

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
MISC. APPLICATION NO. 105 OF 2020
ARISING FROM CIVIL APPEAL NO. 35 OF 2020
ARISING FROM CIVIL APPEAL NO. 0052 OF 2018
(ALL ARISING FROM CIVIL SUIT NO. 49 OF 2016)

1. KISAALU JOSEPH
2. MUWULUZI DANIEL
3. NSUBUGA DANIEL
4. SUUNA JONATHAN
5. SSEKIMPI ASUMAN
6. TUMWINE YORAM APPLICANTS
7. KIROOKA
8. SADAM SSEKIMPI
9. NAKAWOOYA ANNET
10. KAYAGA HARRIET
11. NASSANGA JANAT

VERSUS

1. NAKIITO MAYI
2. KIRUMIRA MATIA (suing RESPONDENTS

through his lawful attorney Nakiito Mayi)

Before; Hon Lady Justice Victoria Nakintu Nkwanga Katamba

RULING

This application was brought under Order 43 Rules 1, 3, 5 & Order 52 Rules 1, 2, 3 Civil Procedure Rules and Section 98 of the Civil Procedure Act for orders that;

1. A stay of execution of the decree vide Civil Appeal No.0052 of 2018 be granted pending determination of the appeal in the Court of Appeal;
2. Costs of the application be provided for;

The grounds of the application as contained in the affidavit of Kisaalu Joseph one of the Applicants are briefly that;

1. The Applicants are dissatisfied with the judgment of court delivered on the 15th day of July, 2020;
2. They have filed the Notice of Appeal in the Court of Appeal and also requested for a record of proceedings which has not yet been provided;
3. The Respondents have threatened to execute the decree and the Applicants are likely to suffer irreparable damages if the application is not granted;
4. The Applicant`s appeal has a likelihood of success.

In his affidavit in reply, the 2nd Respondent Kirumira Matia opposed the application and averred that they have not threatened the Applicants with execution nor have they applied for the execution. The application is a delaying tactic and the Applicants have not demonstrated conditions requisite for stay of execution. The application is untenable in law and an abuse of court process and the Applicants have not deposited security for due performance. The Respondent prayed for the court to order the Applicants to deposit at least Ugx. 50,000,000/= if the court is inclined to grant the application.

In rejoinder, the 1st Applicant stated that the applicants filed the appeal vide Civil Appeal No. 269 of 2020 and have also paid security for costs as required by law.

Both Parties filed written submissions.

Counsel for the Applicants cited Order 43 Rule 4 (3) of the Civil Procedure Rules which provides the grounds for the grant of an order for stay of execution. Counsel argued that the

Applicants would suffer irreparable loss if the application is not granted since the subject matter that is the subject of the eviction order is their source of livelihood.

Counsel submitted that the application was not brought with unreasonable delay and further that the Applicants are indigent persons and to order them to deposit security for costs is to deny them justice. The Applicants have lodged an appeal and to deny them an opportunity before the appeal is heard is to cause them greater substantial loss.

In response, Counsel for the Respondents argued that the Applicants have not proved the grounds of the application. Counsel submitted that the Applicants' submission that they derive livelihood from the subject matter of the decree should be weighed against the Respondents' waiting tirelessly to realize the fruits of their judgment since 2018. The Applicants' allegation of substantial loss is not supported by any factual proof. Counsel further submitted that the claim that the Applicants are indigent is not supported by evidence and prayed for Ugx. 50,000,000/= as security for due performance if the application is granted.

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 applicant 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.

a) Substantial loss

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 Applicants' contend that if the application is not granted they will suffer irreparable loss from being evicted from the suit land which they use as a source of livelihood. The Applicants are using the suit land for commercial purposes and they have kiosks on the suit land. The order of the court was for vacant possession/eviction order.

The Applicants claim to be using the land as a source of livelihood and argued that if the application is not granted, they will suffer irreparable loss. If the application is not granted, there is a possibility that the Applicants will be evicted and the status quo will change. It is highly unlikely that in the event that the appeal in the court of appeal is successful, the Respondents would be in position to compensate the Applicant in damages.

I therefore find that it is important to maintain the status quo so that the Applicants are not evicted as being evicted would amount to irreparable loss in the wake of a successful appeal.

b) Delay

The judgment of the court in Civil Appeal No. 35 of 2020 was delivered on the 15th day of June 2020 and this application was filed on the 18th day of August 2020. The Applicants filed a Notice of Appeal on the 20th day of July 2020. It is my observation that there was no delay in filing this application.

c) 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 Lussejere, 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.

It is the Applicants' submission that they are indigent persons and as such cannot afford to pay security for due performance. This is a matter which has been in court since 2016. The Applicants have lodged a second appeal to the court of appeal having lost the main suit and the appeal to this court.

I therefore find that for such a case, it is important to issue an order for security of due performance to avoid abuse of court process by litigants who use the appeal system as a delaying tactic. The Respondents are successful parties in both the Civil Suit and the Appeal in this court and they have a right to enjoy the fruits of their judgment. I will therefore order for a deposit of security for due performance of Ugx. 20,000,000/=

In the result, this application is hereby allowed. The Applicants will deposit a bank guarantee of Ugx. 20,000,000/= in the court within 14 days from the date of this order. Failure of which, the Respondents will be at liberty to proceed with the execution of the judgment.

I so order.

Dated at Masaka this 5th day of November, 2021.

Signed; 

Victoria Nakintu Nkwanga Katamba
Judge