

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA

AT MPIGI

HCT-15-EXD—EMA-0013-2020

(Arising from civil suit No. 58 of 2016)

1. RWASHANDE YOSAM

2. KEKIGANDO MARGARET

3. MAKABUNGO PATRICK

4. MAKABUNGO COSTANCE

10 **5. ZZIWA EDWARD & OTHERS**

6. NAMUYANJA PROC

7. NAMYALO SITERA

8. SSENKONGA FRANCIS

9. KYEYUNE JOHN

10. NAZIWA SISE:.....:APPLICANTS

VERSUS

KAYIWAVICENT:.....:RESPONDENT

BEFORE: HONOURABLE JUSTICE OYUKO ANTHONY OJOK

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RULING

Background.

This application is brought under O.22 R26 and O.52 of the Civil Procedure Rules and R42(1) of the Judicature (Court of Appeal Rules) Directions S.113-10) seeking for the following orders;

The Applicant was seeking for orders that:-

- 1) A stay of execution of the judgment in Civil Suit No. 58 of 2016 in the High Court of Uganda at Mpigi, delivered on the 16th day of December 2020 be stayed pending the hearing and disposal of the Applicants intended appeal to the Court of Appeal.
- 2) That the prevailing status quo at the time of Judgment in the main suit be preserved and maintained till the hearing and disposal of the said intended appeal.
- 3) That costs of this application be provided for:

The Applicant swore an affidavit in support of the application, and the grounds are briefly that :-

- a) The Applicants being dissatisfied with the whole decision in the Judgment in the suit, intends to appeal and have filed a Notice of Appeal and requested for certified proceedings for the purpose of drawing a memorandum and record of appeal to the Court of Appeal.
- b) The intended appeal has a high likelihood of success as stated in the affidavit in support of the application.
- c) The Applicants shall suffer irreparable damage if the stay of the decree is not allowed which would result in their eviction from the land they occupy, recovery of exorbitant general damages and taxed costs which would render intended appeal nugatory.
- d) The balance of convenience is in favour of the Applicants who are in occupation of land from which they were given lease offers.

The 1st Applicant, RwashandeYosam swore an affidavit in reply in support of the application. The pertinent paragraphs were;-

1 That the Learned Trial Judge made a wrong decision in the Judgment that fraud was not proved against the Defendant in the acquisition of the suit land certificate of title to the standard required.

2 The Learned Trial Judge failed to find that the Defendant had no valid and approved application for a lease offer, full lease, instruction to survey and deed plan, supporting the suit defendant's certificate of title.

3 The Plaintiffs proved that the instrument number to Survey and appearing
10 on deed plan disowned by the Commissioner Surveys and Mapping Department, that there was no Uganda Land commission Minute approving the defendant's application for a lease, after the first was rejected and that there was no proof that any authorized surveyor from the survey office surveyed the suit land, made a report for the deed plan to be based on for drawing, authentication and issue by the commissioner Surveys and Mapping.

4 The Learned Trial Judge failed to find that the land for which lease offers were given to the plaintiffs was un-alienated land, according to surveys and Mappings Department Entebbe records, and was recommended by the Area
20 Land Committee to the District LandBoard which issued lease offers, hence Plaintiffs were not trespassers but the Defendant was on the suit land.

5 That we are in possession of the suit land and therefore the balance of convenience is in our favor for the application for stay of execution of the decree to be allowed.

6 That we shall suffer irreparable damage if the application is not allowed since we have no other place to go to if we are evicted from the land we

occupy on the basis of lease offers and the intended appeal shall thereby be rendered nugatory.

7 That we shall also suffer substantial miscarriage of justice if the application is not allowed, and the decree is executed for general damages of shs 30 million and costs awarded to the defendant before the appeal is disposed of, and we believe that it has high likelihood of success.

8 That we have filed a Notice of appeal and requested for certified proceedings hereof annexed marked “PI” and P2” respectively.

In reply KayiwaVicent filed an affidavit while opposing the said application stating
10 that :

1) That in specific reply to paragraph 1 , of the affidavit in support of the application, I have been advised by the above mentioned lawyers which advice I verily believe to be true that they have not been instructed by the co-applicants to file the applicant and swear the affidavit on their behalf.

2) That in specific reply to paragraph 2,3,4 and 5 of the affidavit in support of the Application , I have been advised by my above-mentioned lawyers which advice I verily believe to be correct, that the learned trial Judge rightly dismissed the suit after establishing that:

a) The Applicants failed to adduce evidence to prove that I was privy to
20 any alleged fraud and court did not find that fraud was proved against me in the acquisition of the lease certificate of title for the suit land to the required standard.

b) I am the rightful owner of the suit land by virtue of the subsisting lease granted to me by Uganda Land Commission, and the Applicants were mistakenly granted lease offers on the suit land on the presumption that the land was vacant public land that had not been surveyed or titled before.

c) The Applicants are trespassers on my land since they did not get my consent as the registered proprietor to occupy my land.

5. That in specific reply to paragraphs 6,7,8,9, & 10 of the affidavit in support of the application, I have been advised by my above mentioned lawyers, which advice I verily believe to be correct that;

a) The Applicants have not shown sufficient cause to be granted an order of stay of execution and the entire application does not satisfy conditions for grant of an order of stay of execution.

10 b) The Application is premature as I have not commenced any execution proceedings against the Applicants. To date, the Applicants are still utilizing the disputed piece of land that was decreed by the High Court at MpigiVide,Civil Suit No. 56 of 2016 as belonging to me and neither is there any taxed bill of costs on court record.

c) That the allegation that the Applicants shall suffer irreparable loss if evicted is merely speculative, unfounded, with no evidence and legal basis

20 6. That in specific reply to paragraphs 2,3,4,5,6,7,9 and 10 of the Applicants' affidavit in support of the application, I have been informed by my lawyers, which information I verily believe to be true, that by filing this application, the Applicants intention is to obtain a relief, sit back, buy time and delay prosecution of the appeal while utilizing my land to my detriment.

7. That the intended appeal has no likelihood of success since it is based on frivolous grounds.

Counsel for the Applicants filed an affidavit in rejoinder sworn by Rwashande Yosam as follows:

- 1) That in specific reply to paragraph 4 of the affidavit in reply, the matters raised were explained in paragraph 2,3,4 and 5 of the affidavit in support of the application, which are issues for determination stated in the memorandum of appeal already filed in Court which is pending the Registrar's signature . Copy of the Memorandum of appeal is hereof attached and marked "R2.
- 2) That in reply to paragraph 6 and 7, I have already filed an appeal and the likelihood of success is in my affidavit in support as cited in paragraph 2, above which were not controverted in the affidavit in reply.
- 3) That what I have deponed to herein is true to the best of my knowledge , save
10 for what is on advice from our lawyers herein whom I verily believe to be true.

Representation:

During the hearing of the application ,the Applicants were represented by **Erick Muhwezi of Muhwezi Law Chambers Advocates**while the Respondent was represented by **ChrisestomKatumba of M/s Lukwago& Co. Advocates**.

Submissions

Both counsel made oral submissions.

- 20 Counsel for the Applicants submitted that the Applicants sued the Defendants for invalidation of the Respondents title on the grounds that the deed print in support of the title was cancelled.

Counsel filed the Notice of appeal and the memorandum of appeal which was served on counsel for the Respondent.

This Court in a number of cases laid down principles governing the exercise of the discretion conferred by this rule.

In **Akankwasa Damian Vs Uganda Const. Appln. Nos. 7&9 of 2011**, for instant, the principles were re-stated as follows;

1. Applicant must establish that his appeal has likelihood of success, or a prima facie case of his right of appeal.

2. That the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.

3. If 1-2 above have not been established, Court must consider where the balance of convenience lies.

4. That the application was filed without delay

10 The same principle was echoed in the case of **John Baptist Kawanga Vs Namyalo Kevin & Ssemakula Laurence Mis Application No. 51/2012**

Notice of appeal was filed **under O.22 R26 of the Civil Procedure Rules** supported by the affidavit of Rwashande Yosam

a) That in specific reply to paragraph 4 of the affidavit in support, the matters raised were explained in paragraph 2,3,4 and 5 of the affidavit in support of the application, which are issues for determination in the Memorandum of Appeal already filed in court which is pending the Registrar's signature. Copy of the Memorandum of Appeal is hereof attached and marked "R2.

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c) That what I have deposed to herein is true to the best of my knowledge, save for what is on advice from our lawyers herein whom I verily believe to be true

Balance of convenience in favor of the Applicants to stay on their land they occupy for which they were lawfully given the lease offer. See paragraphs 7&8 of the affidavit in support and paragraph 6 of the affidavit in rejoinder.

Pray that the application for stay of execution be allowed and costs be provided for.

If the application is not allowed the Respondent will execute the orders to the disadvantage of the applicant and the appeal will be rendered nugatory.

Reply objection

Paragraph 3 deponent of the affidavit in support of RwashandeYosam was not instructed by the rest of the applicants to swear the affidavit on their behalf.

10 **O. 1 r 12 (1) of the Civil Procedure Rules** that where more than one plaintiff, any one or more of them may be authorized by others to appear, plead or act for others in proceedings.

The authority must be attached. The Deponent has not attached any authority.

Affidavit in rejoinder; he purports to attach an authority as R1 but this authority is signed by three persons only. The rest did not.

Katavimuringo Isreal purports to be attorney for the 2nd Respondent, Mwesigwa Plaintiff Attorney for the 3rd and 4th Applicants and Ziwa Edward for the 6th to 10th Applicants. No proof before court. No powers of attorneys attached. Even if they appear to be attorneys for those people, a delegate cannot delegate.

20 The 2nd, 3rd, 4th then 6th to 10th Applicants did not authorize RwashandeYosam. The issue of power of Attorney was discussed in the case of **Lena Nakalema Binase & 3 others vs Mwanguzi Myers Misc. Application No. 460 of 2013**, which stated that; *“an affidavit is defective by reason of being sworn on behalf of another without showing that the deponent had the authority of other.”*

Stay of execution

These are executing orders. It can only be reversed by an order of higher court.

On Permanent Injunction executing order, they don't deserve any execution by bailiffs:-

The other two orders are declarations not executable orders.

Payment of general damages and costs are the only executable orders, Respondent in paragraph 5 (a) (b) & c), the Respondent says that the application is premature since I have not taken steps to execute. The Applicants are still in the disputed land and the respondent has taken no step, not even filed bills of costs.

- 10 The Applicants have not shown grounds for stay and as such pray for dismissal with costs.

Rejoinder:

The Powers of Attorney were shown to Court that gave powers to RwashanddeYosam and attached in the main suit. Counsel for the Respondent never objected to it in the main suit, so the preliminary objection should be disregarded.

Resolution by Court

Ruling on preliminary objection

- As regards the objection whether RwashanddeYosam had powers of attorney, it was found out that there was Power of attorney giving him powers to act on their behalf
20 which was attached on the pleadings. Therefore the objection is hereby over ruled and the case quoted by Counsel is in applicable.

0.22 R 26 of the Civil Procedure Rules which states that, “where a suit is pending in any Court against the order of a decree of the Court in the name of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.”

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“1. Applicant must establish that his appeal has likelihood of success, or a prima facie case of his right of appeal.

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In the case of **Kyambogo University Vs Prof. Isaiah OmoloNdiege CA No. 341 2013** expanded the list to include:

- a) There is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory.
- b) That the application is not frivolous and has a likelihood of success.
- c) That refusal to grant the stay would inflict more hardship than it would avoid.”

Regarding the first and forth principle that there should be a pending appeal, the applicant annexed a Notice of Appeal to this application. The said notice was received by Court of appeal. It is my considered view that this application was lodged without
10 unreasonable delay .This principle was satisfied by the application.

The second principle that there is serious or eminent threat of execution of the decree or orders, and if the application is not granted, the appeal would be rendered nugatory, it was brought to my attention by counsel for the applicant specifically Para 6&7 that the Applicants have been residing on the said suit to date. This ground is also satisfied.

The first principle that the application is not frivolous and has a likelihood of success, I have perused the judgment, the application and proceedings. The applicant raised pertinent appealable issues that would call for Court Of Appeal to determine whether the trial Judge did not misdirect herself.

20 The third Principle; the balance of convenience lies in the favor of the applicant because if evicted they have nowhere to go in line with paragraphs 6 &7 which I agree.

It was stated that it is trite that where a party is exercising its unrestricted right of appeal, and the appeal has likelihood of success, it is the duty of the Court to make such orders as if will prevent the appeal, from being nugatory if successful. In the

instant case, the applicants were clearly exercising their unrestricted right of appeal, and the appeal meets the conditions precedent; it was thus the duty of this court to ensure that their appeal, if successful, will not be rendered nugatory. See the **case of Lawrence Musitwa Kyazze Vs Eunice Busigye SCCA No. 18/1990**

The application for Stay of execution is hereby granted, costs await for the outcome of the appeal.

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Hon. Justice Oyuko Anthony Ojok

Judge.

20/4/2021

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Ruling read in the presence of Counsel **Erick Muhwezi**, for the Applicants, Counsel **Katumba Chrisestom** for the Respondent, in the presence of 1st, 3rd, 5th and 9th Applicants and in the presence of the Respondent.

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HON: JUSTICE OYUKO ANTHONY OJOK

JUDGE

Dated this 20th day of April 2021.