

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
MISCELLANEOUS APPLICATION NO. 47 OF 2019
(Arising from Civil Suit No. 513 of 2001)

ALAI DADA.....APPLICANT
VERSUS
HOIMA CATHOLIC DIOCESE.....RESPONDENT

RULING BY HON. JUSTICE GADENYA PAUL WOLIMBWA.

Introduction

This is an application for stay of execution brought under S. 6 & 98 of Civil Procedure Act, S.33 of the Judicature Act, Order 43 r 4 (2), (3) and (5), O 52 R 1&2 of the Civil Procedure Rules. The application seeks the following orders:-

1. That the execution and any proceedings arising from the Civil Suit No. 513 of 2001 pending before this Honorable court be stayed until the hearing and determination of the Applicant's Appeal to the Court of Appeal.
2. Costs of the application be provided for

The application was supported by the affidavit of the applicant Alai Dada but briefly, the grounds are-

1. That the Applicant/Appellant filed a suit against the Respondent in the High Court of Uganda Holden at Masindi Vide Civil Suit No. 513 of 2001 for orders that he is the rightful owner of the suit land, cancellation of the Respondent's Title on grounds of fraud *interlia*.
2. That this Honourable court dismissed the Applicant's case with costs.
3. That the Applicant being dissatisfied with the decision of this Hon. Court immediately lodged an appeal in the court of Appeal of Uganda by filing a notice of appeal.
4. That the applicant also applied for certified copies of proceedings from this Court but the said proceedings are not yet supplied.

5. That the Respondent has filed Misc. Application No. 10 of 2019 and the subject matter is the same suit property in the consequential orders being sought in Misc. cause No. 10 of 2019 by the Respondent and it is only fair and just that an order of stay of execution and proceedings of any pending matters before this court be issued until the determination of the Applicant's pending Appeal in court of appeal.
6. That the Applicants Appeal has high chances of success since he has been in occupation and use of the land for over 40 years.
7. That the respondent has commenced the process of execution by filing and fixing the bill of costs for taxation and if the execution of the said decree is not stayed, the Applicant shall suffer irreparable harm and loss and this shall render the appeal nugatory.
8. That the application has been made without any unreasonable delay.
9. That it is in the interest of justice that this application be granted until the determination of the applicant's appeal for justice to prevail.

While responding to the Application, the Respondent's trustee, Rev. Father Dominic Ndugwa deponed that:-

1. That the respondent is the registered proprietor of the land comprised in Leasehold Registration Volume 1850 Folio 9 Plot 7 Bugahya Block 20 land at Kyamugenzi Butema Buhanika, Hoima District, measuring approximately 273.4 hectares.
2. That HCCS No. 513 of 2001; Alai Dada Vs. The Registered Trustees of Hoima Catholic Diocese & others was dismissed in favor of the Respondent.
3. That the applicant has been given an opportunity to be heard on the motion before court vide HCMC No. 10 of 2019, and in order to avoid multiplicity of suits or yet a fresh suit being instituted over the same issues no prejudice will be occasioned to the Applicant, to warrant a stay of the said proceedings.

Arguments of the parties

Both counsel filed written submission and counsel for the applicant discussed the principles upon which stay of execution is granted.

Arguments of the Applicant:

Counsel for the applicant submitted that there is no specific provision of the law enabling the High Court to grant a stay of execution pending an appeal in the Court of Appeal but that there are precedents where the court can stay execution pending appeal. He cited the case of LAWRENCE MUSITWA Vs. EUNICE BUSINGYE, Civil Application No. 18 of 1990, where the Supreme Court, ruled that in applications for stay of execution pending appeal, the applicant must be prepared to meet conditions similar to those set out under (then) O. 39 r 4 (3) and now O. 43 of the Civil Procedure Rules.

The first principle is that the Applicant will suffer substantial loss if execution is denied. Secondly that the applicant's appeal stands high chances of success. Starting with the second principle whether the Applicant has an arguable appeal, counsel for the Applicant submitted that the Applicant has been on the suit land for four decades, a point which the court did not take into account when it dismissed his case in Civil Suit No. 513 of 2001. Referring to paragraph 9 of the affidavit in support of the application, counsel submitted that the applicant has several developments including permanent structures, farm on the suit land where he derives sustenance and maintenance for himself and his several dependents. Further referring to paragraph 11 of the affidavit in support counsel submitted that, the applicant's rights as an equitable owner and qualifies both as a bonafide and lawful occupant were not considered by the court and that since no orders for eviction were made to evict him and there was no counter claim, it is imperative upon this court to stay execution and any eviction proceedings or orders giving vacant possession of the suit land to the respondents before the disposal of the appeal.

Counsel for the Applicant further submitted that much as there are still a lot of pending proceedings before this court in regard to the same matter, the respondents have already filed a bill of costs, that is due for taxation and that it is therefore clear that if execution is not stayed by this court, the respondents are determined to proceed with their intentions of evicting the applicant before the disposal of the appeal. Counsel, submitted that since the applicant has permanent structures thereon and it is where he derives sustenance, he will suffer serious substantial and irreparable loss leading to his being homeless and mentally distressed.

With regard to whether the application had been brought promptly without unreasonable delay, counsel for the Applicant submitted that judgement and decree of this Honourable court which the applicant has preferred to appeal against was delivered on 11th April 2019, and he immediately thereabout applied for certified copies of the record of proceedings and judgement alongside a notice of appeal on the 16th day of April 2019, and subsequently in the Court of Appeal on the 18th day of April 2019. That the respondent then filed Misc. cause No. 10 of 2019 followed by the bill of costs. The applicant filed in this court the application for stay of execution therefore, the application has not been brought unreasonably late and counsel prayed that it be allowed.

With regard to furnishing security for due performance, counsel for the applicant, submitted that although he not given any security for the due performance of the decree, he is willing to furnish security should this court impose it as a condition for the orders sought herein. That this demonstrates that this application was not intended to defeat the respondents from enjoying the fruits of its success in litigation but rather to balance the interest of the applicant who has lodged an appeal, and the respondent who holds an order of this Honourable court in their favor.

Counsel further submitted that, the applicant under paragraph 11 and 12 of his affidavit in support, asserted that he has sufficient assets on the suit land which in the event the respondent succeeds on appeal, would be enough to meet the respondent's costs and that as such he will not suffer any prejudice by this court granting the orders of stay of execution and any pending proceedings without necessarily conditioning the applicant to furnish security. Counsel furthermore submitted that under Section 98 of the Civil Procedure Act, this court is enjoined to "make such orders as are necessary to achieve the ends of justice", and that therefore the court should stay execution the appeal is determined. Counsel also prayed for the costs of the Application.

Arguments of counsel for the Respondent

Counsel for the respondent did not submit on the principles for granting stay of execution apart from disputing the Applicant's assertion that his appeal has high chances of success. Counsel submitted that the main contention of the applicant is that he has since filed a notice of appeal and requested for certified copies of the proceedings that are yet to be availed.

Counsel submitted that the application is premature, misconceived and abuse of process and lacks merit in as far as it does not meet the condition for grant of stay of execution as set out under Order 43 rule 4 (3) c of the Civil Procedure Rules. He submitted that the consequential orders sought in HCMC No. 10 of 2019 are necessary because of the judgement in HCCS No. 513 of 2001, that no prejudice will be occasioned to the applicant herein if the consequential orders sought are granted since he has been given an opportunity to be heard on the motion. Counsel submitted that the consequential orders sought were not a subject of the judgement and as such the same cannot in any way be the subject of the applicant's intended appeal and the applicant's fears of his appeal being rendered nugatory or his interests being prejudiced by the grant of the consequential orders are baseless and unfounded. That the grant of the same would not in any way cause injustice, harm, or loss an irreparable damage to the applicant.

Counsel submitted that on the contrary the respondent stands higher chances of success on appeal on the merits.

Counsel for the Respondent submitted that the law governing stay of execution is well settled under Order 43 rule 4 (2), (3) and (5) of the CPR and as expounded on in the case of **Lawrence Musiitwa Kyazze Vs. Eunice Busingye SCCA No. 18 of 1990**. He submitted that despite this, the application for stay does not meet the criteria laid out in the law and it should therefore fail. For example counsel submitted the applicant has neither furnished security for due performance of the decree nor explained in his affidavit that he is going to provide the security. Counsel asked court to disregard statement from the bar that the Applicant was ready and willing to furnish any security if the court orders him to do so.

Consideration of the Application

The principles under which an application of stay of execution can succeed are well settled in the case of *Lawrence Musiitwa Kyazze Vs Eunice Busingye, Supreme Court Civil Application No 18 of 1990*, and in the case of *Hon Theodore Ssekikubo and Ors Vs the Attorney General and Ors Constitutional Application No 03 of 2014*, where the Supreme Court has laid down the following conditions that must be satisfied before stay of execution pending appeal is granted. The Conditions are-

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.

The Court of *Appeal in Kyambogo University Vs Prof. Isaiah Omolo Ndiege, CA No 341 of 2013* expanded the list to include:

1. 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
2. That the application is not frivolous and has a likelihood of success.
3. That refusal to grant the stay would inflict more hardship than it would avoid.

Will the applicant suffer substantial loss if the application for stay of execution is not granted?

The applicant submitted that he would suffer substantial loss if the application for stay of execution were denied. The Applicant in paragraph 9 deponed that:

“The grant of consequential orders would prejudice my interest in the suit property as I have several developments including permanent structures , farms and it is where I derive sustenance and maintenance for me and my several dependents and I have been advised by my lawyers that trial and determination of this matter summarily through this application for consequential orders will cause me and my family injustice , harm , loss and irreparable damage since I will not be able to lead evidence to prove my rights as an equitable owner of the suit land”.

In paragraph 12, the applicant deponed that he has lived on the suit land for more than forty years and has erected thereon several permanent structures and he risks to lose all this should this Honourable court fails to halt any pending execution on the suit land which will render him homeless and mentally distressed.

Can this be considered substantial loss? The phrase substantial loss was considered in the case of Kisawuzi v. Oundo UGCOMM 12 (5 February 2014), where Justice Hellen Obura as she then was cited with approval the case of Steel Rolling Mills Limited and Another vs. Gestation Economique Des Mission Catholic and Another , where Mukasa L J cited the case of Pan African Insurance Company (U) Limited vs. International Air Transport Association High Court Misc. Application No. 86 of 2006, where it was held;

“that the deponent should have gone a step further to lay the basis upon which court can make a finding that the applicant will suffer substantial loss as alleged. The applicant should go beyond the vague and general assertion of substantial loss in the event a stay of order is not granted”.

It was also observed in the same case;

“that the words substantial cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence . That is an element, which must occur in every case ...substantial loss must mean something in addition to all different from that”.

I did not receive any evidence to the contrary from the respondent and I find that the applicant has fulfilled this principle.

The Applicant has been on this land for more than four decades where he has invested all his life and livelihood on this land. Ejecting and evicting him from the suit land without hearing his appeal would subject him to great loss beyond what an ordinary litigant would suffer if the decree was executed and the consequential orders of eviction were granted. The Applicant would most importantly lose a livelihood and life, which he has painstakingly put together in the last four decades that he has been in occupation of the suit land. I am therefore satisfied that the Applicant would suffer substantial and irreparable harm if the decree was executed and consequential orders issued by this court to evict him from the suit land.

Has the application been made without delay?

Regarding the second principle that the application has been made without unreasonable delay, the applicant annexed a notice of appeal to this application. All the steps taken by the Applicant to appeal and contest the execution of the decree testify to the great speed that he has brought the Application. The Applicant filed a Notice of Appeal in the Court of Appeal five days after he lost the case in the High Court. The said notice of appeal was filed in this Court on the 16th day of April 2019 and in the Court of Appeal on the 18th day of April 2019. The Applicant also filed the present application for stay of execution on 14th May 2019, thirty days, after the judgment. Given the speed with which the Applicant brought this application, I am satisfied that the application for stay of execution was lodged without unreasonable delay.

Has the Applicant rendered security for due performance of the decree?

An Applicant for stay of execution must render security for the due performance of the decree. I note that the applicant, in this case, has not offered any security for the due performance of the decree. *Prima facie*, the Respondent is right to complain that the Applicant has failed in this respect and should therefore be denied a stay of execution. However, if the court were to take this view, it would abdicate its responsibility of setting the security for due performance of the decree in cases like in the instant case, where the suit in the High Court was dismissed without costs. In cases like the instant one, the court has to set the security for due performance of the decree as it is difficult for the Applicant to know how much money or security that he or she may render for the due performance of the decree. It is therefore not fatal for the applicant not to include in his or her application that he or she is willing to provide security. It is enough that the Applicant expresses his or her willingness to render security for due performance of the decree or complies with the court's directive if ordered.

With regard to this case, the value of the suit property is high and it is most likely that the Applicant will pay more than ten million shillings. Taking into account all these factors and considering that a successful party should not be denied the opportunity to enjoy the fruits of his judgment, I consider a sum of fifteen million shillings as sufficient security for the due performance of the decree. I accordingly direct the Applicant to deposit fifteen million shillings in the High Court as

security for the due performance of the decree by 31st August 2020. In case the Applicant fails to deposit the sum, the Applicant will be at liberty to execute the decree.

Lastly, the costs of the Application will abide the outcome of the appeal in the Court of Appeal.

Decision

I allow the Application with the following conditions.

1. The Applicant will deposit fifteen million shillings as security for the due performance of the decree in the High Court by 31st August 2020, upon failure of which the Respondent will be at liberty to execute the decree.
2. The costs of this Application will abide the outcome of the Appeal in the Court of Appeal.

It is so ordered.



Gadenya Paul Wolimbwa
JUDGE
23rd July 2020

The ruling is delivered in open court in the absence of the parties. The Registry of the Court is hereby directed to email the ruling to the parties before close of business.



Gadenya Paul Wolimbwa
JUDGE
23rd July 2020

Gadenya Paul Wolimbwa
Judge