

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL MISCELLENEOUS APPLICATION NO. 234 OF 2023

(Arising from Civil Application No. 233 of 2023)

(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 :::::::::::::::::::::::::::::::::::APPLICANTS

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 the provisions of Section 33 of the Judicature Act, Order 50(3A) of the Civil Procedure Rules, 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 interim 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 Ketrah Kitarisibwa Katunguka, delivered on 29th January, 2021 in Civil Suit NO. 558 of 2016 pending the determination of the main application.

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 passed in favour of the Respondents. The Respondents then filed a notice of appeal, consequent upon the event of passing of judgement adverse to their interests in the suit land.

The Applicants then filed an application for an interim stay of execution in the High Court vide Misc. Application No.169 of 2021, and they also filed Misc. Application No. 168 of 2021 for an order of stay of execution in the same court. 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 interim order for stay of execution of the decree in Civil Suit No. 558 of 2016 pending the hearing of Civil Application No. 233 of 2023, the substantive application for stay execution.

The grounds upon which this application is based are set out in the affidavit of **BUJINGO AYUB**, sworn on the 2nd June 2023 and in a nut shell are: -

- 1. The Applicants being dissatisfied with the Judgement and orders of Justice Ketrah Kitarisibwa Katunguka in H.C.C.S No. 558 of 2016 filed Civil Appeal No. 396 of 2022.*
- 2. The Respondents have applied for execution of the decree vide HC-FD EMA No.16 of 2022 and secured an eviction notice dated 18th July 2022.*
- 3. The Applicants filed a notice of appeal out of time however, there is pending in the Court of Appeal, Civil Application No. 228 pf 2023 for extension of time/validation of the Notice of Appeal which is the subject of Civil Appeal No. 396 of 2022.*
- 4. The main application for a stay of execution and the appeal, have a very high chance of success and therefore in order to protect the interests of the Applicants an interim order should be issued to stop the Respondents disposing the suit land.*

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 summarized as follows;

- 1. The application lies in vacuum as the affidavit in support is incurable defective for it offends the mandatory provisions of The Illiterates Protection Act as the deponent of the said affidavit in support is illiterate of the English language.*
- 2. The main application for stay Civil Application No. 233 of 2023 is also devoid of any merit and has no chance of success.*
- 3. The Applicants did not file their notice of appeal within the time prescribed by the law.*
- 4. The Applicants have never furnished security for the due performance of the decree in H.C.C.S No. 558 of 2016.*

Representation

At the hearing of the application, **Ms. Norah Matovu** appeared for the Applicants while **Mr. Tomusange Abdu** and **Mr. Lutaalo Eric** appeared for the Respondents. Both parties filed written submissions which were adopted by court and which I have duly considered.

Applicant's submissions

Counsel for the Applicants submitted that the Court of Appeal has under Rule 6(2) (b) discretionary powers to order a stay of execution as the court may think just. Counsel further submitted that this application being one for the issuance of an interim stay of execution, is intended to help the parties preserve the status quo until such time that the main application is disposed of.

Counsel submitted that the grounds that guide court when considering an application for an interim stay of execution have been considered in the case of **Kato & Another vs Nalwoga SC Civil Application No. 12 of 2011** and are;

1. There is a serious threat of execution of the decree.

2. There is a substantive application for stay pending before this court.
3. The applicants will suffer substantial loss and their appeal as well as the main application will be rendered nugatory if the interim order is not granted.

Counsel contended that the Applicants have fulfilled all the aforementioned preconditions requisite for the issuance of an interim order for stay of execution as evidenced in the affidavit in support of the application.

Respondent's written submissions

Counsel for the Respondents, on the other hand, before addressing court on the merits of the application, raised two preliminary points of law.

The first point of law was on the legality of the affidavit in support of the application which was sworn by the 1st Applicant **Bugingo Ayub**. Counsel contended that the 1st Applicant was an illiterate of the English language who could not have read and understood the contents of the affidavit which he swore in support of the application. In support of their assertion counsel referred this court to page 7 of the Judgement in H.C.C.S. NO. 558 of 2016 which was annexed as **"A"** to the affidavit in support of the application, wherein the trial judge found the 1st Applicant to be illiterate in the English language.

Counsel argued that the 1st Applicant being illiterate in the English language he was required to include in the jurat of his affidavit, a certificate of translation as provided for by sections 3, 4, and 5 of the Illiterates' Protection Act, which requirement was not fulfilled. As such, counsel further argued, the affidavit was incurable defective, a nullity and should therefore be struck out. In support of their arguments counsel referred this court to the case of **Kasaala Grower's Co-operative Society Vs Kakooza Jonathan & Another S.C.C.A No. 19 of 2010**.

The second point of law was in relation to the competence of the main application for stay of execution in Civil Application No. 233 of 2023 which, counsel contended, was supported by an affidavit that was also deponed by Bugingo

Ayub an illiterate of the English language. Counsel reiterated their submissions regarding the competence of the affidavit in support of the main application.

Secondly, counsel submitted that the pending appeal was grounded on a notice of appeal which had been filed out of time and that the appeal itself had also been filed out of time.

With regard to the merits of the application counsel, in a nut shell, submitted that the Applicants did not meet the conditions requisite for the issuance of an interim order of stay of execution. Counsel submitted that the application ought to be dismissed with costs.

Consideration of the application.

Before I consider the merits of the application, I find it pertinent to address the preliminary objections raised by the Respondents' counsel.

As stated hereinabove, the first objection challenges the affidavit of the 1st Applicant **Bugingo Ayub**. Counsel's submissions have been set out and I need not repeat them. The gist of the submissions is that **Bugingo Ayub** (the 1st Applicant) being an illiterate of the English language, his affidavit is incurably defective for failure to include in the jurat, a certificate of translation as provided for by sections 3, 4, and 5 of the Illiterates' Protection Act.

Evidence of the 1st Applicant's illiteracy in the English language, according to the Respondents' counsel, is to be found at page 7 of the Judgement in H.C.C.S. NO. 558 of 2016 which was annexed as "**A**" to the affidavit in support of the application and wherein the trial judge found the 1st Applicant to be illiterate in the English language. I have had opportunity to read page 7 of the said judgement which was indeed annexed as "**A**" to the affidavit in support of the application sworn by the 1st Applicant.

The judgement in H.C.C.S. NO. 558 of 2016 is the subject of the Applicant's appeal No. Civil Appeal No. 396 of 2022 which was filed by the Applicants in this court and is pending determination. Page 7 of the said judgement contains the

submissions of counsel for the plaintiffs (in this case Respondents) contending that the 1st Applicant is illiterate in the English language.

I do not consider the submissions by counsel to be evidence of the 1st Respondent's illiteracy in the English language. However, evidence of the 1st Respondent's inability to read or understand English can be found at page 9 of the judgement where the trial judge Justice Ketra Kitarisibwa Katunguka found as follows;

“ ...The 1st defendant was indeed not able to read any document in court especially those attributed to him. The contract of understanding the basis of the transactions in the land was in English language. The witness told court he did not know English yet there was no certificate of translation attached to the document.....”

The above cited paragraph is the trial judge's account of what transpired in her court in the course of the proceedings. This can be taken to be her finding of fact with regard to the illiteracy of the 1st Applicant. In absence of any evidence to the contrary, I am bound to take this as evidence of the 1st Applicant's illiteracy in the English language. That being the case, there is merit in the preliminary objection raised by counsel for the Respondents.

Section 3 of the Illiterate Protection Act (Cap) 78 of the Laws of Uganda provides as follows;

“ Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her.”

To my mind, this provision is mandatory and when applied to documents such as an affidavit which is evidence, the affidavit in question becomes incurably defective. This is not a mere technicality. I am fortified in my views by the case of **Kasaala Grower's Co-operative Society Vs Kakooza Jonathan & Another** (Supra) wherein Justice G.M Okello of the Supreme Court held as follows;

"I do agree with what this court had stated in Banco Arabe Espanal - vs. - BOU, Civil Appeal No. 8 of 1998, that;

"-- - - - a general trend is towards taking a liberal approach in dealing with defective affidavits. This is in line with the Constitutional directive enacted in article 126 of the Constitution that courts should administer substantive justice without undue regard to technicalities Rules of Procedure should be used as handmaiden of justice but not to defeat it."

However, a distinction must be drawn between a defective affidavit and failure to comply with a statutory requirement. A defective affidavit is, for example, where the deponent did not sign or date the affidavit. Failure to comply with a statutory requirement is where a requirement of a statute is not complied with. In my view, the latter is fatal..."

The learned Judge went to hold as follows;

" In Ngoma-Ngime - vs - Electoral Commission and Hon. Winnie Byanyima, Election Petition Appeal No. 11 of 2002, the Court of Appeal confirmed the rejection by the trial High Court judge of an affidavit by an illiterate deponent which did not comply with the provision of that Act.

I agree with and endorse that decision as the correct one. The Act was intended to protect illiterate persons and the provision is couched in mandatory terms. Failure to comply with it must render the document inadmissible."

Thus, concomitantly, I would equally hold that the 1st Applicants affidavit, which failed to comply with the provisions of the Illiterate Protection Act, is defective and is therefore inadmissible. I accordingly strike it out.

The consequence of having the 1st Applicant's affidavit struck out renders this application, in my view, incompetent as it does not comply with the provisions of Rules 43 and 44 of the Rules of this court. Rules 43 and 44 of the Rules of this court provide that applications to the court shall be by motion which shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts. The application as it presently stands is not supported by any affidavit and would be struck out.

The Applicants had sought to rectify the situation by filing an affidavit in rejoinder sworn by **Agnes Gwokyalya** on the 15th of June 2023 in which she deposed that the 1st Applicant had relative knowledge of the English language and that she drafted the affidavit and explained the contents of the same to the 1st Applicant. This however is not in compliance with the provisions of section 3 of the Illiterates Protection Act above cited. The section is clear, this statement must be written on the same document and not separately. The affidavit in rejoinder does not ameliorate the situation.

Counsel for the Applicants, by a letter dated 16th of June 2023 addressed to the Registrar of the Court of Appeal, sought to amend the impugned affidavit by introducing a certificate of translation signed by one Rebecca Kisolo an advocate.

This letter presents two problems. Firstly, it was not copied to counsel for the Respondents. This goes against the dictates of what constitutes a fair hearing. The opposing party to an application must be given an opportunity to respond to matters raised by an applicant.

Secondly the letter states that an oral application was made in open court to amend the affidavit by attaching the Certificate of Translation which would address the defect noted by counsel for the Respondents. The record of proceedings does not bear this out. Counsel for the Applicants mainly focused on the supplementary affidavit sworn by Agnes Gwokyalya. That notwithstanding, evidence is not amended. Amendments relate to pleadings and an affidavit is not a pleading; it is evidence.

For the reasons given above, I disregard the letter dated 16th July 2023 by counsel for the Applicant addressed to the Registrar of the Court of Appeal seeking to introduce a certificate of translation by way of amendment.

The second point of law relates to the main application being incompetent on the same ground. I would dismiss this objection seeing as the said application is not before me for consideration and in any case, there is no evidence before me to suggest that the supporting affidavit in that application falls in the same category as the affidavit in this application.

Having found merit in the first preliminary objection, I accordingly dismiss the application with costs to the Respondent.

I so order.

Dated this day of June 2023

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OSCAR JOHN KIHKA
JUSTICE OF APPEAL