

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

MISC. APPLICATION NO. 0166 OF 2022

[ARISING FROM CIVIL APPEAL NO. 45 OF 2022]

[ARISING OUT OF HIGH COURT CIVIL APPEAL NO. 0003 OF 2019]

AND

[ARISING OUT OF CIVIL SUIT NO. 155 OF 2010 IN THE CHIEF MAGISTRATES COURT OF ENTEBBE]

HARRIET ACHAM

APPLICANT

V

OKUMU HENRY OKORI

RESPONDENT

BEFORE: HON. LADY JUSTICE P. BASAZA - WASSWA

R U L I N G

Representation:

Mr. Magezi John for the Applicant.

Mr. Nuwagaba Gilbert for the Respondent.

Introduction:

- [1] The Applicant; Ms. Acham is the unsuccessful party in HCT. **Civil Appeal No. 0003 of 2019**; an appeal against the decision of the learned Chief Magistrate of the Magistrates Court of Entebbe. The Respondent; Mr. Okori is the successful party and decree holder.

Masabwa 11/4.

[2] The present application was brought by Ms. Acham, by motion under **Sec. 33 of the Judicature Act, Sec. 98 of the Civil Procedure Act (CPA), and Order 43 Rule 4 and Order 52 Rules 1 and 2 of the Civil Procedure Rules (CPR)**, as amended.

Ms. Acham seeks for an order of stay of execution of my judgment and Decree in HCT. Civil Appeal **No. 0003 of 2019**, pending the determination of her appeal to the Court of Appeal vide **Civil Appeal no. 45 of 2022**.

Background:

[3] In the said first appeal vide **HCT. Civil Appeal No. 0003 of 2019**, I passed Judgment on September 30, 2021 in favor of Mr. Okori who was the Plaintiff, and the unsuccessful party in the original lower Court suit: **No. 155 of 2010**.

In my judgment, I set aside the Judgment of the lower court in its entirety, and substituted the same with the following declarations and Orders:

- i) Mr. Okori was declared the lawful owner of **the suit land comprised in LRV 4239 Folio 1, Plot 36 Mirza Road, Entebbe**.
- ii) Ms. Acham was declared to have no interest in the suit land, and to be a trespasser thereon.
- iii) Mr. Okori was granted immediate possession of the suit land; **an empty plot**.
- iv) An eviction order was issued against Ms. Acham to immediately remove her store / makeshift structure, the iron sheet garage, and anything else that she put or erected on the suit land.

Masamba 14/4

- v) A permanent injunction was issued against Ms. Acham, restraining her, her agents, workers and anyone under her from interfering with Mr. Okori's possession and ownership of the suit land.
- vi) Mr. Okori was awarded **UGX. 20,000,000/= (Shillings Twenty Million)** as general damages for trespass against Ms. Acham, and also awarded the costs of the Appeal, and of the Court below.

[4] On February 11, 2022 Mr. Okori's bill of costs was taxed and allowed by the learned Deputy Registrar at **UGX. 9,162,000/= (Shillings Nine Million, One Hundred Sixty-Two thousand)**, and a notice to show cause why execution should not issue was subsequently signed by the learned Deputy Registrar on October 13, 2022.

The grounds of Ms. Acham's application:

- [5] The gist of Ms. Acham's application, accompanied by her affidavit in support, is;
- a) That her appeal raises serious points of law and fact with a high likelihood of success, which warrant determination by the Court of Appeal.
 - b) That she will suffer substantial loss if her application is not granted and execution of the Decree is executed against her, which will render her appeal nugatory.
 - c) That her application is brought in good faith, without inordinate or unreasonable delay.

Asahubwamy 11/4.

Rebuttal by Mr. Okori.

[6] The gist of Mr. Okori's rebuttal, in his affidavit in reply is;

- a) That in complete defiance and contempt of court, Ms. Acham refused to immediately remove the store / make shift structure, the iron sheets garage and anything else that she put, or erected on the suit land.
- b) That in further contempt of the Court Orders, Ms. Acham has for more than a year and a half, continued to interfere with his possession and ownership of the suit land and has not paid the general damages awarded.
- c) That Ms. Acham's appeal has no merit.

Rejoinder:

[7] Ms. Acham rejoined by averring that she has been in occupation of the suit land since 2001, and has extensively developed a guest house thereon, from which she gets income. That if evicted, she will be in danger as she is the only breadwinner and that her husband is permanently impaired.

Issue for determination:

[8] Whether the order sought for stay of execution should be granted?

These will amount to 11/4

Submissions of Counsel:

- [9] The written arguments of both learned Counsel have been duly considered, but shall not be repeated here. The same may be referred to in this Ruling if, and or where necessary.

Analysis by court:

- [10] I will begin by pointing out that an application for an Order to stay execution of a Judgment and Decree of the High Court to the Court of Appeal, is not made under Order 43 Rule 4 of the CPR as wrongly done in this present application. That is a common mistake made by many Counsel. Order 43 of the CPR is an order governing appeals to, and not from, the High Court.
- [11] Citing Mugenyi and Co. Advocates v National Insurance Corporation¹, the Justices of the Supreme Court in their decision in Lawrence Musiitwa Kyazze vs. Eunice Busingye² observed that there is nothing in the Civil Procedure Rules that lays down the procedure for appeals from the High Court. That the jurisdiction of the High Court to stay its orders stems from section 101 (now section 98) of the Civil Procedure Act, which preserves the inherent power of the Court.
- [12] The purpose of issuing an order of stay of execution, like an injunction, is to preserve the *status quo* until the disposal of an appeal or other suit, as the case may be, and to see that the appeal, if successful, is not rendered nugatory.

Musa W. Musinguzi 11/4.

¹ C/Appeal No. 14 of 1984

² SCCA No. 18 of 1990 (1992) IV KALR at 55

See Kyambogo University v Prof. Isaiah Omolo Ndiege³ and DFCU Bank Ltd v. Dr. Ann Persis Nakate Lussejjere⁴.

[13] It is a well settled⁵, rule of practice that when considering an application for stay of execution, the Applicant must satisfy Court of the following;

- i) That the Applicant has lodged an appeal.
- ii) That substantial loss may result to the Applicant unless the order of stay of execution is granted.
- iii) That the Application has been made without unreasonable delay
- iv) That security has been given by the Applicant for the due performance of the Decree or order as may ultimately be binding upon him or her.

[14] The existence of Ms. Acham's appeal to the court of Appeal has not been contested by the opposite party. What is contested is the likelihood of its success. I will refrain from assessing that question, as to do so would be to delve into what is the preserve of the Court of Appeal. To wit; to assess the merits / demerits of that appeal.

[15] I am emboldened in the above position by the decision in DFCU Bank Ltd v. Dr. Ann Persis Nakate Lussejjere (supra), in which the Justices of Appeal stated that 'they did not see why the learned Trial Judge troubled himself about the likelihood of success of the appeal. That certainly, it is a factor that should not

Nashindwa 11/4.

³ COA C/Applic. No. 341 of 2013

⁴ UGCA C/Applic. No. 29 of 2003

⁵ Refer to the DFCU Bank Case (supra), Lawrence Musiitwa Kyazze vs. Eunice Busingye SCCA No. 18 of 1990, among many other authorities

be allowed to interfere with the Judge's decision on whether or not to grant a stay of execution'.

[16] I have carefully considered all the other factors and the circumstances of this case as a whole, and I find that there is no justification for a grant of an order for stay of execution. In arriving at this position, I based on the following;

1. First, although Ms. Acham and her Counsel contend that; 'she has extensively developed a guest house on the suit land from which she gets income, and that if evicted, she will suffer irreparably', that contention was already carefully assessed and rejected in my Judgment in HCT CA No. 0003 of 2019.

In her written statement of defence in the lower Court, Ms. Acham raised the very same contention. However, as shown in the lower Court proceedings, and particularly by the observations made by the learned Trial Magistrate at the locus in quo, it was observed that the suit land was an empty plot. Refer to paragraphs [6], [26] and [48] (1) (c) of my Judgment and orders in HCT CA No. 0003 of 2019. Also refer to the photographs taken at the locus.

In the result, Ms. Acham has failed to demonstrate to this court that she would suffer substantial loss if the order of stay of execution is not granted. My Order that she removes her make - shift store and iron sheets garage structure from the empty suit land, shall not cause her any loss.

nasirullah amin 11/4.

2. Second, Ms. Acham has not shown any special circumstances that would justify her not paying the monetary awards of general damages (UGX. 20,000,000/=) and costs (taxed at UGX. 9,162,000/=) totaling to UGX. UGX. 29,162,000/=. It is not enough for Ms. Acham to simply aver, without any supporting medical or other evidence, that she has an impaired member of her family. As it is, such an unsupported averment remains a mere allegation that carries no evidential value, and is therefore rejected. (Ss. 101-103 of the Evidence Act⁶, applied).

In Kampala City Council vs. National Pharmacy Ltd⁷ the Justices of the Court of Appeal (then the highest court in Uganda) held, after finding that there were no special circumstances to justify the grant of a stay of execution, **that payment of a judgment debt by a judgment debtor, would not cause the applicant any injustice.**

I adopt the same position for this case.

3. Third, Ms. Acham has not, in her affidavit, pledged to pay any security for the due performance of the Decree or order as may ultimately be binding upon her.

Masabwa 11/4.

⁶ Cap 6.

⁷ [1979] HCB 215 -216

Decision of Court:

[17] For these reasons, I decline to grant the order for a stay of execution. I however find it expedient to order, and hereby do order, that pending the disposal of Ms. Acham's appeal in the Court of Appeal, Mr. Okori (the Respondent) should not sell, alienate, waste or dispose of the suit land in any way. **Sec. 33 of the Judicature Act, applied.**

The costs of this application shall be paid by Ms. Acham (the Applicant), to Mr. Okori (the Respondent).

I so order,



P. BASAZA - WASSWA
JUDGE

April 11, 2023

Ruling delivered electronically on the Judiciary ECCMIS portal and via email to the parties.