

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL APPLICATION NO. 632 OF 2007
(Arising from Miscellaneous Cause No. 22 of 2007)
(Also arising from Luwero Land Tribunal Claim No.79 of 2007)**

**LIVINGSTONE NSUMBA MEMBE :::::::::::::::::::::::::::::: APPLICANT
VERSUS
FIBIANO MAYOGA :::::::::::::::::::::::::::::::::::::: RESPONDENT**

BEFORE: HON. JUSTICE RUBBY AWERI OPIO

RULING

This is an application brought by notice of motion seeking orders that:-

- (a) Execution of the judgment and decree of Luwero Land Tribunal in claim No. 79 of 2004 be stayed.
- (b) Costs of the application be provided for.

Upon filing this application the Applicant being a lay person, did not cite the law under which the application was brought. However, by its nature, this application ought to be considered as having been brought under Order 43 Rule 4 of the Civil Procedure Act. It was in fact under the above provisions of the law that both Counsel made their respective submissions.

The grounds upon which the application was based are contained in the affidavit of the Applicant Mr. Livingstone Nsumba Membe. The salient paragraphs are paragraph 2, 4, 5, 6, 7 which are to the effect that:-

- (1) The Applicant has filed Miscellaneous Application for extension of time to file an appeal.
- (2) That the Applicant lives under the threat of execution of the Land Tribunal Judgment and was in fact arrested and charged in Lowero Chief Magistrates Court in an attempted fulfillment of the contested judgment.
- (3) That if the execution is not stayed the Applicant will suffer irreparable damage.
- (4) The application was brought without unreasonable delay.
- (5) That it is in the interest of justice that execution be stayed.

The Respondent opposed the application by filing an affidavit in reply on 31/7/2009 in which he stated briefly as follows:-

- “(b) That the Applicant instituted Civil Claim No.79 of 2004 in the Luwero District Land Tribunal.***
- (c) That judgment was entered in my favour in May 2006.***
- (d) That the Application unreasonably took almost a year before deciding to appeal.***
- (e) That the Applicant’s dilatory conduct is a guise to play delaying tactics and frustrate the prosecution of the case.***
- (f) That the Applicant’s application for extension of time within which to appeal is not merited.***
- (g) That I have not in any way threatened, intimidated the Applicant with eviction but that the Applicant was charged with criminal offences of criminal trespass and malicious damage to my property.***

(h)

(i) ***That the Applicant because of lack of interest and or no likelihood of success is not interested in prosecuting the matter.***

(j) ***That it is only fair and just that this application be dismissed as it lacks merit and is limited by time.”***

The Applicant was represented by Mr. Sibendire Geoffrey of Sibindire, Tayebwa & Co. Advocates while the Respondent was represented by Nsamba Abbas of Mwesigwa Rukutana & Co. Advocates. Both Counsel filed written submission in support of their cases.

Under Order 43 Rule 4 (3) of the Civil Procedure Rules stay of execution may be granted by court upon being satisfied that:

- (a) Substantial loss may result to the party applying for stay of execution unless the order is made.
- (b) The application has been made without unreasonable delay;
- (c) Security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.

The above provision is however available where an application for stay of execution is made before the expiry of the time allowed for appealing from the decree to be executed. See: Order 43 Rule 4 (2). In the instant case, the application for stay of execution is being made pending an application for leave to extend time to appeal. In other words this application for stay of execution was made after the expiry of time allowed for appealing from the decree.

In the premises I find that this application does not fall under Order 43 Rule 4 of the Civil Procedure Rules.

This application was further based under Section 98 of the Civil Procedure Act which gives court inherent jurisdiction.

Further more Section 33 of the Judicature Act grants this court general powers to grant any remedies as any of the parties to a case or matter is entitled to in respect of any lawful or equitable claim properly brought before it. It is under the above provisions of the law that I would consider this application for stay of execution. The contention by Counsel for the Respondent that Section 98 of the Civil Procedure Act does not operate where there is existence of specific procedure does not hold water because that section grants court wide powers to prevent or correct any form of injustice. See: **Mugenyi & Co. Advocates vs National Insurance Corporation [1992-93] HCB 82.**

Under the said provisions of the law the Applicant has to satisfy court that:

- (a) The Applicant is likely to suffer if the execution is not granted.
- (b) That the application has been made without undue delay.
- (c) That the Applicant is likely to suffer substantial loss if the application for stay of execution is not granted.

A successful party is entitled to enjoy the fruits of justice immediately upon pronouncement. Courts of law should not without good reason delay a successful party from enjoying the fruits of his or her judgment. On the other hand a party who is unsuccessful or dissatisfied with the decree of court has discretion to apply for corrective measures without unreasonable delay.

In the instant case the Applicant instituted his claim No. 79 of 2004 in Luwero District Land Tribunal and the tribunal ruled against him in May 2006. Under the Land Tribunal Regulations, the Applicant was required to appeal within sixty days but he decided to sit on his rights for almost one year when he decided to apply for leave to appeal out of time. In my view that constituted unreasonable delay and the common sense I can derive from it is that he had lost interest in the claim and that leave to appeal out of time could have been a mere afterthought.

As far as substantial loss is concerned, the burden is on the Applicant to show that his appeal has real prospects of success and that if stay is not granted he would suffer substantial loss.

In the first place the Applicant has not shown how his application for leave to appeal out of time has prospects of success. The Applicant's affidavit falls short of explaining why he failed to take the necessary steps at the right time. Secondly there was no evidence to show that his appeal had some prospects of success. There was submission from the bar that the Applicant was in actual possession of the land and that he had developed the same with pineapple plantation under NAADS programme and that he has a socio-cultural attachment to the land. However, the law is that submissions from the bar does not constitute evidence. In the above submission is to be believed then this court would also believe the submission by the Respondent's Counsel that the appeal is not likely to succeed because the Applicant also signed as a witness on the Sale Agreement passing the suit property onto the Respondent as per evidence on record. Balancing the circumstances of this case the only conclusion I can draw is that the Applicant has failed to show that his application is genuine and it is accordingly dismissed with costs. I so order.

HON. JUSTICE RUBBY AWERI OPIO

JUDGE

31/8/2009

1/9/2009

The Applicant present in person.

Respondent in court.

Nsamba Abbas for Respondent.

Applicant's lawyer absent.

Ruling read in Chambers as in Open Court.

**HON. JUSTICE RUBBY AWERI OPIO
JUDGE**

1/9/2009.