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

***{Coram: Irene Mulyagonja, JA, sitting as a single judge}***

**CIVIL APPLICATION NO 171 OF 2023**

**ARISING FROM CIVIL APPEAL NO. 49 OF 2012**

**(All Arising from HCCS NO 180 OF 2005)**

**ATAMBA ARTHUR AMSON**
**{Administrator of the Estate of Gershom Rwakishaya)** ::::::::::::::::::::::::::**APPLICANT**

**versus**

**KASULE SAMUEL**
**(Administrator of the Estate Of Christopher Kasule)** ::::::::::::::::::::::::::**RESPONDENT**

**RULING**

The applicant bought this application under rules 2 (2) and 43 of the Judicature (Court of Appeal Rules) Directions, and sections 14 (2) (c) and 33 of the Judicature Act. He sought an order for stay of execution of the decision of the Court of Appeal in Civil Appeal 49 of 2021 pending the hearing of his MA No 02 of 2023 in which he sought the review of the judgment in the same appeal, arising from HCCS No 180 of 2005.

The grounds of the application were stated in the Notice of Motion but more particularly set out in an undated affidavit in support deposed by the applicant. In the said affidavit, he averred that he was aggrieved by the judgment and orders of this court in the appeal above and so applied for review thereof. That the review has high chances of success, and the respondent has never executed the decree in HCCS No 180 of 2005, which is the only chance to prevent wastage of the estate of the late Gershom Rwakishaya, his father. His father was also a beneficiary to the land that was in dispute in the lower court and this court.

He further averred that the respondent filed an application for consequential orders in HCMA No 690 of 2022 seeking vacant possession of the land, the subject of the decree and the appeal in this court, which implies that there is a pending execution. That the continuance of HCMA No 690 of 2022 and execution of the decree in HCCS No 180 of 2005 would render his application for review in this court nugatory. Further that his lawyers advised him that if HCMA No 690 of 2022 is allowed to continue or execution levied in HCCS No 180 of 2005, he would suffer irreparable damage because there will be nothing of the estate left to protect.

He concluded that the order that he seeks in this application will safeguard the share of the late Gershom Rwakishaya in the land, pending the disposal of his application for review in this court, which has high chances of success. That in the interests of justice, the application ought to be granted.

In his affidavit in reply to oppose the application deposed on 17th May 2023, Kasule Samuel averred that the decree in HCCS No 85 of 2005 was fully executed. That a warrant was issued to a court bailiff to curve out 255 hectares of land that was decreed to him, but in doing so, his portion was reduced to 225 hectares. That this was because his late father's share was illegally alienated by the defendants in HCCS No 180 of 2005, but he recovered it through litigation. The warrant in execution and the decree were attached to the affidavit.

The respondent contended that if a consequential order is granted in the application now pending hearing before the High Court, the order therein would be part of the orders in HCCS No 180 of 2005 and it would be amenable to stay once granted, but not before. Further that the applicant is a stranger to the suit because he did not apply to be joined as a party during its pendency. That in addition, the applicant's application for review pending hearing in this court has no likelihood of success because the alleged share of the late Gershom Rwakishaya in

the suit land, which he seeks to have this court identify and apportion, does not lie within the land to which he now possesses certificates of title. He explained that he possesses certificates of title as decreed by court for land in his father's estate, which is ¼ of the land which was the former Plot 4, measuring approximately 900 hectares (comprised in Bulemezi Block 981, Plot 16 and 17) that was held equally on a tenancy in common by 4 proprietors.

The respondent further averred that he did not claim the applicant's father's share in the land in HCCS No 180 of 2005 and therefore it was not part of land in the suit. That the applicant testified on behalf of the defendants in that suit that his late father, Gershom Rwakishaya's share in the land was sold to the defendants in 1988. That this was the reason why the applicant did not sue the defendants in that suit, unlike the respondent who sought to recover his father's share of the land by bringing the suit. A copy of the applicant's witness statement in HCCS No 85 of 2005 was attached to the affidavit in support deposed by the respondent as **Annexure R7**.

The respondent further averred that the applicant had an opportunity to claim his father's share of the land in the suit, or to sue the defendants therein (Mubeezi James, Ntungire Steven and Misaki Kaviigi) but he did not. That as a result, he cannot be aggrieved by the judgment of the High Court and the judgment of this court that arose from the suit. That as a result, the applicant cannot claim that he will suffer any damage consequent upon the execution of the orders in HCCS No 180 of 2005.

**Representation**

At the hearing of the application on 25th May 2023, the applicant was represented by Mr Bainomugisha Abel, learned counsel. The respondent was represented by Mr Eric Muhwezi assisted by Mr Atwine Muhwezi, both learned counsel.

Counsel for the applicant filed written submissions on 12th May 2023. The respondent's advocate filed a reply on 23rd May 2023. They both maintained their submissions filed in court and applied that they be considered in the disposal of the application.

**Submissions of Counsel**

Counsel for the applicant framed two issues for determination by court: i) whether the application warrants the grant of an order for stay of execution; and ii) remedies due to the applicant.

With regard to the first issue, he submitted that the application for review pending before this court has a high likelihood of success. That in the review, the applicant intends to bring matters to the attention of court, which if the court had been appraised of in the lower court could have been cured. This is because these matters relate to the estate of one of the deceased owners of the suit land, whose estate would by implication of the judgment be wasted, despite the fact that the same court nullified the agreement of sale to the defendants in HCCS No 180 of 2005.

He further contended that the applicant would suffer irreparable loss if HCMA No 690 of 2022 and/or execution of the decree in HCCS No 180 of 2005 is not stayed. Further that the application for review pending before this court would be rendered nugatory if this court allows HCMA No 690 of 2022 to continue or execution of the decree in HCCS No 180 of 2005 to proceed, because there would be nothing left of the applicant's father's estate to protect. That an order to stay execution of the decree and stay of the proceedings to obtain a consequential order, pending the hearing of the application for review, would safeguard the applicant's interests in his father's estate. He prayed that an order be granted in the terms stated in the application.

In reply, counsel for the respondent submitted that the order that is sought by the applicant in his notice of motion is vague. It does not state

the cases that are sought to be stayed. That according to the affidavit in support of the application, the order that is sought is to stay execution pending the hearing and final disposal of an application for review now pending before this court. That counsel for the applicant did not state the law that permits an application to stay execution pending the hearing of an application for review, by a person who is not a party to the former suit and the appeal that was dismissed by this court. Counsel then asserted that since the applicant was not party to any of the previous proceedings before this court and the court below, he is not competent to make an application for review thereof.

Counsel further submitted that the decree in respect of which the applicants seeks an order to stay execution was fully executed in 2022. That the High Court issued a warrant to a bailiff to curve out 225 hectares of land from land comprised in Bulemezi Block 981 Plots 16 and 17, **Annexure R1** to the affidavit in reply. That after that a certificate of title was issued in the names of the respondent and his mother. He later produced for the information of the court, as directed during the hearing, copies of the certificates of title that were issued in favour of the respondent and his mother after the execution of the decree and orders of the lower court.

Counsel further emphasised that the applicant's father's share of the land was not part of the land claimed by the respondent in the lower court. Further, that the applicant's application for review pending before this court does not seek to have him added as a party to the suit for retrial so that his case is heard on its merits. Finally, that the applicant does not have the *locus standi* to bring the application for review of the orders of this court in Civil Appeal No 49 of 2021. He is a stranger to the appeal with absolutely no interest in the land that was thereby recovered. That the court could not have considered the applicant's father's share in the land in dispute. He referred to the decision of the Supreme Court in **Miriam Kuteesa v Edith Nantumbwe**

**& Others, Civil Appeal No 20 of 2014,** where it was held that efforts similar to those that have been taken by the applicant in this application amounted to abuse of court process. He prayed that this application and that for review be struck out with costs.

**Determination**

The jurisdiction of this court to entertain substantive applications for stay of execution is contained in section 12 of the Judicature Act. Pursuant to that provision, a party who is dissatisfied with an order issued by a single judge may have his/her application reconsidered by a panel of three justices of this court. [See **Jomayi Property Consultants Ltd. v Andrew Maviiri, Civil Reference No. 174 of 2015 (Arising from Civil Application No. 200 of 2015].**

The principles and/or the criteria that are considered by the courts on applications for stay of execution were re-stated by the Supreme Court, among other decisions of that court, in **Theodore Ssekikubo & Others v. Attorney General & Another, Supreme Court Constitutional Application No 06 of 2013,** as follows:

i. the applicant will suffer irreparable damage or the appeal will be rendered nugatory if the order is not granted
ii. the appeal has a likelihood of success; or a prima facie case of his right to appeal.
iii. If 1 and 2 above has not been established, the court must consider where the balance of convenience lies; and
iv. the application was instituted without delay.

I will consider the criteria above established by the Supreme Court as the issues to be determined in this application, on the basis of the facts that were presented by the parties hereto.

With regard to the first criterion, the applicant claims that his application has a strong likelihood of success because he filed before this court Civil Application No 02 of 2023, an application to review the

judgment of this court in Civil Appeal No. 49 of 2012. In his application, which he attached to his affidavit in support of this application as **Annexure C**, the applicant seeks for an order to review and set aside the judgment in Civil Appeal No 49 of 2012. I observed that the result of the appeal was to uphold the decision of the lower court in HCCS No 180 of 2005, with costs. The parties to the appeal were Mubeezi James, Ntungiira Stephen and Misaki (or Mishaki) Kaviigi, as appellants, and Musiime James and Kasule Samuel, the respondents in this application as plaintiffs. The orders that were upheld when the appeal against the respondent here was dismissed were contained in the decree (**Annexure R1** to the affidavit in support) to the effect that:

a) *That the defendants (who were the appellants in Civil Appeal No 49 of 2012) fraudulently acquired for themselves certificates of title out of land formerly known as Plot 4 on Bulemezi Block 981, partly belonging to the 2nd plaintiff's deceased father's estate, among others;*
b) *The 2nd plaintiff (Kasule Samuel) as administrator of his late father's estate is entitled to 255 hectares out of 900 (hectares) formerly in Plot 4 Bulemezi Block 981, to be curved out of the 2nd and 3rd defendants' Plot 16 and 17, respectively;*
c) *A certificate of title in the names of Kasule Samuel as Administrator of the estate of the late Christopher Kasule be prepared and issued by the Registrar of Titles from the sub division of the above Plots 16 and 17;*
d) *The 2nd plaintiff be awarded the costs of the suit.*

Clearly the orders that were made in the suit were strictly in favour of the respondent as Administrator of the estate of his father. The applicant is therefore a stranger to the said orders, as counsel for the applicant asserted. He had no locus to challenge the orders that were issued in favour of the respondent, which were upheld by this Court in Civil Appeal No 49 of 2012. Indeed, the applicant was not party to that appeal because he was not a party to the suit in the lower court from which the appeal arose.

In addition, there is no longer an appeal before this court to satisfy the 1st criterion for the grant of an order for stay of execution. In support of this point, rule 6 (2) (b) of the Rules of this court provides that institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of the Rules, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just. The application for review that the respondent based his application upon is not included in rule 6 (2) (b) of the Rules of this court.

The applicant seeks to stay the proceedings in HCMA No 690 of 2022. I observed that in that application, attached to the affidavit in support of this application, the respondent seeks a consequential order for vacant possession against the defendants in the suit, Mubeezi James, Ntungiire Stephen and Misaki Kavigi. The applicant is not one of the parties to that application. Neither are his interests in his father's land the subject of the application. The land in dispute in the application is still that which was the subject of HCCS No 180 of 2005 and Civil Appeal No 49 of 2012. Once again the applicant is a stranger to that application. He cannot use it as the basis of his application in this court to stay proceedings in the lower court.

I therefore find that the applicant failed to meet the requirements of the first criterion set out above as well as the requirements of rule 6 (2) (b) of the Rules of this court.

The answer to the 2nd criterion is obvious. There is no appeal before this court, let alone a notice of appeal filed by the applicant. It therefore cannot be determined whether the appeal has a likelihood of success or not. The applicant was clearly a stranger to Civil Appeal No. 49 of 2012. Although it was held in HCCS No 180 of 2005 that the agreement of sale in respect of the land that was in contention was fraudulently obtained

because the sellers were dead at the time it was signed, the applicant's father's rights to the land were not the subject of the suit. While it is true that the agreement was declared illegal or a nullity, no decision was made by the lower court about the late Rwakishaya's portion of the land, save for the declaration that the sale to the defendants in the suit was invalid or illegal. That being the case, the Court of Appeal could not have pronounced itself about the late Rwakishaya's land because it was not brought to its attention in the judgment that was under appeal. Indeed, the judgment made no declaration about the rights of the late Rwakishaya because the applicant was only a witness in the case; he was not a party to the suit.

In addition, the execution of the orders in HCCS No 180 of 2005 that was the subject of Civil Appeal No 49 of 2012 were executed long ago. The land that was claimed by the respondent in the suit was curved out of the land that had been fraudulently acquired by the defendants in the suit, the appellants in Civil Appeal No 49 of 2012. Certificates of tile were issued in the names of the respondent and his mother, Edith Taligira, on 28th February 2022, for Plots 32, 33, 37, 38 and 39, curved out of the land that was formerly registered in the names of Stephen Ntungiire and Kaviigi Mishaki, whose certificates of title to the said lands were cancelled. The respondent now seeks by consequential order from the High Court in HCMA No 690 of 2022, for orders for vacant possession of the said land.

In conclusion therefore, there is nothing for this court to stay. Execution as envisaged by the orders granted in HCCS 180 of 2005 ensued and was completed by the issuance of certificates of title to the land that was in dispute in the suit. The consequential orders that are sought by the respondent in HCMA No 690 OF 2022 are to give effect to the proprietorship of the land by ensuring vacant possession thereof.

I therefore find that for the reasons above, the applicant is not entitled to the order sought. His remedies should have been pursued against the defendants in HCCS No 180 of 2005 who fraudulently acquired the land, not against the respondent. The application is accordingly dismissed and the costs shall be borne by the applicant.

Dated at Kampala this 29th day of May 2023.

**Irene Mulyagonja**

**JUSTICE OF APPEAL**