within fourteen (14) days of the judgment. The 2nd respondent continues to suffer great hardship as a result of the applicants' continued occupation of the property. The application is an abuse of process by seeking to delay recovery under the decree for as long as is possible. It should therefore fail. In the alternative, the applicants should be required to deposit security for the due performance of the decree. They cannot offer as security money decreed to them yet they are challenging the same decree on appeal.

f. <u>The decision</u>.

According to Order 43 rule 4 (3) of *The Civil Procedure Rules*, an application of this nature must be made after notice of appeal has been filed and the applicant should be prepared to meet the conditions set out in that Order including; - furnishing proof of the fact that substantial loss may result to the applicant unless the stay of execution is granted; that the application has been made without unreasonable delay; and that the applicant has given security for due performance of the decree or order as may ultimately be binding upon him (see *Lawrence Musiitwa Kyazze v. Eunice Businge, S. C. Civil Application No 18 of 1990*).

The Court of Appeal in *Kyambogo University v. Prof. Isaiah Omolo Ndiege, C. A. Misc. Civil Application No 341 of 2013* expanded the considerations to include: - there is serious or imminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory; that the appeal is not frivolous and has a likelihood of success; that refusal to grant the stay would inflict more hardship than it would avoid.

i. A notice of appeal has been filed.

The applicant have satisfied this requirement. The applicants filed a notice of appeal on 19th April, 2021, applied for certified copy of the record of proceedings on the same day, served copies of the two documents on counsel for the respondents on 22nd April, 2021. The applicants have since filed a memorandum of appeal in the Court of Appeal on 19th May, 2021.

ii. The appeal is not frivolous and has a likelihood of success;

An appeal by itself does not operate as a stay of proceedings under a decree or order appealed from nor should execution of a decree be stayed by reason only of an appeal having been preferred from the decree (see Order 43 rule 4 of *The Civil Procedure Rules* and Rule 6 (2) of *The Judicature (Court of Appeal Rules) Directions*). In other words, the ordinary rule is that an execution of the decree need not be stayed pending an appeal unless the appellant shows good cause.

The court must be satisfied that the prospects of the appeal succeeding are not remote but that there is a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There should be a sound, rational basis, founded on the facts and the law, and a measure of certainty justifying the conclusion that the appellate court will differ from the court whose judgment has been appealed against; that the appellate court could reasonably arrive at a conclusion different from that of the trial court.

The appeal will be considered frivolous if *prima facie* the grounds intended to be raised are without any reasonable basis in law or equity and cannot be supported by a good faith argument. If there is a strong showing that the appeal has no merit, that is strong evidence that it was filed for delay or not in good faith. Additional evidence indicating a frivolous appeal is the applicant's conduct of prior litigation which may show that the appeal is merely part of a series of suits, applications and appeals over the same subject matter in which the applicant has engaged with no success or no chance of success. The prior litigation or procedural history can be used to establish the lack of merit in the present appeal or the bad faith of the applicant in filing the present appeal.

The applicants have not only provided court with a memorandum of appeal already filed in the Court of Appeal raising a total of sixteen grounds, but they have also adverted to the arguments they intend to raise in support of those grounds. The thrust of the appeal focuses on the validity of exercise of the power of sale and the procedure of sale by a mortgagee. Having perused the judgment, the grounds of appeal and the intended arguments, I have formed the opinion that there is a reasonable basis in law and equity to support the grounds raised and that they can be supported by good faith argument. As a result, the Court of Appeal could reasonably arrive at a conclusion different from that of the trial court. The appeal therefore is not frivolous.

iii. <u>The appeal would be rendered nugatory</u>;

Nugatory means "of no force or effect; useless; invalid." In this context, the term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid, it also means trifling. Whether or not an Appeal will be rendered nugatory if a stay is not granted depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible, whether damages will reasonably compensate the party aggrieved, or it is in the public interest to grant a stay.

Satisfaction of a money decree does not ordinarily pose the danger of rendering a pending appeal nugatory, where the respondent is not impecunious, as the remedy of restitution is available to the applicant in the event the appeal is allowed. The respondents have not been shown to be impecunious. The presumption then is that payment made to the respondents in execution of the decree will be reversible in the event of the applicants succeeding on appeal.

However, as part of the appeal, the applicants seek to reverse sale of property which they claim to be currently occupying as their matrimonial home. This aspect of their statement of facts has not been controverted by either respondents in their respective affidavits in reply nor in their submissions. That being the case, there is a real danger of not being able to recover possession once they are evicted. The respondents have not shown that this turn of events will be reversible, yet they have neither shown that damages will reasonably compensate the applicants. It is in the public interest that, on equitable grounds, courts afford special treatment to matrimonial homes.

For many couples, the matrimonial home represents the largest and most significant asset, and it is also a place of great emotional and personal significance. For that reason eviction from the home during the course of litigation should be the exception rather than the rule. Succeeding on appeal only to attain compensation while losing the comfort of the home due to transactions that are irreversible may turn the success on appeal into a mere trifling. There is therefore a real danger of the appeal being rendered nugatory.

iv. The application has been made without unreasonable delay.

Applications for a stay of execution ought to be made within a reasonable time. Whether delay is unreasonable will depend on the peculiar facts of each case. Delay must be assessed according to the circumstances of each case. The reckoning of time to determine if a delay is unreasonable begins at the time the decree or order is sealed and becomes enforceable.

In the instant case, the judgment was rendered on 16th April, 2021, the application was filed seven days later 23rd April, 2021 while the decree was extracted and sealed on 7th July, 2021. The filing of the application was thus timely. I therefore do not find any unreasonable delay in the filing this application.

v. There is serious or imminent threat of execution of the decree if the application is not granted.

Imminent threat means a condition that is reasonably certain to place the applicant's interests in direct peril and is immediate and impending and not merely remote, uncertain, or contingent. An order of stay will issue only if there is actual or presently threatened execution. There must be a direct and immediate danger of execution of the decree. There should be unequivocal evidence showing that unconditional steps as to convey a gravity of purpose and imminent prospect of execution of the decree, have been taken by the respondent. Steps that demonstrate a serious expression of such intent include; extracting the decree, presenting and having a bill of costs taxed, applying for issuance of a warrant of execution and issuing a notice to show cause why execution should not issue.

It is contended by the 1st respondent that no such step has been taken since the bill of costs was shared with counsel for the applicants only in draft and has not been filed in court. Despite that, the letter forwarding the draft is instructive. Therein counsel states that; "on the whole, if we can agree on the amount, then we will save your client the further cost arising from the process." This was followed by another correspondence dated 4th May, 2021 from counsel representing the 2nd respondent inviting counsel for the applicants to a pre-taxation meeting.

According to Rule I3A of *The Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations, SI 7 of 2018*, advocates for the respective parties or the parties themselves, if unrepresented, are required to jointly identify the costs, fees and expenses on which they agree, if any, before the taxation of a bill of costs. During the actual taxation, the Taxing Officer only taxes the costs, fees and expenses on which there is no agreement, if any. It follows therefore that inviting a judgment debtor to a pre-taxation meeting for their consideration of a draft bill of costs is a serious expression of an intent to enforce the decree. The applicants therefore have proved that there is a serious or imminent threat of execution of the decree if the application is not granted.

vi. Substantial loss may result to the applicant unless the stay of execution is granted.

Substantial loss does not represent any particular size or amount but refers to any loss, great or small that is of real worth or value as distinguished from a loss that is merely nominal (see *Tropical Commodities Supplies Ltd and Others v. International Credit Bank Ltd (in Liquidation) [2004] 2 EA 331*). "Substantial" though cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. The loss ought to be of a nature which cannot be undone once inflicted.

The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his or her appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his or her judgment (see *Alice Wambui*

Nganga v. John Ngure Kahoro and another, ELC Case No. 482 of 2017 (at Thika); [2021] eKLR). For that reason execution of a money decree is ordinarily not stayed since satisfaction of a money decree does not amount to substantial loss or irreparable injury to the applicant, where the respondent is not impecunious, as the remedy of restitution is available to the applicant in the event the appeal is allowed. The respondents have not been shown to be impecunious.

However, by reason of the fact that for many couples, the matrimonial home represents the largest and most significant asset, and it is also a place of great emotional and personal significance, it has not been shown by the respondents that the applicants' eviction therefrom before the appeal is disposed of will not constitute a substantial loss to the applicants.

vii. Refusal to grant the stay would inflict more hardship than it would avoid.

The Court has the duty to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his or her judgement. No doubt it would be wrong to order a stay of proceedings pending appeal where the appeal is frivolous or where such order would inflict greater hardship than it would avoid (see *Erinford Propertied Ltd. v. Cheshire County Council [1974] 412 All ER 448*). It is also a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his or her judgement.

In the instant case, the decree not only awards sums of money but also affects real property occupied by the applicants as their matrimonial home. A matrimonial home for the purposes of this application means any property that is owned or leased by one or both spouses and occupied or utilised by the spouses as their family home, and includes any other attached property. While for the 1st respondent it is only cash at stake in the enforcement of the decree, for the applicants and the 2nd respondent real property as well is at stake. The 2nd respondent will be attempting to secure property he purchased in 2018 and has never take possession of, while the applicants cling to it as their matrimonial home which they accuse both respondents of colluding to wrongly deprive them of. The court is thus invited to consider whether a reasonable accommodation of the applicants in avoiding a disruption in the enjoyment of the property they currently occupy, will

not occasion undue hardship to the 2nd respondent, by reason of the resultant delay in the enjoyment decreed to him, and if so, whether this may be sufficiently alleviated.

In order to merit an order of stay of execution of a decree involving a matrimonial home, the applicant ought to satisfy court that eviction therefrom will occasion the applicant undue hardship, i.e. significant difficulty, expense or disruption. It should be hardship which is excessive or disproportionate in all the circumstances of the case.

When determining the magnitude of hardship that eviction from a matrimonial home is likely to cause, the court will consider, among other factors; (i) the nature of the transaction that exposed the spouses to eviction therefrom; (ii) the size of the family; (iii) the period for which they have occupied the home; (iv) the availability of alternative, reasonable accommodation; (v) any unique qualities of the home; (vi) whether there are likely to be serious safety or health issues emanating from the eviction such as those related to childcare, or responsibilities of caring for an elderly, disabled, or sick family member; (vii) whether loss of that accommodation will substantially affect the applicant's viability as a cohesive family, and so on.

These considerations must be evaluated on a case-by-case basis and therefore undue hardship must be based on an individualised assessment of current circumstances that show that the eviction would cause significant difficulty, expense or disruption, beyond that to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. The burden rests on the applicant to provide evidence in respect of these considerations if arguing that loss of possession of the property would cause undue hardship.

The court must be satisfied that eviction will be unduly costly, extensive, substantial, or disruptive, or that it would fundamentally affect the applicant's ability to pursue the appeal. Examples of when a stay of execution from matrimonial home may be ordered by reason of undue hardship include; where eviction is likely to render the applicant a homeless destitute, a significant and unpredictable change in the applicant's circumstances (e.g. a major health issue), inability to afford alternative reasonable accommodation for the duration of the litigation, due to significant loss of household

income or an inevitable significant increase in necessary out-of-pocket expenses on necessities for the family's upkeep.

Apart from the averments that they invested a lot of money in developing the property and that his family stands to suffer irreparable loss if evicted therefrom and their property attached in execution, the 1st applicant does not offer evidence of objective facts from which it can be deduced that in the circumstances of this case, the looming eviction will cause significant difficulty, expense or disruption, beyond that to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. Moreover, exposure to this eventuality arises from a background of a mortgage over the property, rendering the equitable basis for staying an eviction upon default, at probably its weakest. This is because a property owner who mortgages it has advance notice that it may be sold off in the event of default. I therefore have not found evidence to show that that the eviction would cause significant difficulty, expense or disruption, beyond that to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. If granted, the order is therefore likely to inflict greater hardship than it would avoid.

viii. <u>The applicant has given security for due performance of the decree or order</u>.

In granting an order of stay of execution pending an appeal, the court has to balance the need to uphold the respondent's right to be protected from the risk that the appellant may not be able to satisfy the decree, with the appellant's right to access the courts. It is the reason that courts have been reluctant to order security for due performance of the decree. This requirement has been interpreted as not operating as an absolute clog on the discretion of the Court to direct the deposit of some amount as a condition for grant of stay of execution of the decree in appropriate cases, more particularly when such direction is coupled with the liberty to the decree holder to withdraw a portion thereof in part satisfaction of the decree without prejudice and subject to the result of the appeal.

Courts have instead been keen to order security for Costs (see *Tropical Commodities Supplies Ltd and others v. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331* and *DFCU Bank Ltd*

v. Dr. Ann Persis Nakate Lussejere, C. A Civil Appeal No. 29 of 2003), because the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals. The purpose of an order for security for costs on an appeal is to ensure that a respondent is protected for costs incurred for responding to the appeal and defending the proceeding, which therefore implies such an order does not adequately meet entirely the purpose of security for due performance of the decree. In the case of a money decree, furnishing security for due performance of the decree denotes providing depositing the disputed amount.

The applicants have not undertaken to furnish such security, they have instead suggested that the sum of shs. 621,600,000/= awarded to them should be deemed to serve as security for costs. In the first place it was directed by court that the said amount be offset from the US $ 883,551.14 (approximately shs. 3,180,784,104 at the current exchange rate) which leaves a balance of approximately shs. 2,559,184,104/= in the 1st respondent's favour. That sum therefore cannot serve as security. In any event the applicants cannot seek to draw a benefit from a decree which they are challenging on appeal in its entirety.

The court has a duty in exercise its discretion to grant stay of execution of a money decree, to balance the equities between the parties and ensure that no undue hardship is caused to a decree holder due to stay of execution of such decree. For that reason, alternatively the Court in its discretion may direct deposit of a part of the decretal sum so that the decree holder may withdraw the same without prejudice and subject to the result of the appeal. Such direction for deposit of part of the decretal sum is not for the purpose of furnishing security for due performance of the decree but an equitable measure ensuring part satisfaction of the decree without prejudice to the parties and subject to the result of the appeal as a condition for stay of execution of the decree.

In light of my finding that the order, if granted, would inflict greater hardship than it would avoid, the grant should be conditioned on depositing a reasonable fraction of the amount decreed to the respondents. I consider one quarter of US $ 883,551.14 as sufficient to serve the purpose. The application is accordingly allowed, conditioned on the applicants depositing US $ 220,888 with the 1st respondent within thirty (30) days of this order, failure of which the order shall automatically lapse. The costs of the application shall abide the outcome of the appeal.

Delivered electronically this 24th day of August, 2021

……Stephen Mubiru……..

Stephen Mubiru
Judge,
24th August, 2021.