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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPLICATION NO. 247 OF 2021**

*(Arising out of Civil Application No.246 of 2021)*

*(Arising out of Civil Appeal No.267 of 2021)*

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**1. NAKWANYI DEBORAH**

**2. NAKIJJOBA ESEZA**

**3. SSEBISUBI GEOFFREY**

**4. ZAWEDDE DOROTHY (Administrators**

**Of the Estate of the Late Samwiri Walusimbi) :::::::::::APPLICANTS**

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**VERSUS**

**1. HAMZA KAVA LUTAYA**

**2. GWOKYALYA SALIMA:::::::::::::::::::::::::::::RESPONDENTS**

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

**(SINGLE JUSTICE)**

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**RULING**

This application is for an interim order of stay of execution of the judgment and orders issued by the High Court in Civil Suit No.0083 of 2006 pending the hearing and final disposal of the substantive Application No. 246 of 2021 for stay of execution pending before this Court.

5 The background to the application is that the applicants are the Administrators of the estate of the late Samwiri Walusimbi, the original plaintiff in Civil Suit No.0083 of 2006 who passed on during the pendency of the suit hence being substituted by the applicants in the amended plaint. On 14th October, 1993, the late Samwiri Walusimbi purchased the suit land measuring 1 acre from the 2nd  
10 respondent, Gwokyalya Salima after which the deceased, Samwiri Walusimbi deposited the agreement of sale with the Registrar of Titles at Kampala Mailo Office.

At the time of the sale, the 2nd respondent had lodged a caveat dated 12th October, 1970 over the Certificate of title relating to Plot No.336, Block 156,  
15 Kavule Estate Kyadondo for purposes of protecting her interest as a successor of 1.00 acre by virtue of a Certificate of Succession No.34040 dated 19th April, 1961 of the land registered in the name of Bulaimu Kava, now deceased. Upon purchase of the suit land, the late Samwiri Walusimbi lodged a caveat on the suit land on 30th May, 1994 to protect his interest thereon, took possession of  
20 the suit land and developed it by construction of permanent buildings thereon with the consent of the vendor; the 2nd respondent.

When the late Samwiri Walusimbi entered and took possession of the suit land, he found that the 2nd respondent, Gwokyalya Salima had granted a Kibanja thereon to a one Ezelesi Nakilanda but in the meanwhile, the 2nd respondent  
25 had disappeared before executing a transfer of the suit land in favour of the purchaser, the late Samwiri Walusimbi. The late Samwiri Walusimbi challenged

5 the 1st respondent's letters of administration which he obtained in 1998 as  
having been obtained wrongfully and or fraudulently with intention to defraud  
him of the land he purchased from the 2nd respondent. The 1st respondent  
averred that he was the administrator of the estate of his late father Bulaimu  
Kava who died in 1959 and among the property he was administering included  
10 the suit land comprised in Kyadondo Block 156, plots 342 and 336 which were  
registered in his late father's names on 24th June, 1985 and he transferred the  
latter plot (plot 336) into his names as an administrator of the estate on 14th  
July, 2005. According to the 1st respondent, the certificate of succession alleged  
by the applicants to have been granted to the 2nd respondent, his sister, was  
15 denied and averred that the 2nd respondent was a minor and incapable of  
applying for a certificate of succession in 1961, the year in which she is alleged  
to have been issued with the certificate of succession. Judgment was entered in  
favour of the respondents and the learned trial Judge dismissed the applicants'  
entire claim against the respondents with costs and the counter claim was  
20 allowed with costs payable to the 1st respondent.

The applicants now seek an interim order of stay of execution of the orders and  
decree in High Court Civil Suit No.0083 of 2006 restraining the respondents,  
their servants and/or agents from executing the orders arising from judgment  
pending the hearing and final disposal of the substantive application vide Civil  
25 Application No. 246 of 2021 for stay of execution.



5 The grounds of the application are contained in the Notice of Motion and affidavit in support of the application sworn by Ms. Zawedde Dorothy on behalf of other applicants and dated 13th September, 2021. Briefly the grounds are that;

- 10 1. *On the 21st of October, 2020, the High Court of Uganda (Land division) delivered judgment against the applicants vide Civil Suit No.0083 of 2006 to which being aggrieved, instructed their lawyers M/S Eric-Kiingi & Co. Advocates to file a Notice of Appeal together with all attendant relevant documents in the Honorable Court.*
- 15 2. *In the said judgment, the Court awarded costs to the 1st respondent as well as ordered for the eviction of the applicants from the suit land comprised in Mailo Register, Kyadondo Block 156 Plots 336 and 342 at Kavule Estate in Wakiso District most of which comprise the residential holdings of the applicants' tenants and some applicants including their burial grounds which the respondents without any kindred to the applicants are very eager to execute the orders arising from the said*  
20 *judgment against the applicants including their arrest and imprisonment to civil prison something that is intended to embarrass them and deflate their appeal efforts and process before hearing and final disposal of their appeal.*
- 25 3. *Civil Appeal No. 267 of 2021 raises several legal issues that warrant serious judicial considerations by the Court which prima facie give the intended appeal a high chance of success.*

- 5           4. *There is a serious threat of executing the High Court judgment by the respondents especially the 1st respondent as he has already taken surveyors and prospective purchasers/ Bank Officials to the suit property comprised in Mailo Register, Kyadondo Block 156 Plots 336 and 342 at Kavule Estate in Wakiso District with the view of disposing of the said*
- 10           *property before the hearing and determination of the substantive application No.246 of 2921 as well as the main appeal No.267 of 2021.*
5. *The applicants have filed a substantive Civil Application No.246 of 2021 seeking stay of execution of the judgment and orders arising out of HCCS No.0083 of 2006 pending the disposal of Civil Appeal No.267 of 2021 in*
- 15           *this Honorable Court.*
6. *The applicants shall suffer irreparable loss and the pending substantive application and intended appeal shall be rendered nugatory if this application is not granted.*
7. *The balance of convenience in maintaining the status quo tilts in favour*
- 20           *of the applicants.*
8. *If execution of the judgment and decree is not stayed, the judgment creditors will execute the orders of Court enshrined in the judgment and/ or decree namely;*
- a) *evict the applicants from the suit lands*
- 25           b) *have the entries on the Land Titles to the suit Lands cancelled and reversed*
- c) *recovery of costs of the suit.*

5           9. *There are serious legal issues of law and fact that ought to be determined in Civil Appeal No.267 of 2021 by this honourable Court.*

The respondents opposed the application and filed an affidavit in reply deposed by Muhwezi Atuhairwe, an Advocate in the respondent's lawyers law firm. The ground in opposition as set out in the affidavit of Muhwezi Atuhairwe are as follows;

10           a. *That I have read the judgment in HCCS No.0083 of 2006 being appealed against, affidavit in support of the application and the annexed memorandum of appeal and record of appeal No.267 of 2021 already served on us and I have found no merit in the application.*

15           b. *That at the commencement of the hearing of this application, counsel for the respondents shall raise a preliminary point of law that this application is incompetent and improperly before this Court because it is mandatory under the Rules of this Court to first file an application of this nature in the High Court, which has not been done.*

20           c. *That no evidence of immediate threat of execution was annexed to the affidavit in support of the application and the findings of the trial Judge that the applicants' deceased father as purchaser never signed the purchase agreement to bind him, is not being challenged in the appeal, hence there is no serious issue to determine in the appeal on likelihood*  
25           *of success.*



5 At the hearing of the application, Mr. Eric Kiingi appeared for the applicants while the respondents were represented by Mr. Rukundo Seth.

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

Counsel for the applicants submitted that the primary purpose of this application was to preserve the status quo pending the hearing of the substantive application for stay of execution vide Civil Application No.246 of 2021 and to ensure that the substantive application and the Appeal vide Civil Appeal No.267 of 2021 are not rendered nugatory. He added that the applicants are required to prove that they have filed a notice of appeal, there is a substantive application for stay of execution, the application has not been brought without undue delay and lastly that there is an imminent threat of execution. According to counsel, the applicant had fulfilled all the necessary requirements for the grant of an interim stay of execution. He relied ***the Administrator General Through the Lawful Attorney Kyomuhendo Jolly Christine V The National Social Security Fund & 2 Ors, Supreme Court Civil No.2 of 2009.***

20 Counsel further submitted that there was a serious threat of execution because the respondents had attempted to take steps to that effect to cause the eviction of the Applicants and their tenants from the suit land and the affinity to cause their arrest and imprisonment before the determination of Civil Application No.246 of 2021 is disposed of. He further submitted that the applicants would suffer irreparable loss as the pending appeal will be rendered nugatory if this application is not granted and the balance of convenience in maintaining the

5 status quo tilts in favour of the applicants. Counsel relied on **Hon. Theodore Ssekikuubo & Others V Attorney General & Others, Supreme Court Civil Application No.4 of 2014** and prayed that the application be allowed.

In reply, counsel for the respondents opposed the application and submitted that the instant application and the substantive application for stay of execution are  
10 incompetent and improperly before this Court because they violated Rule 42(1) of the Rules of this Court which requires applications of this nature to first be filed in the High Court.

Counsel further submitted that the applicant's allegation that there is a serious threat of execution by the respondents is false and speculative because the  
15 applicant has not availed any evidence to show that the 1st respondent has taken surveyors and prospective purchasers/ Bank Officials to the suit land with the view of disposing it off. He added that there were no serious legal issues as alleged by the applicant to warrant serious judicial consideration by this Court. He prayed that the application be dismissed.

20 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 mandates the Court to grant a stay of execution, an injunction or order a stay of proceedings on such terms as the Court may deem fit. This Court has inherent powers to make such orders as may be necessary for attaining the ends of justice.



- 5 Counsel for the respondents contended that the application was improperly before this Court because the applicants ought to have first filed the application in the High Court as provided under **Rule 42(1) of the Rules of this Court**. The said Rule states that whenever an application may be made either in the Court or in the High Court, it shall be made first in the High Court.
- 10 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 straight in this Court. **See Kyambogo University v Prof. Isaiah Omolo Ndiege CACA No. 341 of 2013.**
- 15 In **Lawrence Musitwa Kyazze V Eunice Busingye, Supreme Court Civil Application No.18 of 1990**, the Supreme Court provided conditions that must be present before an applicant may file an application of the present type in this Court first, without having filed it at the High Court to include:
1. *There must be substance to the application both in form and content;*
  - 20 2. *This Court may in special and probably rare cases entertain an application for a stay before the High Court has refused a stay, in the interest of justice to the parties. But before the Court can so act it must be apprised of all the facts*

5 The judgment of the learned trial Judge in HCCS No.0083 of 2006 shows that there are exceptional circumstances in this case for this application to be filed in this Court before the applicant could file the same in the High Court.

In ***Hwan Sung Industries V Tajdin Hussein and 2 Others, Supreme Court Civil Application No.19 of 2008***, Okello, JSC (as he then was) stated some of  
10 the principals to be considered in granting interim orders of stay of execution, thus;

*“For an application for an interim order of 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.*

15 *It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.”*

Further in ***Dr. Ahmed Muhammed Kisuule V Greenland Bank (In liquidation), Supreme Court Miscellaneous Application No.7 of 2010***, Court held that;

20 *“For an application in this Court for a stay of execution to succeed the applicant must first show subject to other facts in a given case, that he /she has lodged a notice of appeal in accordance with Rule 72 of the Rules of this Court.”*

From the evidence on record, the applicant filed a Notice of Appeal dated 10th  
25 November, 2020 and marked as annexure “C”. The applicant has not only filed



5 a Notice of Appeal but also a Memorandum of Appeal marked as annexure “E”  
and a letter requesting for typed and certified record of proceedings. The record  
shows that the said documents have been duly served and received by the  
respondents’ Advocates.

A substantive application for stay of execution has also been filed and it is  
10 referenced as Civil Application No.246 of 2021.

Regarding the existence of an imminent threat of execution, Counsel for the  
applicants submitted that there was a serious threat of execution because the  
respondents had attempted to take steps to that effect to cause the eviction of  
the Applicants and their tenants from the suit land and the affinity to cause their  
15 arrest and imprisonment before the determination of Civil Application No.246 of  
2021 is disposed of.

This is evidence of imminent threat of execution because the orders in the decree  
are easily implementable for example through evicting the applicants from the  
suit land and having a change of ownership to the suit land through having the  
20 entries on the land titles cancelled and reversed.

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

- 5 1. An interim order of stay of execution of the orders in HCCS No.0083 of 2006 is hereby issued pending the disposal of the substantive application vide Civil Application No. 246 of 2021 or until further orders of this Court.
2. The Registrar of this Court is hereby directed to fix Miscellaneous Application No.246 of 2021 for hearing in the next 21 days.
- 10 3. The costs of this application shall abide the outcome of the substantive application for stay of execution.

**I so order**

Dated this 8th day of Dec 2021.



CHEBORION BARISHAKI

**JUSTICE OF APPEAL**