

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

MISC. APPLICATION. 628 OF 2022

(Arising from HCT-LD-CS-0133-2011)

LT. MBAZIRA SEBINENE & 7 OTHERS ::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

KALUNGI KIRUMIRA MOSES ::::::::::::::::::::::::::::::::::: RESPONDENT

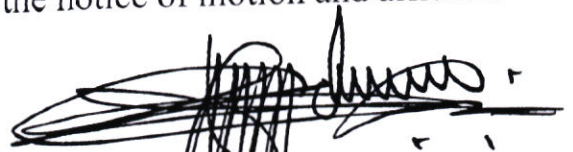
BEFORE: HON. MR. JUSTICE TADEO ASIIMWE

RULING

This application was brought under Order 22 r 23, Order 52 rules 1, & 3 of the Civil Procedure Rules (CPR) and Section 98 of the Civil Procedure Act (CPA) and section 14, 33, 38 & 39 of the Judicature Act.

The applicant is seeking for an order for stay of execution of the decree and orders arising from High court civil suit No. 113 of 2022 pending the determination of the intended appeal and costs of the application be provided for. The application is supported by an affidavit sworn by Mrs NALONGO SSEBATYA the 4th applicant.

The grounds of the application as contained in the notice of motion and affidavit in support and briefly are that;



1. That the applicant was declared true owner /registered owner of the land comprised and known as kyadondo Block 158B plot 21, land at Namunge, Musale.
2. That the applicants were declared trespassers on the suit land.
3. That an eviction order issued against all applicants and their agents from the suit land.
4. That a permanent injunction issued against the applicants restraining them or their Agents from the suit land.
5. That the applicants were jointly and severally ordered to pay to the respondent, a whopping ug. 50,000,000/= (fifty million only) in general damages.
6. That the respondent intends and shall not at any time, hesitate to execute judgement/decreed in HCT-00-LD-0133-2011.
7. That the applicants have filled a notice of appeal in this honorable court to safeguard their right of appeal and have on addition, requested for certified copies of the record of proceeding to enable them prepare a memorandum of appeal and record of appeal against the judgement of this court.
8. That the applicants have a plausible appeal on the merits which raises serious questions and that then issues have a high likelihood of success, which warrants for stay of execution against the applicant.
9. The orders of stay of execution sought are intended to safeguard the applicant's right of appeal and not to render the same nugatory if the order of stay is not granted.

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10. That the respondent shall not be prejudiced on issuance of the order of stay of execution and that the application has been brought without undue delay.

11. That it is in the interest of justice, fair and equitable that this application is allowed.

On the other hand, an affidavit in reply was deposed by Mr. KALUNGI KIRUMIRA MOSES the respondent. The gist of his response is that the application is marred by false hoods and the same should be struck out. That the 4th applicant is not a party to the intended appeal and therefore has no locus to bring this application. Further that this application is speculative and presumptuous since the respondent has not applied for execution, has not served a notice of eviction and has no warrants of arrest or eviction.

At the hearing of this application, Counsel Kagwa David appeared for the applicants while Counsel Babu Rashid represented the respondent.

Court directed both parties to file written submissions which they did and I shall consider them in this ruling.

In his submissions the applicant's counsel submitted that the notice of appeal is a precondition for grant of this application as is not in itself an appeal or a bar to the 4th applicant lodging an appeal. That the 4th applicant should therefore not be turned away by court. He further relied on order 43 rule 4 arguing that the applicants intended appeal has a likely hood of success and that if execution is allowed to succeed the applicant will suffer irreparable damage. That the balance of convenience favors grant of the application, which has been brought without

In response, counsel for the respondent relied on sections 68 and 77 of the civil procedure act arguing that the 4th applicant was not a party to the notice of appeal which expresses the intention to appeal by intending appellants and therefore had no locus to depone the affidavit in support of stay of execution. He further submitted relying on order 43 and the judicature court of appeal rules arguing that the applicant's time to lodge the memorandum of appeal has run out. He added that the applicants intended appeal lacks a likelihood of success, that dismissal of this application will not occasion any substantial loss to the applicants but rather to the respondent, the rightful owner with current position of the suit land. He lastly submitted that there is no serious threat of execution and that this application should be dismissed with costs.

I have considered the grounds of this application, the supporting affidavit and its attachments. I have also considered the arguments for counsel for the applicant in support of the application

For court to grant applications of this nature, the applicant must meet conditions set under Order 43 r 4 (3) of the CPR which has been interpreted in a number of decisions to include the following principles;

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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.
5. That there is a serious or eminent threat of a decree or order and that if the application is not granted the appeal will be rendered nugatory.
6. That the application and appeal are not frivolous and has a likely hood of success.
7. That refusal would inflict more hardship than it would avoid.

Before I delve in to the merits of this application, I wish to resolve the issue raised by the respondent that 4th applicant who deponed the affidavit in support of the motion lacked locus to depone the same since she was not party to the notice of appeal.

By perusal of the record, it is clear that the 4th applicant, NALONGO SEMBATYA deponed the affidavit in support of the motion. However she is not an appellant in the notice of intention to appeal which is a condition precedent to filing such applications.

Ideally the requirement for a notice of appeal is to enable court ascertain the parties' intention to appeal so as to avoid staying execution in a vacuum. Going by Notice of appeal on record, the 4th defendant is not listed among those who appealed and court cannot assume that she intends to appeal or that she contests the facts as put forward by the respondents as per sections 68 and 77 of the civil



procedure act. The effect of this would be to strikeout her affidavit in support of the motion. However I am persuaded to believe the applicant's submission that it was an omission which can be corrected at an appropriate time.

I notice that the 4th and 5th applicants have similar names and it is most likely that whoever edited the notice of appeal could have reluctantly thought it a repetition hence the error. It is in the interest of justice and for avoidance of undue technicalities that the 4th applicant's affidavit is here by validated.

I shall therefore go ahead and assess whether the application meets the conditions as set down in the law.

From the pleadings on record, this court is satisfied that there is a notice of appeal pending filing the memorandum of appeal in the court of appeal which in my view does not constitute an appeal. However, the said notice commences the appeal process as evidenced by the request for proceedings. Therefore the first and 3rd conditions are satisfied since this application has been filed with out unreasonable delay.

I shall now proceed to deal with whether there is serious or eminent threat of execution. To prove this ground, the applicant must show that there is eminent threat of execution to render the appeal nugatory.

In this application, the applicant in his affidavit did not depone that, there was threat of execution but that there is a likelihood of execution. The advocate submitted that there was eminent threat of execution since the respondent had earlier on demolished the structures on the land without a court order. In his view,

the respondent intends and will not hesitate to execute since he now has a court order.


In my considered view that is speculation. Court would have expected to see evidence of an application for execution as proof of eminent threat of execution. However, none exists and this court has no basis to believe that there is existence of an eminent threat. This requirement is not met by the applicant. Therefore, this application was filed prematurely in anticipation of execution of a decree which is even not yet extracted in this matter. This application was not necessary at this stage and is speculative.

Ideally this alone determines the entire application. I shall therefore not delve in determination of other grounds.

For the above reasons, this application fails and it is dismissed with costs against the applicants.

MISC. APPLICATION. 629 of 2022 is also dismissed for being over taken by events.

I so order.

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TADEO ASÍMWE

JUDGE

13/10/2022

