THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATON NO.304 OF 2015
(Arising from Civil Appeal No.11 of 2012

OUTREACH TO AFRICA LTD :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

STEPHEN MANIGAMUKAMA :::::::::::::::::::::::::::::::::::: RESPONDENT

CORAM: Hon. Lady Justice Elizabeth Musoke, JA
Hon. Lady Justice Hellen Obura, JA
Hon. Justice Cheborion Barishaki, JA

RULING OF THE COURT

This application was brought by Notice of Motion under the provisions of section 10 and 12 of the Judicature Act, Cap 13, and Rules 2, 6(b), 43, 44 of the Judicature (Court of Appeal Rules) Directions, SI 13-10. It is for an order staying execution of the decree in High Court Civil Appeal No.11 of 2012, pending the hearing and determination of the applicant's appeal to this Court.

Background to the application;
The applicant purchased land from the respondent for a consideration of UGX 74,000,000/= and paid an installment of UGX 30,000,000/=. The last installment of UGX 44,000,000/= was to be paid upon completion of transfer of the titled land to the applicant. The applicant later declined to pay the balance of UGX 44,000,000/= on the basis that the land did not measure up to 15 acres as had allegedly been the understanding between the parties.

The respondent instituted a suit against the applicant for payment of the balance on the purchase price. The trial Court passed judgment in favour of the applicant on the ground that the UGX 74,000,000/= was excessive for land measuring only 6.908 acres which was far below the estimated 15

acres. On appeal, the High Court reversed the decision of the trial Court and held that the respondent was entitled to the balance of the purchase price since the acreage of the land was not a term of the agreement.

The applicant appealed to this Court against the decision of the High Court. It subsequently filed this application for stay of execution pending disposal of the appeal.

The grounds of the application are contained in the notice of motion and the affidavits sworn by Evelyn Komuntale, a director of the applicant company. The grounds are briefly as follows;

I. The applicant's appeal has a likelihood of success.
II. The applicant will suffer irreparable harm or the appeal will be rendered nugatory if the order is not made.
III. The balance of convenience weighs in favour of granting the application.
IV. There is a serious threat of execution of the decree in High Court Civil Appeal No.11 of 2012 against the applicant.
V. The applicant has not delayed in lodging this application.
VI. It is in the interest of justice that the application is granted.

The respondent opposed the application and filed an affidavit in reply. The main grounds in opposition of the application are that;

1. The intended appeal is frivolous and vexatious, with no chances of success.
2. The respondent has not made any application for execution and there is no threat of execution.
3. The application for stay of execution is baseless.

At the hearing of the application, Counsel for the applicant reiterated the grounds of the application as stated in the notice of motion and the affidavit in support thereof.

Counsel cited ***Gashumba Maniraguha Versus Sam Nkundiye SC Civil Application No.24 of 2015***, and submitted that in determining whether

there was a prima facie case, the question to be determined was whether there were serious questions to be considered in the appeal. Counsel stated that in the present case, the serious question for determination was whether there was a specific covenant for the respondent to deliver 15 acres of land to the applicant and whether the respondent is entitled to the balance of the unpaid money on the agreement.

With regard to likely irreparable damage, Counsel for the applicant submitted that the respondent had already extracted the decree and the bill of costs had already been taxed. This, therefore, meant that at any time, execution would be commenced. Counsel cited ***Nganga Versus Kimani [1969]EA 67***, where it was stated that a holder of a decree may be in position to proceed thereunder in such a way that substantial loss may result notwithstanding that the decree may perhaps be set aside.

It was Counsel's further submission that the balance of convenience weighed in favour of granting the application. Counsel contended that there was a need to preserve the right of appeal and if this application was not granted, the applicant would completely lose his rights in case execution was proceeded with. In addition, Counsel submitted that this application had been brought without delay.

In reply, Counsel for the respondent submitted that where execution proceedings have not commenced, extraction of the decree is a mere possibility that execution might be commenced. Therefore, the applicant herein was under no threat of irreparable loss because execution proceedings had not been commenced. Accordingly, there were no exceptional circumstances to warrant the applicant to lodge the present application to this Court instead of the High Court as required under rule 42 of the Judicature (Court of Appeal Rules) Directions.

As to whether the applicant had a prima facie case, Counsel submitted that the question as to acreage of the land in issue was determined by the lower Court; therefore, the applicant's contentions in that regard were frivolous.

As to the question of irreparable damage, Counsel reinterated his earlier submission and stated that mere extraction of the decree is not commencement of execution. Counsel relied on ***Flora Rwamarungu Versus DFCU Leasing Co, SC Civil Application No.11 of 2009***, and contended that the reputation of the school was not in any danger of irreparable damage. The applicant therefore had a duty to show that execution had actually commenced other than merely stating that there was eminent possibility of execution proceedings about to take place.

We have considered the pleadings as well as the submissions of Counsel in support of and against this application.

Rule 42(1) of the rules of this Court suggests that where this Court and the High Court have coexisting jurisdiction over a matter, such a matter should be lodged with the High Court first before being brought to this Court. ***(See Lawrence Musiitwa Kyazze Versus Eunice Busingye SC Civil Application No.18 of 1990, Aids Health Foundation Versus Stephen Mirembe Kizito CA Civil Application No.146 of 2014.)***

However, in some exceptional circumstances, such matter may be filed in this Court without having it first lodged with the High Court. In ***Lawrence Musiitwa Kyazze (Supra)***, the Court laid down conditions that must be present as follows;

> ***(1) There must be substance to the application both in form and content; This court would prefer the High Court to deal with the application for a stay on its merits first, before the application is made to the Supreme Court. However, if the High Court refuses to accept jurisdiction, or refuses jurisdiction for manifestly wrong reason, or there is great delay, this court may intervene and accept jurisdiction in the interest of justice.***
>
> ***(2) This court may in special and probably rare cases entertain an application for a stay before the High Court has refused a stay, in the interests of justice to the parties. But***

before the court can so act it must be appraised of all the facts"

In ***Aids Health Foundation Versus Dr. Stephen Mirembe Kizito CA Civil Application No.146 of 2014***, Court stated, and we agree, that the reasons why applications of this nature ought to be filed in the High Court first is that it saves time and resources. The High Court having issued the decree or order is better placed to hear and determine the matter without delay and there are more High Court Judges stationed throughout the country.

Therefore, ordinarily, this application ought to have been lodged in the High Court first before being brought to this Court. However, considering the circumstances of this case, we shall consider this application regardless of the fact that it was not lodged with the High Court first.

The jurisdiction of this Court to grant stay of execution is based on **rule 6(b)** of the rules of this Court, where it is stated that where a notice of appeal has been lodged, this Court may order a stay of execution on such terms as the Court may think just. The Court in ***Hon.Theodore Ssekikubo & ors Versus The Attorney General & ors, SC Constitutional Application No.06 of 2013,*** while citing ***Akankwasa Damian Versus Uganda, Constitutional Application No. 7 and 9 of 2011***, stated the principles to be followed in granting an application for stay of execution as follows;

1. Applicant must establish that his appeal has a likelihood of success; or a prima facie case of his right of appeal.
2. That the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.
3. If 1 & 2 have not been established, Court must consider where the balance of convenience lies.
4. The applicant must also establish that the application was instituted without delay.

With regard to whether the appeal raises substantial issues which merit consideration by this Court, we have looked at the High Court judgment as well as the draft memorandum of appeal, and we are alive to the fact that this is a second appeal. The memorandum of appeal raises issues on findings of fact by the Court about the agreed acreage of the land in issue and whether the respondent was entitled to the balance of the unpaid money on the agreement. In our opinion, these are important questions that necessitate consideration by this Court. Therefore, (in our opinion) the appeal is not frivolous.

We also accept the submission of Counsel for the applicant that upon extraction of a decree and taxing the bill of costs, it is highly likely that the respondent might proceed thereunder, and substantial loss may result. It is apparent that the land in issue (school) is the most likely subject of attachment. In that event, we are persuaded that the applicant will suffer irreparable damage. We have looked at the authority of ***Florah Rwamarungu Versus DFCU Leasing Co. Ltd (Supra)***, which was cited by Counsel for the respondent. However, we find that the said case is distinguishable from the present one; while in ***Flora Rwamarungu*** the Court stated that there was no *status quo* to maintain, in the present case execution has not yet been carried out. In addition to the above, ***Flora Rwamarungu*** was an application for interim stay of execution.

It is also clear that this application was brought without undue delay. The judgment of the High Court is dated 17th September, 2015. The record shows that this application was lodged with this Court on 15th October, 2015. In our opinion, the application was lodged within a reasonable time from the date of the High Court judgment.

In the result, this application is allowed on the following conditions;

1. The applicant shall deposit UGX 44,000,000/=, which is the balance on the purchase price, with the Registrar of this Court by way of Bank Draft, within one month from the date of this order.

2. Failure to comply with the above condition, the order of stay granted herein shall automatically lapse.
3. Costs of this application shall be in the main cause.
4. The Registrar is directed to fix the appeal at the nearest convenience of Court.

Orders accordingly.

Dated at Kampala this 27th day of January 2016

.....

Elizabeth Musoke
JUSTICE OF APPEAL

.....

Hellen Obura
JUSTICE OF APPEAL

.....

Cheborion Barishaki
JUSTICE OF APPEAL

27/1/16.

Ruling delivered on open court.

A/R 27/1/16.