

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
MISC. APPLICATION NO. 68 OF 2020
(ARISING OUT OF CIVIL SUIT NO. 36 OF 201)

1. DAVID KAYONGO
2. NAMUTEBI AIDA :..... APPLICANTS
VERSUS

MUKIIBI FRANCIS :..... RESPONDENT

Before; Hon Justice Victoria Nakintu Nkwanga Katamba

RULING

This is an application brought under Section 98 of the Civil Procedure Act, Order 52 Rules 1,2 & 3 of the Civil Procedure Rules SI 71-1 and Section 33 of the Judicature Act seeking orders that;

- a) An order doth issue staying the execution of the decree and orders in Civil Suit No. 36 of 2017
- b) Costs of the application be provided for.

The grounds of the application as contained in the 2nd Applicant`s affidavit are briefly that;

- a) The Applicants who were defendants in Civil Suit No. 36 of 2017 received judgment on the 17th of June 2020 but were not satisfied with the same;
- b) The Applicants have filed a Notice of Appeal against the said judgment;
- c) The Respondent was ordered in the said judgment to pay UGX. 25,000,000/= to the 1st Applicant which has not been done to date;
- d) That no decree or taxation of costs has been extracted and the Respondent`s application for notice to show cause why execution should not issue is premature;
- e) This application has been filed promptly and the Applicants are in real danger of the Respondent proceeding with execution;

- f) The Appeal has a high likelihood of success and will be rendered nugatory if the application is not granted.

In his affidavit in reply, the Respondent opposed the application and stated that;

- a) The application for notice to show cause is not premature since a decree and taxation of costs were extracted;
- b) The judgment/decreed is already partially executed by depositing Ugx. 25,000,000/= in the court's cashier's office;
- c) That the judgment debtors are using this application to deny the Respondent his fruits of judgment;
- d) That the appeal has no chance of success since the Respondent still has interest in the petrol station and the suit land as the owner;
- e) That if the court is inclined to grant this application, the Applicants should pay security for due performance of the decree totally to Ugx. 100.000.000/=

Both Parties filed written submissions and they are on court record.

Counsel for the Applicants submitted that the Applicants filed a notice of appeal and the intended appeal has a high likelihood of success since it was the Respondent who breached the contract and not the 1st Applicant, and the 2nd Applicant bought the suit land as a bonafide purchaser. Counsel further submitted that substantial loss may result to the applicants if the stay of execution is not granted as they are in possession of the suit land and the Respondent has never completed payment for the consideration for the purchase price for the petrol station which the 2nd Respondent has spent a lot of money equipping. The Applicants lodged the notice of appeal two days after delivery of the judgment and also requested for the record of proceedings hence the application has been filed without any unreasonable delay. It is further the Applicants' submission that the Respondent has filed a notice to show cause why execution should not issue which is an imminent threat and if the application is not granted, the appeal; would be rendered nugatory. That the Respondent is

not in possession of the suit land, and would therefore not be disadvantaged in any way by the grant of the stay of execution.

Counsel for the Respondent cited Order 43 Rule 4 (3) of the Civil Procedure Rules and submitted on the conditions of the grant of a stay of execution that the Applicants do not show the substantial loss they will likely suffer if the application is not granted. Counsel argued that it is the Respondent who will suffer substantial loss as he already paid the 25,000,000/= and the 2nd Applicant has refused to vacate the suit land. Counsel further cited the case of Tropical Commodities Suppliers Ltd and ors Vs International Credit Bank Ltd (in Liquidation) [2004] 2 EA 331 on security for due performance which was interpreted to embrace the entire decretal amount rather than security for costs of the appeal. That the Applicants should deposit Ugx. 64,000,000/= as security for due performance.

Determination of the application:

The grounds for the grant of an order for stay of execution are provided for under ***Order 43 Rules 1 and 4 (3) of The Civil Procedure Rules*** that;

The High Court may for sufficient cause order stay of execution of a decree pending an appeal before it where;

- (a) substantial loss may result to the party applying for stay of execution unless the order is made;
- (b) the application has been made without unreasonable delay; and
- (c) security has been given by the applicant for the due performance of the decree.

The above grounds have been expounded further by the Court of Appeal in ***Kyambogo University v. Prof. Isaiah Omolo Ndiege, C. A. Misc. Civil Application No 341 of 2013*** to include: -

- i) there is serious or eminent threat of execution of the decree or order if the application is not granted,
- ii) the appeal would be rendered nugatory;

- iii) that the appeal is not frivolous and has a likelihood of success;
- iv) that refusal to grant the stay would inflict more hardship than it would avoid.

I will consider the grounds of this application in the same order as they were raised and argued by the Counsel for the Applicants.

i) **The Applicant has lodged an appeal with a likelihood of success**

This condition requires a preliminary assessment of the strength of the intended appeal. It is important that the prospects of success on appeal weigh significantly in favor of the Applicant if the application of stay of execution is to be granted. The prospects of success will obviously tend to favour the refusal of a stay if the prospects of the appeal can be seen to be very poor and the grounds raised in the memorandum of appeal seem to be simply fishing grounds. That is because, if there is obviously little prospect of ultimate reversal of existing orders, the concern to ensure that the existing orders can be overturned without residual injustice will have less claim on the discretion than might otherwise be the case.

It is not dispute that the Applicants have preferred an appeal as per the notice of appeal and request for the certified record of proceedings adduced into evidence. The 2nd Applicant attached the Memorandum of Appeal to her supplementary affidavit in which the grounds of the appeal are stated. The Applicants in their intended grounds of appeal fault the trial Judge for failing to properly evaluate the evidence before her especially relating to breach of the contract between the 1st Applicant and the Respondent. In establishing whether the appeal has a likelihood of success, this court is faced with having to avoid pre-empting the appeal and for that reason I will not discuss the grounds of appeal in detail. I however find that the grounds as stated in the memorandum of appeal raise important questions for determination as to the relationship of the parties and the status of the suit land, and such grounds are not merely fishing tactics but rather seek to have the bone of contention in the main suit settled as between the parties. The Respondent did not challenge this ground and I find that the Applicants have sufficiently proved that they have a lodged an appeal with a high likelihood of success.

ii) **Substantial loss may result to the Applicants unless the stay of execution is granted**

The substantial loss raised by the Applicants is that the 2nd Applicant is in possession of the suit land and operating a petrol station that she bought from the 1st Applicant and they will suffer irreparable loss if the application is not granted and the Respondent is allowed to take possession of the suit land.

Counsel for the Respondent argued that the Applicants did not show what loss they will suffer if the application is not granted and that it is the Respondent who will suffer having paid Ugx, 25,000,000/= towards the suit land.

Substantial loss does not represent any particular amount or size; it cannot be quantified by any particular mathematical formula. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without a value or a loss that is merely nominal (see *Tropical Commodities Suppliers Ltd and others v. International Credit Bank Ltd (In Liquidation)* [2004] 2 EA 331).

The Respondent admitted that the 2nd Applicant has not vacated the suit land which confirms the Applicants' allegation. If this application is not granted, the Respondent might evict the Respondents forcefully from the suit land before the appeal is heard to determine the rights of the parties and status of the suit land. I therefore find that if the status quo is not maintained, the Applicants will suffer irreparable loss as they will be evicted from the suit land before the appeal is determined.

iii) **The application has been made without unreasonable delay**

Counsel for the Respondent conceded that this condition has been fulfilled. It is indeed undisputed that the Applicants made this application without unreasonable delay.

iv) **There is a serious threat of execution of the decree or order of the application if not granted**

I have carefully perused the record and established that the Respondent filed a Notice to show cause why execution should not issue. It is also clear that the Respondent has deposited Ugx. 25,000,000/= following the orders of court for him to pay the contract consideration balance.

All these are preparatory steps towards execution proceedings and since I have already observed the need to maintain the status quo pending the determination of the appeal, I find that the threat of execution is imminent and if this application is not granted, the Applicants will suffer irreparable and the appeal will be rendered nugatory.

v) **Security for due performance**

Counsel for the Applicants cited the cases of *John Baptist Kawanga Vs Namyalo MA No. 12 of 2017* and *Margaret Kato Vs Nalwo MA No. 11 of 2011*, and argued that security for due performance is not a condition precedent for the grant of an order of stay of execution.

Counsel for the Respondent on the other hand prayed that the Applicants be ordered to deposit the entire sum of the petrol station of Ugx. 64,000,000/= as security for due performance.

The condition requiring an applicant to deposit security for due performance is established ***under Order 43 Rule 4 (3(c))***.

Security for due performance has been interpreted to mean to entire decretal sum and it is intended to protect the judgment creditor in the event that the appeal is unsuccessful. Courts though have been reluctant to order security for due performance of the decree. Rather Courts have been keen to order security for Costs (*see Tropical Commodities Supplies Ltd and others v. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 and DFCU Bank Ltd v. Dr. Ann Persis Nakate Lussekere, C. A Civil Appeal No. 29 of 2003*), because

the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals.

This court has discretion to grant an order for stay of execution without security for due performance. Some courts have taken the view that the provisions of ***Order 43 rule 4 (3) of The Civil Procedure Rules*** must be obeyed and the application for stay of execution pending appeal must be accompanied by payment of security for due performance of the decree (*see DFCU Bank Ltd Vs Dr. Ann Persis Nakate CACA 29/2003, Lawrence Musiitwa Kyazze v Eunice Busingye S.C Civil Appeal No.18 of 1990*).

In the instant application, the Respondent has deposited Ugx. 25,000,000/= being the amount he was ordered to pay by the trial court. The Applicants are currently in possession of the suit land and it is important that the Respondent's interest if any, is protected pending the determination of the appeal. The Applicants had also received Ugx. 35,000,000/= as consideration under the contract. For that reason, the Applicants shall make a deposit of Ugx. 35,000,000/= being security for due performance as the money paid towards the suit property.

In the final result, this application is hereby allowed with no order as to costs and I hereby order for the stay of execution of the decree in Civil Suit No. 36 of 2017 pending the determination of Civil Appeal No. 237 of 2020.

The Applicants should deposit Ugx. 35,000,000/= (Thirty-Five Million Shillings) as security for due performance within 30 (thirty) days from the date of this order.

I so order.

Dated at Masaka this 6th day of May, 2021

Victoria Nakintu Nkwanga Katamba

Judge