

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL AT KAMPALA
Coram: Irene Mulyagonja, JA (Sitting as a single Judge)
CIVIL APPLICATION NO. 159 OF 2023
ARISING FROM CIVIL APPLICATION NO. 158 OF 2023

AND

CIVIL APPEAL NO. 70 OF 2023

**(All Arising from Miscellaneous Applications No. 1493 and 2067 of
2022 in High Court Civil Suit No. 156 of 2014)**

BETWEEN

EDWARD KASINZI alias GATSINZI ::::::::::::::::::::::::::: APPLICANT

AND

1. HUSSEIN KISIKI NYAMAYAALAWO 2. MINSA NABAGABO 3. NDUGA ABDUL	}	::::::::::::::::::::RESPONDENTS
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RULING

The applicant brought this application under rules 2 and 6(2)(b) of the
Judicature (Court of Appeal Rules) Directions, SI 13-10. He sought an
interim order to stay of execution of orders in High Court Miscellaneous
Application No. 2067 of 2022, pending the hearing and determination of
the main application for stay of execution that is pending before this court.

The application was supported the affidavit of the applicant dated 14th
April, 2023. The grounds for the application were stated in the Notice of
Motion but more particularly set out in the affidavit in support. The salient
facts were that the applicant was the defendant in Civil Suit No. 156 of
2014 which was determined in favour of the respondents. Being
dissatisfied with the judgment, he filed a notice of appeal and requested

for a copy of the typed record of proceedings as a step towards lodging an appeal in this court. He then filed Miscellaneous Applications No. 1493 and 1494 of 2023 in which he sought an interim order and a substantive to stay execution, respectively.

5 The applicant averred that the High Court granted the substantive application (No. 1493 of 2022) for stay of execution on condition that the Applicant deposits UGX. 20,000,000 within 30 days from the date of the ruling. That being dissatisfied with the above orders, the applicant then filed application Miscellaneous Application No. 2067 of 2022 wherein he
10 sought to vary the orders in Miscellaneous Application 1493 of 2022 by reducing the amount to be deposited from UGX 20 million to UGX 10 million and to enlarge the period of payment from one to four months. He further averred that while he awaited the ruling in the application for review, the Registrar recalled the order that had been issued by the judge
15 and instead issued a new order, which omitted the order to stay execution. The applicant was of the view that this was unfair. The applicant went on to state that when the ruling in HCMA No. 2067 of 2022 was finally delivered, the requirement for the applicant to pay UGX 20,000,000 as a condition precedent to the order to stay execution was maintained. That
20 he was dissatisfied with the ruling and order in HCMA No. 2067 of 2022 and thus commenced an appeal against the same as well as a substantive application for stay of execution in this court.

The applicant further stated that the respondents have since ferried livestock and people onto the land in dispute with the aim of subdividing
25 it and changing the *status quo*. Five copies of photographs to prove these facts were annexed to the affidavit in support jointly and marked as **Annexure H**. That he reported this to the Resident District Commissioner, the District Police Commander and the District Internal Security Officer but received no assistance from the three offices. Further, that the

respondents applied to the Commissioner Land Registration to have his title cancelled. He asserts that the intended appeal has already been fixed for hearing and that if the interim order is not granted, the respondents will continue their efforts to take over the land using his failure to pay UGX 20,000,000 as a reason to do so. That the appeal and the main application will be rendered nugatory because the respondent will have executed the orders in Civil Suit No. 156 of 2014.

The respondents opposed the application. They filed twin affidavits in reply deponed by the 1st and 3rd respondents on 18th May 2023. In exactly the same terms in both affidavits, the respondents stated that the applicant's lawyers extracted orders in HCMA No. 1493 of 2022 which were at variance with those that the court had issued. That the Registrar summoned both parties to appear before him in order to resolve the issue and when none appeared, he corrected the error and issued an order that was in line with the order issued by the trial judge.

The respondents asserted that the applicant has no right to appeal against the decision of the trial judge in HCMA No. 2067 of 2022. That the orders therein are not capable of being executed and no application for execution has been filed. They further denied that they ferried livestock onto the land in dispute and that they were destroying the same.

The respondents further asserted that the applicant did not bring any evidence to prove that he reported the allegations against them to the RDC, DPC and DISO. That the allegations referred to in his affidavit are untrue, and this is confirmed by the absence of any evidence to prove them. Further, that the applicant does not have a right to appeal against the decision in HCMA No. 2067 of 2022; he has not even raised any grounds of appeal in that regard. That the applicant ought to have filed this application first in the High Court; the allegation that the High Court

would not do justice in a fresh application for stay of execution is not true since the court granted his earlier application for an interim order to stay execution in HCMA 1494 of 2022.

5 Regarding the order that the applicant pays UGX 20,000,000 as security for the performance of the decree the respondents asserted that the order was just and fair. That the amount that he was ordered to deposit was not even 1% of the value of the land in dispute, which is one a half square miles. In respect of the intended appeal, the respondents assert that it has no merit whatsoever since the applicant has no right of appeal against the
10 orders in HCMA No. 2067 of 2022. That the appeal will not be rendered nugatory if the order sought in this application is not granted. That in fact, the orders therein are not executable. They added that the applicant failed to comply with the conferencing schedules issued by the court in respect the intended appeal; he did not attend at the last date on which he was
15 summoned by the Registrar.

Representation

At the hearing of the application on 25th May, 2023, Mr Lester Kaganzi appeared for the respondents. The applicant's Advocate, Mr Sam Ahamya was indisposed and for that reason, which he made known to court, the
20 applicant appeared *pro se*. Court thus adopted the submissions that he had earlier filed as the legal arguments upon which this application has been decided. The submissions that were filed by counsel for the respondent were also accepted as his final submissions and this application was considered on the basis of written submissions only.

25 Submissions of Counsel

Mr. Sam Ahamya, for the applicant relied on **Hwan Sung Industries Limited v Tadjin and Others SCCA No. 19 of 2008**, for the criteria that

are considered by the courts before they grant an interim order to stay execution. It was his submission that a competent notice of appeal was filed in this Court on 6th April, 2023 and thereafter served on the respondents' counsel on 11th April, 2023. That a substantive application
5 was filed on 21st April 2023 and the same is pending hearing. As to whether there is an imminent threat of execution, counsel referred court paragraphs 12 and 13 of the affidavit in support of the application. He thus contended that the respondents seem to be determined to deny the applicant possession of the land.

10 In reply, Mr. Lester Kaganzi for the respondents' submitted that the application has no right to appeal against the order dismissing HCMA No 2067 of 2022 because it is not one of those that are appealable under section 76 of the Civil Procedure Act (CPA). That he had to first seek leave to appeal against the order as is provided for in section 77 of the CPA. That
15 because he has no right to appeal against that order, his notice to appeal against it is incompetent and cannot form the basis for this application. He invited court to dismiss the application on that basis.

Counsel further argued that the order in HCMA No 2067 of 2022 is not amenable to execution because it simply states that the application to vary
20 the orders in HCMA No 1493 is denied and the application dismissed with costs to the respondents. That since it is not amenable to execution, the execution of the order cannot be stayed by this court.

Counsel went on to submit on the merits of the application for an interim order to stay execution on the basis of the three criteria that were laid
25 down in **Therodore Ssekikubo & 3 Others v Attorney General & 4 Others, Constitutional Court Application No. 4 of 2014**, as follows: i) existence of a valid notice of appeal; ii) whether there is a pending

application for stay of execution, and iii) whether there is a serious threat of execution before the hearing of the substantive application.

With regard to the existence of a valid notice of appeal, counsel for the respondents submitted that the applicant seeks to stay the execution of the orders in HCMA No 2067 of 2022. But the valid notice of appeal that is attached to the affidavit in support as **Annexure A** is in respect of an Appeal against the decision of the trial court in HCCS No 156 of 2014. He asserted that notice to appeal against the decision in HCMA 2067 of 2022, **Annexure G** to the affidavit in support was wrongly attached to the affidavit because the applicant has no right to appeal against that decision. He invited court to find that there is no valid Notice of Appeal in respect of the orders in that application.

As to whether there is a pending substantive application before the court, counsel admitted that court served the respondents with CACA No 158 of 2023 from which this application arises. That the said application was fixed for hearing on the same day as this application for an interim order to stay execution.

With regard to existence of an imminent threat of execution, counsel for the respondents reiterated that there can be no execution of the orders that were issued in HCMA No 2067 of 2022. He invited this court to find so. He attacked the averments of the applicant in paragraphs 12 and 13 of the affidavit in support of the application. He asserted that the activities of ferrying cows and people to enter the land, subdividing the same and destroying property with the intention of changing the *status quo* in order to defeat the main appeal cannot amount to trespass. That this is so because the trial court found that the land in dispute belongs to the estate of the Late Mitina Nakanwagi and the respondents are beneficiaries to the

same estate. That the facts stated by the applicant therefore cannot be trespass on the land.

Counsel added that these issues have nothing to do with HCMA No 2067 of 2022. Further that the application to the Commissioner for Land Registration to have the applicant's title cancelled falls in the same category. He asserted that the activities that the applicant seeks to rely on to obtain an order to stay execution of the orders in HCMA No 2067 of 2022 are the subject of the appeal now pending before this court (Civil Appeal No. 70 of 2023) the result of the orders of the trial court in HCCS No 156 of 2014. That the said activities cannot be used as the basis for an application to stay execution of the order in HCMA No 2076 of 2022.

Counsel for the respondents went on to submit that the application to stay execution of the orders in HCCS No 156 of 2014 was already considered by the trial court in HCMA No 1493 of 2022. That an order to stay execution was granted with the condition that the applicant should pay UGX 20,000,000 as security for the performance of the decree but the applicant refused to comply with the condition. That his application to vary this order was dismissed in HCMA No 2076 of 2022. He thus invited court to dismiss the application with costs to the respondents.

Determination

I have carefully considered the submissions of counsel, the application placed before me and the annexure thereto, as well as the reply filed by the respondents to this application. The principles considered by the courts on granting applications for interim orders to stay execution were re-stated by his Lordship, Okello, JSC (as he then was) in **Hwan Sung Industries Ltd v Tajdin Hussein & 2 Others, Supreme Court Civil Application No. 19 of 2008**, among other such cases. They are that: i)

there is a competent notice of appeal; ii) there exists a substantive application for stay of execution in court, and finally; iii) that there is a serious threat of execution before the hearing of the substantive application is disposed of. I shall consider them on the basis of the facts
5 in the same order.

As to whether there exists a valid notice of appeal on which this application is based, counsel for the respondent argued that the applicant has no right to appeal against the order dismissing the application for review in HCMA No 2067, and I accept his submissions. Appeals are creatures of statute.

10 The order dismissing an application to vary the order for stay of execution issued under order 43 rule 3 that was made under section 33 of the Judicature Act and section 98 of the CPA does not fall among the orders provided for under Order 44 rule 1 CPR; neither is it one of the orders provided for under section 76 of the CPA. The applicant had to first seek
15 leave before he could appeal against the order. The notice to appeal against the order in HCMA No 2067 of 2022 is therefore not valid for purposes of rule 6 (2) (b) of the Rules of this court to entitle the applicant to an interim order to stay execution.

However, in his application, the applicant states that there is an appeal
20 that is pending hearing before this court as Civil Appeal No 70 of 2023. He attached a copy of the memorandum of appeal therein to his affidavit in support as **Annexure I**. The respondents therefore admit that the notice of appeal in respect of HCCS No 156 of 2014 is a valid notice of appeal and that there is an appeal in that regard pending before this court. While the
25 applicant cannot appeal against the order dismissing the application to vary the order for stay of execution on its own, the same may be appealed within the main appeal, without leave of the lower court.

It is also clear from the averments in the affidavit in support that what the applicant seeks to achieve in this application is to have an order issued to stay execution of the judgment and orders in HCCS No 156 of 2014. The applications that were filed in the lower court were meant to achieve the same end. It is also the position that Article 126 (2) (e) of the Constitution requires courts to dispense substantive justice without undue regard to technicalities. I therefore find that there is a valid notice of appeal in this application, in respect of HCCS No 156 of 2014, which is the subject of the order in HCMA No 2067 of 2022.

As to whether there is a substantive application to stay execution in court, the respondents admitted that there is such an application that was fixed for hearing on the same day as the instant application. They went on to argue that the application is not likely to succeed for the reason that the applicant does not have a right to appeal against the order that was dismissed in HCMA No 2067 of 2022. However, the Supreme Court in **Hwan Sung Industries Ltd** (supra) observed that:

"It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay."

The substantive application that is on record now wherein the applicant seeks to stay execution of the orders of the High Court will therefore suffice.

With regard to the threat of execution, the applicant stated that the respondents have applied to have his certificate of title in respect of the land in dispute cancelled. The respondents do not deny it but assert that it follows from the judgment and orders in HCCS No 156 of 2014. Further, that they are within their rights to do so since they were adjudged to be beneficiaries in the estate of the deceased owner of the land in dispute. The applicant also stated that the respondents were in the process of

taking over the land and they brought animals to occupy it as well as people. He attached photographs to his affidavit to depict these happenings. The respondents did not challenge any of the photographs that were adduced by the applicant in **Annexure H** to his affidavit.

5 I observed that one of the photographs depicts cattle grazing on the land. There is another where there is a group of 5 people who are accompanied by a soldier in army uniform, and another where 8 people accompanied by a soldier in army uniform. The photographs with people accompanied by a man in uniform have inscribed upon them the date of 4th April 2023. On
10 the balance of probabilities therefore, I find that there is an imminent threat of execution of the orders in HCCS No 156 of 2014.

The respondents claim that an order to stay execution of the judgment and orders in HCCS No 156 of 2014 was already granted in the trial court, subject to the condition that the applicant deposits 20 million shillings in
15 court as security for the performance of the decree. I note that the order that was corrected by the Registrar, according to counsel for the respondent, was issued on 17th March 2023. The order which is reflected in Annexure E to the affidavit in support of the application was couched in the following terms:

20 *"Stay be granted upon the condition that the applicant deposits into court UGX 20,000,000/= (Twenty Million Uganda Shillings) as security for the performance of the decree within a period of 30 (thirty days) from the date of this order."*

The order was handed down by the trial judge on 23rd November 2022.
25 However, the document that was signed by the Registrar is dated 17th March 2023. If the deposit of UGX 20 million was to be satisfied within a period of 30 days from 23rd November 2022, and the applicant did not deposit the money, the order lapsed after the expiry of 30 days, since the

efforts to have it varied by the trial judge fell through when she dismissed the HCMA No 2067 of 2022. It is therefore my firm opinion that there is no order to stay execution of the judgement and orders of the lower court in HCCS No 156 of 2014.

5 Rule 2 (2) of the Rules of this court preserves the inherent power of this court to make any orders to achieve the ends of justice or to prevent abuse of its process. In the instant application, the justice of the case requires that the main application for stay of execution, now pending before this court, be heard before execution is effected. Otherwise the main
10 application and the appeal would be rendered nugatory. It is therefore prudent to grant an interim order for stay of execution till the hearing and final determination of the main application, Court of Appeal Civil Application No 158 of 2023. The costs of this application shall be in the cause.

15 Dated at Kampala this 2nd day of June 2023.



Irene Mulyagonja

20 **JUSTICE OF APPEAL**