

UGANDA / JUDGMENT

Kawanga Vs Namyalo & Anor

(MISCELLANEOUS APPLICATION NO. 12 OF 2017) [2017] UGHCCD 99 (16 July 2017)

[2017] UGHCCD 99

COURT

HC: Civil Division (Uganda)

BEFORE

Zeija, J

CASE / FILE NUMBER

MISCELLANEOUS APPLICATION NO. 12 OF 2017

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA****HOLDEN AT MASAKA****MISCELLANEOUS APPLICATION NO. 12 OF 2017****(Arising from Civil Suit No. 51 of 2012)****JOHN BAPTIST KAWANGA..... APPLICANT****VERSUS****1. NAMYALO KEVINA****2. SSEMAKULA LAURENCE..... RESPONDENTS****BEFORE: THE HON. JUSTICE DR. FLAVIAN ZEIJA****RULING**

This is an application for stay of execution. It is brought under S. 98 of CPA, S.33 of the Judicature Act, Or 22 R 23 and 26, Or 43 R4 and Or 52 R 1&3 of CPR. It is seeking for orders that:

1. The execution of the Decree and Judgment in High Court Civil suit No 51 of 2012 be stayed pending the hearing and determination of the appeal
2. Costs of the application be provided for

The application was supported by the affidavit of the applicant in which the grounds of the application were more buttressed. The ground upon which this application is anchored are:

1. On the 11th January 2017, the Hon. The lady Justice Margaret C Oguli Oumo delivered Judgment in HCCS NO 51 of 2012.
2. The learned trial Judge found and held that the suit lands were fraudulently transferred into the names of the applicant, that the applicant was a trespasser on the suit lands, that HCCS No 51 of 2012 was not barred by limitation under the Limitation Act and that the respondents were entitled to the suit lands, special and general damages and costs of the suit
3. The applicant being dissatisfied with the whole of the decision of the trial Judge filled a notice of appeal and a letter requesting for a certified record of proceedings on the 24th January 2017. Both notice of appeal and the letter requesting for a certified copy of the proceedings were served on the respondent.
4. The learned trial Judge erred in her judgment and findings as follows:
5. The learned trial Judge erred in law and fact when she relied on a witness statement of the 1st respondent who was never cross-examined on the said statements
6. The learned trial judge erred in law and fact when she held that the applicant was a family lawyer of the respondent whereas not
7. The learned trial Judge erred in law and fact when she ignored the fact the applicant was a bona fide purchaser for value of the suit lands
8. The learned trial Judge erred in law and fact when she held that the suit lands were fraudulently transferred to the applicant
9. The learned trial Judge erred in law and fact when she held that the applicant was a trespasser on the suit lands where as not
10. The learned trial Judge erred in law and fact when she held that the suit was not barred by the limitation Act.
11. The applicant's intended appeal has high chances of success
12. If stay of execution is not granted by this honourable court, the applicant will suffer irretrievable and substantial loss as the applicant has over the last 40 years heavily invested in the suit lands, built a modern and permanent home thereon, developed the property into a modern Agricultural farm from which he gets food for his family and income. The applicant stands to lose the eucarptus tree plantation and crops if the stay of execution is not granted. The applicant has a modern farm of exotic dairy cattle that will die because he has nowhere to move them to if the stay of execution is not granted.
13. The execution of the decree and judgment will render the applicant's appeal nugatory
14. The application was brought without undue delay

15. The applicant was willing to provide guarantee for security for costs
16. It is fair and just to all parties that this application be allowed.

At the hearing, counsel for the applicant argued that the principles upon which stay of execution is granted are captured in a number of Authorities which he cited.

The 1st principle is that the applicant should have filed a notice of appeal. The applicant had already done that and the notice of appeal was annexed to the affidavit.

The 2nd principle is that the appeal should not be frivolous and should have a high likelihood of success. He argued that the learned trial judge relied on a witness statement of the 1st respondent and the 1st respondent was never cross-examined. He further argued that the learned trial judge held that the applicant was a family lawyer whereas not. The learned trial judge also held that the applicant was not a bona fide purchaser for value where as he was. The trial judge held that the applicant was a trespasser whereas the applicant has been in occupation of the land since 1974 after buying it. The learned trial Judge held that the suit was not barred by limitation and yet the cause of action arose in 1974. The learned trial judge relied on a nonexistent case between the applicant and the respondents. She held that the case was determined in the favour of the 1st respondent but there was no such case in the chief Magistrate's Court of Masaka. The learned trial judge entered judgment in favour of respondents who never testified at all. The learned trial judge entered judgment in favour of the deceased person by the time judgment was delivered. She also held that the respondents were the registered proprietors of the land even though their names were not yet entered on the register. These grounds show that this appeal is not frivolous

The 3rd principle is that there is a serious threat of execution of a decree to render the appeal nugatory. In his affidavit, the applicant has indicated that he has been farming, he has a residential house on the land and he is raising cows on the land. He has developed a dairy herd which he will suffer irreparable financial loss once evicted.

The 4th principle is that the application should be brought without unreasonable delay. As demonstrated by the notice of appeal, the applicant filed a notice of appeal within 7 days after judgment and brought this application 28 days after judgment. This application satisfies this principle.

The 5th principle is that the applicant should provide security for due performance of the decree. Counsel argued that the requirement of granting security is not mandatory. He stated that due regard should be had to the fact that this is land which will not go away. The applicant cannot transfer it since the 2nd respondent has already registered himself. The status of the applicant as a senior advocate weighs in favour of not providing security. He referred to the case of ***Amuanaun Sam Vs Opolot David Misc Appl No 3 of 2014*** to support his arguments.

The 6th principle is that refusal to grant the stay would inflict more hardship than it would avoid. Counsel argued that the applicant is a senior citizen and the disputed land is his other source of livelihood for his family. Refusal to grant would inflict more harm to him compared to the respondents who have never occupied this land. Court has powers to stay where it appears to be equitable.

Counsel concluded that the respondents had not challenged the application on the likelihood of success only that they were demanding 150 Million as security deposit. Counsel also attacked the affidavit in reply of the applicant sworn by their advocate as defective. The advocate was deponing on matters which are only in the knowledge of the respondent. He argued that courts have consistently warned advocates not to depone affidavits on facts which are only in the knowledge of their clients. He cited ***Tendo Kabenge Advocates Vs Mineral Access Systems (U) Ltd, HC C MA 565/2011*** to support this argument.

Counsel for the respondent did not submit on the grounds/principles for granting of stay apart from security for due performance. He argued that he would not oppose the application provided the status quo is maintained and the respondent remains the registered proprietor and is given rights of a registered proprietor including taking possession of the land. He also argued that the respondent should provide security for costs. He argued that court has no discretionary powers to grant security or not. The law is couched in mandatory terms that security must be given in matters for stay of execution

The principles under which an application of stay of execution can succeed were well espoused in the case of ***Lawrence Musiitwa Kyazze Vs Eunice Businge, Supreme Court Civil Application No 18 of 199***⁰, but more pronounced in the Supreme Court Case of ***Hon Theodore Ssekikubo and Ors Vs The Attorney General and Ors Constitutional Application No 03 of 2014***. They include:

1. The applicant must show that he lodged a notice of appeal
2. That substantial loss may result to the applicant unless the stay of execution is granted.
3. That the application has been made without unreasonable delay.
4. That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

The Court of ***Appeal in Kyambogo University Vs Prof. Isaiah Omolo Ndiege, CA No 341 of 2013*** expanded the list to include:

1. There is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory
2. That the application is not frivolous and has a likelihood of success.
3. That refusal to grant the stay would inflict more hardship than it would avoid.

Regarding the first principle that there should be a pending appeal, the applicant annexed a notice of appeal to this application. The said notice of appeal was received by the Court of Appeal on the 27th January 2017. The Judgment of the High Court was read on the 11th day of January 2017. The notice of appeal was filed within the prescribed time by the law and is therefore validly before the court of appeal. I find this principle complied with by the applicant

The second principle that substantial loss may result, I refer to the affidavit in support of the applicant's application. In paragraph 7, he avers that he has been farming on the suit land since 1974 where he built a modern residential house, planted vast Eucariptus plantation with Mature trees, developed a modern Diary Farm with exotic cows and grew a range of commercial crops and unless the execution of the decree in HCCS No 51 of 2012 is stayed, he will suffer irreparable loss. In paragraph 8, he states that he has nowhere to move his exotic cows if execution is allowed to proceed. It is clear from these two paragraph that substantial loss would occur to the applicant if execution is not stayed. The applicant would lose his house, his cows and his trees plus a dwelling house and food crops. I did not receive any evidence to the contrary from the respondent and I find that the applicant has fulfilled this principle.

The third principle that the application has been made without unreasonable delay, I have already indicated above that Judgment was read on the 11th day of January 2017, a notice appeal was lodged on the 27th of January 2017 and this application was lodged on the 9th of February 2017. It is my considered view that this application was lodged without unreasonable delay. This principle was satisfied by the applicant.

The fourth Principle that there is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory. It was brought to my attention by counsel for the respondent that the respondent was already registered as proprietor on the certificate of title in furtherance of the decree. What was pending was eviction of the applicant. It is clear that there is eminent danger of execution of the decree to its conclusion. This ground is satisfied.

The fifth principle that the application is not frivolous and has a likelihood of success, I have perused the Judgment, the application and proceedings. The applicant raised pertinent appealable issues that would call for court of appeal to determine whether the trial Judge did not misdirect herself. It should be noted at this stage, I'm not required to look at the Judgment substantively as I'm not a Court of Appeal, lest I be accused of revising my sisters Judgment. Even the Court of Appeal is not expected to look at the substance of the appeal. It is sufficient to establish whether there are grounds with a probability of success. Although I have no memorandum of appeal before me, the affidavit in support of the application gives clear appealable issues that require court's attention. For example, it is clear from the Judgment of the High Court that the applicant has been in occupation of this land from 1974. The respondents became entitled to this land by succession. Having in mind the Limitation Act S. 6, I'm persuaded that the Court of Appeal needs to look into this. The section provides:

Where any person brings an action to recover any land of a deceased person, whether under a will or on intestacy, and the deceased person was, on the date of his or her death, in possession of the land or, in the case of a rent charge created by will or taking effect upon his or her death, in possession of the land charged, and was the last person entitled to the land to be in possession of it, the right of action shall be deemed to have accrued on the date of his or her death.

This is an appealable issue that requires digestion by the court of appeal. There are other issues raised by the applicant, if found valid by the Court of Appeal would affect the validity of the High Court Judgment. For example, a not existent case in the magistrate court which the trial Judge relied upon, the reliance on a witness statement when there was no cross examination, and other issues as highlighted above. I am convinced that the applicant has discharged his burden on this ground.

The sixth principle that the applicant has given security for due performance of the decree or order as may ultimately be binding upon him, I am of the view that every application should be handled on its merits and a decision whether or not to order for security for due performance be made according to the circumstances of each particular case. The objective of the legal provisions on security was never intended to fetter the right of appeal. It was intended to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In essence, the decision whether to order for security for due performance must be made in consonance with the probability of the success of the appeal. There can never be cases with similar facts. As it was held in the case of ***Hon Theodore Sekikubo*** cited above, the nature of decision depends on the facts of each case, as situations vary from case to case. I am persuaded by the decision of my sister Judge Hon Lady Justice Wolayo In ***Amuanaun Sam Vs Opolot David MA No 3 of 2014*** that the status of the applicant should be put into consideration in order to decide whether security should be ordered or not. The applicant is a senior advocate in this country and I believe he appreciates the effect of not honouring his legal obligation on his credibility as well as his practice. In effect, I shall not order for security for due performance.

Consequently, I allow this application. Costs shall abide by the results of the appeal.

Flavian Zeija

JUDGE

16.7.2017

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Prepared on 14 October 2026 · Esheria