

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC APPLICATION NO. 027 OF 2022

Arising From Miscellaneous Application No. 100 of 2019

Also Arising From Revision Application No. 006 of 2018

(All Arising From Civil Suit No. 170 of 2012)

BIRYABAREMA DEOGRATIUS ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. KYARISIMA MILDRED

2. NSENGAYUNVA INNOCENT ::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO

RULING

Introduction,

The applicant filed this application by Notice of Motion under Section 98 of the Civil Procedure Act, Order 52 Rules 1&3 of the Civil Procedure Rules (CPR) for orders that;

- a) That the execution issued in Misc. Application No. 110 of 2019 be set aside and or stayed pending the determination of Civil Appeal No. 363 of 2021 in the Court of Appeal.
- b) That the costs of this application be provided for.

The grounds of the application are reflected in the affidavit of Birabarema Deogratus, the applicant, and the gist of which is that;

- i. That the applicant has filed Civil Appeal No. 363 of 2021 in the Court of Appeal challenging the orders of this court in Revision Application No. 006 of 2018
- ii. The respondents have applied for execution seeking to recover costs in Misc. Application No. 100 of 2019 and yet they have never paid the

judgment debt fully to the applicant which would be unfair and unequitable

The 1st respondent deposed an affidavit in reply opposing the application mainly on grounds that the application was served on the respondents out of time. Also that the decretal sum in Civil Suit No. 27 of 2012 was paid by the respondents in full. She further notes that Misc. Application No. 100 of 2019 from which costs sought to be recovered is not subject to any appeal and there is no reason why the same should be stayed.

Background

The applicant filed Civil Suit No. 170 of 2012 as a summary suit before a Magistrate Grade One court of Fort Portal against the respondents. The respondents filed Misc. Application No. 43 of 2012 for leave to appear and defend and the same was dismissed and a default judgment entered in favour of the applicant. The applicant carried out execution by attaching the respondents' house. The said execution was revised and set aside in Revision Application No. 06 of 2018 and the respondents repossessed their house. The applicant filed Misc. Application No. 100 of 2019 for leave to appeal against the revision orders and the same was granted but with costs to the respondents. It is the said costs that the respondents seek to recover in execution and which the applicant now seeks to stay pending the determination of his appeal in the Court of Appeal.

Representation and hearing.

The applicant is represented by Mr. Richard Bwiruka of Kaahwa, Kafuuzi, Bwiruka & Co. Advocates. The respondent is represented by Pearl Advocates & Solicitors. The hearing proceeded by way of written submissions. Both counsel have filed submissions that have been considered in this ruling.

Preliminary matters

In his written submissions, counsel for the respondents objects to this application on the basis that the notice of motion was served on the respondents out of time having been endorsed by court on 29/04/2022 and served on 26/04/2022 beyond the require twenty one days. Counsel relied on the case of ***Fredrick James Jjunga & Anor Vs Madhivani Group Ltd & Anor HCMA No. 688 of 2015*** to argue that the application ought to have been served within twenty one days as required by Order 5 rule 1 of the CPR which was not done in the present case and the same ought to be considered expired and therefore be dismissed.

No rejoinder was filed by the applicant and as such, this objection has not been responded to by the applicant.

I have considered the submissions of the respondents on this point and I note that the requirement for timelines within which to serve summons is to guide the speedy administration of justice. The requirement to serve summons within 21 days under **Order 5 Rule 1(2)** of the Civil Procedure Rules is mandatory. An applicant who does not comply with this requirement does not entirely lose the right to serve the summons. He may apply to the court to extend the time under that rule within a period of 15 days from the date of expiry of the summons. The applicant is required to furnish sufficient reason for his failure to serve the summons within the stipulated time.

However, it has been recorded in several decisions including the case of ***Rashida Abdul Karim & Another Vs Suleiman Adrisi HCMA No. 009 of 2017*** that in a deserving case, the court may rightly exercise its discretion to overlook the failure to comply with the rules of procedure, upon such conditions as it may deem fit to guard against abuse of its process and to

avoid a multiplicity of proceedings. The controversy between the applicant and the respondent has been dragging on since 2012 in magistrates' courts and now the applicant has filed an appeal in the Court of Appeal. In addition, the effect of dismissing the present application of such a point would leave the applicant with a right to file a fresh application and serve summons within the time allowed by law. For these reasons and in the greater interest of justice, I will ignore the complaint and proceed to consider the application on its merits.

The law.

The general principle is that where an unsuccessful party is exercising their unrestricted right of appeal, it is the duty of the court to make such order for staying proceedings in the judgment appealed from as this will prevent the appeal being rendered nugatory. (See ***Wilson Vs Church (1879) volume 12Ch d 454*** followed in ***Global Capital Save 2004 Ltd and Anor VS Alice Okiror & Anor HCMA No.485/2012***).

The Supreme Court in ***Lawrence Musiitwa Kyazze Vs Eunice Busingye SCCA No.18 of 1990(1992) IV KALR 55*** noted that, an application on 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.

Much as there is no specific provision enabling the High court to grant a stay of execution of its decree pending appeal, the Supreme Court advised that such mandate is present through the inherent powers of Court, for example to preserve the Status quo pending an appeal.(Refer to ***Francis M Micah Vs Nuwa Walakira(1992-93) HCB88***).

Under **Order 43 rule 4 (3)** of the Civil Procedure Rules deals with stay of execution of the decree appealable to the High Court and a stay is allowed where sufficient cause is shown. The conditions that the court should consider before allowing an application to stay execution are given In Order 43 rule 4(3):

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

The Constitutional Court in her decision in ***Hon. Theodore Ssekikubo and others Vs Attorney General and Anor, Constitutional Application No. 06 of 2013***, added another that their appeal has a likelihood of success.

Furthermore, the Court of Appeal In ***Kyambogo University Vs Professor Isaiah Omolo Ndiege, CA No. 341 of 2013*** the Court of Appeal expanded the list to include;

- I. The applicant must prove that 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.
- II. That the application is not frivolous and has a likelihood of success.
- III. That refusal to grant the stay would inflict more hardship than it would avoid.

The rationale for these conditions is to maintain the status quo of the property that is at stake if the stay of execution is not granted, and to preserve the intended appeal and not to render it nugatory.

Counsel for the applicant submitted that the reason the applicant filed the appeal in the Court of Appeal is that the respondents have not completed

the payment of the decretal sum from Civil Suit No. 170 of 2012, execution for which was set aside in revision application No. 06 of 2018. As such, it would be unfair and unequitable to allow the respondents recover costs of Misc. Application No. 100 of 2019 when there is a pending appeal and the respondents have not completed repayment of the decretal sum. It is on this premise that counsel submitted that if this application is not granted, it would cause irreparable loss to the applicant.

It was submitted for the respondents that much as there is a pending appeal before the Court of Appeal, the same seeks to challenge the ruling and orders of the court in Revision Application No. 06 of 2018 and not Misc. Application No. 100 of 2019 from which the costs sought to be recovered arises. As such, counsel notes that there would not be a basis for this court to stay execution when there is no pending appeal against the costs sought to be recovered.

Counsel for the respondents also argued that the applicant has not demonstrated willingness to pay security for costs. Counsel prayed for a dismissal of this application.

The case of ***National Enterprise Corporation Vs Mukisa Foods HCMA No. 7 of 1998*** dealt with the purpose of an application for stay of execution pending appeal in detail. Notable in that decision are the following passages in that regard.

‘As a general rule, the only ground for stay of execution pending appeal is for the applicant to show that once the decretal property is disposed of, there is no likelihood of getting it back should the appeal succeed.’

I have earlier noted in this ruling that the controversy between the parties herein has been a protracted one since 2012. Both sides claim that the other owes them money from the various court matters that have been decided between them. This court is empowered to prevent a multiplicity of

proceedings and this would compel me to stay any execution between the parties pending the determination of the appeal filed by the applicant in the Court of Appeal and a possible final settlement of accounts between the parties after then.

In the premises, I allow this application. The costs of this application shall abide by the outcome of Civil Appeal No. 363 of 2021 in the Court of Appeal.

It is so ordered

Dated at Fort Portal this 17th day of January 2023



Vincent Emmy Mugabo

Judge.

Court: The Assistant Registrar shall deliver the Ruling to the parties.



Vincent Emmy Mugabo

Judge

17th January 2023.