

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC. APPLICATION NO. 46 OF 2021
(ARISING FROM HCT – 01 – LD – CA – 0043 OF 2017)
(ARISING FROM KYENJOJO CIVIL SUIT NO. 20 OF 2017)

KAGANDA GEORGE WILLIAM ::::::::::::::::::::::::::::::::::: APPLICANT
VERSUS

1. NYAMUTALE RUGUMAYO

2. KIIZA KACWAMBA

3. SHUUTI

4. BALINDA ::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE HON. JUSTICE VINCENT WAGONA
RULING

Introduction:

The Applicant brought this application under Order 22 rule 23 of the Civil Procedure Rules for orders that:

(a) Execution orders against the applicant in Civil Suit No. HCT - 01 – LD – CA – 0043 of 2021 be stayed pending the disposal of Civil Appeal in the Court of Appeal.

(b) That costs of taking out this application be granted to the applicant.

Background:

1. The Applicant was the Plaintiff in FPT-21-CV-CS-LD-20 of 2011 in the Chief Magistrates Court of Fort-portal, which ended in favour of the Respondents when the suit was dismissed.
2. The Applicant then lodged Civil Appeal No. 43 of 2017 in the High Court at Fort-portal which was determined in favour of the Respondents in regard to ownership of the suit land with orders that the Applicant was to be allowed to harvest his crops and trees and vacate the suit land within 8 months from the date of the judgment. The date of the judgment was 18th July 2020. .
3. That being aggrieved with the decision of the High Court in C.A No/ 43 of 2017, the applicant lodged an appeal to the Court of Appeal challenging the decision of this court.
4. That the appeal in the Court of Appeal is likely to take long to be heard and that he was indulging court to stay execution of the decree in the judgment delivered by his Lordship Elizabeth Jane Alividza delivered on the 18th day of July 2020.
5. That he lodged a notice of appeal and was taking steps to prosecute his appeal but conditions beyond his control failed him to have the appeal heard in time.
6. That he has been in possession of the suit land for more than 30 years and if he was evicted before the conclusion of his appeal, he will be rendered homeless.
7. That the Respondents shall not suffer any damage, if the execution of the orders of the trial court are stayed as they have no developments on the suit land.
8. That the appeal has high chances of success since court recognized the Applicant's equitable rights which need protection.
9. That the appeal will be rendered useless unless the stay is granted.

10. That the applicant will suffer substantial loss if the stay is not granted.

The respondent opposed the application and stated thus:

5 (a) That judgment in HCT – 01 – LD – CA No. 043 of 2017 which was delivered on the 23rd July 2020 and court gave the applicant 8 months to harvest his crops and trees and vacate the suit land.

(b) That the applicant did not comply with the orders of court and he is still in possession.

10 (c) That the applicant has not served the respondents with the judgment of court and the intended appeal is out of time.

15 (d) That the applicant was trespassing on the 1st respondent's land and reaping income and his continued possession was unfair to him. That the applicant has a home in Kasamba Village, Kyarusozi Sub County in Kyenjojo District and that it was not true that the applicants derives sustenance from the suit land.

(e) That the applicant has not furnished any security to court and if execution is stayed, the 1st respondent was to suffer serious prejudice. She thus asked court to dismiss the application with costs.

Representation:

20 M/s Kesiime & Co. Advocates represented the applicant while M/s Kaahwa, Kafuuzi & Co. Advocates represented the Respondents. The Applicant did not file any written submissions while those of the respondents are on record which I have considered together with the pleadings of the parties.

Issue:

Whether the applicant's application merits grant of stay of execution.

CONSIDERATION OF THE APPLICATION:

Whether the applicant's meets the grounds for grant of stay of execution:

Stay of execution of an order or decree passed by the High Court is governed by
5 order 43 rule 3 and Rule 72 of the Court of Appeal rules. Pursuant to the said rules
an appeal does not operate as a stay of execution. A party who is desirous of
staying the execution of the orders of the court must apply in the trial court (High
Court) that made such orders or signed the decree.

10 Order 43 Rule 4 (3) of the CPR states as follows:

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

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

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

*(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.*

In ***Lawrence Musiitwa Kyazze - vs - Eunice Busingye, Civil Application No. 18***
20 ***of 1990***, the Supreme Court stated that: “Parties asking for a stay” should satisfy
the following:

***(1) That substantial loss may result to the applicant unless the order is
made.***

(2) That the application has been made without unreasonable delay.

25 ***(3) That the applicant has given security for due performance of the decree
or order as may ultimately be binding upon him.***

The supreme court further observed in **Dr. Ahmed Muhammed Kisule Vs. Greenland Bank (in Liquidation), Supreme Court Civil Application No. 7 of 2010**, that there must be proof of lodgment of an appeal in the appellate court. In case of the Supreme Court, the applicant should have lodged a notice of appeal in
5 the Court of Appeal.

(1) Proof of lodgment of an appeal:

The applicant herein attached a notice of appeal lodged in this court as proof of lodgment of an appeal and even requested for a typed record of proceedings. Rule
10 76 (1) of the Court of Appeal Rules is to the effect that any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the High Court. Rule 76 (2) is to the effect that every notice under sub-rule (1) of this rule shall, subject to rules 83 and 95 of these Rules, be lodged within fourteen days after the date of the decision against which it is
15 desired to appeal.

In **Attorney General of the Republic of Uganda versus The East African Law Society & Another EACA Application No.1 of 2013**, cited with approval in **Equity Bank Uganda Ltd versus Nicholas Were M.A No.604 of 2013** it was
20 held that: *‘A notice of appeal is a sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases’*.

In this case there is a notice of an appeal lodged by the applicant in this court on
25 the 29th day of July 2020 and endorsed by the registrar on the 4th of August 2020. The notice was lodged within the 14 days provided for under rule 76 (1) of the

Civil Procedure Rules. This in my view is sufficient proof that there is an appeal competently lodged by the applicant against the decision of this court. Therefore, this ground is satisfied by the applicant.

5 **(2) Substantial loss may result to the applicant unless the order is made:**

For the ground *that substantial loss may result to the applicant unless the order is made* it was submitted for the respondent that this ground was not proved by the affidavit in support of the application. The rules do not define what amounts to substantial loss. In **Tropical Commodities Suppliers Ltd 8b 2 Others –v-**
10 **International Credit Bank Ltd (In Liquidation), Misc. Application No. 379 of 2003**, the concept of substantial loss for purposes of stay of execution was described thus: *“Hence, the question needs to be asked as to what in law constitutes “substantial loss”. In my view, substantial loss need not be determined by a mathematical formula whose computation yields any particular amount.*
15 *Indeed, Jowitt’s Dictionary of English Law (2’ Edn.) Vol. 2, p. 1713, carefully defines the analogous concept of “substantial damages” as: “damages which represent actual loss, whether great or small, as opposed to nominal damages.”*

The applicant contended that if the execution was allowed, he was to suffer
20 substantial loss since he would be disposed of the suit land of which he has been in possession and use of the same. It is not disputed that the applicant is in occupation of the suit land and the respondents sought to execute the orders of the judge by way of eviction of the applicant which in my view would defeat his appeal and the purposes of the appeal being to protect his interest in the suit land. I therefore find
25 that if execution is not stayed, the applicant would be evicted from the suit land

which would cause his loss since he has been using the suit land. I therefore find that the applicant has proved this ground.

(3) That the application has been made without unreasonable delay:

5 On 22nd September 2020, the Respondent herein extracted the decree. On 26th April 2021, the Respondent filed an application for execution of the decree by way of being put into vacant possession of the suit land. On the 7th day of May 2021 notice was issued to the applicant to appear in court on 19th May 2021 to show cause why execution should not issue; there is evidence by affidavit of Aliija Bosco that the
10 Applicant was served on 14th May 2021. The court record shows that on 19/5/2021, the Applicant did not attend court. Instead his lawyer Mr. Vincent Mugisha appeared and told court that the Applicant had not been served with the notice to show cause and requested that they be served again. This Application was then filed on same day 19/5/2021. It is my view that the application was made without
15 unreasonable delay.

I believe if execution is not stayed, there is an imminent threat of executing the orders of the judge by the respondent which in away shall cause substantial loss to the applicant since he is the one in possession of the land per the evidence on
20 record. I therefore find that it is in the interests of justice to stay execution and maintain the current status until the appeal by the applicant is heard and disposed of by the Court of Appeal on merits.

**(4) That the applicant has given security for due performance of the decree
25 or order as may ultimately be binding upon him:**

Order 43 rule 4(3)(c) of the Civil Procedure rules makes it a requirement that a party who is desirous of securing a stay must be willing to deposit in court security for due performance of the decree. The main import of this requirement was stated by the Hon. Lady Justice Alexandra Nkonge Rugadya in **Shem Mpanga Mukasa & Anor Vs. Kizza Clessy Barya, Misc. Application No. 479 of 2021** thus: *“The payment of security for costs is intended to operate as a shield against the filing of frivolous and vexatious appeals which may never succeed yet have an effect in escalating trial costs.”* The Hon. Lady Justice Victoria Nakintu Nkwanga Katamba in **Misc. Application No. 105 of 2020, Kisaalu Joseph & 10 others Vs. Nakintu May & Anor** added thus: *“The condition requiring an applicant to deposit security for due performance is established under Order 43 Rule 4 (3)(c). Security for due performance has been interpreted to mean the entire decretal sum and it is intended to protect the judgment creditor in the event that the appeal is unsuccessful”* The Learned Judge further stated that: *“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 NakateLussejere, 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.”*

Security for costs or due performance of the decree operates as an insurance cover that is meant to indemnify the judgment debtor in the event the appeal fails without recourse to vigorous processes of recovering such costs.

In **Amon Bazira Vs. Maurice Pater Kagimu, Land Division Misc. Application No. 1138 of 2016**, the Hon. Justice Henry I. Kawesa stated as follows:

“It has been trite that due performance of the decree can only be secured by the provision of security for costs. This position was not altered in anyway by the Supreme Court decision of Lawrence Musiitwa Kyazze versus Eunice Busingye SCA No.18/1990.

5

This case is one where, before the stay is granted, there is need to provide security for costs.”

In this case, the Applicant was the Plaintiff in FPT-21-CV-CS-LD-20 of 2011 in
10 the Chief Magistrates Court of Fort-portal, which ended in favour of the
Respondents when the suit was dismissed. The Applicant then lodged Civil Appeal
No. 43 of 2017 in the High Court at Fort-portal which was determined in favour of
the Respondents in regard to ownership of the suit land with orders that the
Applicant was to be allowed to harvest his crops and trees and vacate the suit land
15 within 8 months from the date of the judgment. The date of the judgment was 18th
July 2020. Being aggrieved with the decision of the High Court in C.A No/ 43 of
2017, the Applicant lodged an appeal to the Court of Appeal challenging the
decision of the High Court. Whereas I cannot comment on the merits of the appeal
in the Court of Appeal, I find that this is a case where, before the stay of execution
20 is granted, there is need to provide security for costs.

This application therefore succeeds with the following orders:

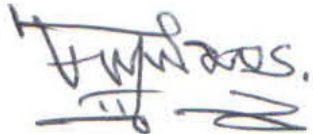
(a) **The Applicant’s application for stay of execution is hereby granted
subject to the provision of security for costs amounting to any taxed
25 costs granted against the Applicant in the High Court and the Chief
Magistrates’ Court.**

(b) If the above condition is met, then the execution of the orders in HCT – 01 – LB – CA – 0048 OF 2017 will be stayed until the final determination of the appeal lodged by the Applicant in the Court of Appeal.

5 **(c) The costs of taking out this application shall abide the outcome of the appeal in the Court of Appeal.**

I so order.

Dated at High Court Fort-portal this 9th day of December 2022.

A handwritten signature in dark ink, appearing to read 'Vincent Wagana', with a horizontal line underneath.

10

Vincent Wagana
High Court Judge