THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)

MISCELLANEOUS APPLICATION NO. 2530 OF 2016

(ARISING FROM EMA NO. 1913 OF 2016)

(ARISING FROM CIVIL SUIT 301 OF 2015)

MUTEBI VINCENT AND 3 OTHERS ---------- APPLICANTS

VS.

ROSEMARY MIREMBE LUKHOLO (ADMINISTRATOR AND BENEFICIARY OF THE ESTATE OF LATE NAKALANZI KAGGWA FLORENCE)
---------- FIRST RESPONDENT

AND

WAITALO WILSON

ZUBAIRI SENTONGO ---------- RESPONDENTS

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This application was made under 0.43 r (4) and 0.52 r (1) and (3) C.P.R seeking orders of this court staying execution of the consent judgment /decree arising from Civil Suit 301/2015 pending the hearing of the Appeal in Miscellenous Application 959/2015.

Costs of the application were also applied for.

The grounds for the application are that:-

The First Respondent, Rosemary Mirembe Lukholo filed Civil Suit 301/2015 against the Second and Third Respondents for recovery of the suit land. The parties entered into a consent judgment that was entered by court on 08.09.15.

The Applicants being aggrieved by the consent judgment filed Miscellenous Application 959/2015 for review and the same was dismissed.

The Applicants filed a notice of appeal intending to appeal against the orders of the trial Judge in Miscellenous Application 959/2015.

The intended appeal involves a substantial question of law and has merit.

The Applicants will suffer gross injustice and the appeal will be rendered nugatory if execution is not stayed.

It is in the interests of justice that the application be allowed.

The application is supported by the affidavit of the First Applicant Mutebi Vincent.

There is an affidavit in reply deponed by First Respondent, Rosemary Mirembe Lukholo, to the effect that there was no sufficient reasons raised in the application to warrant grant of an order of stay as no evidence was attached by the Applicants to verify ownership.

Further that no threat of execution was disclosed upon which court can exercise its discretion to grant stay.

Also that the First Applicant lacks legal authority to file application supporting affidavit on behalf of the rest of the Applicants.

And the only remedy available to the Applicants is to sue the people from whom they acquired the non –existent kibanja interest interalia.

The application was heard on 13.12.16.

Counsel for the Applicant went through the provisions of the law under which it was made, and the grounds thereof.

Going through the supporting affidavit and affidavit in reply, Counsel argued that sufficient reason for stay of execution had been advanced. That is, there are matters which can only be determined by the Appellate Court.

Also that the issue of ownership is not within the mandate of this court, as there is no requirement to prove ownership to stay execution.

That the Applicants filed notice of appeal and the appeal is pending is sufficient cause for stay of execution. – The case of **Nalwoga Gladys vs. Edco. Ltd and Another Miscellenous Application 07/13** was cited in support.

That once appeal is pending and there is a serious threat of execution before appeal is heard, the court intervenes to serve substantial justice.

It was asserted that, all averments in the affidavit in reply are far from what should be dealt with by court.

Under 0.43 r 4 (3) C.P.R, the criteria necessary for stay of execution does not include the requirement to prove ownership.

The condition is security for due performance of the decree.

Since the First Respondent waived right to costs, did not extract a decree but just issued notice to show cause seeking vacant possession, it is an indication that she intends to execute.

It was prayed that application be allowed as the Applicants had demonstrated sufficient cause for stay as required by law.

Objecting to the application, Counsel for the Respondent insisted that no sufficient cause had been shown by the Applicant. No evidence had been adduced to show their interest to appeal against a consent they are not a party to. And there is nothing in the supporting affidavit to show likelihood of suffering substantial loss.

And since the Applicants were not party to the suit, they should not be asking for bill of costs.

It was submitted that the Applicants should deposit security for due performance of the decree before stay can be granted.

Further that, there is no pending case. The notice of appeal was filed in July, 2016, and since then, no step has been taken to file memorandum of appeal. It was argued that, a notice of appeal does not act as an appeal. There is no memorandum of appeal.

That the application is a ploy to use court to delay the Respondent from benefiting from her judgment.

It was prayed that the application be dismissed.

In rejoinder, Counsel for the Applicant explained that the appeal is not against the consent judgment, but from the ruling in application No. 599/15 which was for review. And the costs referred to arise from that ruling and not from the consent.

It was insisted that notice of appeal was filed and that is sufficient to commence an appeal according to the case of **Equity Bank (U) Ltd vis. Were HCMA 604/13.** Where It was held ***"where notice of appeal has been filed, it demonstrated intention of party to appeal and other steps of appeal are not for this court".***

Denying any delaying tactics, it was pointed out that when notice of appeal was filed, the respondent rushed to execute. Otherwise there is no delay in filing the memorandum.

Asserting that the Applicants are resident on the suit land and therefore should be allowed to pursue their rights before court, Counsel prayed for the application to be allowed.

Whether the application should be allowed.

Courts have established guiding principles to be considered on applications for stay of execution. They include the following:-

1) Likelihood of success of the appeal.

2) Likelihood of suffering substantial loss or irreparable damage.

3) Application has been made without unreasonable delay

4) Security for costs has been given by the Applicant

5) Balance of convenience.

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

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

Otherwise, it is trite law that court has discretion to grant stay of execution, although ***"this power ought to be exercised judicially and where it appears equitable to do so, with a view to temporarily preserving the status quo".***

In the present case, the circumstances are such that there is a consent judgment that was entered into by the First Respondent with other parties in Civil Suit 301/15.

Although the Applicants claim to be resident on the disputed land, they were not parties to the suit out of which the consent judgment arose.

However, they claim to be residents on the disputed land, although their application for review of the consent judgment was dismissed by the trial Judge.

Being aggrieved by the decision dismissing the application for review, the Applicants filed a notice of appeal on 20.07.16.

Their contention is that the notice to show cause why First Respondent should not be given vacant possession was issued after they filed the notice of appeal. Hence this application.

As indicated earlier in this ruling, the Applicants claim they were not heard in the suit that resulted into the consent judgment as they were not parties thereto. Yet they are resident on the land and therefore that allowing execution which would result into their eviction would render their appeal nugatory and substantial loss would ensue.

They contend that the appeal raises substantial questions of law and has merit.

This court is aware that in the case of **Attorney General vs. East African Law Society and Another EAC J Application No. 01/13**, it was held that ***"a notice of appeal is a sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases".***

This court finds that in the circumstances of this case, where the Applicants claim to be residents on the disputed land, and that they were never given a chance to be heard, the balance of convenience demands that the order of stay be granted.

While the First Respondent contends that the Applicant has no authority to represent the other Applicants, the application and the supporting affidavit were made on his own behalf as well as on behalf of the others. The eventual outcome would bind all. – S. 33 Judicature Act.

The First Respondent also gave the impression that as long as security for due performance of the decree is deposited in court, the application can be allowed.

But since the Applicants' contention that they reside on the land was not disputed, security for due performance would not be appropriate in this case, more so as they claim that no bill of costs for the dismissed application for review was ever filed by First Respondent.

If they lose the appeal, they stand to be evicted.

The appropriate remedy in the circumstances of this case is to grant a stay on condition that the Applicants file their memorandum of appeal within two weeks from the date of this ruling.

5 The costs of the application will abide the outcome of the Appeal.

10 **FLAVIA SENOGA ANGLIN**
JUDGE
29.05.17