

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
MISC. APPLICATION NO. 49 OF 2020
(ARISING OUT OF MISC. APPLICATION NO. 40 OF 2019)
(ARISING OUT OF CIVIL APPEAL NO. 79 OF 2015)

ARISING OUT OF LAND CIVIL SUIT NO. 117 OF 2009 KALISIZO GRADE ONE)

PETER LUGEMWA APPLICANT

VERSUS

1. NANKYA ALICE
2. NAMUTEBI JUSTINE
3. GALIWANGO STEPHEN
4. SEWAYO KIZITO
5. SSEKIBONEKA WILLY
(The Administrators of the estate
of the late Peter Kiyaga)

..... RESPONDENTS

Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

RULING

This is an application brought under Section 98 of the Civil Procedure Act Cap 71 and Orders 21, 43 of the Civil Procedure Rules SI 71-1, and Section 33 of the Judicature Act, seeking orders that;

- a) Execution of the judgments, orders and decree of the High Court in Misc. Application No. 40 of 2019 and Land Civil Suit No. 117 of 2009 Kalisizo Grade One be stayed pending the determination of the Applicant's intended appeal.
- b) a protection/preservation order be issued restraining the Respondent or anyone obtaining title under them from evicting the Applicant until determination of the intended appeal.
- c) Costs of the application.

The grounds of the application as contained in the affidavit of the applicant are briefly that;

1. On 13/7/2020, the court delivered a ruling dismissing Misc. Application No. 40 of 2019 for readmission of appeal,
2. The applicant has filed a notice of appeal in the court of appeal against the said ruling;
3. The Applicant is apprehensive that the Respondent will execute the decree and/or obtain consequential orders evicting the Applicant from the suit property
4. The Applicant will suffer eviction and substantial loss if a stay of execution or protective order is not granted,
5. The Applicant is willing to abide by any order of this court as to security for costs
6. If the application is not granted, the appeal will be rendered nugatory
7. The appeal against the decision and orders of the high court stands a high likelihood of success,

In reply, the 4th Respondent Sewaya Kizito opposed the application and stated that there is no record of proceedings as the application proceeded by written submissions. The applicant while in execution of proceedings in the lower court requested for one month to give vacant possession of the suit property but has since changed positions as a delaying tactic. The applications have hindered the administration of the estate. The applicant should deposit security for the due performance of the decree.

Both parties filed written submissions.

Counsel for the Applicant cited Order 43 of the Civil Procedure Rules which sets down conditions for the grant of a stay of execution. On substantial loss, counsel submitted that the Applicant is in possession of the suit land and he will suffer irreparable injury if evicted as he shall be left homeless. Compelling the applicant to pay costs both in the lower court and Misc. Application No. 40 of 2019 shall cause irreparable injury to the Applicant since the Respondents would not be able to repay as they have no known source of income. The

application has been made without unreasonable delay and the applicant undertakes to deposit security for due performance.

Counsel for the Respondent submitted that the Applicant meets the conditions for the grant of a stay of execution save for the requirement for security for due performance. The Applicant has an unpaid sum of Ugshs. 8,315,500/= as the costs taxed in the lower court. MA No. 40 of 2019 was also dismissed with costs. The Applicant has never filed a memorandum of appeal in the court of appeal which is a clear indication that the appeal is intended to bring about endless litigation. If court is to allow this application, then court should set tough conditions against the Applicant and require him to deposit Ugshs. 15,000,000/= as security for due performance.

Determination of the application;

The back ground of this application is that the Appellant claims ownership of the suit land which he bought from a one Samula in 1981 and took possession in 1984 when he found the late Peter Kiyaga in possession. The late Peter Kiyaga had acquired the suit land and building thereon in 1984 from a one Hajj Shaban Ssenyonga. He took possession immediately until 2002 when the Appellant illegally entered onto the suit land and took possession based on an order of the LCII Court. Civil suit No. 117 of 2009 was instituted by the late Peter Kiyaga and it was determined in his favor. He was declared the lawful owner and the Appellant was declared a trespasser.

The Appellant instituted Civil Appeal No. 79 of 2015 which was dismissed for non-appearance of the Appellant, on the 23/3/2017. The Appellant filed an application for readmission of the appeal, but it was also dismissed. The Appellant has since lodged a notice of appeal in the court of appeal against the decision of this court dismissing the application for re-admission of the appeal.

The grounds for the grant of an order for stay of execution are provided for in ***Order 43 Rule 4 (3) of the Civil Procedure Rules*** and the Supreme Court in ***Theodore Ssekikuubo & others Vs A.G & Another Constitutional Application No. 06 of 2013***, restated the

principles established in exercising discretion to grant an application for stay of execution as follows;

1. The Applicant must establish that his appeal has a likelihood of success or prima facie case of his right to appeal,
2. It must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted,
3. If 1 & 2 above have not been established, court must consider where the balance of convenience lies,
4. That the applicant must also establish that the application was instituted without delay.

The Court of Appeal in *Kyambogo University v. Prof. Isaiah Omolo Ndiege, C. A. Misc. Civil Application No 341 of 2013* expanded the considerations to include:- there is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory; that the appeal is not frivolous and has a likelihood of success; that refusal to grant the stay would inflict more hardship than it would avoid.

Substantial loss;

Counsel for the Appellant submitted on substantial loss that, the Applicant is in possession of the suit land and he will suffer irreparable injury if evicted as he shall be left homeless.

He cited the case of *Tropical Commodities Suppliers Ltd & Ors V. Credit Bank (in liquidation) (2004) 2 EA 331; J. Ogoola* (as then) in which it was held that:

“Substantial loss does not represent any particular amount or size and cannot be quantified by any particular mathematical formula.”

I associate myself with the above meaning and further observe that substantial loss can be determined by the circumstances of each case. In the instant case, the Appellant entered

onto the suit land in 2002, broke down the late Peter Kiyaga's house and took possession. The civil suit was determined in favor of the late Peter Kiyaga having proved that he was a bonafide purchaser for value. The Appellant lodged an appeal but did not prosecute the same, hence its dismissal. The application for its re-admission bore no merits and for that reason, it was dismissed.

During the hearing for the application for taxation of costs, the Appellant agreed to vacate the property and has since changed his position. Refusal to grant this application would result into a forceful eviction of the Applicant. However, on the other hand, granting the application would deny the Respondent the realization their Judgment. The Respondents have not challenged the Applicant's submissions of substantial loss and Counsel for the Respondent stated in their submissions that the Applicant meets this condition. I therefore find that the Applicant would indeed suffer substantial loss since he is in possession of the suit property.

Rendering the appeal nugatory;

Once a litigant is successful, he should not be deprived of realizing the fruits of judgment unless there is just cause sufficiently adduced to warrant the grant of a stay of execution. Such just cause would include showing that proceeding with execution would render an appeal nugatory. The applicant has sufficiently proved that they will suffer irreparable loss unless execution is stayed and also that an appeal has been lodged with a likelihood of success.

The decree being challenged is for ownership of property. The Applicant stated during the taxation proceedings that he thought the decree was for the suit land and not the property on the land. The intended appeal seeks to challenge an order that was granted without determining the appeal on its merits and therefore, disallowing this application would favor the Respondents to proceed and evict the Applicant without the appeal being determined on its merits.

It is important that the status quo is maintained pending determination of the appeal to avoid rendering the appeal nugatory. Therefore, the Applicant has sufficiently proved that granting this application would render the appeal nugatory.

Filing without undue delay;

In the instant application, the ruling in Misc. Application No. 40 of 2019 was delivered on the 13/7/2020 and this application was filed on the 30/7/2020 seventeen days after. I agree with Counsel for the Respondents that this application was filed without undue delay. This condition was therefore fulfilled.

Security for due performance of the decree;

The Applicant stated that he is willing to abide by any order of this Court regarding security for costs/due performance. Counsel for the Respondents submitted that the Applicant has an unpaid sum of Ugshs 8,315,500/= as the costs taxed from the Magistrates court.

The requirement for security to be given by the applicant for the due performance of the decree or orders as may ultimately be binding upon him or her is provided for under ***Order 43 Rule 4 (3(c))***.

Security for due performance of the decree should not be interpreted to stifle someone's right of appeal. (*See Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation) (2004) E.A. LR 331*) 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*).

The Applicant in the instant case filed a notice of appeal in the Court of Appeal in July 2020 and a request for proceedings in July 2020. It is clear that the Applicant has taken

steps to prosecute the appeal. However, the Respondent is being affected and execution is being delayed. This is an application for a matter that commenced in the LC Courts in 1997. It is trite that litigation must come to an end. In *Brown v Dean [1910] AC 373, [1909] 2 KB 573* it was emphasized that in the interest of society as a whole, litigation must come to an end, and “When a litigant has obtained judgment in a Court of justice.....he is by law entitled not to be deprived of that judgment without very solid grounds.”

Although, the Applicant will suffer irreparably if the application is not granted, it is important that the Respondent is protected and that the appeal is prosecuted expeditiously and disposed of so that the matter is put to bed and the parties’ rights are settled.

Conclusion and orders:

The Applicant has adduced sufficient evidence to show that they will suffer substantial loss and the appeal will be rendered nugatory if this application is not granted.

This application is therefore allowed. The Applicant shall deposit a sum of **Shs. 23,000,000/= (Twenty-Three Million Uganda Shillings)** in Court as security for due performance of such decree or order as may ultimately be binding upon him. This amount in cash, shall be deposited in Court within 14 days from the date of this Order.

In default, this Order shall lapse and the Respondents shall be at liberty to proceed with execution of the decree in Civil Suit No. 117 of 2009, unless cause is shown to the contrary.

I so order.

Dated at Masaka this 10th day of March, 2021

Victoria Nakintu Nkwanga Katamba

Judge