

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
MISCELLANEOUS APPLICATION NO. 142 OF 2021
(Arising from Execution Cause No. 10 of 2021)
(Arising from Civil Suit No. 31 of 2016)

CALEB TWINE.....APPLICANT

VERSUS

NKEERA MUSA.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

Ruling

The applicant Caleb Twine brought the instant application under **Section 33** of the Judicature Act, **Section 98** of the Civil Procedure Act, **Order 22 Rule 23** and **Order 52 Rules 1 and 2** of the Civil Procedure Rules against the respondent seeking the following orders;

1. Stay of execution doth issue restraining the respondent, his servants/agents, or any person acting on his behalf from executing the decree of the High Court Civil Suit No. 31 of 2016, Nkeera Musa v. Enock Katsigazi and 2 Others pending the hearing and final disposal of Court of Appeal Civil Appeal No. 044 of 2021.
2. Costs of the application.

The application is supported by the affidavit sworn by the applicant and the grounds briefly are as follows;

- i. The respondent filed High Court Civil Suit No. 31 of 2016 against the Applicant, his father Enock Katsigazi (deceased) and Muzula Moses for a declaration that the respondent was the rightful owner of the land comprised in Plot 7 Block 75 land at Lwawebe, Gomba County, a declaration that the applicant and his father Enock Katsigazi acquired no legally recognized rights from Muzula Moses and an order for vacant possession of the suit property.

- ii. The HCCS No. 31 of 2016 was heard and determined in favour of the respondent on the 10th day of 2020.
- iii. The applicant being aggrieved with the decision of the court above mentioned, filed his appeal in the court of appeal vide Civil Appeal No. 044 of 2021 and the same is pending hearing.
- iv. The applicant has a plausible appeal that raises serious questions of law with a likelihood of success.
- v. There is a serious threat of execution as the respondent has applied for execution of the decree in HCCS No. 31 of 2016 and a notice to show cause why execution should not issue has been served on the applicant.
- vi. The notice to show cause why execution should not issue has been fixed for hearing.
- vii. If the order for stay of execution is not granted, the respondent will proceed with the execution of the decree and the applicant's appeal will be rendered nugatory.
- viii. It is in the interest of justice that an order for stay of execution doth issue restraining the respondent from carrying out the said execution pending the hearing and final disposal of the appeal.

The application was opposed by the affidavit in reply sworn by the respondent and the pertinent paragraphs are as follows;

7. The appellant claims to have acquired interests in the suit property from his late father, Enock Katsigazi (2nd defendant) (now deceased) who also claimed to have purchased from a one Muzula Moses (3rd defendant) who conceded before court that he had no title to pass to the 2nd defendant is tainted with malafide.
8. The 3rd defendant has at all material times been able and willing to refund the 1st defendant's purchase price but was adamant and the applicant continues to commit acts of trespass.

9. That in specific reply to paragraphs 4 and 5 of the applicant's affidavit in support, the applicant is not entitled to be granted this application since merely being dissatisfied with the judgment and orders of court does not make a frivolous appeal meriteous.

11. That in further reply to paragraph 7, 8 and 9 of the applicant's affidavit in support of his application, the applicant shall not suffer any substantial loss if this application is denied but instead, myself as the successful party and title

holder to the suit land, I continue to suffer substantial loss since I am deprived usage of my land.

13. That in the alternative but without prejudice to the foregoing, if court is inclined to grant the application, a condition be made requiring the applicant to pay/deposit in court security for costs amounting to the total of the taxed bill of costs or any other condition that court may deem fit.

Representation:

Mr. Amos Musheija appeared for the applicant while Kassa Emmanuel represented the respondent. Both advocates made oral submissions.

10 **Resolution:**

Submissions for the applicant:

It was submitted that the 3rd defendant in the main suit claimed that he was going to pay part of the costs and not prefer any appeal, thus the respondent could pursue recovery of the costs from the 3rd defendant.

- 15 That this suit involves immovable property and the respondent is guaranteed costs from the 3rd defendant and the respondent is in possession of the title. Thus, this court should not order the applicant to pay security of costs since the respondent already has the title and immovable property is not going anywhere.

- 20 Further, that if court is inclined to have the applicant pay security for costs, the applicant can pay half of the taxed costs. And if stay is not granted, the applicant will suffer irreparable damage and his appeal would be rendered nugatory.

Submissions for the respondent:

- It was submitted for the respondent that the application was frivolous and vexatious in so far as the pending appeal has no merit and an abuse of court process. Counsel laid down the grounds for grant of stay of execution as per the case of **Amon Bazira v. Maurice Peter Kagimu K. Miscellaneous Application No. 1138 of 2016** where it was stated that;

- 30 *"Under Order 43 Rule 4(3) of the Civil Procedure Rules provides for the grounds of stay of execution which must be satisfied by the Applicant before Court issues the order.*

The grounds are:

1. *That substantial loss may result to the party applying for stay of execution unless the order is made.*
2. *That the application has been made without any reasonable delay.*
3. *That security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him/her."*

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Counsel added that substantial loss will not be occasioned to the applicant since he already has a remedy and relief as per the judgment of this court where the 3rd defendant was willing to refund the money to the 1st and 2nd defendants, and the 3rd defendant has not preferred any appeal. That it was true the application was indeed made without any delay.

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In regard to security for costs, it was agreed that the bill be taxed and the 3rd defendant was willing to deposit UGX4, 800, 000/= (four million eight hundred thousand shillings only). That the subject matter is over UGX 600,000,000/= (six hundred million shillings only) by now. That having agreed to pay the UGX 14,000,000/= (fourteen million shillings only) it would be unfair for the applicant to move away from his responsibility since he is the one who has preferred the appeal. Therefore, it was prayed for the respondent that UGX 10,000,000/= (ten million shillings only) be deposited in Court if court is inclined to grant the application. Otherwise, the application should be dismissed with costs and pave way for the successful party to enjoy the fruits of their judgment.

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Rejoinder:

In rejoinder counsel for the applicant submitted that the applicant was appealing against the entire judgment of this court. That the appeal is pending in the Court of appeal and the merits of the appeal can only be determined by the Court of Appeal (Higher Court). Counsel prayed that the applicant pays half taxed costs of UGX 7,000,000/= (seven million shillings only) as per the case of **Amon Bazira v. Maurice Peter Kagimu K. Miscellaneous Application No. 1138 of 2016.**

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Analysis of court:

I have carefully considered the oral submissions of both counsel and the authorities as cited.

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I do associate myself with my learned brother's layout of the conditions to be considered before stay of execution can be granted as per the authority cited

above. It was conceded by the respondent that indeed the application was brought without undue delay.

5 It was also submitted for the respondent that the applicant already had a remedy available to him in terms of a refund that was coming with interest therefore there was no need to pursue the appeal. That the respondent was also willing to pay part of the taxed costs to a tune of UGX 4,800,000/= on behalf of the applicant who lost his case before this court. Therefore, the applicant would not suffer any substantial loss if the application is not granted.

10 In regard to the appeal having a high probability of success, is none of my business as the case is now before the court of appeal and that is out of my jurisdiction so I cannot delve into the merits of the same. It was the prayer of the respondent that the applicant pays a commitment of UGX 10,000,000 (Ten Million Shillings, only) as security for costs. While the applicant prayed to pay the sum of UGX 7,000,000/= (seven million shillings only).

15 I find that the sum of UGX 7,000,000/= (seven million shillings only) is too little. The sum of UGX10,000, 000 (Ten Million Shillings, only) as security for costs is more appropriate in the circumstances.

I therefore, allow the application on condition that the applicant pays UGX 10,000,000 (Ten Million Shillings, only) as security for costs. Costs in the cause.

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OYUKO ANTHONY OJOK

JUDGE

5/11/2021