

**THE REPUBLIC OF UGANDA.**  
**IN THE HIGH COURT OF UGANDA AT GULU**  
**HCT-02-CV-MA-0117-2004**

**AGARD DIDI:.....APPLICANT**

**VERSUS**

**BAKU RAPHAEL:.....RESPONDENT**

**BEFORE:**

**HON JUSTICE AUGUSTUS KANIA**

**RULING**

The application which is made by Notice of Motion supported by the affidavit of Paul Palia Kiapi sworn on the 13<sup>th</sup> October 2004 is brought under the provisions of Section 98 of the C.P.A Order 48 rule 1 and Order 15 rules 4 and 5 of the C.P.R. By it the applicant is seeking the following orders;-

- (i) The interim order of stay of execution issued by this Court on the 16<sup>th</sup> day of September 2003 be vacated or set aside.
- (ii) Miscellaneous Application No. 86 of 2003 be dismissed with costs for want of prosecution.
- (iii) The Respondent be ordered to show cause why execution should not issue.
- (iv) Costs be provided for.

The grounds of the application are generally;-

1. That on the 16<sup>th</sup> day of September 2003, the present Respondent was granted an Interim Order of stay of execution in Miscellaneous Application No. 0087/2003.
2. That the respondent has since refused and / or neglected to fix the main application for stay of execution in M.A No. 0086/2003.
3. That the interim order has caused great injustice to the applicant because he has been denied the chance to recover his taxed costs of shs 13,358,500/= (Shillings thirteen million three hundred fifty eight thousand five hundred only) awarded to him in election Petition No, 4 of 200 1 where he was the successful first respondent.
4. It would be in the interest of justice if this application is allowed.

Baku Raphael Obudra swore an affidavit in reply the highlights of which are that he did not wilfully refuse to prosecute the appeal but that on the contrary all his efforts to have the application heard have been futile because at the time there was no trial Judge at the High Court in Gulu.

The brief background to this application is that the applicant was the successful party in Election petition No. 4/2001. The applicant's bill of costs was taxed at shs 13,358,500/= and on 19/8/2003 a warrant of attachment was issued in respect of the Respondent property at plot 25 Okudi Road - Moyo Town Council. However on 17/09/2003 the applicant was served with an interim order for stay of execution which the respondent had obtained ex-parte in miscellaneous application 0087/2003. The respondent followed this by filing in September 2003 Misc. Application No. 86/2003 which has not been set down for hearing. Hence this application.

Mr. Paul Palia Kiapi, learned counsel for the applicant submitted that by failing to fix miscellaneous Application No. 86/2003 for hearing the respondent is abusing Court process by denying the applicant the fruits of his Judgment. He prayed that the application be allowed under order 15 rules 4 and 5 of the C.P.R vacating the interim order staying execution and miscellaneous application No, 86/2003 be dismissed. He also prayed for the costs of this application.

Mr. Byamugisha Kamugisha repeated the contents of the Respondents affidavit and submitted that the order 15 rules 4 and 5 are not available to the applicant because no time has been fixed by Court for taking steps and proposed that the applicant should instead set the application No. 86/2003 for hearing or dismissal. He contended that the interim order should subsist until Misc Application No. 86/2003 has been heard. Counsel submitted that each party should bear his costs.

Order 15 rules 4 and 5 on which the applicant relies in this application provides

" 4. where any party to a suit to whom time has been granted to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit for which time has been allowed, the court may not withstanding such default, proceed to decide the suit forth with.

5. If the plaintiff does not within eight weeks from the delivery of any defence, or where a counter claim is pleaded, then within Ten weeks from the delivery thereof, set down the suit for hearing, then the defendant may either set down the suit for hearing or apply to the Court to dismiss the suit for want of prosecution, and on the hearing of such application the court may order the suit to be dismissed accordingly or may make such order, and on such terms as to the court may seem just".

With regard to Rule 4 above it appears to relate to cases where the plaintiff or party has been granted a period to do any of the things incidental to the further progress of the suit. In the face of such default by the plaintiff the Court is empowered to proceed to decide the suit forth with. This is not the remedy the applicant is praying. The applicant can't therefore take advantage of this rule.

Rules 5 of Order concerns a case where the plaintiff does not set down the case for hearing within eight weeks from the delivery of the defence or in the case where there is a counter claim, within ten weeks of the delivery of the defence. In such a situation the defendant may set down the case for hearing or apply to court to dismiss it for lack of prosecution. The last remedy is what the applicant seeks.

To succeed under Order 15 rule 5, the applicant has to show that the respondent/plaintiff did not set down the case for hearing within eight weeks or ten weeks from the delivery of the defence as the case may be. In the instant case, if the rule is applicable, the respondent/plaintiff filed miscellaneous application which is being sought to be dismissed on the 15/09/2003. The same was set down for hearing for the 30/10/2003 and served upon counsel for the applicant per the affidavit of service Mugisha Ndizeya Gideon sworn on the 19<sup>th</sup> - 9 - 2003. In so far as the respondent set down the case for hearing as described above, the case is not subject to the operation of O15, r 5. My understanding is that the rule envisages a case where the plaintiff has never set it down for hearing.

In the result the application is disallowed and each party shall pay his costs. However I have perused the provisions of Order 15 rule 6 which provides;-

"6. In any case, not otherwise provided for, in which no application is made or step taken for a period of two years by either party with a view to proceeding with the suit the Court may order the suit to be dismissed. In such case the plaintiff may subject to the law of Limitation, bring a fresh case"

The above order does not envisage an application by any of the parties before the Court takes the step of dismissing the case. The Court may dismiss the suit on its own motion on realizing that in a particular case none of the parties has made or taken steps for a period of two years with a view to proceeding with the suit.

In the instant case Misc. App. 86/2003 was filed on the 15,09,2003 and fixed for hearing on the 30<sup>th</sup>/10/2003. There in nothing on record to show that either of the parties to that application has made an application or taken a step with a view to proceeding with the application. This is a period in excess of two years. This period is what is envisaged by 0.15 rule 6 of the Civil Procedure Act. In the result on the Courts own motion Miscellaneous Application No. 00086/2003 is hereby dismissed under 0.15 rule 6 of the C.P.R. The Interim Order of stay of Execution dated 16<sup>th</sup> September 2003 is vacated and the Respondent is hereby ordered to show cause why execution should not issue. I shall give no order as to costs.

**SIGNED AUGUSTUS KANIA JUDGE**

**30/0112006**