

**WALUSIMBI MUSTAFA :::::::::::::::::::: APPLICANT**

**VERSUS**

**MUSENZE LUKIA::::::::::::::::::**

**RESPONDENT**

**BEFORE: HER LORDSHIP HON. JUSTICE EVA K. LUSWATA**

The applicant proceeded by motion under section 98 of CPA and O. 34, and O. 52 rr 1 and 3CPR to seek an order for stay of execution of the decree in Civil Appeal No. 100 of 2014, pending determination of the appeal before the Court of Appeal and for costs to abide the result of the appeal. The grounds advanced are that Musenze the respondent was the successful party in the appeal before the High Court where it was ordered (*inter alia*) that he takes over the suit land and the house on it. That there is danger that Musenze would execute the appeal judgment whereat, the appellant

Walusimbi and his tenants would be evicted and the appeal to the Court of Appeal rendered nugatory.

Walusimbi filed this application himself but was subsequently represented by M/s Munyamasoko & Co., Advocates. M/s Okalang Law Chambers defended the application. Their respective written submissions shall be given due consideration in this decision.

Walusimbi Mustafa deposed the affidavit in support of his application. He stated that he was the defendant in C/s No. 156/2010 in which ownership of property at Wampala LCI Zone, Njeru West Parish, Nyenga Sub County, Buikwe District (hereinafter the suit property) was in contention. That suit was resolved in his favour and Musenze was ordered to vacate the suit land. That decision was overturned on appeal in the High Court (in C/A No. 100/2014) and as a result, Walusimbi filed a notice of appeal to the Court of Appeal indicating his intention to appeal the High Court judgment. That none the less, Musenze intends to take over the suit property and without an order for stay of execution, she will evict him and his tenants, a result of which, he will suffer substantial loss. In her affidavit in reply, Musenze strongly objected to the application. She contends that neither her lawyer nor has she been served with the notice of appeal. She added that, Walusimbi has not shown that if execution is carried out, his intended appeal will suffer or be negated as an appeal does not automatically warrant a stay of execution. She continued that when she lost the suit in the Magistrate's Court, Walusimbi did follow through execution against her, despite a pending appeal. Further that, Walusimbi has not furnished or shown that he is prepared to furnish security for due performance of the decree. She prayed for dismissal of the application.

### **The law**

The general principle is that where an unsuccessful party is exercising their unrestricted right to appeal, it is the duty of the Court to make such order for staying

proceedings in the judgment appealed from as will prevent the appeal from being rendered nugatory. See for example, **Wilson Vrs Church (1879) Vol. 12 CH D 454** followed in **Global Capital Save 2004 Ltd & Another Vrs Alice Okiror & Another HCMA No. 485/2012**. In **Lawrence Musiitwa Kyazze Vs. Eunice Busingye SCCA N0. 18 of 1990 ( 1992) IV KALR 55**, it was held that, an application for stay of execution pending appeal is designed to preserve the subject matter in dispute so that the right of the appellant who is exercising his/her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

I do agree with the Supreme Court decision in **Francis M. Micah Vrs Nuwa Walakira (1992-93) HCB 88** that there is no specific provision enabling the High Court to grant a stay of execution of its decree pending an appeal. The same Court advised however that such mandate is present through the inherent powers of Court, for example to preserve the status quo pending an appeal. In my view, that decision is reflected in Order 43 rr. 4(2) in which every court to which an application for stay of execution is filed, powers to stay execution of its decree is allowed; if sufficient cause is shown. The conditions that the Court should consider before allowing an application to stay execution are given in Order 43 rr 4(3) i.e.:

- (i) That substantial loss may result to the applicant unless the order is made
- (ii) That the application has been made without unreasonable delay and,
- (iii) That security has been given by the applicant for due performance of the decree or order as may ultimately be binding upon him or her.

The Constitutional Court in her decision in **Hon. Theodore Ssekikubo & Others Vs. The Attorney General and Another, Constitutional Application N0. 06 of 2013**, added another principle that that the applicant must establish that their appeal has a likelihood of success. That decision is instructive.

On the issue of whether there is an arguable appeal, Hon. Justice Mulangira J, in **Nalwoga Vs. Edco Ltd & Anor MA. N0. 07 of 2013** observed that; in such applications, the Court ought to review the proceedings but desist from prejudging the appeal or interfering with the order of the court. That is the correct position for the purpose is only to preserve the status quo so that the appeal if successful, will not be rendered nugatory.

### **My decision**

The main ground advanced by Walusimbi appears to be that Musenze intends to execute the decree on appeal by obtaining eviction orders against him and his tenants which will render his intended appeal nugatory, and cause him substantial loss. His counsel argued that not in all cases is the judgment debtor expected to furnish security for costs, and that this would apply especially where that party is seeking an equitable remedy (i.e. rights over the suit property). He continued that Musenze's intentions to take over the suit property will negate the appeal and cause his client substantial loss.

As argued for Musenze, the established rule under Order 43 rr 1 and 2 CPR is that, an appeal shall not operate as a stay of execution except where otherwise ordered by the Court. No formal appeal has yet been filed save that the applicant filed a Notice of Appeal on 20/8/2018. I note in addition that the application was filed with no inordinate delay, but the protestations that it was not officially served upon Musenze's counsel were not specifically rebutted. That said, I am persuaded that the provisions of Order 43 rr 3 CPR are mandatory and not merely directory. That position is grounded on the principle that the successful party should not without good reason be deprived of the fruits of a judgment in their favour.

From the authorities studied, the Courts are still not in full agreement on what "*substantial loss*" should entail. The Court in **Andrew Kisawuzi Vrs Dan Oundo Malingu HCMA 467/2013** found that

*“...substantial loss cannot mean ordinary loss or the decretal sum or costs which must be settled by the losing party but something more than that.....the applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is granted”*

On the other hand, Justice Ogola J (as he then was) in **Tropical Commodities Suppliers Ltd and Ors Vs International Credit Bank Ltd (In Liquidation) (2004)2 EA 331** opined that substantial loss does not represent any particular amount or size for it cannot be quantified by any particular mathematical formulae. It refers to any loss, great or small that is of real worth or value as distinguished from loss without a value or that which is merely nominal. It is my considered view then that, the Court ought to consider substantial loss claimed by an applicant in light of the particular facts raised by each case.

Walusimbi deposed that Musenze has intentions of taking over possession of the suit property in pursuance of the orders of the High Court by evicting him and his agents/tenants, a result of which he will suffer substantial loss. He has not shown how, and when Musenze’s intends to actualize her intentions or his particular loss as a result. At best, his complaints remain vague and general. It was stated and not rebutted that before the matter went to Court, Musenze was in occupation of the suit land and was evicted by Walusimbi when her claim was rejected by the trial Court. The High Court has reversed that decision and in my view, without showing substantial loss, the High Court’s powers to maintain control over her proceedings and decisions to meet the ends of justice, should not be fettered. See **Francis M. Micah Vrs Nuwa Walakira (supra)**.

Further, it is a mandatory requirement under Order 43 CPR that execution is stayed only on condition that the applicant has before or at the filing of the substantive application for stay, furnished due performance of the decree. Some Courts have taken the liberal view that such security should be determined by the Court, and for all intent and purpose, should be furnishing security for costs only. See for example:

**Tropical Commodities Suppliers Ltd & Others (supra)** that I followed in **V.G. Keshwala & Sons Ltd Vrs Ronald Musisi M/A No. 544/20160**. Also See **Kampala Bottlers Ltd Vs Uganda Bottlers SCCA No. 25/1995** followed in **Global Capital Save 2004 Ltd & Another (supra)**. I see no commitment by Walusimbi in his application or supporting affidavit to furnish security for due performance or costs. The court cannot assume that he even intended to commit himself to that extent, and thereby the court cannot even determine a fair amount for him to defray.

The Supreme Court in **Musiitwa Vrs Eunice Busingye CA No. 18/1990** advised that a party seeking a stay should be prepared to meet the conditions set out in Order 43 rr 4(3). Walusimbi has not satisfied two of the essential conditions. It was an uncontested fact that Musenze was in possession of the suit land before the matter went to Court. The grounds of this application are not sufficiently strong and have not been well substantiated to the level that would persuade me to deprive her of the fruits of the High Court decree.

I accordingly decline to grant the application which is dismissed with costs to the respondent, Lukiya Musenze.

I so Order

**EVA K. LUSWATA**

**JUDGE**

**02/2/2021**