

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA
CORAM: MUZAMIRU KIBEEDI, JA (SINGLE JUDGE)

CIVIL APPLICATION NO. 13 OF 2019

(Arising from Civil Application No. 12 of 2019 and Civil Appeal No. 1 of 2014)

BETWEEN

1. ROSEMARY BINWOMUKAMA] APPLICANTS
2. OLIVIA BUSOBOZI BAHWAYO]

AND

UGANDA WILDLIFE AUTHORITY RESPONDENT

RULING

This was an application by way of Notice of Motion under Rules 2, 6(2) & 42 of the Court of Appeal Rules, and “5, CPR, O.51 r6, O.52 rr1, 2, 3, S.98 CPA” (sic!). It sought from this court an Interim Order of Stay of Execution of the Judgment and Decree of the Justices of Appeal in Civil Appeal No. 1 of 2014 until the hearing and final disposal of the substantive application for stay of the execution pending before this court namely, Civil Application No. 12 of 2019. The Applicants also sought an order that the costs of this application be provided for.

Background Facts

From the record of this Court in this application, the judgment of this Court in Civil Appeal No. 01 of 2014 and the judgment of the High Court sitting at Fort Portal in Civil Appeal No. 54 of 2009 the background facts to this application appear to be as below:

The 1st Applicant is the registered proprietor of the property known as Plot 7 Tibaitwa Road – LRV 3786 Folio 3 whereas the 2nd Applicant is the registered proprietor of Plot 9 Tibaitwa Road – LRV 3786 Folio 4. In this Ruling, the properties will be jointly referred to as “the Suit Properties”.

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The Applicants obtained their respective leasehold titles from the Uganda Land Commission. At the time the Applicants applied for and were granted their respective leases, the suit properties were being occupied by the employees of the Respondents.

Further, Uganda Land Commission was holding the legal title to the suit properties as the trustee of the Respondent's predecessor-in-title, the Games Department.

Armed with their titles from the Uganda Land Commission, the Applicants instituted a suit in the Chief Magistrate's Court of Fort Portal at Fortportal against the Respondent claiming trespass on the suit property, vide FPT-LD-Civil Suit No. 10 of 2008. The Respondent denied being trespassers and claimed that the Applicants had illegally acquired the suit properties from the Uganda Land Commission which had all along held the said properties in trust for the Respondent and the Respondent's predecessors-in-title.

The trial Magistrate Grade I entered judgment in favour of the Applicants and among others granted them an eviction order. The Applicants executed the eviction order and took over possession of the suit properties from the Respondent.

On their part, the current Respondent appealed to the High Court of Uganda at Fort Portal, vide HCT-01-CV-CA No. 0054 of 2009.

In the judgment of the High Court delivered on 21st January 2013, court declared that the titles of the current Applicants to the suit properties were null and void for having been acquired contrary to the principles of natural justice.

The High Court also declared that the suit properties had vested in the current Respondent by law and outside the categories of properties that had been intended for disposal under the scheme for sale of Government Pool Houses. Accordingly, the High Court cancelled the Applicant's titles to the suit properties and ordered the Registrar of Titles to effect registration of the suit properties in the names of the current Respondent.

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The Applicants were dissatisfied with the decision of the High Court and appealed to the Court of Appeal, Vide Civil Appeal No. 01 of 2014. In the unanimous judgment of the three Justices of the Court of Appeal made on the 25th October 2018, the judgment of the High Court was upheld and Civil Appeal No. 1 of 2014 dismissed with costs to the Respondent.

The Applicants were dissatisfied with the decision of the Court of Appeal and on 05th November 2018 they filed in the Registry of the Court a Notice of Appeal against the whole decision of the Court of Appeal. A copy of the Notice of Appeal was likewise filed in the Supreme Court on 07th November 2018.

On 18th January 2019, the Applicants filed in the Court of Appeal Civil Application No. 11 of 2019 by way of Notice of Motion seeking the Orders that:

1. "Leave be granted to the Applicants to apply for a Certificate of Importance out of time.
2. A Certificate of Importance do issue to the effect that the Applicants' intended appeal against the decision of this Honourable Court in Civil Appeal No. 1 of 2014 concerns matters of law of grant of public and general importance.
3. Costs ..."

No date has been issued for hearing of the said application.

On 18th January 2019 the Applicants filed in the Registry of this Court Civil Application No. 12 of 2019 seeking an Order of stay of execution of the Judgment and Decree of the Justices of Appeal in Civil Appeal No. 1 of 2014 until the hearing and final disposal of the application for a Certificate of Importance and Substantive appeal.

The said application is likewise still pending before this court for disposal.

The Applicants also filed the instant application seeking "an Interim Order of Stay of Execution of the Judgment and Decree of the Justices of Appeal in Civil Appeal No. 1 of 2014 until the hearing and final disposal of an application for stay of execution".

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The Applicants' Case

The grounds upon which this application is based and the supporting evidence are set out in the Notice of Motion and the Affidavit evidence below:

- Ms Olivia Busobozi Bahwayo's Affidavit in Support of the application dated 15.01.2019 and filed in Court on 18.01.2019.
- Ms Olivia Busobozi Bahwayo's Supplementary Affidavit in Support of the application sworn on 14.02.2020 and filed in Court on the same day.

In brief, the Applicants case can be stated to be thus:

- That they have filed an application for a Certificate of Importance to appeal against the Judgment of the Court of Appeal in Civil Appeal No. 1 of 2014 to the Supreme Court. And that the said application has high chances of success.
- That they have likewise applied for stay of execution of the said Judgment pending the disposal of the appeal and that both the appeal and application have a high likelihood of succeeding.
- On 06.02.2020 the Senior Registrar of Titles of Kabarole Ministry Zonal offices, Fort Portal issued letters to the Applicants requiring them to produce the Certificates of Title to the suit property to his office within 21 days for cancellation in execution of the court orders.
- The respondent is in the process of executing the judgment and decree which will lead to an eviction.
- If the application for Interim Order is not granted, the Applicants will suffer substantial irreparable loss and the appeal and application will be rendered nugatory.

Respondent's Case

On 18th February 2020, the Respondent filed an Affidavit in Reply deponed upon by Mr. Ali Luzinda opposing the grant of the Interim Order as being devoid of any merit,

an abuse of the Court process and intended to deny the Respondent from enjoying the fruits of successfully litigating Civil Appeal No. 01 of 2014.

Submissions

The Applicants filed Written Submissions in Court on 14th February 2020 while the Respondent's Counsel filed his Written Submissions in Court on 18th February 2020. The Submissions will be referred to when Court is analyzing the cases of the parties in detail.

The parties appeared before Court on 18th February 2020 and adopted their Written Submissions. Ruling was reserved to be given on Notice.

Representations

The Applicants were represented by Mr. Emmanuel Twarebireho while the Respondent was represented by Mr. Chemonges Mongeya.

Applicable Law

The general context under which this application for Interim Order is made is to enable the Applicant challenge the decision of the Court of Appeal in the Supreme Court by way of 3rd appeal. The law applicable in this context is Rule 2(1) of the Judicature (Supreme Court) Rules, S.I. 13-11 which provides thus:

*"... the practice and procedure of the Court of Appeal in connection with appeals [**and intended appeals**] to the [**Supreme**] Court shall be as set out in these Rules." (Bolding mine for emphasis)*

The words above in bolding have been inserted by me for ease of reference following the definitions of the terms "**appeal**" and "**Court**" as set out in the Judicature (Supreme Court) Rules thus:

- "appeal" in relation to appeals to the Court includes an intended appeal" (see Rule 3(b)).

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- “Court means the Supreme Court of Uganda ...” (see Rule 3(g)).

Consideration by Court

It is settled law that each Court has inherent powers to stay its own decree and orders in appropriate cases upon application by an aggrieved party - See Lawrence Musiitwa Kyazze Vs Eunice Busingye SCCA No. 18 of 1990.

In the context of this matter, the decision of this Court which the Applicants intend to challenge in the Supreme Court by way of 3rd appeal was made by a full bench of the Justices of this Court. As such, it is a full bench of this Court that can stay that decision pending the intended appeal. Pending disposal of the substantive application for stay of execution, Rule 2(2) of the Judicature (Supreme Court) Rules empowers this Court to issue Interim Orders “**as may be necessary for attaining the ends of justice.**”

The principles to be followed by Court in the exercise of this mandate to issue Interim Orders have been the subject of a wealth of judicial pronouncements by the Supreme Court of Uganda and the Court of Appeal of Uganda **including** the following: Hwang Sung Industries Limited Vs Tajdin Hussein & others, S.C. Civil Application No. 19 of 2008, Hon. Theodore Ssekikuubo & Others Vs The Attorney General & Others. S.C. Constitutional Application No. 04 of 2014, Yakobo Senkungu and Others Vs Cerencio Mukasa, S.C. Civil Application No. 5 of 2013, the Commissioner Customs, Uganda Revenue Authority Vs Kirenga Fred, C.A. Civil Application No. 91 of 2014.

The position of the law was summarized by the Supreme Court in Zubeda Mohamed & Another Vs Laila Kaka Wallia & Another, S.C. Civil Reference No. 07 of 2016 thus:

“In summary, there are three conditions that an Applicant must satisfy to justify the grant of an Interim Order:

1. A competent Notice of Appeal;
2. A substantive application;
3. A serious threat of execution.”

I now proceed to consider whether the Applicant meets the preconditions for grant of the Interim Order sought.

Competence of the Notice of Appeal

The competence of the Notice of Appeal is governed by Rule 72 of the Supreme Court Rules. More specifically the Rule provides thus:

- Rule 72(2) "... Every notice [of appeal] ... shall ... be lodged within fourteen days after the date of the decision against which it is desired to appeal."
- Rule 72(4) "when an appeal lies only ... on a Certificate that a point of law of great general importance is involved, it shall not be necessary to obtain ... a certificate before lodging the notice of appeal."

In summary, even in the instant matter where the applicants can proceed to the 3rd appeal only after being granted a Certificate of Importance, the Rules required them to file a Notice of Appeal within 14 days after the decision they intend to challenge.

The Notice of Appeal lodged in the Court of Appeal by the Applicants is attached to Ms Olivia Busobozi Bahwayo's Affidavit in Support of the application as "A". It indicates that it was received by the Registry of the Court of Appeal on 05th November 2018. This was within the period prescribed for lodging the Notice of Appeal. So, the Applicants have satisfied the first condition.

However as this application for Interim Order is being evaluated in the general context of an intended 3rd appeal to the Supreme Court, it is pertinent that the court goes past the competency of the Notice of Appeal and evaluates also the competence of the application for the Certificate of general public importance which is the precondition for the intervention of the Supreme Court by way of a 3rd appeal.

The Submissions of both parties are quiet on this aspect. Rule 39(1)(a) of the Supreme Court Rules provides that the formal application for the Certificate should be lodged with the Court of Appeal within 14 days after the decision the applicant intends to challenge by way of 3rd appeal to the Supreme Court.

In the instant, the judgment of the Court of Appeal was made on the 25th October 2018. By the time the prescribed period of 14 days lapsed, the Applicants had not yet filed the application for the Certificate of Importance. But it appears that the Applicants were alive to the omission as on 18th January 2019 they filed a Notice of Motion seeking inter alia, leave to apply for a Certificate of Importance out of time. A copy of the 2nd Applicant's Affidavit in Support of the said application and marked "D". Its Court Reference No. is Civil Application No. 11 of 2019. The annexure indicates that in the same Notice of Motion, the Applicants joined in the same application the equivalent of the substantive application for the Certificate of Importance, Vide: Civil Application No. 11 of 2019.

So the Applicants are entitled to have their right to be heard in the said application preserved.

Substantive Application for Stay of Execution

There is no doubt that the Applicants filed before this Court the substantive application for stay of execution, vide: Civil Application No. 12 of 2019. It is yet to be disposed of by Court. As such, this condition has been met by the Applicants.

Threat of Execution

The evidence of execution in the instant case is set out in the letters annexed to the Supplementary Affidavit in Support of Ms Olivia Busobozi Bahwayo as "A" & "B". The said letters were addressed to the Applicants on 06th February 2020 giving them 21 days' notice to deliver their respective titles to the office of titles, Kabarole Ministry Zonal Offices in Fortportal to enable the Registrar of titles implement the decision of the Court of Appeal in Civil Appeal No. 1 of 2014. The 21 days expire on 27th February 2020 before the substantive application for stay of execution has been disposed of by Court. So this condition has likewise been satisfied by the Applicants.

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Decision of Court

From the above evaluation of the evidence on the Court record, it is clear that the Applicants have substantially satisfied the conditions for the grant of an Interim Order. What remains is whether this Court should go ahead and grant the application as sought.

Grant of the Interim Order still remains a discretionary matter even after the parties have proved the conditions set out by the law. The Court must make the delicate balance to ensure that the Applicants' right to be heard on their issues as raised in the applications for Stay of Execution and the Certificate of Importance is not prejudiced. On the other hand, Court must also balance the interest of the judgment creditor to enjoy the benefits of his/her/its litigation. In this regard, the wisdom of Mulenga JSC in Wilson Mukiibi Vs James Ssemusamba, Civil Application No. 9 of 2003 (SC) becomes pertinent with regard to the exercise of the discretion. He stated thus:

“A party seeking a stay of execution must satisfy Court that there is sufficient cause why the party with judgment should postpone the enjoyment of its benefits. It is not sufficient for the judgment – debtor to say that he is vulnerable, because the successful party may take out execution proceedings. It must be shown that if execution proceeds there may be some irreparable loss caused.”

I have carefully read and re-read the Affidavits filed in this matter by the Applicants. Beyond the use of the expression that the Applicants will suffer “substantial/irreparable loss” the Applicants have not provided any further particulars to enable Court deduce the nature of irreparable loss that may be suffered by them if the Interim Order is not granted.

It is only in paragraph 9 of Ms Olivia Busobozi's Supplementary Affidavit that the Applicants come out more clearly to show that execution of the Court decision will result in their eviction. However, in the circumstances of this case, eviction or its threat is not sufficient to convince me to exercise my discretion. During the hearing of

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the application, both parties agreed that the Applicants had received physical possession of the suit properties when they successfully evicted the Respondent's employees from the suit properties in the execution of the Chief Magistrate's Decree which was then in force and in their favour. But the fact of being evicted did not in any way prejudice the Respondent's right to pursue its right of appeal to the High Court which eventually over turned the Chief Magistrate's Judgment, Decree and Orders in its judgment of delivered on 21st January 2013.

So the Applicants have failed to prove that if they are evicted, they automatically lose their right to pursue the intended appeal (if any) and the nature of loss they stand to suffer. The precedent the applicants have is that loss of physical possession of the suit premises does not, by itself, prejudice the pursuit of the right of appeal (if any).

The other consideration is that it is now well over 7 years since the respondents were confirmed by the High Court as the genuine legal owners of the suit property on 21st January 2013. And for the whole of this period, the applicants continue to hold possession of the suit property. I have not seen any evidence of payment of rent by the applicants to the respondent for the whole of this period, or at least provision for security for its payment. And yet recovery of lost rent or mesne profit was not part of the original pleadings of the respondent by way of counterclaim since, at the time of the original trial by the Magistrate Grade 1, physical possession of the suit property was in the hands of the respondent. As I have already said before in this Ruling, the applicants took possession of the suit premises after the trial Magistrate had decided the original suit in their favour. So one would have expected that the moment the applicants lost the case at the 1st appellate stage before the High Court, they would have voluntarily quit the suit properties immediately. But perhaps this expectation is too idealistic. So what happens in case the appellate process continues for another 5 years? Should court just look on as the applicants continue to enjoy rent free possession of the suit premises while the already adjudicated legal owner of the suit property cannot enjoy the rights accruing to such adjudication?

This court holds the view that in the circumstances of this case, justice requires that the applicants are not constrained to pursue their right for legal redress upto the highest courts in this country. At the same time, the respondent's already adjudicated right to rent or mesne profit in respect of the suit property should not be unduly prejudiced.

In the premises I grant a conditional Interim Order on the following terms:

1. The Commissioner of Land Registration is hereby restrained from implementing the decision of this Court in Civil Appeal No. 1 of 2014 until disposal of the substantive application for stay of execution (Civil Application No. 12 of 2019) or until further orders of this Court.
2. The applicants and the Commissioner of Land Registration are hereby restrained from effecting any transaction on the register which is likely to prejudice the rights of the respondent in the suit property until disposal of the substantive application for stay of execution (Civil Application No. 12 of 2019) or until further orders of this Court.
3. The Respondent is restrained from evicting the Applicants from the suit premises for the period ending 30.04.2020 during which period the Applicants will be at liberty to find alternative accommodation, voluntarily vacate the suit premises and hand them over to the Respondent.
4. After the expiry of the period ending 30.04.2020, the Applicants may continue staying in the suit premises only upon paying the Respondent the open market rent for the suit premises to be established by the Chief Government Valuer at the Applicants' cost.
5. Payment of the open market rent referred to above shall be in installments of three months in advance to the Respondent and shall be effective from the 01st of May 2020 and shall continue until the determination of the substantive application for stay of execution (Civil Application No. 12 of 2019) or until further orders of Court.
6. The respondent shall be liable to refund all the rent received from the applicants in case the respondent's title to the suit property is overturned by a superior court.

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7. In case the Applicants fail to meet terms 4 & 5 above, then the Respondent shall at any time after the 01st of May 2020, be entitled to evict the Applicants and take over physical possession of the suit property at the cost of the Applicants.
8. The cost of this application shall abide the outcome of the substantive application for stay of execution unless otherwise stated hereinabove,.
9. This Interim Order shall stay in force until the disposal of the substantive application for stay of execution or until further orders of Court.
10. The Registrar of this court is urged to fix the hearing dates of Civil Application No. 12 of 2019 and Civil Application No. 11 of 2019 at the earliest possible time.

I so Order.

Dated at Kampala this 24th day of February 2020.

Muzamir Kibeedi
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MUZAMIRU KIBEEDI

Justice of Appeal

Registrar
Kindly deliver this Ruling
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24/02/2020