

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 279 OF 2017**

KANSIIME ANDREW.....APPLICANT

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VERSUS

- 1. HIMALAYA TRADERS LTD**
- 2. KAMUKAMU ASSOCIATES LIMITED**
- 3. TREASURE TROVE (U) LTD**
- 4. JETWANT SINGH**
- 5. JAMIL KIYEMBA**
- 6. COMMISSIONER LAND REGISTRATION**
- 7. UGANDA LAND COMMISSIONRESPONDENTS**

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BEFORE: HONOURABLE LADY JUSTICE SOLOMY BALUNGI BOSSA

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RULING OF COURT

This is an application for stay of execution of a judgment pending the disposal of an intended appeal. The judgment intended to be appealed is a consolidated judgment concerning High Court Civil Suit No. 132 of 2011 and 57 of 2011 in respect to Plots 20 to 30 Saddler Way, Naguru. The applicant seeks to restrain the respondents, their agents and all servants from executing the decision in the said consolidated suit.

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Background

The 1st respondent is the registered proprietor of the suit property comprised in LRV 4105 Folio 3 plots 20-22, LRV 4172 Folio 5 Plot 28.

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The 2nd respondent is the registered proprietor of LRV 4172 Folio 5 Plot 30. The 4th and 5th respondents are the registered proprietors of LRV 4172 Folio 5 Plot 24 purchased from the 3rd respondent. The 6th respondent is the registered proprietor of LRV 418 Folio 9 Plot 28. All the plots are on Saddler Way Lugogo Bypass. The applicant disputed the ownership of all the said plots (the suit land) in the High Court in the above-consolidated suits alleging that the respondents acquired them through fraud. The High Court (Bashaija J.) rendered judgment on 14 July 2017 against the applicant and declared that the applicant was a

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trespasser and had no lawful interest in the suit land. It ordered him to vacate the suit land as his continued occupation of it was illegal.

5 The applicant filed a Notice of Appeal on 24 July 2017. He then filed
before the High Court *Miscellaneous Application No. 1900 of 2017* for stay
of execution and *Miscellaneous Application No. 1901 of 2017* for an interim
order of stay of execution. He withdrew both applications through a notice
dated 8th September 2017 and then filed the present application in this
Court. At the time he withdrew both applications, the High Court had
10 granted him an interim order, which had been extended to 12 September
2017, the date on which *Miscellaneous Application No. 1900 of 2017* (the
main application) was scheduled for hearing.

The applicant then proceeded to file the present application in this Court
15 on 7 September 2017, 5 days before the scheduled hearing of
Miscellaneous Application No. 1900 of 2017 in the High Court. He also filed
Civil Application No. 280 of 2017 in this Court for an interim order. This
Court (Kavuma DCJ.) granted the interim order of stay on 8 September
2017 for 21 days. On 16 September 2017, just 8 days after the issue of the
20 interim order and before the 21 days expired, this Court (Kavuma DCJ.)
granted another interim order for 10 working days.

Submissions of the parties

The appearances at the hearing were as follows: Counsel Nangumya
25 Geoffrey appeared for the applicant; Counsel Albert Byamugisha appeared
for the 1st respondent; Counsel Moses Lwanyaga and Mr. Swabur Marzuq
appeared for the 2nd and 6th respondents; and Counsel Sarah Kisubi
appeared for the 3rd, 4th and 5th respondents. The applicant and 1st
respondent's director were also present in Court.


30 Counsel for the applicant submitted that this Court should preserve the
right of appeal, as the applicant's occupation of the suit land had been
adjudged illegal. The Court of Appeal Rules did not provide that for a
Notice of Appeal to be valid, a judgment must be attached. The
35 respondents had decided to lease out public land to a third party instead
of the applicant who was in occupation. The applicant's eviction had been
stopped by an interim order of stay from the High Court but the order had

lapsed and could not be renewed due to a judicial industrial strike. Counsel prayed that this Court takes judicial notice of when the judicial industrial strike ended. The applicant relied on the grounds in the affidavit to submit that there was a threat of execution and the probability
5 of the success of the appeal.

Counsel Byamugisha submitted that the applicant did not satisfy the first ground that there should be a valid Notice of Appeal. He further submitted that attachment of the lower court judgment serves two
10 purposes. The first one was to show the Court the date of judgment so that the Court could compute the time within which the Notice of Appeal was filed. The second is to inform the Court whether the intended appeal has merit. At least there should be a proposed draft Memorandum of Appeal for the Court to establish whether the grounds are serious.

15 Counsel also submitted that the High Court issued a warrant on 16 August 2017. The applicant then applied for an interim order of stay of execution, which the High Court granted. The interim order expired and was extended on 8 September 2017 to enable the applicant to file an affidavit
20 in rejoinder. The applicant filed the present application in this Court when the proceedings in the High Court were still pending in the Execution Division, execution had been stayed, and the main application had been fixed for hearing. At the time of the scheduling hearing of the main application, judicial officers were not on strike.

25 According to Counsel, the applicant was seeking to maintain an illegality as the status quo. He had disobeyed injunctions issued by the trial Judge and directives from the Kampala City Council Authority to demolish all illegal structures.

30 Counsel Swabur Marzuq associated himself with the submissions of the 1st respondent. He added that under *Order 25 Rule 5 of the Civil Procedure Rules*, the effect of withdrawal of an application is as if such application has never been filed at all. The applicant therefore flouted the
35 requirements of *Rule 42(1) of the Court of Appeal Rules* when he filed an application before this court instead of the High Court. The applicant had 

not exhibited any exceptional circumstances or shown that the High Court had refused to exercise jurisdiction.

5 Counsel further submitted that the applicant had to satisfy the requirement that he would suffer substantial or irreparable injury. Apart from showing that he conducted a business on the suit premises, he did not prove irreparable loss. He further submitted that judgment was ready on 14 July 2017 and copies were available that very day. He prayed for the application to be dismissed.

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Ms. Kisubi associated herself with the submissions of Counsels Byamugisha and Swabur Marzuq. She added that the irreparable loss the applicant purports will suffer is based on developments carried out on the suit land in contempt or in violation of a court order. The developments
15 included a washing bay and a sports center, both of which could be compensated for in damages. She also prayed for security for costs if the interim order of stay was allowed citing the provisions of *Rule 105(3) of the Court of Appeal Rules*. She further submitted that the applicant came to this Court with unclean hands and should not be allowed to benefit from
20 an illegality.

This being an application for stay of execution, this Court has a duty to examine the conditions that must be satisfied before it can issue such an order. The first condition is that there must be a pending appeal.
25 Secondly, for this Court to entertain the application, it should have been lodged in the High Court first and refused. Further more, a party seeking a stay of execution must satisfy the Court that there is sufficient cause why the party with judgment should postpone the enjoyment of its benefits. It is not sufficient for the judgment debtor to say that he is vulnerable,
30 because the successful party may take out execution proceedings. It must be shown that if execution proceeds, there may be some irreparable loss caused.

The burden lies on the applicant to prove on a balance of probabilities that
35 the requisite conditions have been satisfied (see *Hwang Sung Industries Ltd. V. Tajdin Hussein and 2 Others SC Civil Application No. 19 of 2008*). 88

I have taken the above jurisprudence into account in resolving this application.

5 I begin by noting that in the present application, the applicant did not file the judgment on record. He contented himself with filing only the decree. The applicant had earlier filed an application for stay of execution in the High Court and even secured an interim order of stay but had subsequently chosen to withdraw it and instead file the application in this Court.

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The applicant does not deny that he filed two applications namely *Miscellaneous Application No. 1900 of 2017* for an order of stay of execution and *Miscellaneous Application No. 1901 of 2017* for an interim order of stay of execution before the High Court. He also does not deny withdrawing both applications before the High Court. It is the reason that he gives for the withdrawal that is the problem. According to his Counsel, judicial officers were on strike and he could not access the Registrar. I asked the applicant's Counsel why he did not go to the Judge who granted the injunction for it to be extended. He stated that the Judge too was not available.

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However, the facts on record paint a totally different picture. The High Court had issued an interim order that extended up to 8 September 2017. That order was extended to the adjourned hearing date for *Miscellaneous Application No. 1900 of 2017* of 12 September 2017. On that date, the order of withdrawal on record shows that Registrar Rwatooro Baker was present and the matter was coming up for final disposal. Counsel Albert Byamugisha for the 1st respondent, Counsel Swabur Marzuq for the 2nd and 6th respondents and Counsel Sarah Kisubi for the 3rd, 4th, and 5th respondents were all present in court. However, the applicant and his Counsel were absent. The learned Registrar then made the following order and I quote:

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"1. That following the notice of withdrawal filed by the Applicant in both *Miscellaneous Application No. 1900 of 2017*, the said applications be and are hereby withdrawn.

1. That the costs of the above applications are awarded to the Respondents..."

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The issuance of the said order indicates three things. The first one is that the High Court Registry was functional and if the applicant and his Counsel had desired it, the main application would have been heard. Secondly, all the other Counsel attended the High Court that day except the applicant's
5 Counsel. The applicant was also absent.
Thirdly, the respondents had no knowledge that the applications had been withdrawn.

It is also apparent that the applicant and his Counsel did not wait for the
10 hearing date of 12 September 2017, which Counsel had requested for to file an affidavit in reply, before he withdrew both applications;
Miscellaneous Application No. 1900 of 2017 and *Miscellaneous Application No. 1901 of 2017*. As I have already noted, the interim order of stay had been extended to that date. Instead, the applicant chose to withdraw both
15 applications before that date, without even informing his colleagues.

The applicant then proceeded to file the present application in this Court on 7 September 2017, 5 days before the scheduled hearing of
Miscellaneous Application No. 1900 of 2017 in the High Court. He also
20 filed Civil Application No. 280 of 2017 for an interim order.

This Court (Kavuma DCJ.) granted an interim order of stay on 8 September 2017 for 21 days. On 16 September 2017, just 8 days after the issue of the interim order and before the 21 days expired, this Court (Kavuma DCJ.)
25 granted another interim order for 10 working days.
The chronology of the above events paints a picture of a litigant who is bent on abusing the Court process. The applicant has not come to this Court with clean hands.

Moreover, according to the jurisprudence laid down by the Supreme Court (which at the time was the Court of Appeal before the 1995 Constitution) in the case of *Lawrence Musiitwa Kyazze versus Eunice Businghye SC Civil Application No. 18 of 1990*, in general, applications for a stay should be made informally to the judge who decided the case when judgment is
35 delivered, unless the judge directs that a formal motion be presented on notice (Order XLVIII Rule 1) after notice of appeal has been filed. The judge may in the meantime grant a temporary stay for this to be done. If ~~8~~

the application is refused, the parties may then apply to the Court of Appeal under *Rule 42(1)* of the *Court of Appeal Rules* where again they should be prepared to meet conditions similar to those set out in Order XXXIX Rule 4(3). The Court of Appeal can only entertain the application
5 where the High Court has doubted its jurisdiction or has made some error of law or fact, apparent on the face of the record, which is probably wrong, or has been unable to deal with the application in good time to the prejudice of the parties in the suit property (*Rule 42(2) Court of Appeal Rules*). In such circumstances, the applicant may make the application
10 direct to this Court (see *Lawrence Musiitwa Kyazze versus Eunice Businghye SC Civil Application No. 18 of 1990 supra*).

Thus for an application to be entertained in this Court directly without first having been heard by the High Court, the above conditions must be
15 satisfied. It is important for me to set out the provisions of *Rule 42 of the Rules* of this Court. That Rule provides:

“Order of hearing applications

- 20 **1. Whenever an application may be made either in the Court or in the High Court it shall be made first in the High Court.**
- 25 **2. Notwithstanding subrule (1) of this Rule, in a civil and criminal matter, the Court may on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any act as the justice of the case requires, or entertain an application under Rule 6(2)(b) of these Rules, in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court.”**

30 In the present matter, the applicant did not follow this procedure to the letter because he withdrew *Miscellaneous Application No. 1900 of 2017* before it could be heard. The result of this is that no application was filed and determined before the High Court, as the Rules require.
The applicant has also not come to this Court with clean hands as already
35 indicated above.

Furthermore, the applicant has not shown that there are special circumstances that require this Court to intervene to preserve the status

quo. Since the applicant has not satisfied the above conditions, this application is incompetent.

For all the above reasons, this application is dismissed with costs to the respondents. Civil Application No. 280 of 2017 for an interim order is also
5 dismissed for the same reasons.

Before I take leave of this matter, I wish to comment on the importance of attaching a judgment to an application for stay of execution. Counsel for the applicant did not consider it important to file the judgment on record.
10 It is Counsel Swabur Marzuq who provided a copy of the judgment, which indicates that it was delivered and was available on 14 July 2007. This judgment is however not part of the applicant's pleadings.

As Counsel Byamugisha pointed out, a judgment serves to indicate the date on which it was delivered and but most importantly, to indicate the merits of the intended appeal. I am therefore entitled to draw an adverse inference against the applicant for failure to attach the judgment. It is a clear indication that the judgment did not favour his cause. I am fortified in this reasoning after reading the judgment, which makes clear that the
20 applicant has no interest in the suit land.

Apart from failing to submit the judgment to indicate the merits of the appeal, there is no proof of irreparable damage. If he were to succeed on appeal, his developments could be compensated for by damages.

25 **Conclusion**

The applicant has failed to satisfy me that this application is properly before this court for the reasons articulated above. I therefore accordingly dismiss it with costs.

30 **Dated this 13th day of December 2017.**

Signed by:



Solomy Balungi Bossa

35 **Justice of Appeal**

Delivered by His Worship Assimwe Tadeo