

5 THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO 20 OF 2022
(ARISING FROM NO 19 OF 2022)

10 (ARISING FROM CIVIL APPEAL NO 303 OF 2018, CIVIL APPEAL NO 133 OF
2017 AND CIVIL SUIT NO 056 OF 2014)

SSEMWANGA CHARLES} APPLICANT

VERSUS

1. NAZZIWA AISHA}
2. MOHAMMAD NSUBUGA}
15 3. SALIM KIZITO}RESPONDENTS

RULING OF CHRISTOPHER MADRAMA, JA

20 The Applicant filed this application under the provisions of rule 2 (2), 6 (2)
(b) and rule 43 (1) & (2) of the Judicature [Court of Appeal Rules] Directions
for an interim order of stay of execution of the judgment and orders of the
High Court in Civil Appeal No 133 of 2017 against the Respondents or their
agents or anyone claiming title under them pending the determination of the
main application for stay of execution. Secondly it is for costs of the
application to be provided for.

The grounds of the application averred in the notice of motion are:

- 25 1. The Applicant was the successful party in Civil Suit No 056 of 2014 at
the Chief Magistrates Court at Makindye against the Respondents.
2. The Respondents appealed to the High Court which overturned the
lower court's decision.
3. The Applicant was dissatisfied with the decision of the High Court and
30 appealed to this court.

- 5 4. The appeal is still pending before this court and has a high chance of success.
5. The Respondents or their agents are currently constructing on the suit kibanja yet it is still a subject of court's determination.
6. There is an imminent threat of losing and wasting the suit kibanja to
10 the Respondent or their agents.
7. The Applicant filed miscellaneous application No 19 of 2022 for stay of execution of the decree of the lower court which is yet to be fixed before full bench of the justices of the Court of Appeal.
8. The execution of the decree may be done before the main application
15 for stay and appeal are heard.
9. The application was brought without undue delay having exhausted the lower courts process seeking to stay execution of the decree.
10. It is just and equitable that the application is granted in order not to render the main application for stay of execution nugatory.

20 The Applicant's application is further supported by the affidavit of Ssemwanga Charles deposed on 31st of January 2022 which has the following facts.

The Applicant was the successful party in Civil Suit No 056 of 2014 against
25 the Respondents at the Chief Magistrates Court at Makindye where the court found that he was the rightful owner of the suit kibanja according to a copy of the ruling attached. The Respondent was dissatisfied with the decision and appealed to the High Court land division which overturned the lower court's decision. The Applicant being dissatisfied with the said
30 decision of the High Court lodged an appeal to the Court of Appeal according to the record and memorandum of appeal and notice of appeal together with a letter requesting for proceedings attached. His former advocates were Messieurs Kajeke Maguru & Co Advocates and the new advocates are Messieurs J.P Baigana & Associated Advocates who advised him that his appeal raises matters of law for determination by the Court of Appeal. He
35 repeats the averments that the appeal is still pending determination before the court and has a high likelihood of success. He stated that the appeal in

5 the High Court proceeded without an important page in the proceedings that
has delayed the scheduling conference on the appeal. Further there is an
imminent threat of losing the suit kibanja to waste since the Respondents
or their agents and other people claiming false interest or others claiming
under them are busy constructing on it according to copies of photographs
10 attached.

He states that he did apply for stay of execution in the High Court and the
application was dismissed with costs. Further if the Respondents are not
restrained, the status quo will change in the main application and appeal
will be rendered nugatory. The Applicant filed the main application for stay
15 of execution pending determination of the appeal. The execution of the
decree may take place before the main application for stay of execution is
fixed and heard by the Court of Appeal.

In reply and the 4th Respondent Nazziwa Aisha deposed to an affidavit dated
21st of February 2022 and states that she has authority of other Respondents
20 according to Annexure "A" to affirm the affidavit on their behalf. The written
authority is dated 21st February 2022. She read through the Applicant's
application together with the affidavit in support thereof with the aid of
counsel Messieurs Kayongo Jackson and company advocates and on the
basis of advice states that the application is an abuse of the court process,
25 incompetent and ought to be dismissed with costs.

Secondly the same application had been filed in the High Court and was
dismissed with costs to the Respondents. She states that the Respondents
sold of the entire suit property and as of now there is nothing to stay and
the Applicant is aware of this fact according to Annexure attached to the
30 application being sale agreements dated 10th October 2018, another dated
14th November 2021 and a further agreement dated 22nd July 2021. She
further indicates that the ruling dismissing the Applicant's application for
stay of execution in the High Court contains an observation of the trial Judge
that the entire suit land had been sold and there are 3rd parties in
35 possession thereof. A copy of the ruling was attached. Further the deponent
contends that on the basis of information of our lawyers, the Applicant's

5 contention that an important page in the proceedings is missing is a ploy to
smuggle new evidence into the record. The people the Respondents sold
the suit property to commenced developments and constructions thereof
according to photos of construction attached to her affidavit. She is further
informed by her lawyers that it is a general principle that the appellant court
10 should not travel outside the record of the lower court. That the only remedy
available to the Applicant is to apply to set aside the sale transactions but
not to apply for stay of execution.

Further on the basis of advice of her lawyers she states that the Applicants
purported appeal has no likelihood of success because the Applicant bought
15 the suit kibanja without the consent of the registered owner and the
Applicant has not provided the required consent from the registered owner
up to the time of making the affidavit and the appeal was a waste of the time
of court. Further on the basis of information of her lawyers she asserts that
the suit is based on an illegal contract which no court ought to enforce.
20 Further on the basis of information of her lawyers, the application is
incurably defective for being res judicata having been filed in the High Court
and dismissed and has now been filed in the Court of Appeal without 1st
appealing the High Court dismissal order.

Furthermore, the persons who bought the suit kibanja have already applied
25 to the Buganda land board as representatives of the landlord for consent
which was granted. On the further advice of her lawyers she asserts that
the people they sold the property to applied for and are in the process of
getting their own certificates of title from Buganda land board. That the
Buganda land board recognised the people who purchased the property and
30 have written on their behalf to the town clerk Makindye division for consent
to develop their Bibanja.

Further that the Applicant's application is a disguised appeal and ought to
be dismissed as it would be highly prejudicial to 3rd parties who bought and
are currently in occupation of the suit property and who have not been
35 accorded an opportunity to be heard.

5 When the application came for hearing, the Applicant was represented by learned counsel Mr. Ahumuza Edward while the Respondent was represented by learned counsel Mr. Kayongo Jackson. Both counsel adopted their written submissions as their address to court in this application and judgment was reserved on notice.

10 **Written submissions of the Applicant.**

The Applicant in the written submissions filed on court record on 18th February 2022 states that there are 2 issues for determination namely:

1. Whether there are sufficient grounds for grant of an order of interim stay of execution?
- 15 2. What remedies are available?

On the first question the Applicant's counsel submitted that there are a wealth of authorities giving the factors that the court will consider before granting an application for an interim order of stay of execution pending the determination of the substantive application. In **Hwan Sung Industries Ltd v Tajdin Hussein & 2 others; Supreme Court Civil Application No 19 of 2008** Okello JSC stated that for an application for an interim order of stay, it suffices to show that there is a serious threat of execution before the hearing of the pending substantive application. It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay. Secondly in **Patrick Kaumba Wiltshire v Ismail Dabule; S.C.C.A. No. 03 of 2018** it was held that the Applicant has to satisfy certain conditions namely: that there is a competent notice of appeal, that a substantive application has been filed and thirdly that a serious threat of execution is imminent (see also **Nyakaana & sons Ltd versus Beatrice Kobusingye and others SCCA No 13 of 2017**). Lastly counsel submitted that the matter came from the High Court, and the first condition is that the Applicant must have applied for stay of execution in the High Court and the same was denied.

As far as the competence of the appeal is concerned, counsel relied on the affidavit in support of the application and the documents attached to

5 paragraph 4 which are copies of the record, memorandum and notice of appeal and letter requesting for proceedings which show that they were all served upon the Respondents through their advocates. He, submitted that it is satisfied rule 6 (2) of the Rules of this court.

10 As far as there is a substantive application, paragraph 11 of the affidavit in support of the application proves that civil application No 19 of 2022 was filed from which the current application arises.

15 Regarding the 3rd condition as to whether there was a serious threat of execution, counsel relied on the affidavit to the effect that there is an imminent danger of losing the suit kibanja to waste since the Respondent or their agents and other people claiming false interest are busy constructing on it. He relied on the Annexure "J" and "K" attaching photographs of building activities and materials on the site. He submitted that the order of an interim stay of execution is intended to stop the activities to preserve the status quo and the right of appeal. Further the
20 intended appeal was supposed to be heard and completed but was delayed due to failure of the lower court to produce a copy of a missing page in the record of appeal.

25 On the 4th condition, the Applicant submitted that the application for stay of execution was dismissed by the High Court according to a copy of the ruling attached and marked as Annexure "L" to the affidavit in support of the application.

30 On the possibility of success of the appeal, counsel submitted that the appeal in the lower court proceeded without a properly constituted record for the trial court as seen from the correspondences attached as Annexure "G", "H" & "I" which are letters from the Applicants advocates to court and the one from the court on the missing page which is an essential part of the record. Secondly the appeal raises matters of law worth adjudication and determination by this court on a second appeal as stated in paragraph 5 of the Applicant's affidavit in support. The lower court proceeded with the case

5 without a critical part of the record of proceedings so that there was absolutely no re-evaluation of the evidence.

Further the Applicant fears that the Respondents would cause him serious irreparable harm or loss and the appeal will be rendered nugatory if the Respondents are not restrained by this court.

10 Lastly the Applicant prays that the Applicant be found to have satisfied the conditions for grant of an interim order of stay of execution and for the court to grant the order with costs of the application to the Applicant.

Submissions of the Respondent

15 In the written submissions, counsel for the Respondent submitted that the Applicant purportedly bought the suit property (kibanja) from the late Badru Zziwa who is the father of the Respondents and husband of the late Hadijah Babirye, the 4th Respondent. The suit land was the residential home of the Respondents. The Respondents after the purported sale took their father to court but he died before the conclusion of the case and the Applicant applied
20 to be joined to the suit as a buyer of the suit property. That the Respondents all along have been in occupation of the suit land as their home. The Chief Magistrates Court ruled in favour of the Applicant and the Respondent appealed while the High Court rightly ruled that the Applicants purported sale agreement of the suit kibanja without the consent of the landlord was
25 invalid and could not pass title to him. The Applicant was dissatisfied and appealed to the Court of Appeal. The Applicant then filed an application for stay of execution at the High Court and the same was dismissed.

30 Counsel submitted that no reason has been given by the Applicant why he had not appealed the decision of the High Court dismissing his application for stay of execution rather than applying afresh to the Court of Appeal.

Secondly he submitted that Miscellaneous Application No 205 of 2020 for stay of execution was heard inter partes and was dismissed on 1st June 2021. That the same application for stay of execution is now before the Court of

5 Appeal without the Applicant having filed an appeal against the dismissal. He contended that the suit is res judicata.

On the question of the missing page, the Applicant and his lawyers contended that there is a missing page in the record of proceedings. The Respondents counsel submitted that this was a poor attempt at forging a record of proceedings and that the record was confirmed by the Chief Magistrate who presided in the case. Besides the correspondences on the missing page, none has ever been served on the Respondent. He contends that the Applicant having realised that the appeal is frivolous have resorted to playing tricks on the court.

15 On the question of the likelihood of success of the Applicant's appeal, the Respondents counsel submitted that the Applicant has not presented to court any material facts or point on how his appeal may succeed but rather pointed out to court Annexure which is a notice of appeal, letter requesting for proceedings and a memorandum of appeal. He submitted that the High Court while overturning the decision of the Chief Magistrate's Court stated that the Applicant while purchasing the suit land did not seek the written consent of the landlord. He prayed that the court takes into consideration the letter of May 2016 from Buganda land board and exhibit DX7 which clearly states that Buganda land board who is the landlord does not know the Applicant and any purported sale of the property by him is at best illegal since the landlord's consent was never sought nor granted. Further the Applicant does not in any way possible show that he intends to secure consent from the registered proprietor or his representatives in order for his appeal to succeed.

30 The Respondent's counsel further submitted that the factors for staying execution include the probability of success of the intended appeal and the Applicant provided nothing to persuade the court of the probability of success of his intended appeal.

Further counsel submitted that in an application arising out of an appeal which is a final appeal (a second appeal), the appeal can only be on points

5 of law. He relied on sections 72 and 74 of the Civil Procedure Act for the proposition that a second appeal can only be on points of law.

The Respondent's counsel further submitted that the suit property has been disposed of to various persons and as a result it would be prejudicial to other 3rd parties who have since bought the suit property and commenced
10 construction of buildings on it. In the premises, counsel submitted that there is nothing to stay and the remedy open to the Applicant is to sue the Respondents and the people they sold to. Counsel further submitted that to grant a stay of execution would amount to condemning the buyers without giving them a chance to be heard contrary to the provisions of the
15 Constitution and principles of natural justice.

On the question of whether the appeal would be rendered nugatory, the Respondent's counsel submitted that a stay would be granted on the part which was unsold. However, the Respondents counsel also maintains that the Applicant has not shown how the appeal would be rendered nugatory.

20 Counsel further submitted that the Applicant mentioned the filing of a substantive application but did not attach any evidence nor has he served any substantive application on the Respondents.

On whether there was a threat of execution, the Respondent's counsel submitted that the kibanja had been disposed of to various persons which
25 persons commenced construction on the suit property and those persons are not parties to the application.

In the premises, he submitted that the application has been overtaken by events and ought to fail with costs.

Resolution of application

30 I have carefully considered the Applicant's application which is for an interim order of stay of execution of the judgment and orders of the High Court in Civil Appeal No 133 of 2017 to restrain the Respondents/their agents or anyone claiming title under them pending the determination of the main application for stay of execution.

5 The judgment of the High Court and the facts in the Judgment of the Chief
Magistrates Court demonstrate that the Applicant was the plaintiff in that
suit where he sued in the magistrate's court in the land civil suit No 56/2014
Chief Magistrates Court of Makindye at Makindye for declaration that he is
10 the lawful owner of the suit kibanja, a permanent injunction restraining the
defendants and their agents from continued trespass on the suit
land/kibanja, general damages profits and costs of the suit. The plaintiffs
suit succeeded with the following declarations:

- 15 1. The plaintiff is henceforward declared a lawful owner of the suit
kibanja/property, situated at Kibuma LC 1 Busabala Parish, Makindye
Ssabagabo Wakiso district.
2. The defendants are hereby declared trespassers on the suit
land/kibanja/property.
- 20 3. An eviction order issues against the defendants jointly and/or
severally to vacate the plaintiffs land/kibanja/property within 14 days
from the date of this judgment.
4. General damages of Uganda shillings 7,000,000/= is awarded to the
plaintiff to be paid by the defendants in equal shares.
5. Costs shall also be made by the defendants jointly and severally.

25 The defendants who are the current Respondents appealed against the
decision of the Chief Magistrate issued on 22nd November 2017 to the High
Court. The appeal succeeded with an order that the decision of the lower
court is set aside. Secondly, the appellants were found to be the rightful
owners of the kibanja in dispute and were entitled to judgment as sought
30 for in the lower court. The costs of the appeal and of the court below were
granted to the defendants/appellants in the High Court who are now the
Respondents with the appeal in the Court of Appeal.

The appellant was aggrieved and appealed to the Court of Appeal.

35 The question for consideration is whether the appellant is in possession of
the suit property. Clearly the appellant had obtained an order of eviction of
the defendants within 14 days from the date of the judgment of the Chief

5 Magistrate. There is no indication anywhere that the defendants were evicted. Secondly, it is the appellant who was the plaintiff seeking to gain possession of the suit property as far as what was appealed to the High Court is concerned. The dismissal of the suit pursuant to the decision of the High Court allowing the appeal of the defendants resulted in a negative
10 order of dismissal of the suit in the Chief Magistrates Court. The judgment of the Chief Magistrate clearly demonstrates that there was no counterclaim. The issues framed in the trial court were as follows:

1. Whether the sale of the suit kibanja/land by the late Badru Zziwa to the plaintiff was lawful.
- 15 2. Whether the defendants are trespassers on the suit kibanja/land.
3. Remedies available to the parties.

Further the decision of the Chief Magistrate/trial court clearly shows that there was no counterclaim by the defendants.

The purpose of applications for stay of execution pending appeal or pending
20 the substantive application is the same as for injunctions.

The jurisdiction to stay execution of a High Court order or decree is enabled by Rule 6 (2) (b) of **The Judicature (Court of Appeal) Rules** which provides that:

6. Suspension of sentence and stay of execution
- 25 (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-
 - (a) ...
 - (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 execution, an injunction,
30 or a stay of the proceedings on such terms as the court may think just.

There is no dispute as to the fact that the Applicant filed a notice of appeal and a memorandum of appeal and therefore fulfils the conditions in rules 6 (2) (b) and 76 of the Rules of this Court.

5 The rationale for granting an interim order is to preserve the right of an intending appellant to have his or her appeal heard and to ensure that the intended appeal or main application is not rendered nugatory. The rationale for stay of proceedings was stated in **Wilson v Church (1879) Vol 12 Ch. D 454** and is expressed in the following words:

10 As a matter of practice, where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings in the Judgment appealed from as will prevent the appeal if successful from being rendered nugatory.

15 This rationale applies to stay of execution, stay of proceedings and injunctions. The order is intended to preserve the status quo pending the hearing of the substantive matter such as the substantive application or appeal. In **Uganda Revenue Authority v Nsubuga Guster; Supreme Court Miscellaneous Application No 16 of 2018** the Supreme Court applied rule 2 (2) of the Judicature Supreme Court Rules and held that it gives the court
20 very wide discretion to make such orders as may be necessary to achieve the ends of justice and that one of the ends of justice is to preserve the right of appeal and to help the parties to preserve the status quo before their dispute can be considered on the merits by the full court according to the rules.

25 What the Applicant has before this court for stay of execution is a negative order of dismissal of the Plaintiffs suit in the chief Magistrates Court. There was no order capable of execution which can be stayed.

30 An application for stay of execution presupposes that there is an order capable of execution which may be stayed. In this application such a notion is erroneous because there is no order that is capable of being executed as the order setting aside the decision of the Chief Magistrate resulted in a dismissal of the Applicant's suit. The situation is that there is no suit in existence.

35 There is no order capable of execution involved because a stay order is to stay the use of court processes under section 38 of the Civil Procedure Act

5 and Order 22 of the Civil Procedure Rules to give effect to the judgment. The decision of the Magistrates Court was set aside and the Applicants suit dismissed with costs, The Court of Appeal of Kenya in **Exclusive Estate Limited vs. Kenya Posts and Telecommunications Corporation and Another [2005] 1 EA 53 (CA)** held that a stay of execution order envisaged under rule 10 5 (2) (b) of the Court of Appeal Rules of Kenya (equivalent to the Ugandan Rule 6 (2) (b) of the Judicature (Court of Appeal Rules) Directions) is the execution of a decree capable of execution in any of the modes provided for under the equivalent of the Ugandan section 38 of the Civil Procedure Act and a decree holder is “a person in whose favour a decree capable of 15 execution has been passed”. Further a negative order can only be set aside when the appeal succeeds but cannot be stayed. The question for consideration is whether the respondents are decree holders.

The modes of execution provided for under section 38 of the Civil Procedure Act are:

- 20 “(a) by delivery of any property specifically decreed,
 (b) by attachment and sale, or by sale without attachment, of any property,
 (c) by attachment of debts,
 (d) by arrest and detention in prison of any person,
 (e) by appointing a receiver,
25 (f) in such manner as the nature of the relief granted may require.”

Section 38 (f) of the CPA provides for any other mode of execution as the nature of the relief may require. A dismissal can only be set aside on the appeal succeeding. It is not capable of execution.

30 In **Mugenyi and Co. Advocates vs. National Insurance Corporation Civil Appeal No. 13 of 1984 [1992 – 1993] HCB 82**, the Court of Appeal held that under Section 2 of the Civil Procedure Act an order of dismissal of a suit for default is not a decree and accordingly the Respondent who was the Applicant in the High Court was not a decree holder and thus there was a valid objection to an order for stay of execution pending hearing a suit.

5 Under section 2 (c) of the Civil Procedure Act a "decree holder" means "any
person in whose favour a decree has been passed or *an order capable of*
execution has been made, and includes the assignee of such decree or
order" (Emphasis added). As held in **Mugenyi and Co Advocates v NIC**
(supra) a dismissal order which was in favour of the Respondents/the
10 defendants and which is not capable of execution as it is a negative order.
The Applicant seeks a stay order that positively affects the decision which
would have an impact on the suit kibanja such as an order for possession
or any declaratory orders capable of giving the property to another person.
In any case, there is no indication anywhere that the Applicant is in
15 possession of the suit property.

In the premises, the Applicant's application is incompetent because there is
no order or decree which is capable of execution in the modes provided for
under section 38 of the Civil Procedure Act and the application is hereby
dismissed with costs to the Respondents.

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Dated at Kampala the 25th day of February 2022



Christopher Madrama Izama

Justice of Appeal

- Ahumuga Edward for Applicant
The Applicant is in court
Respondent and counsel
are absent
Kampala Justice as for respondents
