THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA (LAND DIVISION)

MISC. APPLICATION NO. 1619 OF 2021
(ARISING FROM CIVIL SUIT NO. 527 OF 2015)

1. **ISAAC W. OCHIENG**
2. **ANNET BIRUNGI SSERUNKUMA::::::::::::::::::::::::::APPLICANTS**

VERSUS

SARAH NAKYOBE::RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY 1. KAWESA

RULING

This application was brought by notice of motion under Section 98 of the Civil Procedure Act Cap 71, and 0.22 r.3 (1), of the Civil Procedure Rules S.1 71-1.

The application seeks orders that;

l. The execution in Civil Suit No.537 of 2015 be stayed pending the hearing and determination of the Applicant's appeal against the said decision.
2. The costs of the application be provided for.

The grounds of the application, which I shall not reproduce, are supported by the affidavit of Annet Birungi Sserunkuma, and opposed by the affidavit in reply of Nakyobe Sarah. The Applicant also filed an affidavit rejoinder.

Counsel for both parties made oral submissions, the details of which are on Court record and which I shall not reproduce.

Counsel for the Respondent raised a matter touching the decree whose execution is sought to be stayed. According to him, the decree on record has errors and cannot be relied upon to stay execution.

I have looked at the decree and confirmed Counsel's assertions. The decree omits to some of the orders made by Court in the judgment; and it is explicit that it was also extracted without the Respondent's approval. All this is contrary to 0.21 R.6 (1) and R.7(2) of the Civil Procedure Rule SI 71-1.

The above notwithstanding, I have addressed myself to the law and principles applicable to applications of this nature. According to 0.43 Rules 4(3) of the Civil Procedure Rule, and ***John B Kawanga versus Namyalo and Another Misc. App. No. 12 of 2011***, the conditions which govern the grant of stay of execution are:

l . That the Applicant has lodged a notice of appeal;

2. That substantial loss may result to the Applicant unless the stay of execution is granted;

3. That the application has been made without unreasonable delay;

4. That the Applicant has given security for due performance of the decree or order as may ultimately be binding upon him/her.

None of the above principles requires the existence of proper decree. As such, I defer the matter touching the errors on the decree for resolution at the end of determination of the merits of the application.

Consideration of the Application and Conditions above

i) That the Applicant has lodged a notice of appeal.

The Applicants have ably demonstrated that they have filed a notice of appeal, a copy of which they attached to affidavit in support as annexure B. As such, I am convinced that the Applicant has proved this condition.

ii) That substantial loss may result to the Applicant unless the stay of execution is granted.

The Applicant averred that they have lived on the suit land since 2005 to date. That if the application is not granted, the Respondent may transfer the suit land into her names and sell it off to third parties who may evict them.

In the judgment, annexure "A" to the affidavit in support, Court ordered, among others, that the Applicants, in the alternative, pay to the Respondent Ugshs.600,000,000/- (*six hundred million shillings only)* as compensation for the suit land within 180 days of the judgment lest the Commissioner for Land Registration cancels their certificate of title of the suit land.

It suffices to note that the Applicants are yet to pay the afore stated money. I also notice that the afore stated order is self-execution upon the lapse of 180 days. The judgment was pronounced on the 10th day of August, 2021; and calculation shows

that the 180 days lapsed on the 6th of February, 2022. As such execution time already crystalized as against the Applicant. As things stand now, their certificate of title of the suit land can be cancelled at any time upon the initiative of the Respondent.

In view of this, I find that substantial loss may result to the Applicants unless the stay of execution is granted.

The second condition is thus proved satisfactorily.

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

This application was filed on the 14th of September 2021. This was about 35 days after the delivery of judgment in the matter. Considering this, I find that there was no unreasonable delay in bringing the application.

The third condition also succeeds.

iv) That the Applicant has given security for due performance of the decree or order as may ultimately be binding upon him/her.

There is no evidence that the Applicants furnished any security for due performance of the decree. But that notwithstanding, the prevailing judicial practice, as regards this condition, is that it is not mandatory, and the decision whether to order security varies from case to case (***Imperial Royale Hotel Ltd & 2 Others versus Ochan Daniel Misc Application No.111 of 2012***).

Considering the above, I am persuaded by the reasoning that "*the decision whether to order for security for due performance must be*

in consonance with the probability of success of the appeal" (Kawanga vs. Namyalo & Anor; H.C.M.A No. 12 of 2017). This reasoning is premised on the need to guard against the filing of frivolous and vexatious appeals which may never succeed and yet have an effect in escalating trial costs. The need cannot be achieved unless the last element is considered carefully. Accordingly, it is imperative for the Applicants to bring evidence that proves that the intended appeal is meritorious and likely to succeed.

The above said, besides stating in their affidavit in support that their intended appeal has a high likelihood of success, the Applicants do not demonstrate why this may be probable. As such, I am unable to determine the veracity of their assertions. This therefore, means that if the application is to succeed, the Applicants have to provide security for due performance of the decree. But before making a final pronouncement on this matter, I shall revert to that of the decree on record.

I already noted that the decree has errors due to failure to capture some of the reliefs awarded to the Respondent by Court in its judgment; and these, among others, include the alternative relief that the Applicants pay to the Respondent Ugshs.600,000,000/- (*six hundred million shillings)* as compensation for the suit land within 180 days of the judgment lest the Commissioner for Land Registration cancels their certificate of title to the suit land.

This Court however, has power to make such orders as may be necessary for the ends of justice (Section 98 of the Civil Procedure Act Cap 71).

In this case, I believe that it is just, especially since it won't prejudice the Respondent, to order the Applicant to amend the decree on record so as to bring it into conformity with the judgment. With this Court can proceed to grant the application on the basis of the orders already in its judgment pending the amendment.

In the result therefore, this Court hereby stays the execution of its decree, but on condition that the Applicant furnishes 15% of the decretal sum as security for due performance of the decree. This must be deposited on the official account of the Registrar, High Court, within 60 days hereof.

Further, the Applicants are ordered to amend the decree on record in order to reflect the contents of the judgment of Court within 7 days of this ruling.
I so order.

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Henry I. Kawesa
JUDGE
10/03/2022

10/03/2022:

Court: Matter for Judgment.

Nyafono Irene: we are here to receive the Judgment.

Judgment delivered in the presence of Nyafono Irene; Counsel for the Applicant.

Ayo Miriam Okello
DEPUTY REGISTRAR
10/03/2022