

UGANDA / JUDGMENT

Emmejje and Another v Asegoit
(Civil Application 24 of 2024)
[2024] UGCA 136 (28 May 2024)
[2024] UGCA 136

COURT

Court of Appeal of Uganda

BEFORE

Kihika, JA

CASE / FILE NUMBER

Civil Application 24 of 2024

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THE RTPI'BLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVTL APPLICATION NO. 24 OF 2024

lArising from CIVIL APPEAL NO. 1353 OF 2023)

| r. EMME. IJE JOHN | |

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2. OKACUGA EMMANUEL ::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

ASEGOIT ANNA MARGARET::::::::::::::::::::::::::::3::::::::: RESPONDENT

RULING OF COURT

BEF'ORE: HON. WSTICE OSCAR JOHN KIHICA, JA

(Sitting as a single Judge)

Introduction

This application was brought by way of Notice of Motion under Rules 6(2)(b) and 43 of the Judicature Court of Appeal Rules Direction SI 13-10. It seeks orders that;

1. An order of temporary stay of execution be issued staying any execution in respect to Tororo High Court Miscellaneous Application No.279 of 2022 until the disposal of Court of Appeal Civil Appeal No. 1353 of 2023.

2. Costs of this application be provided for.

The grounds upon which this application is premised is contained in the Notice of Motion and the affidavit in support sworn by Mr. OKACUGA EMMANUEL deposed on the 19th day of January, 2024 and briefly are that;

1. The applicant has filed Civil Appeal No. 1353 of 2023 seeking to overturn the orders of the High Court in Miscellaneous Application

No. 279 of 2022 which Appeal is pending before this Honourable Court.

- 2. The Respondent in bid to defeat the appeal applied for execution of the said order.
- 3. The Respondent is threatening to further execute the said order against the Applicants who are administrators of the Estate of the late Okacuga Martin.
- 4. If this application is not granted the Respondent is likely to execute the said order to the detriment of the Applicants.
- 5. The application was made without unreasonable delay.

In reply the Respondent, Asegoit Anna Margaret opposed the application and filed an affidavit in reply sworn on the 15th of February 2024 wherein she briefly averred as follows;

- 1. The Applicants are my step children and co-administrators of the estate of the late Okacuga Martin, who was my husband.
- 2. By the time I got married to the late Okacuga Martin in 1978, he had two other wives; Elizabeth Ajuo his first wife who was settled in Opopongo village Kalait Parish, Kalait Sub county in Tororo District where she lived together with her children including the 2nd Applicant; his 2nd wife Iseren Naume who was settled in Omagoro Village, Amoni Parish Kalait (formerly Mella Sub-county) in Tororo District where she lived with her children including the 1st Applicant. I too was settled in Omagoro village, Amoni Parish Kalait Subcounty, Tororo District.
- 3. Due to persistent conflicts between the second wife and I, the late Okacuga purchased land for me in Kasoli East village, Kasoli Parish, Eastern Division Municipality where he relocated my children and I in 1994.

- 4. That the three families stated above exclusively lived on the land they were settled in and to date, each family remains settled in the same place, save for my family which has been displaced by the Standard Gauge Railway project(SGR)
- 5. It was the clear intention of my late husband that each family was independent of the other to avoid conflict and throughout his life time, no family interfered with the use of land specifically allocated to another family.
- 6. In March, 2016 or thereabout, my family was informed that the land upon which we were settled at Kasoli East Village was required by the Standard Gauge Railway(SGR) project and we were required to relocate.
- 7. On 11th, October, 2016 my husband passed on before compensation was paid by the Standard Gauge Railway(SGR) Project.
- 8. In April, 2021 the SGR deposited UGX 10,300,000/= into the estate account at Centenary Bank and the Balance of 227,642,669/= was paid on 22/06/2022.
- 9. The Applicants then ganged up against their co-administrators, one Okacuga Kezekia and demanded that the funds be split equally amongst the three families, including those not affected by the SGR acquisition.
- 10. That left me with no choice, but to file Misc. Application No. 279 of 2022 against the Applicants and their co-administrators Emmeje Kezekia seeking amongst other orders a declaration that my children and I were solely entitled to the compensation funds from SGR and the same was determined in my favor.
- 11. The Applicants, since March 2018 when they obtained letters of administration to the estate of my late husband, have never divided the estate and have their eyes fixed on the compensation from SGR.
- 12. The Applicants' appeal to this court has no merit and is unlikely to succeed as they seek to partake of the proceeds of compensation for my residential holding.

Background

The background to this application, as can be ascertained from the record is as follows;

The Respondent is a step mother to the Applicants and they are all coadministrators of the estate of the late Okacuga Martin. The late Okacuga was a polygamous man who had three wives each of whom settled with her children in a different village. The Respondent together with her children lived at Kasoli East Village.

In March of 2016, the Respondent was informed that the land upon which they had settled was required by the Standard Gauge Railway (SGR) Project. This destabilized the residential home of the Respondent who had relocate to another place. At the time of relocation, the SGR project had not paid compensation. The Respondent's husband unfortunately died on the 1st of October 2016 before compensation was paid out by the project.

Compensation was eventually paid in two installments. The first was a payment of UGX 10,300,000/= which was effected in April of 2021. The second payment of UGX 227,642,669/- was made on the 22nd of June 2022. These monies were deposited into the account of the Estate of the late Okacuga Martin which was held in Centenary Bank.

Upon payment of the compensation to the Respondent, the Applicants demanded that the payment be split equally amongst the three families, including those that had not been affected by the SGR project. The Respondent then filed High Court Misc. Cause No. 279 of 2022 wherein she sought orders that; a declaration be made that the property at Kasoli East village which was affected by the Standard Gauge Railway (SGR) was her residential holding; an order that the Applicants hand over funds in form of compensation to the Respondent to enable the Respondent together with her children find a new home.

The High Court determined the matter in favor of the Respondent where upon the Applicants lodged an appeal to this court Vide Civil Appeal No. 1353 of 2023. The Applicants additionally filed two applications, one seeking an interim stay (Civil Application No. 35 of 2024), and the other seeking a temporally stay of execution (Civil Application No. 24 of 2024) all arising from the aforementioned appeal which is pending before this court. Civil Application No. 35 of 2024 for the interim stay was granted by this Court pending the disposal and determination Civil Application No. 24 of 2024, the substantive application for a temporally stay of execution, the present application under consideration.

Appearances

At the hearing of this Application, the Applicants were represented by Mr. Orkut Moses both Applicants were absent. The Respondent's counsel on record and the Respondent were absent. The parties however filed written submissions which this Court has considered.

Determination of the Application

I have read and considered the Notice of Motion, the affidavit in support thereof, the affidavit in reply, the written submissions filed by the parties and the authorities provided.

The law governing Applications for stay of execution in this Court is provided for under Rule 6(2)(b) of the Judicature (Court of Appeal Rules) Directions SI 13-10 which stipulates as follows:

“(2) 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—

(b) In any civil proceedings, where a notice of Appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an Injunction, or a stay of proceedings on such terms as the Court may think just. D

The general principle is that where an unsuccessful party has exercised the right to appeal, it is the duty of the Court to make such orders for stay of judgment so as not to render the Appeal nugatory. See *Lawrence Muslwa Kyazze vs Eunice Busingye* SCCA NO. 18 OF 1990 (1992) FV I (ALR 55r where it was held that an application for stay of execution pending Appeal is designed to preserve the subject matter in dispute so that the right of the appellant who is exercising his/her undoubted rights of Appeal are safeguarded and the Appeal if successful is not rendered nugatory.

The conditions an Applicant must satisfy to justify the grant of an order of stay of execution were set out in the case of; *Hon. Theodore Ssekikubo & Others vs Attorney General and Anor* Constitutional Application

No.6 of 2013. The Court re-stated the principles upon which an order for stay of execution may be granted as follows:

- (1) The Applicant must establish that his Appeal has a likelihood of success, or a prima facie case of his right of 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 have 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.

Regarding the first condition, as to whether there is a prima facie case of a right of appeal and whether the appeal has a likelihood of success, the Supreme Court in *Gashumba Maniraguha v Sam Nkudiye* Supreme Court Civil Application No. 24 of 2015, stated that likelihood of success is the most important consideration even though the Court is not at this stage deciding the Appeal, it must be satisfied that the Appeal raises issues which merit consideration by the Court.

The same position was reiterated in *Gapco Uganda Ltd vs Kaweesa & Anor*, MA No.259 Of 2013, where it was held that the Court should be satisfied that the claim is neither frivolous nor vexatious and that there is a serious question to be tried.

It was submitted for the Applicants as per paragraphs 5 and 6 of the 2nd Applicant's affidavit in support, that the Applicants had not only filed a competent Notice of Appeal but they had also filed the actual appeal vide Civil Appeal No. 1353 of 2023 which is pending before this Court. It was further submitted that the Applicants have filed a substantive application for stay of execution pending the disposal of their appeal and that there is a serious threat of execution which if not granted will render that appeal nugatory.

In reply it was submitted for the Respondent that the applicant's preferred an appeal to this court arising from orders in High Court Misc. Cause No. 279 of 2022 but no leave was sought either in the High Court nor in this court. It was further submitted that the appeal has no likelihood of success. It was also submitted that in the appeal pending before this court, the court will be called to determine whether the property at Kasoli East Village was the Respondent's residential holding and if so whether even her children are entitled to benefit from the compensation funds.

As stated before, I have carefully perused the Notice of Motion and the affidavit in support. No where in the grounds is a case made by the Applicants stating that they have a prima facie case on appeal. Whereas the Applicants, in paragraph 14 of the affidavit in support, state that their Appeal has high chances of success, they have not attached thereto their memorandum of appeal in order for this Court to determine whether or not there is indeed a prima facie case established. It is incumbent upon the Applicant to avail evidence, or material to the court in order for it to establish whether or not the Applicant has a prima facie case on appeal.

In the case of *Osman Kassim Vs Century Bottling Company Ltd Civil Appeal 34 of 2019*, the Supreme Court of Uganda stated thus;

"It is trite that in order to succeed on this ground, the Applicant must, apart from filing the Notice of Appeal, place before Court Material that goes beyond a mere statement that the appeal has a likelihood of success.....the Applicant did not find it necessary to attach to his affidavit in support of the application a draft Memorandum of Appeal to

indicate the proposed grounds of appeal....the important questions are not even mentioned in his affidavits so as to give court an idea about the possible ground of his intended appeal. We are in the circumstances unable to establish the likelihood of success in the absence of evidence"

The Applicants in the instant case did not attach the Memorandum of Appeal nor did they deem it necessary to attach the decision of the High Court from which their appeal arises in order for this Court to assess the likelihood of success of the Applicants' appeal. In the circumstances I would therefore find that the Applicants have failed to establish a prima facie case on appeal or likelihood of success.

With regard to the second condition as to whether the Applicant will suffer substantial loss, I note that throughout the pleadings and the affidavit in support the Applicants do not point out the possible irreparable damage that they are likely to suffer if this application is not granted. I therefore find that the Applicants have failed to satisfy this condition as well.

Given that the Applicants have failed to satisfy the Court that they have a prima facie case and that they are likely to suffer irreparable damage, it is not necessary to determine this application on the balance of convenience.

Given the above, I therefore find that the Applicants have not fulfilled the necessary conditions for the grant of a stay of execution.

The Application is dismissed with costs to the Respondent.

I so order.

Dated this 2 day of. ²⁰²⁴

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OSCAR JO KIHKA

JUSTICE OF THE COURT OF APPEAL

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