

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(CIVIL DIVISION)**  
**MISCELLANEOUS APPLICATION NO. 185 OF 2021**  
**(ARISING FROM EMA NO. 16 OF 2021)**  
**(ALL ARISING FROM H.C.C.S NO. 147 OF 2011)**

**SAMUEL WUMA::APPLICANT**

**VERSUS**

**UGANDA RAILWAYS CORPORATION ::RESPONDENT**

**BEFORE: HON JUSTICE SSEKAANA MUSA**

**RULING**

This application is brought under section 98 CPA, Section 33 Judicature Act and Order 22 rule 23 and 89 CPR seeking for;

1. An order of stay of execution of miscellaneous application EMA No. 16 of 2021 (arising from H.C.C.S No. 147 of 2011 be issued pending the determination of the appeal.
2. Costs of the application be provided for.

The grounds upon which this application is based are contained in the affidavit of the applicant Samuel Alfred Wuwa as follows;

- a) The applicant filed H.C.C.S No. 147 of 2011 against the respondent, case was heard and dismissed with costs on 18<sup>th</sup> day of December 2021.
- b) That the applicant has appealed to the court of appeal which is pending disposal and the appeal has a very high likelihood of success.

- c) The respondent has put in motion proceedings to obtain warrant of vacant possession of the property the subject of the appeal vide EMA No. 16 of 2021 which will render the appeal nugatory and the applicant will suffer irreparable loss.
- d) The application is brought without undue delay.
- e) The applicant is ready and willing to furnish security for due performance of the decree.
- f) It is fair, just and equitable that the application is allowed, execution is stayed until final disposal of the appeal.

The respondent opposed the application and filed two; affidavits in reply and supplementary affidavit both deponed by Sarah Nambasa the respondent's corporation secretary.

1. The respondent vehemently in opposition stated that the applicant is not entitled to orders sought and he will not suffer any loss whatsoever in the event the application is denied.
2. That the intended appeal or outcome has no bearing on or connection to the applicant's basis of occupation of the respondent's house as a commercial tenant and that the appeal has no likelihood of success and the application if denied shall not render the appeal nugatory.
3. That the respondent shall be highly prejudiced and inconvenienced if the application is granted since the applicant has no claim for any proprietary interest in the suit premises and continued occupation of the same deprives the respondent of its constitutional right of enjoyment of its property and fruits of judgment.

The applicant was represented by *Counsel Ayebare Robert* while *Counsel Robert Apenya* and *Counsel Sarah Zawedde* appeared jointly for the respondent.

The court directed the parties to file their written submission which were duly filed and have been considered by this court in the determination of this application.

### *Issues*

1. *Whether the order sought for stay of execution should be granted?*
2. *What remedies are available to the parties?*

### **Determination**

Counsel for the applicant submitted that it is a settled rule of practice as stated in the case of ***Mugenyi & Co. Advocates Vs NIC SCCA No. 13 of 1984 and Lawrence Musiitwa Kyazze Vs Eunice Busingye SCCA No. 18 of 1990*** that an applicant seeking for an order of stay of execution by the High Court pending an appeal to the Court of Appeal must plead and prove that;

- i) Substantial loss may result to the applicant unless the order of stay of execution is granted.
- ii) The application has been made without undue delay.
- iii) Security has been given by the applicant for the due performance of the decree/order as may ultimately be binding upon him/her.

Counsel for the applicant submitted that the applicant deponed under paragraph 5 of the affidavit in support that the respondent has put in motion proceedings seeking issuance of a warrant of vacant possession of the said house and if not halted, the applicant will be evicted. The ownership of the said house is subject of the intended appeal. Counsel submitted that unless the application is granted he will suffer substantial loss with the planned eviction by the respondent.

Counsel further submitted that the application being made without delay since the judgment in H.C.C.S No. 147 of 2011 was delivered on 18<sup>th</sup> /12/2020 lodged the notice of appeal and applied for a certified copy of record of proceedings on 19<sup>th</sup> January 2021 a month after judgment. The respondent filed an application for execution on 28<sup>th</sup> January 2021 and served on the applicant on 3<sup>rd</sup> March 2021

and this application was filed on 12<sup>th</sup> March 2021 nine (9) days later which shows the application has been without undue delay. Lastly counsel submitted that the applicant is ready to deposit in court security for costs for the due performance of the decree as stated in paragraph 5 of the affidavit in support.

Counsel submitted that without prejudice to the above there is no need to for the applicant to provide security for due performance since the respondent will still get its property in the event that his appeal is dismissed and the applicant stay in the house will not in any ways prejudice the respondent.

Counsel for the respondent relied on the case of ***Lawrence Musiitwa Kyazze Vs Eunice Busingye (supra)*** cited by counsel for the applicant that the in order an application to be granted for an order of stay of execution he/she must prove that the applicant will suffer substantial loss, the application has been made without unreasonable delay and security has been given by the applicant for the due performance of the decree.

Counsel submitted that the applicant has not demonstrated the substantial loss he is likely to face but generalized the assertion of substantial loss if the eviction order is enforced. Counsel relied on the case of ***Pan African Insurance Co. (U) Ltd Vs International Air Transport Association H.C.M.A No.086 of 2006*** where *Lameck Mukasa J* stated that *it is not enough merely to repeat the word of the code and state that substantial loss will result, the kind of loss must be specified, details must be given and the conscience of the court must be satisfied that such loss will ensure... The word substantial loss cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he lose his case and is deprived of his property in consequence. That the element of which must occur in every case a substantial loss must mean something in addition to all different from that.*

Counsel submitted that the applicant is merely a tenant with no proprietary interest and has been a non paying tenant since 2011 according to paragraph 4 of the respondent's supplementary affidavit and that if court grants the application, it will be denying the respondent it's property and furthering loss on the

respondent which it has already suffered. Counsel cited the case of ***Walusimbi Mustafa Vs Musenze Lukia H.C.M.A No. 232 of 2018*** for the proposition that without showing substantial loss the High Court's power to maintain control over her proceedings and decision to meet the ends of Justice should not be fettered. Counsel that the applicant has not given details of the loss to be suffered and shall not suffer any loss for property since he has no legal or equitable interest.

Counsel for the respondent submitted on the requirement to provide security for due performance of the decree that there is no need for the applicant to provide security for due performance of the decree because once his appeal is dismissed the respondent will get his property. Counsel further submitted that Rule 6(2)(b) of the Judicature (Court of Appeal Rules) Direction SI 13-10 provides that;

subject to sub rule 1 of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court may;

(b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 76 of these rules order a stay of execution, an injunction or a stay of proceedings on such terms as the Court may think just.

Counsel submitted that the pendency of an appeal is not a bar to a successful party's right to enforce a decree by execution.

### ***Analysis***

The application of this nature determined on principles set out in the case of ***Lawrence Musiitwa Kyazze Vs Eunice Busingye SCCA No. 18 of 1990*** cited by both counsel which was relied upon by Court of Appeal in the case of ***Kyambogo University Vs Prof Isaiah Omoro Ndiege Civil Application No. 341 of 2013*** which stated the conditions the applicant must satisfy for grant of an order of stay of execution as follows;

1. That the the applicant must show he has lodged an appeal which is pending hearing.
2. That the said pending appeal is not frivolous and it has a likelihood of success.

3. there is imminent threat of execution of the decree and if not stayed the appeal will be rendered nugatory.
4. That the application was made without unreasonable delay.
5. That the applicant is prepared to give security for due performance of the decree and
6. That refusal to stay would inflict greater hardship than it would avoid.
7. The power to grant or refuse a stay is discretionary.

The applicant has the onus to prove to satisfaction of court that he has met the conditions stated above to secure an order of stay of execution. It is trite that the discretionary powers should be exercised judiciously. In this application, the applicant has proved that there is a pending appeal and a notice of appeal has been adduced in evidence. The applicant also proved that application was made without undue delay since it was filed 9 days after the application for execution. As regards the imminent threat of execution the applicant it is evident that the respondent has already applied for a warrant of vacant possession.

The contention on the requirements for grant of an order of stay of execution in this application is highly of the the likelihood of success of the appeal and substantial loss that may result if the application is not allowed. I have considered submission and authorities cited by both counsel, this court is not satisfied that the applicant has demonstrated that the loss if any will result if the application is not granted which is incapable of being atoned by the respondent in monetary terms. The applicant claims no legal interest but rather equitable interest in the suit property and this alone is enough to prove that if his appeal succeeds the property will not vest in him thus he can be compensated in monetary terms and on the other hand the making respondent wait until the conclusion of the appeal to repossess its property or realise the fruits of the decree will amount to deprivation of its right to enjoyment of its property since the contest is not on ownership.

The applicant's mere alleging substantial loss may result if the application is not granted without demonstration of the loss cannot warrant intervention of this

court to stop the respondent from realisation of it's fruits of judgment through execution. The common thinking among the litigants that court grants stay of execution of every decree by merely stating substantial loss is wrong and should be discouraged the applicant must demonstrate such loss and that the loss is incapable of being atoned in monetary terms. The refusal to grant this application will not occasion any hardship on the applicant other than that the ordinary judgment debtor is exposed to neither render the the appeal nugatory.

The analysis of this court on the requirement of substantial loss may result if order of stay is not granted and that the appeal will not be rendered nugatory disposes of this application.

In granting a judgment debtor the relief of stay of execution, the court must strive to maintain a balance between the need to have a successful party enjoy the fruit of his victory and at the same time to ensure that the unsuccessful party who has appealed would not be incapacitated as not to pursue his legitimate constitutionally guaranteed right to appeal against the judgment. The court must consider if there were any special or exceptional circumstances that would warrant the order of stay of execution to be made. ***Akinnawo v Orotusin (2014) 15 NWLR (pt 1431) p.435***

The litigants should always know that as long as the decree sought to be executed is not set aside by a competent court, it stands valid and the decree holder/judgment creditor should not be denied it's fruits where the applicant/judgment debtor fails to satisfy the conditions to the satisfaction of court to warrant stay of execution otherwise this will encourage judgment debtors to file appeals and applications for stay of execution thinking that the grant of an order of stay of execution is an automatic one to stop the successful party/judgment creditor from enjoying the fruits of litigation.

From the analysis of the evidence adduced by both parties and submission by both counsel, the applicant failed to discharge his onus of proving substantial loss that may be occasioned by the refusal to grant the order of stay of execution and that the appeal will be rendered nugatory. Lastly both counsel agreed on the

requirements to provide security for the due performance of the decree that it is not necessary in the instant application.

In the final result the application fails and the same stands dismissed with costs to the respondent.

I so order.

***Ssekaana Musa***

***Judge***

***8<sup>th</sup> August 2022***