

3. The intended appeal has a likelihood of success and may be rendered nugatory if the Respondents are not halted from proceeding with execution and/or other proceedings to give effect to its judgment;
4. The Respondent has kick-started execution proceedings and a notice to show cause why execution should not issue has been issued against the Respondent;
5. The applicant being in possession and user shall suffer irreparable damage that cannot be atoned by an award of damages;
6. The Respondent has made attempts to evict the applicant in the guise of enforcing the judgment;

In her affidavit in reply, the Respondent stated that she began execution proceedings in December immediately after judgment was delivered and this application has been instituted three months later. That she has not been served with the memorandum of appeal and the applicant is using this application as a delaying tactic to stop her from enjoying the fruits of success. She also stated that the intended appeal has no likelihood of success, the Applicant's whereabouts are unknown and there is a likelihood that he will be unable to satisfy the High Court Decree in the event that the appeal is unsuccessful. That the Applicant be required to deposit the decretal sum and costs in the court, and/or provide adequate security for the due performance of the decree if this application is granted.

In rejoinder, the Applicant contended in his affidavit that there is nothing that prohibits him from applying for stay of execution after the execution process has kick-started and that it is not true that he is selling the trees as alleged. That he will suffer substantial loss since he grazes on the suit land has pine trees worth Ugx. 100,000,000/= and his family derives livelihood on the same land.

Both Parties filed written submissions.

Counsel for the Applicant cited the case of *Lawrence Musiitwa Kyazze versus Eunice Busingye CA No. 18 of 1990* where the court stated conditions for the application for stay of execution were stated that;

1. Substantial loss may result to the applicant unless the order is made
2. The application has been made without unreasonable delay
3. The applicant has given security for due performance of the decree or order as may ultimately be binding upon him

Counsel submitted that the Applicant and his family will be stripped of means of livelihood since the suit premises are his place of business. Relying on the case of *John Baptist Kawaga Vs Namyalo Kevina & Semakula Laurence MA No. 12 of 2017*, counsel submitted that the respondent did not contradict the evidence of the applicant that the suit premises are his place of business and as such substantial loss was proved.

It was also counsel's submission that this being a land matter, it is proper that the question of ownership be investigated on appeal and if the execution is allowed and the respondent's appeal succeeds, he will not be in position to recover damages yet the respondent will have gained from possession of the suit land which would be unfair and occasion loss to the applicant. Further, that the application was filed within three months of preferring the appeal hence it was brought without unreasonable delay. Counsel further relied on the case of *John Baptist Kawaga Vs Namyalo Kevina & Another MA No. 12 of 2017* where it was stated that security for due performance is not a pre-condition for the grant of an order for stay of execution, and submitted that the Applicant has shown that he has filed an appeal which shows that he has no intention of delaying the matter. That the order for security of due performance should be issued only where it is indeed necessary.

In response, Counsel for the Respondent argued that the applicant has not shown how, by payment of damages and costs at this stage, he shall suffer the alleged substantial loss. Counsel cited the case of *Mohan Musisi Kiwanuka Vs Aisha Chand SCCA No. 14 of 2003* where the court held that no prejudice would be suffered if it can be atoned by the award of damages. Counsel invited this court to hold the applicant to pay security for costs as he undertook in his affidavit. Counsel prayed for the court to find that the applicant has not satisfied the requirements to justify the grant of this application and dismiss the application with costs.

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: -

- d) there is serious or eminent threat of execution of the decree or order if the application is not granted, the appeal would be rendered nugatory;
- e) that the appeal is not frivolous and has a likelihood of success;
- f) that refusal to grant the stay would inflict more hardship than it would avoid.

Proof of substantial loss

The Applicant's contends that if the application is not granted, the Respondent will proceed to execute the judgment and decree of this court thereby evicting the Applicant and denying him his source of livelihood.

It is the Respondent's evidence that she has indeed commenced execution proceedings and intends to enjoy the fruits of her judgment.

Counsel for the Respondent argued that the Applicant did not prove what loss he will suffer that cannot be atoned by damages since the subject matter for the suit is land that will still be available after the intended appeal is concluded.

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).

It is not in dispute that the Applicant has pine trees on the suit land. An eviction order was granted by this court and therefore, if the Respondent is to proceed and execute her judgment and decree, the Applicant would be evicted from the suit land. If the Applicant is evicted and his appeal is ultimately successful, he would be inconvenienced and the change in status quo would occasion him substantial loss.

This condition has therefore been proved by the Applicant.

The Applicant filed his notice of appeal three days following the delivery of judgment in Civil Suit No. 051 of 2014. The notice to show cause why execution should not issue was issued on the 4th of February 2021. This application was filed on the 2nd day of March 2021. The time difference from when the notice of appeal was filed, when the notice to show cause was issued and when this application was filed are reasonable and do not amount to undue delay on the Applicant's part.

As to whether the appeal has a likelihood of success, the Applicant seeks to challenge the whole decision of this court and contends that the appeal will be rendered nugatory if this application is not granted. To determine when the appeal has a likelihood of success, this court does not need to inquire into the substantial aspects of the appeal but rather from the face of the appeal/memorandum of appeal, the appeal should raise arguable grounds.

Security for due performance

Counsel for the Applicants cited the cases of *John Baptist Kawanga Vs Namyalo MA No. 12 of 2017* and *Margarette 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 decretal sum and costs, and/or adequate 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 the 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 because the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals. (*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*),

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 instant case commenced in 2014 and over five years later, judgment was awarded for the final settlement of the dispute but the Applicant seeks to continue prosecuting the dispute on appeal. The Applicant is in possession and if the appeal is not successful, the Respondent will have been inconvenienced and prevented from enjoying the fruits of her judgment.

Therefore, I find that this case is one where security for due performance should be given to protect the Respond as judgment creditor since the Applicant is in possession of the suit land and continues to benefit from it.

Having proved the conditions for the grant of this application, the application is hereby allowed on the following orders;

1. Execution in Civil Suit No. 51 of 2014 is hereby stayed on condition that the Applicant deposits in court a bank guarantee in the sum of Ugx. 100,000,000/= made to the Registrar High Court of Uganda, as security for due performance within fourteen days of this order;
2. The Applicant shall deposit the Certificate of Title for the land comprised in Buddu Block 520 Plots 80 & 83 Masaka District with the Deputy Registrar at the High Court Circuit in Masaka;
3. Upon failure of the Applicant to meet the conditions stipulated in 1 and 2 above within the set timelines, execution shall issue;
4. Costs of the application shall abide the results of the appeal.

I so order.

Dated at Masaka this 5th day of October, 2021

Signed;



VICTORIA NAKINTU NKWANGA KATAMBA
JUDGE