THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Irene Mulyagonja, JA (Sitting as a Single Judge)

CIVIL APPLICATION NO. 045 OF 2024

ARISING FROM MISCELLANEOUS APPLICATION NO 1269 OF 2023

BETWEEN

CHRISTINE NASSUNA ::APPLICANT

AND

1. MOSES KAMOGA MATOVU
2. JASPAL SINGH BIRDI
3. KULWINDER } **::::::::::::::RESPONDENTS**

RULING

The applicant brought this application under the provisions of section 33 of the Judicature Act and rules 2 (2), 6 (2) (b), 42 (2), 43 and 44 of the Judicature (Court of Appeal Rules) Directions, SI 13-10.

She sought an order to stay execution of the judgment and decree/orders in **High Court Civil Suit No 378 of 2013, Civil Suit No 17 of 2022, Miscellaneous Application No 2600 of 2023** and **Miscellaneous Application No 1024 of 2023**, till final disposal of her application for leave to appeal now pending hearing before this court. She sought a further order restraining the respondents and their servants or agents from evicting her or otherwise dispossessing her and taking possession of the land registered in Leasehold Register Volume 2220 Folio 1 Plot 13, Kome Drive at Luzira, Nakawa Division in Kampala District, until disposal of her application for leave to appeal.

The application was supported by an affidavit deposed by the applicant on 30th January 2024. The 1st respondent did not oppose the application but the 2nd and 3rd respondents did in an affidavit deposed by Jaspal Singh Birdi, the 2nd respondent, on 13th February 2024.

The facts as can be deduced from the affidavits are that in 2009, the applicant bought and took possession of a piece of land from the 1st respondent. A copy of the agreement of sale was attached to her affidavit and marked as **Annexure C**. Thereafter, she constructed a residential house on the land without any disturbance from any one and she lives in the house with her family. That while she was in possession, the 1st respondent filed a suit against the 2nd and 3rd respondents as **HCCS No. 378 of 2013** in respect of the said land but judgment was entered against him, with orders that he was a trespasser on the land who should be evicted therefrom.

She further averred that being aggrieved by the orders against the 1st respondent, she filed **HCMA No. 476 of 2022** for review and orders to set aside the judgment in **HCCS No 378 of 2013**. She also filed an application to stay execution of the orders in the said suit as **HCMA No 475 of 2022** pending the determination of the application for review, and **HCCS No 17 of 2022**, in order to protect her interest in the land.

The applicant further averred that **HCMA No. 475** and **476 of 2022** were stayed when they were called on for hearing, pending the determination of **HCCS No. 17 of 2022** on its merits. However, the suit was dismissed on 6th April 2022 on the ground that it was *res judicata*. **HCMA No. 475 of 2022** was accordingly also dismissed. She further averred that because she was aggrieved by the decision in **HCCS No 17 of 2022**, she filed an application for review, as **HCMA No. 1024 of 2023** but it too was dismissed. She thus filed an application in the High Court seeking leave to appeal against the decision in the review, but it was also dismissed.

It was then that she filed **Court of Appeal Civil Application No 1269 of 2023** seeking leave to appeal against the orders of the trial judge in the application to review the decision in **HCCS No. 17 of 2022** and subsequent orders therefrom. She now comes to this court on an application to stay execution of the same orders pending the hearing and determination of her application for leave to appeal.

On their part, the 2nd and 3rd respondent are husband and wife, Kenyan and the registered proprietors of land registered in LRV 2220 Folio 1, Plot 13 Kome Drive in Luzira, Kampala District. In his affidavit in reply to the application, the 2nd respondent averred that the 1st respondent admitted in **HCCS No. 378 of 2013** that before he bought the land in dispute, he did not carry out due diligence as to its ownership. He also did not know the description thereof when he bought it in 2010. That as a result, the applicant could not have known the description of the land that she bought from the 1st respondent.

The 2nd respondent further averred that the applicant and the 1st respondent here are one and the same person. That the applicant confessed that he lives in the contested property with his family, during the hearing of **HCCS No. 378 of 2013**. He denied that he applied to execute the orders in that suit. And that as a result, the applicant need not worry for she is in possession of the land in dispute.

In her rejoinder, the applicant averred that there is a danger of execution against her because the respondents filed in the High Court an application for execution of the decree. That notice to show cause why execution should not be effected upon her was issued, dated 24th January 2024 and attached to the affidavit in rejoinder. It showed that the respondents sought to execute to recover costs in **HCCS No. 17 of 2022** and the applications subsequent to it that were filed by the applicant and dismissed.

At the hearing of the application, the applicant was represented by Mr James Muhwezi Rwakoojo. Mr Moses Mulira represented the 2nd and 3rd respondents, while the 1st respondent was represented by Mr Ivan Musinguzi. All parties, except the 1st respondent, filed written submissions which I have considered.

Submissions of counsel

Counsel for the applicant submitted that the grounds upon which applications for stay of execution are issued were stated in **Akankwasa Damian v. Uganda, Constitution Application No. 7 and 9 of 2011,** which was cited by the court with approval in **Theodore Ssekikubo & 3 others v. Attorney General, & Others, Civil Application No 6 of 2013**, as follows:

i. The applicant must establish that his/her appeal has a likelihood of success
ii. The applicant will suffer irreparable damage or that the appeal will be rendered nugatory if the stay is not granted;
iii. If the conditions in i) and ii) have not been established, court must consider where the balance of convenience lies; and
iv. The application was filed without delay.

With regard to the 1st criterion above, counsel for the applicant submitted that the pending application for leave to appeal has a strong likelihood of success because in **HCCS No. 17 of 2022**, the applicant was not heard on the merits of the suit. It was dismissed on a preliminary objection that it was *res judicata*; neither was her case heard in the application for review. That the right to fair hearing is non derogable and for that reason, the application for leave to appeal in this court has high chances of success.

As to whether the applicant will suffer irreparable damage if the application is not granted, counsel submitted that, if the appeal is successful, it will be rendered nugatory. He again adverted to the fact that in the application for leave to appeal, the applicant seeks to enforce her right to be heard on the merits of her case. That the applicant will suffer irreparable damage because the eviction from her home on the land in dispute will traumatise her and her children. That she will suffer further loss if the buildings on the land are demolished.

Counsel further submitted that there is an imminent threat of execution of the decree because the respondents filed an application for execution of the decree, **EMA No 0462 of 2023**, Annexure L1 and L2 to the affidavit in support. Counsel further submitted that the balance of convenience lies in favour of the applicant because she is in possession of the property in dispute. He further asserted that the application was filed without delay and prayed that it be granted.

In reply, counsel for the 2nd and 3rd respondents agreed with counsel for the applicant on the criteria upon which this court considers applications for stay of execution. He asserted that the most important one of them is that the applicant must demonstrate that the appeal has a likelihood of success; or a prima facie case of his/her right to appeal.

Counsel then submitted that the applicant filed a Notice of Appeal in the High Court to appeal against the decision in a ruling handed down by Businge Byaruhanga, J on the 17th day of November 2023. That the Notice of Appeal that was lodged does not amount to the notice that is required under rule 76 of the Court of Appeal Rules, sub rule (1) of which provides that any person seeking to appeal to this court shall give notice in writing which shall be lodged in duplicate with the Registrar of the High Court. That whereas the applicant's purported notice bears a heading that it is a Notice of Appeal, the applicant is appealing to this court to rehear her application for leave to appeal which was dismissed

in **Misc. Application No 2600 of 2023**. Further that the Notice of Appeal was filed in this court, not in the High Court.

Counsel went on to submit that an order for stay of execution in this court is granted to one who has filed an appeal in this court. He referred to the decision in **Dr. Ahamed Kisuule v. Greenland Bank (In Liquidation) SCCA No. 07 of 2020** and **Gashumba Maniraguha v Nikundiye, SCCA No 24 of 2015**.

Counsel went on to submit that the applicant is fully aware that she has no right to appeal to this court. And that while she filed an application for leave to appeal in this court which has not taken off, the applicant did not provide evidence to show that it is likely to succeed. That the application for leave to appeal therefore does not satisfy the requirement of a prima facie case to be heard by this court and for that reason the application should fail.

Counsel further submitted that the applicant did not satisfy the requirement that she will suffer irreparable damage or that her appeal will be rendered nugatory if the order she seeks is not granted. That the respondents had not commenced the execution process and what exists is an effort to execute to recover costs. He went on to submit that the term irreparable damage is defined to mean damage that cannot be easily ascertained because there is no fixed pecuniary measurement. He referred to Black's Law Dictionary, 9th Edition for that definition. He pointed out that the applicant in this case states in her affidavit in support that she will be inconvenienced and that does not amount to irreparable damage.

With regard to the balance of convenience, he submitted that it lies with the respondents who will suffer if they are denied recovery of the partial nominal decretal sum which the applicant had agreed to pay. He

concluded that the applicant failed to make out a case for the grant of the order sought and her application should be dismissed with costs.

Determination

The principles upon which orders to stay execution are granted by the appellate courts were re-stated by the Supreme Court in **Theodore Ssekikubo & Others v. AG, SC Constitutional Application No. 6 of 2013** as follows:

i. The applicant will suffer irreparable damage or the appeal will be rendered nugatory if the order is not granted;
ii. The appeal has a strong likelihood of success, or a prima facie case of the right to appeal;
iii. If 1 and 2 criteria have not been established, the court must consider where the balance of convenience lies; and
iv. The application has been brought without delay.

The power of this court to grant orders to stay execution is provided for in rule 6 (2) (b) of the Rules of this Court as follows:

> **(2) Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may—**
>
> **(a) ...**
>
> **(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.**

Rule 76 of the same Rules provides, in part, as follows:

> **76. Notice of appeal in civil appeals.**
>
> **(1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the High Court.**

(2) Every notice under subrule (1) of this rule shall, subject to rules 83 and 95 of these Rules, be lodged within fourteen days after the date of the decision against which it is desired to appeal.

(3) ...

(4) <u>When an appeal lies only with leave</u> or on a certificate that a point of law of general public importance is involved, <u>it shall not be necessary to obtain the leave or certificate before lodging the notice of appeal.</u>

{Emphasis added}

Counsel for the respondent challenged the notice of appeal that was filed by the applicant on the ground that it did not comply with rule 76, and that it was filed in this court, not the High Court. I carefully perused the said notice of appeal. It was entitled in its body as a *"Notice of Appeal (From the Ruling of Honourable Lady Justice Immaculate Busingye Byaruhanga) handed down at Kampala on 17th day of November 2023."* In its heading, the Application is stated to be in respect of *"Miscellaneous Application No 2600 of 2023, Arising from Miscellaneous Application No. 1024 of 2023; Arising from a Ruling of 6th April 2023 by Hon Lady Justice Immaculate Busingye Byaruhanga, from Civil Suit No 17 of 2022."*

The appeal to which the notice was intended to apply was stated in the body thereof as *"the whole of the decision of the Court that was passed on 17th November 2023."* In paragraph 12 of her affidavit in support of the application, the applicant stated that **Misc. Application No. 2600 of 2023** was an application for leave to appeal, and it was dismissed by Busingye Byaruhanga, J. Although the applicant further indicated that the decision was attached to the affidavit as **Annexure J**, it was not. **Annexure J**, was a copy of the application in **HCMA No. 1267 of 2023**, for leave to appeal to the Court of Appeal against an order of the same Judge delivered on 18th August 2023, in **Miscellaneous Application No. 1024 of 2023.**

The document that corresponded with what was stated in paragraph 12 of the affidavit in support was marked as **Annexure "I".** It was an application for leave to appeal to the Court of Appeal against orders issued by Busingye Byaruhanga, J on 6th April 2023. Though the decision itself was never attached to the affidavit, it is evident that there is no notice of appeal filed in court against the decision of Busigye Byaruhanga delivered on 17th November 2023 at all. As a matter of fact, it is not even clear what that decision related to because it was not in evidence in the affidavits of the applicant. Neither is there evidence that a Notice of Appeal was filed in respect of the decision in respect of which the applicant seeks to appeal to this court, which was stated to be the dated 18th August 2023 and in **Miscellaneous Application No. 1024 of 2023**.

I observed that what is pending in this court as the main application is **Court of Appeal Civil Application No 1269 of 2023**. The applicant seeks leave of this court to appeal against the orders and ruling of Busingye Byaruhanga, J in **HCMA No 1024 of 2023**, an application for review of the decision in **HCCS No 17 of 2022.** The applicant chose to apply for review when the suit was dismissed on 6th April 2023 on the ground that it was *res judicata.*

Section 82 of the Civil Procedure Act provides for the power of review as follows:

> **82. Review.**
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> **Any person considering himself or herself aggrieved—**
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> **(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
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> **(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.**

Order 46 rule 1 of the CPR provides for applications for review in almost the same terms as follows:

> **1. Application for review of judgment.**
>
> **(1) Any person considering himself or herself aggrieved—**
>
> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
>
> **(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or made the order.**
>
> **(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and the appellant, or when, being respondent, he or she can present to the appellate court the case on which he or she applies for the review.**

The applicant had an automatic right to apply for review of the order of Busingye Byaruhanga, J which was rendered on 18th August 2023. However, she had no automatic right to appeal against the order denying the review because Order 46 rule (1) (t) provides that appeals may only be preferred from *"an order under rule 4 of Order 46 granting an application for review."* Order 46 rule 2 of the CPR goes on to provide that:

> **(2) An appeal under these Rules shall not lie from any other order except with leave of the court making the order or of the court to which an appeal would lie if leave were given.**

The applicant applied for leave to appeal against the order of Busigye Byaruhanga, J in the High Court but she denied her leave to appeal against her order dismissing her application for review in **Misc.**

Application No 2600 of 2023. She now comes to this court to seek leave to appeal against the order that was issued in **HCMA 1024 of 2023**, which was the application for review of the decision in **HCCS No 17 of 2023**. I therefore find that this court has the power to consider her application for leave to appeal against the said order under Order 46 rule (2) CPR.

As to whether the applicant will suffer irreparable loss if the application to stay execution is not granted, or the appeal will be rendered nugatory if the order is not granted, the applicant averred that there is an imminent threat of execution and/or eviction because the respondents have extracted a notice to show cause why execution should no issue. This was attached to the affidavit in rejoinder as **Annexure A** and it showed that the proposed execution was for the recovery of UGX 22,206,500, being taxed costs in **TA No. 340 of 2023** and **TA No. 766 of 2023**.

The 2nd respondent denied that there was any attempt to evict the applicant from the land. He asserted, in paragraphs 21-23 of his affidavit that he has not commenced the process of execution to evict the applicant. That the applicant did not furnish court with evidence of execution in that regard and her allegations are redundant, premature and speculative. The respondent's assertions are credible because indeed the NTC is in respect of costs, and there are most likely the efforts of the respondents' lawyers to recover them, not the respondents.

Counsel for the respondent explained the partial execution in his submissions, in paragraph 33, that when the notice to show cause why execution should not issue came up for hearing on 31st January 2024, the applicant proposed a voluntary payment plan through her lawyers. She was ready to pay the costs in eight (8) instalments and she did not oppose the notice to show cause why execution should not issue.

I therefore find that the applicant has not made out a case that she will suffer irreparable damage if this application is not granted. And there being no evidence to show that she is about to be evicted from the premises before her application for leave to appeal is heard and disposed of, I am further unable to find that the application for leave to appeal would be rendered nugatory if the order is not granted to her.

It must now be considered whether the appeal, in this case the application for leave to appeal, has a strong likelihood of success, or whether there is a prima facie case of the right to appeal against the order in the application for review.

It will be recalled that the decision that the applicant seeks to appeal against, the ruling in which the trial judge dismissed the application for review, was not provided to court though it was stated that it was attached to the affidavit in support as **Annexure I**. This annexure was actually a copy of the application in **HCMA No 2600**, the application for leave to appeal against the trial judge's order in **HCCS No. 17 of 2022**. Since that is available together with the decision that the applicant sought leave to appeal against, I believe the court can from that perspective make a decision whether the application for leave to appeal has a likelihood of success.

In her ruling in **HCCS No. 17 of 2022**, the trial judge at pages 7 and 8 of her opinion stated thus:

> *"Civil Suit No 17 of 2022 is res judicata since the plaintiff in Civil Suit 17 of 2022 claims to have got her interest from the plaintiff in Civil Suit 378 of 2013 which was finally determined in 2022. Counsel for the plaintiff indicated that he was conceding to the preliminary objection in respect of res judicata as raised by counsel for the 2nd and 3rd defendants in Civil Suit No 17 of 2022.*
>
> ...
>
> *According to the record, Counsel for the plaintiff has conceded that Civil Suit No 17 of 2022 is res judicata since the plaintiff in Civil Suit No 17 of*

2022 claims her interest in the suit land from the plaintiff in Civil Suit No 378 of 2013 who lost the case in respect of the suit land after final determination of Civil Suit No 378 of 2013. Hence Civil Suit No 17 of 2022 is res judicata and accordingly dismissed under section 7 of the Civil Procedure Act."

The applicant contends in the main application, that the lawyer who is said to have conceded to the point of law that the suit was res judicata was not known to her. He did not represent her and was therefore fraudulently in court. However, as to whether a suit is res judicata or not is determined on the basis of the judgment in the previous suit.

Section 7 of the CPA provides for the defence of res judicata partly as follows:

7. Res judicata.

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

Explanation 1. —The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it.

Explanation 2. —For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation 3. —The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation 4. —Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit.

In **Mansuklal Ramji Karia & Crane Finance Co Ltd v. Attorney General & 2 Others, Supreme Court Civil Appeal No 20 of 2002**, the court considered the doctrine of res judicata. The Honourable Justices of the court had recourse to the decision in **Ismail Karshe v. Uganda**

Transport Ltd, HCCS No 553 of 1966 reported in Cases on Civil Procedure and Evidence, Vol. 3 page 1. They observed that Sir Udo Udoma, then Chief Justice of Uganda, held that once a decision has been given by a court of competent jurisdiction between two persons over the same subject matter, neither of the parties would be allowed to relitigate the issue again or deny that a decision had in fact been given, subject to certain conditions.

The applicant here admits that she bought the land in dispute from the 1st respondent, Moses Kamoga Matovu who was a party to the previous suit, Civil Suit No 378 of 2022 between him and the 2nd and 3rd respondent. There was an agreement between the applicant and the 1st respondent, **Annexure C** to her affidavit in support of the application. She also admits that the land that she claimed in **HCCS No 17 of 2022** is part of the land that is held by the 2nd and 3rd respondent and comprised in Leasehold Register Volume 2220 Folio 1, Plot 13 Kome Drive, Luzira Nakawa Division, Kampala District. Although this is not the description given to the land in the agreement, it is clearly admitted by the applicant that the land she claims is a portion of that which is covered by the 2nd and 3rd respondent's certificate of title.

The 1st respondent who sold her the land does not oppose this application, meaning that he has no intention of continuing the dispute over the land for it would clearly go against him. He is no doubt her predecessor in title and she litigated in **HCCS No. 17 of 2022** as his successor in title. The issues between her predecessor in title and the 2nd and 3rd respondents having been finally adjudicated upon by a court with competent jurisdiction. The applicant's main application for leave to appeal the decision of the trial judge that her suit was res judicata would have no chance of success, in my view.

As to whether this application was filed without delay, the decision that is sought to be appealed was handed down by the lower court on 18th

August 2023. **Civil Application No. 1267 of 2023**, from which this application arose was filed in this court on 1st December 2023, while the instant application was filed on 30th January 2023. Given that the applicant sought to exhaust her remedies in the lower court first, where she filed several applications before coming to this court, I find that this application was filed without unreasonable delay.

With regard to the issue whether the balance of convenience lies in favour of the applicant that the application be granted, there is first of all no action to stay since the respondents have not at any one time tried to evict her from the land in dispute. In the circumstances, an order to that effect would be superfluous, in my view.

This application is therefore hereby dismissed and the costs shall abide the disposal of **Civil Application No. 1267 of 2023** now pending hearing in this court.

Dated at Kampala this 19th day of March 2024.

Irene Mulyagonja

JUSTICE OF APPEAL