THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISC. APPLICATION NO. 412 OF 2013

(ARISING FROM HCCS NO. 61 OF 2005)

HIPOLITO SEMWANGA……APPLICANT

VERSUS

KWIZERA BUCYANA PAUL…… RESPONDENT

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This application is brought by Chamber Summons under **Section 98 of the Civil Procedure Act Cap 71** and **Order 22 rules 26 & 89 of the Civil Procedure Rules SI 71-1** seeking for orders that:-

a) An order of stay of execution doth issue restraining the respondent, his agents and any one rightly claiming under him from executing the decree and orders of this Honorable Court in Civil Suit No. 61 of 2005: Hipolito Sewing Vs Kwizera Bucyana Paul and 2 others until final determination of the Civil Appeal No. 06 of 2012 now pending in the Court of Appeal of Uganda at Kampala.
b) The Applicant be discharged from Luzira Civil Prison until final determination of Civil Appeal No. 06 of 2012.
c) Costs of the application be provided for.

The application was supported by the affidavit of the applicant and the grounds relied on can be briefly summarized as follows:-.

1. That the applicant filed both a notice and memorandum of appeal in Civil Appeal No. 06 of 2012 to contest Civil Suit No. 61 of 2005.

2. That the said Appeal has high chance of success as the trial judge erred in law and fact when he failed to consider the evidence adduced visa-avis the law and came to a wrong conclusion.

3. That the appeal has not yet been fixed for hearing and may not be determined in the near future.

4. That the application was filed diligently and without unreasonable delay and the applicant is willing to comply with terms likely to be imposed by this Honorable Court.

5. Execution of the decree before the determination of the appeal lodged will render the appeal, nugatory.

6. It is just and equitable that the order of stay of execution be granted pending the final determination of the appeal.

The applicant abandoned the prayer for his discharge from civil prison, which his council stated was overtaken by events.

The Respondent opposed the application and an affidavit in reply was deposed by the Respondent where he averred among others that the Applicant's appeal has no likelihood of success. There was inordinate delay in filing and fixing this application, and also that the applicant has not deposited security for the due performance of the decree. It was also argued that the applicant will not suffer loss if execution continues and hearing of the appeal is to commence soon.

Court allowed the parties to file written submissions which they did. I have carefully considered the law applicable and the respective submissions and come to the following findings.

Order 22 rule 26 of the Civil Procedure Rules states that;

"*where a suit is pending in any court against the holder of a decree of the court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.*"

This order was considered in the case of **Peter Mulira Vs. Mitchell Cotts HCMA 715 of 2009** where the Hon Judge held that;

"I find that the most detailed discussion of the rules is found in the Tanganyika case of ***Iddi Halfani Vs. Hamisa Binti Athuman [1962] EA 761****. In that case, Order 21 rule 29 which is equivalent of our Order 22 rule 26 was considered. Sir Ralph Windman (CJ as he then was) held at P. 763 that the said Order '…impose(s) no condition regarding the nature of the pending suit or the effect of a stay of proceedings granted under the rule as regards adjustments of claims or prevention of multiplicity of execution proceedings. All that the rule requires is that there shall be a pending suit, which in the absence of limiting words means any kind of suit, brought by the unsuccessful against the successful party in the earlier suit whose decree is to be executed…'* However, Windham CJ at P. 764 goes on to place a test that *'…the likelihood or even possibility in law of the cross suit being successful, upon the materials before court at the hearing of the application, must be a relevant factor in deciding whether the discretion should be exercised upon terms or at all…"*

In the instant case there is a pending suit which is Civil Appeal No. 06 of 2012 that was filed by the applicant who was the unsuccessful party in the previous suit whose decree is to be executed. Nothing much was advanced to show the likelihood of success of the appeal. However, according to the authority I have quoted, it is enough to show by the memorandum of appeal that there are serious questions to be addressed in the appeal which I believe has been demonstrated in the memorandum of appeal attached to the applicant's affidavit. However this is not the sole ground upon which I must rely; guidance can be obtained from cases of **Lawrence Musiitwa Kyazze Vs. Eunice Busingye Civil Application No. 18 of 1990** and **Dr. Ahmed Muhammed Kisuule Vs. Greenland Bank (In Liquidation) SCC Application No. 17 of 2010** that were cited by counsel for the respondent to include;

a) That substantial loss may result to the applicant unless the order is made.
b) That the application has been made without unreasonable delay.
c) That security has been given by the applicant for due performance of the decree.

I will therefore consider each condition separately.

a) That substantial loss may result to the applicant unless the order is made.

It was submitted for the applicant that he is still in possessionof the suit property which is the subject of the Civil Appeal and that his eviction will render such appeal. nugatory. Counsel cited the case of **Wilson vs. Church (1879) Vol. 12 Ch D 454** also followed in **DFCU Bank Ltd Vs. Dr. Ann Persis Nakate Lussejere CACA No. 29 of 2003.** It was emphasized there, that it is the paramount duty of a court to which an application for stay of execution pending an appeal is made, to see that the appeal, if successful, is not rendered nugatory. It was in addition argued that such loss should be substantial.

In reply, counsel for the respondent contended that the respondent is the registered proprietor of the suit property yet he has for the last nine yearsbeen deprived of its use. Instead, the applicant who lost the case has continued to enjoy the utilization of the suit property which he has rented out and continues to rent out to several tenants from whom he earns substantial sums of money. That execution will not result into the applicant's loss but only to compel him to forfeit the rent he has been illegally collecting from the tenants. That loss is reparable as it can be atoned by compensation.

The authority relied on by the applicant is a good guide on this point. Justice Ogola in**Tropical Commodities Suppliers Ltd & Ors V s. International Credit Bank Ltd (In Liquidation)** held that;

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

It is not in contention that the applicant is still in possession of the suit property and still collects rent from the tenants on the property. On the other hand, the judgment in the suit confirmed the respondent as the registered proprietor of the suit land. Going by that judgment, he has been denied use thereof and rent there from for the last nine years since 2004 when he purchased the suit property. In my mind, a stay will entrench the applicant in occupation of property in which he is not an owner and for which he has no protection by judicial decree, since the appeal is not yet decided. Further, rent collected from properties is always clear, given the fact that receipts are issued in acknowledgment and the amount can thus be computed. Substantial loss is what the applicant will gain or lose upon the disposal of the appeal. In my view, in the event that this

appeal is successful, it will not be rendered nugatory since the rent can be quantified by a mathematical formula and refunded to the applicant. In any case, he has the means open to him in law to guard against further transfer of the suit land as the appeal proceeds. The applicant has thus not made out a case that he will suffer substantial loss.

b) That the application has been made without unreasonable delay.

Counsel for the applicant submitted that judgment in Civil Suit No. 61 of 2005 was delivered on the 18/9/12. The applicant filed a Notice of Appeal on24/9/12 and thereafter a Memorandum of Appeal on the 17/1/13. The applicant was arrested and committed to civil prison on the 11/4/13 and on22/4/13 the respondent procured a Notice to Create Vacant Possession of the suit property. It is upon this notice that the applicant filed Miscellaneous Applications for stay of execution after eminent danger of his eviction from the suit land had been demonstrated by the respondent.

In reply it was submitted for the respondent that the applicant did not bother filing the current application until 9/5/13 after the respondent had almost concluded execution proceedings and had even arrested the applicant on the 10/4/13 for failing to pay the taxed costs. That the sum total of the Applicants' delay in making this application amounts to seven calendar months which delay was considered unreasonable.

The facts indicate that the period between the date of the decree and filing of this application is about seven months. This in my view would be inordinate delay in pursuing a stay of execution of the decree. However, one must take into account the fact that the judgment debtor ought to await for proceedings of execution to begin before reasonably applying to halt them. However, the applicant has not demonstrated much seriousness in prosecuting this application to the extent that his previous applications to stay execution were dismissed for want of prosecution in February 2013. By then, execution had already commenced and even continued with his arrest and detention. In my view, the present application only came as an afterthought when the respondent realized that the applicant had serious intentions to pursue execution of the decree. I therefore find that this application was made with inordinate delay.

c) That security has been given by the applicant for due performance of the decree.

It was submitted for the applicant, and he indicates in his application that he is ready and willing to comply with the terms likely to be imposed on him by this honourable court. That a reasonable amount as security for costs should be imposed on the applicant.

The respondent did not contest this but his counsel argued that in the circumstances of this case, where the respondent has been denied use of his property for the last nine years on account of the fraud of the applicant, the court needs to apply a higher than average percentage of the decretal amount as reasonable security to be paid. 40% of a figure of Shs.574,862,274/- was proposed.

The rationale for security for costs is to protect the interest of the successful litigant by guaranteeing due performance of the order against which an appeal has been lodged.The applicant made no proposal of what he was willing or able to pay but instead made an undertaking that he is willing to comply with the security that would be imposed. In my view, a party's willingness and ability to give security has partly to be borne out of his conduct during the execution proceedings this far. The facts indicate that the applicant was unable to pay the taxed costs of Shs.34,862,274/- which resulted into his incarceration in civil prison. He served the full term, (until 10/10/13) thus closing the door for any further execution of that mode. In my view also, this was a demonstration that he was unwilling or unable to pay any sum in execution. It is doubtful that he will abide by any conditions set by this court, to furnish security for due performance of the decree, however reasonable. I therefore reject arguments advanced for the applicant on this point.

In **DFCU Bank Ltd vs. Dr. Ann Persis Nakate Lussejere (supra)** it was held that all the three conditions above outlined must be proved before Court can grant an order of execution. In my estimation, the applicant has not proved any of the conditions, and I thus move to dismiss this application with costs to the respondent.

I so order.

EVA K. LUSWATA
JUDGE
26/3/14