

UGANDA / JUDGMENT

Baguma Vs Mbabazi (HCT – 01 – CV – MA – NO. 0018 OF 2017) [2017] UGHCCD 155 (30 November 2017)

[2017] UGHCCD 155

COURT

HC: Civil Division (Uganda)

BEFORE

Ojok, J

CASE / FILE NUMBER

HCT – 01 – CV – MA – NO. 0018 OF 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – MA – NO. 0018 OF 2017

(Arising from HCT – 01 – CV – CA – No. 003 of 2016)

BAGUMA GEORGE WILLIAM APPLICANT

VERSUS

MBABAZI MARIA GORETTI RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Ruling

This is an application by Notice of Motion under **Section 33** of the Judicature Act, **Sections 64(e)** and **98** of the Civil Procedure Act, **Order 52 Rules 1** and **2** of the Civil Procedure Rules.

The Applicant was seeking orders that; the execution of the judgment, decree and orders in HCT – 00 – CV – CA – NO. 003 OF 2016 be stayed pending the determination of the Applicant's intended Appeal against the said orders in the Court of Appeal and costs of the Application.

The Application is supported by the affidavit sworn by the Applicant and the grounds briefly are;

1. The Respondent sued the Applicant in the Family and Children Court in FPT – 00 – CV – FCC – 019 OF 2016 wherein various orders were given by His Worship Ngamije Mbale Faishal, Magistrate Grade 1, on the 3rd/3/2016 in favour of the Respondent.

2. The Applicant then appealed to the High Court of Uganda at Fort Portal against the said ruling and orders in FPT – 00 – CV – FCC NO. 0019 OF 2016, under HCT – 01 – CV – CA – NO. 003 OF 2016 in which judgment was issued against him on the 23 March 2017.
3. The Applicant, being aggrieved and dissatisfied with the judgment and orders of the Honourable Mr. Justice Oyuko. Anthony Ojok, Judge given on the 23rd/03.2017 in HCT – 00 – CV – CA – NO. 003 OF 2016 intends to appeal against the said judgement in the Court of appeal.
4. On March 24th 2017, the Applicant duly filed a Notice of Appeal, which was signed for the Deputy Registrar on 28th March 2017 duly served on Counsel for the Respondent, and is intent on pursuing the Appeal and is merely awaiting receipt of the typed and certified record of the proceedings and judgment/ruling to enable him file the appeal in the Court of Appeal which have also been applied for by a letter dated 27th March 2017 and also served on Counsel for the Respondent.
5. There are substantial questions of law and fact to be determined in the said appeal which intended appeal though not yet filed has very high chances of succeeding.
6. Substantial loss may result to the Applicant and the three children with whom he resides in the house he is due to be evicted from by the orders intended to be appealed against unless the stay applied for is given.
7. This application has been brought promptly and without delay and the Applicant is ready and willing to provide security for the due performance of any decree or order that may ultimately be binding on him.
8. It is just, equitable and fair that the execution of the decree and orders referred to herein be stayed until after the determination of the said Applicant's intended appeal.

The Application is opposed through the Respondent's affidavit in reply and also a supplementary affidavit in support of the Respondent's affidavit in reply sworn by Baguma Justus. There were also supplementary affidavits and rejoinders sworn by both parties.

Representation:

Counsel Cosma Kateeba appeared for the Applicant and Counsel Augustine Bafaaki Kayonga for the Respondent. By consent both Counsel agreed to file written submissions.

The law:

Order 43 Rule 4 (3) of the Civil Procedure Rules provides that;

“(3) No order for stay of execution shall be made under sub rule (1) or (2) of this rule unless the court making it is satisfied—

(a) That substantial loss may result to the party applying for stay of execution unless the order is made;

(b) That the application has been made without unreasonable delay; and

(c) That security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.”

In the case Hon. Theodore Ssekikubo & Others versus The Attorney General and Another, Constitutional Application No 06 of 2013 clearly re-stated the principles as follows: in order for the Court to grant an application for a stay of execution;

“(1) The applicant must establish that his appeal has a likelihood of success; or a prima facie case of his right to appeal.

- (2) It must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.
- (3) If 1 and 2 above has not been established, Court must consider where the balance of convenience lies.
- (4) That the applicant must also establish that the application was instituted without delay.”

The law provides conditions that must be met before a stay of execution is granted. This Court will therefore be mindful of the above conditions in resolving this application.

Resolution of the Application:

Counsel for the Applicant submitted that the Applicant is at the threat of being evicted from his residential home which he stays in with his other children yet the Respondent and her children have alternative accommodation that they are currently using unlike the Applicant. That the Applicant will be burdened with incurring additional costs for alternative accommodation and the Respondent will transfer the property into her names yet the Applicant acquired the property in 2002.

Counsel for the Applicant cited the case of **Tropical Commodities and 2 Others versus International Credit Bank Ltd (In Liquidation), High Court Miscellaneous Application No. 379 of 2003**, where it was stated that “substantial loss” does not represent any particular amount or size and it cannot be quantified by any particular mathematical formula. Rather it is a qualitative concept: it refers to any loss, great or small, that is of real worth or value or a loss that is merely nominal.

Thus, the Applicant in the instant case is likely to suffer substantial loss if the application is not granted.

Secondly, that the Applicant stated in his affidavit in support that he is willing to provide security as may be ordered for the due performance of the decree or any orders that may ultimately be binding upon him. That since the Respondent did not challenge this averment then Court should find it in favour of the Applicant.

Thirdly, that the Applicant filed this Application without undue delay and this was also uncontroverted by the Respondent. That it is trite law that where matters of fact which are deponed to in an Affidavit are not rebutted or controverted in the Affidavit in reply, those matters will be treated as having been conceded by the party that ought to have rebutted or controverted them.

Lastly, that it is trite law that for the Applicant to succeed in an application for stay of execution pending appeal he/she has to show whether there is a pending appeal and if that appeal would be rendered nugatory if it is not granted. (See: **Nalwoga Gladys versus Edco Ltd & Another, Miscellaneous Application No. 07 of 2013**).

Counsel for the Applicant went on to submit that the Applicant has also filed a Notice of Appeal and Memorandum of appeal and the same were served on Counsel for the Respondent. Thus, the purpose of the instant application is to preserve status quo to safe guard the Applicant's rights and the appeal has high chances of success.

Counsel for the Respondent on the other in reply submitted that grant of stay of execution is discretionary, meaning in the interests of justice. That the Applicant in the instant case evicted his children without their mother and this was a violation of **Article 34(2)** of the Constitution of the Republic of Uganda, 1995. This act also amounts to cruel and inhuman treatment prohibited by **Article 24** and **44** of the Constitution of the Republic of Uganda, 1995. That this Court should not give furtherance to the unconstitutional acts of the Respondent by depriving the children shelter.

Further, that under **Section 3** of the Children Act, Court is enjoined that in determining any question concerning the upbringing of a child, the welfare of the child shall be paramount vide **Section 1** of the first schedule to the Act and **Section 2** thereof which provides that time shall be of essence namely that "any delay in determining the question is likely to be prejudicial to the welfare of the child." That in the circumstances keeping the children from a home that they grew up from will be an injustice to the children.

Furthermore, that the Applicant will not suffer any substantial loss if he vacates the family residence as he had another place he was residing in after evicting the children. That Court should also not be bound by the report of the probation officer after all this Court and the Magistrate's Court all put it into consideration and the place where the children are staying is not their home.

Counsel for the Respondent also pointed out that the instant case is not one for Security of costs and Court should disregard the same. That if this Application is granted the appeal will not be rendered nugatory as the house will still be in place. That the eviction of the Children was illegal and this Court cannot continue to sanction an illegality. (See: **Makula International Ltd versus His Eminence Cardinal Nsubuga and Another (1982) HCB 11**).

Counsel for the Applicant submitted in rejoinder that the instant case was referred for mediation in the Magistrates Court but the judicial Officer who was supposed to be a mediator turned into an adjudicator and heard the matter which was an illegality and this Court upheld a null and void decision. That this was a perversion of the law as discussed in the case of **Action Aid Uganda versus Tibekanga, Industrial Court, Labour dispute Appeal No. 005 of 2014**.

Further, that the Applicant has not committed any unconstitutional acts as alleged by the Respondent and this Court should not look at the Constitutionality of the acts of the Applicant but rather if the Applicant passes the test for stay of execution orders to be granted.

Analysis of Court:

This is an application for stay of execution and the conditions that should be satisfied by the Applicant are clearly laid down under **Order 43 Rule 4(3)** of the Civil Procedure Rules.

I have addressed my mind to both submissions for which am grateful. I will go directly to looking at the merits of the Application.

The purpose of the application for Stay of Execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his/her undoubted right of appeal are safe guarded and the appeal if successful, is not rendered nugatory. (See: **Lawrence Musiitwa Kyazze versus Eunice Busingye SCCA NO. 18 of 1990 [1992] IV KALR 55**).

In the instant case the subject matter is a family house that the Applicant alleges he is at the threat of being evicted from if stay of execution is not granted. The Applicant claims that he will suffer substantial loss if he is evicted from the house and is also at the threat of the Respondent transferring the same into her names if stay is not granted.

The Oxford Advanced Learner's Dictionary 5th Edition, defines the word "**substantial**" as;*

"Large in amount or value: considerableconcerning the most important part of essential."

The word also has a legal meaning: Black's Law Dictionary, 6th Edition, defines the word "**substantial**" to mean;

"Of real worth and importance: of considerable value. Belonging to substance; actually existing: real: not seeming or imaginary; not illusive; solid; true; veritable. Something worthwhile as distinguished from something without value or merely nominal."

The subject matter in this case a residential house that the children were brought up in and eventually evicted from by the Applicant. The Applicant averred that he will be greatly inconvenienced if he is to find alternative accommodation regardless of the fact that his children are being housed elsewhere. Yet there is a house that they grew up in and the Applicant intends to keep them away from it.

This case is one that touches on the welfare of children which is paramount. The children have had to go through a lot of trauma due to the friction between the Applicant and Respondent and the unending litigation between the two parties.

The instant case involves children, whose welfare is being compromised with. The residential house is one where the children grew up in. The other children of the Applicant are adults who cannot be affected by the eviction but rather can easily settle elsewhere with ease. The Applicant is only buying time so that the Respondent does not enjoy the fruits of the Court decisions in her favour.

Article 34(1) of the Constitution of the Republic of Uganda, 1995 provides that; subject to the laws enacted in their best interest, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up.

Article 31(4) of the Constitution of the Republic of Uganda, 1995 provides that; it is the right and duty of parents to care for and bring up their children.

Section 3 of the Children Act lays out the guiding principle and states that; the welfare principles and the Children's rights set out in the 1st Schedule to the Act shall be the guiding principle in making any decision based on this Act.

The welfare principle was reproduced in the case of **Re M (an infant) Adoption Cause No. 9 of 1995**, that all matters relating to children, the welfare and the best interests of the child shall be paramount.

Also in the case of **Rwabuhemba Tim Musinguzi versus Harriet Kamakune, Civil Application, No. 14 of 2009**, it was stated that;

“Parents have a fundamental right to care and bring up their children. This is a constitutional right. Of course, it is not considered in isolation. The welfare of the child is a consideration to be taken into account, and at times may be paramount consideration.”

It is my view that the Applicant will not suffer any substantial loss as per the definitions quoted above and am certain that the subject matter will not be transferred into the Respondent's name given the fact that the Applicant has already lodged a caveat to protect his interests. The Applicant will not be inconvenienced in finding alternative accommodation to the extent that it cannot be atoned in damages if he wins the appeal. The rights of the children in the instant case ought to be given utmost priority and not be neglected to the benefit of either party. These are young children that should not be robbed of their childhood due to the selfishness of either the Applicant or the Respondent but rather be brought up with their best interests and welfare put at the fore front of everything else.

True, the application was filed without unreasonable delay but that is not the only test that this Court has to consider in order to grant the Application.

The issue of security of costs is not one that this Court will consider since this is not case that requires it and no costs have been awarded previously that the Applicant will be required to fulfil upon disposal of the pending appeal.

In the case of **Imperial Royale Hotel Ltd & 2 Others versus Ochan Daniel Misc Application No.111 of 2012**, it was held that security for costs is not a condition precedent to the grant of stay of execution.

The Applicant also noted that he had filed a Notice of appeal and Memorandum of appeal which makes it express and indicates that he has already filed an appeal in the Court of appeal which if this application is not granted will render the appeal nugatory.

In the case of **Attorney General of the Republic of Uganda versus The East African Law Society & Another EACJ Application No. 1 of 2013****, it was held that a notice of Appeal is a sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases.

I do not doubt that the Applicant has intentions to appeal however; I respectfully disagree that this is a sufficient ground in the instant case to grant the stay of execution. Therefore, this should be applied on a case to case basis depending on the facts of each case. I also cannot predict whether the appeal will be a success or not as this can only be known after the merits of the appeal are determined by the Court of Appeal.

Order 43 Rule 4(1) of the Civil Procedure Rules also requires there to be sufficient cause to stay execution and provides that;

****“An appeal to the High Court shall not operate as a stay of proceedings under a decree or order appealed from except so far as the High Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the High Court may for sufficient cause order stay of execution of the decree.”***

Thus, the Applicant needed to prove much more than just having lodged an appeal in the Court of Appeal which is not sufficient reason to stay execution in the instant case.

Counsel for the Applicant in rejoinder submitted that this whole matter was premised on illegalities as the Judicial Officer assigned to mediate the matter instead of only mediating between the parties upon failure of the mediation decided to adjudicate the same. With all due respect Counsel for the Applicant has been in personal conduct of the case ever since but chose to keep quiet about this procedural illegality all through and only to bring it up in the instant application which I find fishy. I find this an intended act to frustrate the Respondent from enjoying the fruits of her litigation and not an act challenging procedural irregularity.

In a nut shell thereof, I find that this Application has not fulfilled all the conditions as laid out in the Civil Procedure Rules to the satisfaction of this Court.

In the case of ***Kizza Besigye versus Yoweri Museveni and Electoral Commission Petition No I of 2001***, this court considered this issue and reviewed many judicial decisions on the matter. Odoki, C,J in his Judgment cited with approval the following observation of Lord Denning in the English case of **Blyth Versus Blyth [1966] AC 643**:

"My Lords, the word "satisfied" is a clear and simple one and one that is well understood. I would hope that interpretation or explanation of the word would be unnecessary. It needs no addition. From it there should be no subtraction. The courts must not strengthen it; nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When parliament has ordained that a court must be satisfied only parliament can prescribe a lesser requirement. No one whether he be a judge or juror would in fact be "satisfied" if he was in a state of reasonable doubt....."*

The Applicant failed to prove that he will suffer any substantial loss despite the fact that the application was filed without an undue delay and that there is a pending appeal. Granting this application would only occasion an injustice to the Respondent who is currently looking after the children she had with the Applicant. I therefore find that this Application lacks merit and is accordingly dismissed with costs. I so order.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

30/11/2017

Judgment read and delivered in open Court in the presence;

1. Counsel Cosma Kateeba for the Applicant.
2. Counsel Augustine Kayonga for the Respondent.
3. The Applicant.
4. Beatrice Katusabe – Court Clerk.

In the absence of the Respondent.

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OYUKO. ANTHONY OJOK

JUDGE

30/11/2017

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