

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 207 OF 2014

5 **P. K SENGENDO.....APPLICANT**

VERSUS

1. BUSULWA LAWRENCE

2. MALE ABDU.....RESPONDENTS

10 **CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA**

(Single Justice)

RULING OF THE COURT

15 This is an application brought by way of notice motion under S.33
of the Judicature Act, Rules 5(2), 42, 44 of the Rules of this Court.

The applicant seeks the following orders.

- 20 ***(i) An order for stay of execution of the Judgment and orders by way of preserving the status quo in respect of the suit land and recovery of taxed costs in High Court Civil Appeal No. 002/ 2005 arising out of Mpigi Chief Magistrate’s Civil Suit No. 029/2001 be issued by this Honourable Court pending disposal of the appeal by the Appellant/ Applicant.***

(ii) Costs of this application be provided for.

The applicant lost an appeal at the High Court which set aside the Judgment and decree of the Chief Magistrate's Court that had been in his favour.

5 Being dissatisfied with the decision of the High Court dated 25th September 2013, the applicant filed a notice of appeal, which was lodged in this court on 10th October 2013 the same having been filed at the High Court on 8th October 2013.

The grounds for the application are set out in the notice of motion
10 but briefly there are as follows;-

1) That the applicant lodged a notice of appeal in this Court and has also applied for a certified copy of the High Court record.

15 **2) That there is a imminent threat of the execution of the decree in High Court Civil Appeal No. 002 of 2005 the subject of this appeal.**

3) That the appeal herein shall be rendered nugatory unless this application is granted.

The application is accompanied by the affidavit of the applicant.
20 That affidavit states that the filing of the appeal is still pending and awaits the certification of the record of proceedings in the High Court. That the respondent's bill of costs has since been taxed and allowed at shs. 10,905,000/-

That the respondent has since applied for execution of the decree to recover the costs and that if this execution is not stayed the appeal would be rendered nugatory.

5 The first respondent in his affidavit in reply contended that, the applicant's appeal herein has no likelihood of success. That there is no appeal pending since the time for filing the appeal has lapsed and the applicant has never cared to obtain certified copies of the High Court record, which he contends have been ready for a long while.

10 He contended that the appeal would not be rendered nugatory simply by recovery of costs, as the respondent is in occupation of the suit land.

At the hearing this application **Mr. Moses Kugumikiriza** appeared for the applicant while **Mr. Max Mutabingwa** appeared for the
15 respondents.

Mr. Kugumikiriza submitted that he served a letter requesting for certified copies of the proceedings in the High Court upon counsel for the applicant, however, he conceded that he did not retain proof of service of that letter, as receipt thereof was never acknowledged
20 by the respondent's Advocates. He also conceded that he had not been able to file the appeal as the certified court record had not been availed to him, by the High Court.

He further conceded that the court record was almost ready but its completion had been interrupted by the execution process which required the High Court file to be transferred from the Land Division to the Execution Division.

- 5 He submitted that the execution of the decree would render the appeal nugatory and that it was just and equitable to grant the order sought.

He also stated that the applicant was willing, given sufficient time by court to deposit security for due performance of the decree. He
10 stated from the bar that the applicant did not have the money at present to satisfy the decree.

Mr. Mutabingwa opposed the application. He stated that no sufficient ground had been established by the applicant to warrant a grant of an order of stay of execution. That he had not shown that
15 he would suffer substantial loss, or that the appeal would be rendered nugatory. He cited the Supreme Court decision in ***Lawrence Musitwa Kyazze vs Eunice Businghye (Supreme Court Civil Appeal NO 18 of 1990.)***

He submitted that the decree was only in respect of the bill of costs.
20 That it was not for recovery of land as at all materials times the respondents were and are still in occupation of the suit land.

He submitted that as such the applicant cannot suffer any substantial loss, which is that loss that cannot be atoned by way of damages.

5 He submitted that this application has not been brought without undue delay. That the decision the applicant seeks to appeal from was made in October 2013 and that this application was filed in 20th May 2014 which period he submitted constituted long delay.

He submitted that applicant did not serve the letter requesting for proceedings upon the respondent or his counsel and therefore
10 failed to take a necessary step in prosecuting his intended appeal. He prayed for the dismissal of this application.

I have listened carefully to the submissions of both counsel and I have also perused the court record carefully.

The law under which this application is brought, that is section 33
15 of the Judicature Act is not applicable in this Court. That section refers to proceedings before the High Court. Rule 5 of the Rules of this Court does not have any sub-rule, therefore this application could not have been brought under Rule 5(2). In fact Rule 5 of the Rules of this Court relates to extension of time. This application is
20 not for extension of time.

This is an indication of laxity on part of counsel for the applicant. This laxity is manifest throughout these proceedings.

Be that as it may, I will still proceed to determine this application as if it had been brought under the correct law.

An application for stay of execution pending appeal to this court must first be filed in the High Court. It is only when the High Court
5 refuses to grant the stay or where it doubts its jurisdiction or where the disposal of such an application in the High Court would entitle substantial delay that an application would be brought first in this court.

For this court to entertain such an application, the applicant must
10 satisfy court that rendered special circumstances exist. Those circumstances were set out in the case of **Lawrence Musitwa Kyazze vs Eunice Businghye** (Supra). That is where the High Court refuses to accept jurisdiction, where there is great delay in the disposal of the application at the High Court, where there are
15 other special and rare circumstances and it is in the interest of justice to do so.

In any case Rule 42 (1) of the rules of this court clearly stipulates that whenever an application maybe made either in this court or in the High Court it shall first be made in the High Court. This
20 application therefore must fail on that ground alone. There is no evidence that this application was first made in the High Court and rejected.

I have found no special or rare circumstances to exist, that would compel this court to hear this application first. Rule 6(2) of the

Rules of this court clearly stipulates that the institution of an appeal shall not operate as a stay of execution.

In the case of ***Kyambongo University vs Prof. Isaiah Omolo Ndiege*** Court of Appeal Civil application No. 341 of 2013 this
5 Court noted as follows;

10 ***“In my view the law recognizes that not all orders or decrees appealed from have to be stayed pending appeal. It also recognises 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 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.”***

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In the case of ***National Enterprise Corporation vs Mukisa Foods (Miscellaneous application No. 7 1998)*** this Court held as
20 follows;-

“The Court has power in its discretion to grant stay of execution where it appears to be equitable so to do with a view to 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.

5

In this particular case, it is conceded by counsel for the applicant that the stay of execution sought is in respect of payment of shs. 10,905,000 being the taxed costs of the suit in the High court.

I agree with Mr. Mutabingwa that such an execution would not render the appeal nugatory neither would it cause the applicant substantial loss.

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Mr. Kugumikiriza revealed from the bar that the applicant at present has no money to satisfy the decree.

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In the case of ***Teddy Sseezi Cheeye vs Enos Tumusiime Court of Appeal (Civil Application No.21 of 1996)*** this court dealing with a similar situation had this to say.

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“In his submission in reply to Mr. Kabega’s submission, Mr. Kakuru for the applicants conceded that the applicants do not at present have cash to pay the decretal sum. That concession is very revealing. It indicates the true reason for this application for stay of execution as impecuniousness. The application

is thus being used to buy time for the applicants to raise the necessary money. Counsel of both parties conceded that for a stay of execution pending appeal to be ordered, an applicant must show sufficient cause. That is the correct position of law. The contention by Mr. Kakuru of impecuniousness as a ground for a stay of execution is not tenable in our opinion as it does not amount to a sufficient cause for the grant of stay of execution pending appeal.

Further in then Judgment the learned Justices of this Court went on to observe as follows:-

"The Supreme Court of Uganda in Civil Application No.9/90 Francis Hansio Micar vs Nuwa Walakira dealt with the matter now at hand.

In that case, the Court was dealing with a preliminary objection which challenged its jurisdiction to hear application under Rule 5(2)(b) of the Rules of that Court. This is what it said regarding stay of execution.

"There are many cases where High Court may order a stay and one such case maybe to preserve the status quo pending appeal.

It would be unwise in some circumstances to defeat a statutory right of appeal by for example demolishing the subject matter of a suit so that the appeal is render nugatory. Again a stay may be necessary when it comes to the notice of any court that an alleged fraud has been practiced upon it affecting its decree or when courts action is in doubt through want of jurisdiction.”

The above passage does not sate specifically what amounts to a sufficient cause and statement was apparently stated obiter. But it illustrates the type of circumstances that can be considered amounting to sufficient cause for an order of stay of execution. Such include where the subject matter of a case is in danger of being destroyed, sold or in any way disposed of in such a case a stay is ordered to preserve the status quo or where the decree in question is affected by a glaring flaw in the record of the lower court as to make the appeal very likely to succeed. Sufficient cause will vary from case to case, but in our view impecuniousness does not amount to sufficient cause

5 **Mr. Kakuru further argued that because the applicants do not have cash at present to pay the decretal sum, if a stay of execution is not ordered, they will suffer grave inconvenience as their property may be attached and sold in execution of the first applicant may be sent to civil prison. It appears to us that Mr. Kakuru was putting inconvenience as a ground for an order of stay of execution pending appeal. We cannot agree because in every execution pending appeal. We cannot agree because in every execution a Judgment debtor must be inconvenienced somehow.**

15 **We agree with Mr. Kabega, counsel for the respondent applicants have not shown sufficient cause to justify the grant of an order of stay of execution.”**

20 I have no reason whatsoever to differ from the above decision. It sets the law and procedure correctly. It has not been shown by the applicant how the appeal would be rendered nugatory. It has not been shown how the applicant would suffer substantial loss if execution in respect of costs is not stayed.

25 The submissions of Mr. Kugumikiriza in this regard have no merit.

Mr. Mutabingwa submitted that the respondent was not served with a copy of the letter requesting for proceedings of the High Court. Mr. Kugumikiriza contended that the latter was served but was not acknowledged.

5 **Rule 83** of the Rules of this court requires that a party intending to rely on that rule must serve a copy upon the respondent and ‘retain proof’. In this case Mr. Kugumikiriza concedes that he did not retain proof of service. The applicant therefore failed to comply with Rule 83 (2) and (3) of the Rules of this Court, and as such cannot
10 take advantage of the automatic extension of time provided by that Rule.

Compliance with Rule 83 (3) of the Rules of this Court is mandatory.

In the case of ***John Matsiko vs Banyankore Kweterana Court of Appeal (Civil Application No. 43 of 1198)***, this court in
15 reference to Rule 82 (3) which is now 83(3) stated as follows:-

20 ***“We find that the provisions of Rule 82 (3) are mandatory. The duty rests on the appellant to serve the respondents and retain proof of service. That requirement is not a mere technicality and counsel for the respondent cannot rely on Article 126 2(e) of the Constitution”***

The appeal herein ought to have been filed within 60 days after the date when the notice of appeal was lodged under Rule 83 (1) of the Rules of this Court. The notice of appeal was filed on 8th October 2013. Up to date no appeal has been filed in this Court. No
5 application has been made from extension of time.

I find therefore that the time within in which the applicant was required to have filed the appeal has lapsed and as such no appeal lies.

This application therefore fails as it has no merit whatever

10 It is accordingly dismissed with costs. The notice appeal herein is also struck out under Rule 2(2) of the Rules of this Court as it is an abuse of Court process.

This Ruling disposes of Civil Application No. 208 of 2014 between the same parties for an interim order of stay of execution, which is
15 hereby dismissed with no order as to costs.

Dated at Kampala this ...**04th** ...day of...**June**...2014.

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL