

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISC. APPLICATION NO. 282 OF 2021

5 **NESTOR GASASIRA MACHUMBI ::::::::::::::::::::::::::: APPLICANT**

VERSUS

ZIA UWERA MUREKATETE ::::::::::::::::::::::::::: RESPONDENT

*(Under S. 33 Judicature Act, Rules 2(2), 6(2) (b) and 43(1), of the
Judicature Court of Appeal Rules Directions SI 13-10)*

10 **CORAM: HON. MR. JUSTICE. STEPHEN MUSOTA, JA**

(Single Judge)

RULING OF COURT

Introduction

15 This application was filed seeking an interim order of stay of
execution of the Judgment and Decree made in Civil Suit No. 626 of
2018 to be issued pending the hearing and final determination of the
main application and costs of this application.

Grounds:

20 The grounds of the application are set out in the Notice of Motion as
follows:

- a) The Applicant being dissatisfied with the Judgment and Decree
of the High Court in Civil Suit No. 262 of 2020 filed a Notice of

Appeal against the said decision and Miscellaneous Application No. 304 of 2020 for validation of the Notice of Appeal filed out of time.

- b) The Applicant had filed a substantive application pending fixing and hearing by a panel of the Court of Appeal.
- c) There is eminent threat that unless restrained by this court, the Respondent will soon execute the entire Judgment/ Decree thus, rendering the main Application and the intended Appeal nugatory.
- d) There are special circumstances that require this Court to intervene and preserve the status quo.
- e) The Application has been brought without undue delay.

The above grounds are supported by the affidavit of the applicant, Nestor Gasasira Machumbi which expounds on the grounds already set out in the Notice of Motion.

The respondent filed an affidavit in reply deposed by Ernest Kalibala of AF Mpanga Advocates and stated that in July 2013, the respondent and the applicant contracted for the respondent to purchase the applicant's property at Plot 37A Lake Drive Port Bell Luzira for USD 670.000.000. The respondent took possession of the property and paid a deposit of USD 505.000. The contract was terminated by the applicant and the respondent made several demands to get a refund of the money paid to no avail.

The respondent thus instituted H.C.C.S No. 626 of 2018 by way of summary suit, against the applicant for the recovery of the USD

505.000. The applicant was granted conditional leave to appear and defend which he did not meet and judgment was entered against him.

Background

5 The background to this application is that on 13th February 2013, the applicant signed a tenancy agreement letting his property comprised in Plot 37A Lake Drive Port Bell Luzira to the respondent for a period of one year commencing on 1st March 2013 to 28th February 2014. A few months into the tenancy, the respondent offered to buy the property for a sum of USD. 670.000 payable in 10 three installments. Under the sale agreement, the respondent, who was in possession of the property was to remain in occupation and upon payment of the 2nd installment of USD 500.000, the letting arrangement would extinguish and the respondent would be entitled to full and unencumbered possession of the property but the said 15 money was never paid. The applicant served the respondent with a notice dated 28th February 2014 requiring her to vacate the property within 5 days or face eviction. The respondent instituted a summary suit against the applicant for termination of the contract and demanded for a refund of USD 505,000. An *ex parte* judgment was 20 entered against the applicant upon which the applicant filed a Notice of Appeal against the decision in Civil Suit No. 626 of 2018 and requested for a certified copy of the record of proceedings, and an application for validation of the Notice of Appeal out of time.

The applicant filed an application for stay of execution in the High Court which was dismissed and was served with a Notice to show cause by the respondent's lawyers.

5 The parties were directed, through the Registrar, to file written submissions and await Ruling on Notice, which they did according to the time schedules. I have duly considered both counsels' submissions and the authorities cited. For clarity, I will highlight the submissions of both counsel as follows:

Applicant's submissions

10 Counsel submitted that for an application for an interim order of stay of execution to succeed, it suffices to show that the applicant has lodged a substantive application for stay of execution and that there is a serious threat of execution. Counsel relied on the decision in **Huang Sung Industries Ltd Vs Tajdin Hussein SCCA No. 19/2003**
15 to support the position that for an application for an interim order, it suffices to show that a substantive application is pending and that there is a serious threat to execution pending hearing of the substantive application.

20 Counsel submitted that a Notice of Appeal against the decision in Civil Suit No. 626 of 2018 was filed and a substantive application for stay of execution has also been filed. Counsel submitted further that there is an eminent threat of execution and that a Decree has been extracted and a Notice to Show Cause has already been taken out. A warrant of attachment was issued on 12th October 2021 and the

substantive application together with the appeal will be rendered nugatory should this application be denied.

Respondent's submissions

5 In reply, counsel the respondent submitted that the applicant has no *locus standi* to commence this application for interim stay of execution because the applicant failed to comply with the condition of depositing a sum of USD 120.000 as ordered by the trial Court. In addition, that there is no appeal pending in this court because the Notice of Appeal was not filed within the statutory timelines under
10 Rules 76 (1) and (2) and 83(1) (a) of the Judicature Court of Appeal Rules Directions SI 13-10. The applicant did not file an application for extension of time to file a Notice of Appeal.

Counsel submitted that there is no substantive application for stay of execution served upon the respondents and as such, the
15 conditions set forth in **Huang Sung Industries Ltd Vs Tajdin Hussein SCCA No. 19/2003** have not been fulfilled. Further, that there is no threat of execution because the ruling of the trial Court on the Notice to Show Cause why execution should not issue made execution conditional upon filing the valuation report whereupon the
20 court could make orders of sale of the property.

Counsel for the respondent further argued that the applicant is in possession of the property and continues to collect rent from it and filed this application to frustrate the respondent, by continuing holding her USD 505.000. This application is a delaying tactic

adopted by the applicant to try and delay the enjoyment of the fruits of the judgment by the respondent.

Applicant's rejoinder

5 In rejoinder, Counsel for the applicant submitted that the current application is anchored on **Rule 2(2)** of the **Judicature (Court of Appeal Rules) Directions** which provides for inherent powers of this court to make such orders as may be necessary for attaining the ends of justice. That the Notice of Appeal was filed on 3rd November 2020 and Miscellaneous Application No. 304 of 2020 was also filed to
10 validate the said Notice of Appeal.

Consideration of the application

I have duly considered all the arguments of both counsel and the authorities cited therein. In the commonly cited decision of the Supreme Court in **Hwan Sung Industries v Tajdin Hussein and**
15 **others, Supreme Court Civil Appeal, No. 19/2003**, it was held by G.M Okello JSC (as he then was) that:

20 *'For an application for interim order it suffices that a substantive application is pending and that there is some threat of execution before the hearing of the pending substantive application. It's not necessary to pre-empt consideration of the matters necessary in deciding whether or not to grant the substantive application for stay. The court in addition to considering that a Notice of Appeal has been filed and that there is a substantive application has to*

consider whether there are special circumstances to warrant such an interim order.’ (Emphasis mine)

Likewise, in the case of **Teddy Sseezi Cheeye and another v Enos Tumusiime, Court of Appeal Civil Appeal, No. 21/1996**, it was

5 held that:

‘While considering circumstances court should take into account before granting a stay of execution include where the subject of a case is in danger of being destroyed, sold / in anyway disposed of. 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.’

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It suffices to note that before court can consider grant of an interim application for stay of execution, the applicant must prove that a Notice of Appeal has been filed in this court and a substantive application for stay of execution. The applicant in this case filed a Notice of Appeal on 3rd November 2020, which was out of time since the decision of the High Court was delivered on 11th November 2019. The Notice of Appeal was filed one year after the decision of the High Court was made.

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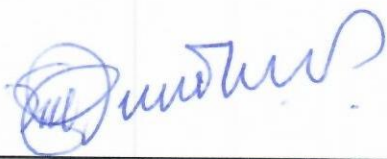
The applicant also filed Miscellaneous Application No. 281 of 2021 for substantive stay of execution and Miscellaneous Application No. 304 of 2020 to validate the Notice of Appeal filed out of time. Misc. Application No. 304 of 2020 is still pending hearing in this court. In the eyes of the law, the applicant has no Notice of Appeal filed in this

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Court, because his Notice of Appeal has not been validated. Whereas the applicant's counsel invites this court to apply Rule 2(2) of the Rules of this Court, this rule ought to be applied judiciously so as not to create a by-pass to the law. I am constrained to decline to grant
5 this application for reasons that there is no appeal pending before this court. The applicant's counsel should have first requested for a hearing date of Miscellaneous Application No. 304 of 2020 to validate the Notice of Appeal before fixing the current application.

This application is therefore dismissed with costs to the respondent.
10 I also order that Miscellaneous Application No. 304 of 2020 should be fixed by the Registrar of this court in the next available session.
It is so ordered.

15 Dated this 25th day of May 2021



Stephen Musota

20 **JUSTICE OF APPEAL**