

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT FORT PORTAL
MISCELLANEOUS APPLICATION NO. 74 OF 2022
(ARISING FROM CIVIL APPEAL NO.020 of 2021)
(ARISING FROM KJJO-00-CV-LD-NO.008 OF 2016)

1. ALICE KISOKE _____ APPLICANTS
2. KISEMBO EDSON

VERSUS

KATALIHWA RUHUNGA _____ RESPONDENT

BEFORE HON. JUSTICE VINCENT WAGONA

RULING

This application was brought under Sections 16(1) and 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Order 43 rule 22 (1) (b) and Order 52 Rules 1 and 3 of the Civil Procedure Rules SI 71-1), seeking orders that:

- a. The partial execution in **KJJO-00-CV-LD-NO.008 OF 2016** to wit, vacant possession, be set aside for being unlawful;
- b. Further execution in **KJJO-00-CV-LD-NO.008 OF 2016** be stayed pending the hearing and determination of **High Court Civil Appeal No. 020 of 2021**.
- c. Costs of this Application be provided for.

The grounds of the application are set out in the Notice of Motion, particularized in the supporting affidavit of the 1st applicant, and were highlighted in the written and



oral submissions of Counsel Luleti who appeared for the applicants. The grounds are: That the Applicants were sued by the Respondent vide **KJJO-00-CV-LD-NO.008 OF 2016** which matter was heard and determined in the Respondent's favour. That the Applicants being dissatisfied with the Judgment and orders arising from the aforementioned suit appealed against the same in High Court of Uganda at Fort Portal vide High Court Civil Appeal No.020 of 2021 which appeal is pending determination. That the Respondent subsequently applied for execution of the decree in **KJJO-00-CV-LD-NO.008 OF 2016** which was granted. That as a result, the Applicants were arrested in execution. That subsequently the Magistrates Court issued a warrant of eviction without giving the Applicants notice as required by law yet they were in occupancy of the same. That the Magistrates Court subsequently ruled to have the eviction to occur by 28th July 2022.

Submissions of the applicant:

1. Whether the Applicants satisfies the necessary grounds for grant of stay of execution:

Counsel cited Order 43 r. 4(3) of the Civil Procedure Rules that provides for the conditions under which Court may grant an application for stay of execution and as recited *Lawrence Musiitwa Kvasze vs Eunice Busingye, SC Civil Application No. 18 of 1990* that "Parties asking for a stay" should meet conditions like; (1) That substantial loss may result to the applicant unless the order is made. (2) That the application has been made without unreasonable delay. That in this case, there is a high likelihood of a substantial loss as the Applicants are likely to suffer if stay of execution is not granted by this Honorable Court because the judgment creditor will not only seek to keep the Applicants in a civil prison but their appeal in the High Court will

have been rendered nugatory. Furthermore, that their properties and home are in danger of being lost if this application is not granted since the judgment creditor is availed with more avenues for execution of the decree. Counsel cited *Tropical Commodities Supplies Ltd & 2 others v International Credit Bank Ltd (jn Liquidation) [2004/2 EA 337*, where Ogoola J held that the phrase substantial loss doesn't represent any particular amount or size, it cannot be qualified by any particular mathematical formula.

2. The civil appeal has a likelihood or probability of success:

It was submitted that there was cogent evidence tendered that should have led the trial magistrate to find that in favour of the applicants. That as per *Gapco Uganda Ltd v Kaweesa & Anor (MA No.259 of 2013* the claim is not frivolous or vexatious and that there is a serious question to be tried.

3. The application was made without unreasonable delay by the Applicants.

Counsel cited *Sewankambo Dickson v Ziwa Abby HCMCA No.0178 of 2005* court relied on *Wagar Singh v Runda Coffee Estates Ltd 11966[EA 263* where sir Clement De Lestang, Ag. V.P stated: '*...it is only fair that an intended appellant who has filed a notice of appeal should be able to apply for a stay of execution...as soon as possible and not have to wait until he has lodged his appeal to do so. Owing to the long delay in obtaining the proceedings of the High Court it may be many months before he could lodge his appeal. In the meantime, the execution of the decision of the court below could cause him irreparable loss.*'

Evidence of the respondent:

The applicants and the respondent never attended court. The lawyer for the respondent did not attend court and their submissions were not on file by the time of writing this ruling. The respondent in his affidavit in paragraphs 5 and 6 stated that:

That after the said land was decreed to me, I applied for execution of the orders of the Trial Court against Alice Rusoke, Kisembo Edson and Baguma Yolam by way of evicting them from the Suitland and by way of arrest and detention to civil prison to recover the decree sum of shs. 12,000,000/=.

That the orders of the Trial Court I sought to execute under the modes of execution stated above are fully executed, the 2nd applicant is now in civil prison, the 1st applicant was released from prison because of her old age, I am now in full possession of my land, the applicants were arrested and detained in civil prison and I have been informed by my advocate disclosed herein above whose advice I believe to be true that there is no pending execution before any court that the applicants intend to stay.

RESOLUTION BY COURT

There is a ruling on record in Misc. Appl. No. 05 of 2022 (Arising from Kyenjojo -21-CV-CS-LD-NO. 008 OF 2016) by His Worship Babu Waiswa, Magistrate Grade One where the applicants had sought orders that:



- a) An order for stay of execution of a decree in KJJO 008-CV-LD-NO.008 OF 2016 be issued pending the hearing and determination of High Court civil Appeal No. 20 of 2022.

The application was dismissed by a ruling of **20/6/2022** on the grounds that: Court had the benefit of visiting the locus after filing of the application and indeed observed that the applicants had gardens on some parts of the suit land while the respondent had already taken possession of the other parts not cultivated by the applicants. It was also observed that the respondent had served the applicants and squatters on the same land with warrant to give vacant possession/eviction notice dated 28th April 2022. Save for the applicants, other persons who had trespassed on the land had vacated.

On the 10th of June 2022 during the locus visit, it was observed that the applicants had gardens of maize, beans and cassava which would be ready for harvest before the eviction date of 28th July 2022 and could safely vacate without incurring any anticipated costs.

A notice to show cause why execution should not issue dated 29th March 2022 was issued and served and upon their appearance on 28th April 2022 and upon their failure to show cause why execution should not issue upon them, an eviction order was issued against them and the applicants were committed to civil prison in execution. Misc. Appl. No. 05 of 2022 was filed after execution had already taken place by way of arrest and committal to civil prison of the applicants. The 1st applicant was discharged from prison on health grounds while the 2nd applicant is still in civil prison.



When court visited locus and on information furnished by the parties in the presence of their counsel and the LC1 chairperson of the area, it was observed that other than the applicants, other persons who had trespassed on the land had vacated upon receiving the warrant to give vacant possession/eviction order. Further, it was observed that much as the applicants still had claims over the suit land, they had in effect stopped attending to their gardens on the suit land.

The above were some of the grounds upon which the application brought in the Magistrates Court was dismissed. The applicants have now come before this court seeking orders that:

- a. The partial execution in **KJJO-00-CV-LD-NO.008 OF 2016** to wit, vacant possession, be set aside for being unlawful;
- b. Further execution in **KJJO-00-CV-LD-NO.008 OF 2016** be stayed pending the hearing and determination of **High Court Civil Appeal No. 020 of 2021**.

The affidavit of the 1st applicant states in paragraphs 6 to 9 as follows:

That prior to the determination of the aforementioned application, the Magistrate had issued warrant to give vacant possession and or eviction order to the bailiff, Mr. Kasuka Godfrey without giving me adequate notice and the bailiff filed a false report that he had concluded execution and that I had voluntarily left the suit land which was not true given that I was still in possession of the suit land and this was in an effort of trying to render the aforementioned application nugatory whereas it was not. A copy of the report from the bailiff is attached hereto and marked "C".



That I am informed by our lawyers, M/s Mugabe-Luleti & Co. Advocates which information I verily believe to be true, that I was entitled to a 90 (ninety) days notice prior to issuing the warrant for any eviction which was not given to me. A copy of the report from the bailiff is attached hereto and marked "D".

That the magistrate has ordered out of my land by 28th July 2022, yet I still have an appeal pending before this Honourable Court vide High Court Civil Appeal No.020 of 2021.

That it is in the interest of justice that the 2ND Applicant and I be granted an order for setting aside execution and staying any further execution since failure of which would render our Appeal filed in High Court nugatory and I may lose my land as I am aware that the Respondent desires to sell yet I derive my livelihood from the same as I cultivate therein.

The above evidence is unhelpful as it does not establish whether or not the applicants are still on the land or in possession. The 1st applicant in paragraph 9 prays for an order setting aside execution, implying that execution has already taken place as contended by the respondent. At the same time, the 1st applicant seeks a stay of any further execution, without stating the extent of execution that has already taken place or what is remaining of the execution process.

Furthermore, the 1st applicant in paragraph 11 states that execution remains unconcluded because the decree of the Magistrates Court has not been complied with, without stating in what way the decree has not been complied with.

Furthermore, the 1st applicant states that there are still more modes of execution available to ensure compliance of the decree, without stating what more modes of execution still remain.

The applicants appear to question the execution process, which complaint can be taken to the executing court, and they fail to controvert the position of the respondent that the execution process is already concluded. I am therefore not satisfied that the application should be granted. The application is hereby dismissed and I make no order as to costs.

Dated at High Court Fort portal this 11th day of August 2022.



Vincent Wagana

High Court Judge