

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)
MISCELLANEOUS APPLICATION NO. 794 OF 2021
(ARISING FROM CIVIL SUIT NO. 75 OF 2021)

MUYANJA HENRY APPLICANT

VERSUS

JOEL KITUMBA RESPONDENT

BEFORE: HON. LADY JUSTICE ALICE KOMUHANGI KHAUKHA

RULING

Introduction

This ruling is in respect of an application brought by way of Notice of Motion under section 98 of the Civil Procedure Act, Cap. 71, section 33 of the Judicature Act, Cap. 13 and Order 52 Rules 1 and 2 of the Civil Procedure Rules, S.I 71-1. The applicant seeks for stay of execution of the judgment resulting into orders and the decree made thereunder by this Honourable Court in Civil Suit No. 75 of 2013.

Appearance and Representation

When the application came up for hearing on **23rd March 2022**, the applicant was in court but unrepresented while the respondent was represented by Counsel Dan Busingye of Muhumuza-Kiiza Advocates & Legal consultants. However, the applicant's written submissions were filed by Makmot-Kibwanga & Co. Advocates.

The application

The application is supported by the affidavit of Muyanja Henry (hereinafter referred to as **the applicant**). Joel Kitumba (hereinafter referred to as **the respondent**) filed his affidavit in reply to the application to which the applicant filed a rejoinder. Both Counsel for the applicant and the respondent filed written submissions, citing authorities and the same have been considered in this ruling.

Facts

The facts as deduced from the pleadings and written submissions by counsel are as follows:

The respondent, who is a brother to the applicant, filed **High Court Civil Suit No. 75 of 2013** (hereinafter referred to as **the head suit**) against the applicant seeking for Orders to: vacate the caveat lodged by the defendant(now applicant) against any grant of Letters of Administration for the remaining estate of the late Steven Semugenya (hereinafter referred to as **the deceased**), allow the family to nominate/confirm new administrators, stop the defendant (applicant) from intermeddling with the estate, remove the caveat lodged by the defendant (applicant) and Nanyanzi Irene on land comprised in Block 203 Plot 444 at Kazo which is estate property, among others.

The head suit was heard by the learned trial judge then and judgment was delivered on 3rd August 2021. In the said judgment, the learned trial Judge gave judgment in favour of the plaintiff (now respondent) with Orders and declarations that: the caveat to the petition of Letters of Administration be lifted because it was lodged in bad faith, Letters of Administration are issued to Joel Kitumba, Nanyonga Ruth and Kyeyune Michael to complete administration of the estate of the late Steven

Semugenya, the deceased's property in Kazo and Buikwe and any other that may be discovered shall be appointed only by these appointed administrators, the defendant and his mother –Irene Nyanzi are restrained from dealing in any way in the estate unless authorized by the administrators, the caveats lodged by the defendant and/or Nyanzi on the estate property in Kazo and/or Buikwe were irregular and not in good faith, the Commissioner Land Registration is directed to remove these and any other caveats immediately to enable the administrators do their work effectively, the plaintiff is awarded general damages of UGX 30,000,000 (Uganda Shillings Thirty Million), among others.

It is against this background that this application was brought to this honorable court for determination of the issues raised therein to wit:

1. Whether or not the execution of a decree and orders arising from the judgment and orders against the applicant in HCCS No. 75 of 2013 can be stayed by this Honourable Court pending appeal; and
2. What are the remedies available?

Resolution of the issues

Issue 1: *Whether or not the execution of a decree and orders arising from the judgment and orders against HCCS No. 75 of 2013 can be stayed by this Honourable Court pending appeal.*

Counsel for the applicant in his submissions stated that the applicant had filed an application for leave to appeal out of time in the Court of Appeal vide Miscellaneous Application No. 291 of 2021. That HCCS No. 75 of 2013 raised several legal and just issues which required judicial consideration. That the respondent has extracted the decree and commenced serious transactions which included removal of the caveats and distribution of the land which is not property of the estate.

Counsel for the applicant further contended that the applicant was in actual possession of Plot 444 Block 203 at Kazo which was part of the late Steven Ssemugeny's principal residence and makes part of the estate in issue. That execution would throw out the applicant without the determination of his appeal and thus greatly inconvenience him. He further avers that the applicant is likely to suffer irreparable loss and damage which is not capable of being atoned by monetary considerations.

Counsel for the applicant while relying on the cases of *Walusimbi Mustafa Versus Musenze Lukia Miscellaneous Application No. 232 Of 2018*, *Lawrence Musiitwa Kyazze Versus Eunice Busingye Scca No. 18 Of 1990*, *Thembi Nakibuka Sebalu Versus Peter Sematimba & 2 Others Scca No. 15 Of 2014* And *Otim Talib & Others Versus Uganda Revenue Authority M.A 242 Of 2017*, submitted that an application for stay of execution pending appeal is designed to preserve the subject matter in dispute so that if the appeal is successful, it is not rendered nugatory, prayed that the application is granted.

The respondent's counsel in his submissions stated that the respondent had not commenced any execution proceedings in this Honourable Court as alleged by the applicant, no bill of costs had been filed and that the applicant had not shown any evidence of the alleged execution proceedings both in his affidavit and submissions. As such, the application was premature.

Counsel for the respondent while citing the case of *Umeme Ltd Versus Rurihoona Elisam M.A No. 70 Of 2021* submitted that the general rule is that an appeal does not operate as a stay of execution; court does not deprive a successful litigant of the fruits of the litigation.

It was further submitted by Counsel for the respondent that the principles under which an application for stay of execution can succeed are espoused in the cases of *Lawrence Musiitwa Kyazze Versus Eunice Busingye Scca No. 18 Of 1990*, *Kyambogo University Versus Prof. Isaiah Omolo Ndiege Civil Application No. 341 Of 2013*, *Equity Bank Uganda Ltd Versus Nicholas Were M.A No. 604 Of 2013* And *Kampala Capital City Authority Versus Mulangira Joseph M.A No. 26 Of 2016*. In the said cases, the principles under which an application for stay of execution can succeed were that: the applicant must show that he has lodged an appeal that is pending determination, the appeal is not frivolous and it has a likelihood of success, there is serious and imminent threat of execution of the decree, and if not stayed, the appeal will be rendered nugatory, the application was made without unreasonable delay and that the applicant is prepared to give security for due performance of the decree.

In regard to the above principles for stay of execution, Counsel for the respondent submitted that the applicant is a beneficiary of the estate of the deceased just as the respondent is. That the decision was made for the benefit of all the family members including the applicant. That even when court awarded the respondent general damages of UGX 30,000,000 (Uganda Shillings Thirty Million), no execution proceedings have been filed in this Honourable Court and there is “No Warrant/Notice To Show Cause Why” yet. As such, it was Counsel’s submission that there is no substantial loss that may result to the applicant.

Counsel for the respondent also submitted that the application has been made with reasonable delay because the applicant, through his then lawyers of KIWANUKA & MPIIMA ADVOCATES were informed of the date of delivery of the judgment in the head suit but they did not show up. That the applicant has been in the habit of changing lawyers at every stage of the trial. That the respondent, who is among the

Administrators of the estate of the deceased following their appointment in the judgment of the head suit, have already exercised their mandate to distribute the estate. An inventory to that effect was filed in Court on 28th January 2022 and the applicant as a beneficiary therein already got his share. It was further submitted that the application for stay of execution was served upon the respondent five months after the applicant had filed the Notice of Appeal and seven months after judgment was entered in the head suit.

Counsel for the respondent further submitted that this application is a way of delaying or dragging this matter on. As such, he prayed that court dismisses the application with costs and/or in the alternative, order the applicant to furnish security for due performance of the decree at UGX 50,000,000 (Uganda Shillings Fifty Million).

Considering the pleadings on Court record and the submissions filed by Counsel for both parties, I am inclined to agree with Counsel for the respondent that the application is pre-mature as there is no evidence on record showing the commencement of execution. No Bill of Costs has been filed by the respondent in a bid to commence the execution proceedings of the general damages that were awarded to the respondent in the head suit. However, if the execution the applicant is trying to stay pertains the entire estate of the deceased, then I find this act too late. There is evidence on record that the Administrators that were appointed by the Orders of the learned Judge in the judgment of the head suit, have already filed an inventory showing the distribution of the said estate and the applicant has already got his share out of the estate. In that regard, there would be no estate for which stay of execution should be issued.

Be that as it may, the principles under which an application for stay of execution can be made as per Order 43 rule 3 (4) of the Civil Procedure Rules (CPR) that were also stated in the case of LAWRENCE MUSIITWA KYAZZE VERSUS EUNICE BUSINGYE SCCA No. 18 of 1990 that has been cited by counsel for both parties are that: substantial loss may result to the party applying for stay of execution unless the order is made, the application has been made without any reasonable delay and security has been given by the applicant for due performance of the decree or order as may ultimately be binding upon him/her.

Regarding the first ground that substantial loss may result to the party applying for stay of execution unless the order is made, I find no evidence to the fact that the applicant is going to incur any substantial loss if the application for stay is not granted. The estate in question belongs to the late Semugeny Steven for which the applicant is a beneficiary just like the respondent.

As earlier stated, an inventory as to the distribution of the said estate was filed in Court on 28th January 2022. I had the opportunity of looking at the same and I believe that the interests of the applicant were catered for justly considering the circumstances. The applicant in fact has nothing to lose given the fact that the distribution has already been done. In fact, I wonder which property the applicant is trying to save from execution since the estate has already been distributed as per the said inventory that was filed in Court on 28th January 2022. As such, I find that no substantial loss may result to the applicant if execution is not stayed. The first ground is hereby resolved in the negative.

The second ground pertains to the fact that the application was made without any reasonable delay. I am inclined to agree with Counsel for the respondent that there was unreasonable delay in the circumstances. From the Notice of Motion on court's

record, I find that the same was filed on 10th December 2021 yet the applicant in his submissions states that he filed Miscellaneous Application No. 291 of 2021 in the Court of Appeal seeking leave to appeal out of time the decision and Orders in the head suit on 18th October 2021. I find that it took the applicant more than a month to file this application, which in my view is unreasonable delay on the part of the applicant if he considered this application to be a matter of urgency.

From the foregoing, it has been noted that the estate of the deceased has been distributed already by the Administrators that were appointed following the Orders of the Court in the head suit. I find that the applicant has been caught up by the equitable principle of laches. He has not been vigilant in enforcing his rights, if any, by delaying to make the said application. I have noted that the applicant also kept changing lawyers throughout the course of the proceedings of the head suit. Such an act leaves questions as to the credibility of the applicant's reasons fronted as to why he delayed to make the applications both in this Court and in the Court of Appeal. I highly doubt that the delay was occasioned due to Counsel's fault in this particular incident. As such, the applicant has also failed to prove the second ground too.

Since Court has found the first two grounds in the negative, there is no reason as to why the applicant should be asked to furnish security for due performance of the decree or Order.

In light of the above, I resolve issue 1 in the negative and find that the execution of the decree or Orders against the applicant in HCCS No. 75 of 2013 cannot be stayed by this Honourable Court pending the alleged appeal.

Issue 2: What are the remedies available?

Having resolved issue one in the negative, I find no merit in the entire application. The same is hereby dismissed. Costs for this application are awarded to the respondent.

Dated at Kampala this 14th day of June 2022.

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Alice Komuhangi Khaukha

JUDGE

14/06/2022