

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO.679 OF 2022

(Arising from Civil Application No.678 of 2022)

(Arising from HCCS No.22 of 2015)

10 **ORYONGA MOSES:.....APPLICANT**

VERSUS

ETANU OSULEK THOMAS:.....RESPONDENT

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

(SINGLE JUSTICE)

15 **RULING**

The applicant brought this application by Notice of Motion under the provisions of Rules 2(2), 6(2) (b) and 43(1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10 seeking for orders that; an interim order for stay issues; staying the execution and/ or implementation of the Decree of the High Court of Uganda at Soroti in Civil Suit No.22 of 2015 until the final determination of Civil Application No.678 of 2022 and that costs of the application be provided for.

The application is supported by an affidavit sworn by Oryonga Moses, the applicant and opposed through an affidavit in reply sworn by Etanu Osulek Thomas, the respondent.

5 **Background**

The respondent sued the applicant in HCCS No.22 of 2015 for revocation of Letters of Administration to the estate of the late Yoana Obukui granted to the applicant in High Court Administration Cause No.48 of 2008. The respondent claimed that he was a beneficiary and successor of Obukui's estate as his nephew and customarily adopted son and that the applicant fraudulently got letters of administration to the same. The applicant on the other hand claimed that the land that formed the late Obukui's estate belonged to his father the late Ekubu Vincent and that he was the customary heir to the same. The applicant further claimed that the respondent as a maternal nephew to the late Obukui could not inherit the estate under the customs and cultures of the Iteso. Judgment was given in favour of the respondent.

Dissatisfied with the judgment, the applicant appealed to this Court in Civil Appeal No.119 of 2022. He then filed Miscellaneous Application No.060 of 2022 for stay of execution in the High Court of Uganda at Soroti and an application for an interim stay of execution, Miscellaneous Application No.061 of 2022. The interim order of stay of execution was granted whereas the substantive application for stay of execution was dismissed. He has now filed the instant application.

25 **Grounds of the application**

The grounds in support of the application are contained in the Notice of Motion and they are expounded in the affidavit in support. The gist of the grounds is that the applicant is dissatisfied with the judgment and decree of

5 the High Court in Civil Suit No.22 of 2015. He has filed a Notice of Appeal
and Misc. Applications No.0061 of 2022 and 0060 of 2022 for interim stay of
execution and stay of execution respectively. That Miscellaneous Application
No.0061 of 2022 was granted while Misc. Application No.0060 of 2022 was
denied. The applicant further contended that he had filed a substantive
10 Application No.678 of 2022 which is pending hearing and determination in
this Court. That the applicant's appeal raises important legal issues and he
will suffer substantial loss and damage if the application is not granted. The
applicant further contends that the application has been made without
undue delay and it is in the interest of justice that the application is
15 allowed.

Grounds of opposition

The application is opposed by the respondent and the gist of the
respondent's opposition is set out in the affidavit in reply of Etanu Osulek
Thomas stating that the application did not meet the required test for grant
20 of an interim order of stay. That reference to Rule 2(2) of the Rules of this
Court is inapplicable and that the respondent has not been served with a
substantive application and while it is true that the applicant filed Civil
Appeal No.119/2022 before this Court, the said appeal has no chances of
success. The respondent further contended that there was no serious threat
25 or imminent danger of execution that has been demonstrated by the
applicant and there is no fairness, justice or equity in interfering with the
enjoyment of the respondent's rights as the successful party.

Representation

At the hearing of the application, the applicant was represented by Mr. Caleb Alaka, Ben Ikilai and Racheal Asimwe while the respondent was represented by Mr. Echipu Johnson Elvis.

10 Applicant's submissions

Counsel for the applicant raised a preliminary objection to the effect that the affidavit in reply deposed by the respondent offended S.2 of the Illiterates Protection Act CAP 78 which provides that any person who writes the name of the illiterate shall also write his name and address on the document as a
15 witness. He added that in the instant case, there was no evidence of any person providing his name and address as a witness to such affidavit and hence the same affidavit offended S.1 of the Oaths Act CAP 19 which makes provision on how oaths should be in the First Schedule to the Act.

Counsel further submitted that Echipu Johnson Elvis who purported to
20 have made a declaration that he had read and explained the contents of the affidavit to the respondent did so after the Commissioner for Oaths had already commissioned the affidavit of the respondent. In counsel's view, such affidavit commissioned before the Commissioner for oaths before the contents had been explained to the deponent cannot stand in the eyes of the
25 law. He added that the conduct of Advocate Echipu Johnson of representing the respondent whose affidavit he had prepared without reading it over and explaining the contents to the deponent made him personally involved in the

5 Client's case contrary to Regulation 9 of the Advocates Professional Conduct Regulations.

Counsel contended that all the annextures attached to the respondent's affidavit in reply could not be relied upon since they offended the third schedule Rule 9 of the Commissioner for Oaths (Advocates) Act CAP 5. That
10 exhibits which are not certified by the Commissioner for Oaths before whom the affidavit is sworn cannot be relied on. He relied on ***Chelbei Fred & Anor V Masai Labu, Court of Appeal Miscellaneous Application No.140 of 2010***. Counsel prayed that his preliminary objection be upheld and the respondent's affidavit in reply be struck out.

15 Counsel further contended that the conditions for the grant of an interim order of stay include a competent Notice of Appeal, a substantive application and a serious threat of execution as was stated in ***Zubeda Mohamed & Anor V Laila Kaka Wallia & Anor, Supreme Court Civil Reference No.07 of 2016***. He added that the applicant averred under paragraph 2 of
20 his affidavit in support of the application that he had filed a Notice of Appeal, a letter requesting for the record of proceedings in Civil Suit No.22 of 2015, a Memorandum of Appeal and a Record of Appeal attached as annextures "C", "D", "E" and "F" to his affidavit.

Counsel further submitted that he had filed a substantive application for
25 stay vide Civil Application No.678 of 2022 which was pending hearing and determination in this Court. Regarding existence of a serious threat of execution, counsel submitted that the nature of the orders granted by the High Court embedded in the Decree attached as annexture "B" to the

5 applicant's affidavit in support to the Notice of Motion were self-executing in nature. He relied on ***SBI International Holdings AG (U) Ltd V COF International Company Ltd, Miscellaneous Application No.183 of 2018*** where this Court held that in addition to considering whether a notice of appeal and a substantive application have been filed, this Court may also
10 consider other special circumstances to warrant issuance of an interim order. Counsel prayed that the application be allowed.

Respondent's submission

Counsel for the respondent submitted that the preliminary issues raised by counsel for the applicant were misplaced and ought to be ignored and
15 substantive justice must be administered without undue regard to technicalities. He then cited the case of ***Uganda Creameries Ltd and Another V Reamaton Ltd CACA No.44 of 1998*** to demonstrate the distinction between exhibits and annextures. He further submitted that Rule 9 of the Commissioner for Oaths (Advocates) Act did not apply in the instant
20 case because the certification shows that the interpretation was done before the affixation of the thumb mark. That a simple reading of the certification confirmed the same. In counsel's view, it was misleading to say that because the Commissioner's stamp appeared before the certification meant that it was the same order in which the events occurred.

25 Regarding the conditions to be fulfilled before an interim order of stay can be granted, counsel submitted that the said conditions must be satisfied in entirety and not in the alternative. He conceded that the applicant had filed a competent Notice of Appeal and a substantive application was pending

5 hearing before this Court. However, he added that the applicant had not demonstrated that there was a serious threat of execution. In counsel's view, the applicant only intends to delay the respondent from enjoying the fruits of the judgment and further that the argument by counsel for the applicant that the orders sought to be stayed were self-executing was misleading
10 because a self-executing decree cannot be stayed as it is deemed to have been executed. Counsel relied on **Karayira Francis V Eogers Bosco, Supreme Court Reference No.23 of 2016** for the proposition that an interim stay of execution is preventive than corrective.

Analysis

15 The jurisdiction of this Court to grant an interim stay of execution is set out in Rule 6(2) (b) and Rule 2(2) of the Rules of this Court.

Rule 6(2) (b) provides that:

*“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or stay execution but the Court may in any civil
20 proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just”*

Rule 2 (2) of the Rules of this Court give this Court inherent powers to do whatever is necessary to attain the ends of justice and prevent abuse of
25 process.

The applicant raised a preliminary objection.

5 He contended that the affidavit in reply deponed by the respondent offended
S.2 of the Illiterates Protection Act Cap 78. That no evidence of any such
person providing his name and address as a witness to such affidavit had
been furnished hence offending the provisions of S.1 of the Oaths Act CAP
19 which makes provision for Oaths to be taken as set out in the First
10 Schedule to the Act. Further that Echipu Johnson Elvis who purported to
have made the declaration that he had read and explained the contents of
the affidavit to the deponent did it after the Commissioner for Oaths had
already commissioned the affidavit of the respondent.

Section 2 of the Illiterates Protection Act CAP 78 provides as follows;

15 *“No person shall write the name of an illiterate by way of signature to
any document unless such illiterate shall have first appended his or her
mark to it; and any person who so writes the name of the Illiterate shall
also write on the document his or her own true and full name and
address as witness, and his or her so doing shall imply a statement
20 that he or she wrote the name of the illiterate by way of signature after
the illiterate had appended his or her mark, and that he or she was
instructed so to write by the illiterate and that prior to the illiterate
appending his or her mark, the document was read over and explained
to the illiterate.”*

25 **Section 1 of the Oaths Act, CAP 19** provides that the oath which shall be
taken as occasion shall demand shall be the oath set out in the First
Schedule to the Act.

5 Form B of the 1st schedule to the Act provides for the form of jurat where the Commissioner has read the affidavit to the deponent.

I have looked at the said affidavit in reply and find that although it did not match the format set out in Form B of the Oaths Act CAP 19, a declaration was attached signed by Echipu Johnson Elvis confirming that the contents
10 of the affidavit had been read and explained to the respondent who was unable to read and write owing to advanced age. Further that the affidavit had been explained to the respondent in Ateso language by Echipu Johnson Elvis who is fluent both in Ateso and English languages and the respondent had confirmed the contents thereof as being true and correct before
15 appending his thumb print thereon.

Although there was a variance between the certification in the affidavit in reply and the format provided by law, I find the variance minor because the law was complied with. Section 43 of the Interpretation Act CAP 3 provides
20 which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead.

Further, counsel for the applicant did not avail evidence showing that Echipu Johnson Elvis who purported to have done the declaration that he
25 had read and explained the contents of the affidavit to the respondent did so after the Commissioner for Oaths had commissioned the affidavit of the respondent. Whereas it is true that the signature of the Commissioner for Oaths appeared before the Declaration/ Certification by Echipu Johnson

5 Elvis, I cannot conclude that the Commissioner for Oaths commissioned the affidavit before or after the declaration by Echipu Johnson Elvis.

counsel further submitted that all annextures to the respondent's affidavit in reply could not be relied upon since they offended the Third Schedule to the Rules (Rule 9) of the Commissioner for Oaths (Advocates) Act Cap5.

10 Article 126 (2) (e) of the Constitution provides that in adjudicating cases of both a civil and criminal nature, substantive justice shall be administered without undue regard to technicalities.

In **Colonel Dr. Kiiza Besigye V Museveni Yoweri Kaguta Election Petition No.1 of 2001**, the Supreme Court held that reliance on
15 technicalities is not desirable and offends Article 126 of the Constitution. This was after the Court had been asked to strike off affidavits which did not disclose the name and address of the jurat.

The applicant's preliminary objection is therefore overruled and I will proceed to determine the application on its merits.

20 Rules 6 (2), 42 (2) and 43 of the rules of this court give wide discretion to this Court to grant interim or substantive orders of stay of execution for purpose of preserving the right of appeal.

In **Zubeda Mohamed & Sadru Mohamed V Laila Kaka Wallia & Anor, Supreme Court Civil Reference No.07 of 2016** which cited with approval
25 **Hwan Sung Industries Ltd vs. Tajdin Hussien and 2 others SCMA No. 19 of 2008**, the Supreme Court stated as follows;

5 *“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 substantive application. Needless to say, there must be a
Notice of Appeal. See **Hwan Sung Industries Ltd vs. Tajdin Hussien
10 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;*
2. *A substantive application; and*
- 15 3. *A serious threat of execution.”*

The evidence on record shows that the applicant had filed a competent
Notice of Appeal marked as Annexure “C” and attached to the applicant’s
affidavit. The applicant also filed a Memorandum of Appeal marked as
annexture “E” as well as a Record of Appeal marked as Annexure “F”.

20 Secondly, the applicant has filed a substantive application vide Civil
Application No.678 of 2022 pending hearing and determination by this
Court.

Regarding a serious threat of execution, counsel for the applicant submitted
that the nature of the orders granted by the High Court embedded in the
25 Decree attached as annexture “B” to the applicant’s affidavit in support of
the Notice of Motion were self-executing in nature. In response counsel for
the respondent submitted that the applicant had not proved that there was
a serious threat of execution. In counsel’s view, the applicant only intends to

5 delay the respondent from enjoying the fruits of the judgment and further
that the argument by counsel for the applicant that the orders sought to be
stayed were self-executing is misleading because a self-executing decree
cannot be stayed as it is deemed to have been executed.

The applicant attached a Decree marked as annexure "B" and I am positive
10 that the respondent is desirous of executing the said decree.

I therefore find that the applicant is facing an eminent threat of execution of
the decree.

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

1. An interim order is hereby issued staying the execution and or
implementation of the Decree of the High Court of Uganda at Soroti in
Civil Suit No.22 of 2015 until the final determination of Civil
Application No.678 of 2022 pending before this Court.
- 20 2. The Registrar of this Court is hereby directed to fix Civil Application
No.678 of 2022 for hearing in the next convenient session.
3. The costs of this application shall abide the outcome of the
substantive application for stay of execution

I so order

25 Dated at Kampala this.....15th day ofDec.....2022.


Cheborion Barishaki
JUSTICE OF APPEAL