THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO.200 OF 2020

(Arising from Misc. Application No. 199 of 2020)

LUCY MARY ORECH::APPLICANT

VERSUS

KABOGOZA MUTWALIB::RESPONDENT

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

(SINGLE JUSTICE)

RULING

This is an application for an interim order of stay of execution of the Decree of the High Court in Civil Suit No. 106 of 2011 dated 4th June, 2020 against the Respondent pending the hearing and determination of the main application No. 199 of 2020.

The application is brought by way of Notice of Motion under Section 98 of the Civil Procedure Act Cap.71 and Rules 2(2), 6(2) (b), 43(1), 44(1) of the Judicature (Court of Appeal Rules) Directions S.I 13 – 10.

The applicant sued the respondent in HCCS No. 106 of 2011 at Kampala. The suit was dismissed on a preliminary objection on grounds that it was res judicata. The appellant was dissatisfied with the High Court's decision and filed Civil Appeal No. 99 of 2018 before this court.

During the pendency of a counter claim in HCCS No. 106 of 2011, the respondent partially evicted the applicant on a warrant from Nakawa Civil Suit 234 of 2011. The applicant applied for stay of execution vide Miscellaneous Application No. 3040 of 2017 and an unconditional order staying execution pending the final disposal civil Appeal No. 99 of 2018 which was granted. On 4th June 2020 Judgment in the counter claim was delivered in favor of the respondent granting him vacant possession.

Being dissatisfied with the judgment in the counter claim, the applicant filed a notice of Appeal and Miscellaneous Application No. 199 of 2020 in this court to stay execution of the decree in the Counter claim and this Application.

The Notice of Motion and Supporting Affidavit deponed by Lucy Mary Orech on 27 August 2020 contain the following grounds on which the Application is premised:

1. That the Applicant being dissatisfied with the Judgment and orders of the High Court in HCCS No. 106 of 2011 has filed a Notice of Appeal and intends to appeal against the whole decision.
2. That the Applicant has also filed Misc. Application No.199 of 2020 for stay of execution of the Decree in Civil Suit No. 106 of 2011;
3. That there is a serious threat of execution of the Decree in Civil suit No. 106 of 2011.
4. That the Applicant will suffer irreparable damages and her appeal will be rendered nugatory.
5. That it is in the interest of justice that this court grants this application.

The application was opposed by the respondent who filed an affidavit in reply deponed by Kabogoza Mutwalib. The grounds in opposition can be summarized as follows:

1. That the application for stay of execution lacks merit as there is no threat of execution.
2. That the application is premature as there is no extracted decree to be executed in the matter.
3. That the current application is improperly before this court as the applicant has not exhausted her remedies in the lower court.
4. That there is no serious threat of execution against the applicant since no execution proceedings have been undertaken by me and there is no warrant of attachment to that effect and as such this application is premature and should not be entertained.

At the hearing of the application, Mr. Alex Baguma represented the applicant and Mr. Sebbuta Hamza represented the respondent. Both parties filed written submissions.

Counsel for the applicant submitted that the conditions set in ***Crane Bank Limited & Ms. Fang Min V Belex Tours and Travel Ltd Misc Applications No. 343 and 345 of 2013*** for the grant of an interim application for stay of execution were all present namely: that the applicant must prove that a notice of Appeal had been filed, there was a substantive application and a serious threat of execution existed.

He submitted that the filing of the substantive application did not bar the respondent from executing the judgment of court. That the applicant had been ordered to vacate the suit property within 90 days. That a serious threat of execution existed because the Order of the High Court does not require an application for execution. He contended that it was self executionary and nullified the order of stay of execution granted by the high court in Misc. Application 3040 of 2011 wherein execution by way of eviction was stayed pending the determination of Civil Appeal No. 99 of 2018.

He further submitted that the respondent had evicted the applicant before using a warrant emanating from civil suit 234 of 2011 yet the applicant was not a party to these proceedings and when the hearing of his counter claim in HCCS No. 106 of 2011 was still on going. That the respondent has no regard for court process and is likely to evict the appellant.

He contended that the applicant`s appeal will be rendered nugatory if she was evicted from the suit property which was akin to ratifying the respondent`s purported ownership of the suit property when the matter of ownership was still being challenged in this court. That there was no guarantee that the respondent would not dispose of the suit property if the Applicant is not in physical possession. That the applicant would be rendered homeless if execution is not stayed pending the hearing of the appeal.

The respondent opposed the application and raised a preliminary objection regarding the competence of the application. He contended that the application ought to have first been filed in the high court which passed the judgment not in the appellate court. He relied on ***Rule 42 of the Judicature***

(court of Appeal Rules) Directions and the case of ***Joel B Kato and Anor vs Nuulu Nalwoga Civil Application No. 12 /2011*** for the proposition that whenever an application may be made either in the court or in the High Court, it shall be made first in the High Court.

Counsel submitted that the conditions for the grant of an interim order of stay of execution laid by the Supreme Court in ***Hwan Sung Industries vs Tajdan Hussein and 2 others Civil Application No. 19 of 2008*** were not in this application. He further contended that the respondent was neither served with a copy of the main application nor submissions on the same and for that reason, he could not authoritatively submit on the application.

He further submitted that there was no serious threat of execution because no decree in Civil Suit No.106 of 2011 was extracted and no execution proceedings had been undertaken by the respondent in the current matter. That the absence of an extracted decree rendered the current application incompetent and it was further evidence that there was no threat of execution. That the decree attached as evidence of threat of execution to the application by the applicant was neither extracted, signed nor dated by the relevant court official and did not in any way prove threat of execution. He contended that evidence in the matter should be by way of a warrant for vacant possession and notice to show cause why execution should not issue. That the applicant had failed to prove that there was a threat of execution in HCCS No.106 of 2011.

Counsel further submitted that the applicant`s reliance on a warrant to give vacant possession in EMA No. 1351 of 2011 arising from civil suit No. 234 of

2011 where the applicant was not a party to allege that there was threat of execution cannot stand. He contended that the threat of execution relevant to the current application is in respect of civil suit no 106 of 2011.

In rejoinder, counsel for the applicant submitted that different persons had approached the applicant claiming that the suit property was on sale since the 90 days granted by court for the applicant to vacate were expiring. He contended that on two occasions, the respondent had evicted her from the suit property without serving her notice to show cause why execution should not issue. That the judgment negated the stay of execution issued by the execution division in Misc. Application No. 3040 of 2017 which exposed the applicant to eviction and sale of the property without her knowledge.

Counsel for the respondent submitted that the application before this Court was incompetent because it ought to have first been filed in the high court which passed the judgment and not in this court.

The jurisdiction of this court to grant a stay of execution is set out in Rules 2(2) and 6(2) (b) of the Judicature (Court of Appeal Rules) Directions which mandates the Court to grant a stay of execution, an injunction or order a stay of proceedings on such terms as the court may deem fit.

Lady Justice Dr. Esther Kisaakye in ***E.B. Nyakaana and Sons Limited and Beatrice Kobusinge and 16 Others, Supreme Court Misc. App. No.13 of 2017;*** ruled that the Court of Appeal is vested with powers under Rule 2(2) of the Judicature (Court of Appeal Rules) Directions to issue orders staying execution as may be necessary to meet the ends of justice.

Section 12 of the Judicature Act, Cap.13 provides that a single justice of the Court of Appeal may exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal.

The Supreme Court in ***Lawrence Musiitwa Kyazze versus Eunice Busingye Supreme Court Civil Application No.18 of 1990*** stated the conditions that must be present before an applicant may file an application in this Court first, without having filed it at the High Court as:

1. There must be substance to the application both in form and content;

   This Court would prefer the High court to deal with the application for a stay on its merits first, before the application is made to the Supreme Court. However if the High Court refuses to accept the jurisdiction, or refuses jurisdiction for manifestly wrong reasons, or there is great delay, this Court may intervene and accept jurisdiction in the interest of justice

2. *This Court may in special and probably rare cases entertain an application for a stay before the High Court has refused a stay, in the interest of justice to the parties. But before the Court can so act it must be apprised of all the facts*

Further, this Court has in ***Kyambogo University v Prof. Isaiah Omolo Ndiege CACA No. 341 of 2013*** held that;

"It is now settled law that this court and the High Court have concurrent jurisdiction in this matter. It appears to me that applications of this nature

should be first filed in the High Court as a general rule, and should only be filed in this court, where exceptional circumstances exist".

I agree that indeed this Court and the High Court have concurrent jurisdiction in applications of this nature. Such an application may be filed in the High Court or in this court. However, as I have already noted above the conditions set out in the ***Lawrence Musiitwa Kyazze*** (Supra) must be in existence before an application of this nature is filed first in this court.

Rule 42 of the Court of Appeal Rules provide;

"42. Order of hearing applications

1) *Whenever an application may be made either in the Court or in the High Court it shall be made first in the High Court.*
2) *Notwithstanding sub rule (1) of this rule, in civil or criminal matter, the Court may, on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any as the justice of the case requires, or entertain an application under rule 6(2) (b) of these Rules, in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court."*

A combined reading of Rule 42 of the rules of this Court and the case of ***Lawrence Musiitwa Kyazze*** (Supra) in my view require that except in rare and exceptional circumstances an application of this nature ought to be filed in the High Court first.

I note that counsel for the applicant did not advance any reasons as to why the applicant opted to file this application in this Court without first filing the same in High Court. In my view, there are no special or rare circumstances that would require this Court to hear and determine this application before the High Court does so but in the interest of justice, I will proceed to consider the application.

In ***E.B. Nyakaana and Sons Limited and Beatrice Kobusinge and 16 Others, Supreme Court Misc. App. No.13 of 2017***; Lady Justice Dr. Esther Kisaakye in her ruling stated that before Court exercises its discretion to grant an interim order of stay, it must be satisfied that:

(a) A Notice of Appeal has been lodged in accordance with Rule 72 of the Rules of this court;

(b) A substantive application for stay of execution is pending before court;

(c) There is a serious threat of execution before the hearing of the substantive application; and

(d) The application has been filed without undue delay.

The evidence on record shows that a Notice of Appeal was filed in the High Court on 7th August 2020 showing the applicant`s intention to appeal against the decision in Civil suit No.106 of 2011 as required under Rule 76 of the Rules of this Court. The substantive application referenced Civil Application No.199 of 2020 for stay of execution was filed in this court and pending hearing and determination. The respondent`s allegation that he was never

served with the substantive application will best be adjudicated on when the main application is heard.

I agree with the reasoning of Kakuru, JA in ***Kyambogo University V Prof. Isaiah Omolo Ndiege, Court of Appeal Civil Application No.341 of 2013*** where he stated that:

> *"In my view the law recognizes that not all orders or decrees appealed from have to be stayed pending appeal. It also recognizes a fact that an appeal may be determined without the Court having to grant a stay of execution. However, Court may stay execution where the circumstances of the case justify such a stay. It is therefore incumbent upon the applicant in every application of stay of execution to satisfy Court that the grounds exist for grant of a stay of execution.* ***The assumption that once a party has filed an appeal a stay of execution must follow as a matter of course has no legal basis"*** *(Emphasis mine.)*

As to whether there was delay on the applicant's part to bring this application, the judgment of court in HCCS No. 106 of 2020 was delivered in June 2020 and the evidence on record shows that this application was lodged in this court in August 2020 which in my opinion was within a reasonable time.

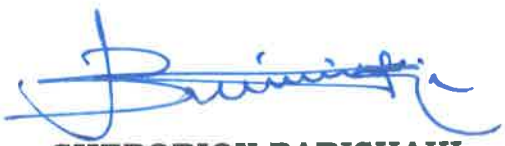
Counsel for respondent argued that no decree had been extracted and no execution proceedings had been undertaken before this application was filed. That the applicant`s reliance on a warrant to give vacant possession in EMA No. 1351 of 2011 arising from civil suit No. 234 of 2011 did not amount to a threat.

The applicant did not adduce any evidence to show that the respondent had extracted a decree or done any act to execute the decree. He neither applied for a warrant of execution nor served a notice to show cause why execution should not issue. There is no evidence that there is an imminent threat of execution and yet this is one of the most important conditions because if it is true, it will render the appeal nugatory.

The application is dismissed and costs shall abide the cause.

I so order

Dated at Kampala this 27th day of Oct 2020



CHEBORION BARISHAKI

JUSTICE OF APPEAL