IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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

CIVIL APPLICATION NO. 044 OF 2024

ARISING FROM CIVIL APPEAL NO 176 OF 2023

Arising from Misc. Application No. 172 of 2022; High Court Civil Revision No 004 of 2022 & High Court Misc. Application No. 002 of 1996)

All Arising from Mbarara Chief Magistrates Civil Appeal No. 076 of 1990]

BETWEEN

1. CHARLES MUTUNGI
(As Administrator of the Estate of Christopher Kajundira)
2. GODFREY MUHOOZI KAJUNDIRA ::::::::::::::::::**APPLICANTS**

AND

1. JANET RUBADIRI SHALITA
2. LYDSAY MUSOMINARI SHALITA
3. JOY SHALITA
4. NORA SHALITA
5. ISAAC NDAHIRO
6. JULIET KAYOSHE
7. GEORGE NVEGERI ::::::::::::::::::**RESPONDENTS**

RULING

The applicants brought this application under rules 2 (2), 43 and 44 of the Judicature (Court of Appeal Rules) Directions, SI 13-10. They sought an order to stay execution of the orders in Mbarara High Court Miscellaneous Application No. 172 of 2022, pending the hearing of their appeal in this court.

The grounds of the application were set out in the Notice of Motion but more particularly in the affidavits in support that were deposed by both applicants on 30th January 2024. The respondents opposed the application in an affidavit deposed by Lyndsay Musominari Shalita, the 2nd respondent.

The salient facts upon which the application was based are long and convoluted involving may applications and orders made by the courts below. I deemed it useful to set down most of them, as deduced from the affidavits in support and opposition, in order to facilitate a better understating of the final decision in this matter.

According to his affidavit of 30th January 2024, Charles Mutungi is the Administrator of the Estate of the Late Christopher Kajundira. He averred that the dispute from which this application arose began in 1987 when Christopher Kajundira, his predecessor in title and father, sued the late Bishop Kosiya Shalita over a piece of land whose location he did not state, in the Magistrate Grade II Court in **Civil Suit No. MMB 37 of 1987**. That the matter was decided in favour of Christopher Kajundira, but Bishop Shalita appealed in the Chief Magistrates Court at Mbarara. The Chief Magistrate reversed the decision of the Magistrate GII in **Civil Appeal No. 76 of 1990**, declaring that the whole of the land in dispute belonged to Bishop Shalita.

The 1st applicant further contended that the Chief Magistrate entertained the matter in spite of the fact that Bishop Shalita passed on before the appeal was heard. Further, that Christopher Kajundira was given a period of time within which to vacate the land and remove his crops and any other developments therefrom. However, Christopher Kajundira filed **HCMA No 02 of 1996** in the Chief Magistrate's Court

for leave to appeal against the decision of the Chief Magistrate to the High Court, but it was dismissed.

Mr Mutungi further averred that as the Administrator of the estate of Christopher Kajundira, he was advised to and filed **HCMA No 004 of 2022** at the High Court in Mbarara, in which he sought the revision and setting aside of the orders in **MMB Civil Appeal No 76 of 1990.** His main ground was that the appeal was heard and decided in spite of the fact that Bishop Shalita passed on before its hearing, but the application was dismissed for want of prosecution because his advocate did not appear.

He further averred that upon the dismissal of the application for revision, as the representative of the late Christopher Kajundira, he left the land in dispute and did not return to it, save as a visitor to his relatives who currently own the property in dispute, as well as acquaintances who reside thereon. He added that he brought it to the attention of court that he left the land in dispute after the dismissal of **HCMA No 04 of 2022** where he was the applicant but the court ignored this information in its decision in **HCMA No 172 of 2022**. He referred to a copy of his affidavit in Application 004 of 2022 which he attached to his affidavit here as **Annexure "A".**

He went on to state that despite the evidence that he was not on the land in dispute after he lost **HCMA No 004 of 2022,** the judge found that he was in contempt of court, ordered him to vacate the land and jointly with the 2nd applicant here to pay UGX 10,000,000. That he was dissatisfied with the order and so filed a notice of appeal and applied for the record of proceedings to enable him file an appeal in this court, which he served upon the respondents. That through his lawyers, he filed **HCMA No 354** and **359 of 2022** for an interim order to stay

execution and a substantive order to the same effect, respectively, but both applications have never been heard, though he did request that they be fixed for hearing.

He further stated that the respondents secured a Notice to Show Cause (NTC) why execution of the orders against him should not issue by attachment and sale of his property, including livestock, to recover the costs arising from **HCMA 95 of 2022**. In his view, this constitutes an eminent threat to his property before the determination of Civil Appeal No 176 or 2022, now pending in this court. Further, that according to information from his Advocates, the appeal has high chances of success and if the order sought herein is not granted his appeal will be rendered nugatory. He concluded that application was filed without delay and it will not prejudice the respondents if the order is granted.

The affidavit of Godfrey Muhoozi Kajundira, the 2nd applicant, was not much different in that he too denied being in contempt of court. However, unlike the 1st applicant, he did not deny being in occupation of the land. Instead, he claimed to have had no knowledge of the orders that court held him in contempt of. He asserted that his title did not flow from that of Christopher Kajundira, a party to the original suit, but he occupied the land in his own right having been allocated it by Kiruhura District Land Board.

Godfrey Muhoozi Kajundira explained that in 2015, he found empty land at Ekyera, inquired about it from various people and community leaders in the area, who informed him that it belonged to Kiruhura District. That he thus approached Kiruhura Disctict, which allowed him to utilize the land, as he processes papers for the grant of a freehold title. That as a result, he was shocked when he learnt that he and the 1st applicant were sued for disobeying orders in **HCCR No 004 of 2022**,

arising from **HCMA No 002 of 1996**, arising from Chief Magistrates **Civil Appeal No 76 of 1990**.

He further stated that in the said application he denied that he was a successor in title to the late Christopher Kajundira. Further that he had any knowledge of the orders in relation to the land. That he also informed court in his defence that he occupied the land on authority of its controlling authority, Kiruhura District Land Board. That in spite of these averments before the Court in **HCMA No 172 of 2022**, the judge found that he disobyed orders passed against the late Christopher Kajundira and sanctioned him for contempt of court. He denied that he participated in any violent attack to re-occupy the land, as alleged by the respondents in this application.

That he is thus aggrieved that the judge erred when she found that he was in contempt of court which, in his opinion, entitled him to an order to stay execution of the orders for contempt of court so that his appeal pending in this court about them is heard.

In her affidavit in reply, Lyndsay Musominari Shalita confirmed that the dispute between the parties began in 1987 when the late Kajundira sued Bishop Shalita for trespass on land at Omukyeera, Kayonza, Kikatsi Sub-County in Nyabushozi, Kiruhura District. That the dispute was decided in favour of Bishop Shalita by the Chief Magistrate in **Civil Appeal No. 76 of 1990** on the 14th July 1994. She explained that court held that the land belonged to Bishop Shalita and Christopher Kajundira was a trespasser thereon.

She further averred that Christopher Kajundira had no right to appeal against the decision of the Chief Magistrate so he sought leave to do so in Misc. Application No. 35 of 1994. However, in its ruling the court not only dismissed the application but also confirmed that the Late

Kajundira was a trespasser on the land in dispute. Further, that being dissatisfied with the decision, Christopher Kajundira filed **MA No 002 of 1996** in the High Court, in which he sought leave to appeal against the Chief Magistrate's decision in **Civil Appeal 76 of 1990**, but the application was dismissed; court found that he was a trespasser and the land belonged to Bishop Shalita.

She further averred that by the time the application for leave to appeal was denied by the High Court, Bishop Shalita and his family had already executed the orders in the appeal pursuant to an order from the Magistrate's Court, and the warrant of its return, Annexure D and F to her affidavit. She went on to state that in March 2022, 25 years after the eviction and after Christopher Kajundira died in 2005, his family, led one Major Muhoozi Kajundira, the 2nd applicant, and supported by the Resident District Commissioner (RDC) and District Police Commander (DPC) of Kiruhura District, attacked members of the family and relatives of Bishop Shalita including the respondents, with guns, machetes and spears and forcefully occupied the land in dispute.

Further, that immediately thereafter the 1st applicant, on behalf of the family of the late Christopher Kajundira, filed an application to obtain an order to guard against their forceful occupation of the land in dispute, **MA No 004 of 2022** at the High Court in Mbarara. In that application they sought to review the decision in **Civil Appeal No 76 of 1990**, **Misc. Application No. 35 of 1994** and **HCMA No 002 of 1996**, wherein it was held that the land in dispute belonged to Bishop Shalita. This was based on the ground that the decision was issued after the death of Bishop Shalita. That the application was dismissed with costs on 20th April 2022; the order was attached to the affidavit as **Annexure F**.

Ms Lyndsay Shalita further averred that in June 2022, the respondents filed **HCMA No 172 of 2022** against the applicants, the RDC and DPC of Kiruhura, and the Attorney General, in which they sought an order against the applicants here for contempt of court. That before the application was heard, the Attorney General purged himself of the contempt and advised that the illegal actions of defying court orders were committed by the applicants and other officials of the Uganda Police who were on frolics of their own. A copy of the Attorney General's Report to the Inspector General of Police (IGP), dated 5th August 2022 was attached to the affidavit as **Annexure G**.

She further averred that in response to **Application 172 of 2022**, the applicants admitted that they were on the land but argued that the orders in **Misc Appeal No 76 of 1990** did not bind them; they adduced no evidence to show that they vacated the land. Further, that in September 2022, the court held that the land in dispute belongs to the respondents' family and that the family of Kajundira, successors in title who invaded the land were bound by the decision in **Misc Appeal No. 76 of 1996**. A copy of the ruling was attached to the affidavit as **Annexure B**.

She went on to state that on the advice of her Advocates, the application now before court is in abuse of court process. Further that the applicants cannot seek an order to stay execution against their eviction when they claim to have vacated the land in dispute already. She explained that in further contempt of the court orders against them, the applicants processed and acquired certificates of title in respect of the land in dispute for the sole purpose of defeating the respondents' interests therein. Copies of 4 certificates of title were attached to the affidavit as **Annexure H, I, J** & **K.**

She went on that by an order issued in **HCMA No 17 of 2023**, the applicants were found in further contempt of court for processing titles to the land that was in dispute. That the court further ordered cancellation of the said titles in a ruling that was attached to the affidavit as **Annexure M**. And that the applicants and their agents continue to occupy the land in dispute in spite of the orders in **HCMA 172 of 2022** which found them in contempt of earlier court orders and ordered them to vacate the land. That the court further ordered that in view of the fact that the applicants illegally processed land titles in contempt of court, no application, inclusive of **Misc Application No 354 and 395 of 2022** for stay of execution, should be heard till the applicants purge themselves of contempt and vacate the land in dispute.

Further, that her Advocates advised her that the current application is bad in law because the applicants had no automatic right to appeal against the decision for contempt of the courts' orders, and they sought no leave to appeal either. She asserted that the applicants are heavily indebted to the respondents in unpaid costs amounting to approximately UGX 400,000,000. That they will not suffer irreparable damage if they vacate the land in dispute, and cease and desist from trespassing thereon.

The 2nd applicant filed an affidavit in rejoinder deposed on 15th February 2024, in which he stated that the 1st applicant and he were not parties to the suits between Christopher Kajundira and Bishop Shalita. They were thus not privy to whatever transpired in court between the two parties. That they returned to the land having been individually allocated the portion that they occupy at present by Kiruhura District Local Government. He denied that either of them invaded the land

because it was vacant and unoccupied according to the explanation by the controlling Authority.

Further, that there was no report made to the Police against him or the 1st applicant about the allegations of invasion of the land in dispute. Further that HCMA No 004, 82 and 83 of 2022 were filed by the 1st applicant to preserve the rights of the estate of the late Christopher Kajundira, not either of the current occupants of the land, as allocated by Kiruhura District. That the said applications were not dismissed on merit but due to the absence of the Advocate. That the 1st applicant continued to pursue the rights of the estate as Administrator and he lodged a Notice of Appeal in **HCMA No 417 of 2022**, arising from **HCMA No 172 of 2022**.

He emphasised that he occupies the land as allocated by Kiruhura District Local Government and that the 1st applicant left the land upon the dismissal of **HCMA No 004 of 2022**. He only comes to the land to visit relatives, including himself. He reiterated that they did not forcefully invade and occupy the land in dispute as alleged by the respondents; rather Kiruhura District allocated individual portions of it to different members of the applicants' extended family. That they therefore did not acquire the land as successors in title of the late Christopher Kajundira, the litigant in **Civil Appeal No 76 of 1990**; neither are the respondents here as representatives of the late Bishop Shalita so that they can claim benefits against the applicants.

He explained that the certificates of title, **Annexes H, I, J and K** of the 1st respondent's affidavit in reply were processed under the law before the filing of **HCMA No. 17 of 2023**. Thus the attempts by the respondents to have the titles cancelled and the decision in **HCMA No 17 of 2023** with regard to the certificates of title was erroneous. That the applicants filed a Notice of Appeal and intend to appeal against the

decision of the Commissioner for Land Registration to cancel the titles. That the judge in HCMA 172 of 2022 erroneously condemned him in contempt of court and there is an appeal against the order.

Representation

At the hearing of this application on 7th March 2024, Mr Augustine Akineza represented the applicants. The respondents were represented by Messrs Bruce Musinguzi and Rayner Mugyezi.

Counsel for both parties filed written submissions and prayed that they be considered as the final arguments in this application. I have accordingly considered them.

Determination

The right to apply for an order to stay execution of the orders of the lower court, pending the hearing of an appeal before this court, is drawn from rule 6 (2) of the Judicature (Court of Appeal Rules) Directions, the Rules of this Court, which provides 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) in any criminal proceedings, where notice of appeal has been given in accordance with rule 59 or 60 of these Rules, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal; and**
> >
> > **(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.**

The principles upon which the courts rely to grant orders to stay execution pending appeal were laid down by the Supreme Court in **Lawrence Musiitwa Kyazze v. Eunice Busingye, Civil Application**

No. 18 of 1990, where it was held that parties should meet three conditions: i) substantial loss may result to the applicant unless the order is made; ii) the application has been made without unreasonable delay; and iii) the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

The principles were re-stated in **Theodore Ssekikubo & Others v. Attorney General & Another, Constitutional Application No 06 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 likelihood of success; or a prima facie case of his right to appeal;
iii. if 1 and 2 above have not been established, the court must consider where the balance of convenience lies; and
iv. the application was instituted without delay.

I will consider the 4 criteria in **Ssekikubo's case** as the issues to be determined in this application. Added to that will be the issue whether a party that has been found by the court to be in contempt of its orders has a right to bring a matter before any court before he/she purges themselves of the contempt.

Starting with the requirement in rule 6 (2) (b) of the Rules of Court to have a Notice of Appeal filed in this court, as is required by rule 76, it is evident from the Annexure to the affidavit in support of the application that the applicants did file a Notice of Appeal in the High Court at Mbarara on 13th October 2022 from the decision that was rendered by the Judge on 29th September 2022. The applicants followed this up when they filed a Memorandum of Appeal in this court on 25th April 2023. They thus not only complied with the requirements of rule

6 (2) (b) but actually have an appeal that is pending hearing in this court.

With regard to the issue whether the applicant will suffer irreparable damage if the order to stay execution is not granted, the applicants state that the respondents have issued NTC why their assets, being livestock, should not be taken in execution in order to recover UGX 108,828,200. The NTC was issued on 21st December 2023 and the applicants were summoned to appear on 14th February 2024 at 10.00 am. That date passed without a hearing and the applicants have not demonstrated to this court that there is any threat to execute the order for the taxed costs since then.

It is therefore my opinion that there is no threat of execution that is imminent upon the applicants on account of any order obtained by the respondents. Indeed, there is no order at all to be executed against the applicants because the impending threat ceased to exist when the 14th day of February 2024 passed without the court hearing them on the NTC. The applicants are therefore not likely to suffer any damage on account of execution for the costs due in the previous litigation between the parties.

As to whether the appeal has a likelihood of success; or whether there is a prima facie case of the applicant's right to appeal, the grounds of the applicants' pending appeal are clear in the memorandum of appeal, **Annexure I** to the affidavit in support of the application deposed by Charles Mutungi. The grounds that were framed by the applicants/appellants are as follows:

1. *The learned trial judge erred in law and fact in holding that the applicants had locus standi to file an application for contempt of court.*

2. *The learned trial judge erred in law and fact and occasioned a miscarriage of justice in holding that the Limitations Act does not apply to contempt of court proceedings.*

3. *The learned trial judge erred in law and fact in holding that the High Court had unlimited jurisdiction to determine questions of contempt of court for a decree from proceedings in a lower court thereby occasioning a miscarriage of justice.*

4. *The learned trial judge erred in law and fact in holding that execution of orders in Civil Appeal No. 76 of 1990 had not closed and extinguished contemptible orders thereby occasioning a miscarriage of justice.*

5. *The learned trial judge erred in law and fact in holding that the 2nd respondent now 2nd appellant was in contempt of court orders he was not aware of thereby occasioning a miscarriage of justice.*

6. *The learned trial judge erred in law and fact in holding that the 1st respondent now 1st appellant was in contempt of court orders despite evidence on record that he was not on the suit land thereby occasioning a miscarriage of justice.*

There were further orders that were issued by the same judge in Misc Application No 17 of 2023, where the respondents complained that the applicants were in continued contempt of the orders of the court. They included those that were issued in **Misc Application No 172 of 2022**, when the 2nd applicant and others in the family of the late Christopher Kajundira obtained certificates of title to various pieces of the land alleged to be in dispute.

It was alleged that the titles were obtained by the applicants and it was them that were taken to court in **HCMA 17 of 2023**, as having continued to disobey court orders in Chief Magistrates Court **Civil Appeal No 76 of 1990** and **HCMA 172 of 2022**. However, the titles that were annexed to the affidavit in support of the application as **Annexure H, I, J & K,** show that there were issued to the following persons, with the attendant particulars stated below:

i) 80.9130 hectares of Land at Nyabushozi Kiruhura, known as Plot 42, Block 90 at Ekimono registered in the names of Muhoozi Kajundira Godfrey and Nisiima Alex as tenants in common;

ii) 75.5440 hectares of land at Nyabushozi Kiruhura, known as Plot 43, Block 90 at Ekimono registered in the names of Kyamukuku Margaret, Mutungi Charles and Atushusire Phionah, as joint tenants;

iii) 80.9850 hectares of land at Nyabushozi Kiruhura, known as Plot 44, Block 90 at Ekimono registered in the names of Kirabo Alice, Katuru Charles and Mbihingwire Benon, as joint tenants; and

iv) 80.6890 hectares of land at Nyabushozi Kiruhura, known as Plot 44, Block 90 at Ekimono registered in the names of Mugarura Henry, Arinaitwe Bernard (minor until 2033) and Ampurire Ezra (minor until 2037), as joint tenants.

The applicants do not deny that these titles were issued to them and other members of their family. The land included in the certificates of title put together amounts to about 3 square kilometres and all four titles were issued on 21st September 2022, while the order in HCMA No. 172 of 2022 which is the subject of Court of Appeal Civil Appeal No. 176 of 2023 was delivered on 29th September 2022. Though there appears to have been an error in the reckoning of time in **HCMA No 17 of 2023** because the titles were issued just eight (8) short days before the decision therein was delivered by the trial judge, the 2nd applicant in his affidavit stated that they applied for the grant of the freehold titles before the respondents filed the application. It is my opinion therefore, that the fact that they obtained certificates of title to various portions of land at Ekimono does not absolve them of disobedience of the orders in **Civil**

Appeal No 76 of 1990, since the titles are in respect of the land in dispute.

The applicants further contend that it has never been clear to them exactly which portion of land the respondents claim in this dispute. They deny that the land they occupy is the same as that which the respondents claim to have been awarded to their deceased father in Mbarara Chief Magistrates **Civil Appeal 76 of 1990**.

However, in his judgment, the Chief Magistrate described the land thus:

> *... The land which was in dispute was occupied by the respondent/plaintiff. It was named* ***Omukyera.***
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> ...
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> *Evidence on record also reveals that the land in dispute was formerly occupied by Mutashwera and his group. Even Ndyareeba who is said to have been one of the chiefs who allocated land to the respondent (Kajundira) said in his evidence that when the respondent went he occupied land which was formerly occupied by Mutashwera. The appellant and his witnesses also say so. It is this land the appellant himself says he was given by Mutashwera and his group and Mutashwera confirmed this. Mutashwera says he gave the appellant an introductory letter to take to the chiefs. This is confirmed by witnesses Birengaire and Kanuma, in their evidence before the trial court. the appellant therefore claims entitlement to this land through Mutashwera and his group.*
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> ...
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> *In 1964 Mutashwera and his group approached him with forms applying for land at* ***Kimomo, Kyera and Akanombero Hills.*** *He and his committee sat and filled in the form for giving him the land. The said Mutashwera and his group began grazing there and later when they were given ranches they gave the land to the appellant. Mutashwera gave appellant an introductory letter which was brought to him Kanuma.*

The land that was found to be owned by Bishop Shalita was therefore described in the judgment in Magistrates Court **Civil Appeal No 76 of**

1990. It was located on or comprised of three Hills, Kimomo, Kyera and Akanombe.

There is a contrast to this position in the documents available on the record. In **Annexure E** to the affidavit in reply to the application, the report of the Court Bailiff, Serapio Mugenyi, dated 20th February 1997 and addressed to the Chief Magistrate at Mbarara in respect of a Warrant to give Possession of Land in **Civil Appeal No MMB 76 of 1990**, the bailiff states that he was instructed to go and survey the area where the exercise of eviction was to be carried out. This was to enable the O/C Operations to determine how many policemen would be required to cover the exercise. He described the process thus:

> *"So on the morning of 18th February 1997, I together with police O/C Operations AIP Mushezi went to C. Kajundira's area of residence. We were accompanied by the son of Bishop Sharita called Isaac Ndahiro who directed us around the area. After surveying the whole area where we found four homesteads the police O/C Operations came out with a conclusion that we would need 12 policemen to* ***cover the four homesteads in case of violent resistance.***
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> *The following day 19th February, 1997 I together with the police O/C Operations Mushezi with a company of 12 policemen armed and a selected labour force of eight local men went to C. Kajundira's place. ...*
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> *We reached the homestead of C. Kajundira he was not at home but his wife was there. I told the wife the purpose of our being there and requested her to remove all house items; properties and put them outside the homestead. The houses were made of mud and poles and grass thatched. I told the labourers I had gone with to put down all the homestead houses.*
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> *While the exercise was going on, one of the sons of Kajundira called Kongo came but did not resist in any way but simply watched on and later another son of Kajundira called Rubomba Musinguzi also came and saw what was going on, he kept calm. In all we pulled down* ***all the houses in the four homesteads*** *that had been erected in the Bishop's land. I think because of the presence of the policemen the exercise had no interruptions and it ended successfully.*
>
> ...

I also advised the sons of Kajundira that after that eviction exercise they should get out of the land and should therefore advise their father to know there would be serious consequences if they try to stay any longer or to re-erect and structures on the land of the Bishop.

{My emphasis}

The report thus proves that the matter in the Magistrates Court was not only between Bishop Shalita and Christopher Kajundira. The trespass was by members of the Kajundira family on Bishop Shalita's land as delimited as stated by the Chief Magistrate above. If indeed the eviction that was carried out as stated was in respect of four homesteads where houses were demolished, but the respondents or the family of Kajundira claim to have obtained certificates of title in respect of approximately 3 square kilometres of land thereafter, it is implied that they must have re-entered the land after the eviction and taken over more land than they had originally trespassed upon.

On the basis of the analysis above, *prima facie*, the applicants appeal against the orders for contempt of court stands no chances of success. I say so because it is inconceivable that the 1st applicant knew about and tried to challenge the orders in Chief Magistrates Court **Civil Appeal No. 76 of 1990,** while his brother the 2nd respondent knew nothing at all about it.

I also find that the 1st applicant was equivocal about whether or not he ever left the land in dispute. While he stated in paragraph 8 of his affidavit in support of this application that he left the land after the dismissal of **HCMA No 0004 of 2022** wherein he applied for the review or revision of the decision in **Civil Appeal No 76 of 1990**, in paragraph 18 of his affidavit in reply in **HCMA No 172 of 2022**, he stated thus:

"I state that I have never been evicted from the land at Kimomo village as stated in the affidavits of the Applicants. Instead, I left the land in 1999, after the 5th Applicant and one RENZYAHO a son of the 7th Applicant,

with other armed people attacked my house on the 28th February 1999 and shot at me and members of my family and bombed my house. As a result of which I was severely injured, my one year old son RWOOJO MUTUNGI lost an arm and three members of my family were killed namely: ENID MUTUNGI (my wife) who was expecting a child, AKANSASIRA WINNIE (my daughter), and RWAKAHARUZA (my worker). Copies of the post mortem reports and charge sheet are annexed hereto and marked Annexures C1, C2, C3 and C4, respectively."

If the situation when he left the land in 1999 was dire and led to death of members of the 1st applicant's family, what gave him the confidence to return, so that he had to leave again when his Application **No. 0004 of 2022** was dismissed for non-appearance of his Advocate at the hearing?

The contradictions in the facts relating to the applicants' occupation and eviction from the land, as well as their implied re-occupation thereof after an order was clearly executed against them as a family in February 1997 led me to the conclusion that the applicants did not bring this application in good faith. The 1st applicant in particular made statements that amount to perjury, as is shown above. The 2nd applicant is far from truthful. If it is indeed true that he did not know about the eviction that was carried out against members of his family following a court order issued in 1997, it implies that he did not do sufficient due diligence when he applied for the grant of a freehold title that was issued to him on 21st September 2022, because the information about the history of the land was with members of his family, among others.

There is therefore, in my view, no need to consider whether the balance of convenience lies in favour of the applicants for the issue of an order to stay execution of the orders against them for contempt of court, because it clearly does not. The applicants were clearly in contempt of the orders that were issued against their father, Christopher Kajundira and executed against the whole family in their homesteads on 19th

February 1997, as it is stated in the report of the Court Bailiff, Serapio Mugenyi.

As to whether the applicants are entitled to file any applications in this court or any other after disobeying the orders in **HCMA 172 of 2022**, counsel for the respondent relied on the decision in **HCMA No 17 of 2023** to support her submission that they should not be heard in the instant application. In that application, which was for an order that the applicants be found in continued contempt of court, the trial judge found and held, that the applicants could not be heard in four applications that they filed in the High Court at Mbarara (**CV-MA-395-2022; CV-MA-418-2022; CV-MA-419-2022** and **CV-MA-354-2022**) because the court established that they were in contempt of court and granted the orders that are under appeal in this court. The judge relied on the decisions of this court in **Housing Finance Bank Ltd & Another v. Edward Musisi, Misc Application No 158 of 2010**, and **Jingo Livingstone Mukasa v. Hope Rwaguma, Civil Apopeal No 190 of 2015,** to come to her decision.

In the **Housing Finance Bank case**, the court held that a party in contempt of court by disobeying existing court orders cannot be heard in a different, but related cause or motion unless and until such person has purged himself or herself of the contempt. In **Jingo Livingstone Mukasa** (supra), the court ruled that:

> *"... Consequently, the subject matter of this Appeal having been removed from the court's purview at the instance of the appellant and blatant violation of the trial court's orders ... it would be antithetical to the rule of law and an endorsement of the flagrant abuse of court process were this court to entertain an appeal by the Appellant that has been adjudged for disobedience of lawful court orders that are the subject of appeal."*

This court considered the principles on the same issue in **Male H. Mabirizi Kiwanuka v. Attorney General, Civil Application No. 549**

of 2022 in which the contemnor filed several applications to be released from prison pending the hearing of his appeal in this court. The circumstances were that the contemnor was incarcerated in prison for the violation of the orders of High Court and ordered to pay a fine of UGX 300m. He sought to appeal the orders to this court and so filed several applications for his release from prison pending the disposal of his appeal. For purposes of disposing of this issue, I am of the view that it will be sufficient to set down the decision of the court on the issue verbatim; and it was as follows:

> *The principle on that point was laid down in the decision of the House of Lords in **X Ltd v Morgan-Grampian (Publishers) Ltd [1991] AC 1**. Lord Bridge cited a passage from the earlier judgment of Brandon LJ in **The Messiniaki Tolmi [1981] 2 Lloyd's Rep 595** in which, at page 602, it was stated thus:*
>
> > *"I accept that, while the general rule is that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt."*

The court also relied upon the oft cited decision on the point that was laid down by Denning LJ in **Hadkinson v Hadkinson [1952] P285** as follows:

> *"It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would like to refer to what Sir George Jessel MR said in a similar connexion in In re Clements, Republic of Costa Rica v Erlanger (1877) 46 LJCh 375, 383: 'I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be*

discovered after consideration to be the true measure of the exercise of the jurisdiction.' Applying this principle I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

The court then came to the finding that the decisions cited above clearly applied to civil contempt which can be easily purged. But with regard to a committed contemnor for criminal contempt, where the rules relating to appeals state that the contemnor has access to the courts as of right, the contemnor must be heard. This is especially so where the contemnor challenges the order against him/her for contempt. A denial of audience in such a case would be contrary to the provisions of Article 28 of the Constitution.

The applicants here were found to have committed civil contempt of two orders, one in respect of an order of the Chief Magistrates Court executed against their successor in title, and the other in respect of an order of the High Court, in which they were ordered to purge their contempt by paying a fine of UGX 10,000,000. Instead, the court found in a subsequent application that they not only did not purge themselves of the contempt; they carried it further by obtaining certificates of title for the land in dispute that were being processed during the pendency of the contempt proceedings.

The application here is in respect of an appeal against the orders above. The applicants seek an order to stay execution pending the hearing of the appeal. I do not think that the application in itself compromises the pending appeal and so it has been determined since there is an appeal pending before the court.

However, the applicants have not convinced me that the appeal that they lodged in this court against the sanctions for contempt has any chances of success. The facts presented to the court are in some material parts contradictory of what has been stated in previous applications that were drawn to the attention of this court by the applicants themselves. The 1st applicant in fact perjured himself, while the 2nd applicant's statements are far from truthful.

In the circumstances therefore, the order to stay execution of the fine to purge the contempt pending the hearing of the appeal is denied and hereby dismissed. The applicants shall pay the costs of the application, in any event.

Dated at Kampala this 19th day of March 2024.

Irene Mulyagonja

JUSTICE OF APPEAL