

**Byamugisha and Others v Kasisiri and
Another (MISC. APPLICATION NO. 074 OF
2023) [2025] UGHC 236 (3 February 2025)**
[2025] UGHC 236

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- [2] The application is supported by the affidavit deposed by **John Nyamugabo**, the 2nd Applicant on his own behalf and on behalf of the 1 st, 3rd & 4th Applicants wherein there are grounds of the application:
- a) That on 17th/5/2023, the court delivered a judgment in **C. S No.46 of 2023** in favour of the Respondents/plaintiffs where they were declared the lawful owners of the suit land.
- b) That the Applicants/defendants being dissatisfied with the judgment, they have preferred an appeal to the Court of Appeal vide **Civil Appeal No.228 of 2023** which has a high likelihood of success.
- c) That there is a serious threat of execution of the decree by the Respondents and if the application is not granted, the appeal will be rendered nugatory.
- d) That the Applicants will suffer substantial loss/irreparable damage as they utilize their portions of land for subsistence farming and have grown crops for both food to feed their families and for sale respectively. They have also immensely invested in their respective plots of land and have both permanent and temporary structures thereon including a community church.
- e) That the Applicants are able and are willing to give security for due performance of the decree.
- f) That the application has been brought without unreasonable delay and it is just and equitable that the application is granted.
- [3] The 1 st Respondent, **Kasisiri Swaibu**, deponed an affidavit in reply opposing the application on the following grounds:
- a) That the Respondents have an executable decree in their favour and are entitled to possession of their land.
- b) That the homes, houses and church were constructed by strangers to whom the 2nd, 3rd & 4th Applicants alienated part of the land when the hearing was about to close in contempt of the orders of court as the Applicants had been restrained from alienating the suit land.
- c) That Civil Appeal No.228 has no possibility of success and the application for stay of execution ought to be dismissed with costs.

Background

- [4] The Respondents/plaintiffs sued the Applicants/defendants vide **MSD C. S No.36 of 2012** inter alia, for orders that the Respondents are the lawful owners of the suit land, cancellation of the certificate of title comprised in **Buhaguzi, Block 2 plot 6, Mahamba Kyangwali, Hoima**,

damages and costs of the suit. The suit was determined in favour of the Respondents/plaintiffs by this court on the 22nd/05/2023.

- [5] The Applicants being dissatisfied with the decision of the court filed an appeal in the Court of Appeal, Kampala by way of a memorandum of appeal lodged in the Court of Appeal registry on 13th/06/2023 and the same is still pending determination.
- [6] The respondents filed a bill of costs and are threatening to execute against the Applicants while there is a pending appeal against the judgment. This prompted the Applicants to file the instant application for stay of execution of the decree in C. S No.46 of 2023.

Counsel Legal Representation

- [7] The Applicants were jointly represented by **Mr. Akampurira Jude** and **Mr. Tishekwa Ambrose** of **M/s MACB Advocates, Kampala & M/s Tishekwa. A. Rukundo & Co. Advocates, Kampala** respectively while the Respondents were represented by **Mr. Nagaruye Ruhindi** of **M/s Ngaruye Ruhindi, Spencer & Co. Advocates, Mbarara**. Both counsel filed their respective written submissions as permitted by court.

The law Applicable

- [8] **O.43 rule 4(3) CPR** is to the effect 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."***

The principles under which an application for stay of execution can succeed were well enunciated in the case of **Dr. Ahmed Muhammed**

Kisuule Vs Greenland Bank (in liquidation), S. C. M. A No.7 of 2010,

where the Supreme court held that;

"For an application in this court for stay of execution to succeed the applicant must show subject to other facts in a given case, that he/she has lodged a notice of appeal..... The other facts which lodgment of the notice of appeal is subject vary from case to case but include the fact that the applicant will suffer irreparable loss if a stay is not granted, that the appellant's appeal has a likelihood of success."*

Therefore, in this application, the Applicants have to prove the above for this court to grant the stay of execution.

a) Lodgment of a notice of appeal and likelihood of success of the Appeal

- [9] Counsel for the Applicant submitted that the Applicant's appeal which is pending determination by the Court of Appeal has arguable grounds with a high likelihood of success. That it will be the Court of Appeal to decide on the questions of proprietorship once the Applicants' right to be heard is preserved by the grant of the application thus allowing the appeal to prevail. Counsel for the Respondent on the other hand submitted that even though the Applicants have filed a Notice and memorandum of appeal, there is no likelihood of success because according to him, the memorandum of appeal is fatally defective as the grounds are too general. That the Applicants are on a fishing expedition of buying time and delaying the Respondent's execution process.
- [10] A "likelihood of success" refers to the plausibility that the Applicant's appeal will be successful, indicating a strong possibility of overturning the judgment or order being appealed, **Juna Co. (T) Ltd & 2 Ors Vs DFCU Bank Ltd, HCMA No. 027 of 2023**. In **Beeline Travel Care (U) Ltd Vs Finance Trust Bank, CACA No.67 of 2023 (K)** Court held that *"An arguable appeal is not one which must necessarily succeed, but one ought to be argued fully before the court; one which is**

**not frivolous. In considering an application brought under Rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal."*

- [11] In the present application, I find that though the Applicants have not raised any arguable issues of fact and law in the affidavit, they can be discerned from the memorandum of appeal. The issues discerned from the memorandum of appeal include complaint of none evaluation of evidence, failure to visit locus and failure to ascertain the acreage of the suit land which merit consideration by the Court of Appeal. It is however apparent from the Applicant's affidavit in support, his Witness statement attached to the affidavit in reply and affidavit in rejoinder that at the time he purchased the suit land in around 2003, the suit land was empty without any occupant. Then thereafter, in 2005 and 2006 the 2nd Applicant sold it to 3rd and 4th Applicants. The initial suit of this matter was filed in 2009. The implication is that whatever structural developments are to be found on the land were put up when the suit was pending and therefore any argument relating to the developments on the land cannot be found in favour of the Applicants. For the above reasons, I nevertheless find that the Applicants have demonstrated by virtue of the arguments raised in the memorandum of appeal, to the satisfaction of court, that the Appeal has a likelihood of success.

b) Unreasonable delay

[12] The Applicant in this case filed a Notice of appeal and Memorandum of appeal on 19th/5/2023 and 13th/6/2023 respectively after the Judgment that was delivered on 17th /5/2023. The present application was filed on 23rd/6/2023 after the Respondents filed a taxation hearing notice on 6 th/6/2023. In view of the above, I find the applicant lodged this application promptly (within a period of 2 weeks and a few days

from the taxation hearing notice) and therefore, there was no unreasonable delay in filing the present application.

c)Substantial loss

- [13] Counsel for the Applicants submitted that save for the 1st Applicant, the suit land is occupied and utilized by the other applicants and the community therefore deriving their sustenance therefrom. That evicting the 2nd , 3 rd & 4th Applicants would render them homeless, violate of their right to food and shelter and render the appeal nugatory. Counsel for respondents on the other hand submitted that none of the Applicants is in occupation of the suit land and that the same is occupied by other people to whom the land was alienated. 2ndly, that the structures on suit land were constructed by those other people while the matter was about to be concluded and the same were built in contempt of the orders of court preserving the status quo.
- [14] In **Pan African Insurance Co. Ltd Vs International Air Transport Association, HCMA No.86 of 2006**, it was held that the deponent in an application for stay of execution must go a step further to lay the basis upon which court can make a finding that the applicant will suffer substantial loss. That it should go beyond the vague and general assertions of substantial loss.

It therefore follows that the Applicants in this case have to prove substantial loss which must be over and above the ordinary loss and beyond merely asserting that substantial loss will occur.

[15] In **paragraphs 7 & 14** of the affidavit in rejoinder, the 2nd Applicant appeared to admit, in response to the respondents' assertion that the Applicants do not anything on the suit land, that the 1st Applicant has no home on the suit land while the 3 rd & 4th Applicants have gardens, farms, church etc from which they derive their livelihood and sustenance. On record, Photographs of a church and homes and or buildings are attached and marked "A9". The Applicant has not attached any proof to the effect that those structures as per **annexture "A9"** indeed belong to the 1st , 2 nd, 3rd & 4th Applicants. Merely attaching pictures or photos of buildings without any proof of ownership of the buildings is not enough. In absence of any evidence that the Applicants are in occupation and legally own the structures i.e the church and other buildings on the suit land, I am inclined to believe the Respondents' assertion that the Applicants do not own anything on the suit land but other people who it is apparent acquired interests on the suit land from the Applicants during the pendency of the suit for purposes of defeating the Respondents' interests. The Applicants appear to had been

swift in disposing off parts of the suit land to 3rd parties during the pendency of the suit to defeat the litigation efforts of the Respondents. As a result, this court cannot condone the above by granting this Application. Therefore, I find that there is no evidence that the Applicants will suffer any substantial harm/loss in the circumstances of this case if the Application is not granted.

- [16] However, since the appeal is a right but considering the circumstances of this case, I find that this is a case where Security for due performance of the decree ought to be considered. The Applicants have also shown willingness to pay the security, in the premises, the Application is allowed on condition that the Applicants deposit in court Ugx 200,000,000/= as security for due performance of the decree.
- [17] In conclusion, despite the entire of the above, since grant of this Application is discretionary, I find this a proper case for grant of this application for stay of execution of the decree in C. S No.46 of 2023. It is granted on terms of payment of security for due performance of the decree amounting to Ugx 200,000,000/= in view of the value of the subject matter and the fact that the Judgment decree includes general

damages worth Ugx 400,000,00/=. Each party to bear his/her own costs.

Dated at Hoima this 3 rd day of February, 2025.

..... Byaruhanga Jesse Rugyema JUDGE

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