

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

**MISC. APPLICATION NO. 0047 OF 2016
(Arising from HCT-01-CV-CA-046 OF 2012)
(Arising out of FPT-00-CV-CS-064 OF 2001)
(FORMERLY HCT-01-CV-CS-0001 of 2001)**

MRS. MPANGIRE.....APPLICANT

VS

CHARLES NYAMUGABWA KAWAYA.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO ANTHONY OJOK, JUDGE

RULING

This is an application by notice of motion under section 33 of the Judicature Act Cap 13, section 98 of the Civil Procedure Act cap 71 and Rules 6 (2) (b), 42 (1) (2), 43 & 44 of the Judicature (Court of Appeal Rules) Directions S.1 13-10 seeking for orders that;

1. Execution of the Decree in HCT-01-CV-CA-046 OF 2012 be permanently stayed pending the decision from the Court of Appeal of Uganda or until further orders of Court
2. Costs of this application be provided for.

This application is supported by the affidavit of Mrs. Mpangire, the applicant and the grounds are;

1. The applicant has filed a Notice of Appeal and in Court a letter applying for typed and certified record of proceedings.
2. The applicant shall suffer substantial loss if an order for stay of execution of the Judgment and Order in HCT-01-CV-CA-046 of 2012 pending the determination of the intended appeal is not granted.
3. The intended appeal has a very high likelihood of success.
4. The applicant has made this application without reasonable delay.
5. The applicant is under imminent threat of execution and a Notice to show cause has already been issued.
6. The execution will render the intended appeal nugatory.
7. It is just, fair and equitable that an order for stay of execution doth issue against the Respondent pending the determination of the intended Appeal.

The application was opposed by an affidavit in reply sworn by Charles Nyamugabwa Kawayo.

Ms Tugume-Byensi & Co. Advocates appeared for the Applicant and MS Kaahwa, KAffuzi, Bwiruka & Co. Advocates appeared for the Respondent. By consent both counsel agreed to file written submissions.

Submissions

Counsel for the Applicant submitted that paragraph 2,3, and 4 of the Applicant's affidavit in support shows that this honourable Court entered Judgment against the Applicant who having been dissatisfied with that decision filed a Notice of Appeal and applied for a typed and certified record of proceedings and Judgment for purposes of pursuing her 2nd appeal to the Court of Appeal and there is an immediate and imminent threat to carry out execution since the Court ordered so and the applicant has been served with a Notice to Show cause why Execution should not issue. That it is trite that execution process is commenced by issuance of Notice to Show Cause why execution should not issue.

Paragraph 9 of the affidavit in support shows that the Applicant's appeal shall be rendered nugatory if no stay is issued against the Respondent who has already served the Applicant notice to show cause why execution should not issue.

That the applicant in paragraphs 3,4 and 5 of the Affidavit in rejoinder shows that she has furnished security for due satisfaction of the decree which was a pre-condition by this court for grant of an interim order for stay of execution pending the hearing and disposal of this applicant. The applicant has also applied for a typed and certified record of proceedings and court has not yet availed her with a copy for purposes of preparing memorandum of appeal and she is still waiting for Court to avail her the same so as to enable her prepare the record of appeal in the court of Appeal.

In **Lawrence Musiitwa Kyazze Vs Eunice Busingye SCCA No. 18 of 1990 (1992) IV KALR 55** held that an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his/her undoubted right of appeal are safe guarded and the appeal if successful is not rendered nugatory.

The conditions for granting stay of execution have been held to be;

1. Whether there is an arguable appeal.
2. Whether the appeal would be rendered nugatory if such application is not granted.

There is also a condition that the applicant has to furnish security for due satisfaction of the decree.

On whether there is an arguable appeal, Justice Murangira J, In **Nalwoga Vs Edco Ltd & Anor MA No. 07 of 2013** Court observed that; in an application for stay of execution pending appeal, the Court has to review proceedings and yet not prejudice the appeal so as to make sure that it is not lightly interfering with the order of the court but on the other hand

preserving the status quo so that the appeal will not be rendered nugatory. Court further observed that similarly the Court should avoid saying anything that indicates a concluded view as to the merits of the action; on fact or law, because the judgment is the subject matter of the appeal and will have to be heard and dealt with thereafter.

The status quo in this matter is that it is the Applicant who is in possession and occupation of the suit land and she is to suffer irreparable damage if the order is not granted.

Further, it is not for the Court appealed from in an application for stay of execution pending appeal to consider its own decision to find out whether it was probably wrong, and to assess the chances of the appeal against its decision succeeding. This is left to the appellate Court.

Guided by the above principles, the application in this matter is intended to preserve the status quo which is the subject of the appeal until the appeal is disposed off. In the case of **Hwang Sung Industries Ltd Vs Tadjin Huseein 2 Rainbow Foods Ltd and Nizar Hussein SCCA No. 79 of 2008** court held that once an appeal is pending and there is a serious threat of execution before hearing the appeal Court intervenes to serve substantive justice. In the instant case, there is a pending appeal which is awaiting preparation of the record of appeal after the appellant is availed with a typed and certified record of proceedings and issuance of a certificate of correctness. The appeal will thus be rendered nugatory if the order of stay sought by the Applicant herein is not granted.

The ends of justice are served where a party such as the Applicant is given the opportunity to be heard on merits and if dissatisfied with a decision made against her, she be given the opportunity to exhaust the appeal remedies available to her. The appeal she has filed has chances of succeeding in the Court of Appeal. Preserving the status quo pending the disposal of her appeal is in the best interest of substantive justice as denying the Applicant the substantive order of stay of execution will render her appeal nugatory and condemn the applicant unheard on the merits of her case. In the case of **Fredrick Kabugo Sebugulu Vs The Administrator General CACA No. 69 of 2010**, the Court of Appeal of Uganda cited with approval the Supreme Court case of **AlHaji Yahya Balyejusa Vs Development Finance Company Limited Civil Appeal No. 34 of 2000** in which it was held that it was a cardinal principle that as far as possible litigation on land matter should be resolved on merit. The facts of the instant case being a land matter, they prayed that Court be pleased to issue a substantive order of stay of execution pending the determination of the pending appeal.

Further, in the case of **Joyce Muguta Vs Idah Herura SCCA No. 09 of 2006** Court observed that there was appealing appeal and stayed the execution to serve better justice for both parties. In this case court considered land matters as special matters where it is important to maintain the status quo until the appeal is finally determined. This was similarly observed in **Kassala Growers Co-Operative Society Vs Jonathan Kalemera & ANor. Civil Application No. 24 of 2010** where Hon. Lord Justice J.W.N Tsekooko (as then he was), held that in land cases it is proper to allow parties to exhaust their legal rights of appeal

In reply Counsel for the Respondent submitted that the Applicant filed a Notice of Appeal and wrote a letter asking for a record of proceedings. From 1st December 2015 to date the

applicant has never bothered to follow up the proceedings. The proceedings on appeal constitute a few attendances because both parties filed written submissions. The applicant is on the land and has been trespassing since 2001.

The Judgements of the Chief Magistrate and that of the High Court are clear and the Applicant's intended appeal has no chances of success at all.

The applicant claimed that he acquired the suit land from Mwesige Sharp FW6 and that witness did not show that he sold the suit land to the Applicant.

DW6 confirmed that the only land sold to the Applicant was Plot 126 and not the suit land. The appeal is a waste of Courts time and has no chances of success at all..

For this Court to grant a stay of execution consideration should be made on the Judgments the Applicant intends to challenge to determine and know the reasons why she lost the case. This would discourage frivolous appeals only intended to delay realization of fruits of litigation. See **J.W.R. Kazoora Vs ML.S Rukuba SC Civil Application No. 4/1991 reported in(1993) KALR 287.**

The Respondent was awarded general damages of Shs. 10Million interest and costs in the Chief Magistrate's Court were taxed and allowed at Shs. 19,116,000/= . He was also awarded costs on appeal which were taxed and allowed at Shs 9,891,500/= . The total judgment debt is now Shs 42,007,500/=.

He submitted that the security to be deposited should be for full satisfaction of the decrees both the High Court and the Chief Magistrate's Court.

Justice Mukasa in the case of the **New Vision Publishing Corporation & 2 Others Vs Peter Kagawa HCMA 127/2006 reported in (2007) KALR 391** quoted with approval the Judgment of Justice Kato in the case of **Ntege Mayambala Vs Christopher Mwanje (1993), KALR, 97** where Justice Kato held that;

"I..... there are several reasons why depositing of security by the applicant in this type of application is necessary. One of the reasons is to maintain the status quo among the parties, another reason is to ascertain that the purpose of the application is not merely intended to defeat the course of justice by delaying tactics whereby after the execution has been stayed the decree holder is made to wait indefinitely for the fruits of his success. By providing security the Judgment debtor is also trying to prove how serious he is in his application for stay of execution "

The applicant in this case has not bothered to follow the record of proceedings. There are no letters of reminder written to Court asking for proceedings. It is now 1 year and 2 months since Judgment was passed. The intended appeal is frivolous as submitted above.

I do concur with the submissions of Counsel for the Respondent that that the applicant never bothered to follow the record of proceedings, no letters of reminders written to court for over

1 year since Judgment was passed. Much as I cannot conclude whether the appeal has merit or not, its upon Court of Appeal to determine.

I must categorically state that many times counsel appeal to buy time or to avoid execution when surely they have no basis. In the interest of Justice and not to render the appeal nugatory, I will stay execution on the following terms;

1. Deposit of the total Judgment costs in Court.
2. The applicant within three weeks from delivery of Judgment to expedite the proceedings and have the matter fixed in Court of appeal.
3. Costs in the cause.

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Oyuko Anthony Ojok
Judge

Judgment delivered in open court in the presence of;

1. The Appellant
2. The Respondent.
3. Benard Musinguzi holding brief for Tugume, Richard Bwiruka for the Respondent
4. James Court clerk

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Oyuko Anthony Ojok
Judge
30/5/2017