

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLICATION NO. 460 OF 2020
(ARISING FROM HIGH COURT CIVIL SUIT NO. 0002 OF 2015)

BETWEEN

BAGUMA PAUL T/A PANACHE
ASSOCIATES.....APPLICANT

AND

ENG. KARUMA
KAGYINA.....RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application by Notice of Motion under section 98 of CPA, CAP 71, section 33 Judicature Act Cap 13, O. 22, R. 23 and O. 52 of the CPR SI 71-1 seeking for the following orders that;

- a) Stay of execution doth issue of the judgment /orders made by the High Court on the 20th day of December 2019 in Civil Suit No.0002 of 2015 be stayed pending appeal
 - b) The costs of this application be provided for
- The parties were represented by M/S Ingura &Co. Advocates and M/S Bashasha & Co. Advocates respectively. Both filed written submissions.

This application is supported by the affidavit of Paul Baguma, the Applicant in this application and the grounds briefly are that;

1. That the applicant is dissatisfied with the judgment and decision of the High Court in Civil Suit No. 0002 of 2015.
2. That the applicant has filed a Notice of Appeal with an intention to appeal against the whole judgment.
3. That the appeal has a likelihood of success.
4. That the respondent intends and shall not hesitate to execute the judgment / decree in HCCS No. 0002 of 2015 against the applicant after expiry of four months ordered from the date of judgment delivered on the 20th day of December 2019.
5. That the applicants appeal shall be rendered nugatory and the applicant shall suffer irreparable damages if this application is not granted.
6. That it is equitable and in the interest of justice that this application be granted.

The grounds are repeated in Paul Baguma's affidavit in support of the application to which he attaches a notice of appeal and other evidence. Mr. Karuma Kagyina the respondent filed an affidavit in reply. In his view, the application is an abuse of court process, incompetent, misconceived, vexatious and bad in law, the respondent has not commenced the execution process, and there is no evident prejudice to the applicant.

In **Lawrence Musiitwa Kyazze vs. Eunice Busingye SCCA No. 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.

The authorities provided by both the applicant and respondent's counsel well summary the principles to be considered before allowing an application for stay of execution. In the case of **Hon. Theodore Ssekikubo & others vs. The Attorney General and Another, Constitutional Appln No. 06 of 2013** the Constitutional Court re-stated the principles as follows:

- I. The applicant must establish that his appeal has a likelihood of success;
- II. It must also be established that the applicant will suffer irreparable damages or that the appeal will be rendered nugatory if stay is not granted.
- III. If 1 and 2 above have not been established, court must consider where the balance of convenience lies.
- IV. That the applicant must also establish that the application was instituted without delay.

In the case of **Nalwoga vs. Edco Ltd And Another Miscellaneous Application No. 07 of 2013**, Hon. Justice Mulangira J on the issue of whether there is an arguable appeal 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 correction position for the purpose is only to preserve the status quo so that the appeal if successful, will not be rendered nugatory.

Determination

The appeal which is the subject of this application is against the decision of High Court. In his decision, the trial judge decreed that the applicant/plaintiff had breached the tenancy agreement when he failed to pay rent as agreed between the parties but continued to occupy the premises.

It is the position of the law that once an appeal is pending and there is a serious threat of execution before hearing the appeal, the court intervenes to serve substantive

justice. (See **HWANG SUNG INDUSTRIES LTD vs. TADJIN HUSEIN & OTHERS SCCA No. 79 of 2008**)

It is evident that there is no memorandum of appeal and the applicant's intention to appeal is still represented by a Notice of appeal.

However, it is trite law that a notice of appeal is not by itself an appeal and cannot stop a successful party's right to enforce a decree obtained, even by execution. An appeal does not operate as a stay of execution. From the notice of appeal I am unable to tell the intended grounds of appeal and therefore cannot reasonably tell the strength of the appeal and its chances of success or if the application is denied, it will be rendered nugatory.

Further the applicant is not specific on whether he will suffer irreparable damages. He argues that the respondent has embarked on the steps of execution to which end has taxed the bill of costs in Civil Suit No. 0002 of 2015 that he knew when execution is carried out it will alter the status quo of things, and it will most likely occasion him irreparable injury given that the tools of trade were my main source of income and shall render nugatory my pending appeal and yet it has a high likelihood of success. There is in fact no proof that the tools of trade are at risk of being disposed of which to my mind will equate to irreparable loss because it is possible for the applicant to regain the same.

Most importantly is the fact that the application is pre-mature. There is no proof that an application for execution has been filed or approved.

The general rule is that courts should not order a stay where there is no evidence of any application for execution of the decree. (See **Orient Bank Ltd vs. Zaabwe & others M/A No. 19 of 2007**)

It could be argued that the allegations under paragraphs 13 and 14 of the applicant's affidavit in support of the application could be interpreted to be conduct by the respondent to execute the decree. However, the statements are not supported by any evidence and thus it is not proved that the respondent has embarked on execution process or whether there was any execution proceedings being undertaken by the respondent. Under such circumstances, the court would only be convinced if there is a formal application for execution that would show a clear indication of the respondent's intention of executing the decree.

The applicant did not adduce any evidence to show that the respondent had done any act to execute the decree. He did not apply for a warrant of execution neither did he serve a notice to show cause why execution should not issue. There is no evidence that there is an imminent threat of execution and yet this is one of the most important conditions to be proved because if it is true, it renders the appeal nugatory.

The party intending to appeal and is applying for a stay of execution should be able to persuade court that he will be unable to recover the sums he is required to pay if the appeal succeeds and this is major consideration upon which the court may order stay.

While exercising the discretion conferred under the law of stay of execution, the court should duly consider that a party who has obtained a lawful decree is not deprived of the fruits of that decree except for good and cogent reasons. So long as the decree is not set aside by a competent court, it stands good and effective and should not be lightly dealt with so as to deprive the holder of the lawful decree of its fruits.

Therefore a decree passed by a competent court should be allowed to be executed unless a strong case is made out on cogent grounds no stay should be granted. Where the stay is to be granted, it must be on such terms as to security so that the earlier decree is not made ineffective due to lapse of time.

In summary and for the reasons herein above, I am not persuaded that the applicant has satisfied grounds to warrant a stay of execution.

The application therefore fails and is dismissed with costs to the respondent.

I so order.

SSEKAANA MUSA

JUDGE

30th/04/2021