

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 173 OF 2017
[ARISING OUT OF MISCELLANEOUS APPLICATION NO. 172 OF 2017]
(ALSO ARISING OUT OF CIVIL APPEAL NO. 169 OF 2014)

MUGISHA JOYCE NSHEMEREIRWE :::::::::::::::::::: APPLICANT

VERSUS

JOY KOBUSINGYE NYAKAITANA :::::::::::::::::::: RESPONDENT

CORAM: HON. JUSTICE PAUL K. MUGAMBA, J.A

RULING

This application is brought by Notice of Motion under Rules 2(2), 6(2) (b) and 43 of the Rules of this Court. It is supported by an affidavit sworn by the Applicant as well as an affidavit in rejoinder also sworn by the Applicant. The Application expressly states that it seeks:

- a) *An interim order of an injunction be issued restraining the Respondent , her agents, employees and persons acting on her behalf or instructions from interfering with the Applicant's quiet enjoyment of the suit property until the hearing and final determination of the main application for a temporary injunction which is pending before this honourable Court.*
- b) *Costs of the Application be provided for.'*

The grounds for the Application were given as stated hereunder:

1. That the Applicant was sued by the Respondent in Mbarara High Court Civil Suit No. 41 of 2012.
2. That High Court Civil Suit No. 41 of 2012 was determined in favour of the Respondent.
3. That being dissatisfied with the decision of the High Court in Civil Suit No. 41 of 2012, the Applicant instituted Civil Appeal No. 169 of 2014 challenging the forementioned decision of the High Court.
4. That Civil Appeal is still pending hearing and determination before this honourable court.
5. That despite the pendency of Civil Appeal No. 169 of 2014, the Respondent and her agents, employees and or people acting on her behalf and instructions went ahead and purported to subdivide the suit property which alleged subdivision was done in the absence of the Applicant.
6. That the Respondent and her agents, employees and or people acting on her behalf and instructions following the forementioned purported subdivision of the suit property are currently in the process of illegally annexing/appropriating the Applicant's property including her cattle farm, plantations and houses.

7. That if the actions of the Respondent and her agents, employees and or people acting on her behalf and instructions are not stopped, the main application for a temporary injunction will be rendered nugatory.
8. That it is in the interest of justice and to the prejudice of no party that this application be granted.

The Respondent opposed this application.

Representation:

Mr. Eric Muhwezi and Mr. Lester Kaganzi appeared for the Applicant while Mr. John Musiime represented the Respondent.

Background:

It is common ground that the High Court at Mbarara heard and determined Civil Suit No. 41 of 2012 and that the Respondent was the successful party therein. It is not disputed either that following the decision aforesaid the Applicant filed an Appeal, Criminal Appeal No. 160 of 2014 which is pending before this Court. This Application for an interim order as well as the application for a substantive order are filed in the wake of the Appeal. For now I consider this Application; for an interim order only.

Analysis:

Rule 2(2) of the Rules of this Court states that:

'Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the Court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay.'

Rule 6(b) is relevant to stay of execution and related orders. It states that the institution of an appeal shall not operate as a stay of execution though court may in any civil proceedings, where a notice of appeal has been duly lodged, order a stay of execution, an injunction or a stay of proceedings on such terms as the court may think just.

In the affidavit in support of the Application I find the following paragraphs significant:

6. *That I applied for and on the 30th day of March 2016, I secured an interim order of stay of execution from this Honourable court vide Civil Application No 029 of 2016.*
7. *That however on the 11th day of July 2016 His Lordship Hon. Justice Remmy Kasule, Justice of Appeal, refused to grant an extension of the*

forementioned interim order of stay of execution in Civil Application No 41 of 2012.....

8. *That following the above decision, the Respondent's lawyers proceeded to move the trial court, to issue a warrant for vacant possession of 22 acres of the suit property in favour of the Respondent.....*
9. *That the trial court issued a warrant to the bailiff to give vacant possession of the forementioned suit property, however this warrant expired before execution was done.....*
10. *That in a letter Ref. No. GEN 1/06/17 dated 27th June 2017, bailiffs from King Solomon Instant Auctioneers falsely claimed to have executed the orders of the trial court in High Court Civil Suit No 0041 of 2012 and that they purportedly surveyed off 22 acres from the 54 acres suit land and left the rest of the suit land in my possession.....*
11. *That I am advised by my lawyers of M/s Muhwezi Law Chambers Advocates and M/s Kaganzi & Co Advocates which advice I verily believe to be true, that the above mentioned purported execution of the orders of the trial court in High Court Civil Suit No 0041 of 2012 was done illegally and this honourable court shall be moved to find as such.*
12. *That forementioned purported execution process was carried out in my absence and resulted in the bailiffs handing over to the Respondent land that*

comprises my home, kraal, plantations, houses and watering hole/dam.....

13. *That following the forementioned purported subdivision of the suit property; the Respondent, her agents, employees, and or people acting on her behalf and instructions are currently in the process of illegally fencing off and annexing/appropriating my property including my home, kraal, plantations, houses and watering hole/dam.....*
14. *That the forementioned purported execution of the orders of the trial court was done illegally and with the sole aim of wrongfully appropriating my personal property to the Respondent.'*

Needless to say, an appeal does not serve as a stay of execution. On her part the Respondent swore an affidavit in reply. I find paragraph 13 through to 17 of the affidavit need to be taken into consideration. I extract them as they appear.

- 13. That I know that the said Mr. Chris Baguma T/A King Solomon Instant Auctioneers executed the warrant and wrote a return to the Registrar of the High Court at Mbarara confirming that it had been fully executed.*
.....
14. *That as per the list of witness of the execution in the above report, the execution was witnessed by local government and church leaders and members of the applicant's family such as her son Mr. Denis Kansiime.*

.....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-exempt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.'

Looking at the evidence as a whole, the Respondent states that execution was done and as such there are no future plans of execution. The Applicant states that no execution has as yet been done but she apprehends interference, by the Applicant, with her quiet enjoyment of the suit property. For the record no ground is given for that apprehension. There isn't any iota of evidence supporting her fear of a threatened execution or any interference with the status quo prior to the hearing of the intended substantive application.

I agree with the submissions of counsel for the Respondent that this application lacks merit and should be dismissed.

Accordingly, it is dismissed with costs.

Dated at Kampala this 20th of November 2017.


PAUL K. MUGAMBA
JUSTICE OF APPEAL.

acres allegedly subdivided by Mr. Chris Baguma T/A King Solomon Instant Auctioneers.

11. *That I am advised by my lawyers of M/s Muhwezi Law Chambers Advocates and M/s Kaganzi & Co Advocates which advice I verily believe to be true that the contents of paragraph 16 of the Respondent's affidavit in reply are completely false as the status quo of the suit property is that I am in occupation of the suit property.*

12.

13. *That the orders of the trial court in HCCS 041 OF 2012 never authorized the Respondent to evict me from or appropriate my property on the suit land.*

14. *That the Respondent is now also in the process of disposing of or allowing 3rd parties to rent and or utilize the suit property; including a one Kabarabara Fred who even moved his cattle to graze on the suit land despite the existence of a quarantine stopping movement of cattle in the area to curb the spread of foot and mouth disease.'*

Is there something to point to an imminent threat to the status quo which should call for grant of the order being sought in this application? Relative to the remedy being sought, in Hwan Sung Industries Ltd v Tajdin Hussein, Civil Appeal No. 8 of 2008, Okello JSC stated in his dicta:

.....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-exempt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.'

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Dated at Kampala this 20th of March 2017.


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