Republic of Uganda

In the supreme court of Uganda

At mengo

(CORAM: J. W. N. TSEKOOKO, JSC – Single Judge)

CIVIL APPLICATION NO. 2 OF 2009

THE ADMINISTRATOR GENERAL
THROUGH THE LAWFUL ATTORNEY
KYOMUHENDO JOLLY CHRISTINE……APPLICANT/APPELLANT

VERSUS

1. **NATIONAL SOCIAL SECURITY FUND**
2. **BASAIJA DAVID KISEMBO T/A ULTIMATE COURT BAILIFFS & AUCTIONEERS**
3. **FULUGENCE MUNGEREZA…….RESPONDENTS**

(Civil Application arising from Misc. Application No. 1 of 2009)

RULING OF TSEKOOKO, JSC.

The Administrator General (the applicant) instituted this application by way of Notice of Motion under Rules (6) (2) (b) and 42 of the Rules of this court seeking for an interim order to stay execution of what is describes as a High Court decree in Civil suit No.10 of 2005 pending the hearing of the main application by which the applicant seeks for a final order of stay of execution of the same decree.

The notice sets out some ten grounds in support of the application. The application is supported by an affidavit sworn by Kyomuhendo Jolly Christine, who described herself as the Attorney for the applicant. In the affidavit she explains why the application has

been made. To that affidavit are annexed a number of documents. In opposition to the application are three affidavits. The first is sworn by Stella Alibateese, an Internal Legal Counsel for the first respondent. The third respondent swore the second affidavit in which he stated that he purchased the suit property in September 2006 from one Nakanjako Margaret Njeri and was registered as proprietor on 5/9/2006 and that the occupants of the suit property have now been evicted. He is now in possession of the property since 16th March, 2009. Finally Festus Kateregga swore his affidavit to the effect that as Court Bailiff, he, on 16th March , 2009, carried out the eviction and handed the suit property to the 3rd respondent who has acknowledged this in his own affidavit.

The facts (or background) are that a man called Patrick Kaija (now deceased) owned property comprised in ***Plot 111, Makerere Kiyindi*** (suit property). While alive, the deceased, who was an employee of the first respondent, obtained a loan from the latter and mortgaged the suit property to secure that loan. Employment of the deceased ceased whereupon he was required to repay the loan in full which he was unable to do. There upon the 1st respondent instituted a suit (by originating summons) No. 10 of 2005, in the High court to recover the loan. A consent judgment was on 15th May, 2006 entered against the deceased. By that consent judgment the deceased agreed to repay the loan and the costs of the suit in installments. Under paragraph 4 of the consent judgment/decree, it was agreed and ordered that:

> "**in the event of default in any one payment by the defendant/Mortgagor, the whole outstanding balance shall automatically become due and payable in a lump sum to be realized by the sale of the suit property WITHOUT RECOURSE TO COURT."**

As fate would have it, the deceased appears to have died probably soon thereafter. There was default in repayment in accordance with the consent decree. The suit property was thereafter sold by the second respondent as Court Bailiff to one ***Nakanjako Margaret Njeri*** who in turn sold it to the 3rd respondent. From what Mr., Patrick Mugisha, counsel for applicant stated before me during the hearing of this application, ***Nakanjako Margaret Njeri*** was not registered as proprietor before she resold the property to the 3rd respondent. The latter became a registered proprietor. It appears an application to challenge the sale to the third responded was then instituted in the High Court from

whose decision in that application, an appeal was apparently instituted in the Court of Appeal. That appeal is still pending. But the applicant instituted Misc. application No. 206/2007 in that same Court seeking orders to stay execution of the decree in the High Court)Civil Suit No. 10. of 2005.) According to the ruling of the Court of Appeal, in that application, the applicant sought an order "to ***restrain the 3rd respondent*** from disposing of or alienating the property……until the appeal is heard"

The first respondent opposed the application in the Court of Appeal principally on the basis that the appeal in that court was unlikely to succeed as its foundation was bad in law. The Court of Appeal dismissed the application and declined to grant stay of execution. The applicant lodged a notice of appeal intending to appeal against that ruling. Consequently this application for stay was filed.

Now the Attorney, Ms Kyomuhendo, in paragraph 7 of the affidavit supporting the application deponed thus:

> ***"the gist of the appeal to this Court and the application for stay is that the Court of Appeal's refusal of stay is unjustified and unfair, having a appreciated that the impugned transactions are tainted by illegalities which will require scrutiny at the trial of the main appeal."***

This paragraph when read together with the contents of the Notice of Appeal show that the intended appeal to this Court is against the ruling by the Court of Appeal in which the Court declined to grant a stay of execution of the decree of the High Court. With respect I do not think that the applicant should have appealed again the ruling of the Court of Appeal. It therefore appears that the applicant was not sure about which decree was to be stayed when she instituted the present application.

I am alive to the practice that judicial decisions should not be based on technicalities. It is substantive justice which is important. But parties must be clear in their pleadings and what they litigate about in order for Courts to decide an issue on merit.

I think that this application is muddled up. It is like one throwing a stone into a bush to see which bird flies out. In one breath the applicant seeks for stay of execution of decree

of the High Court whereas the Notice of Appeal which is the basis upon which the application for stay was made shows that the intended appeal is against the refusal by the Court of Appeal to grant stay. Rule 6(2)(b) by virtue of which the applicant filed, this application, gives Court discretion to order a stay of execution where a notice of appeal has been lodged in accordance with Rule 72 of the Rules of Court. It goes without saying that such a notice of appeal must relate to the decision on the merits of the case, namely the subject matter of litigation; in this case repayment of the loan and consequent sale of the suit property. The Application in this Court for stay of execution is automatic provided a proper notice of appeal is in existence. Application for stay of execution cannot and would not depend on an appeal to this Court arising from refusal by the Court of Appeal to grant a stay.

Therefore while l agree with some hesitation caused by the conduct of counsel for the 3rd respondent in regard to carrying out eviction when this application was fixed for hearing, that this application abates, I think that there was no proper notice of appeal upon which this application for stay of execution could be based. In other words even if the application could not abate because of the evictions, I would decline to grant an interim order for stay.

Let me also point out that by virtue of sub-rule 2(b) of Rule 6 of the Rules of this Court, applications for stay of execution are not supposed to be heard by a single judge of this court. However over the last eight years or so, there has evolved a practice of such applications being heard by a single judge. Examples are: ***Horizon Coaches Ltd Vs Francis Mutabazi & 3 Others*** (Civil application No. 21 of 2001). Mulenga JSC (Retired) heard the application with hesitation because he was not certain that as a single judge, he was empowered to hear it. See also ***W. Mukiibi Vs J. Semusambwa*** (Civil Application No. 9/2003) and ***Stanbic Bank (U) Ltd Vs Atabya Agencies Ltd.*** (Civil Application No. 31 of 2004) Those applications were heard exparte. This practice is necessitated by the desire to do justice.

In this application after perusing the notice of motion and Attorney's affidavit, I considered it desirable to hear both sides. This was because I had noticed some apparent deficiencies.

I also thought I would encourage parties to consent to an interim order of stay pending the hearing of the main application on merit. In any case apart from the exercise of inherent powers under Rule 2(2), the Rules of the Court do not specifically provide for the hearing of applications for and or the grant of interim orders by a single judge.

When the matter came up for hearing on 12/3/2009, Mrs. Basaza Wasswa, counsel for the first respondent, applied for adjournment to enable her file affidavit in reply. Mr. Zimula who held a brief for Mr. Sekatawa, counsel for the 3rd respondent, made a similar application. I granted the adjournment and asked counsel for both sides to attempt a settlement. Sadly when this application came up for hearing on Wednesday 18th March to which I had adjourned it, on application by the respondents, Mr. Patrick Mugisha, counsel for the applicant informed Court that no discussion for settlement was possible because in the interim execution had been carried out by eviction of occupants of the suit property. Mr. Sekatawa, counsel for the 3rd respondent, conceded that indeed execution had been carried and the occupants of the suit properly had been evicted. As I have pointed out already, the court bailiff who carried out the eviction swore an affidavit to that effect and so did the 3rd respondent himself. On the other hand Mrs. Basaza Wasswa, Counsel for the 1st respondent pointed out that in fact execution of the proper decree of the High Court was carried out as far back as in 2006 when the suit property was sold to one ***Nakanjako Margaret Njeri***. Indeed this is what influenced the Court of Appeal when on 26/2/2009 it declined to grant on order for stay of execution.

Whatever the case I want to repeat here what I told Mr. Sekatawa during the hearing that it was absolutely improper to cause eviction to be carried out after his firm had been served with a hearing notice. He claimed that he and his firm could not know what went on between the court bailiff and the Registrar of the Court who signed the warrant for the eviction.

With respect to Mr. Sekatawa, I think that he was not being candid to court. It is within my experience (and he could not dispute this) that it is the advocate for a decree-holder who normally moves the court (or its Registrar) by lodging necessary documents for purposes of execution. I notice that the warrant to give vacant possession (Annexure "B1" to the affidavit of the 3rd respondent) was signed by the Registrar on 12th March,

2009, the day on which this application was before me for hearing, Mr. Zimula who appeared before me on that day holding a brief for Mr. Sekatawa, whose firm had been served, appeared before me on behalf of the 3rd respondent. It is most unlikely that when Mr. Zimula appeared before me on the morning of 12th March, 2009, and applied for adjournment so as to prepare affidavit in reply, he, as agent of Mr. Sekatawa, was not aware that steps to effect eviction had been taken. Nor do I believe that Mr. Sekatawa was unaware either.

The main reason why the applicant sought for an interim order was to prevent the 3rd respondent, Fulgence Mungereza from evicting the applicant from the suit property the subject of these proceedings. Unfortunately and strangely, eviction was carried out despite the fact that the respondents were aware of the pending applications (this one and the main one). Because of the pending appeal in the Court of Appeal and the main application which the applicant may chose to pursue, I would not say much more than that I am unable to grant this application.

Because of the conduct of the respondents, I make no order as to costs.

Delivered at Mengo this **20th** day of **March** 2009

J. W. N. TSEKOOKO.
JUSTICE OF SUPREME COURT.