

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISC. APPLICATION NO. 1181 OF 2017
(ARISING FROM CIVIL SUIT NO. 358 OF 2013)

LWANGA BEN MBEREGENYA:..... PLAINTIFF

VERSUS

- 1. KAKANDE ALOYSIOUS**
- 2. COMMISSIONER LAND REGISTRATION :..... DEFENDANTS**

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

The Applicant filed an application under **Section 29 (2) of the Civil Procedure Act and 33 of the Judicature Act**, and **3 of the Civil Procedure Rules** applying for;

1. An order of stay of execution of the Decree extracted from the Judgment of *Hon. Mr. Justice Kwesiga in Civil Suit No. 358 of 2013* until the Applicant's appeal is fully heard and finally disposed of.
2. Costs of the application be provided for.

The application is supported by the affidavit of LWANGA BEN MBEREGENYA. The general grounds are that;

- a. On the 19th day of May 2017, Judgment was delivered by Hon. Mr. Justice J. W. Kwesiga in **Civil Suit No. 358 of 2013**.*
- b. The Applicant is aggrieved by the Judgment and lodged a Notice of Appeal under **Rule & 76(1) of the Judicature Act (Court of Appeal Rules)**.*
- c. The appeal has high chances of success and will be rendered nugatory if not granted.*

- d. That the application was made without delay and the Applicant is not guilty of dilatory conduct.*

The Respondents oppose the application. The Respondent filed an affidavit in reply by Kakande Aloysious. The affidavit challenges the steps taken by the Applicants to pursue the appeal (*see paragraph 6*). The affidavit states that the Applicant has not instituted any appeal, has not proved any loss suffered under the Judgment, and that the application is intended to delay the process of justice. The Applicant filed an affidavit in rejoinder rebutting the above.

I have perused the pleadings and studied the submissions by the parties' Counsel. I do find as herebelow;

The Law:

(a) **Article 126(2)(e) of the Constitution;**

The provisions for stay of execution pending appeal are inferred by the provisions of **Article 126(2)(e) of the Constitution**, which requires that litigants who come to Court are entitled to substantive justice, which should override any technicalities of law.

- (b) **Section 33 of the Judicature Act – Cap 13;** empowering the High Court to grant such remedies are lawful to enable the final determination of all matters of controversy between parties.

- (c) **Section 29 (2) of the Civil Procedure Act and O.52 R1, and 3 of the Civil Procedure Rules** providing for the procedure by Notice of Motion and affidavit evidence.

- (d) **Judicature (Court of Appeal Rules) Directions SI- NO 13 – to Rule 76;** providing for the filing of a Notice of Appeal.

The arguments

It was argued for the Applicant that all requirements of the law necessary to be proved before a grant of a writ of stay of execution pending appeal, were satisfied. However, the Respondent argues that the application is without merit and should be disallowed. This Court however finds as follows:

Findings

a) On Notice of Appeal

Rule 76 of the Judicature (Court of Appeal Rules) (*supra*) requires that appeals be commenced with filing of a Notice of Appeal. The Notice of Appeal on this application was lodged in the High Court Registry on the 26th day of May 2017, but was not endorsed by the Deputy Registrar. (See annexure 'B'). Annexure 'd' the draft Memorandum of appeal is also not signed by Counsel for the Appellant and not yet endorsed by the Registrar.

Is there an appeal as required under **Rule 76 of the Rules**? The Applicant and his Counsel have postulated a thesis in the affidavit of Lwanga Ben Mberegenya (*paragraph 4, 6*) and the affidavit in rejoinder (*paragraphs 3, 4, 5 and 6*) that the said notice satisfies the requirements under **Rule 76 of the Court of Appeal Rules**

Counsel for the Applicants in his submissions relied on the affidavits above and the provisions of **Rule 3 of the Judicature Act (Court of Appeal Rules)** to argue that since these rules refers also to an '*intended appeal*', then it covers the situation before Court, having been filed within time.

The Respondent's Counsel however did oppose that thesis and instead, referred to **Rule 76** (*supra*) to fault the said notice; since it was not filed in duplicate with the Registrar of the High Court, was not lodged in 14 (*fourteen*) days after the decision of Court and did not name all persons it intended to be supplied with.

The case law which I was referred to by both Counsel postulates that the aim of any application for stay of execution is the desire to maintain the *status quo* so that the intended

appeal is not rendered nugatory. See cases of *Kyambogo University versus Isaiah Omolo Ndiege (2013) 1 HCB*; *Kabaka of Buganda versus Male Mabirizi K. Kiwanuka; MA No. 395/2017*; *Ahamed Muhamed Kisule versus Greenland Bank (in Liquidation) SCCA No.7/2010*.

For Court to preserve the *status quo* however, the applicant must have satisfied the Court that;

- 1) He/she has lodged an appeal in accordance with the Rules.
- 2) The application was done without unreasonable delay.
- 3) The Applicant has an appeal with a high likelihood of success.
- 4) The Applicant must demonstrate that he/she will suffer irreparable loss if a stay is not granted.
- 5) The applicant must prove that if the stay is not granted, the appeal will be rendered nugatory.

Having regard to the circumstances before me, and in view of all the arguments, I am convinced that the subject matter of this application is titled land. The decision which is intended to be appealed is of such a nature that it touches the rights of both the Applicants and the Respondent's interests on the said property.

Article 126 (2)(e) enjoins Courts to administer substantive justice so that all disputes between parties are adequately adjudicated upon, without technicalities being allowed to impede the flow of such justice.

In this case, the structures of **Rule 76 of the Judicature Act (Court of Appeal)** is toned down by **Rule 3** thereof which provides for an '*intended appeal*'. If I take that liberal approach in view of the Applicant's evidence that they encountered frustrations in trying to regularise their notice of appeal as deponed by the Applicant in the affidavit in rejoinder *paragraph 4, 5 and 6*. I am satisfied that an appeal has been duly filed by the Applicant.

Regarding the question of time, the affidavit in rejoinder has offered the explanations for the lapses in time, and I am also convinced that the Applicant is not guilty of dilatory conduct.

On the question as to whether proof that an appeal was lodged, exists as argued by Counsel for Respondents in view of **Rule 83 (1)**, there is an explanation in the affidavit in rejoinder under paragraph 6 that annex 'A' which is a letter requesting for the record of proceedings was received in the High Court on 25th May 2017, but the record had not yet been received.

I agree with the response to the submissions by Counsel for the Applicant that in such situations as always, time begins to run from the date when the record of proceedings are prepared by the Registrar and he/she notifies the Applicants of their availability for collection.

The other requirement is to prove that the intended appeal has a likelihood of success.

The case quoted of ***Mugenyi & Co. Advocates versus National Insurance Corporation CA No.13/1984 by Wambuzi P*** (as he then was) that;

'it is not the function of this Court to express an opinion as to whether or not the appeal is likely to succeed, as it would in effect be prejudging the appeal' is binding and directory.

This Court can only look at the proposed grounds of appeal and determine if they pass the test or not being *vexatious* and *frivolous*. In the proposed memorandum of appeal, it is shown that the Applicant wishes to argue the appeal on points of law.

At this stage, I am satisfied that the Applicant has satisfied a *prima facie* that he has an appeal with arguable grounds of appeal capable of success.

Finally, the question of irreparable damage/loss if the stay is not granted.

The fact that the order of Court involves orders for alternations on the title which can have effects of changing the *status quo*, is in itself irreparable, save by way of an appeal.

That ground is self-proving since, to require the Applicant to re-evaluate the evidence, would amount to rehearing the evidence afresh, which the appeal is intended for.

I am satisfied therefore that the Applicant has proved this ground as well.

All in all, the Applicant has proved this application. The application will be granted subject to the Applicant's providing security for costs equivalent to half of the taxed costs under HCCS No. 358/2018 from which the intended appeal arises.

The application is granted in terms as above.

Each party to bear their own costs of this application.

I so order.

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Henry I. Kawesa

JUDGE

08/02/2018

08/02/2018

Applicant absent.

Counsel for Applicant absent.

Kakande present.

Commissioner Land Registration absent; No counsel

Court: Ruling delivered to parties as above.

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Henry I. Kawesa

JUDGE

08/02/2018