Hon. J. Tsehooho

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

MISCELLANEOUS APPLICATION NO.5/92.

(FROM H.C.C.A. NO. MM 13/91).

Glory D/Ekeau

ASADI SEMIKO ..... APPLICANT

VERSUS:

MAIMUNA ZIRABAMUZALE ..... RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE ENGWAU.

R U L I N G

This is an application for stay of execution brought by notice of motion under s.39 r. 4 (1), (3), (5) C.P.R. and section 101 C.P.A. It seeks an order of this court that execution proceedings arising from C.S. No. MM 45/89 be stayed pending the disposal of H.C.C.A., No. 13/91. The application is supported by the applicant's affidavit dated 11.5.92.

The learned trial Magistrate Grade 1 heard and decided the substantive civil suit No. MM 45/89 on 2.12.91 ex parte and ordered the applicant/ defendant to vacate the suit land on 31.12.91.

The suit land was recovered and handed over to the respondent/ plaintiff on or about 19.3.92 and this application was not filed in court until 11.5.92. Apparently an advertisement was made for the sale of a house and the plot around it in a bid to realise U. Shs 643,600/- being costs of the suit plus costs and expenses of the court brokers.

In consequence thereof, this application is made on the following grounds:-

1. THAT, the order to vacate the suit land was made per incuriam.
2. THAT, the execution now being conducted has occassioned an abuse of the process of the court.
3. THAT, the execution complained of has inflicted substantial losses and severe hardships to the applicant.
4. THAT, it is in the interest of justice that further execution be stayed to save the applicant's property and residential house from wanton destruction and unjustified conversion, and
5. THAT, because the intended appeal is likely to succeed as the learned trial Magistrate proceeded to dispose of the matter without giving the applicant a fair hearing.

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Turning now to the first ground of this application, Mr. Ariu, Counsel for the applicant relied on paragraph 8 of the affidavit of the applicant in which it was deponed that had the learned trial magistrate been made aware of the fact that the applicant was born and has a family of 18 people on the suit land, the order to quit the suit land by 31.1291 would not have been made. In the light of that the learned counsel argued that the order was made per incuriam.

On the other hand, however, Mr. Wandera for the respondent dismissed the argument of the counsel for the applicant and contended that there was relief open to the applicant and that was to set aside the ex parte judgment and then adduce facts which were not brought to the attention of the trial court. The applicant cannot be heard now to say that the order was per incuriam.

After considering the submissions of both Counsel above, I'm inclined to agree with the submissions of the learned counsel for the respondent. The provisions of O.9 rr.9 24 and 25 C.P.R. would have conveniently handled the matter now raised in the first ground of this application. Moreover, the original suit was heard and decided ex parte there would be no other short cut other than to set aside ex parte judgment and adduce evidence of facts of new matters which were not brought to the attention of the trial court. Accordingly, the first ground of this application fails. In any case, both counsel conceded before this court that the suit land purportedly to have been bought by the applicant in 1980 from a third party had been handed back to the respondent. What remains now is how the costs of the suit were to be realised.

Be that as it may, on the second ground, the Counsel for the applicant strenuously argued that the bill of costs was on the 3.3.92 taxed by the trial magistrate ex parte. The applicant/defendant or his advocate was not served with either the bill of costs or the notice to show cause why execution should not issue. In the premises, the Counsel argued that the whole procedure was very unfair and against the principle of natural justice, presumably meaning that the applicant was condemned unheard. Worse still, the Counsel pointed that according to the proceedings of the trial court, the counsel for the respondent received instructions to conduct the original suit on

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28.10.91 and yet he included claims on the bill of costs as far back as the 3.7.91. Mr. Ariu therefore argued that the bill of costs presented by the learned Counsel for the respondent did not reveal true facts of accounts of work done by him. In support of that arguement, Mr. Ariu cited Balwantrai D. Bhatt Vs. Ajeet Singh & Anor. (1962) E.A 103, and concluded that an abuse of court process arose because neither the applicant nor his advocates were present when the bills of costs were taxed otherwise this abuse, as he contended, would not have arisen.

In reply, Mr. Wandera for the respondent argued that the Bill of costs was taxed ex parte under O.9 r 17 (1) (a) C.P.R. as the original suit was heard and decided ex parte therefore there was no need to serve either the applicant/defendant or his advocates. The Counsel further argued that originally the applicant had engaged another firm of advocates and later withdrew instructions and engaged him. Therefore, claims made since 3.7.89 inclusive of those made when he received instructions since 28/10/91 were actual costs incurred by the respondent in the prosecution of her suit as a whole. In the premises, Mr. Wandera submitted that Bhatt's case (supra) is not applicable in the instant case.

O.9..17 (1) (a) states:-

> "Where the plaintiff appears and the defendant does not appear when the suit is called for hearing -
>
> (a) if the court is satisfied that the summons or notice of hearing was duly served, it may proceed ex parte;"

According to the proceedings of the original suit dated 2.12.91 service was effected on the applicant/defendant through his advocates. Mr. Ariu who was the counsel representing the applicant sought leave of the court to leave the court when the case came up for hearing on the ground that his client, the applicant had gone to Nairobi for treatment and as he was not instructed to proceed with the case in the absence of the applicant, he could not do so. The trial court granted him leave to leave the court and the case proceeded ex parte.

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It is my humble view, with due respect to the learned Counsel for the respondent that O.9.r. 17 (1) (a) CPR above does not stipulate that because the suit proceeded ex parte therefore when the Bill of costs was tabled for taxation automatically the whole taxation should have been done ex parte.

It is in the interest of justice that the applicant or his advocates should have been served with Bill of costs or Notice for his appearance or that of his advocates when the Bill of costs was being taxed. In view of this holding, I do not wish to tackle Bhatt's case (supra) as an appeal on the matter is on the pipeline.

The 3rd and 4th grounds were combined and argued together by the counsel for the applicant. He relied on paragraphs 9 and 10 of the applicant's affidavit. In essence, the applicant deponed in the said paragraphs that should the threatened execution which had been advertised for 21.5.92 be carried out then the applicant and his family would be rendered destitutes with no other means of livelihood. The respondent who is named and staying with her husband twenty miles away from the suit land would not suffer any damage or loss as she has nothing to lose but that the whole livelihood of the applicant would be put at stake.

In reply, Mr. Wandera for respondent argued that O.39 r 4(3) C.P.R sets down circumstances under which order for stay of execution can be granted. O.39 r 4(3) C.P.R stipulates as follows:-

> "No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the court making it is satisfied -
>
> (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
>
> (b) that the application has been made without unreasonable delay; and
>
> (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."

It is the contention of the learned Counsel for respondent that no evidence that substantial loss shall result if execution is carried out.

Paragraphs 9 and 10 of the affidavit of the applicant show that there is a threatening execution but do not claim any substantial loss. The application, he contended, should have been made without any unreasonable delay. The appeal, that is, H.C.C.A. No. MM 13/91 was filed on 30.12.91 and this application was filed on 11.5.92, that is, a period of about 5 months was too long and unreasonably delayed the application. Further, the Counsel argued that the applicant should have given security but has not done so here. The Counsel then concluded by submitting that this application lacks merit and should be dismissed.

In light of the above submissions, I have had a chance of perusing the affidavit of the applicant in support of this application and also perused the affidavit of the respondent in reply thereto and make the following observations:

In paragraphs 9 and 10 of the applicant's affidavit, it is quite clear that the applicant avers that the suit land is the only means of his livelihood and his family and that if the said land is sold his livelihood would be put at stake.

In her reply at paragraphs 2 and 3 of her affidavit, the respondent states categorically that the suit land purported to have been bought by the applicant in 1980 from a third party without her knowledge and consent was on 19.3.92 given back to her. The Counsel for applicant conceded to this point. However, the respondent stated in her said affidavit that it is not true that the applicant was born on the disputed land and that it is not true that the suit land is the only land that the applicant lives on. The respondent has no claim whatsoever on that parcel of land where the applicant has built his house except for realising costs of the suit.

Be that as it may, in paragraph 12 of his affidavit, the applicant submitted himself to this court by undertaking to abide by any decree or order of this court if stay of execution granted.

In the premises, I find that grounds 3 and 4 of this application are so much linked to the grounds of the pending appeal that disposing of them in greater details would tantamount to disposing of the appeal itself. Land to any Ugandan to-day is almost blood and life. It suffices at this stage that stay of execution be granted but on the following terms: 5

1. Applicant to deposit half the costs of the suit to the court.
2. Appeal pending be disposed of as soon as possible.
3. Costs of this application be in the cause.

Whether the appeal is likely to succeed or not is a matter for the appellate court to decide. Order accordingly.

27.5.92. Both applicant and respondent present.
Mr. Ariu for applicant present.
Mr. Wandera for respondent also present.
Mr. Gabula Court clerk present.

Ruling read out and signed.

S.G. ENGWAU
JUDGE

27.5.92.