

UGANDA / JUDGMENT

Iriso v Okurut (Miscellaneous Application 45 of 2023) [2024] UGHC 787 (16 July 2024)

[2024] UGHC 787

COURT

High Court of Uganda

BEFORE

Adonyo, J

CASE / FILE NUMBER

Miscellaneous Application 45 of 2023

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The Republic of Uganda

In the High Court of Uganda at Soroti

Miscellaneous Application No. 0045 of 2023

(Arising from Civil Appeal No. 003 of 2022)

(All arising LCIII Court of Bukedea Town Council)

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Iriso Gabriel :::::::::::::::::::: <pre>.....

VersusOkurut Francis **Respondent**

Before: Hon. Justice Dr Henry Peter Adonyo

Ruling on Stay of Execution:**1. Introduction.**

This application was brought by way of notice of motion under section 98 of the Civil Procedure Act and Order 43 Rule 4 and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules for orders that the execution of the judgement and decree issued in Civil Appeal No. 003 of 2022 by the Chief Magistrates Court of Kumi Holden at Kumi be stayed and costs of this application be provided for.

2. Grounds.

The grounds of this application as set out in the application and affidavit sworn by the applicant are that; 25

- a) The applicant was the Appellant in Civil Appeal No. 003 of 2022.
- b) That judgement was pronounced on the 31st day of May 2022 against the applicant which among others the Respondent was declared the rightful owner of the suit land having upheld the objection raised and dismissed the appeal with costs of the suit awarded to the respondent.
- c) That he is desirous to appeal against the said decision and has since filed an application to file an appeal out of time.
- d) That upon passing judgment, the Respondent filed a bill of costs against the applicant which was taxed amounting to a tune of 3,680,000/= (three million six hundred and eighty thousand shillings only) and a notice to show cause why execution should not issue.
- e) The applicant will suffer irreparable damage loss of this application is not granted pending the application to appeal out of time.
- f) That the intended appeal is meritorious and has a high probability of success.

In reply, the respondent stated that;

- a) The applicant's application has no likelihood of success since his appeal was dismissed on a point of law.
- b) The applicant will not suffer any a substantial loss since he is not in possession and has never at any moment used the said land that in any case his damages can be compensated.
- c) If the decree and orders in Civil Appeal No. 003 of 2022 are executed the applicant's application and appeal will not be rendered nugatory and will not in any way lead to the applicant suffering any damage beyond monetary compensation.
- d) The applicant has not furnished security for due performance of the decree as required by law.

\$5\$

3. Representation.

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The applicant was represented by M/s Opio & Co. Advocates while the respondent was represented by M/s Sanywa, Wabwire & Co. Advocates. This matter proceeded by way of written submissions and the same will considered as and when necessary.

10 4. Determination.

Counsel submitted on the conditions required for stay of execution under Order 15 43 rules 4(3) of the Civil Procedure Rules, stating that this application is a proper case for grant of an order for stay of execution as can be deduced from the averments of the applicant in his affidavit.

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- The said pending appeal is not frivolous and it has a likelihood of success.
- b) There is a serious and imminent threat of execution of the decree and if not stayed the appeal will be rendered nugatory.
- c) The application was made without unreasonable delay.
- d) The Applicant is prepared to give security due performance of the decree and;
- e) The refusal to stay would inflict greater hardship than it would avoid.
- f) The power to grant or refuse a stay is discretionary.

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In the instant application it should be noted that there is no pending appeal, rather an application for leave to appeal out of time. \$10\$

I have perused <u>Miscellaneous Application No. 0039 of 2023</u> filed by the applicant for leave to appeal the judgement and decree issued in Civil Appeal No. 003 of 2022 by the Chief Magistrates Court of Kumi.

The reason given for failure to file his appeal in time was that the said judgment was pronounced on the 31st day of May 2022 against the applicant and he was 15 not informed of the same till February 2023.

I have further perused the proceedings in Civil Appeal No. 003 of 2022 and they indicate that on the 31st of May 2023, when the ruling was delivered all parties were in court and as such the same was delivered in their presence.

While there is a substantive application pending determination between the 20 parties, I find that the same does not have a likelihood of success as no evidence to that effect has been adduced by an affidavit.

Regarding imminent threat of execution and substantial loss, the applicant states under paragraph 9 of his affidavit in support that he is likely to suffer substantial

loss if execution of the decree and order issued in Civil Appeal No. 003 of 2022 25 are not stayed.

That the respondent filed a bill for taxation for costs arising from the appeal which were taxed at 3,680,000/= (three million six hundred and eighty thousand

shillings only) which bill he now seeks to execute by imprisonment of the S applicant.

In *Tropical Commodities Supplies Ltd & 2 others v International Credit Bank Ltd (In Liquidation)* [2004] 2 EA 331, Ogoola J (as he then was) held that

"The phrase substantial loss does not represent any particular amount or size; it cannot be qualified 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".

Substantial loss giving rise to stay of execution only arises where there is eminent threat of execution of the decree, which execution would change the status quo

in such a manner that the appeal would be rendered nugatory if the execution is 15 not stayed.

In this instance while there is an Application for Execution, a copy of which was attached as annexure 'D' to the application, the applicant was also further served with a notice to Show Cause Why a Warrant of Arrest should not issue dated 10th January 2023.

Further, on the 2nd of February 2023 when the matter came up for hearing of the Notice to Show Cause, the applicant raised concerns regarding failure to be availed with a copy of the judgement in Civil Appeal No. 03 of 2022.

The trial Magistrate availed him with one month to process his appeal and serve the court with proof of the appeal lodged in the High Court.

On the 2nd of March 2023, when the matter came up for mention on the status of the applicant's appeal, the applicant told the lower trial court that while he was processing his appeal, in the meantime he undertook to pay the costs of 3,680,000/= within one and a half months.

He failed to pay the costs of Shs. 3,680,000/= which he had promised but rather $\$$ he filed this application on the 27th of March 2023 which action caused the Magistrate's Court to issue an order that execution doth issue.

From the above it can have been seen that while there is indeed a risk of execution against the applicant, the same in my opinion, does not constitute

substantial loss especially since the applicant himself was willing to pay the costs 10 but later changed his mind then filed this application, which in my considered opinion was done with the sole reason of delaying a payment which he had himself agreed to undertake voluntarily.

Regarding inordinate delay, I note that the impugned judgment was delivered on

the 31st of May 2022 and this application was filed on the 27th of March 2023. 15

It has already been established that the applicant was present when the ruling in Civil Appeal No.003 of 2022 was delivered and was therefore aware of the orders therein, any delay in getting a copy of that ruling and filing this application, in my opinion, was intentional on the part of the applicant.

The applicant only brought up the issue of an appeal and all applications 20 attendant thereto when he appeared for hearing on the notice of cause why execution should not issue.

It is therefore clear that he is guilty of inordinate delay, having filed this application as an afterthought when he was faced with execution of the costs in

25 Civil Appeal No. 003 of 2022.

> Arising from the factual assessment of the sequence of events above, I would find that the applicant has failed to prove that his application has a likelihood of success and hence proven any substantial loss, were the impending execution to be implemented.

That being the case, I would consequently find that this application lacks merit \$5\$ and thus would fail.

The application is, as a result, dismissed with costs to the respondent. I so order.

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Hon. Justice Dr Henry Peter Adonyo

Judge

16th July 2024

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Prepared on 13 October 2026 · Esheria