

UGANDA / JUDGMENT

Kisekka v Rwabunyoro (Civil Application
1131 of 2023) [2024] UGCA 239 (3 May 2024)
[2024] UGCA 239

COURT

Court of Appeal of Uganda

BEFORE

Monica K. Mugenyi, JA

CASE / FILE NUMBER

Civil Application 1131 of 2023

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THE COURT OF APPEAL OI. UGANDA AT KAMPALA

(Coram: Monica K. Mugenyi, lA, sitting as a Single ludge)

CIVIL APPLICATION NO. 1131 OF 2023

o (Arising from Civil Application No. 1 1'1 1 oI 2023)

KISEKKA GEORGE

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(suing through his lawful Attorney Musore Frank Kisekka) APPLICANT

VERSUS

RWABUNYORO DAVID MUGUME RESPONDENT

Civil Application No.l l3 I of 2023

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RULING**A. Introduction**

- 1. This Application was brought under Rules 2(2), 6(2)(b) and 43(1) of the Judicature (Court of Appeal Rules) Directions S.1 13-10 ('the Court of Appeal Rules'). The Applicant seeks an interim order of stay of execution in respect of the decision by the High Court sitting at Mubende in Miscellaneous Application No. 187 of 2022 until the determination of Civil Appeal No. 632 of 2023.
- 2. The background to this Application is that the Applicant filed Civil Suit No. 272 of 2021 in the Land Division of the High Court at Kampala. The file was transferred to the High Court in Mubende and re-assigned Civil Suit No. 16 of 2021. The High Court in Mubende did in Miscellaneous Application No. 187 of 2022 rule that the plaint in that suit did not disclose a cause of action and dismissed the suit on that premise. Dissatisfied with that result, the Applicant filed a notice of appeal and Miscellaneous Application No. 53 of 2023 in the High Court at Mubende for leave to file an appeal and stay of execution but the application was subsequently dismissed for want of prosecution. The Applicants then filed Civil Application No 1111 of 2023 in this Court for stay of execution, as well as the present application for interim orders.
- 3. The application for interim orders is supported by the affidavit of Mr. Frank Musore Kisekka that was lodged in this Court on 24th October 2023. It is opposed by the Respondent, who filed an affidavit in reply to that effect.
- 4. At the hearing of this Application, the Applicant was represented by Mr. John Bosco Mudde while Mr. Edris Musimani represented the Respondent.

B. Parties' Legal Arguments

- 5. Learned Counsel for the Applicant cited Hon. Theodore Ssekikubo & 3 Others v Attorney General, Constitutional Application No. 6 of 2013 (SC) and Hwan Sunq Industries Ltd v Taidin Hussein & 2 Others, Civil Application No 19 of 2008 (SC) for the proposition that for purposes of interim orders of stay of execution, it suffices to show that a substantive application is pending and that

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there is a serious threat of execution before the hearing of the substantive application. It is argued that the dismissal of Civil Suit No. 16 of 2021 by the High Court exposes the Applicant to the threat of eviction from the suit land.

- 6. Additionally, it is submitted that the caveats previously lodged in respect of the suit land have since been withdrawn, leaving a serious threat of alienation of the land to third parties, which would affect the status quo pending the disposal of Civil Appeal No. 632 of 2023. Furthermore, by filing their partially taxed bill of costs, there is a lurking danger of the Respondent and his agents executing the High Court's order(s) if an interim order is not granted.
- 7. Conversely, learned Respondent Counsel cites *Lawrence Musiitwa Kyazze v Eunice Busingye*, Civil Application No. 18 of 1990 (SC), which lays emphasis on the pre-requisites in Order 39 of the Civil Procedure Rules, to argue for security for costs that were in this case taxed at Ushs. 123,109,400. It is further opined that Miscellaneous Application No. 53 of 2023 having been dismissed for want of prosecution, the present application does not fall within the exceptional circumstances that would warrant the filing of an application for stay of execution in the Court of Appeal. Counsel argues that this is an abuse of Court process as the Applicant ought to have sought a reinstatement of the dismissed application.
- 8. Reference is further made to *Zubeda Mohammed & Another v Laila Kaka & Another*, Civil Reference No. 7 of 2016 (SC), where the conditions for the grant of interim orders were highlighted, for the proposition that the alleged threat of execution is untenable since the Respondent has not filed any applications for execution and, in any case, there is no proof of substantive application for stay of execution having been filed. Counsel contends that the intended appeal has no merit as the Applicant did not seek leave to appeal before lodging the appeal in this Court, the initial application for leave to appeal having been dismissed for want of prosecution. It is further argued that execution has already ensued and the land comprised in Singo Block 780 Plot 3, land at Kanywamahuri was sub-divided and sold to third parties.
- 9. No rejoinder was forthcoming from the Applicant therefore this Application shall be determined on the basis of the submissions on record.

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C. Court's determination

- 10. Upon careful consideration of the parties' submissions, I am constrained to observe that I am not at liberty to interrogate the merits of either the substantive application that is pending determination by the fully constituted Court or the issues for determination on Appeal that have in some measure been alluded to by both parties.

- '1 1. The grant of interim orders is governed by Rule 2(2) of the Court's Rules. That procedural rule recognizes this Court's inherent power to 'make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court ... and shall be exercised to prevent abuse of the process of any court caused by delay.' The conditions that should be satisfied for the grant of interim orders of stay of execution were delineated in *Hwan Sunq Industries Ltd v Taidin Hussein & 2 Others* (supra) as follows

For an application for an interim order of stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application. It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.

12 In the latter cases of *Zubeda Mohammed & Another v Laila Waia & Another* SC Civil Reference No. 7 of 2016 (supra), the Court reviewed and summed up those conditions as follows:

> In summary, there are three conditions that an Applicant must satisfy to justify the grant of an interim order;

- i. A competent notice of appeal
- ii. A substantive application
- iii. A serious threat of execution
- 13. In *Theodore Ssekikubo & 2 Others v Attorney General & 4 Others*, Constitutional Application No. 4 of 2014, the preservation of parties' right of appeal was adjudged by the Supreme Court to speak to the ends of justice. In that case, the court did also allude to the role of interim orders in preserving the status quo so as to allow for the determination of the issues in contention between the

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parties by the full court. See also *Uganda Revenue Authority v Nsubuga Guster & Another*, Miscellaneous Application No. 1 of 2018 on the preservation of parties' right of appeal as an end of justice

- 14. Additionally, it is now the law that for an application for interim orders of stay of execution to succeed there must be a substantive application for the same relief in respect of a pending Appeal, as well as imminent threat of execution of the lower court's orders before the determination of the substantive application. The existence of a Notice of Appeal is a *res qua non*. See *Patrick Kaumba Wiltshire v Ismail Dabule*. Civil Application No. 3 of 2018 (SC) and *Theodore Ssekikubo & 2 Others v The Attorney General & 4 Others* (supra)

- ¹5. The circumstances of the present Application are that a notice of appeal was filed in a matter that is not amenable to an automatic right of appeal without securing the requisite leave to appeal. In *Lukwaqo Erias & Another v Attorney General & Another*, Civil Application No. 6 of 2014 (SC) it was held:

The right of appeal is a creature of Statute. There is nothing known in law as an inherent right of appeal. The legal foundation for application for stay of execution pending an appeal is the right of appeal to the proper Court and the fact that a Notice of Appeal has been filed in that Court. Where a Notice of Appeal has been filed but the right of appeal does not exist, the Notice of Appeal is inoperative and cannot form the basis for an application for stay of execution pending appeal, as there is no pending appeal. [Emphasis mine]

16. On that premise alone, the present application would fail. I find no reason to delve into any other matters as the absence of a pending appeal would unravel any quest for interim or interlocutory orders that are by their very nature dependant on the same.

D. Conclusion

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17. In the result, this Application is dismissed with no order as to costs.

It is so ordered.

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rMonica K. Mugenyi Justice of Appeal

. This judgment was signed before this judge ceased to hold that office.

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