

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISC APPLICATION NO. 102 OF 2021

Arising From High Court Civil Appeal No. 19 of 2011

1. MUGISA FORTUNATE

2. KEFA MUFUMU ::: APPLICANT

VERSUS

1. REV. G.W. RUTABALENGYA

2. ESTHER RUTABALENGYA::: RESPONDENTS

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO

RULING

Introduction,

The applicant filed this application by Notice of Motion under Section 98 of the Civil Procedure Act, Order 22 rule 23 & 26, Order 52 Rules 1&3 of the Civil Procedure Rules (CPR) for orders that;

- a) That the execution of the decree in High Court Civil Appeal No. 19 of 2011 be stayed pending the determination of the appeal against the same in the Court of Appeal.
- b) That the costs of this application be in the cause.

The grounds of the application are reflected in the affidavit of Kefa Mufumu, the 2nd applicant, and the gist of which is that;

- i. That the applicants are dissatisfied with the decree of this court in High Court Civil Appeal No. 19 of 2011 delivered on 27th October 2021, has filed a notice of appeal dated 9th November 2021 and requested for a record of proceedings
- ii. Among the orders contained in the decree is one for vacant possession. That if the stay is not granted, the applicants will suffer substantial

loss as the appellants have for their life time been on the subject land and derive their food and income therefrom.

- iii. That execution of the decree will render the applicants' appeal nugatory

The affidavit in reply was deposed by Olimi David Rutabalengya. He opposed the application stating that ever since the judgment was delivered by this court, the applicants have never filed an appeal in the court of appeal but just want to delay and frustrate the respondents. He noted that the record of appeal was certified by the registrar of this court to enable the applicants file their appeal on 6th June 2022 but the applicants have never bothered to file their memorandum of appeal. As such, their time to appeal is outrun and they have not filed any application for leave to appeal out of time.

Representation and hearing.

The applicants are represented by Mugisa, Nyamutale & Co. Advocates while the respondents are represented by Mr. Mugisa Rwakatooke of Ngamije Law Consultants & Advocates. The hearing proceeded by way of written submissions. Both counsel have filed submissions that have been considered in this ruling.

Preliminary matters

In his affidavit in reply, the respondents' administrator stated that there was late service of the application on him. He stated that the application was filed on 2nd December 2021, endorsed by court on 7th December 2021 but was not served on the respondents until May 2022 beyond the required twenty one days. No submissions were made on this objection and no rejoinder was filed by the applicants to oppose the same.

I note that the requirement for timelines within which to serve summons is to guide the speedy administration of justice. The requirement to serve

summons within 21 days under **Order 5 Rule 1(2)** of the Civil Procedure Rules is mandatory. An applicant who does not comply with this requirement does not entirely lose the right to serve the summons. He may apply to the court to extend the time under that rule within a period of 15 days from the date of expiry of the summons. The applicant is required to furnish sufficient reason for his failure to serve the summons within the stipulated time.

However, it has been recorded in several decisions including the case of ***Rashida Abdul Karim & Another Vs Suleiman Adrisi HCMA No. 009 of 2017*** that in a deserving case, the court may rightly exercise its discretion to overlook the failure to comply with the rules of procedure, upon such conditions as it may deem fit to guard against abuse of its process and to avoid a multiplicity of proceedings. The controversy between the applicants and the respondents has been dragging on since 2006 in land tribunals and magistrates' courts and now the applicant has filed a notice of appeal. In addition, apart from stating that there was late service, no documentary evidence is adduced to advance the objection. Also, the effect of dismissing the present application on such a point would leave the applicants with a right to file a fresh application and serve summons within the time allowed by law. For these reasons and in the greater interest of justice, I will ignore the complaint and proceed to consider the application on its merits.

The law.

The general principle is that where an unsuccessful party is exercising their unrestricted right of appeal, it is the duty of the court to make such order for staying proceedings in the judgment appealed from as this will prevent the appeal being rendered nugatory. (See ***Wilson Vs Church (1879) volume 12Ch d 454*** followed in ***Global Capital Save 2004 Ltd and Anor VS Alice Okiror & Anor HCMA No.485/2012***.)

The Supreme Court in ***Lawrence Musiitwa Kyazze Vs Eunice Busingye SCCA No.18 of 1990(1992) IV KALR 55*** noted that, an application on 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.

Much as there is no specific provision enabling the High court to grant a stay of execution of its decree pending appeal, the Supreme Court advised that such mandate is present through the inherent powers of Court, for example to preserve the Status quo pending an appeal.(Refer to ***Francis M Micah Vs Nuwa Walakira(1992-93) HCB88.***

Under **Order 43 rule 4 (3)** of the Civil Procedure Rules deals with stay of execution of the decree appealable to the High Court and a stay is allowed where sufficient cause is shown. The conditions that the court should consider before allowing an application to stay execution are given In Order 43 rule 4(3):

- 1) That substantial loss may result to the applicant unless the order is made.
- 2) That the application has been made without unreasonable delay and,
- 3) That security has been given by the applicant for due performance of the decree as may ultimately be binding upon him or her.

The Constitutional Court in her decision in ***Hon. Theodore Ssekikubo and others Vs Attorney General and Anor, Constitutional Application No. 06 of 2013***, added another that their appeal has a likelihood of success.

Furthermore, the Court of Appeal In ***Kyambogo University Vs Professor Isaiah Omolo Ndiege, CA No. 341 of 2013*** the Court of Appeal expanded the list to include;

- I. The applicant must prove that 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.
- II. That the application is not frivolous and has a likelihood of success.
- III. That refusal to grant the stay would inflict more hardship than it would avoid.

The rationale for these conditions is to maintain the status quo of the property that is at stake if the stay of execution is not granted, and to preserve the intended appeal and not to render it nugatory.

Counsel for the applicants submitted that the reason the applicants filed the notice of appeal and the present application is that the applicants have lived on the subject land for all their lives, have developed the same with agricultural developments from which they derive their food and income. He stated that if a stay is not granted, the applicants will suffer substantial loss.

Counsel for the respondents argues that the present application is only a delaying tactic employed by the applicants to frustrate the respondents and therefore an abuse of court process. He argued that it is now over a year since the judgment of the court was delivered but that the applicants have never filed their appeal in the Court of Appeal. He also states that the record of appeal which would have enabled the applicants file their appeal was certified by the registrar on this court on 6th June 2022 but the applicants have never taken out the same. As such, the applicants' time to appeal has expired and they have not filed any application for leave to appeal out of time. Counsel cited **Rule 83 of the Judicature (Court of Appeal) Rules** which provides for filing a memorandum of appeal within sixty days from the date of the notice of appeal.

It is my considered opinion that the conduct of the applicants in never filing their substantive appeal in the court of appeal when the record of proceedings has been available since June 2022, failing to serve the present application within the prescribed time, never attempting to fix the present application for hearing points to calculated foul play on their part.

I have carefully looked at the Court of Appeal rules cited by counsel for the respondent and I will reproduce them hereunder for ease of reference;

83. Institution of appeals.

(1) Subject to rule 113 of these Rules, an appeal shall be instituted in the court by lodging in the registry, within sixty days after the date when the notice of appeal was lodged—

(a) a memorandum of appeal, in six copies, or as the registrar shall direct;

(b) The record of appeal, in six copies, or as the registrar shall direct;

(c) The prescribed fee; and

(d) Security for the costs of the appeal.

(2) Where an application for a copy of the proceedings in the High Court has been made within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the High Court as having been required for the preparation and delivery to the appellant of that copy.

84. Effect of default in instituting appeal.

If a party who has lodged a notice of appeal fails to institute an appeal within the prescribed time—

(a) He or she shall be taken to have withdrawn his or her notice of appeal and shall, unless the court otherwise orders, be liable to pay the costs

arising from it of any persons on whom the notice of appeal was served; (Underlining for emphasis).

From the above rules and in the absence of any application by the applicants for leave to file the appeal out of time, would it be safe to say that the applicants have a pending appeal? Or a notice of appeal? With likelihood of success? May be not. The record of proceedings was certified by the registrar of the court on 6th June 2022 and was therefore available to the applicants to take out and file their substantive appeal but they have not done so to date. This delay is not satisfactorily explained. It my considered view that if the order for stay of execution is granted, it will be abused with delaying tactics of the applicants to frustrate the respondents.

In the premises, this application stands dismissed with costs to the respondents.

It is so ordered

Dated at Fort Portal this 28th day of February 2023



Vincent Emmy Mugabo

Judge.

Court: The Assistant Registrar shall deliver the Ruling to the parties.



Vincent Emmy Mugabo

Judge

28th February 2023.