THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISCELLANEOUS APPLICATION NO. 1637 OF 2021
(ARISING FROM MISC. APPL NO. 505 OF 2021)
ALL ARISING FROM CIVIL SUIT NO. 511 OF 2013

1. RUTAJENGWA ELISTARIKO
2. TUSIIME JANAT ::: APPLICANTS

VERSUS

SANYU SCOVIA GATETE::: RESPONDENT

BEFORE: THE HON. JUSTICE DR. FLAVIAN ZEIJA

RULING

This application is for stay of execution. It is brought by way of Notice of Motion under S.98 of the CPA, S.33 of the Judicature Act, Order 43 R4 and O.52 of the Civil Procedure Rules S.I 71-1. It is seeking for orders that:

a) *Execution of the orders of the Principal Judge in Miscellaneous Application No. 505 of 2021 arising out of Civil Suit No. 511 of 2013 be stayed pending the final disposal of the Applicants' intended appeal and;*

b) *Costs of this application be provided for.*

The application is supported by the affidavits of the 1st & 2nd Applicants. Briefly, the grounds upon which this application is anchored are:

a) *The Applicants have filed and served a notice of appeal and an application for the record of proceedings on the Respondent's Counsel.*

b) *The intended appeal has high chances of success.*

c) *There is an imminent threat and danger of execution of the orders of the court if stay is not granted.*

d) *The Applicants' intended appeal will be rendered nugatory if a stay of execution is not granted.*

e) *The application has been made without unreasonable delay.*

f) *The Applicants are ready to deposit security for due performance of the decree as may ultimately be binding on them, and*

g) *It is just and equitable that this application be granted.*

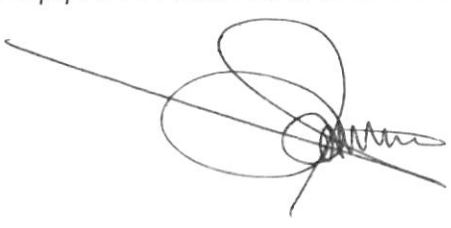
In opposition to the grounds in support of the application, the Respondent deponed that;

a) *This application is frivolous, vexatious and an abuse of court process.*

b) *The application is incompetent since there is no pending appeal.*

c) *The Applicants do not have an automatic right of appeal in the matter and their notice of appeal is therefore, incompetent.*

d) *The intended appeal has no likelihood of success.*



e) The application is overtaken by events since the caveats lodged on the properties were vacated by the Commissioner Land Registration.

f) That all the orders of court save for the orders of the Commissioner Land Registration are non-executable and the Applicants face no threat of execution of the orders of court.

g) The averments made by the Applicants are mere speculations and not actual threats to warrant grant of an order for stay of execution.

h) The balance of convenience is in favor of dismissing this application.

i) That if this court is inclined to grant the application for stay of execution, the Applicants should be ordered to deposit UGX. 5,000,000,000 (Five Billion Shillings) as security for due performance of the decree.

j) The Respondent has not brought any buyers on the suit properties nor offered any property for sale.

k) The Applicants have without reasonable cause made several attempts to deny payment of general damages in a bid to delay enjoyment of the Respondent's successful litigation.

l) The Applicants will not suffer any irreparable or substantial loss if the general damages as per the High Court decree are paid.

m) It is in the interest of justice that this application is dismissed with costs as it has absolutely no merit.

In rejoinder, the Applicants deponed that;

a) *The Respondent hurriedly and irregularly processed an order from the court's ruling on review without sending it to opposite Counsel for approval as required by law.*

b) *That this court has power to stop further transfers and preserve the titles in the name of the Respondent (who is the target of appeal) until the appeal is disposed of.*

c) *From the time the application was filed, the Applicants made several efforts to obtain copies of proceedings in order to lodge the appeal but has not succeeded to-date.*

Representation

At the hearing of this application, the Applicants were jointly represented by Kahuma, Khalayi & Kaheeru Advocates. The Respondent was represented by CMS & Co. Advocates (formerly C. Mukiibi Sentamu & Co. Advocates).

The Law

The principles under which an application of stay of execution can succeed were well espoused in the Supreme Court decision of ***Lawrence Musiitwa Kyazze vs. Eunice Busingye, Supreme Court Civil Application No. 18 of 1990,*** but more pronounced in the Supreme Court Case of ***Hon. Theodore Ssekikubo & Ors vs. The Attorney General & Ors, Constitutional Application No. 03 of 2014.*** They include:

1. *The applicant must show that he lodged a Notice of Appeal.*

2. *That substantial loss may result to the applicant unless the stay of execution is granted.*

3. *That the application has been made without unreasonable delay.*

4. *That the Applicant has given security for due performance of the decree or order as may ultimately be binding upon him.*

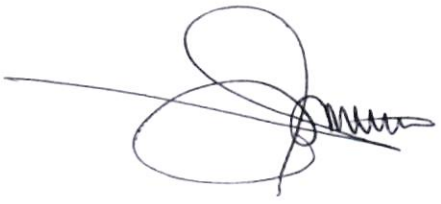
The Court of Appeal in ***Kyambogo University vs. Prof. Isaiah Omolo Ndiege, CA No.341 of 2013*** expanded the list to include:

5. *There is a serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory.*

6. *That the Application is not frivolous and has a likelihood of success. That the refusal to grant the stay would inflict more hardship than it would avoid*

Preliminary point of law

From the onset, Counsel for the Respondent raised a preliminary point of law for court's consideration before delving into the merits of this application. He submitted that this application is premised on a Notice of Appeal filed on 11th November 2022 in respect to an intended appeal against Miscellaneous Application No. 505 (arising out of Civil Suit No. 511 of 2013). That the said Miscellaneous Application No. 505 of 2021 was an application for review whose decision cannot be appealed as of right without leave of court. Contrariwise, Counsel for the Applicants submitted in rejoinder that it is only when an application for review has been denied that a party wishing to appeal that denial has to obtain leave of court.



The enabling provisions in regard to this preliminary objection is Order 44 rules 1,2,3 & 4 of the Civil Procedure Rules S.I 71-1. Order 44 rule 1(1) which provides for appeals from Orders as follows;

1. Appeals from orders.

(1) An appeal shall lie as of right from the following orders under section 76 of the Act—

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court;

.....

.....

(h) an order under rule 4 of Order XLVI granting an application for review;

(2) An appeal under these Rules shall not lie from any other order except with leave of the court making the order or of the court to which an appeal would lie if leave were given.

(3) Applications for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from.

(4) Application for leave to appeal shall be by motion on notice.

Of interest to this application is Order 44 rule 1(1)(f) and rule 2 which are to the effect that an order made under rule 4 of Order XLVI granting an application for review shall be appealed as of right and that an appeal from any other Order of court not listed under Order 44 rule 1(1) shall only lie except with leave of court. A strict reading of the heading of the said Order 46 rule 4 would suggest that the rule is exclusive to applications for review which are granted by the same judge who passed the decree and not any other judge. The far-reaching implication of such an interpretation would mean that in a

review application, orders granted by the same judge who passed the decree are appealable as of right while orders by a different judge in similar circumstances and of similar jurisdiction are only appealable with leave of court.

The question then would be; Is there an automatic right of appeal for a party aggrieved by an order of the judge granting a review application other than the judge who passed the decree? Counsel for the Respondent was of the position that since the order being challenged by the Applicants was not passed by the same judge who passed the decree, the Applicants have no automatic right of appeal. Counsel for the Applicants on the other hand was of the view that it is of no consequence whether an application for review is granted by the same judge who passed the decree or not as long as the application for review was granted by a judge, the right to appeal is automatic.

Order 44 rule 1 (2) is couched in mandatory terms and any deviation therefrom would automatically render inexistent any Notice of Appeal lodged without leave of court. The right of appeal is a creature of statute and must be given expressly by statute and the requirement for leave is intended to act as a check on unnecessary and frivolous appeals. ***Lane v. Esdaile (1891) A.C. 210 at 212*** **and** ***Ex parte Stevenson (1892) 1 Q.B. 609***.

The law under Order 44 rule1(2) envisages that review is a reconsideration of the same subject matter by the same court and by the same judge. Certainly, the same judge who passed the decree is better suited to correct any error or mistake on the face of the record and he or she is moreover in an advantaged position to remember what was earlier argued before him/her and what was not argued. To give such interpretation however would create an absurdity. The words "the same Judge" implies a court that passed the Judgement. There are instances where the same "judicial officer" may not be available due to death, retirement, transfer or where for

administrative reasons, the application is allocated to a different Judge. Such other unexpected or unavoidable causes which might prevent the judge who passed the order from reviewing it. Such exceptional cases are allowable only ***ex necessitate*** and in those cases his/her successor or any other judge of concurrent jurisdiction may hear the review application and decide the same as though he/she were the same judge that passed the decree. *See;* ***Rwehuta & 9 Ors v Tumwijukye & 13 Ors (Miscellaneous Application 152 of 2020).*** My view therefore is that for as long as a judge of similar jurisdiction issued the orders in review, the same lie within the confines of Order 44 rule 1(1) (h) and the same enjoy the right of automatic appeal as of right. In the circumstances therefore, I find that the preliminary point of law is without merit. I now turn to consider the merits of the application.

Consideration of the application on merit

The 1st principle: *The Applicant must show that he lodged a Notice of Appeal.* I refer to paragraph 10 of the 1st Applicant's affidavit in support of the Application wherein the 1st Applicant deponed that the Notice of Appeal had been filed and a copy thereof attached. On inspecting the attached Notice of Appeal, it is evident to me that the Notice of Appeal was filed on 11th November 2021 approximately two Weeks after the decision and Orders of the High Court in Miscellaneous Application No. 505 of 2021. This was a period well within the timelines for filing a Notice of Appeal. I therefore, find that the Notice of Appeal was competently lodged as required by law.

The 2nd Principle: *That substantial loss may result to the Applicant unless the stay of execution is granted.* I refer to the case of **Tropical Commodities Supplies Ltd & 2 Others v International Credit Bank (in Liquidation) [2004] EA 331** that:

"The term substantial loss doesn't represent any particular amount or size; it cannot be quantified by any particular mathematical formula. It refers to any loss great or small, of real worth or value as distinguished from a loss that is merely nominal."

Similarly, substantial loss has been defined in several other English authorities as *something of real worth and importance, not seeming or imaginary or illusive. Something worthwhile as distinguished from something without value or merely nominal.* ***See: Seglem v Skelly Oil Co., 145 Kan. 216 P.2d 553, 554, and the case of; In Re Krause's Estate, 173 Wash. 1, 21 P. 2d 268.*** In Miscellaneous Application No. 505 of 2021 from which the present application arises, this court made orders with the effect that the Applicants were not entitled to claim in the suit properties several of which included; FRV 584 Folio19 Plot 35 Nakivubo Road, LRV 3550 Folio 21 Plot 24Mackay Road Kampala, FRV 454 Folio 19 Plot 27 Martin Road Kampala and account balances on DFCU Bank Account No. OIL6020131100. If these are disposed of by the Respondent, no doubt the Applicants would suffer substantial loss should this court find merit in this application.

The 3rd principle: *That the Application for stay of execution should be made without unreasonable delay*. It is clear from the record that the instant Application was filed in court on 30th November 2021 close to one month after the decision and Orders of Court in Miscellaneous Application No. 505 of 2021. I find that the Application for stay of execution has been brought without unreasonable delay.

The 4th principle: *That the Applicant has given security for due performance of the decree or order as may ultimately be binding upon him/her.* I have held in several decisions before that in determining whether or not security for costs is a requirement in an application for stay of execution, each case ought to be weighed on its own merits. Particularly in the case of ***John Baptist Kawanga v.***

Namyalo Kevina & Anor (Miscellaneous Application No.12 of 2017) cited by Counsel for the Applicants, I stated that;

> ***"I am of the view that every application should be handled on its merits and a decision whether or not to order for security for due performance be made according to the circumstances of each particular case. The objective of the legal provisions on security for due performance, was never intended to fetter the right of appeal. It was intended to ensure that courts do not assist litigants to delay execution of decrees through filling vexatious and frivolous appeals. In essence, the decision whether to order for security for due performance must be made in consonance with the probability of the success of the appeal. There can never be cases with similar facts. As it was held in the case of Hon Theodore Sekikubo cited above, the nature of decision depends on the facts of each case, as situations vary from case to case. I am persuaded by the decision of my sister Judge Hon Lady Justice Wolayo In Amuanaun Sam Vs Opolot David MA No 3 of 2014 that the status of the applicant should be put into consideration in order to decide whether security should be ordered or not. The applicant is a senior advocate in this country and I believe he appreciates the effect of not honoring his legal obligation on his credibility as well as his practice. In effect, I shall not order for security for due performance."***

In the instant Application, the Applicants expressed commitment to deposit security for costs as may ultimately be binding on them as a sign of their desire to have justice done in this matter. On the other hand, the Respondent deponed that the Applicants should deposit UGX. 5,000,000,000 (Five Billion Shillings) premised on the value of the subject matter, as security for costs if court be inclined to grant this application.

Having considered this application as a whole, the decision whether or not to order security for costs will depend on the success of this

application in finality. I will therefore, first consider to finality the other principles for granting an application for stay of execution.

The 5th principle: *That there is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory*. It is indeed the paramount duty of a Court to which an application for stay of execution pending an Appeal is made to see that the Appeal, if successful, is not rendered nugatory: ***See: Wilson v Church (1879) 12 Ch.D 454.*** In the instant application however, it would appear that execution already partly ensued as the current search reports attached to the Respondent's affidavit in reply indicate that caveats lodged on the suit properties were already vacated by the Commissioner Land Registration in compliance with the court Orders in Miscellaneous Application No. 505 of 2021. I find that this application has been overtaken by events in respect to the order for removing caveats from the suit properties. However, there are no steps that have been taken to execute the Order as to general damages which the Applicants were ordered to pay to a tune of UGX. 100,000,000 (One Hundred Million Shillings).

The 6th principle: That the application is not frivolous and has a likelihood of success. At this stage, it is not necessary for me to look at the merits of the Appeal substantively as this would be a preserve of the Appellate Court. What suffices is a determination whether there are grounds of appeal meriting adjudication by the Appellate Court. I am mindful that there need not be a Memorandum of Appeal before me to decipher what the Applicants allude to as their possible grounds of appeal. The applicant however needs to make skeletal arguments to convince court that the appeal has a high likelihood of success and is not frivorous. In this application however, the Applicants simply reproduced the Orders of this court in Miscellaneous Application No. 505 of 2021 but made no effort to show any substantial questions sufficiently important for the determination of the appellate court. This Court expected the Applicants to point out in their pleadings in the instant application, any unfairness or injustice

that may have been occasioned in the determination of the application for review, which would constitute grounds of appeal to be determined by the Court Appeal. However, this was not done. Counsel for the Applicants did not save the situation in his submissions to this court either. He simply made an unsubstantiated claim that while handling the application for review, this court acted like an appellate court. He did not labor to demonstrate in what aspects this court may have assumed the powers of the appellate court. Consequently, the application is frivolous and devoid of merit.

In the end result, I find no merit in this application. I hereby dismiss it with costs to the Respondent.

Dated at Kampala this 11th day of July 2022

Flavian Zeija (PhD)

PRINCIPAL JUDGE