

UGANDA / JUDGMENT

Olivia Orishaba v Ngobi Anthony
(Miscellaneous Application 118 of 2023)
[2023] UGHC 240 (20 October 2023)
[2023] UGHC 240

COURT
High Court of Uganda

BEFORE
Bukirwa, J

CASE / FILE NUMBER
Miscellaneous Application 118 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT Jinja
MISCELLANEOUS APPLICATION No. 118 of 2023 (ARISING FROM MISCELLANEOUS APPLICATION No. 117 of 2023) (ARISING FROM MISCELLANEOUS APPLICATION No. 49 of 2023) (ARISING FROM MISCELLANEOUS CAUSE No. 24 of 2023)

OLIVIA ORISHABA-----VERSUS

NGOBI ANTHONY-----

BEFORE HON: JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI

RULING

This application was brought by the applicant under Section 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act Order 52 Rule 1,2, & 3 of the Civil Procedure Rules S. I. 71-1 for orders that:

- An interim order doth issue for staying the implementation of the Ruling and $\dot{i}$.
Orders of this Court made against the applicant in Miscellaneous Cause No. 24 of 2022 until the hearing and final disposal of the Applicant's main application for stay of execution vide Miscellaneous Application 117 of 2023.
- $\ddot{i}$. Costs to be provided for.

Representation

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At the hearing, the Applicant was represented by Edgar Kakoma and the Respondent was represented by Counsel Isabirye John.

The application was supported by the affidavit of the applicant sworn on the 16th day of May 2023 and briefly the grounds are: -

- a) That the respondent instituted a suit against the applicant Vide Miscellaneous Cause No. 24 of 2022, under the Human Rights (Enforcement Act 2019 seeking among others, an order that the motor vehicle Toyota Wish No. UBE 010L allegedly wrongfully detained at Kamuli Police Station by the Applicant be released in the favour of the Respondent.

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- b) That the said motor vehicle was impounded by the Police at CID headquarters Kampala, put in custody of Kamuli Police Station and is an exhibit in a criminal case at the Chief Magistrates Court at Kamuli Vide CRB 1122/2021 which case is still under hearing and is yet to be determined.
- c) That although the Respondent sued the applicant by virtue of her being the Officer in charge of Criminal Investigations at Kamuli Police Station, she has since been transferred to Kabalye Police Training School.
- d) That the Ruling was entered against the applicant in favour of the respondent for general damages in the sum of UGX 6,000,000/ \$=\$, costs of the suit and the Respondent was also ordered to release the said motor vehicle which is not in her custody but rather in the custody of the Police at Kamuli Police Station.
- e) That the Ruling was entered on the 3rd day of March 2023 against the applicant and given her dissatisfaction with the same, she filed this instant application for review of the said Ruling and order in this court vide Miscellaneous Application No. 49 of 2023.
- f) That the applicant has also filed an application for orders of stay for execution of the ruling and orders of this court in Miscellaneous Cause No. 24 of 2022 and the same is pending determination by this Court.
- g) That while the applications for interim stay, stay of execution and review are pending hearing and final disposal, there is an imminent threat of execution of the orders against the applicant.
- h) That if execution is not stayed, the applicant will suffer substantial loss, as she will be compelled to pay colossal sums of money.

- i) That once that sum is recovered through execution proceedings, the applicant is unlikely to recover it if the application for review succeeds and in any case, the substantive application for stay of execution and review will be rendered nugatory.
- j) That the Respondent is determined to execute the orders of Miscellaneous Cause No. 24 of 2022 from which the application for review arises which shall in turn render the application for stay of execution and review nugatory.

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The respondent opposed this application and filed an affidavit in reply which was sworn by the respondent on the 8th day of June 2023 and briefly the grounds are: -

- That the respondent was informed by his lawyers of M/s Isabirye & Co. Advocates which information he verily believes to be true that the present application is incompetent, bad in law and is devoid of any merit and a preliminary objection shall be raised at the earliest opportunity for dismissal in as far as:
 - a) The instant application does not satisfy or meet the test for the grant of an interim order of stay of execution.
 - b) That the application is res-judicata.
- That in specific reply to paragraphs 3 and 4 of the Applicant's affidavit in ii. support of the application, the respondent was informed by his lawyers of which information he verily believes to be true that the averments contained therein are res-judicata since the same have been adjudicated upon by this Honorable Court in Miscellaneous Cause No. 24 of 2022.
- That in further reply to paragraph 5 of the Applicant's affidavit in support of iii. the application, the applicant has since obdurately ignored and refused to comply with the orders of court vide Misc. Cause No. 24 of 2022 and through his lawyers had instituted contempt proceedings against her in this Honorable Court.
- That in specific response to paragraph 7 of the Applicant's affidavit in support iv. of the application, the respondent was informed by his lawyers of which information he verily believes to be true that the proposed grounds for stay of execution in the main application are devoid of any merit and the same application has no likelihood of success since;
 - a) The main application is incompetent as it was served on the respondent out of time as stipulated by law.
 - b) The main application was filed after a reasonable delay and after the applicant failed to comply with Court orders in Misc. Cause No. 24 of 2022.

- c) That the applicant has failed to prove substantial loss which cannot be atoned by way of damages in the main application.
- d) That the main application for stay of execution is speculative and therefore incompetent.
- That in specific response to paragraph 8 of the applicant's affidavit in support \$V\$. of the application, there is no imminent threat of execution since the respondent had not issued any notice or warrant of execution to the applicant.

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- That in further response to paragraph 8 of the applicant's affidavit in support vi. of the application, the respondent was informed by his lawyers of which information he verily believes to be true that the filing of the bill of costs in this Honorable Court does not amount to an imminent threat of execution.
- That the contents of paragraphs 9 and 10, 13,14 and 15 are denied in toto and vii. the applicant shall be put to strict proof thereof.
- viii. That in specific response to paragraphs 11 and 12 of the applicant's affidavit in support of the application, the applicant has a right of appeal against the orders in Misc. Cause No. 24 of 2002 in case she is aggrieved by the same.
- That in specific response to paragraph 16 of the Applicant's affidavit in ix. support of the Application, this application has been filed after a reasonable delay in so far as it was filed after 2 months and 27 days after judgement was delivered against the respondent in Misc. Cause 24 of 2022.
- That this application is frivolous, lacks merit and is an afterthought that has \$X\$. been filed by the applicant to defeat the orders in Misc. Cause No. 24 of 2022 and that this Honorable Court should dismiss it with costs.

The applicant further swore an affidavit in rejoinder dated the 13th day of June 2023 and briefly the grounds are: -

- That in specific reply to paragraphs 4, 4.1 and 4.2 of the Respondents $\mathbf{i}$. affidavit the applicant was informed by her lawyers that the instant application, contrary to what is deponed in the reply has merit. is not bad in law and is not incompetent.
- That's in in response to paragraph 5 of the respondent's affidavit, the ii. applicant was informed by her lawyers that the averments in paragraphs 3 and 4 of her affidavit in support are not res-judicata but rather statement of facts.

- That in response to paragraphs 6 and 7 of the respondent's affidavit the iii. applicant has not refused to comply with the orders of Court but rather the said orders were issued in vain as she has never detained the respondent's motor vehicle and neither does she have it in her possession.
- That further in addition to paragraph 6 and acting on the advice of her iv. lawyers, the purpose of the Miscellaneous Application No. 49 of 2023

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is to among others to show cause that the said orders were issued in vain and showed be reviewed.

- That in response to Paragraph 8 of the respondent's affidavit, she was \$V\$. informed by her lawyers that her main application for review has merit and has a high likelihood of success.
- That in response to paragraphs 8.1. and 8.2 of the respondent's vi. affidavit, she was informed by the lawyers that the main application is competent as the applicant sought extension of time to serve the said Miscellaneous Application No.93 of 2023. That in addition to paragraph 9 the said application seeking the extension of time was heard and granted by this honorable court on 18th May 2023 and that the filing of the main application was not reasonably delayed.
- vii. That in response to paragraphs 8.3 and 8.4 of the respondent's affidavit in reply, the orders of Court which sought to be reviewed were issued in vain and execution of the same ought to be stayed until the main application is disposed of.
- That in response to paragraphs 8.5 of the Respondent's affidavit in viii. reply, there is imminent threat to execution as the respondent has written to applicant's employer seeking that the applicant and her employer comply with the court order in Miscellaneous Cause No.24 of 2022 or else face contempt of court proceedings.
- That in response to paragraphs 9, 10, 11 & 12 the respondent's affidavit ix. in reply, there is an imminent threat of execution against the applicant as the respondent has written correspondences threatening the applicant's lawyer to comply with the court order.
- That the instant application has not been inordinately delayed given the \$X\$. imminent threat of execution arose on the 23rd May 2023 when the respondent threatened the applicant and her employers with contempt of court proceedings for failure to comply with the court orders vide Misc. Cause No. 24 of 2022.

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Court has observed that this application first came up for hearing before the His Worship Waninda Fred K. B the Deputy Registrar of this Court. Counsel for the respondent prayed to cross examine the applicant on her affidavit in support which prayer was granted. However, the Deputy Registrar declined to hear the application any further and referred the matter to the Trial Judge. Both Counsel made oral submissions in this application and reiterated most of the contents of their respective affidavits on record.

Consideration by Court

Before proceeding into the merits of the application, I wish to first dispose of the preliminary objection raised by the respondent's counsel that the application is resjudicata since the issues raised in this application were already decided under Misc. Cause No. 24 of 2022 by this Court.

The law of on Res-judicata**Section 7 of the Civil Procedure Act Cap 71 provides that: -**

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court."

Justice Stephen Mubiru in the case of Onzia Elizabeth Vs Shaban Fadul (as Legal Representative of Khemisa Juma in the High Court of Uganda sitting at Arua in Civil Appeal No. 0019 of 2013 citing the case of Ponsiano Semakula v. Susane Magala and others (1993) KALR 213 explained the doctrine of res-judicata as follows: -

"The doctrine of res-judicata, embodied in Section 7 of the Civil Procedure Act, is a fundamental doctrine of all courts that there must be an end to litigation. The spirit of the doctrine succinctly expressed in the well-known maxim: 'nemo debet bis vexari pro una et eadem causa' (No one should be vexed twice for the same cause). Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded forever between the parties. The test whether or not a suit is barred by res-judicata appears to be that the plaintiff in the second suit trying to bring before the court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res-judicata applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time".

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Further quoting the case of Boutique Shazim Limited v. Norattam Bhatia and another, C. A. Civil Appeal No.36 of 2007, it was held that essentially the test to be applied by Court to determine the question of res judicata is this: is the plaintiff in the second suit or subsequent action trying to bring before the Court, in another way and in the form of a new cause of action which he / she has already put before a Court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of *res judicata* applies not only to points upon which the first Court was actually required to adjudicate but to every point which belonged to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the

In the instant case the applicant filed an application for the interim stay of execution arising from Misc. Application No. 117 of 2022 which is for stay of execution also arising from Misc. Application No. 49 of 2022 for review of the Judgment and Orders under Miscellaneous Cause No. 24 of 2022. From the above cited law and the cited cases this application doesn't fall into the category of res-judicata as it's not a fresh suit but an application arising from an application of the review of the decision that was issued by this court under Miscellaneous Cause No.24 of 2022. Therefore, from the foregoing, I don't find merit in this preliminary objection and overrule the same.

Looking at the merits of this application and in reference to the inherent jurisdiction and inherent powers of this Court is important. Section 98 of the Civil Procedure Act provides that: -

"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"

The criteria for grant of an interim stay of execution was decided in the case of Hwan Sung Industries Ltd Vs Tojdin Hussein and 2 Others, Supreme Court Civil Application No 19 of 2008 where the court held that: -

"---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."

Therefore, in summary the applicant must demonstrate to Court that;

1. There is a substantive application pending before the Court.

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2. There is a serious threat of execution before the hearing of the pending substantive application.

Regarding the ground as to whether there is a substantive application pending before this Court in the instant application, I am not satisfied that there is a substantive application for stay of execution under Misc. Application No. 117 of 2022 pending before this Court as the same has never been filed and endorsed by this Court nor served on the Respondent.

I will now turn to determine whether the Applicant has sufficiently demonstrated that she faces a serious threat of execution before the hearing of the substantive application. In a matter I find similar to the instant case before me, which I will replicate verbatim, is the case Mohammed Mohamed Hamid v Roko Construction Ltd (Miscellaneous Application No. 23 of 2017) [2017] UGSC 77, the Late Hon Justice Arach Amoko stated that: -

"Regarding the third condition, it is clear from the authorities cited above, that the law is that the applicant must adduce cogent evidence of a serious imminent threat of execution. The applicant deponed in paragraphs 4 and 5 that the respondent has taken steps towards execution of this court's judgment No.14 of 2015. That the steps include but are not limited to filing for taxation of bills of costs in this court arising from the impugned judgment and that this application is made to stay the imminent probability of execution so that Miscellaneous Application No.22/17 and Miscellaneous Cause No.18/17 are not rendered nugatory.

Other than this averment, the applicant has not adduced any evidence of execution of the judgment. I also note that the applicant mainly pointed out the issue of taxation of bills of costs as a threat to execution. Taxation of bills of costs is provided under Rule 105 and the third schedule of these Rules. It is the duty of the Registrar to tax the bill of costs of a successful party in accordance with the Rules. If a party is dissatisfied with the decision of the registrar in his capacity as the taxing officer, he or she may make a reference to a single judge and finally to a full bench as provided under **Rule 106**.

In the instant application, there is no conclusive evidence adduced or attached by both parties to prove that the bill has been taxed by the taxing officer and therefore in my opinion there is nothing to stay. Further, there is no evidence adduced to show that there is an application for execution of the taxed bill. In my judgment, therefore, I find no evidence of any imminent threat of execution upon which this court can base the exercise of its discretion to grant this application."

In the instant case the applicant filed an application for the interim stay of execution and under Paragraphs 8 and 9 of her affidavit in support of the application indicated that while the application for interim stay, stay of execution

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and review are pending hearing and final disposal by Court, she faces an imminent threat of execution of the orders of Court in M. C 24 of 2022. She attached a Bill of Costs filed by the Respondent for taxation as evidence of this imminent threat.

The applicant also indicated that if execution is not stayed, she will suffer substantial loss as she will be compelled to pay colossal sums of money and once the same is recovered through the execution proceedings, it is highly unlikely that she will recover it if the application for review succeeds. Therefore, citing the case of Mohammed Mohamed Hamid v Roko Construction Ltd (supra) the applicant has not proved any imminent danger which warrants therefore the grant for the interim order to stay the implementation of the orders of this Court in MC 24 of 2022. The filing of the bill of the costs by the Respondent does not justify that there is an imminent threat to the Applicant in the absence of proof of the attendant processes attached to the filing of the Bill of Costs.

The applicant's argument that the application filed by the Respondent for Contempt of Court against the Applicant amounts to a threat to the Applicant is disturbing and untenable. I am in total agreement with the argument of Counsel for the Respondent that the outcome of the application for contempt of court is unknown and therefore cannot constitute a threat. The Applicant is rather speculative in this respect.

It should be noted that the two grounds for grant of interim stay of execution should be both be proved. The applicant has failed to prove the existence of a substantive application for stay of execution and has further failed to prove that she faces a serious threat of execution.

In the premises, I dismiss this application with costs to the Respondent.

FARIDAH SHAMILAH BUKIRWA NTAMBI

JUDGE

Ruling delivered on 20th October, 2023.

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