

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0075 OF 2016
(Arising from Arua High Court Criminal Appeal No. 0014 OF 2015)

JATHO OMIRAMBE ALBERT **APPLICANT**

VERSUS

UGANDA **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application made under O 43 r 4 (1), (3) and (5) of *The Civil Procedure Rules* and s 98 of *The Civil Procedure Act*, for orders that execution issued by Paidha Grade One Magistrates Court Criminal Case No. 031 of 2014 be stayed until the final disposal of the pending appeal. It is supported by the affidavit of the applicant who deposes that in the court below, he was charged, tried and convicted for the offence of Malicious damage c/s 335 (1) of *The Penal Code Act*, whereupon he was on 22nd September 2015 sentenced to a fine of shs 2,000,000/= (two million shillings) or 19 months' imprisonment in default and was ordered to compensate the complainant in the sum of shs 13,000,000/=. He paid the fine but nevertheless appealed the conviction and sentence on 8th October 2015. Before the appeal could be heard, he was on 4th August 2016 arrested and committed to civil prison in execution of the sentence of the Paidha Grade One Magistrates Court upon his failure to satisfy the order of compensation. On 5th August 2015, he secured an interim order staying the execution, ordering his release from civil imprisonment and directing him to pledge his residence in Paidha as security. The respondent did not file an affidavit in reply.

When the application came up for hearing on 5th October 2016, counsel for the applicant, Mr. Jimmy Madira argued that the application ought to be granted because the appeal is still pending and is likely to succeed considering that the trial magistrate appears to have exceeded his sentencing powers.

In response, counsel for the respondent Ms. Harriet Adubango, Senior Resident State Attorney argued that the order should not be granted since the appellant has deliberately failed to prosecute his appeal which was only filed as a means of frustrating the complainant. The applicant's counsel wrote a letter requesting for a certified copy of the record of proceedings on 11th August 2016, after the applicant was arrested on 4th August 2016 in execution of the sentence. In the alternative, she prayed that a date be fixed for hearing of the appeal.

The power to make orders of compensation to a complainant in a criminal case are conferred by section 197 of *The Magistrates Courts Act*, the relevant subsections of which read as follows;

197. Order for compensation for material loss or personal injury.

- (1) When any accused person is convicted by a magistrate's court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable.

- (3) Any order for compensation under this section shall be subject to appeal, and no payment of compensation shall be made before the period allowed for presenting the appeal has elapsed or, if an appeal is presented, before the determination of the appeal. (Emphasis added)

Whereas, sections 198 and 182 of *The Magistrates Courts Act* allow for enforced recovery of compensation specified in conviction or sentencing orders, section 182 (1) of the Act provides for a default mode of recovery, i.e. by way of attachment of the movable and immovable property of the person ordered to pay it by distress and sale under warrant. It is only if the officer having the execution of a warrant of distress reports that he or she could find no property or not sufficient property on which to levy the money mentioned in the warrant with expenses, that the court may, after hearing the convict, commit him to him or her to imprisonment according to the scale prescribed by section 180 (see s 183 of *The Magistrates Courts Act*).

It is not disputed that the applicant filed an appeal against both conviction and sentence and that the appeal is yet to be heard. At this stage we are not dealing with the merits of the appeal and

the applicant has no obligation to satisfy court that the appeal shall succeed. That will be considered when the appeal is eventually heard. In any event, it is also settled that an arguable appeal is one which should be argued fully before the court but not one which must necessarily succeed.

In the instant application, the order sought to be stayed is unlawful for the reason that it seeks to execute an order of compensation made as part of a sentence following a conviction in a criminal trial yet the appeal arising from that conviction and sentence is still pending. This is in violation of s 197 (3) of *The Magistrates Courts Act*.

It is not possible, based on the material presented to this court, to determine whether the order committing the applicant to imprisonment for six months was made after the magistrate's court had first issued a warrant of distress and was satisfied by evidence of an officer having the execution of that warrant of distress that he or she could find no property or not sufficient property of the applicant on which to levy the money mentioned in the warrant with expenses, as is required by s 183 of *The Magistrates Courts Act*. The applicant though in his application for the interim order of stay of execution pledged his land and residence in Paidha as security, which would suggest that he has some property on which the money due, or a part thereof, can be levied.

Be that as it may, this application has revealed an error material to the merits of the case which involves a miscarriage of justice when the Magistrate Grade One Court proceeded to enforce an order of recovery of compensation made as part of a sentence for a criminal offence when the appeal against that order is still pending, in contravention of s 197 (3) of *The Magistrates Courts Act*. For that reason, the appropriate procedure is not to stay execution of the order of compensation but rather to invoke this court's powers of revision under s 50 (1) of *The Criminal Procedure Code Act* to quash the execution proceedings and set aside the order of commitment to prison dated 4th August 2016, which was issued in Paidha Grade One Magistrates Court Criminal Case No. 0131 of 2014.

The court though observes that whereas the appeal was filed 8th October 2015, one year later, the appellant is yet to file a memorandum of appeal. The only evidence of a further step he ever took

since the lodgment of the Notice of Appeal is the letter requesting for a certified copy of proceedings at the trial which was filed on 11th August 2016, after the applicant was arrested on 4th August 2016. The applicant does not appear to have followed up his appeal with any obvious due diligence. I therefore find substance in the submission of counsel for the respondent that the court should come up with measures to curtail further delay in the prosecution of the appeal. This court must balance competing rights: on the one hand the rights of the complainant which accrued from the orders of the trial court and on the other, the applicant's undoubted right to appeal against the said order. The court must therefore make orders on such terms as are just in the circumstances of this case.

This court is enjoined by s 17 (2) of *The Judicature Act*, with regard to its own procedures and those of the magistrates courts, to exercise its inherent powers to prevent abuse of the process of the court by curtailing delays, including the power to limit and stay delayed prosecutions as may be necessary for achieving the ends of justice. Guided by this principle, the order that commends itself to this court to ensure that the interests of both the complainant and the applicant are safeguarded is to fix a date when the appeal should be heard. The applicant is hereby given a maximum of 45 (forty five) days from today within which to file his memorandum of appeal and cause the record of proceedings of the court below to be transmitted to this court. Therefore, this order should be certified to the Paidha Grade One Magistrates Court, which shall take such steps as are conformable to this order in accordance with s 53 of *The Criminal Procedure Code Act*.

In the final result, the execution proceedings in Paidha Grade One Magistrates Court Criminal Case No. 0131 of 2014 are hereby quashed and the resultant order of commitment of the applicant to prison dated 4th August 2016 is set aside, with no order as to costs.

Hearing of Arua High Court Criminal Appeal No. 0075 of 2016 is hereby fixed for the day of 2016 atI so order.

Dated at Arua this 13th day of October 2016.

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Stephen Mubiru,
Judge