

UGANDA / JUDGMENT

Balwaine v Asinga (Civil Application 562 of 2023) [2025] UGCA 104 (17 April 2025)

[2025] UGCA 104

COURT

Court of Appeal of Uganda

BEFORE

Obura, JA

CASE / FILE NUMBER

Civil Application 562 of 2023

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ctvtL APPLtcATtoN NO. 5620F 2023

BALWAINE DAVID APPLICANT

VERSUS

ALLEN ASINGA NAMUSISI RESPONDENT

BEFORE: HON. LADYJUSTICE HELLEN OBURA, JA

RULING

Introduction

This is an application brought by way of Notice Motion under Rules 1(2), 2(2), 612, 42, 43 and 44 of the Judicature (Court of Appeal Rules) Directions SI 13-10 (the Rules of this Court). The applicant seeks the following orders.

- ¹. That an order of stay of execution be issued pending determination of an appeal against the decision of Hon. Justice Joseph Murangira vide Originating Summons No. 006 of 2022. 15
- 2. Costs of this application be provided for.

Brief Background Facts

The brief facts giving rise to this application as ascertained from the court record are that the High Court gave a judgment against the applicant on 20th May, 2022 in an originating summons/ Civil Suit No. 006 of 2022. Being dissatisfied, the applicant filed a Notice of Appeal which was assigned No. 047 of 2022. A letter requesting for a record of proceedings was written on 25th May, 2022 which were served on the respondent. 20

On 5th October, 2022 the applicant through the local area Chairperson Kirangira Village got to know that an eviction notice vide EMA 27 of 2022 had been issued against him ex parte without him or his lawyer being served. The applicant then filed an application for an order of interim stay of execution in the High Court vide High Court Miscellaneous Application No. 934

5 of 2022 which was granted pending the disposal of the main application for stay of execution vide High Court Miscellaneous Application No. 933 of 2022. That main application was heard and dismissed on 21st July, 2023, hence this application.

The grounds upon which this application is premised are contained in the Notice of Motion but briefly are as follows;

- 10
- 1) That the applicant filed an appeal before the Court of Appeal vide Civil Appeal No. 806 of ²⁰²³ and the same is still pending hearing and determination.
- 2) That the said appeal has higher chances/likelihood of success and is not frivolous.
- 3) The above appeal shall be rendered nugatory if this application is not granted and execution goes on.
- 15
- 4) That the applicant is willing and ready to provide security for due performance of the judgement as may ultimately be binding on him by court.
- 5) It is just and equitable that this application be allowed for the orders as prayed for.

The application is accompanied by the affidavit in support sworn by the applicant on 26th July, 2023. The respondent filed two affidavits in reply, one sworn by respondent herself on 8th September, 2023 in which she avers that this application has been overruled by events as execution was lawfully carried out and completed, that the application is frivolous, vexatious, and an abuse of court process as it was brought in bad faith. The other affidavit in reply was sworn by Mr. Muwanga Jackson, T/A Kitavujja General Agencies Auctioneers & Court Bailiffs. He averred that he was appointed by the respondent's counsel to carry out the process of 20

giving vacant possession of the suit property to the respondent. Further, that he took steps 25

and obtained all the necessary clearance and in the presence of both parties and their respective relatives, the local council and police, he carried out execution of the decree on 4th September 2023, where upon he handed over vacant possession of the suit plot and premises to the respondent. He added that in accordance with the orders of the High Court, Family Division, he returned the warrant with an endorsement vide his letter certifying the day and the manner in which it had been executed. A copy of the Return of Warrant of Attachment dated 4th, September 2023 that was attached to the affidavit and marked "H". Copies of the photographs of what transpired during the execution were also attached and marked "X1 x14",.

The applicant filed an affidavit in rejoinder in which he averred that the execution was not completed as he managed to secure one room in the premises where he put his property and in which he was residing with his family. 10

Representation

At the hearing of this application, Mr. David Mwina appeared for the applicant. The respondent who was present informed court that her lawyer was sick and could not make it to court. Both parties had earlier filed written submissions which were adopted as their respective arguments and have been considered in the preparation of this ruling. I must however point out from the outset that the respondent filed affidavits in reply after the applicant had filed his written submissions. The applicant then filed an affidavit in rejoinder to rebut the averments in the affidavits in reply. He also filed submissions in rejoinder. 20

Applicant's Submissions

Counsel submitted that the applicant's appeal raises a prima facie case with a likelihood of success since he is seeking for an opportunity to be heard which he was denied by the lower court contrary to his constitutional right envisaged under Article 28 of the 1995 Constitution as amended. He added that the appeal raises many other grounds as envisaged in the

Memorandum of Appeal in different aspects of legal jurisprudence such as the suit proceeding by way of originating summons, affidavit evidence, admission of wills under succession act and procedures of admission to matrimonial properties among others. Counsel supported his submissions with the decisions in Attorney General vs Hon Micheal Kabaziguruka,

Supreme Court Constitutional Application no. 5 of 2021 and Akankwasa Damain vs Uganda, Constitutional Application no.7 & 9 of 2011 in which conditions for grant of an application for stay of execution were expounded.

Counsel also submitted that the applicant will suffer irreparable loss which cannot be atoned for in damages if this application is not granted since he together with his family will be evicted from the suit property where they have lived for the last five years and the same will be demolished by the respondent. He argued that there is already an eviction notice which is signed and sealed as averred in paragraphs 5,6,7,8 and 9 of the applicant's affidavit in support of the application. Counsel concluded that if the application is not granted the respondent will be free to execute

and the appeal shall be rendered nugatory. He relied on 10

Tropical Commodities Supplies Ltd & 2 ors vs International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 in which the phrase "substantial loss" was defined as loss that cannot be quantified by any particular mathematical formula. It refers to any loss great or small: of real worth or value as distinguished from a loss that is merely nominal.

In regard to the balance of convenience, counsel submitted that the applicant will be more traumatized and inconvenienced if the application is not granted since he together with his family will be deprived of the right to own property when evicted and the suit property demolished by the respondent. Counsel argued that on the contrary the respondent does not reside on the suit property and only wants to fraudulently throw out the applicant who is her step father. 20

On whether this application was filed without unreasonable delay, counsel submitted that it was filed on 26th July, 2023, two days after the applicant's application for stay of execution in the High Court was dismissed. Counsel also submitted that upon pronouncement of the High Court decision, the applicant filed a Notice of Appeal in this Court as required under rule 76

of the Rules of this Court and elaborated on *Phenny Mwesigwa vs Petrol Uganda Limited* CA No. 129 of 2019. He added that the applicant also filed the Memorandum and Appeal and Record of Appeal in Civil Appeal No. 806 of 2023.

Regarding payment of security for due performance, counsel submitted that the applicant complied with rules 83 (d) and 105 of the Rules of this Court when he paid UGX.200,000/= 10 upon filing the appeal. Further, that the applicant is willing and ready to furnish security for due performance of the decree if ordered by this Court. He cited the decision in *John Baptist*

Kawanga vs Namyalo Kevin and another, MA No. 12 of 2017.

In addition, counsel submitted that it is in the interest of justice that this application is granted. He prayed that the costs of this application be granted to the applicant.

15 Respondent's Submissions

In response, counsel protested that the applicant filed his submission before the respondent filed her affidavit in reply and that the applicant's submissions do not consider their affidavit in reply.

20 On the merit of the application, counsel submitted that this application is barred by law as the execution it seeks to stay was done and completed under lawful orders of the High Court. He asserted that the application is overtaken by events since there is nothing to stay and that it is frivolous, vexatious and an abuse of court process. He relied on *Katayira Francis vs Rogers Eosco Bugembe*, SC Civil Reference No. 09 of 2017 to support his submission. However, counsel chose to attach pages 1, 11 and 12 of the said ruling which I find

unconventional, unacceptable and I take exception to. Counsel is guided to always provide a complete copy of the ruling or judgment he relies on.

Counsel also submitted that Civil Appeal No. 0806 of 2022 was filed out of time and therefore the applicant's argument that it has a likelihood of success cannot stand. He prayed that this application be dismissed with costs to the respondent.

Applicant's Rejoinder

In rejoinder counsel submitted that the respondent tactfully declined service and refused to file a response to this application as directed by court. Counsel added that although the respondent partially tried to execute, the said execution was not successful as the applicant was able to secure a room in the house where he currently resides with his family.

Counsel pointed out that the partial execution was carried out on 4th September 2023 after the filing of this application on 17th August 2023. He argued that the partial execution was done without first notifying the applicant to justify the respondent's claim that the application is overtaken by events so as to render the appeal nugatory. According to counsel, this explains why the respondent flouted the directions of court to file submissions and chose to file it on 12th September 2023 after the partial execution on 4th September 2023. He prayed

Counsel concluded that the applicant is still in possession of the suit property which implies that the decree of the lower court is not fully executed. He added that there is a serious threat to further execute the decree if the application is not granted, and this will render the appeal nugatory. He urged this Court to stay further execution of the decree pending the determination of the appeal.

that court stays full execution pending the determination of the appeal.

Court's Consideration

I have carefully perused the application and the supporting affidavits, the affidavit in reply and the submissions of both counsel. I am alive to the conditions that an applicant must fulfill before an application for stay of execution is granted as stated in a number of authorities.

5 In *Joseph Mubiru Kizito vs African Forward Christian Ministries*, Civil Application No.300 of 2023 this Court summarised the principles and conditions for grant of an order for stay of execution as stated by the Supreme Court in its decisions in *Lawrence Musiitwa Kyazze vs Eunice Besigye*, Civil Application No.18 of 1990; *Dr. Ahmed Muhammed Kisuule vs Greenland Bank (in liquidation)* S. C. C. A No.7 of 2010 and *Hon. Theodore*

Sselrikubo & 3 others vs The Attorney General & 4 Others, (supra) as follows: - 10

- ¹. The applicant must show that that he/she has lodged a Notice of Appeal in accordance with the relevant provisions of the Rules of the Court in which the application is lodged;
- 2. The applicant has to satisfy court that his/her appeal has a high likelihood of success;

- 3. The applicant must demonstrate that he/she will suffer irreparable loss if a stay is not granted;
- 4. The applicant must show that substantial loss may result to him/her unless the order is made;
- 5. The applicant must show that the application was instituted without unreasonable delay;
- 6. That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.
- ⁷. If 2 and 3 above have not been established Court must consider where the balance of convenience lies

In this application, it is not disputed that judgment was given against the applicant in Civil Suit No. 006 of 2022 and execution proceedings were commenced by the respondent who was granted an order to evict the applicant from the suit property. It is also not disputed that execution was done on 4th, September 2023. However, while the respondent asserts that execution was done and completed on the above stated date, the applicant contends that there was only partial execution of the court orders since he was still in occupation of one of the rooms on the suit property.

In a bid to establish the truth, I have perused the affidavits in reply sworn by the respondent and the bailiff who carried out the execution. I have also perused all the documents attached to the affidavits which include the Return of Warrant of Attachment and copies of the photographs taken during the execution. The Return of Warrant of Attachment clearly outlined

all the steps that were taken to carry out the execution and stated that the applicant was successfully evicted from the suit property and vacant possession was given to the respondent.

I therefore have no doubt in my mind that the execution the applicant is seeking an order of this Court to stay was carried out and completed on 4th September 2023. Consequently, I find

that this application was overlaken by that event. If at all the applicant managed to secure one room in the suit property where he claims to be staying, that would be an illegal action which this Court cannot sanction by granting an order of stay which in effect would be recognizing his illegal stay there. 10

In the result, the above finding disposes of this application and I find it not necessary to consider the conditions for grant of an order of stay of execution because it would only be for moot purposes. 15

In conclusion, this application is dismissed with costs to the respondent

I so order.

I[^] Dated at Kampala this, 2025.

Hellen Obura

JUSTICE OF APPEAL20

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