THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT FORT PORTAL

CIVIL SUIT NO. DR. MFP 84/89

GEORGE NYAKAANA::::::::::::::::::::::::::::::::::APPLICANT/DEFENDANT

VERSUS

BEATRICE KOBUSINGE NYAKAANA::::::::::::::RESPONDENT/PLAINTIFF

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA

RULING

This is an application by notice of motion brought under order 39 rule 4 (2) and order 48 of the Civil Procedure Rules seeking for an order of stay of execution of the judgment/ decree in Civil Suit number DR. MFP *84* until the intended appeal to the Supreme court is heard and disposed of. The application is supported by the affidavits sworn by the applicant/defendant himself and that of his counsel Mr. Winyi of M/S Kulubya and Co. Advocates plot *4* Kampala Road P.O. BOX 290 Kampala.

Briefly the facts were that the respondent/plaintiff filed a Civil Suit against the applicant/defendant seeking for orders of the annulment and removal of a Caveat lodged by the applicant against the grant of probate to the respondent and hers. On 15th February, 1991 judgment in the said suit was delivered in favour of the respondent whereby the Caveat lodged by the applicant against the grant of probate was removed and on 20th February 1991 the court proceeded and granted probate to the respondent. On 19th February instant the applicant filed in the Supreme Court notice of appeal intending to appeal against the judgment and decree of this court.

The learned counsel representing the applicant/defendant submitted that if the execution of the said judgment is carried out before the disposal of the intended appeal there would be irreparable

damage to the estate of the Late Nyakaana. That the Estate of Nyakaana is in serious danger of damage by the respondent/plaintiff who has decided to sell off the estate at the disadvantage of the children and has stopped paying school fees. And the situation of the estate is in danger and might erupt into violence unless there was a stay of execution.
Mr. Winyi went on to submit that in his own affidavit he averred that the applicant/defendant was one of the beneficiaries and that he was dissatisfied by the said judgment of this Honourable court of 15/2/91 and as a result they have lodged a notice of appeal to the Supreme Court of Uganda contesting the judgment and justice can only be done if there was a status quo. The records of the proceedings are still being processed to enable the intended appellant file a memorandum of appeal and that may take sometime, and if the situation is not stayed there is an imminent danger to the estate and the same might end up in turmoil. Because of the seriousness of the matter the applicant lodged a notice of appeal 4 days after judgment. That order 39 rule 4 of the Civil Procedure Rules gives this court power to order stay of execution. The learned counsel referred me to a number of authorities.

Mr. Mugamba counsel appearing for the respondent on the other hand submitted that an order for stay of execution under order 39 r 4 (2) CPR shall be made only under subrule *3* when the court was satisfied

(a) That substantial loss may result to the party applying for stay of execution unless the order is made.

Now the question in what substantial loss would result to the party. According to the general grounds irreparable damage would ensue. According to counsel for the applicant again it is put that irreparable damage would result but while entertaining the contents of affidavits of the applicant himself para *3* of the affidavit what is not clear there is to whom Beatrice bus threatened to sell the estate to or whether had advertised for sale.

He further submitted that paragraph 4 speaks of threatening to evict the children whether that was being done contrary to the Will was not clear. And it was not clear when they will be evicted nor were the particulars of those children *given.* It was too much to ask. The court had the opportunity of hearing evidence concerning the estate before. We have been told how the

children have been going without school fees because of Beatrice Kobusinge. Doubtless the court is at a loss as to the particulars of children that have had their school fees stopped or likely to be stopped. This was a cry of wolf which this court has heard before. The application has been set on shaky foundation. The applicant should have been candid to show from whom the unwarranted violence would come since there are two people involved. He submitted that there was no evidence shown on of substantial loss that would result. Concerning subrule 3, that the application has been made without unreasonable delay, He commended the applicant upon his zeal but contended that there was subrule 3(a) which the learned counsel should have addressed the Honourable court upon whether security had been given by the applicant for the due performance of such decree or order as may be ultimately be binding upon him. The import of this provision is not idle. It is to the end than in case inconvenience pecuniary or otherwise should accrue to the respondent consequent upon stay of execution there was security to cushion such an eventuality. He continued to submit that he had already observed that the applicant was vigilant when he made the application without delay. In a similar vein he submitted must bring to the attention of the court that the respondent was equally zealous because she and others had since obtained probate from this Honourable court in which case the court could h <u>functus officio</u> to stay execution which it has already granted. He therefore prayed to the court that the application being stale, it should be dismissed with costs against the applicant.

In reply Mr. Winyi submitted that the submission of his brother had got no basis at all because the applicant stated in clauses 3, 4, & *5* that the respondent had threatened to evict the children and refused to pay school fees. Those allegations were unchallenged. The respondent failed to put in an affidavit to show that those allegations were not true because they were not contested. And they filed in the notice of appeal with speed that alone showed the gravity and seriousness of the matter. About the zeal of the applicant in appealing with speed and the respondent obtaining notice of appeal on 19/2/91 when judgment was given on 15/2/91 he submitted that probate could have been granted *30* days within which the appeal would have elapsed. About the accusation that he did not address the court about rule *3* (c) concerning security he submitted that was not necessary. That reasoning was not necessary to the application and should be ignored on the allegation that this court was functus officio he submitted that that was untrue. The court had

jurisdiction under order *39* rule 4 of the CPR. The court had power of recalling the probate until the matter was disposed of by the Supreme Court. He contended that the application was not stale. It was valid arid supported by the authorities. He maintained his prayer that the application be granted and this court orders stay of execution until the matter is disposed of by the Supreme Court.

Order 39 of the CPR deals generally with appeals to, the High Court but under rule 4 (2) it states:-

> *"Where an application is made for stay of execution of on an appealable decree before the expiration of the time allowed for appealing there from the court which passed the decree may on sufficient cause being shown order the execution to be stayed."*

Despite the fact that order 39 deals with appeals generally to the High Court, the High Court as a court which passed the decree could entertain an application for stay of execution. So the application for stay of execution is properly before this court.

When addressing the court on this application the learned counsel representing the applicant referred me to the case of **Wilson vs. Church No. 2 1879 12 CR D P. 454** where it was decided that:-

> *"Where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court it ordinary cases to make such order for staying proceedings under the judgment appealed from as will prevent the appeal if successful from being rendered nugatory."*

And order *39* rule 4 (2) states:—

"Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing there from the court which passed the decree may on sufficient cause being shown order the execution to be stayed under rule *3* No. order for stay of execution shall be made under subrule *1* or subrule 2 unless the court making it is satisfied."

(a) that substantial loss may result to the party applying for stay of execution unless the order is made.

(b) that the application has been made without unreasonable delay and

(c) that the security has been given by the applicant for due performance of such decree or order as may ultimately be binding upon him.

In Lawrence Musiitwa Kyazze .V. Eunice Busingye Supreme Court Civil App. No. 18/1990 unreported their lordship JJA had this to say about an application for stay of execution:-

> *"The practice that this court adopt, is that in general application for Stay should be made informally to the judge who decided the case when judgment is delivered, The Judge may direct that a formal motion he presented on notice (Order 48 r .1) after notice of appeal has been filed. He may in the mean time grant a temporary stay for this to be done The parties asking for stay would be prepared to meet the conditions set out in order 39 rule 4 (3)."*

Now turning to the merits of the application I must state outright that this application should not he considered in isolation of whet transpired at the trial of this case. The applicant in his affidavit in support of the application averred that unless a stay of execution was granted he was likely to suffer irreparable damage and that there was imminent danger. That the respondent would like to sell off the estate and that violence was likely to erupt unless a stay of execution was granted. It is true that there was no evidence to contradict the applicant's averments. But the affidavits did not disclose what irreparable damage the applicant would suffer if the stay of execution was not granted. The applicant should have gone ahead in his affidavits to show the nature of the irreparable damage he was likely to suffer if the stay was refused. I have very great doubt whether according to the affidavits and the nature of evidence that transpired in court here that there existed such a thing as irreparable damage.

About the affidavits averring that the respondent would like to sell the estate I have also very great doubts about this. Mention should have been made about the possible prospective purchasers of the said estate merely to swear that the respondent wanted to sell off the assets of

the estate is not enough and I have very great doubts about the authenticity of the affidavits sworn by the applicant. The respondent is a mere executor. She had to distribute the properties according to the tenor of the Will. The applicant is one of the beneficiaries. At least he could have mentioned part of the estate that was likely to be sold off. The estate had vast assets at least the applicant would have assisted if he the court had mentioned any properties that were being alienated.

About the allegation of violence that was likely to occur if there was no stay of execution. Here again the applicant should have shown in his affidavit the nature of the violence and where it was likely to emanate.

Be that as it may my general impression of the affidavits deponed by the applicant was that there were a lot of half truths. The court proceeds to grant probate to the respondent and three others because the estate was in a state of decay after the Caveat had been lodged by the applicant. The animals were dying in the ranch because the respondent could not withdraw money from the bank in order to purchase drugs. It was also very difficult to get school fees for the testators children let alone to get money to maintain the widows. The business the B.A.T. Tobacco shop was not functioning properly because of the Caveat. I am of the view that to recall the probate would put the whole estate of the testator in jeopardy since it is most likely that the appeal might not take off soon. The respondent could make inventory of the estate in case the appeal is allowed or after the Supreme Court had granted the applicant **a** stray of execution of the decree of this court.

From that explanation above the applicant has failed to show to the satisfaction of the court that substantial loss might result unless the order for stay of execution was granted. Moreover the applicant had not given security for the due performance of the decree or order as might be ultimately be binding upon him See order *39* rule *4 (3)* (c) of the Civil Procedure rules. He has however shown that he made the application without an unreasonable delay. I mean the application for stay of execution and also lodged in the notice of appeal to the Supreme Court.

However all in all I see no merit in this application and as a result I am in full agreement with the learned counsel representing the respondent that the application must fail. The same is therefore dismissed with costs to the respondent.

I.MUKANZA

JUDGE

30.4.91