

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**MISCELLANEOUS APPLICATION NO.104 OF 2015**

(Arising out of Civil. Appl. No.103 of 2015)

**FALCON ESTATES LIMITED.....APPLICANT/  
INTENDING APPELLANT**

**V E R S U S**

**BISMILLAH TRADING LIMITED..... RESPONDENTS**

**CORAM: A SINGLE JUSTICE  
HON. JUSTICE RICHARD BUTEERA**

**THE RULING OF COURT:**

This is an application by Notice of Motion brought under rule 2, 6, and 43 of the  
Judicature (Court of Appeal Rules) Directions S.A. No.13 – 10.

According to the Notice of Motion the application is seeking for interim orders as  
follows:-

(1)An interim order for stay of execution against the respondents and their  
agents restraining them from executing the orders of Hon. Justice Wilson J.  
Kwesiga issued on 24/04/2015 in Miscellaneous Application No.330/2015.

(2)An interim order of stay of proceedings in HCCS No.192 of 2015 until the  
hearing and disposal of the main application.

(3) An interim order of injunction against the applicants, land unit of the Uganda Police and or agents from implementing the orders of Justice Wilson J. Kwesiga in Miscellaneous Application No.333 of 2015 arising from H.C.C.S. until further orders of this Court.

The applicant is also praying for costs to abide the result of the appeal.

The application is in effect praying for interim orders of stay of execution pending a substantive application for stay of execution before a full bench of this Court.

The grounds upon which the application is brought are set out in the Notice of Motion which is supported by an affidavit of one M/s Alwi Hassan a Managing Director/Chairman of the applicant deponed on 27<sup>th</sup> April 2015 which affidavit generally repeats the grounds in the Notice of Motion.

### **Background facts**

The applicant is the registered owner of a piece of land in Muyenga comprised in Block 244 Plot 3542 over which the respondent claims a right of access to his house. The right of access is disputed by the applicant who filed a Civil Suit No.188 of 2015 against the respondent seeking orders and an injunction to restrain the respondent. The respondent in turn filed Civil Suit No.192 of 2015 against the applicant and Kampala City Council.

On 7<sup>th</sup> April 2015 the applicant obtained a court order from the Deputy Registrar Civil Division in Miscellaneous Application No.329 of 2015 for maintaining the status quo by restraining the respondents/defendant and their agents from trespassing, claiming an easement (road), unlawfully encroaching, erecting illegal structure and in anyway interfering with the suit land until the application is heard and disposed off inter parties.

On 23<sup>th</sup> April 2015 the respondent obtained an order for a temporary injunction in Miscellaneous Application No.330 of 2015 from Hon. Justice Kwesiga for maintenance of the existing access to the residence of the applicant in that application who is the respondent in the instant application. The temporary injunction was to last until the head suit was heard and disposed of.

### **Submissions of counsel for the applicant**

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It was submitted for the applicant that the applicant is required in law to have filed a notice of appeal and a substantive application of stay of execution and these two requirements have already been fulfilled by the applicant. Counsel submitted that the applicant shown that there is a real threat of execution of the High Court order for which the interim order of stay of execution is sought. That efforts to execute the order of the High Court are real as the Police Land Protection Unit has already got instructions to execute the High Court Judge's Order. There is a real risk that the execution of the High Court order shall take place therefore unless stopped in the interim by this Courts order.

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It was submitted for the applicant that an interim stay of proceedings of the main hearing at the High Court be issued until disposal of the main application of stay of execution.

5 According to counsel for the applicant, if the hearing of the main case continued on the schedule already set by the High Court the case would be disposed of within one month. Then the orders that this Court would give in the applications before it would be in vain thus rendering the proceedings in this Court nugatory.

10 According to counsel the main suit is fixed for hearing on 15<sup>th</sup> May and 29<sup>th</sup> May 2015 when it may be concluded and if its heard and disposed of within one month, that might be before the appeal is heard and disposed of and that would render the appeal in this Court to be in vain.

15 Counsel also contended that the disposal of the main suit by the schedule set by Court would prevent the parties from referring the case to mandatory mediation as provided by the rules of the Judicature Mediation Rules. According to counsel the parties were already engaged in mediation negotiations and these would be curtailed if the suit proceedings were allowed to continue.

20 According to counsel, the status quo prevailing at the moment, prior to the filing of all this application to this Court should be maintained so as not to render the substantive application and appeal nugatory.

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### **Submissions of counsel for the respondent**

Counsel for the respondent opposed the application. He submitted that the application was improperly and irregularly brought to this Court. According to  
5 counsel an application for stay of execution would first be filed in the High Court and it is only when the High Court refuses to grant the stay or it doubts its jurisdiction or where the disposal of such an application in the High Court would entail substantial delay that such an application can be made to this Court. According to counsel there are no special circumstances to justify this application  
10 being allowed by this Court.

Counsel also submitted that the applicant had failed to meet the requirements for grant of an application of this nature. Counsel referred this Court to this Court's decision in **Kyambogo University vs. Professor Isiah Ndiege Civil Application**  
15 **No.31/2013** for the requirement.

Counsel submitted further that chances of success of the appeal cannot be properly assessed by this Court as that would be simply speculative since no Memorandum of Appeal had been filed to show the grounds upon which this Court would assess  
20 the likelihood of success.

Counsel contended that there was no serious threat of execution, as there is a letter from Police indicating their inability to execute the order of court since 24/04/2015 to date.

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Counsel further contended that the order of the High Court Judge was only for temporary relief for the respondents to access his premises through the applicant's land as before which would not render the application or the main appeal nugatory.

5 Counsel for the respondent submitted that the main suit before the High Court should not be stayed as prayed by the applicant. According to counsel the two suits before High Court have been consolidated and a hearing schedule agreed upon and the proceeding of the case on the agreed issues is better case management than the matter being stayed. According to counsel there was no  
10 reason or evidence shown as to why the suit should be stayed and what would be achieved by staying the suit.

### **Court's decision.**

15 One of the challenges raised in the application was that this application should have been made in the High Court rather than in this Court.

This Court has in numerous decisions stated the position as to which Court applications such as this have to be made. One such decision was **Civil**  
20 **Application No.207 P.K. Sengendo vs. Busulwa and Another.** The Court held as follows:-

**“An application for stay of execution pending appeal to this Court must first be filed in the High Court. It is only when the High Court refuses to grant the stay or where it doubts its jurisdiction or where the disposal  
25 of such an application in the High Court would entitle substantial delay that an application would be brought first in this court.**

For this Court to entertain such an application, the applicant must satisfy Court that rendered special circumstances exist. Those circumstances were set out in the case of Lawrence Musiitwa Kyazza vs Eunice Businghye (supra) That is where the High Court refuses to accept jurisdiction, where there is great delay in the disposal of the application at the High Court, where there are other special and rare circumstances and it is in the interest of justice to do so.

In any case Rule 42(1) of the Rules of this Court clearly stipulates that whenever an application maybe made either in this Court or in the High Court it shall first be made in the High Court.”

In the instant application there are two High Court orders which are conflicting. The two High Court orders are in reference to the same disputed land and both were granted ex-parte. The two court orders have been given to the police to enforce.

I find those circumstances special and rare justifying the case to be handled by this Court.

The application before this Court is for interim orders.

The law on the considerations for grant of an interim order for stay of execution was stated by Justice G.M. Okello, JSC in Civil Application No.19 of 2008 Hwang Sung Industries Ltd vs. Tajdin Hussein and 2 Others as follows:-

**“...the matter to be considered for grant of a substantive application for stay of are not necessarily the same in considering application for an interim order for stay pending disposal of the substantive application.**

5 **For an application for an interim order of stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application. It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.”**

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With the orders that have been issued clearly there is a serious threat of execution. This Court will not pre-empt consideration of the merits of the main application for stay. Those will be handled by the full Court handling the main application.

15 The status quo currently, according to counsel for the respondent, is that the Court Order issued in Miscellaneous Application No.330 of 2015 arising from H.CC.S. No. 192 of 2015 has not yet been implemented by police.

20 An interim order of stay is granted to maintain that status quo pending the hearing and determination of the main application for stay of execution pending in this Court.

I have had opportunity to hear the submissions of both counsel and I find no justification for grant of a stay of proceedings in the High Court and none is granted at this juncture. The application for that interim stay is therefore dismissed.



Having granted the interim order of stay in respect of Miscellaneous Application No.330 of 2015, I do not find the relevance of considering an interim order stopping police or agents from not implementing the same since that would not arise.

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Costs of this application will abide the outcome of the appeal.

Dated this day at Kampala.....10<sup>th</sup>.....of June.....2015.

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Hon. Justice Richard Buteera  
**JUSTICE OF APPEAL.**