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The Republic of Uganda

High Court of Uganda at Soroti

High Court Miscellaneous Application No. Case 0160 of 2022

(Arising out of EMA No. 0027 of 2022)

(Arising out of High Court Civil Appeal No. 0076 of 2017)

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(All arising from Civil Suit No. 0042 of 2013)

Ejulu Martin Applicant

Versus

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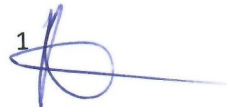
Itobu Margret Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

Ruling

1. Background:

20 - This application is brought by chamber summons under section 98 of the Civil Procedure Act and Order 22 rule 26 and 89 (1) of the Civil Procedure Rules for orders that stay of execution doth issue against the respondent and or her agents from executing the decree of the High Court Civil Appeal No. 0076 of 2017 until final

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determination of the intended appeal by the applicant and costs of the application be provided for.

2. Grounds:

The grounds of this application as set out in the application and supporting affidavit briefly are that the applicant has filed a notice of appeal and a memorandum of
10 appeal against the decrees and orders made in CA 076/2017 and the intended appeal has a high probability of success. The applicant will suffer irreparable loss if an order of stay of execution is not granted and the respondent proceeds to execute the decree. That the applicant's appeal has not yet been fixed for hearing and the
15 determination of the appeal is likely to delay due to busy schedule of the Court of Appeal. The respondent has already applied to execute the decree against the applicant and this execution will not only render the applicants intended appeal nugatory but will also deny the applicant the right of appeal.

In reply, the respondent in her affidavit stated that the applicant's affidavit is full of
20 falsehoods and misrepresentations intended to mislead and waste this honorable court. That the intended appeal has no likelihood of success since it based on frivolous grounds and the same is intended to delay the whole execution process. The application is premature as she has not commenced any execution proceedings against the applicant and the allegations that the applicant shall suffer irreparable loss is merely speculative, unfounded with no evidence and legal basis. That the
25 applicant has not shown sufficient cause to be granted an order of stay of execution and the entire application does not satisfy conditions for grant of an order for stay of execution.

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3. Determination.

There is no specific provision in the Civil Procedure Rules regarding stay of execution of a decree where an appeal lies to the Court of Appeal from the High Court, and this an area in which court exercises its inherent powers.

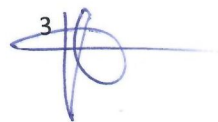
10 **Section 98 of the Civil Procedure Act** gives the High Court inherent powers to take decisions which are pertinent to the ends of justice; and an order for stay of execution is such one (see the case of *Singh v Runda Coffee Estates Ltd [1966] EA*).

The general principle is that where an unsuccessful party is exercising their unrestricted right to appeal, it is the duty of the Court to make such order for staying of proceedings in the judgment appealed from as will prevent the appeal from being
15 rendered nugatory. In *Lawrence Musiitwa Kyazze Vs. Eunice Busingye SCCA NO. 18 of 1990 (1992) IV KALR 55*, it was held that, an application for stay of execution pending appeal is designed to preserve the subject matter in dispute so that the right of the appellant who is exercising his/her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

20 The conditions that the Court should consider before allowing an application to stay execution are given in Order 43 rule 4(3) and espoused in the case of *Lawrence Musiitwa Kyazze Vs Eunice Businge, Supreme Court Civil Application No 18 of 1990*, but more pronounced in the Supreme Court case of *Hon Theodore Ssekikubo and Ors Vs The Attorney General and Ors Constitutional Application No 03 of 2014* and these
25 include:

- a. The applicant must show that he lodged a notice of appeal.

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- b. That substantial loss may result to the applicant unless the stay of execution is granted.
- c. That the application has been made without unreasonable delay.
- d. That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

10 With regard to the first condition, under the paragraph 4 of his affidavit in support that he filed an appeal and the same is pending hearing. He attached a copy of his memorandum of appeal to the application. The respondent does not dispute the existence of the appeal. This condition has been met.

As to whether the applicant will suffer substantial loss, the applicant stated under
15 paragraph 9 of his affidavit that he will suffer irreparable loss if the order of stay of execution is not granted. Counsel for the applicant submitted that allowing execution to proceed before the hearing and determination of the case amounts to substantial loss. That the application for execution made by the respondent and the amount that is subjected to EMA No. 27/2022 is a huge sum and the applicant shall
20 suffer substantial loss.

The respondent in her affidavit in reply under paragraph 7 stated that the allegations of irreparable loss are merely speculative and unfounded with no evidence.

In *Tropical Commodities Supplies Ltd & 2 others v International Credit Bank Ltd (In Liquidation)* [2004] 2 EA 331, Ogoola J (as he then was) held that

25 ***“The phrase substantial loss does not represent any particular amount or size; it cannot be qualified by any particular mathematical formula.***

It refers to any loss great or small: of real worth or value as distinguished from a loss that is merely nominal".

In the present case, the applicant bases his claim of substantial loss on the application for execution filed by the respondent. This application vide EMA 0027 of 2022, indicates that the respondent seeks to execute the decree by arresting and
10 detaining the applicant in civil prison, it also indicates that the amount of costs to be executed is Ugshs. 45,944,900/=. A notice to show cause why execution should not ensue was further served on the applicant and it's at this stage that the application for execution is.

Notice to show cause against execution in certain cases is provided for under **Order**
15 **22 rule 19** and it briefly provides that *where an application for execution is made more than one year after the date of the decree or against the legal representative of a party to the decree, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him or her to show cause, on a date to be fixed, why the decree should not be executed against him or her.*

20 Further **Order 22 rule 20** provides for the procedure after issue of notice thus;

(1) Where the person to whom notice is issued under rule 19 of this Order does not appear or does not show cause to the satisfaction of the court why the decree should not be executed, the court shall order the decree to be executed.

(2) Where the person offers any objection to the execution of the decree, the court
25 *shall consider the objection and make such order as it thinks fit.*

Basing on the above I find that this application is premature before this court, the applicant must first show cause why execution should not ensue, thereafter if there



is any objection it will considered and an order made. It's at this point that the applicant may apply for stay of execution if his objections are not considered.

I thus find that this condition has not been met especially since this application is premature before this court.

As to whether the application has been made without unreasonable delay, I find that
10 this condition has been satisfied given that the notice to show cause was served on the 29th of July 2022 and this was filed on the 11th of November 2022.

As whether there is a likelihood of success in the applicant's pending appeal,

in *GAPCO Uganda Ltd v Kaweesa & Anor (MA No. 259 of 2013) [2013] UGHCLD*
47 court defined likelihood of success of a case to be one that

15 ***"The Court is satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried."***

In the applicant's affidavit under paragraph 8 he states that, the intended appeal has a very high likelihood of success. Counsel made no submissions on this ground.

Counsel for the respondent submitted that the appeal does not have a high
20 likelihood of success as the judgment appealed from found that Ali Nandi from whom the applicant claimed his father (Onongo Kasimiri) bought the suit land was a Kenyan without a right to own land in freehold tenure and to sell the same. The Appellate Judge relied on the law applicable at the time the transaction took place i.e. 1965 that is the *Land Transfer Act (Cap 202)* where under **section 2** no non-African
25 or any person acting as his agent shall without the consent in writing by the minister occupy or enter into possession of any land of which an African is a registered

proprietor, or make any contract to purchase or take on lease or accept a gift inter-vivos or a bequest of any such land or interest therein other than security of money.

The appellate judge further found that the term African as defined in ***Kawalya Kaggwa vs Register of Titles [1974] E.A 48*** means a member of a Ugandan indigenous tribe. The appellate judge after re-evaluating the evidence found that the applicant
10 did not acquire any legal title since the suit land has been property of Ali Nandi and legally speaking the suit land has never formed part of the estate of Onongo Kasimiri.

From the above, I would find that the applicant has not made a case that his appeal has any likelihood of success for his claim of acquisition of the suit land as a beneficiary was found to be illegal and an illegality once brought to the attention of
15 a court of law cannot be condoned as was held in ***Makula International Ltd Vs His Eminence Cardinal Nsubuga & Another [1982] HCB 11***.

As to whether security has been given by the applicant for the due performance of the decree. Security must be given for the due performance of the decree. Courts have however held that each case must be looked at according to its merits. The
20 requirement for payment of security for costs is to ensure that a losing party does not intentionally delay execution while hiding under unnecessary applications.

The applicant made no mention of security for due performance of the decree in his affidavit, however counsel submitted that the principle to provide security for due performance of a decree is not mandatory. Counsel relied on ***John Baptista Kawanga***
25 ***vs Namyalo Kevina and Anor MA No. 12/2017*** where it was held that the decision whether to order for security for due performance must be made in consonance with the probability of success.



Basing on the above counsel submitted that in the circumstances of this case where the applicant has an appeal with a high probability of success and the fact that the respondent is occupying the contested property the applicant need not provide security for due performance however in alternative if he is ordered to pay it, he is willing to deposit the same into court's account.

10 Counsel for the respondent submitted that the appeal does not have a high probability of success and prayed that the applicant is ordered to deposit a security for due performance to guard the respondent from defending a frivolous appeal.

Accordingly, this application for stay of execution though succeeding in some grounds fails especially since it is premature and no likelihood of success of the
15 appeal has been shown by the applicant.

4. Orders:

Consequently, this application is found to lack merit and is dismissed accordingly with costs to the respondent.

I so order accordingly.



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Hon. Justice Dr Henry Peter Adonyo

Judge

26th April 2023