

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA
CIVIL APPLICATION No. 1013 of 2023
ARISING FROM CIVIL APPEAL No. 285 of 2022

- 5 1. KAMYA JULIUS
 2. BAKANU ELIZABETH
 3. MUDOOOLA JAMES 1,2 &3 Suing as Administrators
 of the Estate of the late David Kamya :::::::::: 1ST APPLICANT
 4. JULIUS KAMYA :::::::::: 2ND APPLICANT
10 5. JAMES MUDOOOLA :::::::::: 3RD APPLICANT

VERSUS

HAJI AHMED LUGOLOBI GITTA :::::::::: RESPONDENT

RULING OF CATHERINE BAMUGEMEREIRE, JA

(SINGLE JUSTICE)

Introduction

The applicants brought this application by way of Notice of Motion
20 under section 12 and 33 of the Judicature Act, rules 2 (2), 6 (2) (b), 43
and 44 of the Judicature (Court of Appeal Rules) Directions SI
No. 13 of 2010 (hereinafter referred to as the (CoA Rules) seeking
orders that:

- 25 1. A stay of execution and implementation of the orders in
 Civil Appeal No. 061 of 2020 be issued till determination of

the Civil Appeal No. 1021 of 2023 which is before this honorable court.

2. An order doth issue prohibiting the respondent and his agents or any one acting under his name or deriving interest under him from evicting or otherwise dispossessing the applicants from possession of the suit land comprised in Kyaggwe Block 110 plots 989 and 990 land at seta till the final disposal of civil appeal No. 1021 of 2023 before this court.

3. A further order of injunction be issued restraining the respondent and/or his agents and successors in title or anyone claiming under his name from carrying out and endorsing any transactions in form of selling, subdividing, transferring or pledging as collateral security or further alienating the land comprised in Kyaggwe block 110 plots 989 and 990 land at seta before the determination of Civil Appeal no. 1021 of 2023 pending before this court.

4. Costs of this application abide the outcome of Civil Appeal No. 1021 of 2023 before this court.

Representation

At the hearing of this application, Mr. Jude Byabakama represented the applicants while Mr. Jesse Magala represented the respondent. Both counsel applied to court to adopt their written arguments, which were

already on record in determination of this application. The prayer was granted by court.

Submissions for Both Parties

5 Counsel for the applicant's submissions were based on two issues.

1. **Whether the present application has merit?**

2. **What remedies are available to the aggrieved parties?**

On the first issue, counsel submitted that in considering an application of this nature it must be demonstrated by the applicant that an appeal
10 has been filed and that on the face of it, it has a genuine grievance with the probability of success; that the applicant is likely to suffer irreparable damage if the stay is not granted; that there is genuine need to preserve the status quo; that the balance of convenience lies with the applicants and that the application has been brought without
15 unreasonable delay. He relied on **Nakato Sarah & Anor v James Busonga & 2 Ors Civil Application No. 303 of 2023.**

Counsel submitted that the applicants have satisfied all the above pre-conditions. He submitted that the applicant had made out a prima facie case with a probability of success in Civil Appeal No. 1021 of 2023.
20 He contended that there is sufficient evidence on court record upon which this court can establish that the appeal has a prima facie case with a likelihood of success. Counsel submitted that the applicants through the affidavits of Julius Kamyia and James Mudoola endorsed the record of appeal and memorandum of appeal indicating the
25 grounds of appeal, which are 8 in number. It was counsel's submission

that this court would be justified to conclude that the applicants have a genuine grievance, and it centers around what acreage they occupy on the disputed land as kibanja owners.

Counsel argued that the applicant is likely to suffer irreparable damage if the stay or injunction does not issue and further that the applicants would suffer irreversible damage that cannot be addressed by payment of monetary compensation since the respondent might transfer the disputed land to 3rd parties and bona fide purchasers for value. Counsel argued that where the applicant is likely to suffer irreparable damage, the court has the power to issue a temporary injunction pending an appeal on the sole ground that the aggrieved party might transfer the suit property to 3rd parties or bonafide purchasers before the pending appeal is heard. Counsel referenced **section 12 of the Judicature Act and Gladys Mukula v Rosemary Nabukenya Civil Application no. 211 of 2020** to that effect.

Counsel further contended that the disputed land is located in a prime location in Seeta, a significant portion of which is the current address of the 3rd and 4th applicants since the 1970s and that it is great sentimental value to them, which value cannot be compensated for in monetary terms if the land is alienated and the appeal succeeds. Counsel submitted that since the applicants are still in possession of part of the disputed land on which they lay claim, stay of execution and injunctive orders are justified.

Counsel submitted that the status quo and balance of convenience lies with the applicants. He contended that there is need to preserve the status quo since the applicants are in physical possession of a significant portion of the disputed land on which they lay claim as kibanja owners. He added that the applicants established their homesteads, developments and families on the same.

Counsel further submitted that this application has been brought without unreasonable delay. He submitted that the applicants filed a substantive appeal expeditiously as required and discharged thus as they await the disposal of their appeal, it is necessary that the court grants them the orders sought.

Issue two: Remedies

Counsel reiterated his prayers in the orders sought in the notice of motion. He prayed for an order to stay execution of the orders of High Court Civil Application No. 61 of 2020, a temporary injunction restraining the respondents from dealing with the land till Civil Appeal No. 1021 of 2023 is disposed of and costs of the application.

Counsel for the respondent raised a preliminary objection that the application is incompetent and amounts to an abuse of court process. It was counsel's submission that the filing of this application directly to this court is procedurally irregular and tantamount to possible forum shopping. Counsel contended that it is settled and good practice that

the application ought to have been made to the High court, where the decision appealed from was first heard.

Further, that the applicants have not extracted or attached the decree under Civil Appeal No. 061 of 2021 whose implementation and execution they seek to stay. Counsel argued that the applicants have equally not attached any decree in their record of appeal, which substantially casts doubt over the competence of the appeal lodged before this court. Counsel cited **Barclays Bank of Uganda Ltd v Eddy Rodrigues SC Civil Appeal No. 5 of 1987**, where it was held that,

"It is well settled that no appeal lies to this court until the decree or order appealed from has been extracted".

Counsel implored this court to follow the above decision and find that appeal no. 1021 of 2023 is incompetent and in absence of the decree, it cannot be said that the applicants have an appeal before the court with a prima facie likelihood of success. He further argued that the applicants have not availed any evidence to prove that the respondent has initiated the process of execution. Counsel submitted that the documents attached to the affidavit of James Mudoola have no connection with the alleged subdivision of the disputed land by the respondent but are mere speculations. He contended that section 3 of the Land Act 1998 as amended permits a landlord to undertake any dealings with it without the consent of the kibanja owner. Counsel submitted that the 2010 amendment to the Land Act did away with the requirement of seeking consent from the tenant or occupant before undertaking any dealings in respect of reversionary interest. He

submitted that the applicants are seeking kibanja interest, which even if it had been established to exist on the disputed land would still be protected by law regardless of what the landlord does with and over the certificate of title to the land. He added that the alleged
5 subdivision alluded to by the applicants cannot affect their kibanja or purported interests and therefore the subdivision is not an execution of the decree of the High Court.

Counsel relied **Orient Bank Ltd v Fredrick J.K. Zaabwe & Anor Supreme Court Civil Application No. 19 of 2007**, where the Court
10 dismissed an application for interim stay of execution, having found that it was not proper to institute such an application where there is no evidence of any application for execution of a decree.

On the issue of remedies, counsel submitted that since the application
15 is speculative and premature as it seeks for orders of stay of execution when such execution has not been commenced, the court cannot be seen to issue superfluous orders based on mere speculation of execution by the applicants without evidence of there being any execution. Counsel prayed that the application be dismissed with costs
20 to the respondent.

In rejoinder, counsel for the applicants submitted that the preliminary point raised by counsel for the respondent that this application ought to have been filed in the High court first, lacks merit under rule 42 of
25 the CoA rules which only applies in instances when the high Court

delivers judgment in exercise of its original jurisdiction as a trial court and not as appellate court. Counsel found refuge in **Nakato Sarah v James Busonga (supra)** to that effect.

In response to the second preliminary objection that the applicants did
5 not extract a decree, counsel submitted that appeals from the High Court to the Court of Appeal are against the decisions of the court and not against decrees. Counsel contended that the dicta relied on by counsel for the respondent in **Barclays Bank v Rodrigues (supra)** is not relevant to the respondent's argument and is distinguishable on
10 grounds that in that decision, the contested appeal was filed out of time and as such it that was the basis on which the court found that the appeal was incompetent. He prayed that court dismisses the preliminary objections raised by counsel for the respondent.

For the rest of the grounds, counsel for the applicants reiterated his
15 earlier submissions.

Consideration of the Application

I have cautiously considered the Notice of Motion; the attendant affidavits together with the submissions and authorities cited by both
20 counsel and those not cited but are relevant to this application.

I will at the onset address the preliminary objection raised by counsel for the respondent. He contended that the applicant did not lodge this application for stay of execution in the High Court at Mukono, but he
25 instead chose to come straight to this court, which was irregular. I

believe counsel's submission was premised on **rule 42(1) of the Rules of this court** although he never referred to it in his submissions. This rule requires that such an application be brought before the High Court first. **Rule 42 (1)** provides that, **"Whenever an application**
5 **maybe made either in the court or in the High Court it shall be made first in the High Court."** In *Adonia v Mutekanga* 1970 EALR 429 at 432 it was to the effect that a court cannot invoke its inherent powers where a specific position of law exists that addresses that particular situation. Further in *Okonga Rashid v Byenkya Amos* CA
10 **Civil Application No. 977 of 2023**, posited that:

"It is now settled law that this Court and the High Court have concurrent jurisdiction in this matter. It appears to me that applications of this nature should first be filed in the High Court as a general rule, and should only be filed in
15 **this court where exceptional circumstances exist."**

Similarly, in *Augustine Mukiibi v Hosana Evengelist Mission & Ors* CA Civil Application No. 295 of 2017, Elizabeth Musoke JA (as she then was) while faced with a similar situation, had this to say:

20 **"The reason advanced by the applicant as to why he did not comply with the provisions of Rule 42(1) of the Rules of this court was that it was not a mandatory requirement, and the court could follow sub rule 2 of Rule 42 in an application made under Rule 6(2) of the Rules of this court. I find that**
25 **sub-rule 2 (supra) is subject to sub-rule 1 and an application ought to have been made to High Court first, or else special circumstances ought to have existed to warrant the application to this court without complying with Rule 42(1).**

It was not the case in the present matter. Having failed to demonstrate any rare or special circumstances for not making this application in the High Court first, the applicant has failed to show sufficient cause to justify grant of an interim order of stay of execution in this case under Rule 42(2) of the Rules of this Court. I, therefore, allow the preliminary objection by counsel for the respondent and hereby dismiss Civil Application No. 295 of 2017 with no order as to costs."

In the instant case, the applicants did not indicate in their affidavits or otherwise that they tried to apply for stay of execution in the High court and were denied, neither have they shown that there were special circumstances that forced them to file this application in this court instead of the High Court first. In his rejoinder, counsel for the applicants sought to rely on rule 2(2) of the Court of appeal rules, which gives this court inherent powers to grant any orders it deems just. I must however emphasize that rule 2(2) should not be pleaded to defeat the objectives of the law. Parties should not flaunt the rules of procedure only as an escape route. I find the applicant to be in abuse of the processes of this court. The main application for stay of execution in CL No.1013 of 2023 is herewith dismissed. As a result, the interim application CL No. 1015 of 2023 is rendered nugatory and is also dismissed. In both applications, no order is made as to costs.



CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

29th JAN 2024