



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Application No. 105 of 2019

In the matter between

**1. OJERA ALEX
2. OJARA DAVID**

APPLICANTS

And

OMONA GEORGE

RESPONDENT

Heard: 23 June, 2020.

Delivered: 23 July, 2020.

Civil Procedure — Stay of execution — Order 43 rules 1 and 4 (3) of The Civil Procedure Rules — the High Court may for sufficient cause order stay of execution of a decree pending an appeal before it where; (a) substantial loss may result to the party applying for stay of execution unless the order is made; (b) the application has been made without unreasonable delay; and (c) security has been given by the applicant for the due performance of the decree. — The applicant must make such application after notice of appeal has been filed and should be prepared to meet the conditions set out in the above order. — The requirement of filing of a notice of appeal as a pre-condition to the grant of the order sought and that of the existence of a serious or eminent threat of execution of the decree or order if the application is not granted, are all intended to prevent the abuse of orders of stay of execution.

RULING

STEPHEN MUBIRU, J.

Introduction:

- [1] This is an application under the provisions of section 79 and 98 of *The Civil procedure Act* and Order 43 rule 4 of *The Civil Procedure Rules*, seeking an order of stay of execution of the decree passed in the underlying suit on 20th May, 2018 pending hearing of an application seeking leave to file an appeal out of time. The application is premised on grounds that the applicants only became aware of the judgment intended to be appealed, five and a half months after it had been delivered ex-parte. They contend that the intended appeal has a likelihood of success, they filed the current application without undue delay, they stand to suffer irreparable loss in the event that execution ensues before the intended appeal is heard and it is in the interests of justice that the application be allowed. The respondent never filed an affidavit in reply.
- [2] The background to the application is that the parties have a dispute over the ownership of approximately 15 acres of un-surveyed land situated at Gujulukudu village, Opatte Pariah, Atanga sub-county in Pader District. During the year 2012, the respondent sued the applicant in the underlying suit. Judgment was delivered in the respondent's favour on 20th May, 2018 in the applicants' absence. On or about 20th October, 2018 the applicants received information that the judgment was about to be executed and upon making inquiries at the Court Registry, discovered that the judgment had been delivered in their absence, although the hearing had been inter-parties. They immediately instructed their advocates to remedy the situation but the advocates chose to file an application seeking to set aside that judgment and for stay of its execution. Both applications were withdrawn on 12th March, 2019 by consent of both parties, to enable the applicant file the current application which was filed on 3rd July, 2019.

Conditions for grant of an order for stay of execution of a decree pending appeal.

- [3] Under Order 43 rules 1 and 4 (3) of *The Civil Procedure Rules*, the High Court may for sufficient cause order stay of execution of a decree pending an appeal

before it where; (a) substantial loss may result to the party applying for stay of execution unless the order is made; (b) the application has been made without unreasonable delay; and (c) security has been given by the applicant for the due performance of the decree. The applicant must make such application after notice of appeal has been filed and should be prepared to meet the conditions set out in Order 43 Rule 4 (3) of *The Civil Procedure Rules* (see *Lawrence Musiitwa Kyazze v. Eunice Businge, S. C. Civil Application No 18 of 1990*).

[4] The Court of Appeal in *Kyambogo University v. Prof. Isaiah Omolo Ndiege, C. A. Misc. Civil Application No 341 of 2013* expanded the considerations to include: - there is serious or eminent threat of execution of the decree or order if the application is not granted, the appeal would be rendered nugatory; that the appeal is not frivolous and has a likelihood of success; that refusal to grant the stay would inflict more hardship than it would avoid. Courts though have been reluctant to order security for due performance of the decree. Rather Courts have been keen to order security for Costs (see *Tropical Commodities Supplies Ltd and others v. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331* and *DFCU Bank Ltd v. Dr. Ann Persis Nakate Lussegere, C. A Civil Appeal No. 29 of 2003*), because the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals.

[5] In the instant application, the applicants have not filed a notice of appeal (but have been granted leave to file an appeal), there is no proof provided of a serious or eminent threat of execution of the decree or that if the application is not granted, or that the appeal would be rendered nugatory if the application is not granted. The applicants though claim that they and their entire families live on the land in dispute. Hardship may be constituted by the likelihood of substantial loss, which loss does not represent any particular size or amount, but refers to any loss, great or small, that is of real worth or value as distinguished from a loss that is merely nominal (see *Tropical Commodities Supplies Ltd and Others v. International Credit Bank Ltd (in Liquidation) [2004] 2 EA 331*). Forceful eviction

would certainly result in loss or damage to some of their property on the land. On the other hand, grant of the order would, for the respondent, only result in delayed enjoyment of the fruits of a judgment delivered in his favour, in the event that the intended appeal is dismissed. For that reason I find that refusal to grant the stay would inflict more hardship than it would avoid.

[6] The requirement of filing of a notice of appeal as a pre-condition to the grant of the order sought and that of the existence of a serious or eminent threat of execution of the decree or order if the application is not granted, are all intended to prevent the abuse of orders of stay of execution. The pre-conditions are intended to avoid a situation where a party does not take any further step after securing the order. However, by virtue of article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995* which enjoins courts to administer substantive justice without undue regard to technicalities, it is not desirable to place undue emphasis on procedural pre-conditions at the expense of the substance of the dispute. Courts are not expected to construe rules of procedure in such a hyper-technical manner so as to result in genuine claims being defeated on trivial grounds. In deserving cases, Courts have always been liberal and generous in applying the rules of procedure. Having granted the applicants leave to file their intended appeal out of time, exceptional circumstances exist in the instant case to merit the suspension of some of the preconditions under Order 43 rules 1 and 4 (3) of *The Civil Procedure Rules*.

[7] Considering that the rationale behind an order of this kind is to preserve the subject matter of the appeal from irreparable damage pending appeal, while at the same time preventing frivolous post-judgment applications intended only to prolong litigation, an unconditional order of stay of execution of the underlying decree is hereby granted. It shall remain in force for fourteen days from the date of this ruling, in the event that no appeal is filed, or until final disposal of the appeal, in the event that the applicants file the appeal.

Order:

[8] In the final result, the costs of the application shall abide the results of the appeal. In default the application stands dismissed with costs to the respondent.

Delivered electronically this 23rd day of July, 2020

.....Stephen Mubiru.....

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the applicants :

For the respondent :