

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[Coram: Kisaakye; Arach-Amoko; Mwangusya; Opio-Aweri; Mwondha; JJ.S.C]

CIVIL APPLICATION NO. 22 OF 2016

BETWEEN

KATAYIRA FRANCIS.....APPLICANT

AND

ROGERS BOSCO BUGEMBE.....RESPONDENT

RULING OF THE COURT

The applicant, Katayira Francis brought this application by Notice of Motion under Rules 2(2), 6(2) (b), 42, 43, 50 and 51 of the Rules of this Court, seeking for the following orders:

- a. **“An order for stay of execution, injunction, and stay of proceedings of the Judgement and Decree/Order of the High Court (Land Division) in H.C.C.S NO.133 of 2007 out of which High Court made an order dated and given on 22nd October, 2014 by Hon. Justice Bashaija. K. Andrew that the suit land comprised in Kibuga Block 14 plot 124 land at Ndeeba belongs to the estate of the late Kristofa Wadda and the Chief Registrar of Titles cancels Katayira Francis names from the Certificate of title and substitutes**

therein the names of Rogers Bosco Bugembe the Administrator of the estate of late Kristofa Wadda and Katayira and his agents/servants be evicted from the suit land.

- b. An order for stay of execution, injunction, and stay of proceedings of the Judgement and Decree/Order of the High Court (Land Division) in H.C.C.S NO.133 of 2007 be issued pending the hearing and final determination of the main appeal to be filed in Supreme Court and heard by a full bench of the Supreme Court.”**

The application is supported by an affidavit in support of the Notice of Motion filed on the 19th December 2016, a supplementary affidavit in support of the Notice of Motion filed on 26th April 2017, a supplementary affidavit in support of the Notice of Motion filed on the 8th May 2017 and an affidavit in rejoinder filed on 9th May 2017.

The respondent filed an affidavit in reply dated 8th May 2017 and one in reply to the supplementary affidavit also dated 8th May 2017.

Background:

The applicant, (Katayira Francis) was sued in the High Court by the respondent (Rogers Bosco Bugembe) for the following orders:

1. Recovery of land comprised in Kibuga Block 14, Plot 124 at Ndeeba.

2. An Order directing the Chief Registrar of titles to cancel the applicant's name from the Certificate of title of the suit land and substitute with his name.
3. General damages.
4. Mesne profits.
5. An eviction order.
6. Cost of the suit.

At the trial of the suit at the High Court, the respondent contended that the applicant had obtained registration of title to the suit land by fraud. The applicant's contention was that he had obtained good title as a bona fide purchaser for value without notice of defect of title.

At the conclusion of the trial, the trial Judge found that the applicant was not a bona fide purchaser for value for the reason that by the time he purchased the land there were developments on the land and a simple inquiry would have revealed that the suit land belonged to the estate of the late Kristofa Wadda of which the respondent was the Administrator.

It was on that basis that Court made a declaration that the suit land belonged to the estate of the late Kristofa Wadda and made an Order for cancellation of the applicant's name on the title and his substitution with the name of the respondent.

Being dissatisfied with the judgment of the High Court, he filed a Notice of appeal in the Court of Appeal on 23rd October 2014 but

did not follow it up with a Memorandum of Appeal. The respondent then filed Miscellaneous Application No.139 of 2016 at the Court of Appeal seeking an Order to strike out with costs the applicant's Notice of Appeal. The Court of Appeal in its ruling made on 27th September 2016 found that there was no Notice of Appeal to be struck out as the same had been withdrawn by the operation of the law i.e. Rule 84 of the Judicature (Court of Appeal Rules) Directions for the failure to lodge the appeal within the prescribed time of 60 days.

The applicant being dissatisfied with the ruling of the Court of Appeal filed a Notice of Appeal to this Court on 3rd October 2016 following which he filed the instant application for stay of execution, injunction and stay of proceedings pending hearing and disposal of the intended appeal.

The grounds on which the application is based may be summarized as follows: -

- (1)The applicant has lodged a Notice of Appeal
- (2)There is a serious threat of execution
- (3)The balance of convenience in maintaining the status quo is in his favour.
- (4)The intended appeal raises several legal issues and has a high chance of success.
- (5)The application was filed without delay.

Representation

At the hearing of this application, Mr. Semuyaba Justine represented the applicant while Mr. Wilfred Niwagaba represented the respondent. Both the applicant and the respondent were in Court.

Submissions:

Counsel for the applicant submitted that the application meets all the criteria for grant of an Order for stay of execution and gave details of how each of the criteria had been established by the application. The criteria and the details of his submissions are produced hereunder.

Counsel for the applicant submitted that the applicant was required to show that there was a prima facie case with a probability of success and proof that the application was not frivolous and vexatious and that there were serious questions to be tried. These were to be found in applicant's supporting affidavits and supplementary affidavits which showed that the decision of Court of Appeal denied him a fair hearing hence rendering it illegal.

He submitted that the applicant was the registered proprietor of the suit land and that he had acquired it as a bona fide purchaser for value without notice of fraud. He added that the Certificate of title was still registered in the applicant's names and the intended appeal had high chances of success. He pointed out that the

applicant had filed the application promptly and without undue delay.

Counsel submitted that there was evidence of a serious threat to execute and implement the Judgement and Decree/Order of the **High court (Land Division) in H.C.C.S No.133 of 2007.**

Counsel stated that the respondent was in the process of executing the order in the Judgment of the High Court and that he had on several occasions visited the suit land threatening to evict the applicant. He argued that this will cause the applicant substantial loss and damages which cannot be monetarily compensated as the suit land is prime land located at Ndeeba, Entebbe Road. That is where the applicant and his family reside and carry out business and if execution goes on, there is no likelihood of getting back the property.

Counsel submitted that the applicant was still in possession of the suit land as a registered proprietor and the intended appeal had a high probability of success. He added that the respondent would not suffer any damage if the application was granted.

On the balance of convenience, counsel submitted that the balance of convenience in maintaining the status quo lies in favour of the applicant as he was still in possession of the suit land. He added that the applicant could not have applied for stay of execution at the Court of Appeal as his Notice of Appeal was struck out. Counsel

prayed that this court restrains the respondent from evicting the applicant and from recovering the costs of Ug.Shs 49,195,680/=.

On preservation of the status quo, counsel for the applicant submitted that the applicant was still the registered proprietor and in possession of the suit land. That the respondent was threatening to evict him but no eviction had been effected. He added that this court should not allow a partial execution of the Judgement and Decree/Order of the High court and a stay of execution would restrain Commissioner for Lands from implementing the execution, thus safeguarding the integrity of the appeal in case it succeeded.

Counsel submitted that court finds that execution had not yet been completed and the applicant was seeking to prevent violation of his constitutional right to own property.

He cited cases of **Lawrence Musitwa Kyazze vs Eunice Busingye, Supreme Court Civil Application No. 18 of 1990** and lastly **NEC vs Mukisa Foods Court of Appeal Misc Application No.7 of 1998** for the principle that an injunction is intended to preserve the status quo until the disputes to be investigated in the suits are finally resolved.

Counsel for the applicant prayed that this court allows the application for stay of execution, injunction and stay of proceedings. He further prayed that the Commissioner of Land Registration be restrained from cancelling the applicant's name from the Certificate of title of the suit land and substituting it

therein with the name of the respondent. He also prayed Court to restrain the respondent and his agents from evicting the applicant from suit land. He prayed for the costs to abide the outcome of main appeal.

Reply by Respondent's Counsel

Counsel for respondent in opposition to the application, submitted that considerations for grant of stay of execution were non-existent. Counsel submitted that there was no prime facie case with a probability of success because the applicant failed to prosecute his appeal at the Court of Appeal within the stipulated time and has no ground to challenge the finding that his Notice of appeal was withdrawn by operation of law.

Counsel cited the case of **Dr.S.B Kinyatta and another vs Subramanian Gopaln & another C.A No.108 of 2003 and Utex Industries Ltd VS Attorney General SCCA No 52 of 1995** to the effect that it was the duty of an applicant to prosecute his appeal and not that of the respondent

Counsel for the respondent further argued that the respondent had already executed the decree of the High Court by deregistering the applicant from the Registered Certificate of title of the suit land. That the respondent is registered as Administrator of the estate of Kristofa Wadda and that the applicant had already been evicted by the respondent who already was in possession of the suit land. Counsel argued that the status quo had changed following

execution of the High Court Decree and that the applicant had nothing to protect on the suit land. He prayed that the application be dismissed with costs.

Applicant's submission in Rejoinder

Counsel for the applicant submitted that at the time of filing this application on 19th December, 2016, the applicant was still registered as proprietor of suit land. He stated that the warrant to give vacant possession was issued on 19th April 2017 yet the decree was extracted on 11th December 2014, which was a period of three years and there was no valid Notice issued by the Registrar of the High Court to show cause as to why execution should not issue. He added that the bill of costs of Ug.Shs 49,195,680 as cost of the case and court bailiff's fees has never been taxed by the High Court.

Counsel submitted at length that the execution done by respondent was illegal as there was no Notice served to him. Further execution was done without taxation of costs and depositing of duplicate or special Certificate to court and registration was done without removing his caveat.

Counsel reiterated that the applicant had satisfied all conditions for grant of stay of execution including a valid Notice of Appeal in this Court.

Counsel submitted that the applicant was no longer the registered proprietor of the suit land, as the Commissioner Land Registration

had illegally changed the register without properly removing the applicant's caveat.

Counsel submitted that the respondent had acted unlawfully and fraudulently in executing the warrant of vacant possession in respect of suit property and prayed this court finds execution was irregular.

Counsel prayed that the applicant be granted stay of execution in order to prevent the demolition of permanent houses which he had built on the suit property until the main appeal was heard.

Finally, counsel reiterated that this court allows his application for stay of execution, injunction and stay of proceeding in order to preserve the status quo and further restrain the respondent from completing the execution in this case and that the cost of the application should abide the outcome of the main appeal.

Consideration of the application by court:

An issue as to whether or not the applicant was denied a fair hearing was raised by his counsel. Without delving into the merits of the intended appeal we wish to observe that the applicant was present in court. He applied for an adjournment to enable him consult his Counsel but the adjournment was denied. The Court of Appeal invoked Rule 84 of the Judicature (Court of Appeal Rules) Directions to dismiss the appeal for default in instituting the appeal. The rule provides as follows: -

“Effect of default in instituting appeal.

If a party who has a notice of appeal fails to institute an appeal within the prescribed time: -

- (a) he or she shall be taken to have withdrawn his or her appeal and shall, unless the Court otherwise orders be liable to pay the costs arising from it of persons on whom the notice of appeal was served.**
- (b) any person on whom the appeal was served shall be entitled to give notice of appeal notwithstanding that the prescribed time has expired, if he or she does so within fourteen days after the date by which the party who lodged the previous notice of appeal should have instituted his or her appeal.”**

As to whether or not the Court of Appeal rightly applied the above rule is an issue for consideration on appeal to this court and we would not wish to pre-empt the outcome.

The Jurisdiction of this Court to grant a stay of execution is set out in Rule 6(2) (b) of the Rules of this Court which provides that:

“2. Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or stay execution, but the Court may -

a)

b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule, Rule 72 of these Rules of this Court, order a stay of execution, an injunction of stay of proceedings ...on such terms as the may consider it just”.

The above Rule gives this Court the discretion in civil proceedings where a Notice of appeal has been lodged in accordance with rule 72 of the Rules of this Court, to order stay of execution in appropriate cases and on terms that it thinks fit. Like all judicial processes the discretion must be exercised on well-established principles.

It is the paramount duty of Court to which an application for stay of execution pending appeal is made to see to it that the appeal if successful, is not rendered nugatory. This Court has in a number of cases including the ones cited by Counsel for the applicant above, laid down the principles governing the exercise of the discretion conferred by Rule 6(2)(b).

This Court in the application by **Hon. Theodore Ssekikubo & Others vs. The Attorney General and Another, Constitutional Application No 06 of 2013** clearly re-stated the principles to be followed in granting stay of execution as follows:

“In Akankwasa Damian vs. Uganda, Const. Appl. Nos. 7 and 9 of 2011, for instance, the principles were re-stated as follows:

- 1. Applicant must establish that his appeal has likelihood of success; or a prima facie case of his right of appeal.**

2. That the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.

3. If 1-2 above have not been established, Court must consider where the balance of convenience lies.

We should add that another principle is that the applicant must also establish that the application was instituted without delay.”

It is now settled law that applications of this nature where both this court and the Court of Appeal have concurrent jurisdiction to hear them, must first be made to the lower Court. It is only when the application is denied by lower Court the applicant may resort to this Court. See Rule 41(1) of the Rules of this Court.

In the case of **E.B. Nyakaana & Sons Ltd v Kobusingye & 16 Ors (Supreme Court Misc. Application No. 13 of 2017)** the Hon. Justice Dr. Kisaakye JSC stated as follows: -

“Before proceeding to consider whether the applicant has met the above requirement for grant of an interim order of stay of execution, there is a matter that I have deemed proper to dispose of by way of a preliminary point. This related to matters over which this Court and the Court of Appeal have concurrent jurisdiction.

Rule 41(1) of the rules of this Court provides as follows:

‘Where an application may be made to either the Court or to the Court of Appeal, it shall be made to the Court of Appeal first.’

The orders the applicant intends to stay temporarily were issued by the Court of Appeal, which is also vested with powers under Rule 2(2) of the Judicature (Court of Appeal) Rules to make such orders as may be necessary to meet the ends of justice. These include powers staying execution of its orders. Indeed in *Housing Finance Bank Ltd & Anor v. Edward Musisi*, Misc. Application No.158 of 2010(CA), the Court of Appeal held that under Rule 2(2) of its Rules, it is vested with powers to grant a stay of execution of its orders to deserving applicant in cases of an applicant intending to appeal against its decision to the Supreme Court.

It therefore follows that since this Court and the Court of Appeal have concurrent jurisdiction over this application, the applicant was enjoined to file its application in the Court of Appeal first. (Underling for emphasis)

The applicant in paragraph 21 of his affidavit in support of the Notice of Motion dated 19th December 2016 and paragraph 14 in his Supplementary affidavit in support of the Notice of Motion dated 26th April, 2017 avers that he could not file this application at the Court of Appeal because when the Court of Appeal delivered its

ruling, it struck out his Notice of Appeal hence his entire appeal was dismissed. We do not find this reason advanced by applicant plausible because it is for the very reason that the Court of Appeal struck out his Notice of Appeal that he appealed to this Court.

We therefore, find that the instant application does not comply with Rule 41 subrule 1. However, we are aware that the failure to comply with subrule (1) does not on its own preclude the Court from granting an order of stay of execution. Under rule 41 (subrule (2) the Court is given discretionary powers to entertain an application for stay of execution under rule 6(2)(b) of our rules to safeguard the right of Appeal even though the applicant has not made his or her application to the Court of Appeal first. The subrule is set down hereunder:

“41. Order of Application to the court and to Court of Appeal.

(1) ...

(2) **Notwithstanding subrule (1) of this rule, in any civil or criminal matter, the Court may, in its discretion, on application or of its own motion, give leave to appeal and make any consequential order to extend the time for the doing of any act, as the justice of the case requires, or entertain an application under the rule 6(2)(b) of these rules to safeguard the right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal.”**

In other wards the application is heard on its merit which the learned single judge did before dismissing the application in E.B. Nyakana vs Beatrice Kobusingye & 16 Others (Supra)

The third consideration which goes to the merit of this application is that by the time the application for stay of execution was filed, execution had been completed. In paragraphs 9 and 10 of his Affidavit in reply filed on the 8th May, 2017, he states: -

“9. That in reply to paragraphs 16,17,18,19 and 20 of the said affidavit the decree has already been executed by canceling the Applicant’s names from the register and entering the Respondent’s names thereon and evicting the Applicant’s tenants from the land and putting the same into the Respondent’s possession (A copy of the Certificate of title duly registered in the respondent’s names and a return of the warrant to give possession to the Respondent are hereto attached and marked annexures LL1 and LL2 respectively).

10. That as result of the foregoing and in further reply to paragraphs 16,17,18,19,20,21,24,25 and 26 of the said affidavit I am advised by my Advocates whose advice I verily believe to be true that there is nothing to stay as the execution has been lawfully done and completed.”

Then in paragraphs 3 and 4 in his affidavit in reply to the supplementary affidavit filed on the same day the respondent further avers:

“3. That in reply to paragraphs 5,11,13,16,17,18,19 and 20 of the said affidavit, I have, following the dismissal of the applicant/appellant’s application for an interim order of stay execution, had the decree executed and the certificate of title is now registered in my names and the applicant/appellant has since been evicted from the suit land (A copy of the certificate of title duly registered in my names and the return of the Bailiff of Court showing that the applicant/appellant has been evicted from the property are hereto attached and marked A and B respectively).

4. That in reply to paragraphs 12,14 and 15 of the said affidavit I am advised by my advocate aforesaid that the Applicant has no ground to challenge the finding of Court that his Notice of Appeal was withdrawn by operation of law and that no appeal lies in the circumstances and if there is any, then the same is time barred.”

He attached a title indicating an entry on 19.04.2017 whereby he had been registered as Administrator of the estate of the Late Kristofa Wada alias Bukulu (Admin. Cause No.1093 of 2004 in the High Court of Uganda at Kampala).

In his Affidavit in Rejoinder the applicant averred in paragraphs 6,12 ,15 and 16 that said execution was illegal and stated as follows:

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“6. That after filing this application on the 19th December 2016 in the Supreme and while the application was still pending hearing by the Supreme Court and fixed on the 30th May 2017 at the same time on the 8th May 2017 the respondent through Court Bailiffs M/S Tropical General Auctioneers on the 8th May 2017 proceeded to illegally execute the above mentioned WARRANT TO GIVE VACANT POSSESSION IN HIGH COURT CIVIL SUIT NO.133 OF 2007 (HCT-EMA NO.826 OF 2017) issued by His Worship Muse Musimbi the Registrar Execution and Bailiffs Division on the 19th April 2017 and the Respondent has now illegally transferred the suit land comprised in KIBUGA BLOCK 14 PLOT 124 LAND AT NDEEBA into the names of ROGERS BOSCO BUGEMBE the Administrator of the Estate of the Late Kristofa Wada and KATAYIRA FRANCIS. (A photocopy of the return of THE WARRANT TO GIVE VACANT POSSESSION IN HIGH COURT CIVIL SUIT NO.133 OF 2007(HCT-EMA NO.826 OF 2017) which was filed by Court Bailiffs M/s Tropical General Auctioneer and the search Certificate from the Commissioner of Land Registration are here to attached and marked as annexure C and D.

12. That the execution in this case was therefore illegal as at all material times I was still in possession of the Original Certificate of Title of the Suit Land comprised in KIBUGA BLOCK 14 PLOT 124 LAND AT NDEEBA and the Respondent J/Creditor has not yet formally obtained a Notice to Show Cause as the Decree in this matter had been issued by the High

Court Land Division on the 11th December 2014 and the Respondent never formerly applied to execute the order that the Chief Registrar of Titles that cancels KATAYIRA FRANCIS'S names from the certificate of title of the suit land and substitute therein the names of ROGERS BOSCO BUGEMBE the administrator of the estate of the late Kristofa Wada.

15. That further the illegal execution in this case was conducted without an order of the Registrar of Execution and Court Bailiffs Division and that the execution went ahead without the process of taxation of costs incurred being done as is required by law.

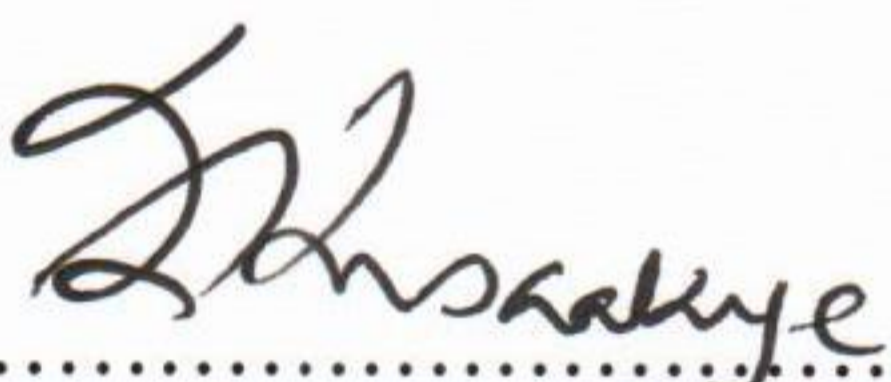
16. That as a result of these errors this honorable court can issue an order to reverse the illegal transfer and restore the property the suit land comprised in KIBUGA BLOCK 14 PLOT 124 LAND AT NDEEBA as at 19th December 2016 the time this application for stay of execution, injunction and proceedings was filled in the Supreme Court as it is clear that the said illegal execution did not proceeded as the normal procedure for execution provides and a proper notice to show cause was not issued and properly served as there was no advertisement and the taxation of costs of the lawyers and court bailiffs had not yet been done and therefore this execution is still partially done as it was illegal and can still be stayed."

The alleged illegal registration of the respondent as Proprietor when there was caveat to the title is a matter for the Commissioner for


Land Registration to resolve. Issues of illegality related to execution in the High Court where the execution took place are resolvable by the High Court whose decree was being executed. The applicants above concerns cannot be resolved in an application for stay of execution which by its nature is preventive rather than corrective.

We therefore find no merit in this application and the same is dismissed with costs to the respondent.

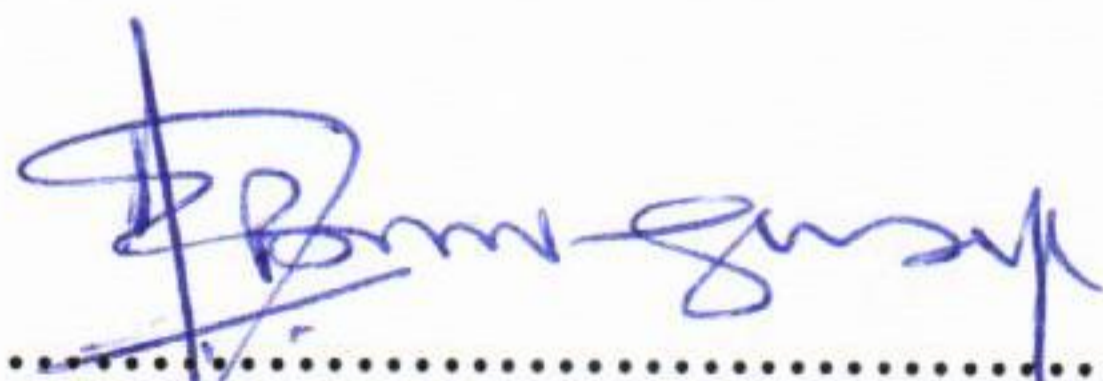
Dated at Kampala this^{1st}.....day of*June*..... 2020



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Hon Justice Dr. Esther Kitimbo Kisaakye
JUSTICE OF THE SUPREME COURT



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Hon Justice Stella Arach-Amoko
JUSTICE OF THE SUPREME COURT



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Hon Justice Eldad Mwangusya
JUSTICE OF THE SUPREME COURT

.....
Hon Justice Rubby Opio-Aweri
JUSTICE OF THE SUPREME COURT

.....
Hon Justice Faith Mwendha
JUSTICE OF THE SUPREME COURT