

UGANDA / JUDGMENT

Afro Logistics Services Limited v Hussein (Civil Application 393 of 2024) [2024] UGCA 330 (11 October 2024) [2024] UGCA 330

COURT

Court of Appeal of Uganda

BEFORE

Kazibwe, JA

CASE / FILE NUMBER

Civil Application 393 of 2024

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO.393 OF 2024 (ARTS)NG FROM CtVtL AppEAL NO.1406 OF
20231

10 AFRO LOGISTICS SERVICES LTD

APPLICANT

VERSUS

MOHAMMED HUSSEIN

RESPONDENT

RULING OF MOSES KAZIBWE KAWUMI,JA

¹⁵ (Sitting as a single Justice)

This ruling arises from an application brought by Notice of Motion under Rules 2(2), 42(1) & (2) and 43(1) of the Judicature Court of Appeal Rules Directions S1.13- 10 and other enabling Laws. The Applicant seeks orders for:-

- zo a) The decree and orders granted in High Court Civil Suit No.52 of 2011 to be stayed till the hearing and determination of Civil Appeal No. L406 of 2023.
- b) Costs of this application to be in the cause.
- O Grrond, of the Application

The grounds of the application are that the Applicant is aggrieved by the decision in HCCS No.62 of 2011 and has since filed Civil Appeal No.1406 of 2023 which has good chances of success. It is contended that substantial loss will accrue to the Applicant if the Decree in the suit is executed.

It is also the Applicant's contention that if a stay of execution is not granted, the Appeal shall be rendered nugatory yet the application was made without 30 unreasonable delay after the High Court declined to grant a stay of execution.

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- An affidavit in support of the application was sworn by Atuhair Priscilla a Director of the Applicant company. She states that the Applicant purchased the suit land from Agaba Nathan and Vincent Kayemba in 2010. The Applicant was registered as the proprietor of the suit property described as Folio 23 Plot 55 Ismael Road and has been in possession to date.
- It is averred in the affidavit that The Commissioner Land Registration at the instance of the Respondent summoned the Applicant to produce the title for cancellation basing on allegations of fraud which prompted the Applicant to file Civil Suit No.062 of 2011 for a permanent injunction among other reliefs but the suit was dismissed.
- The Respondent was declared to be the rightful owner of the property. The Court ordered the Applicant to give vacant possession and further made a declaration that the lease comprised in LRV 4148 Folio 23 Plot 55 in the Applicant's name is non-existent. The Applicant was further ordered to pay General damages of Ugx. \$600,000,000/= to the Respondent and costs of the suit.
- Atuhair Priscilla contends that the Appeal has good chances of success since the trial Judge ignored to consider a point of law relating to the expropriation of the suit property and further failed to properly evaluate the evidence on record. The Applicant contends that there is an imminent threat of execution which will result into irreparable loss if a stay of execution is not granted and the balance of convenience tilts in the Applicant's favour since they are in possession.

Respondent's Affidavit in Reply

The Respondent contends that the Applicant's only claim is in respect of Plot 55 and they did not indicate a willingness to provide security for due performance valued at Ugx.3.35 Billion. It is contended further that the Applicant will not suffer irreparable loss since they sought compensation in the suit and even on appeal

v/herein they seek to be paid the value of the land hence their claim is quantifiable.

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It is the Respondent's claim that the Appeal has no chances of success given that S the forgery of the certificate of title to the suit land was proved by the Commissioner Land Registration and in the judgments of the Courts at Buganda Road and the Criminal Division of the High Court.

The Respondent argues that the Applicant is not in possession of the suit property but it is Agaba Nathan who is in possession and the balance of convenience favours the Respondent who has been denied his rights to the property for over 20 years. It is contended that the Applicant has no known assets or thriving business which will greatly prejudice the Respondent if a stay of execution is granted and it is in the interest of justice that the application is not granted.

Applicant's Affidavit in Rejoinder

In the Affidavit in rejoinder deposed by Atuhairi Priscilla the Applicant contends that Plots 55 and 56 are enclosed together which would lead to execution on Plot 55 and thus render the Appeal nugatory. The Applicant further contends that Plot 56 is registered in her name and is bound to lose proprietary rights and occupation of the suit land which loss is not quantifiable.

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It is further contended that Agaba Nathan was acquitted of the offence of forgery of the Certificate of title by the High Court and the Applicant has never been on trial for forgery in any court and has enjoyed uninterrupted possession of the suit land through its agents from 2011 to date. It is contended that the Respondent has obtained a Notice of eviction and the execution process will commence on 11^{th} October 2024 which will render the appeal nugatory.

Representation

Mr. Peter Mukidi Walubiri appeared for the Applicant while Mr. Ernest Sembatya appeared for the Respondent.

Counsel filed submissions which were adopted and considered by the court for the 30 decision.

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⁵ Submissions for the Applicant

It was submitted for the Applicant that Civil Appeal No.1406 of 2023 lodged in this court will be rendered nugatory if the stay of execution is not granted. The intended Appeal according to the Applicant is not frivolous and raises ten (10) substantive grounds of appeal which will likely be upheld by the court.

Counsel argued that Rule 6(2Xb) of the Judicature (Court of Appeal Rules) Directions. SI 13-10 mandates the court to order for a stay of execution once ^a Notice of Appeal has been filed but the Applicant filed a Memorandum of Appeal raising serious grounds meriting disposal by the court. 10

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It was further submitted that the Applicant stands to lose the subject matter of the Appeal if the application is not granted since the Respondent will be free to deal with it as he wishes which may include alienating it. The loss will be irreparable since the property may not be recovered once it is alienated by the Respondent. 15

Counsel referenced the case of Shiv Construction Co. Ltd V Endesha Enterprises Ltd. Civil Appeal No.34 of 1992 for the proposition that in cases of dispute over land, damages are not usually sufficient as compensation.

It was submitted that the application was filed without undue delay and the balance of convenience is in favour of the Applicant currently in possession of the suit property. The court was urged to grant the application with costs to be in the cause.

Submissions for the Respondent 25

It was submitted for the Respondent that the Applicant categorically denied having any interest in Plot 56 Ismael Road all through the trial court proceedings and thus has no basis for seeking a stay of execution in respect of that particular plot. The court was urged to dismiss the application and order the Respondent to extract ^a warrant of vacant possession in respect of Plot 55 Ismael Road Mbuya.

Counsel argued that the Appeal has no likelihood of success since it is premised on vague and generalized grounds that are liable to be struck out by the court under Rule 86(1) of the Rules of this court. It was further argued that the Appeal lacks

⁵ merit since the two lower courts confirmed that the title for Plot 55 Ismael Road waved by the Applicant was forged in concert with Agaba Nathan and Vincent Kaye mba.

In relation to the alleged substantial loss likely to be suffered by the Applicant, it was submitted that the Applicant sought compensation from the Attorney General

for the market value of Plot 55 placed at UGX.2.6 Billion and the same prayer was made in the Appeal pending disposal in court. 10

Counsel contends that in view of the sought relief for compensation, the Applicant has a quantified compensation sum of 2.5 Billion and it thus cannot be argued that the Applicant will suffer a loss that is incapable of quantification or compensation in damages.

It was submitted that the Applicant is a limited liability company with no known assets or trading operations and functional offices which has not expressed any willingness to deposit security for due performance of the decree. It would therefore be detrimental if the Respondent's rights as a judgment creditor were further curtailed given the long time he has sought to recover the suit land. Counsel urged the court to dismiss the application on account of the failure by the Applicant to deposit in court security for due performance.

Counsel submitted that the balance of convenience lies in favour of the Respondent who has been deprived of the use of his land for decades and who has sought justice from different courts whose judgments confirmed his ownership interest in the suit property.

Submissions in rejoinder by the Applicant

Counsel for the Applicant submitted in rejoinder that Plot 55 is owned by the Applicant and is in the same enclosure with Plot 56 hence carrying out an eviction on Plot 56 will include carrying out an eviction on Plot 55 hence rendering the Appeal nugatory.

In regard to the argument about security for due performance, Counsel for the Applicant submitted that it was not a legal requirement under Rule 6(2) of the Rules of the court that an applicant for stay of execution must deposit security for due

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performance. Counsel cited *Margaret Kato vs Nuulu Nalwoga*. Civil Miscellaneous Application No.11 of 2014 for the proposition.

Determination

I have considered the Motion and the filed affidavits, the submissions and the case law cited by Counsel for the parties. Counsel for the Respondent raised three issues for resolution by the court :-

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- i) Whether the Applicant admitted that it does not own or have any claim to/over Plot 56 Ismael Road at Mbuya.
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- ii) Whether in relation to Plot 55 Ismael Road at Mbuya, the Applicant meets the grounds for the grant of a stay of execution pending appeal from the High Court to the Court of Appeal.
- iii) What remedies are the parties entitled to?

The mandate for this court to order for stay of execution of decrees is derived from Rule 6(2Xb) of the Judicature (Court of Appeal Rules) Directions. SI 13-10 which provides that:-

"subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may--- 20

> (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75 of these Rules, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just."

- In the exercise of the jurisdiction conferred on the court by Rule 6(2Xb), the objective the court is required to achieve is for the filed Appeal not to be rendered nugatory and for the status quo to be maintained until the appeal is finally determined. It is also pertinent to note that at this stage the court is not required to investigate the merits of the Appeal. It is sufficient for the court to establish that 25
- the appeal is not frivolous or vexatious. The court will be guided by those considerations in the determination of the Application. 30

Issue No.1

Whether the Applicant admitted that it does not own or have any claim to/over Plot 55 Ismael Road at Mbuya

⁵ In the affidavit filed to support the application, Ms. Atuhaire Priscilla who is stated to be a director of the Applicant categorically stated that the company bought and is in possession of the land comprised in LRV 41,48 Folio 23 Plot 55 Ismael Road at Mbuya. It was her evidence that the Commissioner Land Registration summoned them to produce the title for Plot 55 for cancellation on allegations that the title was forged.

The confirmation of what the Applicant litigated over further lies in the 11th February 2022 proceedings in court when Counsel for the Applicant stated that the Plaintiff purchased Plot 55 not Plot 56. The same assertion was made by Counsel during the 2nd March 2022 proceedings and the trial court made a finding that the Applicant herein is not a bona fide purchaser for value without notice of fraud of land comprised in LRV 41,48 Folio 23 Plot 55.

The court however declared that the 2nd defendant who is the Respondent in this application is the rightful owner of the property comprised in Plots 55 and 56, Ismael Road at Mbuya and gave orders for the Applicant to give vacant possession of both plots to the Respondent. The Applicant claims to be the registered proprietor of Plot 56 in an affidavit in rejoinder sworn by Atuhaire Priscilla. Attached to the Affidavit is a certified copy of what appears to be a certificate of title though with an illegible ownership page rendering it difficult for the court to state with certainty that the land belongs to the Applicant.

- The above observations notwithstanding, the Applicant in Paragraph 7 of the Memorandum of Appeal challenges the holding by the trial court to the effect that Plots 55 and 56 rightfully belong to the Respondent. The same Plot 56 is also included in the Notice of Eviction issued by the trial court hence it became a subject of this application.
- A determination as to whether the Applicant admitted that it does not own or have a claim over Plot 56 is outside the mandate of this court in an application for stay of execution and can best be handled at the hearing of the Appeal.

I thus find no merit in the 1^{st} issue. S

2^{nd} issue

Whether in relation to Plot 55 Ismael Road at Mbuya, the Applicant meets the grounds for the grant of a stay of execution pending appeal from the High Court to the Court of Appeal.

The grounds for the grant of a stay of execution are now well settled. In *Lawrence 10 Musiitwa Kyazze V Eunice Busingye*. SC Civil Application No.18 of 1990 the court held that:-

"Parties asking for a stay should meet conditions like:

- That substantial loss may result to the applicant unless the order is made. i
- *That the application has been made without unreasonable delay.* ii
- That the applicant has given security for due performance of the decree iii) or order as may ultimately be binding upon him.

In *Theodore Ssekikubo & Others V The Attorney General & Another*. Constitutional Application No.06 of 2013 the Supreme Court re-stated the principles to consider

- before granting an order of stay of execution pending appeal. The principles are 20 \$ that :-
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- It must be established that the applicant will suffer irreparable damage i)\$ or that the appeal will be rendered nugatory if a stay is not granted.
- The application must establish that the appeal has a likelihood of success; ii)\$ or a prima facie case of his right to appeal.
- If (i) and (ii) above have not been established, the court must consider iii) where the balance of convenience lies.
- That the applicant must establish that the application was instituted iv)\$ without delay.
- I will be guided by the above principles to determine whether the Applicant has 30 met the conditions necessary for the grant of the sought relief.

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1. Whether the application was made without any undue delay

On 31st May 2024 the High Court dismissed the Application filed by the Applicant for a stay of execution of the decree. The Applicant filed the present application on 17th July 2024 and this was without delay.

2. Whether the appeal has a likelihood of success or shows a prima facie case of the applicant's right of appeal

What is required of the court is to determine whether the questions raised by the Applicant on appeal are not frivolous or vexatious and it is not about the merits of the appeal. The Applicant claims to have bought land comprised in Plot 55 Ismael Road Mbuya which transaction the trial court declared to be unlawful and the purported lease non-existent.

The trial court further ordered that Plot 56 rightfully belongs to the Respondent and ordered for the Applicant to give vacant possession of the same property to the Respondent. The Applicant purports to hold ^a certificate of title to Plot 56 a certified copy of which was attached to the Affidavit in rejoinder sworn by Atuhare Priscilla. The ownership of the Plot seemingly denied at the hearing but claimed in this application merits determination by the Court of Appeal.

It is also pertinent for the court to resolve the issue of the disregarded point of law allegedly raised by the Applicant but ignored by the trial court and for the court to determine the liability of the other parties if at all they are liable given the alleged reliance by the Applicant on search certificates issued by the 1st Respondent.

I thus find that the appeal is not frivolous or vexatious but merits consideration at the Appellate level.

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⁵ 3. Whether the Applicant will suffer irreparable damage/injury if the stay of execution is not granted

The Applicant argues that ownership of the suit property will be lost if a stay of execution is not granted since the Respondent may dispose of it and it becomes unrecoverable in the event that the appeal is determined in favour of the Applicant. The Respondent on the contrary argues that the value of the suit property was quantified and the Applicant sought to be compensated for it by the Attorney General.

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The Black's Law Dictionary, 9th Edition at Page 147 defines "irreparable loss" to mean 'losses that cannot be easily ascertained because there is no fixed pecuniary standard of assessment.' This court in *City Council of Kampala VS Donozio Musisi Sekyaya*. CA Civil Application No.3 of 2000 defined irreparable loss as "a loss that cannot be compensated for with money."

It is not denied that the Applicant in the Memorandum of Appeal seeks an order that the Respondent pays the value of the land lost in case the court cancels the certificate of title at the current market value to be determined by the Chief Government Valuer. The suit property comprising of only Plot 55 was valued at 2.6 billion Shillings by a witness introduced by the Applicant during the trial.

I am however inclined to take the position in *Shiv Construction Co. Ltd V Endesha Enterprises Limited*. SC Civil Application No.34 of 1992 where the court opined that in cases of dispute over land, damages are not usually sufficient as compensation. It was also held by this court in *National Enterprise Corporation V Mukisa Foods Ltd*. Miscellaneous Application No.7 of 1998 that :-

'The court has power in its discretion to grant a 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 decreed property is disposed of there is no likelihood of getting it back should the appeal succeed.'

Once a stay of execution is not granted, the Respondent will be at liberty to execute the decree and nothing will stop him from disposing off the suit property never to be recovered if the Applicant's appeal succeeds.

It is thus held that the Applicant will likely suffer irreparable loss if the property is alienated but the Appeal is subsequently determined in their favour.

10 Requirement for payment of security for due performance

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Rule 6 (2) (b) of the Rules of this court provides for the court to grant a stay of execution on such terms as the court may think just. The Respondent made a relevant submission to the effect that the Applicant is a limited liability company with no known assets and with no demonstrable trading operations or functional offices. This assertion was not responded to by the Applicant raising a presumption about its credibility.

The trial court ordered the Applicant to give vacant possession of Plots 55 and 56, the Applicant was also ordered to pay general damages of UGX. 600,000,000/=. The value of Plot 55 was placed at UGX.2.6 billion by an expert witness introduced by the Applicant during the trial. As correctly submitted by Counsel for the Applicant, it is not a mandatory requirement for an applicant to deposit security for due performance of a decree.

Rule 6(2)(b) of the Rules of the court however mandates the court to grant a stay of execution on such terms as the court may think just which implies that each case must be considered on its own peculiar facts. I find the deposit of security for due performance to be necessary to protect and balance the rights of the Respondent as against the claim by the Applicant with no known assets save what is in dispute and decreed to belong to the Respondent.

The Application for the grant of a stay of execution succeeds. I make the following orders :- 30

i) The Applicant shall deposit in court a sum of UGX. 500,000,000/= being security for due performance within 30 days from the 11th October 2024 failure of which the Respondent will be at liberty to execute the decree in Civil Suit No.62 of 2011".

ii) Costs of the application will abide the outcome of Civil Appeal No.1406 of 2023 pending hearing in this court.

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! v Dated at Kampala this day of 2024.

Moses Kazwumi JUSTICE OF APPEAL o

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Prepared on 13 October 2026 · Esheria