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The Republic of Uganda

High Court of Uganda Holden at Soroti

High Court Miscellaneous Application No. Case 052 of 2022

[Arising from High Court Civil Suit No. 021 of 2015]

10 Aupal Kokas Wilfred Applicant

Versus

Aisu Popuras Respondent

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Before: Hon. Justice Dr Henry Peter Adonyo

Ruling on Stay of Execution:

20 1. Background:

This application is brought by notice of motion under section 98 of the Civil Procedure Act, Order 22 rule 26 of the Civil Procedure Rules, section 33 of the Judicature Act and Order 52 rule 2 and 3 of the Civil Procedure Rules for orders that this honorable court be pleased to issue an order of stay of
25 execution of the judgement, decree and orders of the High Court in the suit

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5 aforesaid until the hearing and final disposal of the Applicant's intended appeal and costs of the application be provided.

2. Grounds:

The grounds of this application are in the affidavit in support sworn by the applicant but briefly they are;

- 10 a) That on the 18th day of March 2022, this honorable court delivered Judgement in Civil Suit No. 21 of 2015 against the 1st defendant wherein court entered Judgement in favor of the respondent and, among others, declared that the suit land comprised in LRV 4454 folio 11 Plot 1 A Wiggins Road, Kumi municipality belongs to the respondent and ordered that the Applicant's certificate of title be cancelled and
15 that the land be registered into the respondent's name.
- b) Aggrieved, the applicant filled a notice of appeal and letter requesting for proceedings and served them on to the respondent and intends to expeditiously file and pursue an appeal to court of appeal but has not
20 been availed with the proceedings and the Applicants' intended appeal has a very high likelihood of succeeding.
- c) If execution is not stayed the applicants will suffer substantial/irreparable loss and the intended appeal will be rendered nugatory.
- 25 d) The applicant is ready to deposit reasonable security for costs in court
- e) This application has been made without any delay
- f) This application has been made without any delay
- g) It is the interest of justice that the application be granted and execution be stayed

30 In opposition of the application, the respondent stated that;

- 5 1) The application before court is incompetent, premature, misconceived and devoid of any merit as there is no pending suit before court between him and the applicant to be a subject of the present application
- 10 2) That the application is brought under the wrong procedure by notice of motion instead of chamber summon as provided by law and the same cannot stand before court.
- 3) That the application is speculative as there is no pending appeal in law
- 4) That there is no pending application for execution before court against the applicant to warrant stay of execution to be granted.
- 15 5) That the applicant can not suffer any irreparable damage and substantial loss at all since there is no any pending execution before court to warrant a stay of execution as prayed by the applicant.

3. The case of the Applicant:

20 On the 25th May 2011, the applicant applied for leasing of a plot of land comprised in Wiggins Road, plot 1A, Kumi Town Council. The plot of land was housing electricity transformers and power lines belonging formerly to Uganda Electricity Board which later became Umeme.

25 The applicant was advised to have the electricity lines and transformers removed from the plot land at his cost so that it could be leased to him and the Applicant had the transformers and power lines removed at his cost and he was granted a lease of land after paying the necessary fees and going through all procedures. He took possession of the plot of land and was issued with certificate of title for the land on 7th/08/2013.

5 After being issued with a certificate of title, the respondent sued the applicant before the High Court, vide Civil Suit No. 21 of 2015 claiming that the plot of land as part of his father's customary land and that it was his father's family in possession of the land.

10 The suit was heard interparty and on 18th March, 2022, this Honorable Court declared that the plot of land belonged to the respondent, that the applicant was illegally granted a lease of the land.

Aggrieved, the applicant filled a notice of appeal and letter requesting for proceedings before the High Court and filled this application to court for stay of execution.

15 The issue for determination now is whether the applicant satisfies the necessary grounds for grant of stay of execution.

4. Position of the Law:

Section 98 of the Civil Procedure Act gives the High Court inherent powers to take decisions which are pertinent to the ends of justice; and an order for stay of execution is such one (see the case of *Singh v Runda Coffee Estates Ltd [1966] EA*).

Order 43 rule 4 of the Civil Procedure Rules provides for Stay by High Court. It provides that;

25 (2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing from the decree, the court which passed the

5 decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under subrule (1) or (2) of this rule unless the court making it is satisfied—

10 (a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

15 (c) that 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.

20 (4) Notwithstanding anything in subrule (3) of this rule, the court may make an ex parte order for stay of execution pending the hearing of the application. (5) Applications under subrules (1), (2) and (3) of this rule shall be by motion on notice; an ex parte order under subrule (4) of this rule may be made on a summons in chambers.

25 An applicant seeking stay of execution must meet the conditions set out in **Order 43 rule 4 (3) of the Civil Procedure Rules**. The conditions were espoused in the case of *Lawrence Musiitwa Kyazze Vs Eunice Businge, Supreme Court Civil Application No 18 of 1990*, but more pronounced in the Supreme Court case of *Hon Theodore Ssekikubo and*

5 ***Ors Vs The Attorney General and Ors Constitutional Application
No 03 of 2014*** and these include:

- a. The applicant must show that he lodged a notice of appeal.
- b. That substantial loss may result to the applicant unless the stay of execution is granted.
- 10 c. That the application has been made without unreasonable delay.
- d. That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

I will now proceed to consider if each of the requirements in Order 43 rule 3 of the Civil Procedure Rules have been complied with by the applicant.

- 15 a. Whether the applicant has lodged a notice of appeal.

Under paragraph 10 of the affidavit in support of the applicant Aisu Kokas Wilfred states that he is shocked and aggrieved by the judgement and orders of the court and wish to appeal against the judgement of this court and that he has already filed a notice of appeal and letter requesting for proceedings
20 and served them onto the respondent. The applicant went ahead and attached a notice of appeal and the letter requesting for proceedings.

The respondent, in response, does not deny the fact that a notice of appeal has been lodged and state that an appeal is commenced by a memorandum of appeal and not a notice of appeal.

- 25 The law position of the law, however, is that an appeal is commenced by notice of appeal and not a memorandum of appeal.

- 5 **Section 101 of the Evidence Act** provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

The applicant has in this regard proved the existence of a notice of appeal. This ground has been satisfied.

- 10 b. Whether the applicant will suffer substantial loss.

In ***Tropical Commodities Supplies Ltd & 2 others v International Credit Bank Ltd (In Liquidation) [2004] 2 EA 331***, Ogoola J (as he then was) held that

- 15 ***“The phrase substantial loss does not represent any particular amount or size; it cannot be qualified by any particular mathematical formula.***

It refers to any loss great or small: of real worth or value as distinguished from a loss that is merely nominal”.

- 20 Counsel for the applicant submitted that the applicant may lose the land where the applicant has spent a substantial sum of money to have the electricity lines and transformers removed before it was leased to him.

- 25 Counsel for the respondent, on the other hand, submitted that pending appeal is a waste of courts time for the applicant is just using to the purported appeal as a delay tactic so as to prevent the respondent from enjoying the fruits of his judgement and will not suffer any reparable damage and substantial loss at all since as there is no pending execution as prayed by the applicant.

5 The applicant further submitted that as was averred in paragraph 15 of the affidavit in support and paragraph of the affidavit in rejoinder that after the judgment, the respondent has started interfering with the *status quo* of the land and has started erecting a fence. This fact is denied.

10 In the present case, I find that there is no threat of execution of the judgment, decrees and orders of this court as there is no pending application for execution by the respondent.

It is the position of the law that once an appeal is pending and there is a serious threat of execution before the hearing of the appeal, the court intervenes to serve the purpose of substantive justice. See: ***Hwang Sung Industries Ltd. vs. Tadjaudin Hussein & others SCCA No. 79 of 2008.***

The general rule is that courts should not order a stay where there is no evidence of an application for execution of a decree.

20 See: ***Baguma Paul t/a Panache Associates vs. Eng. Karuma Kagyina MA No. 460 of 2020 (Arising from Civil Suit No. 002 of 2015 High Court Civil Division Kampala*** cited by Ssekaana Musa J while relying on the case of ***Orient Bank Ltd vs. Zaabwe & Others MA No. 19 of 2007.***

25 The court in the above in dismissing an application further held that while exercising the discretion conferred under the law of stay of execution, the court should consider that a party who has obtained a lawful decree is not deprived of the fruits of that decree except for good cause and cogent reasons.

5 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 fruits of the decree.

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
10 be granted. Where a 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.

The provisions of **Order 43 rule 4 (3) (c) of the Civil Procedure Rules** is couched in mandatory terms as a precondition for the grant of stay of execution by courts and the failure to fulfil the conditions leaves the court
15 with no option but to dismiss an application for stay.

In this case, counsel for the applicant, cited and relied on the case of ***Global Capital Save 2004 Ltd vs. Alice Okiror & Anor HCMA No. 485 of 2012*** to submit that the applicant was willing and ready to deposit 10% of value of the suit land in court but I have not seen such an amount deposited.

20 This inaction makes me to believe that the present application is speculative, vexatious, frivolous and one which is inviting this Honourable Court to entertain an application in the abstract given the fact that first, there is no pending application for execution and secondly, there is no evidence of any deposit of any security as opined by the applicant.

25 This condition is thus not fulfilled. This ground fails.

5 In the applicant's affidavit under paragraph 11, he states that, the intended appeal has a very high likelihood of succeeding because the trial Judge ignored the clear and overwhelming evidence on the court record.

He further stated that, the trial judge erred when he held that he acquired the land fraudulently without any evidence of fraud whatsoever.

10 The respondents counsel submitted that, the applicant does not demonstrate how the pending appeal has merit with a likelihood of success as alleged in the application, that mere filling of a notice of appeal which does not highlight or state the grounds of appeal leaves the court in doubt to speculate on the strength and chances of success of the intended appeal and its
15 likelihood of success.

I agree with counsel for the respondent as I find that the applicant has not showed to this court the likelihood of success of his appeal for from the judgment of this court , it was clear that the plaintiff claimed the suit land as his father's customary land and that his father's family members were in
20 occupation of the land though in cross examination the plaintiff and his witnesses conceded that none of them was in actual occupation of the land and none had a building or structure on the land. The applicant was found to have used under hand means to acquire the suit land without following the correct procedure of the law for no person from the District/ Town land
25 Board confirmed in court that the applicant's acquisition of the suit land was in accordance with the provisions of the Land Act. That being the case, the applicant's case was found to have no merit given that his acquisition of the suit land was fraught with illegalities and underhand practices. Given such a clear position, I would find that the applicant has not made a case again that

5 his appeal has any likelihood of success for his state acquisition of the suit land was found to be illegal and an illegality once brought to the attention of a court of law cannot be condoned as was held in ***Makula International Ltd Vs His Eminence Cardinal Nsubuga & Another [1982] HCB 11***

Given this very clear position, I would find that this ground is not proved and
10 satisfied. It thus fails.

e. Whether security has been given by the applicant for the due performance of the decree:

The affidavit of the applicant states that he is willing to furnish security for due performance of the decree.

15 Counsel for the respondent stated that **Order 43 Rule 4 (3) (c) of the Civil Procedure Rules** relating to security to due performance of the decree is couched in mandatory terms as a pre-condition for the grant of stay of execution by the courts and failure to fulfil the condition the court is left with no option but to dismiss the application.

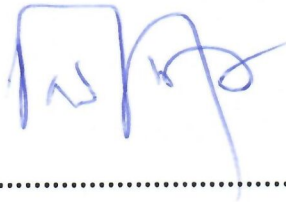
20 Security must be given for the due performance of the decree. Courts have however held that each case must be looked at according to its merits. The requirement for payment of security for costs is to ensure that a losing party does not intentionally delay execution while hiding under unnecessary applications. The applicant who indicated that he was willing to pay for the
25 security as required by the law has not done so as there is no evidence on record to prove so. This ground equally fails succeeds.

5 Accordingly, this application for stay of execution though succeeding in some grounds fails in critical grounds the absence of any application for execution and the fact that there has not been deposited in court any security as is mandatory by virtue of **Order 43 Rule 4 (3) (c) of The Civil Procedure Rules.**

10 5. Orders:

Consequently, this application is found to lack merit and is dismissed accordingly with costs to the respondent.

I so order.



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Hon. Justice Dr Henry Peter Adonyo

Judge

6th September, 2022

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