

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-MA-0150-2004
(From HCT-05-CV-CA-0029-2004)

ALEXANDER MUSERURUAPPLICANT

VS

DAVID BAMUHIGA.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

RULING

This is an application brought by Chamber summons under Order 19 rules 26 and 89 and also under Order 48 rule 1 CPR and Section 98 of the Civil Procedure Act. The application craves an order for stay of execution of the orders of the Chief Magistrate's Court of Kabale issued in Kabale Civil Suit 52 of 1997 until hearing of the appeal now pending before this court in Civil Appeal No. 029 of 2004.

The grounds for the application are given as follows:

5. That there is a pending suit against the decree holder/respondent vide Civil Appeal No. 029 of 2004 pending before this honourable court.
6. That unless the impending execution is stayed, the pending appeal will be rendered nugatory.
7. That the applicant will suffer substantial loss should the appeal later be determined in favour of the applicant.
8. That it is in the interest of justice and the law that the execution is stayed.

According to the affidavit in support of the application the respondent has commenced the process of execution and has already obtained a warrant of vacant possession. The affidavit adds that unless the execution is stayed execution will be carried out to the applicant's prejudice and the appeal will be rendered nugatory. It is further deposed that the applicant will upon execution

suffer substantial loss because he and his family derive a livelihood from the suit land. The applicant's affidavit concludes that the appeal has high prospects of success and that the respondent will not be prejudiced by the stay of execution pending the appeal.

In opposing the application counsel for the respondent argued that the application should not have been brought to this court since it was not the one that passed the decree. He said that in any case this application should have been brought under Order 39 rule 4 of the Civil Procedure Rules. He added that where there is a specific provision of the law Section 98 of the Civil Procedure Act should not be employed. It was the contention of the respondent that the applicant was not likely to suffer any loss as the subject matter was land which was in any case registered in the names of the respondent. He added that the applicant had not shown how execution would make him suffer substantial loss.

Before I go to the gut merits of the application I find it gainful to relate to some points of objection raised by counsel for the respondent. While I agree with him that the application could have been suitably brought under order 39 rule 4 of the Civil Procedure Rules, there is no error made when it is brought the way it was. The wording of Order 19 rule 26 CPR is so general that it is not restricted to any particular kind of pending suit and will thus embrace the present application. See Iddi Halfani vs Hamidsa Binti Athumani [1962] EA 761.

Be that as it may, an application for stay of execution should at the earliest opportunity be made to the Court that passed the decree, provided it is made before the time allowed for appeal expires. The High Court may grant the application after an appeal is lodged and good cause is shown under Order 39 rules 4 (4) and (5) of the Civil Procedure Rules. See Saudi & Another vs All Mukunyu [1987] HCB 51. Besides Order 39 rule 4 CPR where an appeal should be in being the High Court has power to order a stay of execution under its inherent jurisdiction. See Ujagar Singh vs Runda Coffee Estates Ltd [1966] EA 263; Nganga vs Kimani [1969] EA 67. As for invoking section 98 of the Civil Procedure Act, the applicant went to unnecessary levels. Fortunately he had the presence of mind to quote relevant provisions of the law besides the section because where there is a remedy provided under the law or rule to meet the necessities of the case, a party cannot ask Court to invoke its inherent jurisdiction. See Publishing & Advertising Services vs Uganda Litho [1981] HCB 65.

Next I turn to the merits of the application. The provision under which this application is brought, Order 19 rule 26 CPR, reads:

‘Where a suit is pending in any court against the holder of a decree of such Court in the name of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.’

According to the application, the applicant and his family ‘derive a livelihood from the suit land’. To me, these words in quotes from paragraph 6 of the affidavit in support show the relationship of the defendant and his family to the land in issue to be more on the casual than on the salient. They do not derive their livelihood on the land. They derive a livelihood on the land. From the pleadings there is no indication what substantial loss the applicant will suffer besides being sent off the land which the execution is designed to do. I agree with learned counsel for the respondent that since it is land which is in any case registered in the names of the respondent, according to the affidavit in reply which has not been challenged, if the appeal eventually goes in favour of the applicant there is nothing to stop him claiming the land. I have not been shown good cause to grant the order sought.

In the result this application fails. Costs to the respondent.

P. K. Mugamba

Judge

3rd February 2005