



- b) The applicant filed a Notice of Appeal to the High Court as required by the law and the rules on 22<sup>nd</sup> September, 2016.
- c) The applicant filed a letter requesting for the typed proceedings of the High Court with the Registrar High Court on 22<sup>nd</sup> September, 2017.
- 10 d) The applicant applied to the High Court Land Division for stay of execution of its decree which application was denied.
- e) There is a serious threat that the Decree in H.C.C.S No. 166 of 2010 may be executed against the applicant before the intended appeal rendering the same nugatory and desecrating the cemetery where members of the Union bury their children.
- f) The applicant is willing to provide security for the due performance of the decree in H.C.C.S No. 166 of 2010 as may be determined by the Court of Appeal.
- 20 g) The applicant has presented this application for stay of execution without undue delay because the applicant will suffer substantial loss if the decree is not stayed.
- h) The applicant has good grounds on appeal because the Hon. Judge of the High Court misdirected himself on the evidence in the suit and therefore arrived at a wrong conclusion that the 3<sup>rd</sup> respondent had transferred her interest in the suit property to the 1<sup>st</sup> defendant when she herself stated that she transferred the same to the applicant.

The application is supported by an affidavit deponed by Mr. Mukesh Shukla, a trustee of the applicant company, dated the 28<sup>th</sup> September, 2017.



It was opposed through an affidavit of the first respondent Mr. Kagoro Epimac dated the 6<sup>th</sup> day of October, 2017. Briefly the grounds in opposition are that:-

- a) the applicant has filed a Notice of Appeal and applied for the Record of Proceedings in the High Court which are not yet available and they are therefore relying on a non-existing record;
- b) the presiding Judge in the High Court declined to stay the execution of the order/decreed as there was no valid ground for it;
- c) the applicant never obtained the land in question by repossession or purchase;
- d) the application has no merit. It is frivolous, misconceived and an abuse of court process; and
- e) if court is inclined to grant this application, the applicant should be ordered to deposit in court shs. 6,800,000,000/= which is the value of the suit land as security for performance of the decree plus shs. 403, 701,600/= as security for costs.

At the hearing of this application, the applicant was represented by Counsel Augustine Kibuuka Musoke, the 1<sup>st</sup> respondent, by Counsel Gerald Kakubawhile Counsel Mugerwa Nazario appeared for the 3<sup>rd</sup> respondent.

Counsel for the applicant submitted that this was an application for stay of execution of the decree in HCCS No. 166 of 2010 against the applicant who was the plaintiff in the proceedings in the lower court, and that this application is based on majorly seven grounds. He submitted that the



applicant was dissatisfied with the Judgment in HCCS No. 166 of 2010 which merits determination on appeal by this Honourable Court.

It was further submitted that the applicant filed a Notice of Appeal in this court and a letter requesting for the Record of Proceedings on 22<sup>nd</sup> September, 2017. Further that the applicant had been on the suit land since 1944 but they had now been dispossessed of the said land.

Counsel contended that if this application was not granted, the applicant would suffer irreparable injury which could not be satisfied with damages. The applicant had been using the suit land as a burial ground on which, they had buried members of the Union including their children. Further, that there was a serious threat of execution since the essence or logical consequence of dismissing this suit was that the 1<sup>st</sup> respondent would immediately take possession of the suit property.

Counsel further submitted that the applicant was ready and willing to post security for due performance of the decree incase the appeal was denied. He pointed out that the costs in the suit hadnot yet been taxed. It was therefore not possible to determine the amount of costs to deposit in this court since the value of the subject matter was unknown.

Counsel referred court to **Hwang Sang Industries Limited vs. Tajdin Hussein and Others, Supreme Court Civil Application No. 019 of 2008**, for the proposition that for an application for an interim stay to succeed, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application. He then submitted that the applicant filed



Civil Application No. 303 of 2017 in this court as the main application for the stay of execution pending the hearing and determination of the appeal and prayed that this application be granted and that costs of the same abide the outcome of the main application.

10 Counsel for the respondent was of a different view. He submitted that the suit property, FRV 318 Folio 18 Plot B was originally part of the applicant's property comprised in FRV 62 Folio 6 and that the creation of the suit property arose from the sale by the Minister of Finance of Plot 1B which was originally part thereof, to Fulgence Tumwesigye, the 3<sup>rd</sup> respondent who then sold to JK Vision Club which later sold to the 1<sup>st</sup> respondent.

20 Counsel referred to Annexure "B", a letter from the District Director of Health Services to the Town Clerk of Kampala City Council and Annexure "C", a letter from the Town Clerk to the Commissioner Physical Planning Department, both attached to the affidavit in reply and submitted that there was no cemetery in the said land and no burial had taken place thereon since 1981. He stated that the applicant had a different place for cremation which was not the suit area, and that there was a road clearly demarcating the two pieces of land.

It was further submitted that when the members of the applicant Union returned, they obtained a certificate of re-possession which clearly stipulated that they would be re-possessing FRV 62 Folio 1 measuring 0.081 hectares, the area being a crematorium and burial ground. This excluded Plot 1B, the suit property. Further that the respondent had suffered for long being denied access to his property, and since he had



obtained judgment in the lower court, he should be permitted to develop his land. Although the applicant had re-entered the property for purposes of assessing the damage thereon, he had not yet applied for execution of the decree of the lower court.

10 Counsel concluded that if court was inclined to grant this application, the applicant should be asked to deposit shs. 6,800,000,000 as security for costs since the value of land was currently estimated at 1.5 million United States dollars. He also presented a bill of costs amounting to shs. 403,000,000 filed in High Court on 3<sup>rd</sup> October, 2017, which was pending taxation.

In rejoinder, counsel for the applicant submitted that the applicant was a union of religious members who use both properties at the same time, one for cremating the adults and the other for burying their children. He asked Court to maintain the status quo since the applicant was in possession of the suit premises, until the main application was heard and determined. Further, that it wasn't necessary to get into the technicalities of the values  
20 and sums of costs at this point as the same would be determined by the main application of stay of execution before a full bench.

I have considered the application, the submissions of Counsel for and against this application as well as the evidence presented and law and authorities relied upon.

**Rule 6(2) (b) of the Judicature (Court of Appeal Rules) Directions S.I 13-10** provides that:-



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

10 **(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 purpose of the application for Stay of Execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his/her undoubted right of appeal are safe guarded and the appeal if successful, is not rendered nugatory."**

20 **Rule 42 (1) of the Rules of this court** clearly stipulates that whenever an application may be made either in this court or in the High Court, it shall first be made in the High Court. It is common ground that the applicant had applied for stay of execution in the Land Division of the High Court but it was rejected.

**Rules 6 (2), 42 (2) and 43** of the Rules of this Court give wide discretion to this Court to grant interim or substantive orders of stay of execution for purposes of preserving the right of appeal, but this should be where special circumstances exist. **See Lawrence Musiitwa Kyazze versus Eunice (supra).**

It is trite that in an application for stay of execution pending appeal, the court has to review proceedings and yet not prejudge the appeal so as to make sure that it is not interfering with the order of the Court, but on the



other hand preserving the status quo so that the appeal will not be rendered nugatory. An interim order is an order to maintain the state of affairs of a situation relating to the subject matter of the litigation during the time that comes between the time of filing the application for an interim order and the time as to when the substantive application is disposed of, subject to any other directions of the court.

It follows therefore, that, there must be specific reasons and/or circumstances that necessitate an application for an interim order. An application for an interim order ought to be lodged as a matter of course, wherever and whenever an applicant lodges a substantive application for stay of execution or some other prayer.

**In Civil Application No.019 of 2008: Hwang Sung Industries Ltd vs. Tajdin Hussein and 2 Others (SC), Okello, JSC held that:-**

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

***Suffice to add that the burden lies upon the applicant to prove to Court on a balance of probabilities the requisite conditions that must be satisfied before an interim order is granted."*** Emphasis added.





Further still, in **Wilson Mikiibi vs James Ssemusambwa, Civil Application No. 009 of 2003 (SC)**, Mulenga, JSC, held with regard to an application for an interim order that:-

10 ***"A party seeking a stay of execution must satisfy the Court that there is sufficient cause why the party with judgment should postpone the enjoyment of its benefits. It is not sufficient for the judgment debtor to say that he is vulnerable, because the successful party may take out execution proceedings. It must be shown that if execution proceeds there may be some irreparable loss caused..."***

***The Interim Order ought to be made only in compelling circumstances, to prevent defeat of justice, and strictly pending ascertained hearing of a substantive application by the full Court."***

20 Further, in **Teddy Sseezi Cheeye and Another vs. Enos Tumusiime, Court of Appeal Civil Application No. 21 of 1996**, this Court, while considering circumstances court should take into account before granting a stay of execution, held:-

***"Such include where the subject of a case is in danger of being destroyed, sold or in any way disposed of."***

Further still, in **National Enterprise Corporation versus Mukisa Foods, Miscellaneous Application No. 7 of 1998**, this Court held that:-



***"The Court has power in its discretion to grant stay of execution where it appears to be equitable to do so with view of temporarily preserving the status quo.***

***As a general rule the only ground for stay of execution is for the applicant to show that once the decretal property is disposed of there is no likelihood of getting it back should the appeal succeed.*** (Emphasis added)

In the present application, a copy of the Notice of Appeal was lodged in the Court of Appeal on 22<sup>nd</sup> September 2017, and a copy thereof is attached to the application and marked Annexure "B". The stamps thereon indicate that it was served on M/S Kiboijana, Kakuba and Co. Advocates on 25<sup>th</sup> September 2017, and MRK Advocates on 14<sup>th</sup> October, 2017. Further, a letter requesting for proceedings was filed in Court and a copy served on the respondent herein. Having looked at the Judgment and order of the lower Court, I am satisfied that there exists serious issues of law that require judicial consideration by this Court on appeal. The appeal is, therefore, not frivolous and neither is it vexatious.

It is also not disputed that this application has been brought without undue delay, and there is a substantive application for stay on record vide Miscellaneous Application No. 303 of 2017. What ought to be ascertained then, is whether or not there is a threat of execution or other sufficient cause necessitating the grant of some interim relief.

The case for the applicant is that there is a serious threat of execution of the Judgment and orders of the High Court. Mr. Mukesh Shukla, a trustee



of the applicant company deponed in paragraph 4 of his affidavit in support of the motion that:-

10 ***"There is a serious threat that the Decree in H.C.C.S No. 166 of 2010 may be executed against the applicant before the intended appeal rendering the same nugatory and desecrating the cemetery where the members of the union burry their children."***

Although counsel for the respondent submitted that the respondent had not yet applied for execution of the decree, he had gone ahead to re-enter the premises so as to assess the damage to the property, if any. Counsel has also extracted a decree arising from the said Judgment and has further lodged a bill of costs for taxation purposes in the High Court. In my opinion this is being done in preparation for execution of the award.

20 I am satisfied that special circumstances exist for the grant of interim stay of execution in this matter. The subject matter is stated to be a "Cemetery" and the final resting place for children of the members of the applicant union. It is clear, therefore, that if the said suit property is released to the respondent in compliance with the High Court order, that would render the appeal nugatory as the bodies of the deceased are likely to be moved away and desecrated.

It follows, therefore, that on a balance of convenience given the circumstances of this application, not granting the interim order of stay will result into more inconvenience, loss and suffering to the applicant. In my opinion, the interests of justice would be better served if execution of the award is temporarily stayed.



I accordingly allow this application and make the following orders:

1. An interim order is hereby issued staying the execution of the Judgment and orders of the High Court in Civil Suit No. 166 of 2010 delivered on the 22<sup>nd</sup> September, 2017 pending the final disposal of the main application for stay of execution.
- 10 2. The costs of this application shall abide the outcome of the substantive application for stay of execution.
3. The Registrar of this Court is hereby directed to cause the hearing of Misc. Application No. 303 of 2017 as soon as practicable.

I so order.

Dated at Kampala this 18 day of October, 2017.



Elizabeth Musoke.

**JUSTICE OF APPEAL**