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The Republic of Uganda

High Court of Uganda Holden at Soroti

High Court Miscellaneous Application No. Case 0180 of 2022

[Arising from High Court Civil Appeal No. 065 of 2022]

Obwatan John Steven Applicant

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Versus

1. Wakholi James

2. Watojo

3. Wanjofu

4. Naula

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5. Nansige

6. Sentiba

7. Asio Betty

8. Waiswa

..... Respondents

Before: Hon. Justice Dr Henry Peter Adonyo

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Ruling.

1. Background:

25 This application is brought by notice of motion under section 98 of the Civil Procedure Act, Order 22 rule 23, Order 52 rules 1, 2 and 3 of the Civil Procedure Rules, sections 14, 33, 38 and 39 Judicature Act for orders that stay of execution be issued staying the decree in Civil Suit No. 006 of 2018 of the Magistrate's Court Grade one Bukedea pending the hearing of the main appeal, that the status quo



5 before the delivery of judgement in Civil Suit No. 006 of 2018 be maintained until the final disposal of the appeal and the costs of this application be provided for.

2. Grounds:

The grounds of this application as set out in the application and in the affidavit in support sworn by the applicant briefly are that the applicant was the unsuccessful
10 party in Civil Suit No. 006 of 2018 and filed CA 065/2022 in this court which has a high chance of success. That this application has been made without unreasonable delay and in good faith. There is eminent threat of execution as the respondents from 07th December 2022 have continued to throng the suit land doing several activities. That the applicant is likely to suffer irreparable damage if this application
15 is not granted.

Okolong Sam in a supplementary affidavit in support of the application stated that the applicant is in possession of the suit land and made averments regarding the 7th of December 2022 when the respondents descended on the applicant's garden and uprooted his cassava.

20 In reply, the 4th respondent stated that the respondents were on the suit land prior to the institution of the civil suit in Bukedea Court and have not forcefully entered the suit land. That there is no eminent threat of execution as alleged as they have never at any time applied for stay of execution. That if this application is granted the family members shall starve as the suit land is their only source of livelihood.

25 In rejoinder the applicant stated that the affidavit in reply was filed out of time and should be struck out. He further stated that the respondents have never been on the suit land and were enjoined from doing anything on the suit land at trial and do not have any crops thereon rather the pictures attached to the affidavit in rely are

5 his own crops. That it is a fact that the respondents stole his mature cassava on 7th
December 2022 and on 14th December he got the 3rd, 4th and 8th respondent
arrested vide SD Ref. No. 004/14/12/2022 of Aloet Police station in Bukedea. That
by the respondents not applying for stay of execution they are trying to illegally
achieve what they ought to achieve through lawful execution proceedings by
10 attempting to grab the suit land.

3. Position of the Law:

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 *Ujagar Singh v Runda Coffee Estates Ltd [1966]*
15 *1 EA 263*).

Order 43 of the Civil Procedure Rules provides for Stay by High Court. Rule 4 (1)(2) &
(3) provide that;

(1) An appeal to the High Court shall not operate as a stay of proceedings under a
decree or order appealed from except so far as the High Court may order, nor shall
20 execution of a decree be stayed by reason only of an appeal having been preferred
from the decree; but the High Court may for sufficient cause order stay of execution
of the decree.

(2) Where an application is made for stay of execution of an appealable decree before
the expiration of the time allowed for appealing from the decree, the court which
25 passed the decree may on sufficient cause being shown order the execution to be
stayed.

5 (3) No order for stay of execution shall be made under sub rule (1) or (2) of this rule unless the court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

10 (c) that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.

An applicant seeking stay of execution must meet the conditions set out in **Order 43 rule 4 (3) of the Civil Procedure Rules**. The conditions were espoused in the case of *Lawrence Musiitwa Kyazze Vs Eunice Businge, Supreme Court Civil Application No*
15 *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 include:

- a. The applicant must show that he lodged a notice of appeal.
- b. That substantial loss may result to the applicant unless the stay of execution
20 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.

Arising from the above, I will now turn to proceed to consider if each of the
25 requirements have been complied with by the applicant.

5 4. Whether the applicant has lodged a notice of appeal:

Under paragraph 3 of the affidavit in support of the applicant he states that he has filed CA No. 065 of 2022 before this court. In his supplementary affidavit the applicant attached a copy of the memorandum of appeal filed in this court on the 12th December 2022. The respondent does not deny this fact.

10 While the applicant has not brought evidence of a notice of appeal I find that the memorandum is sufficient to prove existence of an appeal.

5. Whether there is a likelihood of success in the applicant's pending appeal:

The likelihood or probability of success of a case was defined in ***GAPCO Uganda Ltd v Kaweesa & Anor (MA No. 259 of 2013) [2013] UGHCLD 47*** 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 5, he states that, the intended appeal has a very high chances of succeeding, however apart from attaching a copy of the memorandum of appeal neither party made substantial submissions on this ground.

20 The said memorandum indicates 6 grounds of appeal primarily based on the trial magistrate's evaluation of the evidence before her and the resultant orders made. The grounds raise issues for determination and as such I find this ground has been proved.

6. Whether the applicant will suffer substantial loss:

25 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

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“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”.

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Counsel for the applicant submitted that the applicant has both young and mature crops on the suit land which the respondents were caught red-handed stealing. That the applicant and his family are likely to suffer famine and loss of food for sustenance is substantial loss which will cause injury to the applicant.

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Counsel for the respondents submitted that the applicant cannot suffer substantial loss since he had not been using the suit land as alleged but the respondents have been using the same.

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The applicant has belaboured to lead evidence on the destruction and looting of his gardens by the respondents. He attached pictures, gave a brief on how they attacked his garden and furthermore got the LC1 to give evidence in this regard in a supplementary affidavit. However, it is also clear that the respondents have not started the process of execution of a decree and the applicant admits this much in his affidavit in rejoinder.

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Counsel for the applicant stated that it is common ground that the respondents have not used the formal execution proceedings to execute the orders emanating from the judgment in Cs No.006.2018 and have employed illegal processes to access the suit land and this court should not condone such illegalities.

Execution of decrees essentially means the process of realization of what is contained a court Judgment. This process starts with obtaining a judgement,

5 extraction of a court decree and then finally an application for execution of the decree in any of the modes specified in Order 22 of the Civil Procedure Rules.

It is after the application for execution has been filed that one can seek stay of execution; an order of stay must therefore arise from an existing application for execution.

10 Substantial loss giving rise to stay of execution only arises where there is eminent threat of execution of the decree, which execution would change the *status quo* in such a manner that the appeal would be rendered nugatory if the execution is not stayed.

15 It is the position of the law that once an appeal is pending and there is a serious threat of execution before the hearing of the appeal, the court intervenes to serve the purpose of substantive justice.

See: *Hwang Sung Industries Ltd. vs. Tadjudin Hussein & others SCCA No. 79 of 2008.*

The general rule is that courts should not order a stay where there is no evidence of an application for execution of a decree.

20 See: *Baguma Paul t/a Panache Associates vs. Eng. Karuma Kagyina MA No. 460 of 2020 [2021] UGHC 27*

While it is true that a court should not condone illegality it should be also noted that the court is bound by the law and in an application for stay of execution there are specific parameters within which the court should confine itself. For a court to grant
25 an order of stay of execution the process of execution must as a matter of fact be ongoing.

5 The illegalities the applicant is being faced with at this level with no application for execution are best resolved by other means including the police and other local authorities.

Without an application for stay of execution on record, eminent threat of execution and substantial loss arising from execution have not been proved.

10 7. Whether the application has been made without unreasonable delay:

Counsel for the applicant submitted that the judgment in the lower court was delivered on the 6th of December 2022, the applicant filed his Memorandum of appeal on the 12th of December 2022 and this application was filed on the 15th December 2022. I find that it was filed without unreasonable delay.

15 8. Whether security has been given by the applicant for the due performance of the decree:

The applicant in his rejoinder under paragraph 21 states that he is committed to deposit any reasonable costs this court will deem fit. That he is unable to name the amount of money as the costs in the lower court have not been taxed.

20 Counsel for the respondent stated that the applicant has not paid security for due performance and even if he did the application for stay cannot stand because there is no eminent treat of execution.

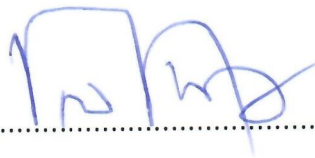
I see no need to determine whether or not the applicant should be directed to pay security for due performance of the decree as the essence of an application for stay
25 of execution has not been met as discussed above.

5 9. Orders:

Consequently, this application is found to lack merit as it is not based on an existing
• application for execution which has been filed such that an order of stay would and
be issue.

10 Accordingly, this application is dismissed with costs to abide the outcome of the
pending appeal.

I so order.

A handwritten signature in blue ink, consisting of stylized initials and a surname, positioned above a dotted line.

Hon. Justice Dr Henry Peter Adonyo

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31st May 2023

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