

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA
MISCELLANEOUS APPLICATION NO. 0013 OF 2021
ARISING FROM CIVIL APPEAL NO. 009 OF 2021
ARISING FROM CIVIL SUIT NO. 0011 OF 2019

1. CHRISTINE AZIKU
2. MUNDURU VIVIAN
3. MASUDIO GLORIA SUSAN
4. IJOREA JANET FLAVIA
5. NDEEZO JOSEPHINE
6. MORIKU PAMELA
7. ENDREO JULIET
8. REV. FR. G. GRACE A. WAIGO
9. MALI MICHEAL
10. UNZI MAURINO APPLICANTS

VERSUS

1. ROKANI ANDREW
2. OKUMU DANIEL ASOBASI RESPONDENTS

BEFORE: Hon Justice Isah Serunkuma.

RULING

This application is brought under Section 14 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 43 rule 4, Order 52 rules 1, 2, & 3 of the Civil Procedure Rules for Orders that;

1. Execution of Order in Civil Suit No. 0011 of 2019 be stayed pending the disposal of the appeal in Civil Appeal No. 009/2021 pending before this court.

2. That Civil Suit No. 007/2021 filed by the 2nd respondent against the tenants of the applicants be stayed until the disposal of Civil Appeal No. 009/2021.
3. Costs of this application be provided for.

The brief facts state that the applicants/plaintiffs instituted Civil Suit No. 0011 of 2019 against the respondents for; trespass to land, a declaration of ownership of land situate at Plot 33, Okudi Road, Moyo Town Council measuring approximately 17m X 30m, a permanent injunction, general damages and costs of the suit against the respondents. The learned trial magistrate dismissed the suit on the basis of a preliminary objection. The objection raised by the respondents was in regard to the suit being time barred and failure to appoint a legal representative of the 1st defendant. Being dissatisfied with the decision, the applicant filed a notice of appeal and a memorandum of appeal in this honourable court on the 03rd day of March 2021 against the decision of the lower court from which this application arises.

The grounds upon which this application is premised are set out in two affidavits which were deponed by **Rev. FR. Grace Waigo** (hereinafter referred to as the **8th applicant**), and **Mr. Mali Micheal** (hereinafter referred to as the **9th applicant**) on behalf of the applicants whose content is similar. According to the affidavit of the 8th respondent, the main ground of this application is embedded in paragraphs 2, 3, 4, 5 & 6. The applicants are literally seeking this court to preserve the status quo of the pending appeal before it. The applicant further expressed the fact that there exists a threat by the respondents of executing the orders of the lower court before the appeal filed in this honourable court is expeditiously disposed of. The applicant stated that the respondents begun the execution process by filing a bill of costs and fixing the same for taxation. That the said respondents further filed a civil suit as well as an application for an order for temporary injunction against the applicants' tenants with an aim of evicting them.

In their response, the 2nd respondent swore an affidavit in reply wherein he indicated that the present application is premature, speculative and an abuse of court processes. The 2nd respondent instead deponed that filing and taxation of a bill of costs is a legal process allowed

in law and that the suit filed was a way of implementing the orders of the trial magistrate. That the suit filed is against different persons who are not parties to the current suit and as such are not part of the execution proceedings. The 2nd respondent further stated that the applicants have not stated and described how they will suffer substantially in case he proceeds with execution neither will any substantial loss occasion the applicants. That the applicants do not stay on the suit land neither do they have any interest in the same and as such, stay of execution will cause more hardship to the respondents as opposed to the applicants.

Representation

Counsel Nobert Achiye of M/S Matovu N. J & Company Advocates appeared for the Applicants, while Counsel Jimmy Madira of M/S Madira & Co. Advocates represented the Respondents. Both parties filed written submissions which I have taken into consideration while making decision in this ruling.

Applicants' Submissions

Counsel based his arguments on the grounds an applicant has to satisfy before being granted a stay of execution as laid out in the case of **Sewankambo Dickson Vs Zziwa Abby; HCT-00-CC-MA-0178 of 2005** which are laid out hereunder together with the applicants' counsel's arguments including;

That substantial loss may result to the applicant unless the order of stay is made.

Counsel defined substantial loss as per the case of **Tropical Commodities Suppliers Ltd & Others Vs International Credit Bank Ltd (In Liquidation); Misc. Application No. 0379 of 2003** that "*substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or a loss that is merely nominal*". Counsel submitted that the subject matter of Civil Appeal No. 009 of 2021 pending before this court is land, which the applicants are in possession of and have tenants on the same. Counsel added that the 2nd respondent's intention of evicting the tenants caused him to file a civil suit and an

application for an injunction to that effect as per annexure “E” to the affidavit of the 9th applicant.

Counsel submitted that Civil Suit No. 0011 of 2019 from which the Civil Appeal No. 009 of 2021 arose was rather dismissed on a technicality and not its merits. Counsel added that if the 2nd respondent is not stopped from proceeding with execution, the applicants shall suffer substantial loss in terms of;

- the commercial structure of the 9th applicant if demolished shall not be able to be restored to its original state thereby causing substantial loss,
- the loss of livelihood including the eviction of the tenants of the applicants from which they derive monies to sustain themselves causing loss of revenue and,
- destruction of evidence the applicants may intend to use in case of an order for a retrial.

Counsel further argued that the respondents did not deny their intentions to execute the orders of the lower court, accept having filed a bill of costs and fixed the same for taxation.

That the application has been made without unreasonable delay.

Counsel submitted that the applicants filed Civil Appeal No. 009 of 2021 from which this application arose on the 03rd day of March 2021. Counsel added that they filed this application on the 31st day of March 2021 after the respondents filed a taxation application in the lower court on the 15th day of March 2021. Counsel stated that the applicants brought this application without any delays.

That security for due performance of the decree has been given by the applicant.

Counsel relied on **Sewankambo Dickson Vs Zziwa Abby; HCT-00-CC-MA-178 of 2005** where the issue of security for due performance was explained that, “it is sufficient that the applicant is willing to give security for cost, rather than security for the entire decree and the amount would

necessarily be determined depending on the circumstance of each case". Counsel submitted that the previous counsel did not adduce any statement indicating the applicants' willingness to give security for due performance of the decree which is a technicality that this court ought to ignore. Counsel further stated that instructions were received by them on the 18th day of November 2021 when parties had already closed pleadings and fixed the matter for hearing with the help of their previous counsel. Counsel added that the applicants are willing to put land situated at Plot 31 Okudi Road, Moyo Town Council near the suit land which belongs to the 9th applicant as security for the due performance of the decree. Counsel further stated that the said property is valued at approximately 50,000,000/= (Uganda shillings fifty million) making it sufficient for the due performance of the decree.

With regard to the stay of proceedings under Civil Suit No.004 of 2021 filed in the Chief Magistrates Court of Moyo by the 2nd respondent, counsel relied on Section 6 of the Civil Procedure Act which provides that, *"no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in previously instituted suit or proceedings between the same parties, or between parties under whom they claim litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda"*. Counsel submitted that Civil Appeal No. 0009 of 2021 pending before this honourable court is on the same subject matter with the Civil Suit No. 0004 of 2021 which counsel prayed for its stay.

Respondents' Submissions

In their reply, counsel relied on the Uganda Civil Justice Bench Book at pg. 254 which states that, *"An appeal to the High Court shall not operate as a stay of proceedings under any decree or orders appealed from nor act as a stay of execution, except as the high court may order."* Regarding substantial loss, counsel submitted that the applicants did not state nor describe how they will suffer substantially if in any case the respondents proceed with execution and in case this application is not granted. Counsel argued that the applicants do not stay on the suit land neither do they derive any sustenance or have any interest in the same and so they will

not suffer in any way if the execution proceeds. Counsel added that a stay can only be ordered in circumstances where an irreparable loss would occur that cannot be atoned by any award or compensation.

5 With reference to security for due performance of the decree, counsel submitted that for such applications to stand, the applicant should prior to fixing the application furnish security for costs which an unsuccessful plaintiff will be able to satisfy any eventual award of costs made against him. Counsel added that when a law mandates something to be done and a party falls short of the obligation, then it tantamount to premature proceedings. Furthermore, counsel argued that it's an admitted fact by the applicants that they did not furnish security for costs
10 in this application thus warranting a dismissal.

Court's Analysis

It is with no doubt that Order 43 rule 4 of the Civil Procedure Rules grants this court the discretion to grant an order for stay of execution to any applicant where sufficient cause has been showed. It is also imperative to note that under sub rule 3 of Order 43 rule of the above
15 rules requires an applicant in proving that his or her application has sufficient cause, to prove to this court that;

“(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

20 *(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”.*

Substantial loss was explained in **Tropical Commodities Suppliers Ltd & Others Vs International Credit Bank Ltd (In Liquidation) (Supra)** to mean, *“Substantial loss does not represent any particular amount or size. It cannot be quantified by any particular mathematical formula.
25 Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal”.*

In the instant application, the 8th & 9th applicants averred in their respective affidavits that substantial loss may occur unless the order is granted and if not granted, would render the appeal a nugatory. The applicants further stated that they were in possession of the suit premises and that the 9th applicant has a permanent commercial structure. The applicants
5 added that they have tenants on the said suit land whom the 2nd respondent is threatening to evict having filed a Civil Suit No. 0004 of 2021 and an application for a temporary injunction against them vide Misc. Cause No. 0010 of 2021 as per annexure “E1”. There is no denial stated by the 2nd respondent who rather states that he is exercising his rights of ensuring that he enjoys the fruits of his judgement.

10 It is trite law as was emphasized by the Court of Appeal in **DFCU Bank Ltd Vs Dr. Ann Persis Nakate Lusejjere; Civil Application No. 0029 of 2003** that, *“It is the paramount duty of a Court to which an application for stay of execution pending an appeal is made to see that the appeal, if successful, is not rendered nugatory”*. According to the pleadings before this court, the subject matter in this application as well as the appeal is land situate at Okudi Road, Moyo
15 Town Council on which the 9th applicant constructed a commercial structure. The subject matter herein is comprised of real worth and value whereby if the execution as commenced by the respondents is allowed, shall cause such irreparable loss to the applicants. Based on the subject matter in dispute, it is this court’s opinion that it would not cost a thing to the respondents if their execution proceedings are put to a halt so as to resolve the root of this
20 matter.

Furthermore, whether this application is brought without unreasonable delay or not, is not in dispute between the parties before this court. Based on the pleadings before this court, the decision of the lower court was delivered on the 25th day of February 2021. The appeal was later lodged in this court on 3rd march 2021 as per annexure “A” and this application was
25 lodged on the 31st day of March 2021 which is 27 days after the appeal was lodged.

With reference to security for due performance of the decree, the respondent’s counsel argued that applicants did not furnish any security for costs thus rendering this application

nugatory. The applicants' counsel does not deny the same. The applicants' counsel however, defends himself by stating that previous counsel did not adduce any statement in the affidavits indicating the willingness of the applicants to give security for the due performance of the decree. He added that he received his instructions to represent the applicants on the 18th day of November 2021 when pleadings had already been closed. The applicants' counsel further prayed to this court that mistakes of previous counsel should not be visited onto the litigants. In their submissions, the applicants' counsel stated that the applicants are willing to put land situated at plot 31 Okudi Road, Moyo Town Council near the suit land and valued at approximately 50,000,000/= (Uganda shillings fifty million only) as security for performance of the decree.

The law states that in order for this court to grant an order for stay of execution, it must be satisfied 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. Both counsels agree that no security for due performance of the decree has been furnished by the applicants neither was any statement made in their affidavit in support of the motion indicating their willingness to furnish the same. Several authorities have as a result of the above dismissed such applications for example the case of *Walusimbi Mustafa Vs Musenze Lukia; High Court Miscellaneous Application No. 0232 of 2018*, where Justice Luswata concluded that, "Without any commitment by the applicant in his or her application or supporting affidavit to furnish security for due performance or costs, a stay would not be granted despite having satisfied the other conditions necessary'.

It is imperative to note that in such applications, the main thrust is preserving the status quo such that in case the pending appeal is successful, the same is not rendered a nugatory. However, I believe that with certain applications being concluded as the aforementioned case, there ought to be a rationale surrounding the decision. Such decision is premised on the factual circumstances of each case which should be put into consideration. According to applicants' counsel, he claims to have received the instructions in this matter on the 18th day

of November 2021 after closure of pleadings. The application was lodged on the 31st day of March 2021 and the last pleading, which is the respondents' affidavit in reply was filed on the 14th day of May 2021.

The period from May to November is quite long and though this court would not condone unreasonable delay, the same cannot be completely blamed on the litigants themselves. This court is also aware that rules of procedure should not be ignored. As such, this court hereby adopts the provisions of Article 126 (2)(e) of the Constitution of the Republic of Uganda so as to administer substantive justice without undue regard to technicalities. In addition, counsel indicated to this court through their submissions that the applicants are willing to furnish security to wit; land situated at Plot 31 Okudi Road, Moyo Town Council near the suit land and valued at approximately 50,000,000/= (Uganda shillings fifty million only) as security for performance of the decree. This offer was uncontested by the respondents in their submissions.

It is a general principle that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. Several authorities have interpreted the provision of security for due performance differently. One case in point is ***Global Capital Save 2004 Ltd & Anor Vs Alice Okiror & Anor; HC Misc. Application No. 0485 of 2012*** where Justice Obura held that, *"Indeed this court must abide by the holding of the Supreme Court to the effect that the applicants should furnish security for costs rather than security for due performance of the decree. I am persuaded by the view of Ogoola, J (as he then was) in Tropical Commodities Suppliers Ltd and Others v International Credit Bank Ltd (In Liquidation) (Supra) that the requirement is more just and insistence on a policy or practice that mandates security for the entire decretal amount is likely to stifle appeals especially in a commercial court where the underlying transactions typically lead to a colossal decretal amount."*

It has been noted that the above authorities' interpretations surround specifically where the subject matter involved is only a colossal sum of money. In addition, the said cases having considered the fact that furnishing security is mandatory, conditional orders for stay of

execution have been granted. In other words, an order for stay of execution has been granted subject to depositing the security as ordered. The case before this court involves an immovable property which is land and the applicants have given their uncontested offer through their submission. The land offered is claimed to be worth 50,000,000/=. However, it is not within
5 this court's knowledge about the tenure of the said land neither its registration status.

In the result, this court hereby grants an order for stay of execution premised on the principle that it is the paramount duty of a court to which an application for stay of execution pending an appeal is made to see that the appeal, if successful is not rendered nugatory. The said order shall suffice on condition that the applicants do deposit with this court a sum of Ushs
10 30,000,000/= (Uganda shillings thirty million only) on the account of the Registrar High Court as security for due performance of the decree within a period of 60 days. Failure to comply with the said condition shall hereby grant the respondent the liberty to proceed with the execution process so as to retrieve the fruits of their judgement or ruling of the lower court.

This application is hereby allowed subject to the conditions set therein.

15 I so order.

Dated and Delivered on this 31st day of March 2023.

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Isah Serunkuma
20 JUDGE