

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION No.1049 of 2023
(Arising from Civil Appeal No. 284 OF 2023)**

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- 1. PRINCE CHARLES MATOVU SIMBWA**
 - 2. PRINCE JOSEPH SIMBWA ::::::::::::::: APPLICANTS**
- VERSUS**

- 1. KYASA FRED**
- 2. KIZZA SANYU IRENE ::::::::::::::: RESPONDENTS**

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Civil Procedure –Substantive Stay of execution - a pre-existing application for stay of execution in the High Court.

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**RULING OF CATHERINE BAMUGEMEREIRE, JA
(SITTING AS A SINGLE JUDGE)**

Introduction

The applicant brought this application by way of Notice of Motion under Rule 2(2), 6(2)(b), Rule 42(2), 43(1) and 44(1) of the
Judicature (Court of Appeal Rules) Directions hereinafter
referred to as the Court of Appeal rules) seeking orders that;

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1. An order of substantive stay of execution against the respondents in respect of judgment and decree in High Court Civil Suit No.26 of 2018 until final disposal of the Civil Appeal No. 284 of 2023 pending in this Honourable court.
2. Costs of the application be provided for.

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The grounds in support of the application are contained in the affidavit of Prince Joseph Simbwa but briefly are that:

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- 1) The applicants were the unsuccessful party in HCCS No.26 of 2018 between Kyasa Fred and Kizza Sanyu Irene v Prince Charles Matovu Simbwa and prince John Simbwa.

- 2) That the applicants filed a notice of appeal and a record of appeal in this Honourable Court which is pending hearing.
- 5 3) That there is an eminent threat of execution as the respondents are ferrying surveyors to survey the suit land for purposes of creating subdivisions.
- 10 4) That the respondents have further extracted a decree, applied for taxation of the bill of costs and are in the process of effecting change of administrators according to the decree.
- 15 5) That the applicant's appeal before this Honourable Court has a high chance of success.
- 6) That the applicants shall suffer substantial loss and their appeal shall be rendered nugatory if this application is not granted.
- 20 7) That this application has been brought without unreasonable delay by the applicants.
- 8) That it is in the interest of justice that this Honourable Court be pleased to allow the application so that the status quo is maintained pending the hearing of the appeal.

In response, the respondents challenged the application in an affidavit sworn by Fredrick Kyasa, the first respondent, briefly
25 stating that;

- 1) There's no proof that the respondents have commenced execution.
- 2) That Civil Appeal No.284 of 2023 filed by the applicants has no chance of success.
- 30 3) That the applicants intend to stay execution so as to continue to intermeddle and withhold accountability by way of not filing an inventory as was decreed.
- 35 4) That the applicants refused to comply with the court's order by continuing to refer to themselves as administrators of the deceased's estate which constitutes a violation of the decree.

- 5) That the applicants still possess the letters of probate which were revoked by the High Court and continue using them to interfere with the estate of the deceased which is in total contempt of the judgment and decree in HCCS No.26 of 2018.
- 6) That the subject matter of Civil Appeal No.284 of 2023 which is the estate of the late Omulangira Samusoni Simbwa is not property of the Applicants and that the applicant's claim that they will suffer substantial loss has no merit.
- 7) That the estate has 22 other beneficiaries other than the applicants and staying the execution will affect them as the beneficiaries will further abuse and waste the estate.
- 8) That the applicants did not give security for due performance of the decree issued by the High Court.
- 9) That an order of stay of execution would prejudice the interests and rights of the beneficiaries to the estate.
- 10) That the application should be dismissed and costs be awarded to the respondents.

Background

The respondents obtained judgment against the applicants in the lower court. This resulted into the applicants filing of a notice of appeal and memorandum of appeal in this court. Consequently, the applicants filed an application for a stay of execution.

Representation

During the hearing of this application, Mr. Kenneth Kajebe represented the applicants, while Brian Tindyebwa Kusingura represented the respondents.

Parties' Submissions

Counsel for the applicants argued that the respondents are threatening to dispose of the suit land, which could lead to the creation of third-party interests. Counsel also contended that the respondents are executing the decree of the lower court by filing a bill of costs. Counsel for the applicants contended that any change in the status quo of the suit land could lead to substantial losses for the applicants.

Counsel for the respondents contended that this application is premature since the applicants had previously submitted an application for a stay of execution in the High Court, which has yet to be scheduled for a hearing. It was counsel's contention that while the applicants claim to have withdrawn the High Court application (Misc Application No.854 of 2023). There being no order from the High Court indicating that HCMA No.854 of 2023 was withdrawn, a letter or notice provided cannot constitute sufficient evidence of withdrawal and hence the current application is considered premature and should be dismissed.

It was further contended on behalf of the respondents that the applicants are no longer authorized to serve as administrators of the estate of the late Omulangira Samusoni Simbwa since their letters of probate were revoked. Counsel further asserted that while the beneficiaries would suffer substantial loss if the application was granted, the applicants would not incur

significant loss if it was denied. Counsel decried the delay in filing the application, with a lapse of four months between the filing of the notice of appeal on 1.6.2023 and the submission of the instant application on 8.10.2023. Consequently, the applicants' claim was
5 deemed unreasonable by counsel for the respondent.

It was further argued for the respondents that the applicants had failed to provide an account of the estate of the late Omulangira Samusoni Simbwa, despite a court decree in HCCS No.26 of 2018 ordering them to do so since 2015. Counsel argued that the
10 applicants had failed to furnish any security for the due performance of the decree. He invited this court to find that the grounds advanced by the applicants lacked merit and that therefore the application should be dismissed with costs.

15 **Determination of the Application**

It is on record that, the applicants filed Miscellaneous Application No.854 of 2023 in the High Court, seeking for an order of a stay of execution. Later, the applicants sent a letter to the High Court, dated 12th September 2023, withdrawing
20 Miscellaneous Application No.5853 & 854 of 2023. The applicants cited the High Court's delay in resolving the application and the respondents' intention to file the application in the Court of Appeal as reasons for withdrawal. However, counsel for the respondent contended that the applicant's letter did not
25 constitute evidence of withdrawal since there was no order from

the High Court. As a result, the respondent claimed that the application before this court is premature, as it was filed before resolving the initial one, making this application tantamount to abuse of the court process.

- 5 It's a well-established legal principle that both this court and the High Court possess concurrent jurisdiction in applications such as this. In **Lawrence Musiitwa Kyazze v Eunice Busingye Supreme Court Civil Appeal No.18 of 1990**, it was held that;

10 "the practice that this court should adopt is that general applications for stay should be made informally to the judge who decided the case when judgment is delivered. The judge may direct that a formal motion be presented on notice (Order XLVIII Rule 1), after a notice of appeal has been filed. He may in the meantime grant a temporary stay
15 for this to be done. The parties asking for a stay should be prepared to meet the conditions set out in Order XXXIX Rule 4(3) of the Civil Procedure Rules. The temporary application may be exparte if the application is refused, the parties may then apply to the Supreme Court under Rule
20 5(2)(b) of the court of appeal rules where again, they should be prepared to meet similar conditions, similar to those set out in XXXIX Rule 4(3). **However, there may be circumstances when this court will intervene to preserve the status quo.** In a case where the high court
25 has doubted its jurisdiction or has made some error of law

or fact, apparent on the face of the record, which is probably wrong, **or has been unable to deal with the application in good time, to the prejudice of the parties in the suit property, the application maybe**
5 **made direct to this court.”** (Emphasis added).

My understanding of the questions in contention is that they are not questions of jurisdiction, per se. Be that as it may, it's worth noting that this court is not precluded from hearing an application for stay of execution where the High Court fails to
10 address a matter promptly, leading to detrimental outcomes for the parties involved or where the high court is in doubt of its jurisdiction or has made some error of law or fact, apparent on the face of the record.

It is also important that I set out the provisions of Rule 42 of the
15 rules of this court. It provides as follows:

“42. Order of hearing applications.”

- (1) Whenever an application may be made either in the court or in the High Court, it shall be made first in the High Court.
- 20 (2) Notwithstanding subrule (1) of this rule, in any civil or criminal matter, the court may, on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any act as the justice of the case requires, or entertain an application under rule 6(2)(b) of

these Rules, in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court.”

5 This court may, on application or of its own motion entertain an application under rule 6(2)(b) of these Rules, in order to safeguard the right of appeal. This court can therefore lawfully hear applications of this nature where there has been inordinate delay by the High Court. Having decided that this court has the mandate to entertain this motion, I dismiss the objection raised
10 by counsel for the respondent regarding the question whether this application can be entertained by this court.

I will now proceed to determine the substantive issues. As to the merits of the application, the applicant in order to succeed, ought to show that;

- 15 1. The appeal has a likelihood of success.
2. It must also be established that the applicant will suffer irreparable damages or that the appeal will be rendered nugatory if the stay is not granted.
3. If 1 and 2 above have not been established, court must
20 consider where the balance of convenience lies.
4. That the applicant must also establish that the application was instituted without delay.

See; Lawrence Musiitwa Kyazze v Eunice Busingye SCCA No.18 of 1990 (1992) IV KALR 55 and Hon Theodore Ssekikubo

& Ors v The Attorney General and Another Constitutional Application No.06 of 2013.

With respect to demonstrating the likelihood of success their application and grounds of appeal, I find that is the
5 documentation provided is not sufficient in proving a comprehensive analysis of the merits and demerits of the case in order to determine the likelihood of success. As a result, I am unable to arrive at a reasoned opinion as to whether there is a likelihood of success. Had the applicant provided a copy of the
10 Judgment from which he appeals or formulated the grounds in such a way as to enable a court to make an informed view, I may have been able to determine the likelihood of its success. I concur with the sentiments expressed by Bossa, JA in **Kansiime Andrew v Himalaya Traders Ltd & 6 Ors Court of Appeal**
15 **Civil Application No.279 of 2017.**

“Before I take leave of this matter, I wish to comment on the importance of attaching a judgment to an application for stay of execution. Counsel for the applicant did not consider it important to file the judgment on record... A
20 **judgment serves to indicate the date on which it was delivered and but most importantly to indicate the merits of the intended appeal.** I am therefore entitled to draw an adverse inference against the applicant for failure to attach the judgment. It is a clear indication that the
25 judgment did not favour his case..”

Considering that the applicant did not provide cogent grounds to prove the likelihood of success, and since the Judgment of the lower court was not made available for this court to take a cursory look and form an indicative opinion, I have reason to believe that
5 this applicant has slim chances or likely no possibility of succeeding on appeal.

Regarding the alleged threat to execution, the applicant's Counsel argued that the respondents' actions of extracting a decree and attempting to change administration pose a serious
10 danger. I have carefully examined the decree in question and have observed that the presiding judge declared the letters of probate for the estate of the late Omulangira Samson Simbwa fraudulent. The judge subsequently revoked the letters of administration and ordered the applicants to provide a complete
15 account of the estate's properties and credits. Furthermore, the court made orders to the effect that the respondents could apply for the grant of letters of administration for the estate of the late Omulangira Samusoni Simbwa.

To the best of my comprehension, the decree provides the
20 applicants with the option of applying for letters of administration. In my view, this order is subject to certain conditions that must be satisfied and validated by the Administrator General's Office. The process has embedded safeguards which include the fact that all beneficiaries of the
25 deceased's estate are notified, and their consent is sought before

an administrator is appointed. Consequently, it's worth noting that the Administrator General's Office cannot undertake any actions without the knowledge and approval of all beneficiaries, including the applicants. The process of applying for letters of
5 Administration has minimum statutory times for notice and an opportunity for the time to meet together and choose the best leaders and therefore the applicants cannot allege that it will lead to the estate going to waste. It is safe to assume that the order in question can only be executed upon fulfilment of a list of
10 conditions at the behest of the Office of the Administrator General.

The decree issued by the High Court required the applicant to submit an inventory for the estate of the departed Omulangira Samson Simbwa. I believe that suspending such an order would
15 be imprudent, as it would only serve to prolong the lack of transparency and accountability potentially exacerbating an already complex situation.

The applicants submitted pictorial attachments of "surveyors" purportedly marking land for subdivision to support their claim
20 of a threat to execution. I find this evidence insufficient to paint a complete picture of a significant threat. After a thorough review of the evidence presented, I conclude that the allegations of an imminent threat to execute lack urgency. Additionally, the absence of an immediate executable action ordered by the decree
25 suggests that there is no present danger of execution.

Upon careful consideration, I have concluded that the applicants
have failed to meet the necessary criteria for a substantive stay of
5 execution. The application is dismissed with costs.

Dated this 29th day of 01 2024.

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15 **HON.LADY JUSTICE CATHERINE BAMUGEMEREIRE**
JUSTICE OF APPEAL