

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MA NO.2289 OF 2021
(ARISING FROM CS NO. 304 OF 2002)

1. SANYU PATRCK
2. SEBUTAMA FRANCIS
3. MWESIGYE AMOS
4. GABULIRA JOHNAPPLICANTS

VERSUS

ERNEST KABYANGA.....RESPONDENT

BEFORE: HON. MR. JUSTICE TADEO ASIIMWE

RULING

This application was brought under Section 33 of the Judicature Act, section 98 of the CPA, Order 43 rules 4 (2), and order 52 rules 1,2 &3 of the Civil Procedure Rules (CPR) .

The applicant is seeks for an order of stay of execution of the decree issued by court in civil suit no. 304 of 2002 against the applicants and costs.

The application is supported by an affidavit of the applicant dated 30th November 2021.



The grounds of the application as contained in the notice motion and affidavit in support and briefly are that;

1. The applicant is dissatisfied with the judgment delivered in civil suit No.304 of 2002 in the High Court of Uganda at Kampala and he has filed a Notice of Appeal in the court of Appeal.
2. That a certified copy of the decree was extracted and lodged to the land registry at Mpigi to have the said decree executed.
3. That the land registrar of Mpigi wrote to Registrar High Court to verify the said decree and the Registrar has already verified the decree.
4. That further upon pronouncement of the said judgment, without any eviction order, the respondent's agents attacked his home and cut trees.
5. The respondent through their agents went and dug holes intending to fence of his land and the matter was reported to police under reference number SD REF: 08/31/10/2021.

On the other hand, the respondents opposed the application relying on an affidavit in reply by Ernest Kabyanga, the respondent. The gist of response is that the application is vexatious, frivolous and incompetent without valid grounds of stay of execution.

At the hearing of the application, the applicants were represented by Counsel Byekwaso Godfery while Kamba David and Julius Turinawe appeared for the respondent. Both counsel made oral submissions which I shall consider in this ruling.

RESSOLUTION

I have considered the application, the supporting affidavit and its attachments. I have also considered the arguments for both counsel and found both counsel were alive as to the requirements for grant of stay of execution.

The position of the law is that for court to grant applications of this nature, the applicant must meet conditions as set out under Order 43 r 4 (3) of the CPR which has been interpreted in a number of cases to include the following principles;

1. The applicant must show that he lodged a notice of appeal
2. That substantial loss may result to the applicant unless the stay of execution is granted.
3. That the application has been made without unreasonable delay.
4. That the applicant has given security for due performance of the decree or order.
5. That there is a serious or eminent threat of a decree or order and that if the application is not granted the appeal will be rendered nugatory.
6. That refusal would inflict more hardship than it would avoid.

I shall therefore proceed to assess whether or not the above conditions as set out above were satisfied or met by the applicant.

From the evidence on record as can be ascertained from the pleadings and submissions, this court is satisfied that there is a pending appeal between the parties which was made without delay. Therefore the 1st and 3rd conditions above are proved to the satisfaction of Court.

As regards the 2nd condition of the likelihood of success in the appeal, I hold a strong view that this assessment can only be meaningfully done by an appellate court and not a trial court. Doing the required assessment to determine the likely merits of the appeal would amount to prejudging the appeal. Therefore this court will not consider this ground for those reasons.

As regards the ground of the likely substantial loss, the applicant must plead and prove the said substantial/irreparable loss. It is not enough to only plead. The applicant is expected to lead sufficient evidence to prove what has been pleaded.

In the case of **Pan African Insurance Company (U) Ltd vs International Air Transport Association High Court Misc. Application No. 86 of 2006** where the applicant merely stated that if the decree is not stayed the applicant will suffer substantial loss, it was held among others that:

“The deponent should have gone a step further to lay the basis upon which court can make a finding that the applicant will suffer substantial loss as alleged. The applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is not granted.”

The Learned Judge also cited the case of **Banshidar vs Pribku Dayal Air 41 1954** where it was stated:

“It is not merely enough to repeat the words of the code and state that substantial loss will result, the kind of loss must be given and the conscience of court must be satisfied that such loss will really ensure”

In the same case it was further observed:

“The words ‘substantial’ cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is

deprived of his property in consequence. That is an element which must occur in every case...substantial loss must mean something in addition to all different from that.”

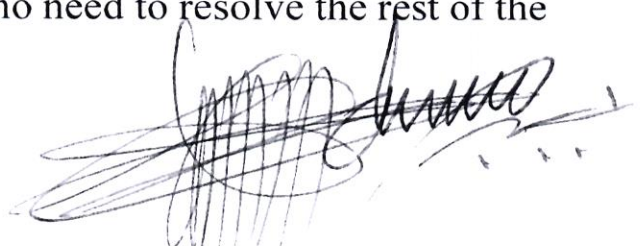
I am fully persuaded by the above decisions and I do find that in the present case the applicant has not demonstrated any loss that will be suffered and cannot be compensated in monetary terms. The applicant only argued that if this application is not granted he will be evicted and it will be difficult for him to find an alternative land to graze his animals. I do not agree. There is plenty of land which can be purchased. Difficulty in finding one does not amount to irreparable loss.

In the circumstances, the applicant has not satisfied this condition.

On the requirement of serious or eminent threat of execution, the applicant must show that there is eminent threat of execution to render the appeal nugatory.

To prove this condition, the applicant in his affidavit deponed that there was threat of execution since the decree has been extracted and served to the land office. That the same decree has been verified and confirmed by court. However, there is no evidence of execution proceedings.

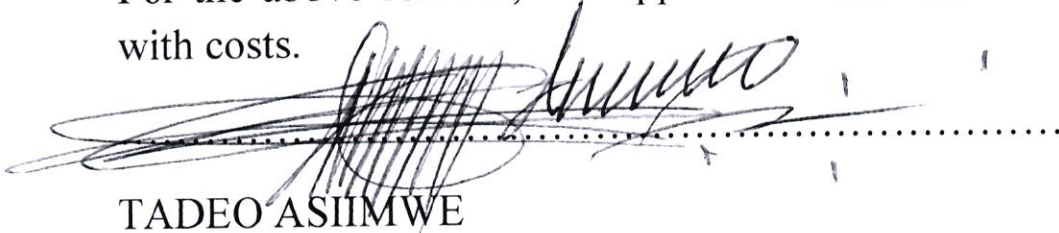
This Court would have expected to see evidence of an application for execution and issuance of the warrant by court as proof of eminent threat of execution. However, none exists and this court has no basis to believe that there is existence of an eminent threat based on the alleged illegalities by unknown persons who destroyed the applicant's trees. This requirement is therefore not proved by the applicant. Therefore it is the finding of this court that the application was filed prematurely in anticipation of execution of a decree in the original case. This determines the entire application. Therefore there is no need to resolve the rest of the

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grounds relating to security for due performance and balance of convenience.

In conclusion, the applicant has not satisfied most of the requirements for grant of an order for stay of execution.

For the above reasons, this application fails and it is hereby dismissed with costs.

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TADEO ASIIMWE

JUDGE

21/06/2023