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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.535 OF 2022

(Arising from High Court Execution Miscellaneous Application No.20 of 2022)

(Arising out of Civil Suit No.194 of 2010)

JAMES MAKUMBI:::APPLICANT

Versus

1. JOSEPH SSEMANGO

2. LAKERI NALUWOOZA::RESPONDENTS

Before: Lady Justice Alexandra Nkonge Rugadya.

RULING:

Introduction:

The applicant brought this application under ***Section 33 of the Judicature Act Cap.13, Section 98 of the Civil Procedure Act Cap.71 and Order 22 rules 23 & 89 (1) of the Civil Procedure Rules SI 71-1*** for orders staying execution of the judgement decree in ***Civil Suit No.194 of 2010; James Makumbi vs Joseph Ssemango & Another*** pending the determination of ***Court of Appeal Civil Appeal No.184 of 2021; James Makumbi vs Joseph Ssemango & Another,*** and that costs of the application be provided for.

Grounds of the application:

The grounds upon which the application is premised are set out in detail in the affidavit in support of the Mr. James Makumbi, the applicant but briefly, that the applicant instituted ***Civil Suit No.194 of 2010*** against the respondents seeking among others a declaration that the estate of the late Israel Nyanzi is the lawful occupant of the land in dispute and is entitled to possession thereof but the same was dismissed with costs. Orders for vacant possession of ***plots 96 & 98*** were made***;*** as well as an order for the immediate demolition of the applicant's house on ***plot 96.***

That the applicant being aggrieved with the judgement filed ***Constitutional Appeal No.184 of 2021*** which raises serious questions of law and facts which are pending determination by the Court of Appeal and that the said appeal has a likelihood of success based on the grounds presented for determination by the court.

That the respondents have been on the move aimed to evict the applicant from his house and as such that there is a real threat of execution of the judgement despite the pendency of the appeal

considering the fact that the applicant was served with a notice to show cause why execution should not issue. It was slated for hearing on 30th March, 2022.

In addition, that the suit land is developed with a house from which the beneficiaries to the estate of the late Nyanzi derive income for their livelihood, which if demolished, will cause irreparable loss to the applicant as well as his siblings and that the pending appeal shall be rendered nugatory.

Further, that the instant application which was brought without delay is brought in good faith, in the interest of justice and that the respondents shall not be prejudiced if the same is granted.

1st Respondent's reply:

The 1st respondent objected to the application through his affidavit in reply wherein he stated *inter alia* that the instant application was not only brought in bad faith but is also a misconception of the law on execution since he has not commenced any execution proceedings against the applicant; and that if the same is granted, the respondent will be unfairly condemned in costs of the application.

2nd Respondent's reply:

The 2nd respondent equally opposed the application though an affidavit in reply sworn by her lawful attorney, Ms. Idah Erios Nantaba who deponed that the applicant's appeal is incompetent because the applicant only effected service of the Notice of Appeal on the 1st respondent on 15th February, 2021 while the 2nd respondent has never been served with the same and that the applicant's lawyers have adamantly omitted to effect service of the memorandum of appeal as well as the record of appeal on the 2nd respondent.

That none of the requisite documents have been served on the 2nd respondent despite the fact that court has on occasions directed the applicant's lawyers to effect service of the same on the 2nd respondent's lawyers.

That following the applicant's failure to comply with a court order to pay ***Ugx. 60,000,000/=*** counsel for the respondent wrote a letter seeking an arrest warrant which was issued against the applicant on 19th May, 2022 and on 20th May, 2022 he was produced before court and was remanded to civil prison.

That the applicant was not only aware of the status of the suit but also that the respondent had commenced execution proceedings against him but the applicant had deliberately refused to pay the money.

That the applicant has been afforded sufficient time to settle the sums therein and further vacate the suit property comprised in ***Block 18 Plot 96*** and that he is seeking to stay the said orders pending determination of an appeal filed challenging the judgement of this court, but the said appeal is not known to either 2nd respondent or her counsel.

Further, that the applicant's alleged application for leave to appeal out of time has no likelihood of success, as it is incurably incompetent and that it is just that this court dismisses the said

application because it is brought in bad faith in a bid to restrain the 2nd respondent from lawfully benefiting from the fruits of its judgment in ***HCCS No.'194 of 2010***.

Applicant's rejoinder:

The applicant also filed an affidavit in rejoinder to the 1st & 2nd respondents' respective affidavits in reply. In response to the 2nd respondent's averments, he averred that the court in ***Civil Suit No.194 of 2010*** made various orders including an award of costs, the amount of which was indicated by court and that the 2nd respondent seeks to, among others, execute the orders for costs in ***Execution Miscellaneous Application No.20 of 2022,*** to which the 1st respondent is a party.

That the averments by the 2nd respondent that she was never served with the Notice of Appeal and memorandum of appeal were are unfounded because ***M/s Magna Advocates*** were served with the same but declined to acknowledge receipt thereof because they had to consult with their client.

The applicant attached a copy of the affidavit of service showing that the papers were received but that counsel with personal conduct declined to acknowledge receipt pending consultations with their client. The 2nd respondent did not deny the fact that she received a copy of the notice of appeal.

In the case of ***Attorney General of the Republic of Uganda versus The East African Law Society & Another EACA Application No.1 of 2013***, it was held that a notice of appeal is a sufficient expression of an intention to file an appeal and that such an action is sufficient to form the basis for grant of orders of stay in appropriate cases'.

The affidavit of service also showed that counsel for the 1st respondent, ***M/s Lukwago & Co. Advocates*** was also duly served with the notice of appeal, which they acknowledged.

In addition, that the instant application was already filed at the time the parties appeared before the learned Registrar who issued the order for payment of monies within 30 days and that the pendency of this application was brought to the attention of the learned registrar who confirmed that the same was yet to be allocated and fixed for hearing via **ECCMIS**.

In response to the objection, this court takes judicial notice of the challenges faced so far in the operation of the ECMIS system giving the benefit of doubt to the applicant. For the above reasons therefore, the objection raised by the 2nd respondent cannot be sustained.

It was also the applicant's claim that the instant application only seeks to stay the execution proceedings in ***Execution Miscellaneous Application No.20 of 2022*** which the applicant's lawyers only found out on 21st March, 2022 when they were served with a notice to show cause slated for hearing on 30th March, 2022 and that this court is clothed with wide discretionary powers to grant the orders sought pending the determination of the appeal.

That the building sitting on ***plot 96*** which is the applicant's ordinary residence was constructed by his late father in the early 1970s also serves as the residence to other beneficiaries of the deceased's estate, and has other sitting tenants who have been in occupation of the same for very

many years and if evicted, will suffer inconvenience. The estate therefore risks a suit in damages by the sitting tenants.

Representation:

The applicant was represented by ***M/s Alliance Advocates.;*** the 1st respondent was represented by ***M/s Lukwago & Co. Advocates;*** and the 2nd respondent by ***M/s Magna Advocates.***

Consideration of the issues:

Where an unsuccessful party is exercising their unrestricted right to appeal, it is the duty of the Court to make such order for staying proceedings in the judgment appealed from as will prevent the appeal from being rendered nugatory. ***(See Wilson vs Church (1879) Vol. 12 CH D 454 followed in Global Capital Save 2004 Ltd & Another vs Alice Okiror & Another HCMA No. 485/2012)***

The principles under which an application of stay of execution can succeed were well espoused in the case of ***Lawrence Musiitwa Kyazze Vs Eunice Businge, Supreme Court Civil Application No 18 of 1990***, as well as the Supreme Court case of ***Hon Theodore Ssekikubo and Ors Vs The Attorney General and Ors Constitutional Application No 03 of 2014*** as follows;

a. ***The applicant must show that he lodged a notice of appeal***
b. ***That substantial loss may result to the applicant unless the stay of execution is granted.***
c. ***That the application has been made without unreasonable delay.***
d. ***That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.***

1. ***Notice of appeal/pending appeal.***

Regarding the first principle which stipulates that there should be a pending appeal, as already noted, in reference to the case of ***Attorney General of the Republic of Uganda versus The East African Law Society & Another EACA Application No.1 of 2013***, the holding in that case was:

> ***'A notice of appeal is a sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases'.***

In the instant case, it was the applicant's uncontroverted evidence that he had filed an appeal in the Court of Appeal vide ***Civil Appeal No. 184 of 2021***. He attached a copy of the Notice of appeal filed on 10th February, 2021 and a copy of the Memorandum of Appeal filed on 2nd June, 2021.

Accordingly, this court finds that the first requirement has been fulfilled by the applicant.

2. ***Substantial loss.***

Regarding the 2nd principle that substantial may result, reference is made to the applicant's affidavit in support, specifically *paragraph 12* wherein the applicant avers that the suit land is

developed with a house from which the beneficiaries to the estate of Nyanzi derive income for their livelihood by way of rent and that if the same is demolished, they will all suffer irreparable loss.

The 2nd respondent in her affidavit in reply refutes the averments by the applicant on the basis that the applicant has not demonstrated that execution of the decree will either endanger him or cause him irreparable damage since one of the houses situate on the suit land claimed to be a source of income for him and the siblings was found to be dilapidated and inhabitable by this court.

In ***Andrew Kisawuzi Vrs Dan Oundo Malingu HCMA 467/2013*** it was held thus:

> ***"...substantial loss cannot mean ordinary loss or the decretal sum or costs which must be settled by the losing party but something more than that.....the applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is granted"***

On the other hand, ***Justice Ogola J (as he then was)*** in ***Tropical Commodities Suppliers Ltd and Ors Vs International Credit Bank Ltd (In Liquidation) (2004)2 EA 331*** opined that substantial loss does not represent any particular amount or size for it cannot be quantified by any particular mathematical formulae. It refers to any loss, great or small that is of real worth or value as distinguished from loss without a value or that which is merely nominal.

In this case, the likelihood that the applicant and his family were likely to suffer irreparable loss is not too remote considering the fact that they are in occupation of the suit land and the respondents intend to evict and demolish the structures thereon.

It is not disputed that the suit land is also occupied by tenants from whom the applicant and his siblings derive sustenance. It follows therefore that if this order is not granted the applicant will suffer irreparable damage also considering the family's emotional and ancestral attachment to the suit land.

3. <u>Unreasonable delay.</u>

The third principle that ought to be fulfilled by the applicant is that the application for stay of execution has been made without unreasonable delay,

In ***Ujagar Singh v Runda Coffee Estates Ltd [1966] EA 263*** where ***Sir Clement De Lestang, Ag. V.P*** stated;

> ***'. . . It is only fair that an intended appellant who has filed a notice of appeal should be able to apply for a stay of execution . . . as soon as possible and not have to wait until he has lodged his appeal to do so. Owing to the long delay in obtaining the proceedings of the High Court it may be many months before he could lodge his appeal. In the meantime, the execution of the decision of the court below could cause him irreparable loss.'***

The applicant in the instant case filed a notice of appeal on 10th February, 2021 and a memorandum of appeal on 2nd June, 2021. This application itself was brought on 25th April, 2022, soon after receiving eminent threat of execution. In the circumstances I find that there was no unreasonable delay in filing the same.

4. Eminent threat of execution

The fourth principle that there is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory. It was brought to the attention of this court that the 2nd respondent had filed ***Execution Miscellaneous Application No.20 Of 2022*** seeking to commence execution of the orders of this court in the main suit. This fact was not denied by either respondents. It is clear that the process of execution has since been commenced. The threat of final execution becomes real and may render the appeal nugatory.

5. Security for due performance of the decree or order.

The requirement for payment of security for costs is to ensure that a losing party does not intentionally delay execution while hiding under unnecessary applications. Courts have however held that each case must be looked at according to its merits. The requirement was never intended to fetter the right of appeal.

A balance must therefore be drawn between on the one hand the delay and inconvenience likely to be suffered by the successful party in accessing the fruits of the judgment and on the other hand, the exercise of a party's right of appeal which ought not prohibited by an excessive amount of security for costs.

In the case of ***John Murray (Publishers) ltd vs G.W Senkindu Civil Suit No. 1018 of 1997,*** this court while dealing with the issue of security of costs noted that;

> ***"I think the first consideration in applications of this nature is whether the respondent has goods or chattels of his in the jurisdiction of this court which are sufficient to answer the possible claim of the other litigant which would be available to execution when the court will order him to give security for costs...."***

In determining the amount to be furnished by the applicant, this court takes into consideration the fact that the applicant is yet to pay the sum as decreed by court which he owes the respondent.

6. Likelihood or probability of success:

While the applicant is required to demonstrate that the appeal is not frivolous and has a likelihood of success, it is not the place of this court to express its opinion as to whether the appeal is likely to succeed or not.

The likelihood or probability of success was discussed in ***GAPCO Uganda Ltd v Kaweesa & Anor (MA No. 259 of 2013) [2013] UGHCLD 47***. Court must be satisfied that the claim is not frivolous

or vexatious and that there is a serious question to be tried. ***(See American Cyanamid versus Ethicon [1975] ALL ER 504).***

The applicant supplied this court with a copy of the memorandum of appeal lodged in the court of Appeal in which seven grounds of appeal were raised. The applicant raised questions of both law and fact to be addressed by the Court of Appeal which sufficiently satisfies the last requirement for the order for stay.

Having fulfilled all the necessary conditions for the grant of an application of this nature, it is the finding of this court that the application merits the prayers sought.

Accordingly, 50% of the costs as decreed shall be paid as security for costs.

Each party to meet its own costs.

I so order.

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Alexandra Nkonge Rugadya.

Judge

6th July, 2022.

Delivered by email

J 6/7/2022