

UGANDA / JUDGMENT

Ssentongo v Muwonge and Another (Miscellaneous Application 248 of 2024) [2024] UGHCLD 58 (4 March 2024) [2024] UGHCLD 58

COURT

HC: Land Division (Uganda)

BEFORE

Nkonge, J

CASE / FILE NUMBER

Miscellaneous Application 248 of 2024

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT
KAMPALA (LAND DIVISION) MISCELLANEOUS APPLICATION NO. 248 OF 2024
(ARISING OUT OF CIVIL SUIT NO. 454 OF 2014)

EDWARD KABUGO SSENTONGO ::::::::::::::::::::::::::::::::::

VERSUS

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- 1. ANDREW MUWONGE ::::::::::::::::::::::::::::::::::
- 2. LENARD PRICE (suing through his lawful attorney, NSAMBA MICHAEL)

RULING:

This application is brought under 043 r 4 & 5 and Order 53 rr 1 & 2 C. P. R SI 71-1, S.98 of the C. P. A Ca/ 71) seeking orders that the execution of the judgement and orders/declarations of this court in HCCS no. 454 of 2014 delivered on \$12^{th}\$ January, 2024 be stayed pending the hearing and disposal of the applicants' intended appeal against part of the judgement and orders/declarations, or until

Grounds of the application:

\$25\$ The grounds in support of this Application are set out in the affidavit of EDWARD KABUGO SSENTONGO, the applicant, but briefly that:

further orders of court and for costs of this application be provided for.

1. On 12/01/2024, judgment in the suit was delivered for orders and declarations that:
 - a) The 2nd plaintiff had no cause of action against the defendant; and other than a refund of the money paid as consideration to which he was entitled, he has no other enforceable right over the suit land.

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- b) The 1st plaintiff did not enter into a valid contract with the defendant, accordingly the agreement is unenforceable against both parties.
- c) The defendant is entitled to a refund of monies paid as consideration to the 1st plaintiff in respect of the suit land within a period of sixty days from the date of delivery of this judgment, upon which the defendant shall immediately return to him the certificate of title for plot 2.
- *d) The defendant is entitled to the first option to purchase the land on fresh terms* \$10\$ and conditions as may be agreed upon, taking into account the existing bibanja and any other interests validly existing on the land; and after securing the required consent from the lessor.
- \$15\$ *e)* Each party to meet their own costs

The applicant being dissatisfied and aggrieved by part of the judgement and orders/declaration, filed a notice of appeal and requested, in writing, for typed and certified copies of the record of proceedings and judgment in the suit (the request) to enable him file and peruse his appeal.

That the 1st respondent through *M/s Asasira & Co. Advocates* has initiated the process of executing the judgment and orders/declarations of the court in the suit with the intention of selling the land.

- If the stay of execution is not granted, the 1st respondent, who is in physical \$25\$ possession of the land, will dispose of the land and the applicant will suffer substantial loss as, according to the 1st respondent's own assessment, the land is valued approximately *Ugx 4 billion*.
- 30 If stay of execution is not granted, the applicant's intended appeal against part of the judgement and orders/declarations in the suit will be rendered nugatory.

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The applicant is ready and willing to deposit security that the court may determine for costs or for the due performance of the decree and orders in the suit in case his intended appeal is not successful

That given that the applicant filed a notice of appeal and request on the 19/01/2024, having received judgement on 15/01/2024, this application has been made without inordinate delay.

Reply by the respondent:

\$10\$

In response, the respondent avers that the application was frivolous, vexatious and misconceived aimed at abusing the court process; and should be dismissed with costs to the respondent and that it was served prematurely on the respondents and therefore incompetent.

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That in compliance with the said judgment, on 17th January 2024, the first respondent wrote to the applicant asking him to avail his bank account details where the refund of monies he paid as consideration can be deposited.

That on the same day and in the same correspondence, the 1st respondent the first \$20\$ option to purchase the land at the consideration of *Ugx. 40,000,000/= (Forty* **million shillings only**) per acre squatter free, asking him to respond to the offer in a period of fourteen (14) days from the date of the correspondence. (A copy of the said correspondence was annexed and marked "B").

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However, that the 14 days elapsed without the applicant saying anything on the offer. That as communicated in the correspondence, the 1st respondent took it that the applicant was not interested in purchasing the land and he has sold the land to the 2nd respondent who was and is still interested in it. (A copy of the sales agreement is hereto annexed and marked "C").

In rejoinder the applicant claimed that he could not avail his bank account details to the 1st respondent or take the offer to purchase the suit land; and that he found the contents of paragraph 3(g) and (h) of the 1st respondent's affidavit in reply contradictory as a litigant cannot apply for execution of a decree which has already been executed.

\$\mathsf{S}\$ Representation:

The applicant was represented by \$M/s\$ UNITED ADVOCATES while the 1st respondent was represented by \$M/s\$ Asasira & Co. Advocates.

\$10\$ Consideration of the issues by court

Counsel for the applicant referred to the case of Attorney General vs. Eddie Kwizera, Constitutional Application No. 1 of 2020, where the Supreme court, citing earlier cases on the matter, enumerated the basic conditions that must be satisfied by an applicant for grant of an order for stay of execution as follows:-

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1. The lodgment of a notice of appeal and request for certified copies of the record of proceedings to enable him or her file a memorandum of appeal.
- 2. That the appeal has a high likelihood of success/prima facie case has been made out.
- \$20\$
- 3. That the applicant shall suffer irreparable loss if the stay of execution is not granted or that the appeal will be rendered nugatory if the stay is not granted;
- 4. If 2 and 3 have not been established, the Court considers where the balance of convenience lies;
5. That the application has been lodged without undue delay; I will consider each of these independently.

Was there delay in filing this application:

According to para 10 of the applicant's affidavit in support, a copy of the judgment 30 was received on 15th January, 2024 and the notice of appeal and request for the certified record of proceedings and judgment were filed on 19th January, 2024.

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I am satisfied that this application has been filed without undue delay.

1. The Lodgment of a Notice of Appeal and request for certified copies of proceedings to enable the applicants file a memorandum of appeal.

It is not in dispute that a notice of appeal was filed and the applicant in addition requested, in writing, for typed and certified copies of the record of proceedings and judgment to enable him file and pursue his appeal. (Refer to Annexures "B" & "C" on the affidavit of support.

This is clear indication that there is a pending appeal.

2. That the Appeal has a high chance of success/prima facie case has been made out

The question as to whether or not the appeal has high chances of success would be pre-emptive as it goes into the merits of the pending appeal. Suffice to state that this is a decision for the appellate court to consider.

I would therefore not delve into its merits.

3. That the applicant shall suffer irreparable/substantial loss if the stay of \$15\$ execution is not granted or that the appeal will be rendered nugatory of the stay is not granted.

Counsel cited the case of **Tropical Commodities Suppliers Ltd & 2 Ors vs. International Credit Bank Ltd.** (In Liquidation), HCMA No. 379 of 2003, where

it was declared by court that substantial loss does not represent any particular \$20\$ amount or size.

It cannot be quantified by any particular mathematical formula. Rather, it is a qualitative concept that refers to any loss, great or small, that it of real worth or value as distinguished from a loss without value or a loss that is merely nominal.

- In *paragraph 6 and 7* of his affidavit in support it was stated by the applicant that:- \$25\$
- a) The \$1^{\text{st}}\$ respondent has initiated the process of executing the judgment and orders of the court in the suit with the intention of selling the land to any willing buyer;

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- b) If the stay of execution is not granted, the \$1^{\text{st}}\$ respondent, who is in physical possession of the land, will dispose of the land and the applicant will suffer substantial loss as, according to the \$1^{\text{st}}\$ respondent's own assessment, the land is valued approximately Ugx 4 billion, a substantial amount by any reckoning *(see Annexure "D" to the applicant's Affidavit in Support)*

Further, the applicant's intended appeal will be rendered nugatory if this application for stay of execution pending appeal is not granted.

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As pointed out by counsel for the applicant, I find the claim on the one hand that the sale has already taken place and on the other hand that execution is still pending, rather contradictory.

It goes without saying that the full execution of the judgment is yet to be concluded and that the possibility of incurring substantial loss cannot be ruled out.

Security for costs/due performance of the decree/orders:

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Counsel for the applicant pointed out that in Attorney General vs. Eddie Kwizera, **Constitutional Application** (supra) the Supreme Court did not consider the giving of security for costs or for the due performance of the decree or order as one of the conditions to be satisfied by an applicant for a stay of execution pending appeal.

- But the above notwithstanding, the applicant claims to be ready and willing to \$20\$ deposit security that the court may determine for costs or for the due performance of the decree and orders in the suit, in case his intended appeal is not successful, as per *paragraph 9* of the affidavit in support.
- In response to the applicant's claim on this issue however, the 1st respondent stated that the applicant failed to respond to the offer he made for him to purchase the \$25\$ land upon which he had filed the application MA No. 49 of 2024. That the land was subsequently sold off to the 2nd respondent who has always been interested in purchasing it.

In the above application, the applicant also seeks for an order of delivery of *Ugx*. 47,000,000/ into court or otherwise as the court may direct, (being the refund of 30 monies paid by the applicant to the 1st respondent as consideration in respect of

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the suit land); and also an arrest and detention of the defendant to civil prison until the time he returns the certificate of title for \$plot 2\$ to the plaintiff. (A copy of the application for execution and ECCMIS annexed and marked "D1" & "D2").

In the interest of justice however, since the applicant claims that he is willing to pay security for costs as set by court, and estimates the current value of the land to be Ugx 4 billion, I would grant this application for stay of execution on condition that 40% of the value (as estimated by the applicant) is paid as security for costs, within a period of 45 days from the date of delivery of this ruling.

Upon such failure to pay the said security of costs within the period as stated, the respondent shall proceed with the execution of the decree.

No orders to costs

Alexandra Nkonge Rugadya

Judge

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4th March, 2024 \$15\$

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