

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL MISCELLANEOUS APPLICATION /CAUSE NO. 390 OF 2018

ATTORNEY GENERAL.....APPLICANT

VERSUS

10 **WALUGEMBE DANIELRESPONDENT**

[Appeal from the Ruling and orders of the High Court of Uganda at Kampala (Civil Division) by Honourable Justice Bashaija K. Andrew delivered on 30th November 2018 in Miscellaneous No. 231 of 2018]

15 **CORAM: Hon. Mr. Justice Kenneth Kakuru, JA**

Hon. Mr. Justice Stephen Musota, JA

Hon. Mr. Justice Christopher Madrama, JA

RULING OF THE COURT

20 This is an application by way of notice of motion under Rules 2(2), 6(2), 43(1) and (2) of the Rules of this Court seeking the following orders.

25 1. *Execution and/or implementation of the orders made by the High Court (Civil Division) in Miscellaneous Cause No. 231 of 2018 be stayed until the determination of the Appeal/Intended Appeal against the said orders;*

2. *Costs of the Application be provided.*

The grounds of the application are set out in the motion as follows:-

30 1. **THAT**, *the Applicant was dissatisfied with the Ruling and orders of the High Court (Civil Division) in Miscellaneous Cause No. 231 of 2018 and has filed a Notice of Appeal against the same, and applied for the typed record of proceedings.*

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2. **THAT** the Intended Appeal raises serious issues that merit judicial consideration by this Honourable Court and has a high likelihood of success which would be rendered nugatory if this Application is not granted.
 - 10 3. **THAT**, the orders granted in High Court (Civil Division) Miscellaneous Cause No. 231 of 2018 affect the ability of a Judicial Commission of Inquiry to exercise its mandate in accordance with its Terms of Reference and the Law.
 - 15 4. **THAT**, the Government of Uganda shall suffer substantial loss of public funds if the orders of the High Court in Miscellaneous Cause No. 231 of 2018 are executed and/or implemented.
 5. **THAT**, the Application for stay of execution has been made without unreasonable delay.
 6. It is in the interest of justice that this Application is granted.

20 The application is supported by an affidavit deposed to by one Dr. Douglas Singiza, the pertinent paragraphs of which state as follows:-

- 25 1. That I am an adult male Ugandan of sound mind and the Secretary to the Commission of Inquiry into the Effectiveness of Law, Policies and Processes of Land Acquisition, Land Administration, Land Management and Land Registration in Uganda, (hereinafter referred to as "the Commission of Inquiry") and swear this Affidavit in that capacity.
2. That I am also a Judicial Officer serving as a Chief Magistrate with the Judiciary and a legal scholar, and as a result, I am well versed with the law as well as the facts applicable to the present matter.
- 30 3. That the Commission of Inquiry was appointed by His Excellency the President of the Republic of Uganda in accordance with the Commissions of Inquiry Act, Cap.166 under Legal Notice No.2 of 20 17 (as amended).
4. That the Respondent filed Miscellaneous Cause No. 231 of 2018, an Application for Judicial Review seeking to challenge a recommendation /



5 directive of the Commission of Inquiry contained in a letter dated
02/08/2018 to the Uganda Land Commission (ULC). A copy of the Notice
of Motion and Affidavit in Support are attached and marked 'A' and 'B'.

10 5. That the High Court granted the Application and granted the orders as
prayed including an order of certiorari quashing the recommendation of
the Commission of Inquiry; an order of prohibition prohibiting the
Ministry of Finance officials, the ULC, and any other Government
Department or official from implementing the recommendation of the
Commission of Inquiry; an order of certiorari quashing the decision of the
Inspector General of Government to investigate compensation by ULC for
15 the land in issue; and a permanent injunction restraining any
Government Department or official or any Commission of Inquiry from
interfering with compensation as directed by court relating to land in
issue or any plot of land which is a subject of a court judgment or order. A
copy of the Ruling is attached and marked 'C'.

20 6. That the Applicant is dissatisfied with the Ruling and orders of the High
Court in Miscellaneous Cause No.231 of 2018 and has filed a Notice of
appeal, and requested for a typed copy of the proceedings and the Ruling.
Copy of the Notice of Appeal and the request for typed record and ruling
are attached and marked 'D' and 'E'.

25 7. That the Intended Appeal raises serious Issues that merit judicial
consideration by the Court of Appeal including:

30 a. Whether the learned judge in the High Court erred in law and
fact when he denied the Applicant the right to be heard by
expunging both the affidavit deponed by the Attorney General,
and the affidavit deponed by the Secretary of the Commission of

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Inquiry therefore proceeding with the application as if it was unopposed.

b. *Whether the orders made are ultra vires the scope of a Court sitting in an application for judicial review.*

c. *Whether the learned High Court Judge acted as a judge in his own cause in light of the fact that his previous orders were the basis of the application for judicial review.*

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d. *Whether the High Court properly exercised its jurisdiction and discretion in the manner in which it handled the Application.*

8. *That, the Government of Uganda is likely to suffer substantial financial loss of public funds to the tune of **UGX 9,651,655,000/= (Uganda Shillings Nine Billion Six Hundred and Fifty-One Million, Six Hundred and Fifty-Five Thousand)** in questionable claims and payments to the Respondent.*

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9. *That, the orders of the High Court prohibiting the Ministry of Finance officials, the Uganda Land Commission, the Inspectorate of Government, and any Government Department from implementing the Commission of Inquiry's recommendations will further cause substantial financial loss of public funds in additional questionable payments to various payees.*

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10. *That there is a great danger that not only the Respondent but other persons not party to the proceedings who are subjects of investigations by the Commission of Inquiry, will take advantage of the wide-ranging orders issued by the High Court, to obtain questionable payments from the Government of Uganda before the Commission of Inquiry has had an opportunity to complete its investigations in accordance with its mandate.*

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5 11. That the recommendation of the Commission of Inquiry was a temporary measure supposed to maintain the status quo until the Commission of Inquiry is able to complete its investigations and would not therefore affect the Respondent rights in a substantial manner.

10 12. That the orders of the High Court greatly curtail the activities of the Commission of Inquiry; seriously compromise and impede its ability to exercise its mandate to investigate and inquire into the operations of the Land Fund; to make recommendations for sanctions against any persons found culpable of wrong doing; and generally, address all issues regarding the proper management of the Land Fund. A copy of the
15 Commission of Inquiry's Terms of Reference are attached and marked 'F'.

On the said affidavit is attached the motion in High Court Miscellaneous Cause No. 231 of 2018 from which this application arises and its supporting affidavit. There is also attached the Ruling of Justice Bashaija from which this appeal arises.

20 The respondent filed an affidavit in reply the relevant paragraphs of which are set out as follows:-

25 3. That this application is incompetent, an abuse of Court process, of no legal consequence, moot and intended to facilitate the applicant's agents' actions of overstepping their mandate and violating my rights and should be dismissed with costs.

30 5. That I filed in Court Misc. Application No. 231 of 2018 Walugembe Daniel vs Attorney General challenging the actions, directives and or recommendations of the Commission of Inquiry in the effectiveness of law, policies and processes of land acquisition, land management and Land Registration in Uganda contained in a letter dated 2nd August 2018 and actions of the Inspectorate of Government whereof they sought to

5 halt, investigate and or interfere with payments made to me by
Government under Orders of Court. (Copies of the said letters are hereto
attached and collectively marked Annexure 'A').

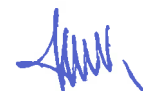
6. That the Trial Judge rightly found that the decision of the said
Commission of Inquiry is prejudicial to me as it will make it hard to
10 recover the decretal sum and interferes with the independence of the
 judiciary.

8. That the payments the Applicant intends to halt arise from Orders of Court
and, inter alia, the Consent Judgment in HCCS No. 550 of 2016 which has
never been set aside or execution of the same stayed. (A copy of the Consent
15 Judgment is attached hereto and marked 'B').

9. That this Application herein is misguided and improperly filed before this
honorable Court and a stay of execution of HCMC No. 231 of 2018 does not
stay the other Orders of the High Court from which the payments arise.

12. That in further reply to paragraph 7, I have been informed by my said
20 Advocates, which information I verily believe to be true that neither the
commission of Inquiry, nor the Inspector General of Government nor any
Government department/ministry has the legal mandate to review/question
a matter which has been conclusively adjudicated upon by a Court of law of
competent jurisdiction.

14. That in reply to paragraph 9 of the Affidavit in support of the
25 Application, the payments made and the subject of HCMC NO.2 1 of 2018 are
a subject of orders of Court which can only be challenged by known
procedures and it is not the mandate of the Applicant or Government
agencies to question the same but on the other hand if not paid in
30 accordance with the orders of Court, they attract penalties which cause
further loss perpetration by errant Government agencies.



5 18. That it is just and equitable that this Application is dismissed with costs since it raises no serious issues that merit judicial consideration and it is nothing more than a waste of court's time and it is prejudicial to my rights and interests.

10 19. That on the other hand, if at all this application is denied, the Applicant and or her agencies with the Inspectorate of Government and the said Commission of Inquiry shall still be able to execute their rightful mandate and or terms of reference and will not be prejudiced in any way whatsoever.

15 When this application came up for hearing Mr. Wanyama Kadoli learned Principal State Attorney appeared for the applicant while Mr. Sserwadda, Mr. Habumugisha and Mr. Mpumwire learned Counsel appeared for the respondent.

The Applicant's Case

20 It was submitted for the applicant that:- The High Court issued orders in the application appealed from that have the effect of prohibiting holding or stopping the regular functioning of two government agencies, the Commission of inquiry in land matters and the Inspectorate of Government. The implementation of the orders issued by the High Court issued at page 24 of the Ruling of the Judge for certiorari quashing the recommendation / order /decision of the Commission of inquiry into land matters to the Chairman of Uganda Land Commission, Ministry of Finance office and any other Government department will cause substantive financial loss of public funds and also foster corruption.

25 These wide ranging orders will negatively impact on the work of the commission of inquiry in other matters before it as the said orders are likely to be used as to shield those being investigated and to curtail the powers of the commission from investigating them.

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5 The orders will compromise, severely impede its ability to exercise its mandate especially in the investigation into the dealings and operations of the land fraud.

This application is intended to be a temporary measure pending the appeal by the applicant against the decision of the High Court. The appeal against the decision of the High Court has great likelihood of success and raises very serious questions of
10 law and public importance as set out in paragraph 7 of the affidavit in support of the application.

Counsel submitted that staying the orders of the High Court would allow the applicant and the Commission of Inquiry into land matters to proceed with work unimpeded by maintaining the *status quo* that was prevailing before the orders
15 were made.

He asked Court to allow this application and grant the orders sought.

The Respondent's case

For the respondent it was contended in reply that, the application has been brought pre-maturely as no application for stay of execution had been first sought at the
20 High Court as provided for under *Rule 42 (1)* of the Rules of Court.

Further the application is incompetent and moot.

The payment that the applicant seeks to stop or stay was as a result of a valid consent Judgment of the High Court that has never been set aside, or its execution stayed. The applicant seeks to stay orders in High Court Miscellaneous Cause No.
25 231 of 2018, but such a stay cannot extend to the decree of Court in High Court Civil Suit No 550 of 2016 the basis of which the payment is premised.



5 There is no payment due or payable under the order sought to be stayed. The respondent shall be prejudiced by the grant of the orders sought where the applicant will suffer no prejudice

He asked Court to dismiss the application.

Resolution

10 We have carefully listened to all Counsel. We have read the pleadings and the affidavits together with annexures thereto.

The principles upon which an application of this nature maybe granted have been set out by this Court in number of authorities. They include the following:-

- 15 1. *That the applicant has lodged a notice of appeal in accordance with Rule 76 of the Rules of this Court.*
2. *That a substantive application for stay of execution has been filed in this court and is pending hearing.*
3. *That the said substantive application and the appeal are not frivolous and they have a likelihood of success.*
- 20 4. *That there is a serious and imminent threat of execution of the decree or order and that if the application is not granted the main application and the appeal will be rendered nugatory.*
5. *That the application was made without unreasonable delay*
6. *The applicant is prepared to grant security for due performance of the decree.*
- 25 7. *That refusal to grant the stay would inflict greater hardship than it would avoid.*

See: *Kyambogo University vs Prof. Isaiah Omolo Ndiege, Civil Application No. 341 of 2013, Francis Nansio Micar vs Nuwa Walakira, Civil Application No.9 of 1990,*



5 *National Housing & Construction Corporation vs Kampala District Land Board, Supreme Court Civil Application No. 6 of 2002.*

An application for stay of execution is without doubt premised on a threat of execution of an order or decree appealed from. Therefore an application such as this seeking orders for stay of execution must first satisfy the Court that indeed the
10 orders or the decree appealed from is capable of being stayed and there is an inherent danger of execution. The law recognises that not every order or decree is capable of being executed or an appeal therefore warrants a grant of stay of execution.

That is why Rule 6(2) of this Court provided that:-

15 *(2) Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution. . .*

In the application before us the applicant seeks to stay execution of the order of the High Court arising from judicial review proceedings. These orders were issued
20 following administrative order issued by the commission of inquiry into land matters directing Uganda Land Commission and other government agencies from complying with a decree of the High Court in High Court Civil Suit No. 550 of 2016 which decree was arrived at by consent of parties. The respondent challenged those executive orders which were countermanding the consent Judgment and decree of
25 the High Court which has not been set aside.

In *Kyambogo University vs Prof. Isaiah Omolo Ndiege, Civil Application No. 341 of 2013*, this Court declined to grant a stay of execution of arising from Judicial proceedings noting that the orders were not capable of being executed. Similarly in
30 this case we are not satisfied that the orders issued by the High Court which this application seeks to stay are capable of being stayed. We find that they are not.



5 Be that as it may, even if we did find that the said orders could be stayed, the decree of the High Court in High Court Civil Suit No. 550 of 2016 in respect of which the applicant is not a party has neither been challenged nor stayed. A grant of an order staying execution of the orders arising from judicial review proceedings would in no way effect the said consent decree and as such it would be an exercise in futility.

10 It would only result into a conflict between the executive on one hand and the judiciary on the other. We say so because then, the orders of the land commission effectively staying the decree of the High Court in High Court Civil Suit No. 550 of 2016 would appear to have been green light by the order being sought in this application.

15 Judgments of Court cannot be stayed, reviewed or otherwise compromised by orders issued by the executive. That would be a blatant constitutional error. A decree of Court can only be stayed by the Court that issued it or an appellate Court. The doctrine of separation of power which affirms the independence of the Judiciary requires that the executive and or legislature ought to uphold the independence of
20 the Judiciary at all times. In this regard Article 128 of the Constitution provides that:-

(1) *In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.*

25 (2) No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.

(3) All organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts. (Emphasis added).

30 The Constitution goes further to ensure that not even Parliament can enact a law whose effect is to override or otherwise alter a decision of a Court of law as between the parties. In this regard Article 92 provides that:-



5 *'Parliament shall not pass any law to alter the decision or judgment of any court as between the parties to the decision or judgment.'*

Accordingly any executive order or directive that have the effect of staying, reversing or otherwise altering a decision of Court in null and void.

10 Allowing this application, would revive the order of the commission of inquiry on land matters which have the effect of staying a Judgment of the High Court.

The Constitution and other laws made there under ensure that the errors made in judicial processes are corrected within the same judicial process. The judicial process therefore has a self correcting system of reviews, revision, appeals and even disciplinary measures that ensure that any errors made are corrected within the
15 judicial system itself. See:- *Attorney General vs Gladys Kiseka, Supreme Court Constitutional Appeal No. 02 of 2016.*

In this case our considered view is that the Attorney General ought to have sought to set aside the consent decree in High Court in High Court Civil Suit No. 550 of 2016 as an aggrieved party if indeed that is the case. That would have triggered a process in
20 which a stay of that decree would be considered by the Court itself. A consent Judgment is not appealable under *Section 67(2)* of the Civil Procedural Act. It follows that it cannot be stayed except in an application to set it aside. To that extent we find that this application is misconceived.

We find that the orders sought to be stayed are not capable of being executed and
25 we decline to grant them.

We re-affirm the independence of the judiciary by stating that, orders issued by the executive however well intended cannot legally stay decisions of any Court of law.

We therefore find no merit in this application and we dismiss it with costs.



5 Dated at Kampala this.....17th day of.....April 2019.



Hon. Justice Kenneth Kakuru
JUSTICE OF APPEAL

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Hon. Justice Stephen Musota
JUSTICE OF APPEAL

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Hon. Justice Christopher Madrama
JUSTICE OF APPEAL

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