

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
MISC. APPLICATION NO. 0102 OF 2022
(ARISING OUT OF CIVIL APPEAL NO. 0022 OF 2019)
(ARISING FROM CIVIL SUIT NO. 0022 OF 2007)

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1. JOSEPH BANURA KAJUNJUBE
2. JUSTUS BAGUMA KAJUNJUBE
3. JOHNSON KAMURASI KAJUNJUBE
- 10 4. JENNIFER BASEMERA KAJUNJUBE..... APPLICANTS

VERSUS

YOSAM KASIGWA..... RESPONDENT

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BEFORE: Hon. Justice Isah Serunkuma

RULING

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BACKGROUND

This application is brought by Notice of Motion under Section 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act, Cap 71 and Order 43 rule 4, Order 52 rules 1 and 2 of the Civil Procedure Rules S.I 71-1 for stay of execution pending an appeal seeking orders that;

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- a. An order to stay the decision or decree of the Honourable Justice Byaruhanga Jesse Ruyyema in Civil Appeal No. 0022 of 2019; Yosam Kasigwa v. Joseph Banura Kajunjube, Justus Baguma Kajunjube, Johnson Kamurasi Kajunjube and Jennifer Basemera Kajunjube.
- 30 b. Costs of the application be provided for.

The grounds of the application as set out in the Notice of Motion are;

1. The Applicants being wholly dissatisfied with the decision of Hon. Justice Byaruhanga Jesse Ruyema in Civil Appeal No. 0022 of 2019, filed a Notice of Appeal.
2. A Memorandum of Appeal is yet to be filed because the record of proceedings is yet to be
5 filed by Court, although the same was requested for.
3. The intended appeal raises serious questions of law and has a high likelihood of success, but shall be rendered nugatory if execution is not stayed in Civil Appeal No. 0022 of 2019.
4. The Applicants shall suffer substantial loss if the Application is not granted.
5. The Applicants have brought this Application without unreasonable delay.
- 10 6. The Applicants are prepared to deposit whichever sums this court deems just as security for due performance.
7. That it is in the interest of justice that this application is granted.

The Affidavit was sworn by Joseph Banura Kajunjube on behalf of all the Applicants. He stated that he was one of the Defendants in Civil Suit No. 0022 of 2007 which was determined in their favour
15 and the 1st Respondent in Civil Appeal No. 0022 of 2019, which was an appeal arising from the former.

He stated that the decision in Civil Appeal No. 0022 of 2019 was delivered on 19th June, 2022 in favour of the Respondent. The Applicants being dissatisfied with the decision in the Appeal, filed a notice of appeal with the intention of appealing to the Court of Appeal. The Applicants requested
20 for a record of proceedings from the High Court on 30th June, 2022 but the same is yet to be availed.

He contended that the intended appeal raises substantial questions of law that need to be determined by the Court of Appeal and that the appeal would be rendered nugatory if the execution of the decree in Civil Suit No. 0022 of 2019 is not stayed. Additionally, that the suit land
25 belonged to his family as a part of their share of the clan land and thus they would suffer substantial loss both as a family and clan in the event that the stay is not granted. He further contended that the Applicants were ready to pay security for due performance of the decree as may be determined by the Court and that the application was brought without undue delay.

In reply, the Respondent stated that he has lived on the suit land since his birth in 1948 to date and that the suit land belonged to his grandfather. He stated that he is the only child of his late father and his aunt was childless. That he was shocked when in 2007, the Applicants sued him in the Chief Magistrate's court in Masindi claiming the ownership of the suit land. The decision at the
5 Chief Magistrate's court was determined in favour of the Applicants and he successfully appealed.

In respect to the application for stay of execution, the Respondent contended that he has not yet threatened to carry out execution and neither has he filed a bill of costs. That the activities he is carrying out on the land are the same ones he is still carrying out. He also contended he has already spent heavily on litigation and therefore, in the event that the stay of execution is granted, the
10 Applicants should deposit UGX. 100,000,000 as security for due performance of the decree. He also stated that he is worried about the Applicants becoming violent given that they have a history of taking matters into their own hands.

Representations.

The Applicants were represented by **M/s Kirunda & Wesige Advocates** while the Respondents was
15 represented by **M/s Tugume – Byensi & Co. Advocates**. The applicants filed submissions but the respondent did not.

Merits of the Application

The institution of an appeal does not operate as an automatic stay of execution and accordingly, where a party intends to maintain stay of execution pending determination of an appeal, the said
20 party ought to apply to court for grant of that order.

The requirements for stay of execution are set out in **Order 43 rule 4(1) of the Civil Procedure Rules SI 71-1** as espoused in the authority of **Lawrence Musiitwa Kyazze versus Eunice Businge; Supreme Court Civil Application No. 0013 of 1990** and **Honourable Theodore Ssekikubo & Ors; Constitutional Application No. 003 of 2014** and they are;

- 25 a. The Applicant shows that he lodged a Notice of Appeal.
- 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 security has been given for due performance of the decree by the applicant as ultimately may be binding upon him.

1. Whether the Applicant lodged a Notice of Appeal.

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As was held in **Gashumba Maniraguha versus Sam Nkudiye (Civil Application No.024 of 2015)[2015]UGSC 7**, the paramount duty of the court to which an application for stay of execution pending an appeal is made is to see to it that the appeal, if successful, is not rendered nugatory. Therefore, in order for one to file an application for a stay of execution pending appeal, there should be an appeal already filed.

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It is the applicants' submitted that this application is to ensure that the appeal which they have filed is not rendered nugatory. On record is a Notice of Appeal dated 24th June, 2022. However, the applicants submitted that they have not yet filed a memorandum of appeal because they have not received a record of proceedings from the lower court, despite having applied for the same on 30th June, 2022. In the circumstances, they prayed that their intention to file an appeal be inferred from the filing of a Notice of Appeal.

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It was held in the case of **Equity Bank (U) Limited versus Nicholas Were; HCMA No. 0604/2013** that a Notice of Appeal is sufficient expression of an intention to file an appeal and that such an action is sufficient to found basis of stay of execution. It is my view that this is one of the instances where the Notice of Appeal is admitted as proof of the intention given the failure to file a Memorandum of Appeal is due to the delay in releasing the Record of Proceedings by court.

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Additionally, it is advised that while considering the existence of an appeal, the concerned court should also consider the likelihood of the success of the appeal albeit this is not the point at which the appeal is being determined. (**Gashumba Maniraguha versus Sam Nkudiye (supra)**). The court has reviewed the draft Memorandum of Appeal that is on record and established that it raises substantial questions of law in respect to the determination of the interest in land and the doctrine

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of prescription. In the circumstances, it is my considered view that there are substantial issues to be determined at appeal.

I find that the Applicants have satisfied the 1st condition for stay of execution.

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2. That substantial loss may result to the Applicant unless the stay of execution is granted.

Counsel for the applicants submitted that the applicants are likely to suffer substantial loss given that the suit land is their family land and have occupied the same since 1979 when they inherited
10 it from their father. They also submitted that given the sentimental ties to the land, financial compensation would not be sufficient compensation if they are evicted from the property and it is sold off as they allege, is being done by the Respondent.

However, in his affidavit in reply, the respondent had pleaded that he has not taken any steps to
15 execute and accordingly, there is no substantial loss to be suffered in the absence of an execution.

It is trite that filing an appeal shall not act an automatic stay of execution. Therefore, whereas the applicant has not yet executed, the fact that he has not commenced cannot stop him from beginning the execution process any moment from now on.

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Substantial loss is a question of fact and should be represented by an anticipated loss beyond the ordinary loss. In **Tanzania Cotton Marketing Board versus Cogecot Cotton SA (1995- 1999)**¹ E.A **312** as cited with approval in **Hoima Municipal Council versus Karamagi (Miscellaneous Application No. 0032 of 2021)[2022]**, Lubuva J.A defined substantial loss as follows,

25 *“The word substantial cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence”.*

Additionally, as has been quoted by the Applicants in their submissions, substantial loss was defined by Justice Ogoola in **Tropical Commodities Supplies Limited & 2 Ors versus International Credit Bank (In Liquidation) 2004**, as herein;

“Substantial loss does not represent any particular amount or size. It cannot be quantified by any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal.”

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Further in the authority of **China Henan International Cooperation Group Co. Limited versus Justus Kyabahwa; Miscellaneous Application No. 0721 of 2020**, it was held that substantial loss is something of real worth and importance, not imaginary or illusive. Something worthwhile as distinguished from something without value or merely nominal.

10 In the circumstances, counsel for the applicants submitted that there is a threat of selling off their family land to which they have sentimental attachment and presented evidence of the intended sale in form of an alleged advert for sale of the suit land together with the receipts thereto. This information has not been disputed by the respondent in his affidavit in reply.

In the event that the suit land belongs to the applicants and it is sold as is being alleged, they shall
15 suffer a substantial loss due to the sentiments attached to the land and the same cannot be cured by an award of damages. It is therefore better to maintain the status quo until the determination of the appeal.

3. That the Application has been made without unreasonable delay.

According to the Constitutional Court in the case of **Ayena Odongo versus Attorney General**
20 **(Constitutional Petition No. 0038 of 2017) [2021] UGCC 30**, the issue of unreasonable delay is a question of fact. In another case of **Alexander Musherure versus David Bamuhiga; HCMA 0015 of 2004**, it was held that the application for stay of execution should be done at the earliest. Therefore, what amounts to unreasonable delay is dependent upon the circumstances in respect to each case.

25 The decision of the High Court was passed on 14th June, 2022 and the Applicants filed their application on 15th August, 2022, which was two months after the decision was made. The Applicants’ Counsel submitted that the two months’ delay was due to the fact that court vacation lasted until 15th August, 2022. The Respondent did not submit in respect to this matter.

It is my considered view that the application was filed without unreasonable delay given that it was filed within one week of the ending of the court vacation and within two months of the decision being made.

5 **4. That security has been given for due performance of the decree by the Applicant as ultimately may be binding upon him.**

10 It was contended by respondent in the affidavit in reply that he has heavily spent on litigation and in the event that court is to stay execution, the applicants should deposit UGX. 100,000,000/= for due performance of the costs arising from both the Magistrate's Court and the High Court. He further submitted that the applicants only intend to deny him the fruits of justice and it is for this reason that they are staying execution.

15 The applicants have submitted that they are ready to abide by any orders that this honorable court may issue regarding security for due performance of the decree. However, they submitted that the amount of UGX 100,000,000/= as was requested for by the respondent as security for costs is too high and curtails the ends of justice.

20 The demand and determination of security for costs is at the discretion of the court. The principle governing security for costs was set out in **Gianfranco Manenthi & Anor versus Africa Merchant Assurance Co. Ltd [2019] e KLR** as was cited with approval in **Hoima Municipal Council v. Karamagi Simon Misc. Application No. 0032 of 2021;**

25 *"The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security.... It is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails....."*

The objective of the legal provisions on the security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due

performance of the decree is not a matter of willingness by the applicant but for the court to determine.”

5 On the basis of the above principle, it is our opinion that the very purpose of security for costs is to ensure that the party in whose favour a judgment is given does not suffer prejudice by the stay of the execution. However, the money demanded for security for costs should also not amount to a deterrent of the right to appeal.

10 The respondent has informed court that he is in possession of the land currently. However, the court is cognisant of the fact that he is apprehensive about the fact that the litigation process has cost him a lot of money and is likely to cost him more. The subject matter in this suit is a piece of land and the costs thereto as was awarded in the Magistrate’s Court and on appeal. With consideration given to the subject matter of the suit, the court orders a deposit of security for due performance of the decree to amounting to UGX. 20,000,000/=.

15 In the circumstances of this case as set out above, we find that the applicants have satisfied the conditions for the grant of stay of execution. The application for stay of execution is granted subject to deposit of the security for due performance on account of the decree within the next 30 days. This must strictly be deposited on account of the Registrar, High Court. The costs shall
20 abide the outcome of the appeal.

It is so ordered.

Dated and delivered on this 31st day of August 2023.

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Isah Serunkuma

JUDGE