

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO.201 OF 2021

(Arising from Civil Application No. 200 of 2021)

1. LUWALIRA NOAH DEOGRATIAS }APPLICANTS
 2. MARGARET SANYU LUWALIRA }

VERSUS

1. LWANGA ENOCK }
 2. LUKUSE FRATESTI }RESPONDENTS

CORAM: HON. MR. JUSTICE. CHEBORION BARISHAKI, JA

(SINGLE JUSTICE)

RULING

This application was brought under the provisions of Rule 2(1), 2(2), 6, 42(1), 43 & 44 of the Rules of this Court. It seeks for orders that:-

1. *An interim order of stay of execution of the decree in HCCS No.144 of 2016 pending the hearing and determination of Civil Application No. 200 of 2021 for stay of execution of the said decree.*
2. *Costs of the application be provided for.*

5 The background to the application is that the applicants were the registered proprietors of land comprised in Kyadondo Block 114 Plots 167 & 833 and are the current owners of the land measuring 30 decimals which is part of land comprised in Kyadondo Block 114 Plot 669 at Masooli. This land was formerly comprised in Kyadondo Block 114 Plot 46. (The suit land). The respondents filed
10 HCCS No.144 of 2016 seeking numerous orders against the applicants herein. They among others sought for an order allowing them to trace all properties that formed part of the estate of the late Lugumu Obadia Wofunira at the time of his death, which included the suit land.

On the 22nd of March, 2021, the trial Judge delivered judgment in favour of the
15 plaintiff/ respondents herein and on the 23rd day of March, 2021, the applicants commenced the process of appeal in HCCS No.144 of 2016. The respondents extracted a decree and filed a bill of costs for taxation of costs. The applicants filed Misc. Application No.294 & 295 of 2021 for stay of execution and an application for an interim stay of execution in the High Court (Family Division).
20 The said application for stay of execution was dismissed by the trial Court on the 7th day of June, 2021. The applicants now seek for an interim order staying execution of the decree in HCCS No.144 of 2016.

The grounds for this application are set out in the motion as follows;-

1. *That judgment in HCCS No.144 of 2016 was delivered on 22nd March, 2021
25 against the applicants and among the orders granted in favour of the respondents, the applicants were directed to vacate the suit land known as*

- 5 *land formerly comprised in Kyadondo Block 114 Plot 24 at Masooli as well as pay to the respondents UGX 20,000,000/= (Uganda Shillings Twenty Million) as general damages and the applicants were ordered to comply with the said orders within 30 days from the date of the said judgment.*
- 10 2. *That being dissatisfied with the above said judgment, the applicants have appealed against the said judgment by filing a Notice of Appeal against the judgment in HCCS No.144 of 2016 and have by letter dated 23rd March, 2021, requested for the typed and certified copy of the record of proceedings and duly served the said Notice of Appeal and letter on the Respondent's advocates.*
- 15 3. *That the applicant filed Miscellaneous Application No.294 of 2021 seeking for an order of stay of execution at the High Court of Uganda at Kampala but the same was dismissed.*
- 20 4. *That the applicants have filed in this Court Civil Application No.200 of 2021 seeking for an order of stay of execution of the decree in HCCS No.144 of 2016 and the same is pending hearing and determination before this Court.*
- 25 5. *That the respondents have extracted the decree, filed a bill of costs in the main suit as the first step of commencement of execution and have further sought a pre-taxation meeting.*
6. *That the trial Court issued an order directing the Applicants to deliver-up vacant possession of the suit land to the respondents within 30 days from the date of the judgment, accordingly judgment having been delivered on 22nd March,2021, the applicants or any persons deriving title from the*

5 *applicants were required to have vacated the suit land by the 22nd of April, 2021 although the applicants are still in physical possession unless this Court issues an order staying execution of the decree, they will be evicted.*

7. *That the applicants will suffer a substantial and an irreparable injury if the orders sought are not granted.*

10 8. *That the orders sought are necessary to achieve the ends of justice and not to render the pending application for stay of execution nugatory.*

9. *That the balance of convenience is in favour of the applicants in the circumstances.*

The motion is supported by the affidavit of the 1st applicant, Luwalira Noah
15 Deogratias, sworn on behalf of other applicants and dated 2nd August, 2021. The said affidavit repeats and expounds on the notice of motion. I find no reason to reproduce its contents here.

The respondent filed an affidavit in reply deposed to by the 1st respondent, Lwanga Enock. The relevant paragraphs of which are reproduced below and
20 stipulate as follows:-

a. *That the applicant had been advised by his lawyers that at the commencement of the hearing a preliminary objection shall be raised to the effect that the application is frivolous, vexatious, misconceived, bad in law and an abuse of Court process by reason of which this Honourable Court*
25 *shall be moved to dismiss it.*

- 5 b. That the applicant had been advised by his lawyers that the application is
frivolous, vexatious, misconceived, bad in law and an abuse of Court
process as the same was heard and determined by the High Court vide
Misc. Application No.294 of 2021 and the same was dismissed with costs
for lack of merit.
- 10 c. That the application if frivolous, vexatious, misconceived, bad in law
because when Misc. Application No.295 of 2021 was dismissed by the High
Court, the applicant instead resorted to filing a fresh application in this
Honorable Court instead of appealing against the dismissal hence an abuse
of Court process.
- 15 d. That judgement was entered in favour of the respondents by the High Court
(Family Division) at Makindye on 22/03/2021.
- e. That the affidavit in support of this application does not disclose any
pertinent appealable issues that require Court's attention to justify interim
stay of execution of the judgment and decree arising thereof from Civil Suit
20 No.144 of 2016.
- f. That the respondents are not aware and neither have they been served with
any substantive application for stay of execution and thus the instant
application has no likelihood of success.
- g. That the applicant has not proved any substantial threat of execution of the
25 judgment and the decree arising thereof from Civil Suit No.144 of 2016 to
render the intended appeal nugatory.

5 *h. That there has been unreasonable delay in bringing this application since judgment was passed on 22nd March, 2020 and the applicant was given 30 days within which to vacate the said land, the applicant instead filed Misc. Application No.295 of 2021 in the High Court on 5th May, 2021, 2 months later after judgment was passed and the same was dismissed for*
10 *lack of merit*

i. That the applicant is hiding behind the application for interim stay of execution to further deny the respondents the fruits of the judgment in Civil Suit No.144 of 2021.

At the hearing of this application, Mr. Kibuuka Rashid appeared for the
15 applicants while the respondent was represented by Ms. Nalule Mariam.

Both counsel filed written submissions which they adopted at the hearing.

Counsel for the applicants submitted that the considerations for grant of an interim order of stay of execution were; whether there was a notice of appeal, whether there was a substantive application and whether there is a serious
20 threat of execution before the hearing of the substantive application. He further submitted that the applicants had filed a Notice of appeal and a letter requesting for a typed and certified record of proceedings in HCCS No.144 of 2016 and the same had been served on the respondents on the 23rd of March, 2021. Counsel submitted that paragraph 5 of the affidavit in support and the Memorandum of
25 Appeal were evidence that the applicant had filed a substantive application. He

5 Miscellaneous Application No.295 of 2021 but instead filed the instant application in this Court with the same grounds. She relied on ***Lawrence Musiitwa Kyazze V Eunice Busingye, Supreme Court Civil Application No.18 of 1990 and Editor in Chief New Vision, Newspaper V Ntabgoba, Court of Appeal Civil Application No.63 of 2005.***

10 Counsel further submitted that the applicants filed a Notice of Appeal on the 24th of March, 2021 having been dissatisfied with the decision of the High Court passed on the 22nd of March 2021. That the said Notice of Appeal was just an expression to appeal. She added that the alleged appeal is a moot and there is no record of appeal on the Court file. That the intended appeal is only meant to
15 deny the respondents the fruits of their judgment in Civil Suit No.144 of 2016.

Counsel submitted that there is no evidence of a pending substantive application for stay in this Court as averred by the 1st applicant under paragraph 5 of his affidavit in support of the application. She added that annexure "ZZ" which is allegedly the substantive application has never been filed before this Court as it
20 does not bear any Court stamp neither was it endorsed by the registrar of this Court. Further that the substantive application has never been served on the respondents.

Regarding the condition of serious threat of execution before the hearing of the pending substantive application, counsel submitted that the applicants had not
25 proved that there was a serious threat of execution. That the applicants fraudulently acquired and sub-divided the suit land forming part of the estate of

5 the late Obadia Luguma Wofunira and illegally sold the same to third parties including a one Kamya Solomon, well knowing that the suit land was subject to Court trial in Civil Suit No.144 of 2016. According to counsel, the applicants are alleging threat of the third party interest, a one Kamya A. Solomon who is nonparty to the suit and whose interest has never been known neither was it
10 brought to the attention of the Court during trial.

Counsel submitted that there was unreasonable delay on the part of the applicants in filing the instant application because it was filed on the 2nd of August, 2021 however the judgment in respect of which it arises was delivered on the 22nd of March, 2021. The applicant filed the application 5 months after
15 the judgment of the lower Court was delivered and after he had been served with a decree and a Bill of Costs. She relied ***on Joel Kato & Anor V Nuulu Nalwoga, Civil Application No.12 of 2011*** and prayed that Court dismisses this application with costs.

I have carefully studied the submissions of both counsel and perused the Court
20 record.

The jurisdiction of this Court to grant a stay of execution is set out in Rule 6(2) (b) and Rule 2(2) of the Rules of this Court which grant the Court power to make any orders to achieve the ends of justice.

Counsel for the respondent raised a preliminary objection that the application
25 was frivolous, vexatious, erroneous, bad in law and an abuse of Court process

5 since the same was heard and determined by the lower Court vide Miscellaneous
Application No.295 of 2021 and was dismissed with costs.

Rule 42 of the Court of Appeal Rules provide;

“42. Order of hearing applications

- 10 1) *Whenever an application may be made either in the Court or in the High
Court it shall be made first in the High Court.*
- 15 2) *Notwithstanding sub rule (1) of this rule, in civil or criminal matter, the Court
may, on application or of its own motion, give leave to appeal and grant a
consequential extension of time for doing any as the justice of the case
requires, or entertain an application under rule 6(2) (b) of these Rules, in
order to safeguard the right of appeal, notwithstanding the fact that no
application for that purpose has first been made to the High Court.”*

It is now settled law that this court and the High Court have concurrent
jurisdiction in applications of this nature. The applications should first be filed
in the High Court but where exceptional circumstances exist, they can be filed
20 straight in this Court. **See Kyambogo University v Prof. Isaiah Omolo Ndiege
CACA No. 341 of 2013.**

It was counsel for the respondents’ submission that the applicants had not
demonstrated any evidence of special circumstances and good cause to justify
grant of the instant application. However counsel did not advance cogent reasons
25 to support this assertion.

5 The applicants stated under paragraph 3 of the application that they filed Miscellaneous Application No.294 of 2021 in the High Court of Uganda at Kampala seeking for an order of stay of execution but the same was dismissed. The applicant therefore complied with Rule 42 of the Rules of this Court.

Okello, JSC in ***Hwan Sung Industries Ltd V Tajdin Hussien and 2 others***
10 ***SCMA No. 19 of 2008*** which was cited with approval in ***Francis Drake Lubega V The Attorney General & 2 others Supreme Court Misc. Application No.13 of 2015*** set out the requirements which ought to exist before an interim stay of execution can be granted. He stated that for an application for an interim order of stay, it suffices to show that a substantive application is pending and that
15 there is a serious threat of execution before the hearing of the pending substantive application. At this stage, it is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.

In ***Zubeda Mohamed & Sadru Mohamed V Laila Kaka Wallia & Anor,***
20 ***Supreme Court Civil Reference No.07 of 2016,*** the Supreme Court stated as follows;

“Considerations for the grant of an interim order of stay of execution or interim injunction are whether there is a substantive application pending and whether there is a serious threat of execution before hearing of the
25 *substantive application. Needless to say, there must be a Notice of Appeal.*

5 See ***Hwan Sung Industries Ltd vs. Tajdin Hussien and 2 others SCMA No. 19 of 2008.***

In summary, there are three conditions that an applicant must satisfy to justify the grant of an interim order:

1. *A competent Notice of Appeal;*
- 10 2. *A substantive application; and*
3. *A serious threat of execution.”*

Counsel for the applicants submitted that the applicants had filed a Notice of appeal and a letter requesting for a typed and certified record of proceedings in HCCS No.144 of 2016 and the same had been served on the respondents on the 15 23rd of March, 2021. Indeed the evidence on record shows that the applicants had filed the notice of appeal and a letter requesting for typed proceedings marked as annextures “C” and “D”. The applicants have satisfied this condition.

Counsel for the applicants submitted that paragraph 5 of the affidavit in support of the application and the Memorandum of Appeal are evidence that the 20 applicant had filed a substantive application. In reply, counsel for the respondents submitted that there is no evidence of a pending substantive application for stay in this Court as averred by the 1st applicant under paragraph 5 of his affidavit in support of the application and that annexure “ZZ” which is allegedly the substantive application has never been filed before this 25 Court as it does not bear any Court stamp neither was it endorsed by the registrar of this Court.

5 The Court record indicates that the applicant on 2nd August 2021 filed a substantive application referenced as Civil Application No.200 of 2021 from which the instant application emanates.

On whether there is a serious threat of execution, counsel submitted for the applicants submitted that the respondents had extracted a decree and filed a bill
10 of costs for taxation of costs and have invited the applicants to a pre-taxation hearing. In counsel's view, the respondents have taken steps required to execute the decree. In reply, counsel for the respondent submitted that the applicants had not proved that there was a serious threat of execution.

I note that there is evidence of an eminent threat of execution as indicated in
15 annexure "B1", the decree and annexure "F", the Bill of Costs meaning execution can be commenced anytime.

Katureebe JSC (As he then was) in **G V C SCCA No.02 of 2003 (unreported)** stated as follows:

*"The granting of interim orders is meant to help the parties to preserve the
20 status quo and then have the main issues between them determined by the full Court. They are granted by a single Judge of the Court invoking its inherent powers under Rule 2(2) of the Rules of this Court.*

*I am also satisfied that the respondent has extracted a decree and has a certificate of taxation. He could, if he wished, proceed to execute, and this
25 would render the applications nugatory.*

5 *I am of the firm view, therefore, that this is a case where I should exercise the inherent power under Rule 2(2) of the Rules of this Court to grant an interim stay of execution until the Court determines the main application."*

I find that the applicants have satisfied the conditions required for grant of an interim order of stay. I allow the application and make the following orders:-

- 10 1. An interim order of stay of execution of the decree in HCCS No.144 of 2016 is hereby issued pending the disposal of Civil Application No.200 of 2021 or until further orders of this Court.
2. The Registrar of this Court is hereby directed to fix Civil Application No.200 of 2021 for hearing in the next 21 days.
- 15 3. The costs of this application shall abide the outcome of the substantive application for stay of execution.

I so order

Dated this*6th*.....day of*Dec*.....2021.

20



CHEBORION BARISHAKI

JUSTICE OF APPEAL