

**THE REPUBLIC OF UGANDA**

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

**MISCELLANEOUS APPLICATION NO. 53 OF 2021**

*(Arising from Misc. Application No. 486 and 487 of 2020)*

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*(Arising from Civil Suit No. 23 of 2010)*

**1. RICHARD SSIMBWA**

**2. JENNIFER NANZIRI ::::::::::::::::::::::::::::::: APPLICANTS**

**VERSUS**

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**1. KATAABU SIMON**

**2. FRANCIS KIMBUGWE**

**3. RONALD MUTEBI**

**4. NDAGIRE ROBINAH ::::::::::::::::::::::::::::::: RESPONDENTS**

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**BEFORE: Hon. Justice Stephen Musota, JA**

*(Sitting as a single Justice)*

**RULING OF COURT**

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The applicants filed this application by Notice of Motion under section 98 of the Civil Procedure Act, section 33 of the Judicature Act, Rules 2(2), 6(2) and 43(1) and (2) of the Judicature Court of Appeal Rules.

The applicant seeks an interim order of stay of execution against the decree of the High Court Family Division in Miscellaneous Application No. 486 of 2020. The grounds upon which this

application is premised are laid out in the affidavit deponed by the 1<sup>st</sup> applicant, Richard Simbwa, and are briefly that;

1. "On 4<sup>th</sup> February 2021, Her Lordship Justice Ketrach Katunguka delivered an omnibus ruling affecting H.C.C.S No. 23 of 2010, H.C.C.S No. 161 of 2016, H.C.C.S No. 119 of 2016 and Miscellaneous Application No. 486 of 2020, and all applications arising therefrom.
2. That the ruling was in response to my filing of Misc. Application No. 486 of 2020 which sought the following reliefs: - orders/judgments and proceedings in C/S No. 23 of 2010, C/S No. 161 of 2016 and C/S No. 119 of 2016 presently in the High Court Family Division be stayed until Misc. Application No. 487 of 2020 for review/varying/setting aside is heard or until the further order of court.
3. The application No. 486 of 2020 was based on the legal maxim that whatever arises out of a nullity is a nullity. The impugned document was a certificate of no objection which was by a letter from the office of the Administrator General dated 13<sup>th</sup> August 2020 declared forged and unauthentic.
4. In the ruling dated 4<sup>th</sup> February 2021 by Justice Ketrach Katunguka, the learned Judge involved herself in extraneous matters and never talked about the illegalities inherent in Adm. Cause No. 711 of 2007, C/S No. 23 of 2010, C/S No. 161 of 2016 and C/S No. 119 of 2016.

5. Being dissatisfied with the ruling, I immediately filed a notice of appeal. I also applied for a certified copy of the proceedings and the ruling.

6. There is a serious threat of execution which would occasion irreparable harm and serious mischief”.

The respondents filed affidavits in reply deponed by the 1<sup>st</sup> and 3<sup>rd</sup> respondents. The 1<sup>st</sup> respondent stated that H.C.C.S No. 23 of 2010 was concluded in 2013 and a consent judgment was entered in which Alice Namukasa and the 1<sup>st</sup> respondent were appointed as administrators of the estate of the late Joseph Kayemba Gaaga. That the 1<sup>st</sup> respondent’s administration does not arise out of the letter of no objection annexed to the affidavit in support of the application. That the 1<sup>st</sup> applicant has used all possible tactics to delay the distribution of the estate of the late Joseph Kayemba Gaaga. That the applicants have so far made 5 criminal complaints to Uganda Police, 1 Civil Suit and 12 Miscellaneous Applications in the High Court.

The 3<sup>rd</sup> respondent stated in his affidavit that the 1<sup>st</sup> applicant has since 2013, been operating a bar called Via King as well as residing in the deceased’s property comprised in Kyadondo Block 250 Plot 201 situate at Bunga.

### **Representation**

At the hearing of the application, Counsel Justin Semuyaba appeared for the applicants while Counsel Richard Lubaale and Eseza Sendege appeared for the respondents. Both parties filed written submissions.

### **Applicant's submissions**

Counsel for the applicant submitted that the principles governing stay of execution in this court are laid out in Rule 5(2) (b) of the Court of Appeal Rules and that stay of execution seeks to suspend the operation of a judgment or order of court. Counsel argued that stay of execution seeks to protect the right of appeal because if the subject matter of the appeal is disposed of, there is no likelihood of the appellant getting it back. In addition, that the applicant will suffer substantial loss unless execution is stayed.

Counsel relied on the decision in **Somali Democratic Republic Vs A. N Treon Civil Application No. 11 of 1988** in which it was held that it is the duty of court to make such orders for staying proceedings to prevent the appeal, if successful, from being rendered nugatory.

### **Respondent's submissions**

Counsel for the respondent raised a preliminary objection that under Rule 42(1) of the Judicature Court of Appeal Rules Directions, such an application ought to have been filed to the High Court first before filing it in this court. Such an application flouts Rule 42 and ought to be dismissed with costs.

In addition, counsel submitted that for an application of stay of execution to be granted, an applicant ought to show that a notice of appeal has been lodged, a substantive application for stay of execution has been filed, substantial loss may occur to the applicant

unless stay of execution is granted, the application was made without undue delay and the applicant has given due performance of the decree. Counsel further argued that the applicants have not provided the Civil Application No. for the substantive application and in addition, that the applicants have no automatic right of appeal from the orders of the High Court in Miscellaneous Applications No. 486 and 487 of 2020. Further, that this application does not show whether there is a pending application for leave to appeal and as such, prayed that this application be dismissed with costs.

Counsel argued further that the applicants have not proved that substantial loss will occur should this application not be granted. The applicants have not given security for due performance and have not shown a serious threat of execution of the decree.

### **Consideration of the application**

I have read the pleadings and considered the submissions of both counsel. The respondent's counsel raised a preliminary objection stating that this application ought to have been filed at the High Court first. Under **Rule 42(1)** of the Rules of this Court, an application of this nature should be made to the High Court first. The Rule provides:

*"42. Order of hearing applications*

*(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."*

This was also echoed in the case of **Lawrence Musiitwa Kyazze versus Eunice Busingye Civil Application No. 18 of 1990**, that an application of this nature ought to have been made at the High Court first.

5 However, it is now settled law that this court and the High Court have concurrent jurisdiction in this matter. It appears to me that applications of this nature should be first filed in the High Court as a general rule, and should only be filed in this court, where exceptional circumstances exist.

10 **Rule 2(2) of the Judicature (Court of Appeal Rules) Directions** grants this court powers to make such orders inter alia as may be necessary for achieving the ends of justice.

**Rule 6 (2) (b)** the Rules of this court which provides for stay of execution states:

15 (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:*

*(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*  
20 *execution, an injunction or stay of proceedings on such terms as the court may think just."*

This is the rule which provides for stay of execution whether interim or substantive. However, there are different principles which the court must consider in an application for an interim stay of

execution. In **Hwan Sung Industries ltd vs Tajdin Hussein and 2 others Civil Application No. 19 of 2008**, Okello JSC (as he then was) stated some of the principals to be considered in granting interim orders of stay of execution, thus:

5        *“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.*

10        *It is not necessary to pre-empt consideration of 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 there is a substantive application, has to consider whether there are special circumstances warranting the granting of such an interim order. For such an application to be granted, there must be an eminent threat of execution.

In the instant application, the applicants filed a Notice of Appeal dated 9<sup>th</sup> February 2021. There is however no substantive application for stay of execution proved to have been filed in this court. The applicants do not have an automatic right of appeal against the orders of the High Court in Miscellaneous Application No. 486 and 487 of 2010 and can only file an appeal after seeking leave of court. There is also no proof that execution proceedings have commenced in H.C.M.A No. 486 and 487 of 2020 and as such, I find that an eminent threat of execution has not been proved by the applicants

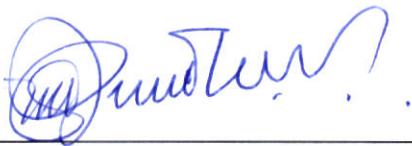
herein. The applicant has also not shown that exceptional circumstances exist to warrant skipping an application in the High Court.

5 The applicant has therefore not fulfilled the conditions to warrant a grant of an interim order of stay of execution.

I therefore find that this application is devoid of merit and the same is accordingly dismissed with costs.

Dated at Kampala this 8<sup>th</sup> day of Feb 2022

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**Stephen Musota**  
**JUSTICE OF APPEAL**

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