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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO 235 OF 2023

(ARISING FROM CIVIL APPEAL NO. 194 OF 2023)

LUBEGA GEORGE===== APPLICANT

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VERSUS

NAMPINGA THERESA ===== RESPONDENT

CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA

(SINGLE JUSTICE)

RULING

15 This Application is brought by way of Notice of Motion under Rules 2(2),
6(2)(b) and 43 of the Judicature (Court of Appeal Rules) Directions.

It seeks for orders that: -

- i. Stay of Execution of the Judgment and orders of the High Court
Land Division in Civil Suit No. 0751 of 2018 doth issue.
- 20 ii. Costs of the Application be provided for.

The background to the Application is that the Applicant is the registered proprietor of the suit land at Busiro Block 421 Plot 42 and at Ziruru having bought the same for valuable consideration. There was a contestation on ownership and was consequently sued in High Court in Civil Suit No. 0751
25 of 2018 and Court ordered the cancellation of the Applicant's title. The Respondent has now threatened to execute the decree and she has applied to the commissioner Land Registration to have the Applicant's title cancelled.

30 The Applicant applied for a stay of execution in the High Court which was dismissed. The Registrar of Titles has advertised seeking to compel the Applicant to surrender the duplicate certificates of title for cancellation.

5 Grounds of the Application

The grounds of the Application are contained in the Notice of Motion and the affidavit in support of the Application sworn by Lubega George briefly stating that; -

- I. The Applicant together with the Co-Appellants Seruma Simon
10 Guwatudde and Nakirya Mary have filed a competent appeal before this Court and the Applicant's appeal has a high likelihood of success.
- II. The Applicant had initially filed for stay of execution in the High Court but the same was dismissed.
- III. There is an imminent threat of execution of the decree issued in HCCS
15 No. 0751 of 2018 as the Respondent immediately extracted the decree and has applied to the Commissioner Land Registration for cancellation of the Appellant's title.

The Application was opposed by the Respondent who filed an affidavit in reply deponed by Lubandi Janet and raised two preliminary objections.

- 20 i) That the affidavit in support and supplementary affidavit in support attached to the Application are fatally defective for offending the Illiterates' Protection Act considering the previous pleadings and evidence on oath in the record.
- ii) That execution has already taken place and there is nothing to
25 stay and the only remedy that is available to the Applicant is to set aside execution.
- iii) That the Appeal is devoid of merit and has no likelihood of success.

Representation

- 30 At the hearing of the Application, Mr Obed Mwebesa appeared for the Applicant while the Respondent was represented by Mr Allan Mwigo.

Applicant's Submissions

5 Counsel for the Applicant submitted that this Court has inherent jurisdiction under Rules 2(2), 6(2)(b) and 43 of the Judicature (Court of Appeal Rules) Directions to grant the reliefs sought and the Applicant demonstrated the following;

- 10 i. First, that there is a competent Notice of Appeal has been filed in this Court pursuant to Rule 76 of the Judicature (Court of Appeal Rules) Directions.
- ii. Secondly, that the Application should be able to demonstrate that the Appeal lodged in the Court has a likelihood of success.
- 15 iii. That the Applicant shall suffer irreparable damage and the appeal will be rendered nugatory if the stay is not granted.

Respondent's submissions

Counsel for the Respondent raised two preliminary objections;

The first being on the legality of the affidavit in support and supplementary affidavit sworn by the Applicant Lubega George. Counsel contended that
20 affidavits attached to the Application were fatally defective for offending the Illiterates' Protection Act considering that in all previous pleadings and evidence on oath, the Applicant admitted to being an illiterate.

That the Applicant's previous affidavits which are on court record were all translated for him. He testified and was cross-examined in Luganda as
25 shown in Paragraph. 3(b) of the affidavit in reply.

It was Counsel's submission that pursuant Section 16 of the Evidence Act Cap 6, Applicant's admission of illiteracy in all the highlighted pleadings and evidence makes the affidavits incurably defective in absence of a certificate of translation and offends the Illiterates Protection Act Section
30 and the affidavits should be struck off court record considering that absence of a Certificate of translation is not a mere technicality which can be cured by Article 126(2)(e) of the 1995 Constitution. That the above principle was considered in the case of *Bujingo Ayub & Others Vs Abubakali Kikoba & Others C.O.A Civil Miscellaneous Application No: 234 Of 2023* which is

5 almost on all fours with the instant Application in that the Applicant in that case had in the previous pleadings admitted to being illiterate and while applying for an interim stay of execution, the affidavit in support lacked a certificate of translation.

10 He submitted that section 3 of the Illiterate Protection Act cap 78 of the laws of Uganda provides that any person who shall write any documents for or at the request, on behalf or in the name of any illiterate shall also write on document his or her own true and full name as the document and his or her true and full address, and his or her doing shall imply a statement that he or she was instructed to write the document by the person for whom it
15 purports to have been written and it fully and correctly represents his or her instructions and was read and explained to him or her. Counsel further submitted this provision is mandatory and when applied to documents such as the affidavit which is evidence, the affidavit in question becomes incurably defective. That this is not a mere technicality as was held in the
20 case **Kasaala Growers Co-operative Society v Kakoza Jonathan & Another S,C Application No.19 of 2020** wherein Justice G.M Okello of the Supreme Court held as follows;

*I do agree with what this court had stated in Banco Arabe Espanol vs BOU civil Appeal no. 8 Of 1998, that ... a general trend is towards taking
25 a liberal approach in dealing with defective affidavit. 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.*

30 The second preliminary Objection was that execution has already taken place and there is nothing to stay and the only remedy that is available to the Applicant is to set aside execution.

Counsel submitted that the cancellation of the 63 Certificates of Title created by the Applicant is complete and the orders sought in this

5 Application will be issued in a vacuum and its trite law that Courts do not issue unenforceable orders.

He further submitted that the letter written to the Applicant and Hammington Thege whom the Applicant had sold to, one of the mutated plots was dated 5th of June 2023 and the transfer would be effected within
10 Seven (7) days and it's past seven days since the notice was issued and cancellation had already been done. He argued that in the circumstances any orders issued by this Court would be in vain as there is nothing to stay. That this Application is misconceived as the proper Application would be to set aside the decree.

15 He invited this Court to find that execution is complete and this Application is misconceived as there is nothing to stay and the Application should be dismissed with costs.

Submissions in rejoinder

Counsel for the Applicant rejoined that the purpose of the Illiterate
20 Protection Act is to protect Illiterates from being manipulated through fraud, misrepresentation and forgery.

In this case according to Applicant's Counsel, the contents of the affidavits were written on Applicant's instructions, they were read and interpreted to him and he duly understood before appending his signature. He further
25 submitted that lack of certificate was Counsel's mistake and should not be visited on the Applicant and he cited the case of ***Tropical Africa Bank Limited Vs Grace Were Mukwana SCCA NO.003/2012***, where it was held that mistakes or inadvertence by Counsel should not be visited on the litigants themselves who come to court seeking substantive justice. Articles
30 126(2)(e) of the constitution recognizes that the technicalities are important. However, such technicalities should not supersede the need for court to administer substantive justice which includes allowing each party to be heard.

Counsel further submitted that the Respondent secretly extracted the
35 Decree and chose to use illegal means of carrying out execution.

Court's determination.

The jurisdiction of this court to grant a stay of execution is set out in Rules 2(2) and 6(2) (b) of the Judicature (Court of Appeal Rules) Directions which mandate the Court to grant a stay of execution, an injunction or order a stay
10 of proceedings on such terms as the court may deem fit.

It is necessary for the Applicant to lodge a notice of appeal in accordance with Rule 76 of the Rules of this Court before the Court exercises its discretion. In addition, the Court has wide discretionary powers to do whatever is necessary to achieve justice under Rule 2(2) of the Rules of
15 Court. See *Apunyo Tom V Atim Margret Obua, Civil Application No.206 of 2020*.

Counsel for the Respondent raised two preliminary objections, I will first address the preliminary points of law raised then determine whether it is necessary to consider merits of the Application.

20 The first Preliminary Objection is about the legality of the affidavits sworn by the Applicant, Lubega George which are alleged to be fatally defective for offending the Illiterates Protection Act considering that in all previous pleadings and evidence on oath on Court's record, the Applicant admitted to being an illiterate and thus the Application should be struck off court
25 record.

It is on record that the Applicant is illiterate and does not understand the English language. His previous affidavits and his witness statement which are on court record were all translated for him. The Applicant testified and was cross-examined in Luganda as shown in Paragraph. 3(b) of the affidavit
30 in reply which was annexed as **B & C (previous affidavits and evidence on Oath (witness statement))**.

The provisions of Section 3 of the Illiterate Protection Act are mandatory and when are not followed, the ensuing document becomes irreparably defective.

5 This requirement is not a mere technical defect and as was held by Justice Okello in **Kasaala Growers Co-operative Society v Kakoza Jonathan & Others (supra)**.

‘... .. a general trend is towards taking a liberal approach in dealing with defective affidavit. This is in line with the constitutional directive enacted
10 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 the statutory requirement. A defective affidavit is, for
15 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.’

In **Ngoma-Ngime - vs - Electoral Commission and Hon, Winnie Byanyima, Election Petition Appeal No. 11 of 2002**, the Court of Appeal
20 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.

The Applicant being an illiterate of the English language, his affidavits are incurably defective for failure to include in the jurat, a certificate of translation required under sections 3, 4, and 5 of the Illiterates' Protection
25 Act.

The Applicant had sought to rectify the defect by filing an affidavit in rejoinder sworn on the 3rd of July 2023 in which he deponed that the contents of the affidavit were drafted on his instructions and were explained to him before appending his signature. This however is not in compliance
30 with the provisions of section 3 of the Illiterates Protection Act which requires that the statement must be written on the same document and not separately. The affidavit in rejoinder does not save the situation.

As a consequence, I find that the affidavit of the Applicant lacks compliance with the Illiterate Protection Act hence defective and is not admissible. It is
35 accordingly struck out.

5 This renders the Application incompetent for failure to comply with Rules 43 and 44 of the court's Rules which require Applications to the court to be supported by affidavits from the Applicant or other persons with knowledge of the facts. The Application is therefore defective and is struck out.

In the circumstances, I find merit in the first preliminary objection.

10 The second preliminary Objection was that execution has already taken place and there is nothing to stay and the only remedy that is available to the Applicant is to set aside execution.

The Ministry of Lands, Housing and Urban Development ordered the Applicant to return the land titles comprised Busiro Block 421 Plot 963-
15 1023 for purposes of implementing the decree in Civil Suit No. 0751 of 2018 of High Court (Land Division) and the transfer would be effected with Seven (7) days and it's past seven days since the notice was issued and cancellation has already been done thus the Application has been overtaken by events.

20 Having found merit in the preliminary objections, the Application is therefore dismissed with costs to the Respondent.

Dated at Kampala this ^{18th} day of ^{February} 2024

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Cheborion Barishaki

JUSTICE OF APPEAL

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