

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

[CORAM: ODOKI, C.J.; TSEKOOKO; KATUREEBE; TUMWESIGYE; KISAAKYE; J.J.S.C.]

CIVIL MISC. APPLICATION NO. 11 OF 2011 BETWEEN

MARGARET KATO

JOEL KATO APPLICANTS

AND

NUULU NALWOGA----- RESPONDENT

[Application arising from Court of Appeal Civil Appeal No. 79 of 2009]

RULING OF COURT

This is a ruling on an application filed by the applicants for an Order of Stay of Execution to issue against the respondent in respect of a Judgment and Decree obtained in Court of Appeal Civil Appeal No. 79 of 2009, until the final disposal of the appeal before this Court and for costs of the application to be provided for. The application is brought under Rules 2(2), 6(2)(b), 41(2) and 42(1) and (2) of the Supreme Court Rules and is based on the following grounds set out in the Notice of Motion.

“a) That there is a serious threat of execution of the Decree in CACA No. 79 of 2009 by way of demolition of the applicant’s residential house following the extraction of a Decree, surveying of the suit land and filling of a bill of costs.

b) _____

- c) *That in the event that this application is not allowed, the applicant will suffer substantial loss and their appeal... will be rendered nugatory.*
- d) *That the application has been made without any unreasonable delay by the applicant.*
- e) *That it is in the interests of justice that this application be allowed and the status quo preserved. ”*

The application is supported by an Affidavit sworn by one of the applicants, Joel Kato on 24th May, 2011 and a Supplementary Affidavit sworn by Ssempenja Peter Prevato on 23rd March 2012.

By consent of the parties, a partial stay of execution was entered by this Court on 12th April, 2012 in the following terms:

- “1. That the applicants pay the costs awarded to the respondent in Supreme Court Civil Application No. 12 of 2011: Joel Kato and Margaret Kato vs. Nuulu Nalwoga, within one week of taxation of the Bill of Costs.*
2. *That the Registrar of the High Court sitting at Nakawa releases the Certificate of Title to the suit land to the Respondent upon filing of the interim consent ruling.*
3. *An order preserving the status quo, to wit, the Respondent being in possession and using the suit land until the final disposal of the intended appeal.*
4. *There will be no transfer of the suit land to any third party before the determination of the intended appeal.*
5. *The costs of the application abide the outcome of the appeal. ”*

Parties were unable to agree on the proposal by the respondent that the applicants should provide security for due perform of the decree. We ordered the parties to file written statements of their arguments on this point for us to decide on the matter.

The applicants were represented by Joseph Kyazze from Kyazze & Co. Advocates, while the respondent was represented by Mrs. Dorothy Kabugo from Kabugo, Tamale & Co.

Advocates. Both parties filed written submissions.

Counsels ' Arguments

Counsel for the applicants opposed the respondent's proposal that his clients furnish sufficient security for due performance of the Decree before they could be granted a full stay of execution. He stated the obvious that this honourable court is vested with jurisdiction to grant an order for stay of execution under rule 6(2)(b) and rule 2(2). He further submitted that the only pre-conditions the applicants were required to satisfy are lodging of a notice of appeal; proof that they would suffer irreparable loss if the stay is not granted; and that their appeal would not be rendered nugatory, if successful. Counsel for the applicants relied on *Ahmed Mohamed Kisuule vs. Greenland Bank (in liquidation) Supreme Court Civil Application No. 10 of 2010* to support his contentions.

He further argued that this court has in the past considered land matters as special matters where it is important to maintain the status quo until the appeal is finally determined. *See e.g. Idah Iterura vs. Joyce Muguta, Civil Application No. 2 of 2007* and *Kasaala Growers Co-operative Society vs. Jonathan Kalemera & Anor., Civil Application No. 24 of 2010*.

He urged the court to treat this present application in a similar manner since the award of 100,000,000/= ordered as general damages by the Court of Appeal was intractably tied to the question whether the applicants were trespassers on the suit land or not. He argued that this application differs from other applications made in appeals involving commercial disputes, where courts have been more inclined to order for security for due performance of the decree.

He submitted that there was no need for provision of security for due performance of the decree. In the alternative, he argued that if court was inclined to grant the respondent's prayer, then a maximum sum of Uganda Shillings 5,000,000/= be ordered as security for due performance of the decree.

Counsel for the respondent, on the other hand, supported her client's prayer that the applicants should be ordered to furnish security for due performance of the Court of Appeal decree before they are granted a full stay of execution for the following reasons. First, that the applicants reside outside Uganda, and that they do not have any assets within the country known by the respondent. Secondly, counsel argued that their client, having been the successful party in the Court of Appeal Civil Appeal No. 79 of 2009, was entitled to "enjoy the fruits of her judgment." Thirdly, she argued that there was no pending appeal. Fourthly, she argued that the applicants would not in any way be prejudiced by the order to deposit security for due performance of the decree and that furthermore, since the applicants had no pending appeal, none would be rendered nugatory. Counsel for the respondent also relied on *Ahmed Mohamed Kisuule vs. Greenland Bank (in liquidation) Supreme Court Civil Application No. 10 of 2010 and Lawrence Musiitwa Kyazze vs. Eunice Busingye, SCCA No. 18 of 1990* to support her contentions.

Finally, counsel for the respondent opposed the applicant's alternative proposal to deposit Shillings 5,000,000/= because the amount is too little, taking into account the amount of general damages of Shillings 100,000,000/=, which the Court of Appeal awarded to the respondent and the outstanding taxed costs of Shillings 24,000,000/=. She proposed that the applicants be ordered to deposit Shillings 50,000,000/= as security for due performance of the decree as a pre-condition for the court's ordering of a full stay of execution.

In rejoinder, counsel for the applicants argued that his clients were not permanently resident abroad and that in any case the respondent could still execute the Decree under *The Reciprocal Enforcement of Judgments Act, Cap 21, Laws of Uganda*, because the United Kingdom has a reciprocal arrangement with Uganda, if she was successful in the appeal before this court. Counsel for the applicants informed court that the respondent had already partly executed the decree and is already in possession of the land she sued to recover.

Lastly, he urged court not to base its decision whether to exercise its discretion to grant a full stay of execution or not, on applications it has previously decided as this would put an end to the Court's discretion under the law. He prayed that each case must be looked at on its own facts and circumstances.

Court's consideration of the application

We will now proceed to consider the arguments of the parties.

Respondent's counsel argued that the applicants should be required to deposit security for due performance of the decree because the applicants are not resident in Uganda and have no known assets to attach in the event that they lose their appeal. We are not persuaded by this argument. The respondent sued the applicants when they were living out of the country. Hence the challenge of how to enforce her judgment if it was issued in her favour, given that the applicants are not fully resident in Uganda, has always existed. Besides, if we were to agree with the counsel for the respondent, this would have the undesirable effect of blocking the applicants, as unsuccessful litigants, from pursuing their right of appeal before the final appellate court merely because of their current residence.

We are also not persuaded by counsel for the respondent's argument that the applicants would not in any way be prejudiced by the order to deposit security for due performance of the decree. The applicants, being individual litigants and not a corporate entity, would most certainly find it onerous if they were to be required to deposit the Shs. 50,000,000/= proposed by counsel for the respondent, as this is, by no means, a small sum of money.

Thirdly, as was rightly pointed out by the applicants, the substantive dispute between the parties involves ownership of land and the respective rights of the parties. Following the success of the respondent in the Court of Appeal and in Supreme Court Civil Application No. 12 of 2011, where Kitumba, JSC., denied the applicants an interim stay of execution, the respondent already partly executed the decree and is already in possession of the suit land. We have also noted that three out of the five terms that the parties consented to before this

court for a partial stay of execution, favoured the respondent. These include the Registrar of the High Court at Nakawa, releasing the Certificate of Title to the suit land to the respondent as well as payment of the respondent' taxed costs in SCCA No. 12 of 2011.

The award of general damages of Shs. 100,000,000/=, for which the respondent now seeks to have a security deposit for due performance, is an auxiliary order made by the Court of Appeal in exercise of its discretionary powers. This court may reach a contrary decision when it finally hears the intended appeal on its merits. The interests of justice would better be served if the status quo was maintained, as opposed to the court ordering the applicants to deposit a substantial amount of money as security for due performance of the decree.

Fourthly, Rule 101 of the Supreme Court Rules provides for a party instituting a civil appeal to lodge in court Uganda Shillings 400,000/= as security for costs. The court also has powers under Rule 101(3) of the same rules to direct that further security for costs be given. We have noted however that counsel for the respondent did not move court to invoke its powers under this Rule and we accordingly make no order for further security under this Rule.

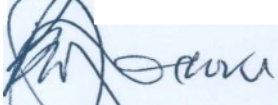
Lastly, Rule 6(2) (b) of the Judicature (Supreme Court) Rules, which is the applicable law on this matter, empowers this court to order a stay of execution in any civil proceeding **“as the court may consider just.”** There is no requirement under our Rules, for an applicant to make a deposit of security for due performance of a decree, before the Court can exercise its powers under rule 6(2) (b). The court is only required to exercise its discretion as it may consider just. The practice in the past of this Court to impose this condition in some cases is only a rule of practice based on case law.

Having considered the arguments of both counsel and the law, we are satisfied that this is a case where an order for a full stay of execution should issue, without requiring the applicants to furnish security for due performance of the decree issued by the Court of Appeal.

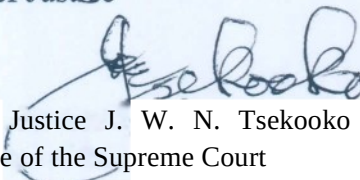
We accordingly order that execution of the decree issued in CACA No. 79 of 2009 be stayed until the final disposal of the applicants' appeal. Given the lapse of time between the time of filing, hearing and ruling of this application, the applicants are hereby ordered to take all steps necessary to ensure that their appeal is ready for hearing at the next convenient civil session of this Court. As previously agreed by both parties, the costs of this application shall abide the outcome of the appeal.

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Dated at Kampala this.....day of February 2013.

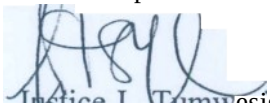


Hon. B. J. Odoki
Chief Justice



Hon. Justice J. W. N. Tsekooko
Justice of the Supreme Court

Hon. Justice B. M. Katureebe
Justice of the Supreme Court



Hon. Justice J. Tumwesigye
Justice of the Supreme Court

Hon. Justice Dr. Esther Kisaakye
Justice of the Supreme Court