

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.474 OF 2022

(Arising out of Civil Suit No. 550 of 2007)

LUTAAYA JAMES:.....APPLICANT

VERSUS

EFURAIMU SAFARI:.....RESPONDENT

Before: Justice Alexandra Nkonge Rugadya.

RULING

Introduction:

The applicant brought this application by notice of motion, under the provisions of **Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 22 rule 23 and Order 52 rules 2 & 3 of the Civil Procedure Rules.**

He seeks orders that the execution of the decree and orders arising from the judgement against the applicant in **High Court Civil Suit No.550 of 2007** be stayed pending an appeal; and for costs of the application to be provided for.

Grounds of the application:

The grounds of the application are set out in the affidavit of Mr. Lutaaya James wherein he stated *inter alia* that the respondent filed **Civil Suit No.550 of 2007** against him and another and that the same was decided in the respondent's favor.

That court ordered for among others the cancellation of the entry of the applicant's name onto the title of the suit land; payment of general damages of **Ug. Shs. 120,000,000/=** with interest at the court rate from the time of judgment until payment in full, as well as the costs for this application.

That the respondent intends to execute the decree as he has served the applicant with a notice to show cause why a warrant of arrest should not be issued. That the applicant instructed his lawyers to file a notice of appeal to safe guard his rights and that he has also requested a certified copy of the proceedings to enable them prepare a memorandum of appeal and a record of appeal.

That although he earlier instructed his lawyers to file an application for stay of execution, there was no threat of execution at the time as normal court business had been affected by the presidential and Chief Justice's guidelines to prevent and mitigate the spread of COVID-19 and that while his previous lawyers did not file the said application, he instructed his current lawyers to file the instant application after the respondent threatened to execute the decree.

That based on the advice by his lawyers, it is the applicant's belief that he has a plausible appeal that raises serious questions of law and facts, with a high likelihood of success thereby warranting the stay of execution against him to safe guard his right to appeal.

5 In addition, that the applicant shall suffer grave injustice if the respondent is not restrained from executing the orders by this court. That not only will the appeal be rendered nugatory, but the applicant's title will be cancelled. Other pieces of land from which the applicant derives livelihood may be attached; and since the respondent has already served him a notice to show cause why a warrant of arrest should not issue, there is also a possibility of his arrest and imprisonment.

10 Furthermore that if the applicant is arrested, he will not be able to prosecute his appeal and that it is just and equitable for this application to be granted as the same was brought without unreasonable delay.

The respondent disputed the above grounds in his affidavit in reply wherein he averred that the applicant's notice of appeal was filed out of time meaning that the applicant has no right of appeal since no leave to file the notice of appeal out of time was sought.

15 That the applicant only filed the said notice of appeal, requested for a certified copy of the proceedings and changed lawyers in a bid to frustrate the respondent's efforts to enjoy his fruits of the judgement through execution.

20 That the applicant does not have a plausible appeal since he has not attached a draft memorandum of appeal with substantial grounds of appeal and that the applicant has never taken any positive steps to file an appeal or seek leave to appeal out of time and acted only after the respondent's lawyers filed for execution.

In addition, that the affidavit in support of the application is full of falsehoods as the same does not contain a certificate of translation yet the applicant does not know English. To this end, the respondent attached a previous affidavit deposed by the applicant wherein a certificate of translation was attached.

25 Further, that the instant application is overtaken by events since execution of the said decree has commenced and the certificate of title of the suit land has already been transferred into the respondent's names and that if this application is to be granted, the applicant should be required to deposit **Ug. Shs. 120,000,000/= (One hundred twenty million shillings only)** or a land title of equivalent value, in the applicant's names as security for due performance of the decree or order.

30 The applicant also filed an affidavit in rejoinder to the respondent's averments contending that he is not an illiterate person since he can read and understand English and that it is his former lawyers to wit; **M/s Victoria Advocates & Legal Consultants** who put the certificate of translation thinking that the applicant could only understand Luganda. But nowhere was it stated that he was illiterate.

35 That when he changed instructions to **M/s Byamugisha, Lubega, Ochieng & Co. Advocates** to pursue the appeal, they discovered that the notice of appeal and letter requesting for certified record of pleadings had been filed and served out of time.

That they informed him that the powers to strike out the notice of appeal are restricted to the court of appeal, upon application of the respondent and because no such application has been made by the

respondent, the applicant has instructed his lawyers to apply for extension of time within which to file and serve the notice of appeal and/or validate the notice of appeal that was filed.

In addition, that the delay was caused by mistake of counsel which should not be visited on the litigant.

Representation.

- 5 The applicant was represented by ***M/s Byamugisha. Lubega, Ochieng & Co Advocates*** while the respondent is represented by ***M/s Mugarura, Kwarisiima & Co. Advocates.***

Both counsel filed written submissions in support of their respective clients' cases as directed by this court.

Consideration of the application.

- 10 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***)

- 15 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:

- 20 ***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.

Lodging a notice of appeal:

- 25 Regarding the first principle which stipulates that there should be a pending appeal, the applicant annexed a notice of appeal to this application. (***See: Annexure 'B' of the affidavit in support of the application.***)

- 30 The said notice of appeal was lodged in this court on 20th December, 2019 and the date on which it was received by the Court of Appeal is quite unclear. The Judgement from which the applicant seeks to appeal was read and delivered by this court on the 17th December, 2019.

- 35 Counsel for the respondent in his submissions argued that the notice of appeal was filed out of time owing to the fact the judgement in issue was delivered on 25th November, 2019 but the notice of appeal was filed 25 days therefrom on 20th December, 2019 contrary to the provisions of ***rule 76 (1) and (2) of the Judicature (Court of Appeal Rules) Directions S.I 13-10*** which stipulate that a notice of appeal ought to be lodged within 14 days from the date of the judgement or ruling.

In addition, that the applicant ought to have sought leave to file the notice of appeal of time before filing the same which means that the applicant does not fulfil this principle.

In the case of **Attorney General of the Republic of Uganda versus The East African Law Society & Another EACA Application No.1 of 2013**, as rightly cited by counsel for the plaintiff in his written submissions, 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 found the basis for grant of orders of stay in appropriate cases'.


In the case before me, it is not in dispute that the applicant filed a notice of appeal as well as a letter dated 20th December, 2019 requesting for the typed certified copy of proceedings. There is no indication however as to whether or not the court proceedings were availed to him.


The applicant in his affidavit in rejoinder categorically stated that he has since instructed his new lawyers to apply for extension of time within which to file and serve the notice of appeal and/or validate the notice of appeal that was filed. There is no evidence however that the application was filed and/or served to the respondent.

Without a notice of appeal filed within time as stipulated by law, and without evidence that an application for extension of time (within which to file and serve a notice of appeal/validate the notice of appeal has been filed, this application must fail.

Costs awarded to the respondent.

I so order.


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Alexandra Nkonge Rugadya
Judge
30th June, 2022.

Devised by email

30/6/2022