

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT GULU**  
**MISCELLANEOUS APPLICATION NO. HCT–GUL-02-CV-MA-049 OF 2012.)**  
**(Arising from Civil Appeal no. 002 of 2012).**

**OJEDE ABDULLAH BINCONA.....APPLICANT**

**VERSUS**

**PHOEBE LUTALO.....RESPONDENT**

**BEFORE:- HON. JUSTICE BYABAKAMA MUGENYI.**

**RULING.**

This is an application for stay of execution of the decree of this court issued in Civil Suit No. 074 of 2007, wherein the applicant was the plaintiff and the respondent was the 1st defendant.

Judgment in the suit was entered for the defendants against the plaintiff whereupon he lodged an appeal to the Court of Appeal.

It is noted an earlier application by the applicant was disallowed by this court presided over by Hon. Justice Masalu Musene, on grounds that it was rather speculative and premature. The decision of court was premised on the fact there was no bill of costs that had been filed or taxed and there was also no application for execution of the decree.

Subsequently, the application for execution of the decree was filed and a warrant to give vacant possession issued by this court, hence this application.

The application is by Notice of Motion, brought under S .98 of the CPA and Order 52 rules 1 and 2 of the CPR and, is supported by the affidavit of the applicant/appellant. The grounds are that:-

- I. The applicant sued inter alia for recovery of land and cancellation of certificate of title obtained by fraud by the respondent, vide civil suit no. 014 of 2007.
- II. That the trial court passed judgment in favour of the respondent but the

applicant being dissatisfied with the decision of the lower court filed a notice of appeal on the 16/02/2012 and requested for typed record of proceedings to enable him prepare a memorandum of appeal.

- III. That in the meantime the respondent is threatening to evict the applicant from the suit land.
- IV. That if a stay of execution is not issued restraining the respondent from carrying out her threat the applicant shall suffer irreparable damage and his appeal shall be rendered nugatory.
- V. That the applicant's appeal has good chances of success.
- VI. That it is in the interest of substantive justice that this application is granted.
- VII. The respondent deposed an affidavit in reply, opposing the application. The applicant was represented by Mr. Ocorobiya Lyold while Mr. Donge Opar was for the respondent. Both counsel opted to file written submissions.

Counsel for the applicant submitted that if stay is not granted the applicant shall suffer irreparable injury since evicting him from the suit land will leave him homeless and the intended appeal shall be rendered nugatory. He also argued there are justifiable grounds for the grant of this application and relied on the case of ***FRANCIS MANSIO MICAH =VS= NUWA WALAKIRA (1992) HCB 88.***

Mr. Donge for the respondent, submitted that the application lacks merit in that it does not satisfy the conditions for grant of stay of execution as stipulated under 0.43 rules 4 (2) and (3) of the Civil Procedure Rules (CPR).

He further argued the applicant is not likely to suffer substantial loss or at all since the building on the suit land has been condemned by the controlling authority to wit, Lira Municipal council.

Furthermore, the applicant does not reside in the said premises but merely rents them out. Any loss of revenue (rent) can be quantified and made redeemable.

In rejoinder Mr. Ocorobiya submitted that the conditions under 0.43 of the CPR are applicable to appeals to the High court and not from the said court.

The law applicable to an application filed in the High court for stay of execution of the decree issued by itself, where an appeal against its decision has been lodged to a superior court, has been the subject of legal debate in the courts.

To capture the gist of the problem, I will set out the relevant portions of 0.43 r (4) in full:-

“4. Stay by High court

- (1) An appeal to the High court shall not operate as a stay of proceedings under a decree or order appealed from except so far as the High court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree but the High Court may for sufficient cause order stay of execution of the decree.
- (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 decree may on sufficient cause being shown order the execution to be stayed.
- (3) 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.
  - 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”.

It is evident the opening words “an appeal to the High court” in rule 4 (1) refer to appeals from the lower courts filed in the High court. This was stated to be the position by the Supreme Court of Uganda in KYAZZE =VS=BUSINGYE (1990)LLR 190, where, the court addressed and analyzed the different provisions of the Civil Procedure Act which provide for appeals from or to the High court, before making the following observation:-

*“There is no provision in any of the legislation for a stay of execution, and when one looks at order 39 [now order 43] one finds with some surprise that those rules only govern appeals to the High court not from the High Court. This is made more poignant because they are the usual rules concerning a stay of execution relating to appeals to the High court”.*

The Supreme Court appeared to recognize the lacuna in the law, for it went on and stated in apparent exasperation that:

*“Why was provision not made for a stay of execution in appeals from the High court? The main reason seems to have been the statutory power of granting a stay of execution given to the Supreme Court of Appeal rules. In that case, why make provision for the High court to hear applications first in rule 41?”*

Being the superior court in the land the court devised ways of filling the lacuna in the statutory rules of procedure and stated as follows:

*“The practice that this court should adopt, is that in general application for a stay of execution should be made informally to the Judge who decided the case when judgment is delivered. The Judge may direct that a formal motion be presented on notice (order XLVII, rule 1) after notice of appeal has been filed. He may in the meantime grant a temporary stay for this to be done. The parties asking for a stay should be prepared to meet the conditions set out in order 39, rule 4 (3) [now 43] of the Civil Procedure Rules. The temporary application may be made ex-parte. If the application is refused, the parties may then apply to the Supreme Court under rule 5 (2)(b) of the court of Appeal Rules where again they should be prepared to meet conditions similar to those set out in order 39 rule 4 (3)”.*

The applicability of the above order to applications of this nature was re-emphasized by the same court in KAMPALA BOTTLERS LTD =VS=UGANDA BOTTLERS (1995) LLR 223 where it held that:-

*“The matter (of stay of execution) is clearly governed by Order 39, rule 4 (3) of the Civil Procedure Rules”.*

Similarly, the Court of Appeal delivered an identical decision in DFCU BANK LTD =VS= LUSEJJERE, Civil Application No. 29 of 2003 affirming the applicability of Order 39 rule 4 (3) [presently Order 43 rule 4 (3)] to applications for stay of execution.

As can be seen, the issue of the law applicable an application for stay of execution of the decree of the High is settled. Consequently, the applicant must satisfy three basic criteria in an application of this kind, to wit.

- i. That substantial loss may result to the applicant unless the order of stay is made.
- ii. That the application has been made without unreasonable delay; and
- iii. That security for costs has been given by the applicants.

In the instant application, the applicant averred that he will suffer irreparable damage if execution proceeds in as much as the appeal would be rendered nugatory.

The execution in the instant case is to give vacant possession of land on plot 5, Obote Avenue, Lira Municipality, by way of evicting any persons bound by the decree. In the head suit, evidence was led by the defence to show the Municipal Engineer recommended the existing structure on the suitland be demolished due to its age and conditions. Exhibit D9 is a letter, dated 21/11/2007, from the Town Clerk to the respondent granting her permission to demolish the structure. While dismissing an earlier application for stay, this court observed that issues of demolition of old or dilapidated structures in urban areas are within the domain of the urban authorities whose mandate is to regulate developments in areas of their jurisdiction.

According to the Valuation Report of the Assistant Valuer of Lira Municipal Council (exhibit D3), dated 12th October 2007, the building was in a sorry state of repair.

In his submissions, Mr. Ocorobiya argued that the applicant shall suffer irreparable injury since by evicting him from the suit land he shall be left homeless. This argument is however controverted by evidence in the head suit to the effect the applicant does not live on the suit property but rents it out.

On the issue of demolition, learned counsel for the applicant submitted that it is outside the scope of this investigation. I however respectfully disagree with that stance.

To my understanding, the demolition of the suit property is not restricted to possession of the property by the respondent but it affects whoever is in possession or claims to have an interest in such property.

Secondly, in so far as the disputed plot is for re-construction and re-development, the existing building having been condemned by the controlling authority, this process would inevitably appreciate the value of the plot other than diminish it.

Consequently, the applicant's contention that he stands to be evicted and the building demolished is overridden by the fact the said structure is due for demolition whichever way, or not withstanding whoever is in possession.

I should perhaps point out, in deciding for the respondent in the head suit, court came to the finding she holds a valid Certificate of Title to the suit property.

In the event the appellate court finds otherwise, the likely outcome would be that the suit property reverts to the applicant. In that case his appeal will not be rendered nugatory.

Having observed that the applicant's assertions that he is bound to be rendered homeless by the eviction is rebutted by the evidence in the head suit, I find no other evidence in support of his claim. The burden to prove he is likely to suffer irreparable loss is upon the applicant. He has not demonstrated this in my view.

In the premises, this application is disallowed and the same is accordingly dismissed with costs. I so order.

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BYABAKAMA MUGENYI

JUDGE

22/3/2013.

22/3/2013

3:20 pm.

Both parties present.

Counsel for both sides absent.

Opio Mobby court clerk.

Court: Ruling read and delivered in open court. Application dismissed with costs.

JUDGE

3:45 pm

22/3/2013.