

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISC. APPLICATION NO. 358 OF 2016

ARISING OUT OF MISC. APPLICATION NO. 357 OF 2016

DAVID LUBUUKA APPLICANT

VERSUS

FRED JOEL NSOBYA RESPONDENT

CORAM: HON. JUSTICE S. B. K. KAVUMA, DCJ ✓

RULING OF THE COURT

10 Introduction

This is an Application for orders that:

1. An interim order be granted staying the execution of the exparte decrees in Civil Suit No. 95 of 2011 until the final hearing and determination of the Substantive Application.

15 2. The costs of this Application be provided for.

Background

The background to the Application is that the respondent instituted Civil Suit No. 95 of 2011 in the High Court of Uganda at Nakawa and obtained an exparte judgment and decree. The applicant filed Misc. Application No. 611 of 2015 to set
20 aside the exparte judgment and decree and the same was dismissed by court.

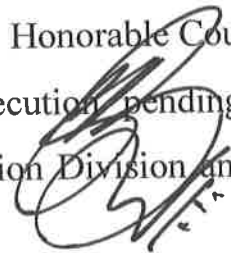
Being dissatisfied with the said court's Ruling, he lodged, in this Court, a Notice of Appeal on 18th March 2016. On the same day, the Applicant requested for a certified copy of the court's Ruling and the Record of Proceedings from the High Court to facilitate the institution of the Appeal but the same has not been availed to
25 him.

The Application is brought by way of Notice of Motion under Rules 2 (2), 6 (2) (b), 42 (2), 43 & 53 of the Judicature (Court of Appeal Rules) Directions S.1. 13-10. It is supported by the affidavit of David Lubuuka, the applicant, dated 23rd December 2016.

5 **Grounds of the Application**

The grounds upon which the Application is premised are stated briefly in the Notice of Motion and laid out in detail in the Affidavit in Support of the Application, wherein the deponent averred, *among other things*, as follows:

- 10 • The respondent applied and obtained warrant of arrest in execution of the decree without effectively serving me with the notice to show cause why execution should not issue against me.
- The affidavit of service alleging that service was effected on me contains falsehoods as no service has ever been effected.
- 15 • I have been advised by my lawyer of Mayende and Associated Advocates that failure to serve notice to show cause why execution should not issue makes the execution bad in law and can be set aside in the main application.
- The subject matter of the main suit is about land which has been registered in my name since 19th September 2008 and for which I have been in possession since 2003.
- 20 • The respondent proceeded exparte on a land matter dispute and obtained an exparte judgment which he has partly executed against me notwithstanding the fact that exparte judgment is subject of appeal in this Honorable Court.
- On the 1st day of June, I applied for stay of execution pending the determination of the Appeal in the High Court Execution Division and the
25 same was dismissed.



- There is great risk of the respondents fully executing the decree since the application for stay of execution before the High Court has been dismissed.
 - The appeal has high chances of success, since the subject of the appeal is the failure of the trial Judge to set aside an ex parte judgment on land matter which was obtained without my participation, and without any notice served to me.
 - I filed Misc. Application No. 357 of 2016 for stay of execution pending the appeal but the same has not been fixed for hearing.
 - If the execution is not stayed, the appeal lodged before this Honorable Court and the substantive application will be rendered nugatory.
 - The application for stay of execution has been made without any delay.
 - The subject matter of this appeal is a dispute involving land and I will be prejudiced if execution is allowed to proceed.
 - It is in the interest of justice that the execution be stayed pending the determination of the main application for stay of execution pending appeal.
- (Sic)

Representation

At the hearing of the Application, the applicant was represented by Mr. Grace Karuhanga, (counsel for the applicant). The respondent was not represented but he appeared personally.

The case for the applicant

Counsel for the applicant relied heavily on the Affidavit in support of the Application. He submitted that the Application fulfilled all the conditions for the grant of an Interim Stay of Execution. He stated that there was pending before this Court a substantive Application for Stay of Execution. He submitted that there was

an imminent threat of execution evidenced by the fact that the applicant was previously arrested after a Warrant of Arrest had been issued against him without giving him an opportunity to show cause why the same should not issue. He had to pay Shs.5M to be released. He noted further that the respondent did not file an Affidavit in Reply meaning that they had no objection to the Application.

Counsel prayed that in the circumstances, Court grants an interim stay of execution, sets aside the Warrant of Arrest and the Shs 5M the applicant had paid be refunded pending the hearing of the Substantive Application for Stay of Execution.

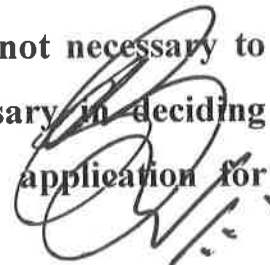
10 **The case for the respondent**

The respondent stated that there was no reason for the Application.

Court's consideration of the Application

In handling applications of this nature, Court is guided by well-laid down principles. These have been relied upon in numerous authorities. In **Hwang Sung Industries Ltd vs Tajdin Hussein and 2 others S.C. Civil Application No. 19 of 2008**. Okello, JSC stated it as follows:

20 "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".



In the instant Application, there is pending before this Court a Substantive Miscellaneous Application No. 357 of 2016, for stay of execution from which this Application arose. It is not contested that the applicant was arrested and had to pay Shs 5 Million to be released. That, in Court's view, is evidence that there is a real and imminent threat of execution.

Besides, the respondent's failure to file an affidavit in reply leaves the averments of the applicant in his Affidavit in Support of his Application uncontroverted and, therefore, taken as accepted. See **Gandesha and Another v G. J. Lutaaya SCCA No. 14 of 1989**. I, therefore, take it that all the averments made in the applicant's affidavit are accepted as truthful.

Basing on the above reasons and being satisfied that the criteria for granting the Application has been fulfilled, I find the instant, an Application where Court may exercise its discretion in favour of the applicant by granting an Interim Stay of Execution and I hereby do so in the terms following here below:

1. An interim order is hereby granted staying the execution of the exparte decrees in Civil Suit No. 95 of 2011 until the final hearing and determination of the Substantive Application for Stay of Execution pending in this Court.
2. The costs of this Application to abide the outcome of the said Substantive Application pending before this Court.

I so order.

Dated at Kampala this 10TH day of NOVEMBER 2017.


S. B. K. Kavuma
Deputy Chief Justice