

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL MISCELLENEOUS APPLICATION NO. 745 OF 2022.

(Arising From COA-00-CV-CA-396 OF 2022)

(Arising From HC-FD Civil Suit No. 558 OF 2016)

1. BUJINGO AYUB
2. KAFUUMA IBRAHIM
3. KASSIM ABDIRAHMAN
4. KASAB B.M INVESTMENTS LIMITED ::::::::::::::::::::::::::::::APPELLANTS
VERSUS

1. ABUBAKALI KIKOBA
2. MARIAM MAKANGA
3. DDAMULIRA ABASI MABALE::::::::::::::::::::::::::::RESPONDENTS

BEFORE: HON JUSTICE OSCAR KIHKA, JA

(Sitting as a single Justice)

RULING OF COURT

This application was brought under Rules 2(2), 6(2)(b), 43(1) and (2) of the Judicature (Court of Appeal Rules) Directions SI 13-10 seeking for orders that;

- a) An order for stay of execution doth issue restraining the Respondents, their servants/agents attorneys or any person acting on their behalf from executing and or enforcing the Judgment and orders of the High Court Family Division by Honourable Justice Ketrach Kitarisibwa Katunguka, delivered on 11th day of October, 2022 in Civil Suit N0. 558 of 2016 pending the determination of the appeal.
- b) Costs of the application to abide the results of the appeal.

Background

The background to this application as discerned from the High Court judgment attached to the affidavit in support of the application is as follows;

The Respondents filed a suit against the Applicants at the High Court Family Division seeking for orders of removal of a caveat lodged on Administration Cause No. 899 of 2015 by the 1st, 2nd and 3rd Applicants; a declaration that the developments including a commercial house on Block 12 Plot 139 land at Kasaato zone Kisenyi II parish still forms part of the estate of the late Hajji Muhammed Makanga; a declaration that a memorandum of understanding dated 17/09/2012 made between the 1st and 4th Applicants is null and void.

The deceased, Hajji Mohammed Makanga purchased land comprised in LRV Folio 17 Block 12 Plot 139 at Kasaato Kisenyi II parish from the Departed Asian Property Custodian Board and obtained a certificate of purchase on 19/07/2000 for a 49 year lease. Upon his death, the family appointed the 2nd Applicant, the 1st, 2nd and 3rd Respondents and one Rehema Nakiryowa Makanga to apply for letters of administration. The 1st, 2nd and 3rd Applicants lodged a caveat to block the application for letters of administration. The suit land is now registered in the names of the 4th Applicant, which registration was effected after the purchase of the suit land by the 1st and 3rd Applicants from Christine Eseza Ntiisa, the then mailo owner and the Applicants claimed that the 49 year lease expired by effluxion of time on 28/10/2014 and the land reverted back to the lesser who sold it to the 1st Applicant.

Due to financial constraints, the 1st Applicant entered into a memorandum of understanding with the 4th Applicant to complete the purchase price. The Respondents allege that the transfer was fraudulently done by the 1st and 4th Applicants and that the land still forms part of the estate of the late Muhammed Makanga.

Judgement was on the 29th of January 2021 was passed in favour of the Respondents.

The Applicants filed an application for an interim stay of execution vide Misc. Application No.169 of 2021, and they also file Misc. Application no. 168 of 2021 for an order of stay of execution. Both applications were heard on the 16th September 2022 and dismissed by Justice Ketra Kitarisibwa Katunguka.

The Applicants have now filed this application for an order for stay of execution of the decree in Civil Suit No. 558 of 2016.

The grounds upon which this application is based are set out in the affidavit of **BUJINGO AYUB** which sworn on the 12th October 2022 and briefly are: -

1. *THAT the Respondents filed a suit against the Applicants in High Court Family Division Civil Suit No. 558 of 2016 (Abubakali Kikoba & 2 Ors Vs. Bujjingo Ayub & 4 Others) and judgment was delivered on 29th January,2021 in the absence of the Applicant and he was not notified by the then Counsel and judgment was in favour of the Respondents*
2. *Soon after judgment was received, we instructed our Counsel then to file an appeal against the whole judgment and to apply for stay of execution.*
3. *A notice of appeal was filed on 12th February, 2021 in the High Court Family Division and later a copy was filed at the Court of Appeal on 11th March,2021.*
4. *The Respondents applied for execution of the decree vide HC-FD EMA No. 016 of 2022 (Abubakali Kikoba & 2 Others Vs 4 others) and secured a Notice of Eviction dated 18th July, 2022 whose expiry date is 17th October, 2022 for one property that was a subject of contention in Civil Suit No. 558 of 2016 (Abubakali Kikoba & 2 Others Vs 4 others Vs. Bujjingo Ayub & 4 Others).*
5. *The Memorandum of Appeal was filed.*
6. *There is a serious risk that since the lower court dismissed the application for stay of execution, the execution of the decree will continue which shall lead to great loss and irreparable damage to us the Applicants and this may render the appeal moot or nugatory.*

7. *The appeal has a very high chance of success and if this application is not granted this will cause a miscarriage of justice.*

The Respondent filed an affidavit in reply opposing the application deponed by **Abubakali Kikoba** sworn on the 25th day of October 2022. The grounds of opposition can be surmised as follows;

1. There is no valid appeal before this court as the Notice of Appeal was filed out of time.
2. That the judgment of the High Court was delivered on the 21st of January 2021 but it is not true that the Notice of Appeal was filed on 12th February 2021. That the Notice of Appeal was filed on 2nd March 2021 which was 31 days from the date of delivery of the judgment.
3. That the High Court has already made a ruling that the Notice of Appeal was filed out of time and backdated.
4. The Applicant's application for stay of execution at the High Court was dismissed on the grounds that there was no valid Notice of Appeal.
5. That Civil Appeal No. 396 of 2022 was itself filed out of time on 12th October 2022 without leave of this court.

Representation

At the hearing of the application, **Ms. Norah Matovu** appeared for the Applicants while **Mr. Kavuma Issa** and **Mr. Kanaabi Emmanuel** appeared for the Respondents. Both parties filed written submissions which were adopted by court.

Applicant's submissions

Counsel submitted that Rule 6 (20(b) of the Judicature (Court of Appeal Rules) Directions S1 13-10 gives this court power to order a stay of execution where a Notice of Appeal has been lodged in accordance with Rule 76. Counsel relied on the cases of **Lawrence Musiitwa Kyazze Vs. Eunice Busingye (SC Civil Application No. 18 of 1990)**, and **Hon. Theodre Ssekikubo & 4 Others Vs.**

Attorney General & 4 Others Constitutional Application No.3 of 2014(SC)

on the principles which govern the grant of stay of execution by an appellate court and these include the following:

- a) The application must show that he/she has lodged a notice of appeal in accordance with rules 76 of the rules of this court.
- b) The other facts to which lodgment of notice of appeal is subject, vary from case to case but include:
 - i. That the Applicants' appeal has a likelihood of success.
 - ii. The substantial loss may result to the Applicant unless the order is made.
 - iii. The application has been made without unreasonable delay.

Counsel submitted that the Applicant has filed a Notice of Appeal in accordance with rule 76. That the Applicants complied with the requirements of this Rule albeit there were some mistakes by the previous Counsel which, according to counsel, should not be visited on the Applicants. Counsel submitted that the Applicants also filed through their lawyer, a letter requesting for record of proceedings and certified copies were endorsed on the 29th July, 2022. In addition, Civil Appeal No. 0617 of 2022 Bujjingo Ayub & 3 others Vs. Abubakali Kikoba & 2 others was filed on 12th October, 2022 hence the Applicant has accordingly complied.

Counsel contended that the appeal has a likelihood of success. At this stage the court needs not delve into the merits of the appeal. Counsel relied on Paragraph 4(d) of the affidavit in support of the application deponed by the 1st Applicant, to which the Memorandum of Appeal was annexed.

Counsel submitted that the trial judge stretched it too far when she decided the case by not differentiating the interests in the disputed land between the parties and made wrong and erroneous decision. That there are merits in the appeal but if the stay is not granted, the appeal will be rendered nugatory. The Applicants shall suffer irreparable loss if the execution takes place. Counsel argued that it is usually in disputes of land that courts are prepared to consider that monetary

compensation will not be sufficient if the appeal is successful. In these circumstances if the Applicants lose land and all their developments thereon, there will be no way of getting it back especially if it sold to 3rd parties.

The application has been made without unreasonable delay as required by rule 42 of the rules of this court. The Applicants first filed HC-FD MA 168 of 2021 (Bujjingo Ayub & 3 others Vs. Abubakali Kikoba & 2 others) and this was dismissed on 11th October, 2022. Instantly this application was filed without undue delay.

Respondent's written submissions

In reply, the Respondents' counsel opposed this application on the ground that there is no valid appeal because the Notice of Appeal and the appeal itself were not filed in accordance with the law. Counsel submitted that the requirements laid down in the **case of Lawrence Musiitwa Kyazze Vs. Eunice Busingye (SCCA NO 18 of 1990)** as cited by counsel for the Applicants, that require that the application must show that he/she has lodged a Notice of Appeal in accordance with Rule 76 of the rules of this court have not been met by the Applicants.

Counsel relied on Rule 76(2) of the Court of Appeal Rules which gives a party who intends to appeal fourteen days to file a Notice of Appeal from the date of the decision of the court from which an appeal is preferred. Counsel argued that the judgment in Civil Suit No. 558 of 2016 was delivered on the 29th day of January 2021 but the Applicant's Notice of Appeal was filed out of time on the 2nd day of March 2021 beyond the 14 days mandatory period.

Counsel argued further that the Applicants engaged in acts of forgery by back dating the Notice of Appeal to appear as if it was filed on 12th day of February 2021 which was false. The High Court indeed investigated the Notice of Appeal and delivered its ruling on the 11th day of October 2022 and found that the Notice of Appeal was filed out of time and back dated. The High Court dismissed Misc. Application No. 168 of 2021 on that ground among others. Furthermore, my the

appeal itself was filed out of time on the 12th day of October 2022 without leave of court for extension of time.

Counsel further argued that the Applicants did not comply with the requirement of Rule 83 of the Rules of this court because the certificate of correctness on Page 170 of the record of Appeal indicates that the letter requesting for proceedings was made on the 6th day of April 2022 beyond the mandatory 30 days' period. That since there is no valid notice of appeal on court record coupled with lodging the appeal out of time, the Applicants have failed to satisfy the requirement for stay of execution and thus, the application should be dismissed with costs.

Consideration of the application.

Before I consider the merits of the application, I find it pertinent to address the issue raised by the Respondent's counsel that the Notice of Appeal filed by the Applicants was filed out of time and backdated and as such, there is no valid appeal pending in this court.

The Respondent's counsel argues that judgment in Civil Suit No. 558 of 2016 was delivered on 29th January 2021 but the Notice of Appeal was filed out of time on 2nd March 2021. That the Notice of Appeal was back dated to 12th February 2021 yet the letter requesting for proceedings was filed on 6th April 2022 beyond the mandatory 30 days period.

The Respondent attached to his affidavit in reply a ruling by Justice Ketrach Kitariisibwa Katunguka in M. A No. 168 of 2021, an application for stay of execution, which was dismissed by the trial Judge.

In her decision, after inquiring into the allegation that the Notice of Appeal was filed out of time on 2nd March 2021 and backdated to the 12th of February 2021 she ruled as follows;

“I have looked at a letter by the counsel for the Respondents to the Registrar Family Division Ref LLK/TA/GEN/2021 dated 9th March 2021; it was bringing to attention of the Registrar that a Notice of Appeal had been

back dated to look as if it had been filed on 12/2/2021 whereas not; that the register for Notices of Appeal together with the receipt for payment of court fees for the said notice of appeal both show that the Notice of Appeal was filed on 2/3/2021 after the time for filing had passed; they requested for investigations to be carried out; counsel for the Applicants did not reply to these particular claims..... I found no record of the Notice of Appeal on 12th February 2021; there was instead a record showing that the notice was entered on 2/03/2021 in the register book of the Notice of Appeal. To me this makes better sense because then it was endorsed as lodged on 4th March 2021, served on counsel for the Respondents on 10th March 2021 and filed in the court of appeal on 11th March 2021; I have not found reason not to believe counsel for the Respondent that the stamp was backdated to make it look as if the notice was received on 12th February 2021 because if it had been so received, it should have been recorded in the register on that date and endorsed by the Registrar immediately thereafter instead of 20 days later...”

I find no reason, given the evidence before me, to depart from the learned trial Judge’s finding. Additionally, the Applicant does not deny the fact that the Notice of Appeal was filed out of time and back dated but contends that mistake of counsel should not be visited on an innocent litigant.

In the case of **Banco Arabe Espanol Vs. Bank of Uganda, SCCA No. 8 of 1998** it was held that;

“A mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Such mistake, or as the case may be, constitutes just cause entitling the trial judge to use his discretion so that the matter is considered on its merits.”

Whereas it is true that mistake of counsel should not be visited on an innocent litigant, this argument is not helpful for the purposes of this application. For an

application for stay to be successful the Applicant must have filed a valid Notice of Appeal. In my view there is no valid Notice of Appeal.

There being no valid Notice of Appeal, the Applicants ought to have filed an application for extension of time which would have validated the Notice of Appeal. It is in that application where arguments of mistake of counsel could be considered.

The Applicants, however, have not demonstrated to this court that there's an application for validation of the Notice of Appeal or extension of time, that is pending hearing. As it stands now, sadly, the Applicants have no appeal pending in this court; and validation or extension of time cannot be granted within ambit of this application for stay of execution.

I therefore find this application void of merit and dismiss it for the reasons given above.

This application is thus dismissed with costs to the Respondent.

I so order.

Dated this^{30th} day of May 2023

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OSCAR JOHN KIIHIKA
JUSTICE OF APPEAL