

5

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
CIVIL APPLICATION NO.740 OF 2023

ARISING FROM CIVIL APPEAL NO. 247 OF 2020

10

(ALSO ARISING OUT OF CIVIL SUIT NO. 0178 OF 2009)

Kalyeboga Appolonaris=====Applicant

Versus

Hussein Muhammed ===== Respondent

15

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

(SINGLE JUSTICE)

20

RULING

This Application is brought by way of Notice of Motion under Rules 2(2),
6(2)(b) and 43 of the Judicature (Court of Appeal Rules) Directions.

It seeks for orders that: -

25

- i. An order doth issue staying execution of the decree in HCCS No.
0178 of 2009 pending the determination of Court of Appeal Civil
Appeal No. 247 OF 2020.
- ii. Costs of this application be provided for.

5 **Background**

The brief background to the Application as discerned from the pleadings is that the Applicant was sued together with 5 others for unlawfully transferring the Respondent's property comprised in LRV 147 folio 10 plot 4 Rubaga Road in civil suit number 178 of 2009 where the Respondent was
10 successful. Consequently, the Applicant filed an Appeal and in this Court and sought for stay of execution in the High Court. However, the High Court refused to grant the stay of execution and as a result, the Applicant filed this Application.

Grounds of the Application

15 The grounds of the Application are contained in the Notice of Motion and the affidavit in support sworn by Kalyeboga Appolonaris briefly stating; -

1. *That the said intended Appeal raises fundamental matters of law specifically the right to a fair hearing, and of great public importance.*
2. *That the intended Appeal has a very high likelihood of success.*
- 20 3. *That the Applicant suffers imminent threat of execution being taken out against him by way of eviction thus necessitating the instant Application.*
4. *That the Applicant is currently residing with his family and the intended Appeal itself may be rendered nugatory if the order for the*
25 *stay of execution is not granted.*
5. *That the Applicant stands to suffer substantial loss if the order of stay of execution is not granted.*
6. *That the Applicant had initially filed HCMA No. 492 of 2021 at the lower Court seeking an order of stay of execution which was disallowed.*
- 30 7. *That the application has been filed without inordinate delay.*
8. *That it is in the interest of justice that the said application be granted.*

The Application was opposed by the Respondent who filed an affidavit in reply describing the Application as a waste of the Court's time, and

5 without merit. The Respondent put forth the following grounds of objection;

1. *That judgment was entered into in my favour in the said suit with orders that Kampala Financial Services Ltd's title be cancelled and that the 4th Defendant, Catherine Adong vacates the suit property.*
- 10 2. *That the Decree whose execution is sought to be stayed has since been executed and the suit property pursuant to orders of the Court has since been registered in the name of the Respondent.*
3. *That I am informed by my counsel that the Applicant has no valid Appeal against Catherine Adong who has not appealed the decree. the*
15 *Applicant is not the subject of this Order and has no interest or rights pending execution.*
4. *That the Applicant has to date never served the respondent with the Notice of Appeal and the record of proceedings as required by the Court of Appeal Rules.*
- 20 5. *That my Bill of Costs was taxed and allowed at Ug. Shs. 25,067,000/= which the Applicant has to date failed and /or refused to settle.*
6. *That the Applicant filed an Application for stay of Execution at High Court which was dismissed with costs and the Applicant has to date failed to pay.*
- 25 7. *That the Applicant has not deposited any security for costs and in the event that any form of order staying execution of the Decree, the Applicant should deposit security for due performance of the Decree in the sum of costs order above.*

30 **Representation**

At the hearing of the Application, Machel Nyambok Omondi appeared for the Applicant while the Respondents were represented by Mr. Isaac Walukaga.

Applicant's submissions.

5 Counsel for the Applicant submitted that this Application by Notice of Motion is brought under Rules 2(2), 6(2), (b), 42(2), 43 and 44 of the Judicature (Court of Appeal) Rules, Section 33 of the Judicature Act, for an order of stay of execution of the Judgment and the decree of High Court in Civil Suit No. 178 of 2009 pending the disposal of CACA Appeal No. 247 of 2021.

10 He cited the case of ***Kyambogo University Vs Prof. Isaiah Omolo Ndiege CAC. Application No. 341 of 2013*** where this Court set forth the grounds for grant of an order of stay of execution to include;

1. *That the Applicant has lodged a notice of Appeal.*
2. *That there is a serious and imminent threat of execution of the*
15 *decree/order and that if the application is not granted, the Appeal will be rendered nugatory.*
3. *That a substantial loss may result to the Applicant unless the stay of execution is granted.*
4. *That the application has been made without unreasonable delay.*
- 20 5. *That the main Appeal is not frivolous and has a high likelihood of success*
6. *That the Applicant is prepared to grant security for due performance of the decree and,*
7. *That the refusal to grant stay would inflict more hardship that it would avoid.*

25 He submitted that the Applicants under paragraphs 5 & 6 of the Affidavit in Support of the Application states that being aggrieved by the Judgment and orders of the High Court, the Applicant lodged the Notice of Appeal in February 2020 and filed in this Court Appeal No. 247 of 2020.

Counsel averred that under paragraphs 8,9, 10, 11,12& 13 of the affidavit in
30 support of the Application that if the eviction is effected, the pending CACA No.247 of 2020 will be rendered nugatory which should not happen. He cited

the case of **Dr. Ahmed Muhammed Kasule Vs. Greenland Bank (In liquidation SCCA No. 7 of 2010)** and added that this condition had been fulfilled.

It was Counsel's submission that the Applicant will suffer irreparable loss if the stay is not granted. At paragraphs 10, 11, 15 & 16 of the affidavit in support, the suit land comprised in LRV 147 Folio 10 Plot 4 land at Rubaga is his matrimonial home where he resides with his wife who is the 4th Respondent in the Appeal. That the Applicant and his entire family will be rendered homeless hence the need for an order of staying execution.

Counsel contended that the instant Application was made without unreasonable delay as stated by the Applicant at paragraphs 17 & 19 of the affidavit in support, the Applicant stated that besides filing the pending Appeal and in compliance with Rule 42 (l) of the rules of this Court, he had filed in High Court but the lower Court dismissed the same. That it was upon the foregoing that the Applicant within a space of 5 days from the date of the ruling filed the instant Application which was duly received on the 5th of October, 2022.

Counsel submitted that the Applicant in his affidavit under paragraphs 6, 7 & 14 among others deposed that the Appeal as per Memorandum of Appeal is grounded on the refusal by the Learned Trial Judge to grant the Applicant a hearing, and continuing with the hearing without proof of service of hearing notices on the Applicant.

Respondent's submission.

Counsel for the Respondent submitted that the Applicant ought to satisfy grounds for a stay of execution as was held in the case of **Kyambogo University Vs Professor Isaiah Omolo Ndiege, (supra)**

Counsel submitted that as can be seen from the trial record, the suit property is occupied by the 4th judgment debtor Adong Catherine who has not filed an Application staying any orders and execution. That the claim by the Applicant that the suit property is a matrimonial home does not create any bar to execution proceedings against the 4th judgment debtor.

5 Counsel submitted that the decree is partially executed. That the only execution proceedings that have been taken out and are pending by the Respondent relate to the 4th Judgment debtor Catherine Adong as noted from judgment.

Counsel adverted that the Application was filed after an inordinate delay
10 because the judgment in issue was delivered on the 6th February 2020 yet the Application was filed on 5th October 2022.

That the Applicant had not furnished security for due performance of the decree for the stay order to be issued and his assertion that he was ready to deposit the security was not supported by any evidence.

15 **Court's Determination.**

The law governing the Application for stay of execution in this Court is provided under Rules 6(2) (b), 42(2) and 43 of the rules of this Court which allow a wide discretion to the Court to grant interim or substantive orders of stay of execution for purposes of preserving the right of Appeal where special
20 circumstances exist.

Where an unsuccessful party is exercising an unrestricted right to Appeal, it is the duty of the Court to make such orders for staying proceedings in the judgment so as not to render the Appeal nugatory as was held in the Supreme Court decision of **Lawrence Musiitwa Kyazze v Eunice Busingye**
25 **SCCA No.18 of 1990 (1992) IV KALR 55.**

When a party exercises its right to Appeal, it's crucial to preserve the efficacy of that Appeal by preventing actions or proceedings that could render it meaningless or ineffective. This can include staying proceedings related to the judgment being Appealed to maintain the status quo until the Appeal is
30 resolved. The aim is to ensure that the Appellate process is allowed to proceed smoothly and that the Appellate Court can fully review the issues without being hindered by actions that might prematurely enforce or nullify the original judgment.

5 As was held by this Court in ***Kyambogo University Vs Professor Isaiah Omolo Ndiege, CA No. 341 of 2013*** for an Application for stay of Execution to succeed, the Applicant has to show that s/he has done the following:

1. He has lodged a notice of Appeal
2. Prove that there is a serious or imminent threat of execution of the
10 decree or order and if the Application is not granted, the Appeal would be rendered nugatory.
3. Show that a substantial loss may result to the Applicant unless the stay of execution is granted.
4. That the Application is not frivolous and has a likelihood of success.
- 15 5. Demonstrate that refusal to grant the stay would inflict more hardship than it would avoid.

With regard to the first condition, paragraph 2 of Applicant's affidavit in Support states that he filed an Appeal and the same is pending hearing. He attached a copy of the memorandum of Appeal to the Application and this is
20 not disputed by the Respondent thus this condition has been met.

As to whether there is a serious or imminent threat of execution of the decree or order, Counsel for the Applicant submitted that if the eviction is effected as threatened, the pending CACA No.247 of 2020 will be rendered nugatory, the Applicant stated in paragraphs 10, 11, 15 & 16 of the affidavit
25 in support, the suit land comprised in LRV 147 Folio 10 Plot 4 land at Rubaga is his matrimonial home where he resides with his wife who is the 4th judgment debtor. That the Applicant and his entire family will be rendered homeless hence the need for an order of staying execution. Counsel for the Respondent submitted that the suit property is occupied by
30 the 4th judgment debtor Adong Catherine who has not filed any Application staying any orders and execution.

The court notes that the execution process is still pending since costs have not yet been recovered. The judgment creditor's advocates have sent a demand letter, which could be perceived as a threat to execute the decree.
35 The demand letter by the judgment creditor's advocates is definitely a threat

5 to execute the decree. However, this threat has to be qualified with other grounds for Court to decide whether to grant the application or not.

As to whether the Applicant will suffer a substantial loss, In the case of ***Tropical Commodities Suppliers Ltd & Ors Vs International Credit Bank Ltd (in liquidation) [2004] 2 EA 331***, Substantial loss was defined as loss
10 that cannot be quantified by any particular monetary compensation, or that there is no exact mathematical formula to compute. Court went further to clarify that it is not enough to simply repeat the words of the code and state that a substantial loss will result. The specific type of loss must be clearly identified, and the court's conscience must be convinced that such loss will
15 occur.

In the present case, the Applicant's counsel submitted that the Applicant is in possession of the suit land and that he will suffer substantial loss if stay of execution is not granted. He based this submission on paragraph 9 of the Applicant's affidavit in support of the Application where the Applicant
20 deponed that he has been in the use of land and has heavily invested in it. Conversely, Counsel for the Respondent argued that the Applicant has never been in possession of the suit property and the record shows that the person in possession of the suit property was Catherine Adong, the fourth defendant in the original suit who is not party to this Application.

25 From the Record of Appeal, the land title has been cancelled by way of execution and the Respondent is now the registered proprietor, therefore execution will not cause any loss to the Applicant. These legal actions have less significant implications for him to result in financial losses, damage to property, or other adverse consequences.

30 I have reviewed the case and it is clear to me that the Applicant has failed to demonstrate any actual loss that he will suffer if his Application is not granted. He argues that he will suffer loss because his wife is in possession of the suit land which was transferred to Kampala Financial Services Ltd but now in the name of the Respondent. This makes it difficult to see the
35 Applicant's loss. That said, if there will be any loss occasioned it can be

5 adequately compensated through monetary means by payment of damages in the event the appeal succeeds. From the above, the Applicant has not satisfied this condition.

As to whether the Application has a high chance of success, ***Gapco Uganda Ltd v Kaweesa & Anor (MA No .259 of 2013)*** defines the likelihood of
10 success of a case to be one where the Court is satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried.

The Applicant must establish that his Appeal has a likelihood of success or a prima facie case of his right of Appeal. Based on the arguments presented by Counsel for the Applicant and on perusal of the memorandum of Appeal,
15 the Learned Trial Judge is faulted for continuing with the hearing without proof of service of the hearing notices on the Appellant. He was also faulted for failing to find that the Respondent's purchase of the suit property was illegal and barred by law.

While the grounds of Appeal presented in the memorandum of Appeal are
20 deemed sufficient, by the Applicant, they alone do not guarantee a high chance of success. While at this stage, this court cannot delve into the merits of the Appeal, after perusal of the record, it is my considered view that the Respondent has on his part put forth a good defence which weighs down the chances of success of the Appeal.

25 It is the responsibility of the Applicant to tilt the balance by convincing Court that the grounds of Appeal have higher chances of success. It is important to note that simply filing an Appeal does not automatically mean that a stay of execution will be granted.

On whether the Application was made without delay, it took the Applicant a
30 period of 18 months to file the Application which I find unreasonable in the circumstances given the fact that Judgement was delivered on 6th February 2020 and the Application was filed in October 2022.

It is important to note that the court will strive to ensure that neither party is unfairly disadvantaged or prejudiced by its decision. Ultimately, the court

5 will aim to strike a balance between the interests of both parties and make a decision that is just and equitable in the circumstances.

In the circumstances, I find that the Applicant has not satisfied the conditions for the grant of an Application for a stay of execution as sought.

In the result, the Application fails and is hereby dismissed.

10 Each party shall bear its own costs of the Application.

I so order.

Dated this 12th day of April 2024.

15



Cheborion Barishaki.

JUSTICE OF APPEAL