

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS APPLICATION NO.2901 OF 2023
ARISING OUT OF CIVIL SUIT NO.422 OF 2008
NANKYA JUSTINE ----- APPLICANT
VERSUS
ADALINA LUBOGO ----- RESPONDENT

RULING

BEFORE HON LADY JUSTICE KANYANGE SUSAN

This Application was brought under Rule 42(1) of the Judicature (Court of Appeal Rules) Directions and Order 52 Rules 1, 2 and 3 of the Civil Procedure Act. It seeks orders that,

1. An order of stay of execution of the decree passed in civil suit No.422 of 2008 pending the hearing and determination of the Applicant's intended appeal.
2. Costs of this application be provided for.

The application is supported by affidavit of the applicant but briefly the grounds are; the applicant intends to appeal the judgment and has lodged a Notice of Appeal. That the intended appeal has merit with high likelihood of success and if the respondent executes the decree of the court, it will render the intended appeal nugatory. Further to this that it

is necessary to preserve the status quo of the suit land in occupation thereon of the applicant.

In reply the respondent averred that the applicant doesn't have locus to institute application in her personal capacity as she is only an administrator of the estate of the deceased. Further to this that the Notice of Appeal was filed outside the statutory period and the appeal is an afterthought intended to prolong an elderly widow from enjoying her land yet case was litigated for over 15 years. That the application is frivolous and ought to be dismissed with costs to the respondent.

In rejoinder the applicant averred that it is true she is an administrator of the estate of the plaintiff and it was an error by lawyers not to indicate that. In addition she is also a beneficiary of the said estate and delay of the case was caused by transfer of Judges in the matter and it is not her fault.

Representation

M/s Muhwezi Law Chambers Advocates represented the applicants while **A F Mpanga Advocates** represented the respondents.

Issue – Whether the application meets the pre-requisite conditions for an order of stay of execution.

Resolution

Preliminary objection

Counsel for the respondent raised a preliminary objection that the applicant does not have locus standi to institute this application in her personal capacity as she is an



administrator of the estate of the plaintiff in the suit from which this application arose. That under Order 31 Rule 1 of the Civil Procedure Rules an action must be instituted by such administrator in their capacity as administrator of the estate and not in their personal capacity. He prayed that application is dismissed as it is barred by law since applicant did not institute it in her capacity as an administrator of the estate but in her personal capacity.

Further to this that the application amounts to amendment of the parties in the suit and it cannot be watered down to a technical error.

In reply counsel for the applicant submitted it was an error not to include applicant as an administrator but she is also a beneficiary of the estate of the plaintiff.

Order 31 Rule 1 of the Civil Procedure Rules provides that 'In all suits concerning property vested in a trustee, execution or administration, where the contention is between the persons beneficially interested in the property and a third person, the trustee, executor or administrator shall represent the persons so interested and it shall not ordinarily be necessary to make them parties to the suit but the court may if it thinks fit, order them or any of them to be made parties.

In the case of **Israel Kabwa versus Martin Banoba Musiga SCCA 52 / 1995 reported in (1996) II KALR at 109-120** it was held that a beneficiary of the estate of an intestate has locus to sue in his own name to protect the estate of the



intestate for his own benefit without having to first obtain letter of administration.

In instant case it was admitted that it was an error not to include that applicant as the administrator of the estate of the plaintiff. It is not in dispute she has letters of administration and even if she did not have as a beneficiary she would be allowed to take over this case and letters of administration would have been granted by court if requested for in respect of this suit.

This is an error which can be curable under **Article 126 of the Constitution** where courts administer justice without due regard to technicalities. I will thus invoke the said article and will not dismiss the application.

The preliminary objection is hereby overruled.

Issue 1- Whether the application meets the pre-requisite conditions for an order of stay of execution

S.98 of the Civil Procedure Act gives the High Court inherent powers to take decisions which are pertinent to the ends of justice and an order for stay of execution is such one.

The general principle is that where an unsuccessful party is exercising their right to appeal, it is the duty of the court to make such orders for staying of proceedings in the judgment appealed from as well as preventing the appeal from being rendered nugatory. In the case of **Lawrence Musiitwa Kyazze versus Eunice Busingye SCCA No.18 of 1990**

(1992) IV KALR 55 relied on by counsel for the respondent it was held that an application for stay of execution pending appeal is designed to preserve the subject matter in dispute so that the right of the appellant who is exercising his/her undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.

The conditions that the court should consider before allowing an application to stay execution are in Order 43 Rule 4(3) and espoused in the Supreme case of **Hon. Theodore Ssekikubo and others versus the Attorney General and others Constitutional Application No.03 of 2014** (cited by both counsel) as

1. The Applicant must show that he 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
5. That there is serious and imminent threat of execution of the decree or order and that if the application is not granted the main application and the appeal will be rendered nugatory

As regards the first condition of **filing a notice of appeal** the applicant avers that that they have lodged a notice of appeal. The respondent avers it was lodged outside the 14 days.

This condition has been met, as late filing can be validated or not by the Court of Appeal.

Issue 2 – Whether the applicant will suffer substantial loss.

The applicant averred that the respondent has taken actual steps to evict the applicant by making an application to evict and demolish her house. That demolition of structure is definitely irreparable damage.

In reply counsel for the respondent submitted that the applicant has not demonstrated substantial loss as court found her father a mere licensee and that an injustice will be rendered to elderly widow if application is granted as she has been denied enjoyment of her land for the last fifteen years.

Substantial loss does not represent any particular amount or size, it cannot be quantified by any particular mathematical formula it refers to any loss, great or small that is of real worth or value as distinguished from a loss without a value or loss that is of real worth or value as distinguished from a loss without a value or a loss that is merely nominal. (See **Tropical Commodities Supplier Ltd and others versus International Credit Bank Ltd (In Liquidation (2004) 2 EA 331.**



The applicant claims to be in occupation and indeed an eviction notice has been ordered by court.

I find that there will be substantial loss if applicants house is demolished

whether there is a serious and imminent threat of execution of the decree or order that if the application is not granted the appeal will be rendered nugatory yet it has a likelihood of success.

The applicant seeks to challenge the whole decision of the Judge and contends that the appeal will be rendered nugatory if this application is not granted. She contends that there are serious questions to be tried.

In reply counsel for the respondent submitted that the respondent is entitled to commence execution proceeding since the decree was extracted and there is no appeal lodged that will be rendered nugatory as notice of appeal was filed out of time without leave and there is only an application of extension of time to file notice of appeal. That there are also no serious points to meet consideration as no memorandum of appeal filed to show that intended appeal is not frivolous and has a likelihood of success.

In **Nalwoga versus Ed Co. & Anor MA No.7 of 2013**. It was observed by Hon Justice Mulangira that the court ought to review the proceedings and desist from prejudging the appeal or interfering with the order of the court. That the correct position for the purpose is only to preserve the status quo so that the appeal if successful, will not be rendered nugatory.



To determine whether the appeal has a likelihood of success, this court does not need to inquire into the substantial aspects of the appeal but rather from the face of the appeal/memorandum of appeal, which should raise arguable grounds.

No memorandum of appeal has been filed as counsel has submitted as they are waiting for proceedings. The intended issues to be raised in the Appeal are detailed in the applicants supporting affidavit. The applicant intends to appeal and state that the father was a lawful tenant on suit land having inherited it as a kibanja from his father in the 1930s etc.

I thereby find that there are appeal questions raised warranting consideration on appeal. As I have stated before, it will be up to Court of Appeal to validate the late filing of the notice of Appeal and memorandum of appeal or not.

The notice of eviction /demolition dated 31st August by the Deputy Registrar indicates that there is a serious threat of execution of the decree that will render nugatory the intended appeal.

Issue 3 – That the application has been made without unreasonable delay

Counsel for the applicant submitted that in paragraphs 6&8 of the affidavit in support that the lawyers were served with notice of eviction /demolition order on 31st August 2023 and the application was filed on 18th September 2023. That application was filed without inordinate delay.

In reply counsel for the respondent submitted that judgment was delivered on 17th January 2023, notice of appeal was



filed on 7th March 2023 and application filed on 18th September 2023. That there is unreasonable long time frame of about seven months and there is dilatory conduct by the applicant.

In the case of **Ayena Odongo versus Attorney General constitutional petition no 0038 of 2017(2021)UGCC 30** it was held that the issue of unreasonable delay is a question of fact.

I find that the notice of eviction/demolition was given on 31st August 2023 and application filed on 18th September 2023. The alleged serious threat of execution arose on 31st August 2023 so there is no unreasonable delay of the applicant in filing the application on 18th September 2023

4- The applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

Counsel for the respondent submitted that the applicant has not adduced any evidence demonstrating that the applicant is ready and willing to provide security for the due performance of the decree.

The condition requiring an applicant to deposit security for due performance is established under **Order 43 Rule 4(3) (c)** of the Civil Procedure Rules. Security for due performance is intended to protect the judgment creditor in the event that the appeal is unsuccessful. See case of **DFCU Bank Ltd versus Dr. Ann Persis Nakato CA 929 of 2003 and Gianfranco Manenthi and anor versus Africa Merchant Assurance co ltd 2019 KLR**. The court has

discretion to grant an order for stay of execution without security for due performance so as not to stifle appeals. See case of **V G Keshwala & Sons Ltd versus Ronald Musisi Misc. Application No.544 of 2016 – arising from civil suit No.14 of 2013.**

Considering the circumstances of this case, the applicant should deposit in court Ug shs 20,000,000(twenty million as security for due performance of the decree.

In conclusion the application is hereby granted with the following orders.

- a) An order of stay of execution of the Judgment and decree passed in Civil Suit 422 of 2008 is hereby granted pending the hearing and determination of the applicants intended Appeal
- b) Applicant to deposit in court Ug shs 20,000,000 as security for due performance of the decree within the next 30 days.
- c)Costs of this application are granted to the respondent.

DATED AT KAMPALA THIS 23rd DAY OF February 2024

KANYANGE SUSAN
AG JUDGE LAND DIVISION.