



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Misc, Civil Application No. 146 of 2019

In the matter between

MWA CHARLES

APPLICANT

And

KOMAKECH ROB WILLIAMS

RESPONDENT

Heard: 27 February, 2020.

Delivered: 8 June, 2020.

***Civil Procedure** — Stay of Execution — In an application for stay of execution pending Appeal, the applicant must show that he or she lodged a notice of appeal; 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. — 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 — Order 43 Rule 4 (3) of The Civil Procedure Rules — The applicant must make such application after notice of appeal has been filed and should be prepared to meet the conditions set out in this order.*

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is an application for stay of execution of a decree of this court on appeal, pending a further appeal to the Court of appeal. The underlying proceedings

began during the year 2006 in the Chief Magistrate's court of Kitgum, where proceedings then pending before the District Land Tribunal of Kitgum were transferred. The respondent had sued the applicant seeking a declaration that the applicant was a trespasser on the land in dispute situated at Gulu Hill in Kitgum Town Council. Both parties claimed to be purchasers of the same piece of land; the respondent relied on an agreement dated 28th January, 2002 while the applicant relied on one dated 18th August, 2000. While the respondent claimed to have purchased the plot from a successor in title to Centoo Maxwell alias Ocen Maxwell, the applicant claimed to have bought from the latter directly. Centoo Maxwell alias Ocen Maxwell testified in favour of the applicant and denied having sold the plot to the respondent's predecessor in title. The court disbelieved him and on 13th May, 2010 judgment was entered in favour of the applicant, declaring him rightful owner of the plot and the applicant a trespasser thereon. The applicant was ordered to vacate the land, pay shs. 1,000,000/= as mesne profits and the costs of the suit.

- [2] The applicant appealed that decision to the High Court at Gulu. The appeal was on 4th August 2014 dismissed with costs to the respondent. The applicant on 3rd February 2015 filed a second appeal to the Court of appeal, whose hearing is yet to be fixed. In the meantime, the applicant was on 5th July, 2019 served with a Notice to Show Cause why the decree of the Chief Magistrate's Court should not be executed, hence this application. The applicant contends that he stands to suffer irreparable damage if the decree is executed before his appeal now pending before the Court of Appeal is heard, since it will result in his eviction from the land in dispute. He contends further that his appeal has a likelihood of success, since it raises arguable grounds whose main thrust is the High Court's failure, as a first appellate court, to discharge its duty of re-appraisal of the evidence adduced before the trial court. The respondent was served with a copy of the application, an affidavit of service dated 24th October, 2019 and filed on 25th October, 2019 is available on record, yet the respondent did not file an affidavit in reply.

Stay of execution pending appeal.

- [3] The principles on basis of which an application of stay of execution pending an appeal from this court to the Court of Appeal can succeed include:- the applicant must show that he or she lodged a notice of appeal; 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. The applicant must make such application after notice of appeal has been filed and should be prepared to meet the conditions set out in Order 43 Rule 4 (3) of The *Civil Procedure Rules* (see *Lawrence Musiitwa Kyazze v. Eunice Businge, S. C. Civil Application No 18 of 1990*).
- [4] 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 eminent 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. 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).
- [5] In the instant application, the applicant has gone beyond the mere filing of a notice of appeal, the memorandum and record of appeal were filed years back, yet the next step has to be taken by the Court itself. Despite the applicant having done all that is required of him for the appeal to be fixed for hearing, there is now a serious or eminent threat of execution of the decree, yet he is not responsible for the delayed hearing of the appeal. His application was filed without undue delay on 26th September, 2019 slightly over two months of being served with a

notice to show cause why execution should not issue on 5th July, 2019 and pursuant to a futile attempt to secure an order of stay from the court below on 18th September, 2019. The proposed grounds of appeal have been furnished and the thrust of the appeal is hinged on failure by the High Court in its duty as a first appellate court. Under section 72 of *The Civil Procedure Act*, second appeals to the High Court lie only with regard to matter of law. Failure by a first appellate court to evaluate the material evidence as a whole constitutes an error in law (see *Muluta Joseph v. Silvano Katama S.C. Civil Appeal No. 11 of 1999*; *Bogere Moses and another v. Uganda, S.C. Criminal Appeal No. 1 of 1997* and *Akbar Hussein Godi v. Uganda, SC. Criminal Appeal No. 03 of 2013*). The appeal is therefore not frivolous and presents arguable grounds which stand the danger of being rendered nugatory if execution proceeds.

[6] Substantial loss does not represent any particular amount or size; it cannot be quantified by any particular mathematical formula. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without a value or a loss that is merely nominal (see *Tropical Commodities Suppliers Ltd and others v. International Credit Bank Ltd (In Liquidation) [2004] 2 EA 331*). Considering that the applicant is in possession of the land forming the subject matter of the pending appeal, refusal to grant the stay would inflict irreparable hardship to the applicant, in the event that he is evicted before the pending appeal is disposed of.

[7] Courts though have been reluctant to order security for due performance of the decree. Rather Courts have 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.

Order:

[8] In the final result, execution of the decree of the court below is hereby stayed on condition that the applicant deposits in court a sum of shs. 500,000/= as security for costs, within fourteen days of this order.

Delivered electronically this 8th day of June, 2020

.....Stephen Mubiru.....

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the applicant : M/s. Okello Oryem and Co. Advocates.

For the respondent : M/s. Odongo and Co. Advocates.