

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
MISCELLANEOUS APPLICATION NO. 17 OF 2021
ARISING FROM DIVORCE APPEAL NO. 0001 OF 2017
ALL ARISING FROM DIVORCE CAUSE NO. 015 OF 2015

1. JOSEPH WALIGO
2. NANJERU NABUKENYA SUSAN :..... APPLICANTS

VERSUS

JOANITA NAMUDDU :..... RESPONDENT

Before; Hon. Lady Justice Vactoria Nakintu Nkwanga Katamba

RULING

This application was brought under Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act, Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules seeking orders that;

1. The court be pleased to order stay of execution restraining the Respondent, her agents, servants and or employees and anyone rightfully acting for/under her from carrying out any form of execution against the Applicants and on any of the Applicants' properties of the final orders and decree rendered in Divorce Appeal No. 001 of 2017 pending determination of Civil Appeal No. 05 of 2021;
2. Costs of the application be provided for;

The grounds of the application as contained in the affidavit of the 1st Applicant Waligo Joseph are briefly that;

1. The Respondent filed Divorce Cause No. 015 of 2015 in the Chief Magistrates Court of Masaka at Masaka against the Applicants and judgment was entered for the Respondent on the 10th day of January 2017;
2. The Applicants were dissatisfied with the judgment and orders of the trial Magistrate and they appealed to this court vide Divorce Appeal No. 001 of 2017;

3. Divorce Appeal No. 0001 of 2017 was dismissed and the judgment and orders of the trial Magistrate were confirmed and upheld on appeal;
4. The Applicants have filed an appeal to the court of appeal challenging the decision of the appellate court;
5. The Respondent filed a bill of costs and the taxation hearing was fixed together with a notice to show cause why execution should not issue by way of vacant possession for the decreed properties;
6. The 1st Applicant is in occupation of the decreed properties and he will suffer irreparable damage and great inconveniences once execution proceeds;
7. The appeal has a high chance of success and will be rendered nugatory;

In her affidavit in reply, the Respondent, Namuddu Joanita opposed the application and stated that;

1. She purchased the Kibanja at Kagando solely and the Applicants started constructing a house thereon;
2. The 1st Applicant was allowed to take the matrimonial home and a share by half in the property at Kagando measuring 10 acres;
3. The 1st Applicant has no interest in the land hosting the school;
4. If the application is granted, the Respondent and the children will continue to suffer;
5. The appeal has no chances of success;

Both Parties filed written submissions.

Counsel for the Applicants submitted that Court of Appeal Civil Appeal No. 05 of 2021 is pending before the Court of Appeal and conferencing proceedings are ongoing, and the appeal raises grounds that are appealable issues that require digestion by the Court of Appeal. Counsel further submitted that there is an imminent threat of execution since the Respondent already filed a bill of costs, taxation hearing notice has been issued and a notice to show cause why execution should issue. Further, that the Applicant is likely to suffer irreparable damage and great inconveniences once the execution applied for by the

Respondent is issued by vacant possession and prayed for court to be pleased to preserve the status quo.

Counsel for the Respondent submitted that the chances of success on appeal are non-existent since the appeal is a second appeal governed by the rules of procedure barring the Court of Appeal from taking fresh evidence. The Applicants did not give evidence to defend their case in both the trial and appellate courts and the chances of succeeding on a second appeal are almost nil. The appellate court confirmed the judgment and orders of the trial court following the law on matrimonial properties as it is settled. The Applicant has not proved how he will suffer irreparable damage if execution proceeds considering that he did not prove his claim in the decreed property. Counsel prayed for the application to be dismissed and in the alternative to be granted on condition that the Applicants deposit substantial security for costs as well as paying the taxed costs within a limited time.

Determination of the application;

The grounds for the grant of an order for stay of execution are provided for under *Order 43 Rules 1 and 4 (3) of the Civil Procedure Rules* that;

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 above grounds have been expounded further by the Court of Appeal in *Kyambogo University v. Prof. Isaiah Omolo Ndiege, C. A. Misc. Civil Application No 341 of 2013* to include: -

- d) 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;

- e) that the appeal is not frivolous and has a likelihood of success;
- f) that refusal to grant the stay would inflict more hardship than it would avoid.

Pending appeal with a likelihood of success;

The Applicants adduced a notice of appeal lodged in the Court of Appeal on the 20th day of October, 2020, the Memorandum of appeal filed on the 7th day of January 2021 and the record of appeal which was certified on the 7th day of January, 2021.

As to whether the appeal has a likelihood of success, the Applicants intend to lodge a second appeal to the Court of Appeal. *Sections 72 and 74 of the Civil Procedure Act* are clear as to appeals from appellate decrees. Section 72 provides that an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—

- (a) the decision is contrary to law or to some usage having the force of law;
- (b) the decision has failed to determine some material issue of law or usage having the force of law;
- (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits.

An appeal to the Court of Appeal from the decision of the High Court on appeal is based on an error in law or mixed law and fact. The grounds of appeal as contained in the memorandum of appeal lodged in the court of appeal include grounds based on matters of fact, matters of evidence as well as matters based on law and fact.

The grounds of the appeal as stated substantially challenge matters of fact and evidence which were already substantially considered by the court on appeal. In consideration of the evidence on record, the pleadings and the intended grounds of appeal, the appeal prima facie is less likely to succeed.

Proof of substantial loss;

Substantial loss does not represent any particular amount or size; it cannot be quantified by any particular mathematical formula. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without a value or a loss that is merely nominal. (*see Tropical Commodities Suppliers Ltd and others v. International Credit Bank Ltd (In Liquidation)* [2004] 2 EA 331).

Counsel for the Applicants submitted that the Applicant is in possession of the Kibanja situate at Kikondere which is an inherited property as his customary land currently acting as his source of income and he is likely to suffer inconvenience and irreparable damage if he is evicted.

To rebut this argument, Counsel for the Respondent argued that it is the Respondent and her children who will continue to suffer as she paid for the properties and has custody of the six issue of the marriage.

The trial court decreed to the Respondent a kibanja which was purchased at 6,000,000/= and 10 acres of land comprised at Kikondere to be shared by the 1st Applicant and the Respondent. The Applicant was ordered to deliver vacant possession of the properties to the Respondent and from the consideration of the application, the Applicants seek to challenge the orders in relation to the property.

It is the Applicants' argument that they are in possession of the decreed property and if the application is granted, they will not be evicted hence will not suffer irreparable damage if the appeal succeeds.

I have considered the evidence on record, the 1st Applicant is in occupation of a kibanja at kagando which was decreed to the Respondent upon court considering and establishing that the same was not matrimonial property and that the Respondent purchased the kibanja solely. The Applicant claims that he will suffer irreparable damage if he is evicted but he has not proved what damage he will suffer in the circumstances. The court ordered that he take part of the matrimonial home and the property at Kikondere housing a school which the 1st Applicant claims to be deriving income from. It was the 1st Applicants averment that

he started using the land at Kikondere as a source of income with a coffee plantation, banana plantation, permanent residential house ever since schools were closed.

I find that the damage complained of is not irreparable damage as the 1st Applicant would be compensated in monetary terms if the appeal succeeded.

I note that this is an appeal arising from a divorce cause of 2014. The Applicants did not adduce evidence to defend the Petition and a consent judgment was later reached at which Parties agreed to the custody of the children which was granted to the Respondent. The Respondent having custody of the children is being deprived of sustaining income from her property and prolonging the Petition is prejudicial to her.

The Respondent stated that she will continue to suffer with her children if the application is granted. It is trite law that in matters involving children, the welfare of children and their best interests is of paramount consideration. Suffice to say, it is the children that are being prejudiced by the delay in resolving this matter. The balance of convenience therefore does not favor the grant.

I therefore find that the Applicants have not adduced sufficient evidence to prove that they will suffer irreparable damage that cannot be atoned in damages if the application is not granted.

This application therefore bears no merit and is hereby dismissed with costs to the Respondent.

I so order.

Dated at Masaka this 12th day of November, 2021

Signed;



Victoria Nakintu Nkwanga Katamba - Judge