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The Republic of Uganda

High Court of Uganda at Soroti

High Court Miscellaneous Application No. Case 0154 of 2022

(Arising from High Court Civil Appeal No. 0010 of 2020)

(Arising from Katakwi Magistrates Court Civil Suit No. 14 of 2014)

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Onyait Gabriel ::: Applicant

Versus

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Okiror Patrick ::: Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

Ruling on Stay of Execution:

1. Background:

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This application is brought by notice of motion under section 98 of the Civil Procedure Act, Order 22 rule 26 of the Civil Procedure Rules and Order 52 rule 1 and 2 of the Civil Procedure Rules for orders that an order of stay of execution issues to stay the execution of the decree of His Lordship Hon. Justice Dr. Henry Peter Adonyo pending disposal of Civil Appeal No. 407 of 2022 that is now pending before the Court of Appeal for determination and costs of the application be provided for.

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5        2. Grounds:

The grounds of this application as set out in the application and supporting affidavit briefly are that there is a pending appeal, that is Court of Appeal Civil Appeal No. 407 of 2022 in the court of appeal challenging the judgment and orders of Civil Appeal No. 10 of 2020 which was delivered in the  
10        respondent's favour.

That if execution is not stayed the applicant's appeal before the Court of Appeal will be rendered nugatory for the appellant lives and derives sustenance from the suit land and will be rendered homeless and it is in the interest of justice that the status quo be maintained.

15        Furthermore, the respondent has commenced execution of the said judgment vide Taxation No. 84/2022.

In reply, the respondent in his affidavit stated that the application for stay of execution or being served with the record of appeal does not stop court from taxing the bill of costs.

20        That the appeal has no likelihood of success and this application is brought to delay the respondent from realizing his fruits of litigation. That being the successful party he is entitled to execute the order of court. That the applicant's stay on the land is illegal and he has continued erecting a new structure on the land despite the order of court. That in the interest of justice  
25        the applicant be ordered to deposit security of costs prior to granting this application.

5        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***).

15        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 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  
20        who is exercising his/her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

I, however, do agree and align myself with the Supreme Court decision in ***Francis M. Micah Vs. Nuwa Walakira [1992-93] HCB 88*** which is to the effect that there is no specific provision enabling the High Court to  
25        grant a stay of execution of its decree pending an appeal.

The Supreme Court advised, however, that such mandate is present through the inherent powers of Court, for example to preserve the status quo pending an appeal.

5 As to the conditions that a court should consider before allowing an application to stay execution, these are provided for in Order 43 rule 4(3) and more championed in the case of *Lawrence Musiitwa Kyazze Vs Eunice Busingye, Supreme Court Civil Application No 18 of 1990*, and more pronounced in *Hon Theodore Ssekikubo and Ors Vs The*  
10 *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 is granted.
- 15 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.

With regard to the first condition, under the paragraph 2 of his affidavit support that he is the appellant in Civil Appeal No. 407 of 2022 pending  
20 before the court of appeal.

He attached a copy of his memorandum of appeal filed in the court of appeal Registry on the 17<sup>th</sup> of October 2022. The applicant did not attach a notice of appeal. However, I do find that the memorandum of appeal sufficient to prove that an appeal has been lodged. This condition has thus been met.

25 As to whether the applicant will suffer substantial loss, the applicant stated under paragraph 5 of his affidavit that he lives and derives sustenance from the suit land which is likely to be destroyed and he will be rendered homeless.

5 The respondent admitted that the applicant lives and derives sustenance from the suit land, though he argues that the stay of the applicant on the suit land is illegal and he is continuing to erect new structures contrary to court orders.

10 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

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

15 *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, I find that there is no threat of execution of the judgment, decrees and orders of this court as there is no pending application for execution by the respondent.

20 While it is true that the applicant lives and derives sustenance from the suit land, he has not led any evidence of an application for execution of this court’s judgement and decree.

By the respondent filing for taxation of a bill of costs is not the same as an application for execution of a decree. Accordingly, with no threat of  
25 execution proved by the applicant, I find that this condition has not been met.

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*

5 ***Industries Ltd. vs. Tadjaudin Hussein & others SCCA No. 79 of 2008.***

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

See: ***Baguma Paul t/a Panache Associates vs. Eng. Karuma Kagyina MA No. 460 of 2020*** (Arising from ***Civil Suit No. 002 of 2015 High Court Civil Division Kampala*** cited by Ssekaana Musa J while relying on the case of ***Orient Bank Ltd vs. Zaabwe & Others MA No. 19 of 2007.***

Indeed, the court in the above in dismissing an application further held that while exercising the discretion conferred under the law of stay of execution, the court should consider that a party who has obtained a lawful decree is not deprived of the fruits of that decree except for good cause and cogent reasons.

So long as the decree is not set aside by a competent court, it stands good and effective and should not be lightly dealt with so as to deprive the holder of the lawful fruits of the decree.

Therefore, a decree passed by a competent court should be allowed to be executed unless a strong case is made out on cogent grounds, no stay should be granted.

Where a stay is to be granted, it must be on such terms as to security so that the earlier decree is not made ineffective due to lapse of time.

As to whether the application has been made without unreasonable delay, I find that this condition has been satisfied given that the judgment was delivered on 30<sup>th</sup> August 2022 and the applicant filed this application on the

5 4<sup>th</sup> November 2022, having requested for certified proceedings and also filed his memorandum of appeal in the Court of Appeal within that period.

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*, the court defined likelihood of success of a case to be  
10 one that

***“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 3 he states that, the intended appeal has a very high likelihood of success as the judgment being challenged  
15 was wrongly evaluated against him.

The respondent disputes this and states that the applicant referring to the respondent's success in the lower court is not proof that he has a good appeal.

A copy of the applicant's memorandum of appeal as attached to the application indicates that the appeal is based on two grounds one of which  
20 relates to the suit being time barred. I do find that this a serious question to be tried and may be successfully challenged and as such this condition has been met.

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  
25 of the decree. Courts have however held that each case must be looked at according to its merits.



5 The 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 this and even when the respondent stated in his affidavit in reply that the application be granted only if security is  
10 deposited, the applicant made no reply.

This shows that the applicant is not willing to deposit security for due performance of the decree and as such this condition has not been met.

Accordingly, this application for stay of execution, though succeeding in some grounds, fails to convince this Honourable Court in the areas of critical  
15 grounds of the absence of any application for execution and the fact that there has not been deposited in court any security as is mandatory by virtue of **Order 43 Rule 4 (3) (c) of The Civil Procedure Rules.**

4. Orders:

Consequently, on its merit and balance, this application is found **generally**  
20 to lack merit and is dismissed accordingly with costs to the respondent.

I so order.



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Hon. Justice Dr Henry Peter Adonyo

Judge

11<sup>th</sup> April, 2023

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