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THE REPUBLIC OF UGANDA

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IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

### Civil Application No. 278 of 2019

*(Arising from Court of Appeal Miscellaneous Application No. 255 of 2019)*

*(Arising from High Court at Kabale Civil Suit No. 35 of 2014)*

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1. Byaruhanga Innocent

2. Turyakira Julius

3. Rwambuka Silva

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4. Arineitwe Wensi

5. Tindiwegi Annet

..... Applicants

Versus

1. Musimenta Flora

2. Kakuramasi Ivan

..... Respondents

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**Coram: Hon. Justice Cheborion Barishaki, JA**

**Hon. Justice Stephen Musota, JA**

**Hon. Justice Remmy Kasule, Ag. JA**

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## Ruling of the Court

This application is brought under Rules 2(2), 6(2), 42(2) and 43 of the Judicature (Court of Appeal Rules) Directions, SI 13-10. It is for orders that:

- 35 i) an interim order does issue staying execution of the decree and enforcement of the orders dated 15<sup>th</sup> July, 2019 made in Kabale High Court Civil Suit No. 35 of 2014 pending the disposal of the substantive application for stay in Civil Application No. 255 of 2019
- 40 ii) cost of the application be provided for.

The grounds of the application are contained in the Notice of Motion and the affidavits in support and in rejoinder sworn by Hilda Katushabe, one of the children of the late Alifunsi Kibande dated 1<sup>st</sup> August, 2019 but briefly, the grounds being that:

- 45 ***a) The applicants are some of the 15 children of the late Alifunsi Kibande who were named in a distribution deed dated 1<sup>st</sup> September, 2013 as beneficiaries to the property described as Plot 8 Lower Bugongi belonging to the late Alifunsi Kibande.***
- 50 ***b) One of the said siblings called Musimenta Flora who is the 1<sup>st</sup> respondent sold a big part of the said Plot 8 Lower Bugongi to the 2<sup>nd</sup> respondent when Alifunsi Kibande***

55 *was still alive alleging that the said Plot 8 Lower Bugongi Kabale Municipality had been given to her by Alifunsi Kibande in 2011.*

60 *c) After his death, all the rest of the children of Alifunsi Kibande, instituted High Court Civil Suit No. 35 of 2014 in Kabale High Court against the 1<sup>st</sup> respondent as seller and the 2<sup>nd</sup> respondent as buyer for recovery of Plot 8 Lower Bugongi, Kabale Municipality, from both of them.*

65 *d) The applicants lost the said case in a Judgment delivered on 15.07.2019. They appealed against the said Judgment to this Court by lodging a Notice of Appeal to the High Court Registrar, Kabale on 18<sup>th</sup> July, 2019.*

70 *e) In the Judgment, the learned trial Judge made orders directing the respondents to take immediate possession of part of the suit property; which means that the trial Court ordered immediate execution by the 2<sup>nd</sup> respondent of the Judgment and decree.*

*f) That the respondents have interpreted the said Judgment and order to have authorized the respondents*

*to execute the court decree without warrant and the respondents have already stated doing so.*

75 *g) In order to protect the status quo of the suit property from being altered, the applicants have filed a substantive Miscellaneous Application No. 255 of 2019 seeking stay of execution of the decree which application is still pending determination in this court.*

80 *h) On 25<sup>th</sup> July, 2019, the 2<sup>nd</sup> respondent took goons to the suit land who broke down part of the fence thereon before they were chased away without raving more havoc.*

85 *i) The 2<sup>nd</sup> respondent then resorted to mobilizing prisoners to be taken to the suit land to deal with it in further execution of the Court Judgment and decree.*

The 1<sup>st</sup> respondent in opposition to the application filed an affidavit in reply in which she contended that the applicants' application was baseless and had been prematurely filed in Court. The 2<sup>nd</sup> respondent also filed an affidavit in opposition to the application.

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By way of background the late Alifunsi Kibande died intestate on the 21<sup>st</sup> April, 2014. He owned land known as Plot 8 Bugongi Road, Kabale Municipality, herein to be referred to as "the suit

property”. He had built a building of four units which he used to  
95 rent out for income. The applicants, who all claim to be children  
of the late, contend that before his demise the late had executed a  
document on 1<sup>st</sup> September, 2013 titled a “declaration” with his  
children to the effect that they were to inherit the suit property in  
equal proportions upon his demise.

100 It is also the case of the applicants that when the late Kibande  
attempted to acquire a Certificate of Title for the suit property, the  
2<sup>nd</sup> respondent lodged a caveat thereon claiming to have purchased  
part of it from the 1<sup>st</sup> respondent. The late Kibande had filed Civil  
Suit No. 010of 2014 in the High Court at Kabale against both  
105 respondents but he died before the case was concluded. The  
applicants took over prosecution of the suit in the High Court at  
Kabale as beneficiaries of his estate. At the conclusion of this suit,  
Judgment was delivered by Court against the applicants. They  
lodged a Notice of Appeal intending to appeal against the said  
110 Judgment.

The respondents on the other hand, claim that the late Alifunsi  
Kibande had on the 14<sup>th</sup> February, 2011 by a gift inter vivos  
gratuitously distributed the suit property to his four wives and  
their children. The 1<sup>st</sup> respondent claims to have specifically been

115 given land behind the house on Plot 8 which she sold to the 2<sup>nd</sup>  
respondent on 14<sup>th</sup> June, 2013. The respondents contend that the  
applicants are thus trespassers on the suit property.

**Representation:**

At the hearing of the application, Counsel Perusi Birungi, holding  
120 brief for Counsel Baku appeared for the applicants, while Counsel  
Rukundo Ibrahim appeared for the respondents.

**Submissions of Counsel:**

Counsel for respondents raised three preliminary objections to the  
application based on the affidavit in reply by the 2<sup>nd</sup> respondent.  
125 The first objection was that this Miscellaneous Application No. 278  
of 2019 was premature and improper before this Court since the  
same ought to have been filed first in the High Court in Kabale. It  
is only upon the same being denied by the High Court that the  
same can be lodged in this Court pursuant to Rule 42(1) of the  
130 Rules of this Court which provides that whenever an application  
may be made to this Court or in the High Court, it shall be made  
first in the High Court.

Learned Counsel submitted that Rule 42(1) of the Rules of this  
Court was mandatory. Counsel relied on **Lawrence Musiitwa**

135 **Kyazze vs Eunice Busingye: Supreme Court Civil Application  
No. 018 of 1990** and **Shshikani Patel vs Akampulira Michael:  
Court of Appeal Civil Application No. 98 of 2003** in support of  
this submission.

On the second objection, Counsel contended that Hilda  
140 Katushabe, the deponent to the affidavit in support of the  
application and the affidavits in rejoinder, lacked legal capacity to  
swear the affidavit in issue, since she was not a party to the  
original suit or a party to the appeal or to this application, thus  
making the application to be incurably defective and liable to be  
145 struck out with costs. This is because the said Hilda Katushbe's  
affidavit in support of the Application was defective by reason of  
being sworn on behalf of others without showing that she, as the  
deponent, had the authority of those others, who were the true  
parties to the Application. The said affidavit therefore offended  
150 Rule 44(1) of the Court of Appeal Rules. Counsel invited this Court  
to dismiss the application on this ground, amongst others.

On the third objection, Counsel submitted that the application in  
issue was overtaken by events since the 1<sup>st</sup> respondent had already  
taken immediate possession of the suit property. Counsel  
155 contended that it was trite law that an interim application could

only be granted if there was eminent threat of execution of the orders appealed against or that the main application and the interim shall be rendered nugatory if an interim injunction is not granted. However in this case, execution of the Decree had already  
160 been completed and the 2<sup>nd</sup> respondent was in possession and ownership of the said property.

Counsel prayed for the three preliminary objections raised by the 2<sup>nd</sup> respondent to be upheld by this Court by dismissing/striking out with costs this application and the main application for stay.

165 In reply, Counsel for the applicants submitted on the first preliminary objection, that the applicants had special circumstances for making this application direct to this Court. These circumstances are stated in the body of the application and also in the affidavits in support and in rejoinder for the applicants.

170 The special circumstances are that the learned trial Judge had ordered the respondents to execute the Judgement with immediate effect when he stated in the Judgement that “the counterclaimant (2<sup>nd</sup> respondent) shall take immediate possession of the portion of plot 8 behind the commercial building; that is suit property.

175 Therefore, since the learned trial Judge had ordered immediate execution of the Judgment, the same Judge would not be impartial



if the same application to stay execution had been placed before him. Counsel prayed this court to reject the first preliminary objection as being without merit.

180 On the second preliminary objection, Counsel submitted that O.19 rule 3 of the Civil Procedure Rules do not require a deponent to be a party to the suit appealed against or a party to the appeal or to the application like this one as it had been contended by learned Counsel for the respondents.

185 Counsel further submitted that the right person to depone to an affidavit is one who has knowledge of the facts of the case before Court and not necessarily one who is a party to that case or application.

Counsel for the applicant further contended that at any rate, Hilda  
190 Katushabe the deponent of the affidavits was a child and beneficiary to the estate of the late Alifunsi Kibande and as such she was a party to the original suit, the appeal and to the application.

Counsel prayed for the second preliminary objection to be  
195 overruled.

On the third preliminary objection, Counsel submitted that the unchallenged evidence in the applicant's affidavits that showed that immediate execution of the Judgment being appealed against had been resisted, rendered the third objection to be without merit.

200 The affidavit in support of the application, in paragraph 10 thereof stated that "on the 25.07.2019, the respondents brought goons who started breaking down the fence and part of it was destroyed before they were chased away". This, according to Counsel was proof that execution had been resisted. Counsel further  
205 contended, that paragraphs 8 and 9 of the affidavit in rejoinder further proved the case of the applicants that their vigilance resisted and barred the respondents from going ahead to execute the learned trial Judge's Judgment and Orders. Accordingly it was not true that the application had been overtaken by events.

210 Counsel for applicants prayed to Court to agree with their submissions, overrule the respondents on the preliminary objections by allowing this application with costs.

We have read the pleadings and the annexures thereto and we have also carefully listened to the arguments of both Counsel.

215 In resolving this application, as regards the preliminary objections,  
the law on preliminary objections is laid out in the case of **Mukisa  
Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd  
(1969) EA 696** to the effect that:

220 *“A preliminary objection consists of an error on the face of the  
pleadings which rise by clear implication out of the pleadings  
and which, if argued as a preliminary objection may dispose  
of the suit”.*

This means that all the objections above, raised by the  
respondents must amount to points of law which, if successfully  
225 established, will fully dispose of the applicants’ Application.

In respect of the first preliminary objection, Rule 42(1) of the Rules  
of this court states:

230 *“42(1) wherever an application may be made either in the  
Court or in the High court it shall be made first in the High  
court”.*

It is a well settled law that this court and the High court have  
concurrent jurisdiction in applications of this nature. The  
Supreme Court in **Lawrence Musiitwa Kyazze vs Eunice  
Busingye: Civil Application No. 18 of 1990** held that:

235       *“The practice that this Court should adopt is that general applications for a stay should be made informally to the Judge who decided the case when Judgment is delivered. The Judge may direct that a formal motion be presented on notice (Order XLVIII Rule 1.), after a notice of appeal has been filed. He may*

240       *in the meantime grant a temporary stay for this to be done. The parties asking for a stay should be prepared to meet the conditions set out in Order XXXIX Rule 4(3) of the Civil Procedure Rules. The temporary application may be ex parte if the application is refused, the parties may then apply to the*

245       *Supreme Court under Rule 5(2)(b) of the Court of Appeal Rules where again, they should be prepared to meet similar conditions, similar to those set out in XXXIX Rule 4(3). However there may be circumstances when this Court will intervene to preserve the status quo. In a case where the High*

250       *Court has doubted its jurisdiction or has made some error of law or fact, apparent on the face of the record, which is probably wrong, or has been unable to deal with the application in good time, to the prejudice of the parties in the suit property, the application may be made direct to this*

255       *Court”.*

The Supreme Court did not hold that the categories of special circumstances it enumerated were the only ones. It remains to the Court handling the matter to determine what constitutes “special and rare circumstances and whether or not it is in the interest of justice to do so. See: **Court of Appeal Civil Miscellaneous Application No. 207 of 2014: P.K. Sengendo vs Busulwa Lawrence & Another Judgment of Kenneth Kakuru, JA.**

From the applicant’s affidavit, it is stated that while passing Judgment, the learned trial Judge made an order authorizing the 2<sup>nd</sup> respondent to take immediate possession of the portion of the suit property. This made this portion of the Judgment to be executable with immediate effect. The 2<sup>nd</sup> respondent immediately set out to execute the order and brought people who destroyed the fence of the suit property. However, they were stopped by the applicants and the police together with the local councils. This state of affairs justified lodgement of this application direct to this Court according to the applicants.

It is our considered view that the applicants have proved the exceptional circumstances envisaged in **Lawrence Musiitwa Kyazze vs Eunice Busingye (Supra)** case. The learned trial Judge’s Judgment was, in a way self-executory when it allowed the

2<sup>nd</sup> respondent to take possession and occupation of part of the suit property immediately on delivery of the Judgment. This made it rather difficult, in terms of fairness, for the applicants to go to  
280 the same trial Court and pray for a stay of the same Judgment which in a way, was self-executing on its delivery date.

Yet the applicants had to act effectively and with all speed. Given the above circumstances, this Court is satisfied that the applicants were justified to lodge this application direct to this Court without  
285 first lodging the same and having the same first determined by the High Court. The first preliminary objections is overruled.

The second objection queries the affidavits sworn by Hilda Katushabe on the grounds that she lacked legal capacity to swear the same because she was not a party to the original suit and is  
290 not a party to this application. We note that Rule 44(1) of the Rules of this Court provides that:

**“44. Supporting Documents**

(1) *Every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other person or  
295 persons having knowledge of the facts”.*

Learned Counsel for the respondents did not point out to this Court any law that provides that it is only a party to a suit or to an application who is allowed to depone to an affidavit in that suit or application. Our appreciation of the law is that anyone who has  
300 knowledge to prove the case or any other matter that is before Court can depone to an affidavit. In this case Hilda Katushabe, being a child thus a beneficiary of the estate of the late Alfunsi Kibende, whose estate was the subject of litigation was entitled to depone to the affidavits. We accordingly overrule the second  
305 objection.

The third preliminary objection is that this application has been overtaken by events in that the Judgment has been partly executed by the 2<sup>nd</sup> respondent's taking immediate possession of the relevant part of the suit property.

310 The applicants have asserted in the affidavit in support as well as in the affidavit in rejoinder, that any attempts by the respondents to execute the Judgment or part of it was resisted by them. Accordingly a threat of execution is still obtaining.

The respondents did not deny the assertions of the applicants as  
315 to resistance of the execution of the Judgment. At any rate, the respondents admit the fact that the whole Judgment has not been

executed as by now. It follows therefore that a threat of execution of the Judgment whether in part or as a whole still obtains. An application for a stay cannot therefore, in such circumstances, be  
320 said to have been overtaken by events. The third preliminary objection is accordingly also disallowed.

As to the merits of the application the applicants, in order to succeed, ought to show that; they lodged a Notice of Appeal in accordance with Rules of this Court, have filed in this Court a  
325 substantive application for stay of execution and that the same is pending hearing. The applicants have also to show that there is a serious and imminent threat of execution of the decree or orders, the subject of the intended appeal, and that if the interim application is not granted the main application and the appeal will  
330 be rendered nugatory, and finally that the application for interim stay of execution was made without unreasonable delay. See:  
**Supreme Court Miscellaneous Application No. 13 of 2015: Francis Drake Lubega & Another vs The Attorney General.** See also: **Hwang Sung Industries Ltd vs Tajdin Hussein & Two  
335 others: Supreme Court Civil Application No. 19 of 2008.**

We agree with learned Counsel for the applicants that the applicants lodged a Notice of Appeal in accordance with Rule 76 of



the Rules of this Court. This was done on 18<sup>th</sup> July, 2019. The respondents do not deny this fact.

340 As for the substantive application for stay of execution, we have ascertained from the Court records that there is a pending **Miscellaneous Application No. 255 of 2019** for a substantive application for stay of execution from which this application arises. As to the respondents' contention that they have, as yet, not been  
345 served with this application, this does not amount to the said application not having been lodged and being pending in this Court.

It is most unlikely that the pleadings in **Miscellaneous Application No. 255 of 2019** from which this Application for  
350 Interim Stay (278 of 2019) arises, are different in any substantial way. The respondents were served with this application for interim stay and therefore have a broad picture of what the substantive application to stay execution is about. Accordingly their claim of not having been served with the substantive application to stay  
355 execution cannot be a ground for refusing grant of this application for interim stay. The applicants are accordingly held to have satisfied the condition that a substantive application for stay of execution is pending before this Court.

As to the existence of a serious or eminent threat of execution of  
360 the trial Court Judgment and orders made therein, there is  
evidence from the applicants' affidavits in support and in rejoinder,  
that on 25<sup>th</sup> July, 2019 goons sent by the respondents destroyed  
part of the cactus fence in the process of attempting to execute the  
Judgment of the trial Court in Civil Suit No. 35 of 2014. They had  
365 no Court warrant issued by the Court Registrar to carry out such  
execution. They were resisted by the applicants and were chased  
away. Thereafter the respondents mobilized prisons to once again  
take over the suit property on the basis of the same court  
Judgment. They were again resisted by the applicants assisted by  
370 police and the local council officials.

The above stated threats of execution are stated by the applicants  
in the affidavit in support of the application and in the affidavit in  
rejoinder.

None of the above averments were rebutted by contrary evidence  
375 from the respondents.

This Court is therefore satisfied that the applicants have  
established the existence of an immediate threat of execution of  
the trial Court's Judgment in Civil Suit No. 35 of 2014. This  
justifies a grant of an order for interim stay.

380 The requirement that the applicants must show that the  
application for interim stay was not lodged in this Court after  
undue delay, the evidence on Court record is that Judgment in  
Civil Suit No. 35 of 2014 was delivered on 15<sup>th</sup> July, 2019 and the  
application for Interim Stay was filed in this Court on 20<sup>th</sup> August,  
385 2019. This was exactly 35 days after delivery of Judgment. The  
first attempt by the respondents to execute the Judgment without  
any warrant to do so from the court registrar was on 25<sup>th</sup> July,  
2019 when the respondents sent the goons to the suit property in  
an attempt to execute the Judgment.

390 The above evidence is proof, which this Court accepts, that the  
application for interim stay was filed in this Court without undue  
delay.

This Court is therefore satisfied that the applicants have satisfied  
the requirements necessary for the issuance of an order for interim  
395 stay. The Court is also satisfied that it is in the interests of justice  
to preserve the status quo of the suit property from execution,  
pending disposal by this Court of the main substantive application  
No. 255 of 2019.

Accordingly this Court hereby issues an order staying the  
400 execution of the Judgment of the High Court at Kabale delivered

on 15<sup>th</sup> July, 2019 in Civil Suit No. 35 of 2014 until the disposal by this Court of the application for substantive stay that is Civil Application No. 255 of 2019 or the appeal that the applicants are pursuing in this Court.

405 The Registrar of this Court is hereby directed to take steps to fix for hearing the said substantive application No. 255 of 2019 at the earliest date possible.

As to costs of this application, the same shall follow the event in the Substantive Application No. 255 of 2019.

410 It is so ordered.

Dated at Kampala this 17<sup>th</sup> day of Aug..... 2020.


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**Cheborion Barishaki**  
**Justice of Appeal**

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**Stephen Musota**  
**Justice of Appeal**

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**Remmy Kasule**  
**Ag. Justice of Appeal**