**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT JINJA**

**MISC. APPLICATION No. 276 OF 2016**

**(ARISING FROM CIVIL SUIT NO. 041 OF 2004)**

**(ARISING IGANGA DISTRICT LAND TRIBUNAL CASE NO. 042 OF 2004)**

**BALWA ALEX** :::::::::::::::::::::::::::::: **APPLICANT**

**VERSUS**

**MAGIDA MOGA** :::::::::::::::::::::::::::::: **RESPONDENTS**

**RULING**

**BEFORE JUSTICE MICHAEL ELUBU**

This is an application by the BALWA ALEX against MAGIDA MOGA which is filed under Section 33 of **the Judicature Act**, and Section 98 of **the Civil Procedure Act.** The applicant seeks orders that:

1. The execution of judgment/orders vide Civil Appeal No. 41 of the 2004 be stayed pending the hearing and determination of an appeal in the Court of Appeal
2. The costs of this application be provided for.

The grounds of this application are set out in the Notice Motion and particularised in the supporting affidavit deposed by **Balwa Alex**. He states in sum as follows:

That the applicant is dissatisfied with the decision of the Justice Namundi delivered on the 17th of November 2015 in Appeal No. 58 of 2008. That he filed

a Notice of Appeal in The Court of Appeal. There is therefore a pending appeal although he states that it cannot be properly filed until he receives the record of appeal to enable him properly formulate the grounds of appeal. That he shall suffer prejudice if the application is not allowed as he has been threatened with eviction from the suit land where he lives.

The respondent opposes this application and avers that a Notice of Appeal was filed on the 18th of December 2015. That she only became aware of the Notice of Appeal on the 6th of October 2016 when she was served with the application for stay of execution to which the notice was attached. That the respondent was never served with a letter applying for the record of proceedings nor with the Notice of Appeal. That the respondent will be prejudiced as she has been denied use of this land for 10 years.

The parties were granted leave to file written submissions which are on record.

In his submission the applicant raised a preliminary point of law in which the contention is that the application was served on the respondent on the 6th of October 2016 for hearing on the 6th of December 2016. That the affidavit in reply was served on the 5th of December 2016 which was two months late and offends Order 12 Rule 3 (2) of The **Civil Procedure Rules**. The applicant relied on **Stop and See (U) Ltd vs Tropical Africa Bank M.A. 333/2010.**

It was argued in the alternative that the applicant seeks a stay of execution pending the hearing of the appeal because there is an eminent threat to execute and she would be prejudiced, as she and not the respondent, lives on the land.

That the law requires for such an application to succeed the applicant must show that there is an appeal that has a real chance of success; and if the application is not granted the appeal will be rendered nugatory. That the applicant has houses and a family on the suit land.

That it was not true, as alleged by the respondent, that the applicant did not apply for the record of proceedings.

In reply, the respondent submits that this application was filed on the 21st of December 2015 and the respondent only served on the 6th of October 2016. The respondent then put in her reply in the month of December 2016.

That the applicant himself served the application after a more than year. That the applicant was aware that the respondent was an illiterate person who had counsel but still chose to serve her personally. This objection should be dismissed.

The respondent argues farther that the application is incompetent and does not meet the conditions for a grant of a stay of execution; that no security for costs has been furnished; that there is no pending appeal because the Notice of Appeal is out of time considering it was filed 31 days after the Judgement of the High Court. Finally no letter requesting the record of proceedings was served on the respondent.

The applicant submission in rejoinder is that the reply ought to be struck out as being out of time.

Secondly regarding the competence of the appeal, the submission is that the applicant filed a Notice of Appeal at the High Court in Jinja and also wrote a letter requesting for a record of proceedings. That the letter is on record. Any other errors can be cured under Article 126(2)(e) of the Constitution. Regarding security for costs the same was not furnished as it settled law that justice should be done to all irrespective of economic or social status.

I will start with the filing of the pleadings. The applicant filed this application on the 21st of December 2015 but served after almost one year on the 6th of October 2016. The respondent lodged her reply on the 5th of December 2016.

The relevant provision for service of Interlocutory applications is Order 12 rule (3) which stipulates that service on the opposite party shall be made within fifteen days from the filing of the application, and a reply by the opposite party filed within fifteen days from the date of service of the application and be served on the applicant within fifteen days from the date of filing of the reply.

It is clear that both sides have flouted the limitation periods on the filing of the application. Both rely on the case of Stop and See (supra). In that case although the court found a transgression on time, it still allowed the parties the opportunity to make good on the their default by addressing court on the merits of the case. I have adopted the same course here and dismissed the objections in view of the failure by both sides to abide by timelines on service after filing.

I now turn to the merits.

An application for stay should satisfy the grounds in O. 43 r. 3 and 4 of the CPR.

The rules state in sub rule 2 that 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.

Sub rule (3) is to the effect that 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;
c. and 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.

Under sub rule (2) there must be an appeal that has been filed before the expiration of time allowed to file the appeal.

Judgement in Jinja H.C.C.A. No 1 of 2004 was entered on the 17th of November 2015. The appellant filed his Notice of Appeal in the High Court on the 17th of December 2015.

An appellant who intends to apply for stay must show that he has filed a competent appeal in the Court of appeal. He must therefore show that he has a competent appeal pending in that Court.

By Rule 76 of the **The Judicature (Court of Appeal Rules) Direcetion** a Notice of Appeal should be filed within 14 days. Under Rule 78 the Notice should be filed on the opposite party within seven days. Under Rule 83 (2) the appeal should be filed within 60 days. If a party fails to file as required because he has not received the record of proceedings from the High Court then he should furnish proof that he applied for the proceedings and that he has proof of service of that letter on the opposite side.

Compliance with Rule 83 (2) is mandatory [see **Sengendo vs Busulwa & Anor C.A. No 207 of 2014 (COA)]**

The above shows that the applicant failed to comply with the requirements for filing an appeal in the Court of Appeal. Consequently there was no competent appeal in this case.

In **Sengendo** (supra) the Court also noted that the impecuniousness of the appellant is not sufficient cause for grant of a stay of execution. It had been submitted in rejoinder that the appellant had not furnished security for costs and that notwithstanding justice should be done to all irrespective of economic or social status. Therefore financial inability to furnish security for costs cannot be a ground for the grant of a stay of execution.

Lastly the Court in **Sengendo** (Supra) observed that in the case of ***National Enterprise Corporation vs Mukisa Foods (Miscellaneous application No. 7 1998)*** this Court held as follows: ***The Court has power in its discretion to grant stay of execution where it appears to be equitable so to do with a view to temporarily preserving the status quo.***

***As a general rule the only ground for stay of execution 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."***

From the application the applicant did not demonstrate any danger of a permanent alienation of the suit property.

In view of the foregoing this application lacks merit and is accordingly dismissed with costs.

**Michael Elubu**

**Judge**

**13.2.2019**

2/2/19

Applicant absent.
Res. present.
Ruling: Clear.
Court: Ruling delivered in the presence of the absent.