

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)
MISCELLANEOUS APPLICATION NO. 185 OF 2017
(ARISING FROM EMA NO. 1849 OF 2017)

(ARISING FROM MAKINDYE MISC. CAUSE NO. 112 OF 2017)

JOHN TUGGY DANIEL ----- APPLICANT

VS

- 10 **1) DAVID WAPENYI MABISI**
2) MAGUMBA ISMAIL T/A CAPITAL DEBT AGENCY
3) PRISCILLA KYOSIMIRE WAPENYI ----- RESPONDENTS

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

15 By this application made under Article 126 of the Constitution, S.33 Judicature Act, S.98 CPA and 0.52 rr 1 and 3 C.P.R, the Applicant sought orders of this court:-

- 1) Staying execution of the warrants of distress, eviction and taxation, pending the determination of the Applicant's appeal.
- 2) Alternatively but without prejudice to the first order sought, an order be issued by this
20 court directing that all losses, costs and liabilities arising out of MA 112/2017 be borne by the Third Respondent.
- 3) Costs of the application be provided for.

The grounds of the application are that:-

- The Applicant was at all material times the lawful tenant in the premises comprised in
25 Block 244, Plot 2014, Kisugu, Muyenga, Makindye Division, Kampala (suit premises). The Third Respondent was his land lady.
- On 31.03.17, a certificate to levy distress for rent and another certificate of eviction and delivering of vacant possession of the premises was issued to the Second Respondent.
- On 18/04/17, the Applicant was evicted from the suit premises and his property attached.

- The Applicant and the Third Respondent filed MA 178/17 to set aside the distress proceedings but the same was dismissed on 03.07.17.
- The proceedings and orders in MA 112/17 were marred with material illegalities, exercised outside jurisdiction and unjust and the Applicant has commenced the process of appealing against the said orders.
- The First and Second Respondent have commenced eviction by way of advertising the Applicant's property for sale and also obtaining a warrant of arrest in execution of the Bill of Costs.
- The application has been filed without undue delay and it is in the interests of justice that execution be stayed until determination of the Applicant's appeal.

The application is supported by the affidavit of Applicant. There is also a supplementary affidavit filed on 31.07.17.

There are three affidavits in reply deponed by the First and Second Respondents and Third Respondent respectively.

- 15 The First Respondent, the Administrator of the estate of late Wapenyi and registered proprietor of the suit premises by virtue thereof contends that, the application is untenable, incompetent, barred by law and an abuse of court process, brought in bad faith and ought to be dismissed.

He denies Third Respondent being landlord of the premises but that she was a mere caretaker.

- 20 When the Applicant refused to pay rent or vacate the premises, the distress process ensued and the Applicant was removed from the premises.

All efforts by the Applicant and Third Respondent to set aside the distress orders proved futile.

- 25 Disputing the contents of the supplementary affidavit, the First Respondent asserts that there is no appeal as none has ever been served upon him or his lawyers. That the Third Respondent is conniving with the Applicant to lie to court that an appeal has been filed.

That the application cannot be sustained as execution has been partially conducted and only the attached property has not been sold.

But that, if court is inclined to grant stay, the court should exercise its discretion to order the Applicant to deposit security for due performance inclusive of the taxed costs and rental arrears.

5 It would not be just to order the Third Respondent to pay all the losses, costs and liabilities arising from MA 112/2017, as this is a ploy by the Applicant and Third Respondent to deprive the beneficiaries of late Wapenyi of the proceeds from their late father's estate.

Further that, no application for revision to declare the orders of distress and eviction and the award of costs as irregular has been filed. And this application should therefore be dismissed with costs.

10 The affidavit of the Second Respondent is almost in similar terms with that of the First Respondent.

The Third Respondent confirms that steps have been taken to file an appeal against the decision in M 178/2017 and that the dispute between her and the First Respondent is still the subject of Civil Suit 26/17 in the Family Division.

15 That it was wrong for the First Respondent to file the application for distress when the dispute between her and him was still a subject of a civil suit.

And that, the alleged distress costs and liabilities arising out of MA 112/2017 should be borne by the First and Second Respondents who carried out an illegal eviction and distress.

The application was heard on 02.08.17.

20 Counsel for the Applicant recited the laws under which the application is made and the orders sought. Referring to the supporting affidavit, she submitted that, the stay sought is not perpetual but is conditioned upon the disposal of the appeal against the ruling which dismissed the application to set aside the distress proceedings.

25 Counsel observed that, while it is the practice of court to order security for due performance, the Applicants property held by the First and Second Respondents is worth more than the amount sought for in the distress proceedings and it is sufficient security.

She prayed for the application to be allowed.

In reply, Counsel for the First and Second Respondents contended that, the application is bad in law as it is premised upon an appeal filed after the present application was filed and it is 30 also filed by another Firm of Advocates.

The affidavit in support is therefore defective in so far as it claims that the lawyers prosecuting this application was instructed to file the appeal.

The case of **Makerere University vs. S Education Institutes Ltd & Others HCCS 378/93** was cited for the holding that ***“an affidavit with falsehoods is defective and renders evidence***
5 ***to be struck off the record and the application dismissed”***.

Further that, the Applicant filed a supplementary affidavit without leave of court, which is contrary to the law.

Also that, the application does not satisfy the requirements for grant of stay of execution. It is made under the wrong provisions of the law. Whereas under 0.43r4 C.P.R, court cannot
10 grant stay unless the Applicant will suffer substantial loss. The application was delayed and Applicant has not offered security for due performance of the decree.

But echoing the sentiments of the First Respondent, Counsel submitted that if stay is to be granted, the Applicant should be required to deposit security, including taxed costs and rent arrears.

15 She also pointed out that, the Applicant was required to deposit Shs. 15,000,000/- in court so that his attached property could be released but did not do so and now seeks orders of this court to stay the sale of the same.

And therefore that, since he did not fulfill court’s orders, the stay of sale should not be granted.

20 Emphasizing that, the Applicant has not established sufficient ground for stay other than the pending appeal which is not in existence as it was an afterthought. That he relies on the appeal filed by the Third Respondent. And has connived with the Third Respondent to avoid payment of costs in MC 112/17.

Counsel relied on the case of **Gaga Enterprise Ltd & Another vs. Mpindi MA 02/14**
25 **arising from Civil Suit 53/11-** where it was held that ***“stay of execution applied where there is an appeal”***. And the case of **Uganda Revenue Authority vs. & Another MA 783/07** Justice Egonda Ntende held ***“mere claim of success of the appeal without proof to support it, is not sufficient”***.

In the present case, Counsel reiterated that no appeal had been lodged and therefore the
30 application cannot be allowed.

She prayed court to dismiss the application with costs to the First and Second Respondent.

Counsel for the Third Respondent submitted that the Third Respondent was not opposing the application for stay.

Referring to her affidavit in reply, Counsel stated that, there is no doubt that there is an appeal lodged by the Applicant and the Third Respondent against the orders in MA 178/17.

5 Further that, the dispute between the Third Respondent and First Respondent which has embroiled the Applicant is still pending resolution in the Family Division vide Civil Suit 261/17.

It was also wrong, Counsel argued, for the First Respondent to file the application for distress for rent against the Applicant when the civil suit was still pending in the High Court.

10 It was asserted that the appeal had been filed and the Third Respondent is party to the appeal challenging orders of the lower court. If the application is not granted, the appeal will be rendered nugatory.

And that if court is to order costs, they should be paid by the First and Second Respondent who carried out an illegal distress and eviction.

15 In rejoinder, Counsel for the Applicant stated that, Counsel for First and Second Respondents had not cited any law that requires supplementary affidavit to be filed with leave of court. She added that, such leave would be required if the supplementary affidavit is filed after the reply. But that, in the present case, it was filed before the reply and therefore Counsel for the First and Second Respondents had chance to address the contents of the affidavit.

20 Also that, there is no falsehood in the affidavit in support which in paragraph 21 talks of an intended appeal. S.79 CPA allows Appellant thirty (30) days within which to file the appeal. The days expire on 03.08.17. However, the Applicant who, is at risk of execution has demonstrated that he has taken necessary steps to file appeal within time, and it should not be rendered nugatory.

25 Court was urged to find that the Appellate process has been commenced and therefore should be preserved.

That unless stay is granted substantive loss will occur; and yet the application was filed without unreasonable delay.

As to depositing security for due performance, it was reiterated that the First and Second
30 Respondent hold Applicant's household properties and therefore have sufficient security for due performance.

Also that, it was the Third Respondent who was required to deposit the Shs. 15,000,000/- in the lower court and not Applicant.

Counsel vehemently protested Counsel for the First Respondent's allegations of connivance as baseless. That Applicant was free to instruct any Counsel to file appeal. And applying for proceedings and filing of notice of appeal by another Counsel is not evidence of connivance.

And if extra security is required, then it is the Third Respondent who should deposit it.

Earlier prayers were reiterated.

Whether execution should be stayed.

Whether court should direct that all losses, costs and liabilities arising out of MA 112/17 should be borne by the Third Respondent.

Stay of Execution: - It is trite law that *"court has discretion to grant stay of execution"*. However, it has been repeatedly emphasized that the *"power ought to be exercised judiciously and where it appears equitable to do so with a view to temporarily preserving the status quo"*.

Guiding principles to be taken into account in determining **whether to grant stay of execution or not** have also been established by decided cases.

They include the following:-

- 1) Likelihood of success of the appeal.
- 2) Likelihood of suffering substantial loss or irreparable damage.
- 3) The application was made without unreasonable delay.
- 4) Security for costs has been given by the Applicant.
- 5) Balance of convenience

- See the case of **David Wesley vs. Attorney General Constitution Application 61/14**.

But cases have also emphasized that *"in applications of this nature, the guiding principle would depend on the individual circumstances and merit of each case. The individual circumstances and merit of each case will determine whether the case falls within the scope and parameters of any other laid down principles"*. – Refer to the case of **East African Development Bank vs. Blueline Enterprise Ltd [2006] 2EA 5 (CAT)**.

The execution proceedings in the present case arise out of distress for rent and eviction proceedings filed by the First Respondent against the Applicant and the Third Respondent.

The certificate for distress for rent and eviction and delivery of vacant possession of the premises was issued by court to the Second Respondent.

- 5 On 18.04.17, the Applicant was evicted from the suit premises and his household property attached to be eventually sold to recover the rent arrears.

The application filed by the Applicant and Third Respondent to set aside the distress proceedings was dismissed on 03.07.17.

- 10 The Applicant's property has been advertised for sale and also a warrant of arrest obtained for his arrest in respect of the costs of the proceedings hence this application to stay execution to enable the Applicant to process the appeal against the distress and all attendant orders arising therefrom.

- 15 The application was filed on 21.07.17. The supplementary affidavit filed on 31.07.17 has attachments to indicate that typed ruling and copy of proceedings were applied for on 28.07.17 by another Firm of Advocates, for Third Respondent and the Applicant.

Notice of appeal was also filed on 31.07.17.

- 20 While as already indicated in this ruling, Counsel for the First and Second Respondent argues that there is no appeal, this court wishes to point out that it is the principle of decided cases that ***“a notice of appeal is a sufficient expression of an intention to file an appeal and such action is sufficient to found the basis for grant of orders of stay in appropriate cases”***. – Refer to **Attorney General vs. East African Law Society & Another EAC J Appl. No. 01/13**.

- 25 Considering the date on which the ruling intended to be appealed against was delivered, this court finds that the proceedings and ruling were applied for before the time within which to appeal had expired and the notice of appeal was filed.

Apart from the pending appeal, there is also a suit pending between the Third Respondent and the First Respondent at the Family Court.

The appeal raises issues of material illegalities and lack of jurisdiction. The suit also affects the rights of the Applicant who claims to have been a lawful tenant in the suit premises.

If the stay is not granted in those circumstances, both the Appeal and the suit will be rendered nugatory. And the Applicant's attached property will be disposed of without him being given a chance to try and prove his alleged lawful occupation of the suit premises prior to his eviction. This would certainly result into substantial loss.

5 Counsel for the First and Second Respondents' contention that the application is barred by law and is an abuse of court process is not sustainable.

The execution is not complete. While the Applicant was evicted from the premises; his property that was attached has not yet been disposed of although it has been advertised for sale.

10 As to **whether it is the Applicant who ought to have deposited the Shs. 15,000,000/- for the release of his property or the Third Respondent**, will be determined by the Appellate court.

Stay of execution, that is, sale of the Applicant's attached property and warrant of arrest is hereby stayed for all those reasons. This will give the Applicant a chance to prosecute the
15 appeal.

I wish to observe that, while the Applicant may have instructed another Advocate to file the appeal other than the one appearing for him in this application, that cannot be said to be evidence of connivance between him and the Third Respondent.

A party has a right to instruct **any** Advocate they wish to defend them or file proceedings on
20 their behalf. There is no set number of Advocates required to appear for any party.

Counsel for the First and Second Respondent prayed court to exercise its discretion and require the Applicant to deposit security for due performance inclusive of the taxed costs and rental arrears.

But as pointed out by Counsel for the Applicant and rightly so in my view, the First and
25 Second Respondents already hold the property of the Applicant. Since they have not indicated that they are releasing it, I find that, that is sufficient security. The balance of convenience demands that neither the Applicant nor the Third Respondent be required to deposit any extra security until all the issues arising out of this matter have been finally determined and other orders made by court.

30 The supplementary affidavit deponed by the Applicant was filed before the First and Second Respondents made their replies. They were therefore able to respond to the issues raised

therein and no injustice was occasioned to them thereby. The affidavit is properly before court.

The application is allowed for all those reasons set out herein and the following orders are made:-

- 5 1) The sale of the attached property of the Applicant is stayed pending the determination of the appeal.
- 2) The warrant of arrest for the Applicant is hereby cancelled.
- 3) The attached property of the Applicant will suffice as security for due performance of the decree and a list thereof should be availed to this court by 07.08.17.
- 10 4) Costs of the application will abide outcome of the appeal.

FLAVIA SENOGA ANGLIN
JUDGE
04.08.17