THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISCELLANEOUS APPLICATION N0. 306 OF 2017

ARISING OUT OF CIVIL APPEAL N0. 104 OF 2017

(ARISING FROM JINJA HIGH COURT CIVIL APPEAL N0. 089/101 OF 2013)

(ALSO ARISING FROM IGANGA CIVIL SUIT N0. 089 OF 2004)

MUTESI ALICE:: APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF THE CHURCH OF UGANDA BUSOGA

DIOCESE ::: RESPONDENT

RULING

BEFORE: HER LORDSHIP HON. JUSTICE EVA K. LUSWATA

1.0 Introduction and brief facts

1.1 This is an application by Chamber Summons under section 98 of CPA Cap71, S.33 of the Judicature Act Cap 13 and O. 22 r 23 (1), 26 and 89 (1) and O. 26 CPR seeking for the following orders that;

(a) Stay of execution doth issue retraining the Respondent or its agents from executing the Orders of the High Court vide Civil Appeal No. 89/101 of 2013, evicting or interfering with quiet possession of the Appellant on the premises comprised at Ibaako Village Bugwari County, Iganga District pending the hearing and determination of the application before this honourable court for leave to appeal as the same is between the same parties.

(b) The costs of this Application be provided for

The parties were represented by M/S Ochieng Associates Advocates & Solicitors and Isabirye & Co. Advocates (respectively). Both counsel filed written submissions.

1.2 This application is supported by the Affidavit of Walube Willy Wambi, the lawful attorney of the applicant and the grounds briefly are that;

1. That the Applicant is dissatisfied with the judgment and decision of the High Court in Civil Appeal N0. 089/101 of 2013.
2. That the Applicant has filed a Notice of Appeal with an intention to appeal against the judgment.
3. That the appeal has a like hood of success.
4. That there is imminent threat of execution and alienating the land since the Respondent has made an Application to convert the suit land from customary land tenure to freehold.
5. That the Applicant's appeal shall be rendered nugatory and the Applicant shall suffer irreparable damage if this application is not granted.
6. That it is equitable and in the interest of justice that this application be granted.

1.2 The grounds are repeated in Wambi's affidavit in support of the application to which he attaches a notice of appeal and other evidence. Rev. Benon K. Walube, in charge, land and estates of the Respondent filed an affidavit in reply. In his view, the application is an abuse of court process, the Respondent has not commenced the execution process, and there is no evident prejudice to the applicant.

1.3 Wambi rejoined to state inter earlier that the two parties are in joint possession of the suit land. That that notwithstanding, the Respondent has planted mark stones and erected structures on it.

2.0 The law

2.1 In Lawrence Musiitwa Kyazze Vs. Eunice Busingye SCCA N0. 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 who is exercising his/her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

2.2 The authority provided by applicant's counsel well summarises the principles to be considered before allowing an application for stay of execution. The Constitutional Court

in her decision in **Hon**. **Theodore Ssekikubo& Others Vs. The Attorney General and Another, Constitutional Application N0. 06 of 2013** re-stated the principles as follows:

"(1) The applicant must establish that his appeal has a likelihood of success;

or a prima facie case of his right to appeal.

(2) It must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.

(3) If 1 and 2 above has not been established, Court must consider where the balance of convenience lies.

(4) That the applicant must also establish that the application was instituted without delay."

2.3 On the issue of whether there is an arguable appeal, **Hon. Justice Mulangira J, in Nalwoga Vs. Edco Ltd & Anor MA. N0. 07 of 2013** observed that; in such applications, the Court ought to review the proceedings but desist from prejudging the appeal or interfering with the order of the court. That is the correct position for the purpose is only to preserve the status quo so that the appeal if successful, will not be rendered nugatory.

3.0 My decision

3.1 The appeal which is the subject of this application is a second appeal against the decision of the Magistrate GD1. In his decision, my brother Namundi J decreed the suit land to the Respondent. As related above, once an appeal is pending and there is a serious threat of execution before hearing the appeal, court intervenes to serve substantive justice. **See Hwang sung Industries Ltd Vs. Tadjin Husein & Others SCCA N0. 79 of 2008.**

3.2 Although refered to as Annexture "D" to the application, it is evident that there is no memorandum of appeal and the applicant's intention to appeal is still represented by a notice of appeal. The applicant would by no means be late in filing the memorandum

since there is indication that she applied for the certified proceedings and judgment, which have not yet been provided.

However, it is trite that a notice of appeal is not by itself an appeal and cannot bar a successful party's right to enforce a decree obtained, even by execution. In fact, I am unable to tell from the notice the intended grounds of appeal and therefore cannot reasonably gauge the strength of the appeal and its chances of success or if the application is denied, it will be rendered nugatory.

3.3 Further, the Applicant is not specific on whether she will suffer irreparable damage this point. She argues that the Respondent without following due process of the law, has made an application to convert their land from customary to free hold tenure. It is not contested that that application was lodged by the Respondent but it is also not shown how a conversion of the land or its development will result into irreparable damage. There is in fact no proof of its alineation, which to my mind will equate to irreparable loss as it may never be possible for the Applicant to regain it.

3.4 More significant is the fact that the application is pre-mature. There is no proof that an application for execution has been lodged or approved. The general rule is that courts should not order a stay where there is no evidence of any application for execution of the decree. **See forexample Orient Bank Ltd Vs. Zaabwe & 7 Others M/A N0. 19/2007.**

3.5 It could be argued that Annexure "E" the application to change tenure, could be interpreted to be conduct by the Respondent to execute the decree. However, it is un dated and thus it is not clear when it was filed or even whether it has been lodged with the correct authority for action. Under such circumstances, only a formal application for execution would have been the clearest indication of the Respondent's intention with regard to the decree.

In summary, I am not persuaded that the applicant has satisfied grounds to merit a stay of execution.

The application therefore fails and is dismissed with costs to the Respondent.

I so Order

EVA K. LUSWATA

JUDGE

24/5/2018