THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

[Coram;Tumwesigye; Kisaakye; Arach-Amoko;JJ.S.C, Odoki; Tsekooko Ag JJ.S.C]

Civil application No. 24 of 2015

Between

Gashumba Maniraguha……..……..Applicant

Sam Nkudiye……...…….Respondent

RULING OF THE COURT

The applicant Gashumba Maniraguha brought this application for an order staying the execution of the judgment of the Court of Appeal in Civil Appeal No.23 of 2005 until the determination of his appeal to this court. He also prayed that the costs of the application be provided for.

The Application was brought by Notice of Motion under rules 6(2) (b) and 42 of the rules of this court on the following grounds:

a. *That the applicant has filed an appeal in this court.*
b. *That the applicant's appeal has likelihood of success.*
c. *That the respondent is likely to apply to execute the decree as he has already sent the same to the applicant's lawyer for approval.*

d. *That the applicant's appeal will be rendered nugatory if the order for stay of execution is not granted.*
e. *That the application was brought without delay.*

The application is supported by the affidavit sworn by the applicant on the 2nd April, 2014 in which he substantially repeats the grounds set out in the Notice of motion.

In his response, the respondent Sam Nkundiye, filed an affidavit sworn on the 23rd of February 2015, opposing the application. The main thrust of his confession is that the appeal is incompetent for lack of a certificate from the Court of Appeal that the appeal concerns a question of great public or general importance as required by law, and the execution is complete because he is in sole occupation of the suite land.

Background:

It is necessary to give a brief background to this application as far as can be gathered from the record which is the following;

In 1981, Ernesta Kashumba also known as Gashumba instituted CS No.51 of 81 in the Chief Magistrates Court in Kabale against one Kosea Nkundiye for trespass and general damages in respect of land situated at Rugarama, Ndorwa in Kabale district (hereinafter referred to as the suite land). His claim was that his mother had acquired the suite land from the church mission in 1933 and he had inherited it from her in 1975 after her death. That he had since then utilized the suit land until 1980 when Nkundiye trespassed on it by cultivating thereon.

Kosea Nkundiye on his part denied the claim and contended that he was the lawful owner of the suit land, having acquired the same from the Muluka chief of the area at that time. He further

contended that he was the one who had out of compassion invited Gashumba's mother who also happened to be his mother in law, to live with him and his wife on the suit land after being chased away from the church land.

When the suit came up for hearing before Grade 1 Magistrate, Gashumba raised an issue that he had litigated with Kosea Nkundiye over the same land before a Magistrates Court in Kabale in Civil Suite No. 53 OF 1966 and judgment had been given in his favour. The Magistrate gave judgment in Gashumba's favour.

Kosea appealed to the high court in Kabale against that judgment. Katutsi J. allowed the appeal and set aside the judgment of the Magistrate on the 12th May, 2004. Sadly, both of them died thereafter. However, the administrators of their estates, Gashumba Maniraguha and Sam Nkundiye, the present parties, maintained the dispute. Consequently, Gashumba lodged Civil Appeal No. 23 of 2005 in the Court of Appeal against the decision of the High Court. That appeal was dismissed on the 21st of February 2014. He was dissatisfied with that decision. He filed a Notice of appeal on the 5th March, 2014. He also filed the instant application as Civil Application No.25 of 2014 on the 19th August, 2014. Hon Tsekooko Ag. JSC heard and granted the application for the interim order of stay of execution on the 23rd October, 2014, pending the determination of the instant application.

At the hearing of this application, Mr. Andrew Mauso represented the applicant while Mr. Eric Hatanga appeared for the respondent. They adopted their written submissions that had been filed.

Submissions:

According to Mr. Mauso, the two issues for determination are:

1. Whether there are grounds for an order for stay of execution pending appeal.
2. Whether costs should be provided.

Regarding the first issue, Counsel submitted that this Court has held that in an application for a stay of execution, the applicant must show that he has lodged an appeal in accordance with rule 72 of the rules of the Court; that substantial loss may occur unless the order is made; and that the application has been made without undue delay. He referred us to the decision of this Court in ***Dr. Ahmed Mohhamad Kisule v Greenland Bank (In liquidation) SCCA No. 7 of 2010*** and ***Lawrence Musitwa Kyazze v Eunice Busingye*** **Civil Application No. 18 of 1990,** to support his submission.

Based on the two authorities, he submitted firstly that the applicant had satisfied the conditions set out in that he has filed a notice of appeal.

Secondly, he submitted that the appeal has a likelihood of success because the learned High Court judge had grossly misapplied and or misconstrued the facts. This was never addressed in the judgment of the Court of Appeal. Additionally, the judge's use of strong diction and language in his judgment showed apparent bias. The Court of Appeal overlooked this as well. If the application is not granted and the respondent executes, then the subject matter of the appeal will no longer be available, hence rendering the appeal that has a likelihood of success nugatory.

Thirdly, Counsel submitted that substantial loss may result to the applicant unless the order is granted. This is because according to paragraph 8 and 9 of the applicant's supplementary affidavit, his livelihood hinges on the suit land as he still cultivates crops and has a permanent home on the land.

His Fourth argument is that, notwithstanding the fact that the respondent has already commenced the execution process and was only halted by the Commissioner, his contention is that execution is a process, not an event, and as such, if this court does not grant his application, substantial loss may result to the applicant. In support of this submission, Counsel referred to a statement by G.M Okello, JSC as then was, in the case of **Hwang Sung Industries Ltd v Tajdin Hussein & Ors Civil Application No. 19 of 2008** where his Lordship, when dealing with a similar application, observed as follows:

"I find no dispute about the attachment having been effected in execution of the decree in question but I accept Mr. Omunyokol's submission that the attachment alone did not complete the execution. In an execution by attachment, both components must be completed in order to complete execution"

Lastly, Counsel submitted that this application has been made without undue delay. That the applicant learnt of the impending execution the day before and filed this application on the 19th August, 2014 but it was signed by the registrar on the 18th February, 2015.

In light of the above, he prayed that an order for stay of execution be granted by the Court.

Regarding the second issue, counsel prayed that in light of the above reasons, the costs of the application be granted to the applicant

In his reply, Counsel for the respondent also relied on the cases of **Dr. Ahmed Mohhamed Kisule v Greenland Bank (in liquidation) and Hwang Sung Industries Ltd v Tajdin Hussein & Ors (supra)** and agreed with the principles governing stay of execution set out therein. However he disagreed that the applicant had satisfied the conditions for the grant of a stay of execution.

Regarding success, Counsel submitted that the appeal has no likelihood of success because in law, no appeal lies. The proposed appeal to this Court is a third appeal, the case having been instituted in the Chief Magistrates Court at Kabale. Under Section 6(2) of the Judicature Act, (Cap 13), the intended appellant is required to apply for and obtain a certificate of importance from either the court of Appeal or from this court within 14 days from the date of the decision to be appealed or from the date of refusal to grant such a certificate as the case may be. Counsel for the applicant admitted this fact during the hearing for interim application before Tsekooko Ag. JSC, but contended that it was a mere technicality. That in his ruling, Tsekooko JSC stated that the requirement was not a mere technicality but a substantive right enjoyed upon fulfilling given conditions. Despite this ruling, counsel has not sought this certificate and it is now over 5 months since the ruling and over one year since the decision to be appealed to this Court.

In the premises, counsel submitted, it cannot be justifiably said that the applicant's appeal has a high likelihood of success when no prerequisite steps have been taken to satisfy the above condition precedent to appeal. The Supreme Court stated at p.10 that such failure could impact on the likelihood of success of the applicant's appeal pending before the Court.

Counsel submitted further on this point that in **Dr. Ahmed Mohhamad Kisule Vs. Greenland Bank (in liquidation)**; the applicant had not obtained leave from the high court or Court of Appeal. The Supreme Court stated at p.10 that such failure could impact on the likelihood of success of the applicant's appeal pending before the court.

Counsel prayed that the application be dismissed with costs to the respondent.

Consideration of the application by court:

The jurisdiction of this Court to grant a stay of execution is set out in Rule 6(2) (b) of the Rules of this Court which provides that:

"2. Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or stay execution but the Court may:

a)….

b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule Rule 72 of the Rules of this Court, order a stay of execution…..on such terms as the Court may think just".

This Rule gives this Court, the discretion, in civil proceedings, where a notice of appeal has been lodged in accordance with rule 72 of the Rules of this Court, to order stay of execution in appropriate cases and on terms that it thinks fit. Like all judicial discretion, it must be exercised on well established principles.

It is the paramount duty of court to which an application for stay of execution pending appeal is made to see to it that the appeal, if successful, is rendered nugatory. The Court has, in a number of cases including the ones cited above, laid down the principles governing the exercise of the discretion conferred by Rule 6(2) (b).

Recently, this Court has in the application by **Hon. Theodore Ssekikubo & Others vs. The Attorney General and Another, Constitutional Application No 06 of 2013** clearly re-stated the principles as follows:

In order for the Court to grant an application for a stay of execution;

"(1) The application must establish that his appeal has a likelihood of success; or a prima facie case of his right to appeal

(2) It must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.

(3) If 1 and 2 above has not been established, Court must consider where the balance of convenience lies.

(4) That the applicant must also establish that the application was instituted without delay."

Merits of the application

The issue for determination by the Court is whether the applicant has adduced sufficient reasons to justify the grant of a stay of execution.

Upon careful consideration of the submissions by counsel, the affidavits on record and the law, we find and conclude as follows:

Regarding likelihood of success, which is the most important consideration in our view, it is not disputed the intended appeal is a third appeal. It is also not disputed that the applicant has not complied with Section 6 (2) of the Judicature Act. The section provides that:

"(2) Where an appeal emanates from a judgment or order of a chief magistrate or a magistrate grade 1 in exercise of his or her original jurisdiction, but not including an interlocutory matter, a party aggrieved may lodge a third appeal to the Supreme Court on the certificate of the Court of Appeal that the appeal concerns a matter of law of great public or general

importance, or if the supreme Court considers, in its overall duty to see that justice is done, that the appeal should be heard." (the underlining is added for emphasis).

However, under the Rules of this Court, the absence of the certificate per se, does not render the appeal incompetent at this stage since Rules 40(1) and 72(4) provide that it is not necessary to obtain leave or a certificate before lodging the notice of appeal. Rule 40 (1) provides that:

"(1) where an application for certificate or for leave is necessary, it may be made before or after the notice of appeal is lodged.

And Rule 72(4) provides that:

"(4) When an appeal lies only with leave or on a certificate that a point of law of great general or public importance is involved, it shall not be necessary to obtain the leave or certificate before lodging the notice of appeal."

In the circumstances of this case, it is of course obvious that the 14 days provided under Rule 39(1) of the Supreme Court Rules within which to apply for the certificate has long expired. Rule 39(1) provides that:

"(1) In civil matters---

> ***(a) Where an appeal lies if the Court of Appeal certifies that a question or questions of great public or general importance arise, application to the Court of Appeal shall be made formally at the time when the decision of the Court of Appeal is given against which the intended appeal is to be taken; failing which a formal application by notice of motion may be lodged within 14 days after the decision, …"***

The applicant will therefore, if he wishes to pursue the appeal, have to apply for extension of time within which to apply for the certificate before lodging the Record of appeal because it is a requirement under Rule 83(1) and (2) (h) which provides that:

"(1) The record of appeal shall contain the records of appeal in the Court of Appeal, the High Court, and in case of a third appeal the record of appeal from the trial magistrate's court in addition to the foregoing records:

(2) (a)…(g)…

(h) in case of a third appeal, the certificate of the Court of Appeal that a point or points of law of great public or general importance arise" (underlining was added for emphasis)

For this reason, the fact that the applicant has not yet complied with section 6(2) of the Judicature Act has no bearing on the success of the appeal since he still has the opportunity to do so. For that reason, the case of **Dr. Ahmed Mohamed Kisule vs Greenland Bank** relied on this point is distinguishable in that it is a requirement under order 44 r 2 of the Civil Procedure Rules for an applicant to obtain leave before lodging in an appeal to the Court of Appeal. Dr. Kisule had not complied with that requirement. The relevant part reads as follows:

"(2) An appeal under these Rules shall not lie from any other order except with the leave of the court making the order or the court to which an appeal would lie if leave where given."

Further, in our view, even though this Court is not at this stage deciding the appeal, it must be satisfied that the appeal raises issues which merit consideration by Court. A cursory perusal of the record particularly the judgment of the Court of Appeal as well as the Notice of appeal reveal that the intended appeal raises the important question of *res judicata*, it is not therefore frivolous.

Regarding the second criteria, our finding is that, although the respondent has adduced evidence in his affidavit in reply that execution is complete and he is in sole occupation of the suit land, there is also evidence from the applicant in paragraphs 8 and 9 of his supplementary affidavit in the application for an interim order of stay where he responded that:

"8. That the bailiff destroyed two semi-permanent houses which belong to my son and brother but were halted before they destroyed my house which is a permanent house still standing to date."

"9. That I and my brothers are still in occupation and even grow Irish potatoes, beans, peas and cabbage."

The evidence on record therefore indicates that there is a permanent house that is yet to be demolished. This means that the process of execution is not yet complete. If the appeal succeeds after execution has been completed, it would be difficult for the applicant to construct another permanent house. In the circumstances, there is no doubt that substantial loss will result to the applicant if a stay is not granted.

We also accept the submission by the applicant that the application was also brought without undue delay. The judgment of the Court of Appeal was delivered on the 21st February 2014. The decree is dated 23rd April 2014. The applicant filed the notice of appeal as well as Civil Application No. 25 of 2014 on the 19th August, 2014, soon after learning of the threat of execution. The warrant of execution is dated 17th September, 2014.

In the peculiar circumstances of this case and for the reasons given above, we find that the applicant satisfied the conditions for the grant of a stay of execution. We accordingly grant this application and order as follows:

1) The judgment and decree in Civil Appeal No. 23 of 2005 is herby stayed until disposal of the applicant's appeal or until further orders.
2) The applicant shall lodge the application for the certificate of importance in the Court of Appeal within fifteen (15) days from the date of this order.
3) If fifteen (15) days lapse without the applicant lodging the application, the stay of execution shall lapse automatically.
4) The costs of this application shall abide the outcome of the appeal.

Dated at Kampala this 23rd day of April 2015

J. TUMWESIGYE, JSC

Dr. E.M. KISAAKYE, JSC

M.S. ARACH-AMOKO, JSC

Dr. B.J. ODOKI, Ag. JSC

J.W.N. TSEKOOKO Ag. JSC