

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION No. 146 OF 2021
(Arising from Civil Application No. 145 of 2021)
5 **(Arising from Civil Appeal Nos 161 & 162 of 2020)**

1. KAMPALA FINANCIAL SERVICES LTD
2. ANKOLE FARMERS AND TRADERS
10 SAVINGS CREDIT LTD

} APPLICANTS

VERSUS

HUSSEIN MUHAMED..... RESPONDENT

15 **CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.**

RULING

INTRODUCTION

20 This is an Application brought under Rules 2(2), 6(2)(b) and 43(1) and (2) of the Judicature (Court of Appeal) Rules SI 13-10 (hereinafter referred to as the "Rules of this Court").

The Applicants seek orders that :-

- a) An interim stay of execution of a decree issued on 20th March 2020 in HCCS No. 178 of 2009 be granted pending determination of the substantive Application No. 145 of 2021.
- 5 b) An interim injunction restraining the Respondent from alienation or disposing of/or creating third party interest and/or interfering with the status quo in respect of the Suit property comprised in Plot 4 LRV 147 Folio 10 situated at Rubaga Road Kampala until the determination of the aforesaid substantive Application.
- 10 c) The costs of and incidental to this Application abide the results of the respective Appeals.

The Application is supported by the affidavits of Mr. Muhurizi Julius the Managing Director of the first Applicant Company and Mr. Wycliffe Nahamya the Director of the second Applicant.

15 Due to the second wave of Covid-19 in Uganda, parties were directed to file written submissions.

Factual background

The Respondent sued the first and second Applicants vide High Court Civil Suit No. 178 of 2009 seeking cancellation of the first Applicant's Certificate of Title to property comprised in LRV 147 Plot 4 Rubaga Road (the suit
20 property) and removal of the second Applicant's mortgage over the suit property. The Suit was determined in favour of the Respondent with orders that the first Applicant's Title is cancelled and the second Applicant's mortgage is vacated. The Applicants, being aggrieved by the decision of the trial Court filed Civil Appeals Nos 161 and 162 of 2020 in this Court. In order
25 to safeguard their rights of Appeal, the Applicants filed Misc. Application no.

1871 of 2020 before the trial Court for stay of execution but the application was dismissed on 30th April 2021.

The Applicants then, in accordance with Rules 42(2) and 6(2)(b) of this Honourable Court's Rules, filed before the Court of Appeal, Civil Application
5 No. 145 of 2021 seeking an order for stay of execution and subsequently filed this Application No. 146 of 2021 seeking an interim order for stay of execution.

Grounds

The grounds in support of the Application are contained in the Notice of
10 Motion and the Affidavits in support as earlier mentioned in this Ruling and they are as follows:

1. The Applicants filed Civil Application No. 145 of 2021 pending determination before this Honourable Court.
- 15 2. The Applicants promptly filed Misc. Application No. 1871 of 2020 before the trial Court and the same was dismissed on 30th April 2021.
3. There is imminent threat of the Respondent executing the decree in HCCS No. 178 of 2009 and/or transfer or disposing of the suit land into 3rd party's name(s).
- 20 4. The Applicants have not only filed notices of Appeal but have duly filed Civil Appeal No. 161 & 162 of 2020 pending hearing and/or determination before the Court of Appeal.
5. If the orders sought are not granted, the Applicant's civil Application No. 145 of 2021 will be rendered nugatory.

6. The interim stay and injunction sought for, pending determination of substantive application are necessary for attainment of the ends of justice.

5 7. It is just and equitable that interim stay of execution and an interim injunction restraining the Respondent from transferring the Suit land to any person and interfering with the status quo be granted pending determination of the substantive application and/or the Applicant's respective Appeals before the Court of Appeal.

Submissions for the first and second Applicants

10 Counsel for the Applicants raised two issues for determination in this Application namely;

1. Whether the partial execution of the decree issued on 20th March 2020 was lawful?
2. Whether the Applicants' application merits the grant of the orders
15 sought for?

Counsel for the Applicants relied on the affidavits of Mr. Muhurizi Julius and Mr. Wycliffe Nahamya who testified that the Respondent filed an Application for execution in the trial Court but before it was determined by the trial Court, and without an order for execution, the Respondent caused his reinstatement
20 and removal of the second Applicant's mortgage by the Commissioner Land Registration and a substitute Certificate of Title was issued to him.

Counsel for the Applicants submitted that the Respondent's act of executing the decree without an order from the executing Court is invalid and/or illegal. Counsel relied on Section 38 of the Civil Procedure Act and the case of **Kibuka
25 Nelson & Anor v. Yusuf Ziiwa**, High Court Misc. Application No. 72 of 2008.

In light of the above submission, Counsel for the Applicants contends that there was no lawful execution and as such the reinstatement of the Respondent and removal of the second Applicant's mortgage on the suit property is a nullity.

5 Counsel for the Applicants referred to the case of **Patrick Kaumba Wiltshire v. Ismail Dabule**, Supreme Court Civil Application No. 03 of 2018 where the Court relied on its earlier decision in **Zubeda Mohamed & Anor v. Laila Walia & Anor**, Civil Reference No. 07 of 2016 where it laid down the conditions to be satisfied by an Applicant to justify the grant of an interim
10 order, namely the presence of;

- i) A competent notice of Appeal
- ii) A substantive application for stay of execution; and
- iii) A serious threat of execution

In a bid to satisfy the above conditions, Counsel for the Applicants submitted
15 that the Respondent extracted a decree, had a bill of costs taxed and made an application for execution before the trial Court and that all these actions point to the threat of an imminent execution of the decree.

Counsel prayed that the application for an interim order for stay of execution be granted in the interest of justice.

20 **Submissions for the Respondent**

Counsel for the Respondent raised two issues for determination in this Application, different from those that were framed by counsel for the Applicants, namely;

1. Whether an interim order staying execution of the decree in Civil Suit No. 178 of 2009 should be issued against the Respondent?
2. What remedies are the parties entitled to?

Counsel for the Respondent contends that the Application has been overtaken
5 by events and that no stay can issue in respect of a decree that has been
executed in its entirety. Counsel relied on the Respondent's Affidavit in reply
where he testified that the first Applicant's proprietorship was cancelled and
the Respondent subsequently restored the suit property into his name and the
second Applicant's mortgage was vacated.

10 Counsel contended that it is trite law that the purpose of orders staying
execution is to maintain the status quo whereas the status quo of this suit
property has since changed.

In response to the allegations of the illegality of the cancelation of the first
Applicant's Certificate of Title and the vacation of the mortgage, Counsel for
15 the Respondent submitted that the orders of Court were made directly to the
Commissioner Land Registration, who was the fifth Defendant in the suit in
the trial Court. It was incumbent upon the Commissioner to comply with the
orders of the trial Court.

Counsel for the Respondent further submitted that the allegation that the
20 entire execution process was not followed and therefore the execution was
illegal is a technicality meant to defeat substantive justice.

Submissions for the first and Second Applicants in Rejoinder

Counsel for the Applicants reiterated his earlier submissions and maintained
that a judgment creditor has no choice but to make an application for

execution before the Court that granted the decree and the aforesaid execution process is mandatory and therefore to state that avoidance of the mandatory execution process is a technicality is equivalent to stating that non-compliance with substantive law is a technicality.

5 **Resolution**

I have read the pleadings and the submissions of both counsel for which I am grateful.

Rule 6(2)(b) of the Rules of this Court provides for stay of execution and states: -

10 *"(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) ...

15 *(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, or a stay of proceedings on such terms as the court may think just."*

20 This is the Rule which provides for stay of execution whether interim or substantive. However, there are different principles which the Court must consider when considering an interim stay on the one hand and a substantive stay on the other.

In the instant Application for an interim stay of execution, this Court, in addition to considering that a Notice of Appeal has been filed, it is necessary for the Court to also consider the principles articulated in the case of **Patrick Kaumba Wiltshire v. Ismail Dabule** (Supra), where the Supreme Court
5 relied on the decision of **Zubeda Mohammed & Anor v. Laila Wallia & Anor** (supra) where it was held;

"The principles followed by our courts were clearly stated in the celebrated case of Hwang Sung Industries Limited v. Tajdin Hussein & Others, Supreme Court Civil Application No. 19 of 2008 where Okello JSC, as he then was, said;

For an Application for an interim 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 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."

In the case of **Patrick Kaumba Wiltshire v. Ismail Dabule** (Supra), the Court further held;

"In summary, there are three conditions that an Applicant must satisfy to justify the grant of an interim order;

- i) *A competent Notice of Appeal;*
- ii) *A substantive application; and*
- iii) *A serious threat of execution."*

In the instant Application, it is established that a Notice of Appeal in respect of Civil Appeal No 161 of 2020 was lodged by the first Applicant on 19th
25 February 2020 and thereafter a Memorandum of Appeal lodged on 27th

August 2020. In respect of Civil Appeal No. 162 of 2020, the Notice of Appeal was lodged on 20th February 2020 and thereafter a Memorandum of Appeal lodged on 27th August 2020 in accordance with Rule 76 of the Rules of this Court.

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In addition, there is a substantive Application vide Civil Application 145 of 2021 for an order for stay of execution of the Decree made in HCCS No. 178 of 2009 and an injunction restraining the Respondent from disposing of the suit property to a third party until the determination of Civil Appeals No. 161 and 162 of 2020 which was filed in this Court on 14th May 2021.

According to Counsel for the Applicant's submissions, there is a threat that the Respondent may alienate or dispose of the property in question before the disposal of the substantive Application. The threat stems from the actions of the Commissioner for Land Registration, who was the fifth Defendant in the Trial Court, who based on the orders of the trial Court in Civil Suit No. 178 of 2009, cancelled the first Applicant's Certificate of Title and reinstated the Respondent as the registered proprietor of the Suit property. The Commissioner Land Registration subsequently issued a substitute Certificate of Title in the names of the Respondent on 24th February 2021 under instrument No. 494178.

According to Counsel for the Applicants, the other actions that constitute imminent threat, as reflected in the Affidavits in support of the Application, are that the Respondent extracted a Decree, had a bill of costs taxed and made an application for execution which is pending determination before the trial



Court. It is also alleged that the Respondent may alienate or dispose of the property in question before the disposal of the substantive application.

From the above, I find that the status quo of the suit property has already changed given that the Respondent is now the registered proprietor of the suit property.

This notwithstanding, the Respondent's Application for execution reflects that the Respondent seeks to recover special damages of Ug shs 6,000,000/=, general damages of Ug shs 50,000,000/= and costs to a tune of Ug shs 25,067,000/=. I find that this Application for financial remedies is still pending determination and these sums are yet to be recovered.

I further find that if the Respondent alienates or disposes of the suit property which is now in his names, it would render the main application nugatory.

In the circumstances, the grant of an interim order to restrain the Respondent from alienating or disposing of the disputed property, which is now in his names, pending determination of Civil Application No. 145 of 2021 would be in the interest of justice.

Similarly, I also find that the order for interim stay of execution of the decree issued in HCCS No. 178 of 2009 sought by the Applicants is necessarily to preserve the prevailing status quo until the application for a temporary injunction is heard and determined (see: **Guiliano Gariggio v. Claudio Casadio**, Supreme Court Civil Application No. 03 of 2013).



Before I take leave of this matter, and for the avoidance of doubt, this interim order for stay of execution granted herein does not reverse the reinstatement of the Respondent as the registered proprietor of the suit property.


5 Consequently, the Application succeeds with the following orders;

1. An order for interim stay of execution of the decree issued on 20th March 2020 in HCCS No. 178 of 2009 is hereby granted pending determination of Civil Application No. 145 of 2021.
- 10 2. An interim injunction restraining the Respondent from alienation or disposing of/or creating third party interests and/or interfering with the status quo in respect of the Suit property comprised in Plot 4 LRV 147 Folio 10 situated at Rubaga Road Kampala until the determination of the aforesaid substantive Application is granted.
- 15 3. I make no order as to costs.

I so Order.

Dated at Kampala this20th..... day ofJan..... 2021.

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HON. JUSTICE GEOFFREY KIRYABWIRE, JA