

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**MISCELLANEOUS APPLICATION NO. 182 of 2017**  
**(ARISING OUT OF CIVIL APPEAL NO. 71 OF 2017)**  
**(ARISING OUT OF CIVIL SUIT NO. 127 OF 2008)**

**OSUNA OTWANI ::: APPLICANT**  
**VERSUS**  
**DAVID OCHIENG            ::: RESPONDENT**

**RULING OF THE COURT**

**BEFORE: HON. LADY. JUSTICE ELIZABETH MUSOKE, JA**

This application was brought under the provisions of Rules 1 (3), 42 and 43 of the Judicature (Court of Appeal Rules) Directions SI 13-10. It is for orders that:-

- i. Court issues an interim order staying the execution of the Judgment and orders in Mbale Civil Appeal No. 98 of 2012 and Tororo Civil Suit No. 127 of 2008 pending disposal of the main application for stay of execution.
- ii. Costs of this application be provided.

**Background to the application:**

The applicant sued the respondent vide Tororo Civil Suit No. 127 of 2008 in respect of the suit land which is situated at Tororo for general damages and encroachment on his land. The suit was decided against the applicant with costs.

Being dissatisfied with the judgment and orders of the court, the applicant filed an appeal vide High Court Civil Appeal No. 098 of 2012 in which judgment was delivered on 15th of February, 2017, dismissing the same with costs.

Being dissatisfied with the judgment and orders in Civil Appeal No. 98 of 2012, the applicant has now preferred an appeal to this court vide Civil Appeal No. 71 of 2017.

The grounds of the application are contained in the Notice of Motion and affidavit in support of the application sworn by Mr. Osuna Otwani, the applicant and dated the 7th day of July 2017. The grounds are briefly that:

- a) The applicant sued the respondent vide Tororo Civil Suit 127 of 2008 in respect of the suit land situate at TICAF Tororo for general damages for encroachment into the applicant's land and the said suit was decided against the applicant.
- b) Being dissatisfied with the said Judgment and orders, the applicant appeal to the High Court at Mbale vide Civil Appeal No. 98 of 2012 wherein judgment was given on 12.2.2017 dismissing the appeal with costs.
- c) The applicant has now appealed to this court vide Civil Appeal No. 71 of 2017.
- d) The respondent is likely to execute the orders of the lower courts by way of taxing and recovering taxed costs.
- e) The application for an interim order of stay of execution was dismissed in the High Court of Mbale.

- f) It is in the interest of justice that execution of the Judgment and orders be stayed pending disposal of the appeal.
- g) The main application for stay of execution has been filed and is pending disposal.
- h) The applicant's main application for stay stands to be prejudiced if execution is not stayed.
- i) It is only fair, just, equitable and in the interest of justice that this application be granted.

In opposition to the application, the respondent filed an affidavit in reply dated 30<sup>th</sup> October, 2017. He stated:-

- a) The applicant filed Civil Suit No. 127 of 2008 which was determined in favour of the respondent.
- b) High Court Civil Appeal No. 98 of 2012 was also determined in the respondent's favour.
- c) The respondent's advocates filed a bill of costs in Mbale HCCA No. 98 of 2012 which was taxed on 11<sup>th</sup> July, 2017.
- d) Upon taxation, execution proceedings were taken out to recover the taxed costs of which the applicant has made partial payment.
- e) Before the said bill of costs could be taxed, the applicant filed High Court Miscellaneous Application No. 154 of 2017 for an interim order to stay execution but the same was dismissed on 13/6/2017.
- f) The applicant also filed the main application in the High Court at Mbale vide Miscellaneous Application No. 153 of 2017 seeking stay of execution and the same is scheduled for hearing on 7<sup>th</sup> February, 2018.

- g) It is not practical to have the same application pending in two different courts as the case is here.
- h) The respondent has lived on the suit land with his family since 1993, when he purchased it, and so only seeks to recover the taxed bill of costs in execution.
- i) Execution only relates to the recovery of costs which the applicant is obliged to pay.
- j) This application does not disclose sufficient grounds to warrant the grant of an interim stay of execution.

The applicant further deponed a supplementary affidavit in support dated 11<sup>th</sup> October, 2017 wherein he stated that:-

- a) The respondent is in the process of executing the orders of court in the lower courts by way of A Notice to Show Cause fixed for hearing on the 25<sup>th</sup> October, 2017.
- b) It is in the interest of justice that execution of the Judgment and orders in the lower court be stayed pending disposal of the main application.
- c) The applicants appeal vide Civil Appeal No. 071 of 2017 and the main application stand to be prejudiced if the execution is not stayed.

At the hearing of the application, the applicant was represented by Counsel Kugumikiriza Moses (Counsel for the applicant), while Counsel Aketch Robinah (Counsel for the respondent) appeared for the respondent.

Counsel for the applicant submitted that at the time of deponing the affidavit in support to the application herein, Counsel for the respondent had already filed a bill of costs and a taxation hearing notice had already been issued out

for taxation of the said bill of costs. The bill was taxed as per the supplementary affidavit in support and a notice to show cause why execution should not issue was issued out by the High Court in Mbale on the 4th of October 2017 directed at the applicant. The said notice to show cause was in execution of the taxed costs which had already been taxed by court and allowed at Ugx. 9,713,000/= .The taxation was completed on 11<sup>th</sup> July, 2017.

It was further submitted that an application for stay of execution was filed on 23<sup>rd</sup> April, 2013, in the High Court at Mbale and it is still pending determination. An application for an interim order that is, Miscellaneous Application No. 154 of 2017, before the Deputy Registrar of the same court was dismissed because at that time, there was no threat to execute.

Counsel contended that the main application for stay of execution in this case was filed vide Miscellaneous Application No. 181 of 2017 on 10th July, 2017, and this application for an interim order of stay arose therefrom. Further, that it was clear from the supporting affidavit and the supplementary affidavit in support that there was a threat to execute the judgment of the lower court for recovery of the costs as taxed and yet the main application had not yet been disposed of.

It was further contended that this application disclosed sufficient grounds for the issuance of the interim orders of stay of execution pending hearing of the main application. Counsel referred court to **Hwan Sung Industries Ltd vs. Tajdin Hussein and 2 Others, Supreme Court Civil Application No. 19 of 2008**, for the proposition that upon this court being satisfied that there is a notice of appeal lodged in accordance with the rules

of the court, it is only necessary for the court to satisfy itself on evidence that a substantive application is pending and that there is a serious threat of execution before the substantive application is heard and determined. **See Kabianga Ernest and Others versus Sanyu Patrick, Civil Application No. 102 of 2015**

Counsel concluded that there was a pending substantive application in this court and a threat to execute for the recovery of costs which were taxed in the lower court. He prayed that this application be granted in the interest of justice and that costs abide the outcome of the main application.

Counsel for the respondent did not agree. In opposition to the application, she submitted that according to paragraph 5 of the respondent's affidavit in reply, execution of the orders that the applicant sought to stay had already started and the applicant made part payment towards the said costs. She presented two annexures to court in support of that argument that is to say, A1 being the Notice to Show Cause why Execution should not issue and A2 being the receipt in proof of part payment of the costs.

Counsel submitted that the applicant paid a sum of Ugx. 2,700,000/= and undertook to pay the balance of Ugx. 7,000,000/= by 1<sup>st</sup> November, 2017 which he did not. Further, that these orders if granted, would be in vain as execution had already ensued.

Counsel further submitted that according to paragraph 7 of the respondent's affidavit in reply, there was already an application for stay of execution pending in the High Court at Mbale scheduled for hearing on 7<sup>th</sup> February, 2018. She relied on the provisions of Rule 42(1) of the rules of this court

which stipulates that an application of this nature must first be filed in the High Court and stated that the main application had neither been withdrawn nor determined. It was, therefore, unlawful for the applicant to have 2 similar applications pending in both this court and the High Court at Mbale.

Counsel contended that after the interim application for stay of execution had been denied by the Registrar, High Court at Mbale, the only available option to the applicant would have been to expedite the hearing of the main application as opposed to filing a fresh one.

It was further submitted that the respondent sought to recover costs only. Counsel relied on **Francis Sembuya versus Allport Freight Services, Supreme Court Civil Application No. 015 of 1998**, to state that an application for stay of execution must exclude payment of costs. An applicant is bound to pay costs and all court can do is to warn the advocate who receives the costs to refund the same should the appeal succeed.

Counsel further relied on **Uganda Revenue Authority versus Kirenga Fred, Court of Appeal Miscellaneous Application No. 91 of 2014** for the proposition that an interim order is an order to maintain the state of affairs of a situation relating to the subject matter of litigation during the time that comes between the time of filing the application for an interim order and the time as to when the substantive application for stay is disposed of, subject to any other directions of the court. Further, that there had to be specific reasons and/or circumstances necessitating an application for an interim order. It ought not be lodged as a matter of course.

Counsel concluded that the application and supporting affidavit as a whole did not show sufficient grounds and/or circumstances to warrant the grant of the said orders. She prayed that the application be dismissed with costs.

In rejoinder, Counsel for the applicant submitted that even though part payment of the costs had occurred, this could not bar the court from issuing the prayers sought. Counsel referred to **Bukenya Paul and Others versus Mary Margaret Nakawunde Civil Application No. 207 of 2016**, where partial execution of the Judgment and orders of court had ensued by issuance of titles to the successful party. The respondents therein were ordered to desist from carrying out any further acts in implementation of the said court order.

Counsel further submitted that the applicant had exhausted all avenues in the lower court. He referred court to **Augustine Mukiibi versus Hosanna Evangelistic Mission and Others, Court of Appeal Miscellaneous Application No. 295 of 2017**, for the proposition that where the lower court had refused the stay of execution, this court could handle the matter in the interest of justice after considering all the factors of the case.

Counsel stated that Miscellaneous Application No. 153 of 2017 scheduled for February, 2017 was supposed to be heard before Kaweesi, J who was transferred to the High Court of Uganda at Kampala, Land Division and so the matter would not be heard in time.

Counsel further rejoined that costs are awarded arising out of a Judgment and they are part of orders granted to the successful party. He concluded



that execution for costs is execution of the Judgment and orders which court can in its inherent jurisdiction stay pending disposal of the appeal.

I have carefully considered the Notice of Motion, the affidavits, the annexures thereto as well as the law and authorities relied upon. I have also considered the submissions of counsel on either side.

The law regarding to stay of execution is well settled. **Rule 42 of the Judicature (Court of Appeal Rules) Directions S.I 13-10**, states as follows:-

**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 any 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 act 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.*

**Rules 6 (2), 42 (2) and 43** of the Judicature (Court of Appeal Rules) Directions S.I 13-10 give wide discretion to this Court to grant interim or substantive orders of stay of execution for purposes of preserving the right of appeal, but this should be where special circumstances exist. **See:**

**Lawrence Musiitwa Kyazze versus Eunice Supreme Court Civil Appeal No. 018 of 1990.**

**In Civil Application No.019 of 2008: Hwang Sung Industries Ltd vs. Tajdin Hussein and 2 Others (SC), Okello, JSC held that:-**

***"For an application for an interim 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-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.***

***Suffice to add that the burden lies upon the applicant to prove to Court on a balance of probabilities the requisite conditions that must be satisfied before an interim order is granted."*** Emphasis added.

Further, in **Wilson Mikiibi vs James Ssemusambwa, Civil Application No. 009 of 2003 (SC), Mulenga, JSC**, held with regard to an application for an interim order that:-

***"A party seeking a stay of execution must satisfy the Court that there is sufficient cause why the party with judgment should postpone the enjoyment of its benefits. It is not sufficient for the judgment debtor to say that he is vulnerable, because the successful party may take out execution proceedings. It must be shown that if execution proceeds there may be some irreparable loss caused..."***

***The Interim Order ought to be made only in compelling circumstances, to prevent defeat of justice, and strictly pending ascertained hearing of a substantive application by the full Court."***

Further still, in **National Enterprise Corporation versus Mukisa Foods, Miscellaneous Application No. 7 of 1998**, this Court held that:-

***"The Court has power in its discretion to grant stay of execution where it appears to be equitable to do so with view of temporarily preserving the status quo.***

***As a general rule the only ground for stay of execution is for the applicant to show that once the decretal property is disposed of there is no likelihood of getting it back should the appeal succeed."***

Emphasis added.

In the present application, I note that the interim order of stay being sought is against the costs granted by the lower courts since the respondent is in possession of the decretal property and merely seeks to recover costs in execution. It was the applicant's case that execution for costs is execution of the Judgment and orders and it should be stayed. Counsel for the respondent, however, argued that an application for stay of execution must exclude payment of costs. She referred court to **Francis Sembuya versus Allport Freight Services** (supra) where the learned Justices of the Supreme Court relied on **Wilson versus Church (No.2) (1879) 12 Ch. D. 454**.

I have had occasion to read through both decisions. In my opinion there are obvious distinctions between **Francis Sembuya versus Allport Freight**

**Services** (supra), **Wilson versus Church** (supra), on the one hand and the application before me on the other hand. Those two cases involved an application for stay of execution while this one is an application for an interim order for stay. The principal distinction is that in the former cases, the respondents had provided some form of security for costs should the appeal be allowed and the solicitors entitled to receive those costs in Wilson's case personally undertook to refund those costs if the appeal was lost.

The applicant in this matter lost Civil Suit No. 127 of 2008 and Civil Appeal No. 98 of 2012. The respondent being in possession of the decretal property proceeded to file and tax a bill of costs at Ugx. 9,713,000= . On 25<sup>th</sup> October, 2017, the applicant paid a sum Ugx. 2,713,000= out of the sum of 9,713,000/= in partial fulfillment of the claim. It is not in issue that there was partial execution of the award and a sum of 7,000,000= is still outstanding.

This being an application for interim orders, the only issue to be resolved is whether the applicant has established that there is a substantive application for stay, and sufficient cause as well as imminent threat of execution in order for court to consider granting this application. In this application, an interim application for an order of stay vide **Miscellaneous Application No. 154 of 2017** was denied in the High Court at Mbale for the reason that there was no imminent threat of execution. The main application for stay, that is to say, **Miscellaneous Application No. 153 of 2017**, is scheduled for hearing before Kaweesi, J on 7<sup>th</sup> February, 2018. Counsel for the applicant informed court from the bar that the Judge meant to hear the main application had been transferred to the Land Division, in Kampala. This Court

takes judicial notice of the fact that Honourable Justice Kaweesi was indeed transferred to the Land Division in Kampala.

There is, therefore, substantial proof that the application for an interim order was rejected and that, there is also likely to be a substantial delay in handling the substantive application for stay for reasons given above.

I find from the evidence on record that there is a serious threat of execution before the main application is heard. The execution was commenced sometime back and a sum of Ugx. 2,713,000= of the costs is stated to have already been given out to the respondent. It is further my view that the questions of whether a stay of execution arises in case of costs, belong to the main application for stay.

As pointed out earlier, the tests which this Court must consider in order to determine an application of this kind are spelt out in **Rule 42 of the Rules of the Court** and I am satisfied that the applicant has demonstrated rare and/or special circumstances to justify the grant of an interim order of stay of execution in this case under Rule 42(2) of the Rules of this Court.

I accordingly allow this application and make the following orders:-

1. An interim order is hereby issued staying the execution of the Judgment and orders in High Court Civil Appeal No. 098 of 2012, and Tororo Civil Suit No. 127 of 2008, pending the final disposal of the main application for stay of execution.
2. The costs of this application shall abide the outcome of the substantive application for stay of execution.

3. The Registrar of this Court is hereby directed to cause list Misc. Application No. 181 of 2017 for hearing as soon as practicable.

**I so order.**

Dated at Kampala this 15<sup>th</sup> day of NOV 2017.



Elizabeth Musoke

**JUSTICE OF APPEAL**