THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 12 OF 2011

BETWEEN

1. JOEL KATO}
2. MARGARET KATO} ::APPLICANTS

AND

NUULU NALWOGA :::RESPONDENT

[An application arising from the judgment of the Court of Appeal at Kampala in Civil Appeal No 79 of 2009 dated 21st March 2011]

RULING OF KITUMBA JSC

This application has been bought by the two applicants by Notice of Motion under Rules 2(2),6(2), (b) 41(2) and 42(1) (2) of the Rules of this Court. It seeks for an interim order of stay of execution against the respondent in respect of the judgment and decree in C.A. Civil Appeal No 79 of 2009 until the final disposal of the main application for stay of execution pending in this court.

I t also seeks that the costs of this application be provided for.

The main grounds of the application are:

a) That there is a serious threat of execution of the decree in C. A. *Civil Appeal No* 79 *of* 2009 and the applicants' residential house will be demolished following the extraction of the decree, surveying of the suit land and filing of the bill costs by the respondent.

b) that there is a substantive application for stay pending before this court.

c) That the applicants will suffer substantial loss and their appeal as well as the main application will be rendered nugatory if this application is not granted

d) That the application has been made without unreasonable delay by the applicants.

e) That in the interests of justice the application be allowed so that the status quo is maintained.

The application is supported by the affidavit of the first applicant in which he repeats the statements contained in the main grounds of the application. He also avers that according to the judgment of the Court of Appeal dated 17th March 2011, orders evicting the applicants from the suit land and condemning them to pay a colossal sum of damages of Shs.l00,000,000j= to the respondent were given.

The following documents are attached to the 1st applicants' affidavit as annextures and marked accordingly, the decree in *Civil Appeal No 79 of 2009* is "A", the Notice of Appeal is "B" counsel's letter to the Registrar of the Court of Appeal, requesting for typed copy of the proceedings is "C" the Bill of Costs is "D" and the taxation hearing notice is "E".

The respondent in her affidavit in reply denied the applicants' allegations. In paragraph 3 of her affidavit, she averred that the applicants were not under any threat and would not suffer irreparable loss in case of execution because they do not own the *"bibanja"* on the suit land and they do not reside there. In paragraph 4, she averred that the applicants were illegally constructing a house on her land comprised in Kyadondo Block 215 Plot 975 at Kulambiro. That the applicants permanently live outside the country and since the late 1990's they abandoned the house to a caretaker.

The background to the application as can be discerned from the affidavit in support of the application and the annextures thereto and the affidavit in reply, is that the respondent is the registered proprietor of land comprised in Kyadondo Block 215 Plot 975 at Kulambiro. The applicants bought the "bibanja" on that land from other people and not the respondent. The applicants filed a suit against respondent in the High Court claiming that they were lawful owners of *"bibanja"* on the respondent's land. The respondent counter claimed that she was the registered proprietor of the suit land and had never sold *"bibanja"* to the applicants. She counter-claimed for damages. The High Court decided the suit in favour of the applicants.

The respondent appealed to the Court of Appeal in *Civil Appeal No 79 of 2009.* On 1 7th March 2011, the Court of Appeal allowed the appeal and ordered that the applicants be evicted from the suit land as they were trespassers. The Court of Appeal ordered them to pay damages to the respondent amounting to Uganda Shillings one hundred million (100,000,000/=) and condemned them to costs in both courts.

The applicants' counsel filed a Notice of Appeal on 28-3-2011 and on the same day wrote a letter to the Registrar of the Court of Appeal applying for a copy of the proceedings. A decree was extracted and counsel for the respondent filed a bill of costs which according to Annexture E was to be heard on the 6th April 2011. On 24th May 2011 counsel for the applicants filed in this court the instant application and the substantive application for stay of execution which is Civil *Application No* 12 *of 2011*.

During the hearing of the application, the applicants were represented by learned counsel Mr. David Kaggwa and learned Counsel Mrs. Dorothy Nandugga Kabugo and Miss Irene Akurut appeared for the respondent.

In his submissions the applicants' counsel referred to the Notice of Motion and repeated the contents of the affidavit in support. He argued that if the decree is executed, the applicants will suffer irreparable loss which cannot be atoned by damages. He submitted that in an application of this nature, what one has to show is that the Notice of Appeal has been filed in time, there is a substantive application and that there is a serious threat of execution before hearing the substantive application. Counsel submitted that all these three conditions have been satisfied. In support of his submission he referred to the authority of ***Hwan Sung Industries Ltd Vs Tojdin Hussein and 2 Others,*** *Civil Application No* 19 *of* 2008. *SC,* which was quoted with approval in ***Alcon International Ltd Vs New Vision Printing and Publishing*** **Co** ***Ltd and the Editor*** **in** ***Chief New Vision and Sunday Vision.*** *Civil Application No* 04 *of* 2010 SC *(Unreported)* Counsel prayed this court to allow the application.

In opposition to the application, Mrs. Kabugo for the respondent submitted that the application is premature, has no merits and should be dismissed with costs. She, too, heavily relied on the affidavit in reply. She argued that Counsel for the applicant has not been diligent. The judgment was delivered on 17/03/2011 but he did not file the application until the decree was extracted and bill of costs filed. This was in May 2011. She submitted that there was no appeal on record and she had not been served with the substantive application. She did not therefore, know whether such application exists.

She argued that there was no serious threat of execution and that the respondent in her affidavit in reply had averred that the land has not been surveyed. She further submitted that that in order to allow the application for stay of execution, the following conditions must be satisfied.

(1) *Substantial loss may result* to *the applicants*

(2) There is *a likelihood of success of the appeal*

(3) *The application has been made without unreasonable delay*

and

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

Counsel submitted that the applicants do not reside within the jurisdiction of the Court and they have no known assets in this country. In the alternative she argued that if this court is inclined to allow the application the applicant should be ordered to pay additional security for costs. In support of her submissions she quoted the following authorities:

Dr. Ahmed Mohamed Kisuule Vs Greenland Bank in liquidation SC. *Civil Application No* 10 *of* 2010. ***Lawrence Musiitwa Kyazze Vs Eunice Busingye.*** **Civil Application No18 of 1990** ***BC***

In rejoinder counsel for the applicants submitted that the application is not premature since a Notice of Appeal has been filed under Rule 72 of the Rules of this court. Additionally depositing security for costs is not appropriate under this application.

I have read the pleadings and listened to the submissions of both counsel. Rule 6 (2) (b) the Rules of this court which provides for 10 stay of execution states:

> ***(2) "Subject to sub role (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution but the court may:***
>
> ***(a)……..;***
>
> ***(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 72 of these Rules,***
> ***order a stay of execution, an injunction or stay of proceedings as the court may consider just."***

This is the rule which provides for stay of execution whether interim or substantive. However, there are different principles 25 which the court must consider when considering an interim stay and a substantive stay.

In the instant application for an interim stay of execution, the court in addition to considering that a notice of appeal has been filed and there is a substantive application has to consider whether there are special circumstances warranting the granting of such an interim order. An example of that would be the immediate destruction of the suit property, I respectively agree with the following statement in ***Hwan Sung Industries Ltd***
(Supra)

> ***"---for an interim order of stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application.***
>
> ***It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay."***

I appreciate the submissions by counsel for the applicants that counsel for the respondent has based her submissions on factors to be considered by court for a substantive stay of the execution.

I have, however, found it difficult to believe the pleadings of the applicants and submissions of their counsel from the bar. The applicants' counsel filed the instant application in this court only after the decree had been extracted and the taxation hearing notice issued. Besides, counsel did not attach the judgment of the Court of Appeal as an annexture to the affidavit in support of the application.

Counsel for the applicants filed this application in this court and not the Court of Appeal which had heard the appeal and was well acquainted with the facts. When counsel was asked by Court why he did not file the application in the Court of Appeal, his reply was that he had the choice to file this application in either Court.

Rule 41 *of the Rules of this court provides;*

> (1) *Where an application may be made either* to *this court* or *to the Court of Appeal] it shall be made to the Court of Appeal first.*
>
> *(2) Notwithstanding sub rule* (1) *of this rule] in any civil* or *criminal matter] the court may, in its discretion] on application* or *of its own motion] give leave* to *appeal and make any consequential order to extend time for the doing of any act] as the justice of the case requires] or entertain an application under rule* 6(2) *(b) of these Rules to safeguard the right of appeal] notwithstanding the fact that no application has first been made to the Court of Appeal. **(Underlining mine)***

I am aware that this court has been hearing and granting such 40 applications but that is discretional according to the circumstances of each application. In my view, that is what is meant by the provision in sub rule (2) that I have underlined.

I am fortified in this view by the authority of ***Lawrence Musiitwa 45 Kyazze Vs Eunice Busingye Civil Application No 18 of 1990.***

In that application, the Supreme Court was faced with a situation similar to the instant one and it had to interpret the provisions of rule 41 of the Rules of the Court. Counsel for the respondent objected to the application for stay of execution on the ground that the applicant had not made the application first in the High Court.

The Supreme Court stated thus:

> ***"There must be substance to the application both in form and content; This court would prefer the High Court to deal with the application for a stay on its merits first, before the application is made to the Supreme Court. However, if the High Court refuses to accept jurisdiction, or refuses jurisdiction for manifestly wrong reasons, or there is great delay, this Court may intervene and accept jurisdiction in the interest of justice.***
>
> ***This court may in special and probably rare cases entertain an application for a stay before the High Court has refused a stay, in the interests of justice to the parties. But before the court can so act it must be appraised of all the facts. "***

I t should be noted that this application to the Supreme Court was made before the Court of Appeal was established by the 1995 Constitution.

I am not convinced that Counsel for the applicants has filed this application in this Court in good faith and with due diligence. I base my opinion on the fact that counsel filed this application after the taxation hearing notice had been served on him. He did not even attach a copy of the judgment of the Court of Appeal but only a decree. In my view the reason for that might not be hard to find. Most probably, he did not want this court to have a full picture of the case. On inquiry from learned counsel for the applicants, this court learnt that he did not even consult counsel for the respondent on whether she could agree to a stay or not. He simply rushed to this court to argue the matter so as to secure an interim stay, which if granted would lock out the respondent from use of her land for a considerable time.

In my opinion, failure to file the application in Court of Appeal and to attach a copy of the Court of Appeal judgment, failure to serve

counsel for the respondent with substantive application for stay of execution coupled with failure to consult counsel for the respondent are all indicative of bad faith and abuse of process.

Before I take leave of this ruling, it must be stated that counsel should always observe Rule 27 of the Rules of this court. There was a list of authorities to be referred to but no actual authorities were filed until the court had requested for them. This was after the hearing of this application.

In the result, I dismiss this application with costs to the respondent.

Dated at Kampala this .....30th ……day of. June 2011

C.N.B. KITUMBA

JUSTICE OF THE SUPREME COURT