

THE REPUBLIC OF UGANDA
IN THE HIGH COURT AT KAMPALA
(LAND DIVISION)
MISC. APPLICATION NO. 1138 OF 2016
[ARISING FROM HCCS CIVIL SUIT NO.396 OF 2014]

AMON BAZIRA-----APPLICANT

VERSUS

MAURICE PATER KAGIMU .K.-----RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

This application was brought by notice of motion under Order 22 r.23, Order 52 r.1&2 of the Civil Procedure Rules, Section 14,33,38 and 39 of the Judicature Act and Section 98 of the Civil Procedure Act for orders that;

1. The execution of the decree and or orders arising from the Judgment and Orders against the Applicant in HCCS No.396 of 2014 be stayed pending appeal.
2. That provision for costs be made.

In Civil Suit No. 396 of 2014, the Respondent sued the Applicant for prayers *inter alia* that the Applicant/Defendant breached the tenancy agreement and an order for payment of rent arrears up to the date of eviction be made. The Respondent also prayed for a declaration that the Applicants' bar structures are illegal and a demolition order for the same be made, eviction order, general damages for breach of contract, interest at 35% per annum on all sums payable and costs of the suit.

After Court hearing both parties, it entered Judgment on 2nd September 2016 in favour of the Plaintiff/Respondent. The Applicant being aggrieved with the above decision served a notice of appeal to this Court awaiting typed record of proceedings to appeal, and also filed both an

application for interim stay and stay of execution. The interim stay was granted by this Honourable Court.

The grounds of this application are contained in the notice of motion and the accompanying affidavit of the Applicant Mr. Bazira Amon which grounds are briefly that;

- i. The Applicant was ordered to vacate this suit property and handover vacant possession of the same within 30 days from the date of Judgment and was also ordered to remove the temporary structures within the same time.
- ii. The Respondent intends and shall not hesitate to execute the Judgment/Decree in HCCS No.396 of 2014 against the Applicant after the 30 days from the 2nd September 2016.
- iii. The Applicant filed a notice of appeal in this Honourable Court to safe guard his right of appeal and requested for certified copies of the record of proceedings to enable him prepare a memorandum of appeal and record of appeal against the Judgment of this Court.
- iv. The Applicant has a plausible appeal on the merits which raises serious questions and that the issues have a high likelihood of success which warrants for stay of execution against the Applicant.
- v. The orders of stay of execution sought are intended to safe guard the Applicants' right of appeal and not to render the same nugatory if the order of stay is not granted.
- vi. The Respondent shall not be prejudiced on issuance of the order of stay of execution and that the application has been brought without any delay.

In Counsel for the Respondents' submissions, he claims there is an affidavit in reply to the application, however, upon perusal on the record of proceedings, this affidavit is not on record, and both parties filed written submissions which shall be relied on in the determination of this application.

Preliminary Objections.

The Applicant filed a supplementary affidavit in support of the application dated 19th March 2018, Counsel for the Respondent in his submissions objected to the filing, admissibility and reliance on the supplementary affidavit contending that the same flouting the Civil Procedure

Rules. He submits that O.8 r18 (1) of the Civil Procedure Rules provides that the Plaintiff/Applicant shall be entitled to file a reply within 15 days after the defence (affidavit in reply) or the last defense has been delivered to him/her, unless the time is extended.

Quoting the above rule, Counsel for the Respondent submitted that when the Applicant filed HCMA No.1138 of 2016 on 13th September 2018 and served it on the Respondent on the 6th October 2016 and affidavit in reply was filed on 8th February 2017 and served on the Applicant on the 8th February 2017. That the Applicant did not file any reply or rejoinder but instead filed a supplementary or additional affidavit in support of the application. That the additional affidavit was filed out of time and without the leave of Court hence contravening the law (Order 8 r 18 (1) Civil Procedure Rules). Counsel therefore prayed that the additional affidavit should be expunged and stuck out from the Court record.

In reply to the preliminary objection, Counsel for the Applicant submitted that there were new developments or issues that arose after the closure of the pleadings which were a clear indication of imminent danger demonstrated by the Applicant and the extent of irreparable harm like to be suffered if the order of stay is not granted. Counsel prayed that the supplementary affidavit should be allowed and in the interest of justice, the Respondent be given an opportunity to reply to the same before Court disposes of the matter.

In this matter, it suffices to note that though Counsel for the Respondent alludes to the fact that he made an affidavit and even stated the date it was filed in Court. Counsel for the Applicant conceded to the fact and averred that though the Respondent filed an affidavit in reply on the 8th February 2017 and was served on him on 6th October 2016. That the same was filed out of time (*after 4 months*) and it ought to be rejected.

However, however, as noted *inter alia*, the affidavit in reply opposing the application is not on record and even if Court recognizes the cited dates alleged to be the days the affidavit was filled, it is glaringly clear that the affidavit in support would have been filed out of time, making it liable to for sticking off the record.

It is therefore my finding that the supplementary affidavit might have been sneaked onto the Court record without leave of Court, given the fact that the Respondent had already submitted by 15th November 2017. This means that the filing of a supplement affidavit on 20th March 2018, after the Applicant had read through the Respondents' submission is irregular, having been done without first seeking leave of Court.

Under O.8 r18 (2) of the Civil Procedure Rules, parties are given mandate to seek leave where pleadings are deemed closed and this leave is discretionary, as such the supplementary affidavit in support of the application filed by the Applicant after the Respondent submitting into Court, is found irregular and is thereby struck off the record of proceedings if it does exist.

Counsel for the Respondent further raised objections, basing on the fact that the provisions of O.22 r23 of the Civil Procedure Rules is not applicable to the circumstance of this application because, Court issued that decree and it was not sent to it by another Court. Counsel hence averred that this application is a non-starter, bad in law and incompetent and He prayed that the application be dismissed with costs.

In reply to this objection, Counsel for the Applicant stated that when an application has been brought under a wrong procedure or law applicable, that the Court has held from time to time that this is a curable defect as no real harm, prejudice or miscarriage of justice has been occasioned to the Respondent.

In response to the above arguments, I do hold as follows;

In the case of ***Alcon International versus Kasirye Byaruhanga (1995) 111 KALR)***; Justice Musoke held that *procedural defects can be cured by the invocation of Article 126(2)(e) of the Constitution.*

The omission referred to under this objection is one that is curable. I therefore find that this objection is hinged on a procedural defect which can be cured by Article 126, this objection is therefore overruled.

Merits of the application:

The issue for determination is whether the application for stay of execution of the Decree entered in by this Court on 2nd September 2016 should be granted pending hearing of the appeal.

Resolution

This application was brought under Order 43 of the Civil Procedure Rules, Order 43 r.4 which provides that,

“an appeal to the High Court shall not operate as a stay of proceedings under Decree or Order appealed from except so far as the High Court may order, nor shall execution of a Decree be stayed by reason only of an appeal having been preferred from the Decree; but the High Court may for sufficient cause order stay of execution of the decree”.

Justice Elizabeth Ibanda Nahamya, in the case of **Equity Bank Uganda Ltd versus Nicholas Were M.A No.604 of 2013**, while explaining the above cited order noted that;

“The import of this provision is that an Appeal to the High Court does not perse operate as a stay of execution of proceedings. Rather, any person who wishes to prefer an Appeal from such a decision shall institute a stay of proceedings on such sufficient cause being shown to Court. “Sufficient cause” under the provision, leaves the High Court with the discretion to determine whether the proceedings fall within the premises”

Under Order 43 r4 (3) of the Civil Procedure Rules provides for the grounds of stay of execution which must be satisfied by the Applicant before Court issues the order.

The grounds are:

1. That substantial loss may result to the party applying for stay of execution unless the order is made.
2. That the application has been made without any reasonable delay.
3. That security has been given by the Applicant for the due performance of the decree or order as may ultimately be binding upon him/her.

Counsel for the Respondent argues that the Applicant has not fulfilled any of the above grounds. He contends further that since that appeal does not exist in the Court of Appeal Registry, that there is no plausible appeal to talk about that the Applicant has not filed that appeal and has not even served that Respondent with the requisite documents.

In the case of *Attorney General of the Republic of Uganda versus The East African Law Society & Another EACA Application No.1 of 2013*, cited with approval from the case of *Equity Bank Uganda Ltd* (*supra*), 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 this particular case, it’s true that the Applicant has requested for a record of proceedings from this Court, but it has never been availed. Is this sufficient ground for this Court to grant the relief?

The case of *Kampala Capital City Authority versus Mulangira Joseph MA 26/2016* sets out the grounds upon which stay can be granted. Citing other decisions of superior Courts. These are as follows;

1. Likelihood of substantial loss if the order is not made.
2. Application made without unreasonable delay.
3. Provision of security for due performance of the decree.

It was contended by the Applicant in his affidavit in support (paragraph 9) that if stay was not granted in the present case, the Applicant will lose the suit premises where he derives sustenance and livelihood and later the bar, restaurant and the recreation center the suit premises, are his sole source of income,. He also claimed that he extended large sums of money on renovations, repairs and capital improvements to convert what was a residential premise to a commercial Recreation Center.

However, these are the matters the appeal should consider since the Court below has already pronounced itself on them. Suffice to say, though any execution would lead to loss to the Applicant.

Secondly, the application was also filled without unreasonable delay, given the fact that the Judgement was entered by this Court on 2nd September 2016 and the said application was filed in Court on 13th September 2016 that is, within 10 (ten) days.

Lastly, Counsel for the Respondent argued that there is no security for due performance as provided for under Order 43 r4 (3) of the Civil Procedure Rules. However, Counsel for Applicant relied on the case of ***Imperial Royale Hotel Ltd & 2 Others versus Ochan Daniel Misc Application No.111 of 2012*** which held *that security for costs is not a condition precedent to the grant of execution.*

It has been trite that due performance of the decree can only be secured by the provision of security for costs. This position was not altered in anyway by the *Supreme Court* decision of ***Lawrence Musiitwa Kyazze versus Eunice Busingye SCA No.18/1990.***

This case is one where, before the stay is granted, there is need to provide security for costs.

This Court finds that the Applicants' application for stay of execution shall be granted subject to provisions of security for costs amounting to half of the taxed costs granted in the main suit from which the current Applicant seeks to appeal. If the above condition is met, the execution will be stayed pending the appeal is granted as prayed.

I so order.

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Henry I. Kawesa

JUDGE

01/06/2018

01/06/2018:

Mr. Mugabi Silus for the Applicant.

Applicant present.

Respondent absent.

Clerk: Irene.

Court: Trial Judge indisposed.

Matter adjourned to the 07/06/2018 at 2.00 pm

Before me:

Samuel Emokor
DEPUTY REGISTRAR
01/06/2018