IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Misc. Civil Application No.133 of 2019

In the matter between

LABEJA PIRIMINO **APPLICANT**

And

OJERA JOSEPH **RESPONDENT**

Heard: 20 March, 2020
Delivered: 22 May, 2020

Civil Procedure *— stay of execution — execution of a decree is barred only after the expiration of twelve years from the date on which the judgment became enforceable, except where the judgment debtor has, by fraud or force, prevented the execution of the decree at sometime within twelve years immediately before the date of the application. Civil imprisonment in default of satisfaction of the decree —Civil imprisonment is not a final remedy. The respondent is at liberty to re-apply for execution of the decree, using a different mode, until full satisfaction of the decree, if at any time within the twelve years, the judgment-debtor comes by some resources and has not fully discharged the decree —Substantial loss— does not represent any particular amount or size, it cannot be quantified by any particular mathematical formula. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without a value or a loss that is merely nominal— Order 43 rule 4 (3) of The Civil Procedure Rules — the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals, and only security for costs should be provided for.*

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is an omnibus application under Order 43 rules 1, 2, 3, 9, 12 and 27 of *The Civil Procedure Rules*, Order 50 rule 6 of The Civil Procedure Rules, and sections 96 and 98 of *The Civil Procedure Act*, seeking orders that; (i) execution of the decree in High Court Civil Appeal No. 20 of 2013 be stayed pending the determination of Court of appeal Civil Appeal No. 194 of 2019 arising there from; (ii) the applicant be released from civil imprisonment; (iii) the ex-parte certificate of taxed costs in Civil Appeal No. 20 of 2013 be set aside and an order be made for taxation of the respondent's bill of costs inter-parties; (iv) and the applicant be awarded the costs of the application.

[2] The background to the application is that the applicant sued the respondent in the Chief Magistrate's court at Gulu. Judgment was entered in his favour on 4th July, 2016. The respondent appealed that decision to the High Court at Gulu and judgment was entered in his favour on 25th October, 2018, reversing the decision of the trial Magistrate. The applicant filed a notice of appeal on 9th November, 2018 intending to appeal that decision to the Court of Appeal. He was on 17th May, 2019 furnished with a certified copy of the record of proceedings and he duly filed an appeal to the Court of Appeal on 24th July, 2019. However, on 24th April, 2019 the applicant was arrested in execution of the decree of the High Court. He contends that it is only after he was committed to civil imprisonment that he learnt that the respondent's bill of costs had been taxed ex-parte resulting in an award of shs. 17,587,300/= against him, hence the application. He contends further that neither himself nor his then advocate, was served with a hearing notice for that taxation.

[3] By his affidavit in reply, the respondent opposes the application and avers that the application was overtaken by events since execution is complete. The applicant was served in person with the taxation hearing notice, notifying him that the respondent's bill of costs was to be taxed on 22nd February, 2019. On that day, neither him nor his advocate turned up in court. The court adjourned to 7th

March, 2019 and the applicant was served again. On that day the applicant was represented in court by his advocate and the taxation proceeded inter-parties. Execution of the decree was thereafter prompted by the applicant's failure to pay the decretal amount, and after he was served on 12th April, 2019 with a Notice to show Cause why execution should not issue, dated 10th April, 2019. He failed to appear in court as required by that notice on 15th April, 2019 resulting in his arrest and commitment to civil imprisonment on 24th April, 2019. The intended appeal has no chances of success. The application is thus frivolous and should be dismissed.

Arguments of Counsel for the applicant:

[4] In his submissions, counsel for the applicant, argued that the applicant has satisfied all requirements justifying an order of stay of execution;- he has filed a notice of appeal and a memorandum of appeal, hence there is a pending appeal in existence; he has proved that he is likely to suffer substantial loss since he has been resident on the land in dispute for over twenty years; he made the application without unreasonable delay; the appeal will be rendered nugatory if execution proceeds before it is heard, yet the grounds raised have a probability of success; ordering the furnishing of security for the due performance of the decree is discretionary and the facts of the case favour the applicant since the subject matter of the dispute is immovable property, land. There should therefore be no order for payment of security. As regards the certificate of costs, the applicant was never served with a taxation hearing notice thereby denying him his right to be heard. The purported service on the applicant in person and not his advocates was a move calculated to defeat the course of justice. The applicant's purported signature on the taxation hearing notice was a forgery. Some of the items listed in the bill of costs were never taxed. The application therefore ought to be allowed.

Arguments of Counsel for the respondent:

[5] In response, counsel for the respondent, argued that the application has been overtaken by events. At the time of filing the submissions in reply, the applicant was left with 14 days to the end of the period of his commitment to civil imprisonment where he had spent over five months. Execution was for recovery of the decretal sum of shs. 17,587,300/= the payment of which cannot occasion substantial loss to the applicant. The application was filed belatedly too, since it was filed after execution was more or less complete. His undertaking to pay security for costs is not a substitute for the legal requirement of payment of security. No attempt has been made to enforce the order or eviction. There is no imminent threat of execution. As regards service of the taxation hearing notice, for the date fixed initially of 22nd February, 2019 the applicant was served in person while the subsequent one of 7th March, 2019, his counsel was served and the bill of costs was thus taxed in his presence. The resultant certificate of taxation is therefore not an *ex-parte* one. The applicant's right to a fair hearing was observed in the taxation proceedings.

Ruling:-

[6] When considering applications of this nature, Court is mindful of the fact that it is a cardinal principle of fairness that both parties should be given an opportunity to be heard before court pronounces itself on the matters in controversy between the parties. It is for that reason that an ex-parte judgment will be set aside if there is no proper service (see *Okello v. Mudukanya [1993] I K.A.L.R. 110*). Order 9 rule 27 of *The Civil Procedure Rules* empowers courts to set aside *ex-parte* decrees and orders, where the court is satisfied that the court process was not duly served, or that the applicant was prevented by any sufficient cause from appearing when the matter was called on for hearing.

[7] Under Order 43 rules 1 and 4 (3) of *The Civil Procedure Rules*, the High Court may for sufficient cause order stay of execution of a decree pending an appeal before it where; (a) substantial loss may result to the party applying for stay of execution unless the order is made; (b) the application has been made without unreasonable delay; and (c) security has been given by the applicant for the due performance of the decree. Satisfaction of the same conditions is by judicial practice required for appeals from the High Court to the Court of Appeal (see *Lawrence Musiitwa Kyazze v. Eunice Busingye, S.C Civil Appeal No.18 of 1990*).

Security for due performance

[8] Courts though have been reluctant to order security for due performance of the decree. Rather Courts have been keen to order security for Costs (see *Tropical Commodities Supplies Ltd and others v. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331* and *DFCU Bank Ltd v. Dr. Ann Persis Nakate Lussejere, C. A Civil Appeal No. 29 of 2003*), because the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals.

Order for setting aside certificate of taxation

[9] Regarding the order sought for setting aside the certificate of taxation and directing taxation to proceed inter-parties, the reason advanced is failure to serve the applicant and his advocate with notice of the taxation hearing. Under Order 5 rule 10 of *The Civil Procedure Rules,* wherever it is practicable, service has to be made on the adversary in person, unless he or she has an agent empowered to accept service, in which case service on the agent is deemed sufficient. As stated by Order 3 of *The Civil Procedure Rules*, except if expressly provided by any law for the time being in force or where court has specifically ordered that appearance shall be in person, any application to, or appearance, or act, in any court required or authorised by the law to be made or done by a party in such

court, may be made or done by the party in person, or by his or her recognised agent (a person holding powers of attorney authorising him or her to make such appearances and applications and do such acts on behalf of party), or by an advocate duly appointed to act on his or her behalf.

[10] Order 3 rule 3 (1) of *The Civil Procedure Rules,* specifically provides that unless the court otherwise directs, process served on the recognised agent of a party is as effectual as if it had been served on the party in person. Therefore under Order 3 rule 4 of *The Civil Procedure Rules,* process served on an advocate is presumed to be duly communicated and made known to the party whom the advocate represents, and, unless the court otherwise directs, is as effectual for all purposes as if the process had been given to or served on the party in person. Advocates are recognised agents of a party for purposes of representation of a party before court (see *Lena Nakalema Binaisa and three others v. Mucunguzi Myers, H.C. Misc. Application No. 460 of 2013* and *Otim Talib and three others v. Uganda Revenue Authority and another, H.C. Misc. Application No. 494 of 2017*).

[11] I have examined the record of proceedings and it reveals that counsel for the applicant attended the taxation proceedings. Taxation having proceeded in the presence of his advocate, the applicant cannot contend that it was *ex-parte*. This part of his application is misconceived. The application for setting aside the certificate of taxation and directing taxation to proceed inter-parties is accordingly dismissed.

Order for Stay of execution

[12] Regarding the order sought for stay of execution, according to section 3 (3) of *The Limitation Act* and section 35 (1) of *The Civil Procedure Act*, execution of a decree is barred only after the expiration of twelve years from the date on which the judgment became enforceable, except where the judgment debtor has, by fraud or force, prevented the execution of the decree at sometime within twelve

years immediately before the date of the application. Within that period, sections 40 - 50 of *The Civil procedure Act* and Order 22 rule 8 (2) (j) provide that full realisation of the decree may be achieved by; (i) the delivery of any property specifically decreed; (ii) the attachment and sale, or by the sale without attachment, of any property; (iii) the arrest and detention in prison of any person; (iv) the appointment of a receiver; or (v) otherwise, as the nature of the relief granted may require.

[13] Although the respondent served the maximum six months of civil imprisonment in default of satisfaction of the decree, there is no evidence that he has discharged the obligation to pay the sum of shs. 17,587,300/= certified as costs due to the respondent. Although a judgment debtor once discharged from jail, cannot be arrested a second time in execution of the same decree (see section 42 (2) of *The Civil Procedure Act*), civil imprisonment in default of satisfaction of the decree is not a final remedy. The respondent is at liberty to re-apply for execution of the decree, using a different mode, until full satisfaction of the decree, if at any time within the twelve years, the judgment-debtor comes by some resources and has not fully discharged the decree.

[14] Furthermore, the decree also granted vacant possession to the respondent of the land in dispute (the land he occupies on his side of the Pabbo Road). The applicant therefore stands the risk of being evicted from land in dispute (land he occupies on the respondent's side of the Pabbo Road). It therefore is not correct to say that the application has been overtaken by events. Substantial loss does not represent any particular amount or size, it cannot be quantified by any particular mathematical formula. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without a value or a loss that is merely nominal (see *Tropical Commodities Suppliers Ltd and others v. International Credit Bank Ltd (In Liquidation) [2004] 2 EA 331*). I am inclined to agree with the applicant counsel that the application was made without unreasonable delay and that the applicant stands to suffer substantial loss if an

order of stay of execution pending appeal is not granted. The only question is whether it should be conditional.

[15] Some courts have taken the view that the provisions of Order 43 rule 4 (3) of *The Civil Procedure Rules* must be obeyed and particularly that the applicant must furnish security for due performance of the decree (see for example *Lawrence Musiitwa Kyazze v Eunice Busingye (supra)*; *New Vision Newspaper v. J.H Ntabgoba [2004] KALR 481*, and *Uganda Commercial Bank Ltd v. Ssanyu and Another [1999] KALR 804*). I am however persuaded by the view by other courts that the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals, and only security for costs should be provided for.

Order:

[16] In the final result, the application for stay of execution is allowed on condition that the applicant deposits in court Shs. 5,000,000/- as security for costs within fourteen days from the date of this order. The costs of this application are to abide the results of the appeal.

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Delivered electronically this 22nd day of May, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Fred Kalule and Co. Advocates

For the respondent : M/s Donge and Co. Advocates