THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUKONO

MISCELLANEOUS APPLICATION NO.171 OF 2021

(Arising from Miscellaneous Application No. 86 of 2018

and Civil Suit No. 75 of 2013)

SUGAR CORPORATION OF UGANDA LIMITED.....APPLICANT

VERSUS

1. SENDEGE GEORGE
2. ASUMAN BAWALENKENDI KIZITO
3. NAMUTEBI ERON
4. NAKIGUDDE FLORENCE KINTU
5. NABUNJO MANGYERI:::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: THE HON. JUSTICE DR. FLAVIAN ZEIJA

RULING

This application is for stay of execution. It is brought under S. 64(e)& 98 of the CPA, S.33 of the Judicature Act, Order 43 Rule 4, Order 44 Rule 1(2),3 and 4, Order 52 Rules 1and 3 of the Civil Procedure Rules S.I 71-1.

It is seeking for orders that:

a) The execution and enforcement of the Ruling and Orders of this Honorable Court issued in Miscellaneous Application No. 86 of 2018 (arising out of Civil Suit No. 75 of 2013) be stayed pending the hearing and determination of the Applicant's Appeal against the said ruling and orders to the Court of Appeal.

b) Leave be granted to the Applicant to lodge an appeal in the Court of Appeal against the decision of Hon. Justice Batema N.D.A delivered on the 7th April 2021, in Miscellaneous Application No. 86 of 2018

c) Costs of this Application be provided for.

The application was supported by the affidavit deponed by Mr. Ronnie Kyazze, the Applicant's Head Legal /Company Secretary. Briefly the grounds in support of the application are that;

1. The Applicant is aggrieved by the ruling and orders issued in Miscellaneous Application No. 86 of 2018 wherein court ordered that all subsisting titles created out of the suit land to wit; FC 7240 of 407.75 acres of Samwiri Kiwanuka Katiginya and FC 9064 of 474 acres of Misusera Kamya Omukabya be cancelled by the Registrar of Titles and that the Registrar of Titles be ordered to register the 1st to 4th Respondents(applicants therein, for FC 9064 of 474 acres and the 5th Applicant for FC7240 of 407.75 acres in Mailo Tenure.

2. The Applicant has through its lawyers, M/S H&G Advocates filed before this court a Notice of Appeal and a letter dated 16th April 2021applying for a typed copy of typed and certified ruling and order and a copy of the certified record of proceedings in the above matter to be able to formally file the appeal.

3. The Applicant was surprised to learn that on page 3 of the ruling in MA 086 of 2018, an order was granted to the Respondents on 7th April, 2021 to proceed ex-parte for failure to file a reply within the prescribed time, yet Counsel for the Applicant had on the same day intimated to court presided over by the Learned Registrar that he intended to raise points of law against the grant of the application whereupon the matter was adjourned to Monday 19th April 2021 at 9.00 am for hearing.

4. That the Applicant's intended appeal has high and reasonable chances of success with valid grounds of Appeal which merit serious judicial consideration by the Court of Appeal interalia that;

   a) The Learned Trial Judge erred in law and fact when he failed to find that the application for review was incompetent for having been served outside the time prescribed by law without any extension being sought within 15 days after the expiry of the 21 days prescribed.
   b) The Learned Trial Judge erred in law and fact when he found that the Applicant (Respondent therein) had put himself outside the jurisdiction of Court for failure to file a reply yet the Applicant's Counsel was on 24th February, 2021 in court and ready to oppose the grant of the application on grounds of points of law that did not require filing of an affidavit in reply.
   c) The Learned Trial Judge erred in Law and fact when he on 12th April, 2021 issued and executed the extracted Order in the matter that included an order ***"That the Respondents give vacant possession of the suit land to the Applicants"*** when the said particular order was not any of the orders in the ruling delivered on 7th April, 2021.
   d) The Learned Trial Judge erred in law and fact when he issued the above said order when he was functus officio and further without being moved for consequential orders by the Applicant.
   e) The Trial Judge erred in law and fact when he erroneously held that there was no evidence that the Governor had paid the consideration to Mr. Kamya for the suit land when there was no any obligation on the part of the Governor or the Protectorate Government to make any payment or consideration to Mr. Kamya in acquisition of the suit land.
   f) The Learned Trial Judge erred in law and fact and reached an erroneous finding that there was a lease for 99 years in favor of the Applicant which has expired whereas not.
   g) The Learned Trial Judge erred in law and fact when he failed to find that the alleged unpaid consideration (which is denied) if any was purportedly due on 24th September, 1912 and hence the

Respondents' suit only filed in 2013 was barred by the Law of Limitation and hence untenable.

h) The Learned Trial Judge erred in law and fact when he allowed the application for review without determining satisfying himself that the Respondents had discovered any new and important matter or evidence which was not in their knowledge by the time the decree or judgment in H.C.C.S No. 75 of 2013.

i) The Learned Trial Judge erred in law and fact when he erroneously found that the Applicant was a trespasser on the suit land for over 60 years without considering that the Applicant was a bonafide purchaser for value.

j) Having found that the Applicant was not party to the alleged fraud, the Trial Judge erred in law and fact when he went on to order for cancellation of title in FRV 64 Folio 18 at Kasenso whose title is unimpeachable unless fraud is attributable to the registered proprietor.

5. The Respondents have already submitted and delivered a copy of the order to the Commissioner Land Registration for cancellation of the Applicant's title

6. That if an order of stay of execution is not granted as prayed herein, the Commissioner Land Registration will proceed to cancel the Applicant's title to the Applicant's substantial detriment and prejudice and the cancellation will render the Appeal nugatory.

7. The Applicant's land forms the heart of the Applicant's sugar cane business with chunks and chunks of sugar cane plantations thereon, a staff camp and stores and hence the Applicant is bound to suffer irreparable and substantial loss of grown sugar cane, loss of 882.39 Acres of land and livelihood if a stay of execution is not granted.

8. The title for the suit land was pledged by the applicant to M/s Bank of Baroda to secure substantial credit sums that were granted to the Applicant to run its business and the order for cancellation of title will

dislodge the mortgage on the title and hence render the said credit facilities due and payable immediately and this will further cripple the Applicant Company completely.

9. The Applicant will suffer a substantial and un imaginable huge economic loss that is irreparable and can never be atoned for in damages whatsoever if the stay of execution of the said orders is not granted immediately.

10. That if execution is not stayed, the Applicant's title to the suit land will be cancelled and the Applicant evicted from the said land, rendering the appeal nugatory.

11. This application has been brought without undue delay

The grounds in opposition are contained in the affidavit in reply deponed by Busuulwa Francis, an Attorney to the 5th Respondent, acting on the Powers of Attorney granted to him to prosecute this matter on behalf of the 5th Respondent. The affidavit in reply in respect to the 1st to 4th Respondents was deponed by King Rogers Murungi on the authority of powers of Attorney granted to him by the 1st to 4th Respondents. Briefly, the grounds which are similar for all the defendants combined are that;

1. That the present application is barred in law on grounds that;

    a) The court order was already fully executed on 19th April, 2021 before the filing of an application for interim order which was filed on 21st April, 2021 and issued on 11th May, 2021.
    b) The court order had further been executed by the Registrar of Titles in favor of the 5th respondent by creating a Mailo certificate of title for her under Kyaggwe Block 171 Plot 1 for the decreed 407.75 acres (165.0142 hectares) and she has since transacted on the land by subdividing it and selling to various third parties who got their respective certificates of title.

c) That a party in a court cause who is dissatisfied with an exparte judgment / ruling and orders thereof can only apply to the same court to set aside or vary judgment / ruling upon such terms as may be just, but not to apply for leave to appeal, hence the Notice of Appeal and intended leave to appeal are legally inconsequential as no appeal can lie.

d) It is trite law that a party who does not file a defense puts himself or herself out of court which does not wait for him or her to raise a point of law not raised in a pleading.

e) The application discloses no reasonable Cause of Action against the Respondents because the Applicant neither appeared nor applied for a review of the judgment cancelling its freehold certificate of title FRV 64 Folio 18 in the head suit No. 75 of 2013.

f) The Applicant also lacks locus standi to file this application since it no longer has legal interest, neither in the expired lease nor in the FRV cancelled certificate of title, which has twice been cancelled.

g) Though the Applicant is still in possession of the suit land, it is in trespass as declared in the ruling and a mere declaration is neither executable nor capable of being stayed.

In a rejoinder, the Applicant deponed that;

1. The mandate given to the Busulwa Francis in the power of Attorney to swear an affidavit on behalf of the 5th Respondent, if any, was given in respect of Civil Suit No. 165 of 2012 and not Civil Suit No. 75 of 2013 from which the instant proceedings arise. Accordingly, there is no affidavit in reply duly filed by the 5th Respondent in the instant matter.

2. The Certificates of Title purportedly created for land comprised in Kyaggwe Block 171 Plot Nos. 1 and 37 at Namasagga are not titles created pursuant to the court order in Misc. Application No. 86 of 2018 wherein Court ordered for the creation of Mailo titles in favor of the Respondents

3. Instead, the said titles which are believed to be unauthentic are purportedly created under the judgment of this Honorable Court in Civil Suit No. 75 of 2013 wherein court did not order for creation of Mailo Titles but rather a Leasehold title for 99 years in favor of the Applicant Company.

4. It is therefore not true that the application for stay of execution of the Orders in Miscellaneous Application No. 86 of 2018 has been overtaken by events. Further, the Applicant is still in possession of the suit land, a fact acknowledged by the Respondents.

5. The purported Certificate of Title for land comprised in Kyaggwe Block 171 Plot 37 land at Namasagga was purportedly issued and registered in the name of the 5th Respondent on 23rd April 2021 yet the Survey Deed Plan for the same land was only created and issued by both the Cartographer and Commissioner Surveys and Mapping on 15th June 2021 well after the certificate of title was purportedly issued which is highly erroneous, irregular and unauthentic.

6. The interim Order for stay of execution of this Court issued by the Hon. Principal Judge on 11th May 2021 staying the execution and enforcement of orders in MA. No. 86 of 2018 was duly communicated to the Commissioner Surveys & Mapping and the Registrar Mukono before the said deed plans were created and issued on 15th June 2021.

7. The irrevocable Powers of Attorney purportedly granted to a one Rogers Murungi by the 1st -4th Respondents on 4th January 2019 was in respect of purported land comprised in FC 9064 and PC No. 6840 which was non-existent as found by this court in its judgment in HCCS No. 75 of 2013. As such, the said powers of attorney were premised on a nonexistent subject matter.

8. The Certificate of Title for land comprised in Kyaggwe Block 171 Plot 2 at Kasenso believed to be unauthentic is purportedly issued under the orders of court in HCCS No. 75 of 2013 wherein court ordered for creation

of a 99 year lease for the Applicant. The same applies to purported Block 171 Plot 17 annexed as R6 to the affidavit in reply for the 1st-4th Respondents and which was purportedly issued on 16th June 2021 way after this court had already issued an interim order for stay of execution of orders in MA. No. 86 of 2018.

9. It is false for the deponents of the said affidavits in reply to state that the orders in M.A No. 86 of 2018 have since been executed as ordered by court whereas not.

10. The Applicant has a right and locus to file the instant application since the Applicant is entitled to its leasehold interest in the suit land for a period of 99 years as decreed by court in H.C.C.S No. 75 of 2013.

Representation

M/s H & G Advocates represented the Applicant

M/s The Muhwezi Law Chambers Advocates represented the Respondents.

Preliminary points of Law

From the onset, the pleadings of both parties to this application raise some pertinent preliminary points of law which this court is enjoined to dispose of first. The immediate point of law raised by Counsel for the Respondents is that the orders of court were fully executed on 19th April, 2021 way before the filing on 19th April, 2021 and grant of the interim application for stay of execution on 11th May 2021. Counsel for the Applicant disputed the authenticity of the Certificates of Title purportedly issued in execution of court's orders. He submitted that the impugned Titles were not issued pursuant to the orders in M.A No. 86 of 2018 and invited court to examine the entries on the Titles attached for Kyaggwe Block 171 Plot. Nos. 1, 2, 17

and 37 which show that the fictitious Titles were issued pursuant to the Order in Civil Suit No. 75 of 2013 and not orders in M.A No.86 of 2018.

Upon examining the record, I notice that the only order capable of being executed altering entries on Certificates of Title in regard to Civil Suit No. 75 of 2013 is on page 27, where the trial judge directed that the Commissioner Land Registration cancel the Defendant's Title (Applicant's herein) in respect of the free hold tenure and the same should be substituted with a leasehold tenure from the relevant authority for a period of 99 years. It therefore follows that no other entry or cancellation can by virtue of the orders arising from Civil Suit No. 75 of 2013 can be allowed to stand as it would be non-existent. On the other hand, the orders arising out of Misc. Application No. 86 of 2018, **extracted and signed on 12th April 2021** are to the effect that the suit land reverts to the Respondents and that all subsisting Titles Certificates of Title thereon be cancelled by the Registrar of Titles.

The question to determine at this stage is whether the purported cancellations and entries of Mailo interest on Block 171 Plots 1, 2, 17 & 37 were made by virtue of the orders arising from Civil Suit No. 75 of 2013 or M.A No.86 of 2018.

First, the entry on Block 171 Plot 1, was made on **23rd April 2021** in favor of the 5th Respondent. Secondly, the entry on Block 171 Plot 2 was made in favor of the 1st -4th Respondents on **23rd April 2021**. Both entries on Plot 1 and 2 were made by virtue of the orders purportedly arising out of Civil Suit No. 75 of 2013.

Thirdly, the first entry on Block 171 Plot 17 was made in favor the 1st -4th Respondents as joint tenants on **16th June 2021** and later transferred to a third party on **12th July, 2021.**

Fourthly, the entry in Block 171 Plot 37 was made in favor of the 5th Respondent on **23rd April 2021** by virtue of court order in Civil Suit No. 75 of 2013 and later transferred to a third party on **6th July 2021.**

By letter dated 14th April, 2021, the Commissioner Land Registration wrote to the Registrar High Court at Mukono requesting for a confirmation and authentication of the orders in Misc. Application No. 86 of 2018. There is no record of the Registrar issuing the requested confirmation, the basis of which the Commissioner Land Registration intended to act on the orders of court in M.A No. 86 of 2018. Just one Week after the said letter of inquiry on **21st April 2021** is when the Applicant filed the present application. One then wonders on what authority the Commissioner Land Registration could have acted if at all.

However, what is clear is that this court issued an order for interim stay of execution on 11th May 2021 and the same was duly served on the Commissioner Land Registration and received on **14th May 2021.** It is also evident that the purported entries on Plot 1& 2 were supposedly made on the foundation of Civil Suit No. 75 of 2013 which does not contain any such orders for the impugned entries. As such this court does not recognize the impugned Titles as authentic legal instruments. The entries on Plot 17 and 37 suffer the same fate for being purportedly entered when there was an interim order for stay of execution duly brought to the attention of the Commissioner Land Registration and still subsisting. I am unable to agree with Counsel for the Respondents that such perpetuations could have been effected without foul play. The Respondent's preliminary point of law that the orders of court in M.A No. 86 of 2018 were already fully executed fails with the greatest contempt that it deserves. If anything was done to achieve the purported maneuvers at the Land Registry in Mukono, whatever was done was done to the detriment of the Respondents and the subsequent transferees of such maneuvers.

The second point of law raised by Counsel for the Respondents is that the Applicant has no locus standi to file the instant application on the basis of having lost its right in the suit property by reason of the promulgation of the 1995 Constitution which did not allow non- Ugandan citizens to own freehold interest in land. Moreover, the Applicant obtained the said freehold title in 2007 against the spirit of the constitution.

Whereas I agree that by law, non-Ugandan citizens cannot own freehold interest, I do not agree that it necessarily deprives them of the right to own any other interest in land. To say that the Applicant has no locus standi would tantamount to saying that the Applicant has no case worth listening to. I am unable to agree. The Applicant has a legal grievance which this court is enjoined to grant audience in light of the sacrosanct right to a fair hearing enshrined in the Constitution of Uganda, 1995. It is in the interest of justice that the Applicant who is incidentally still in possession of the suit land be given their day in court to explain the circumstances under which the freehold title was granted in favor of the Applicant who is a non-citizen. The preliminary point of law on lack of locus standi fails.

The third preliminary point of law by the Respondents is that a party who is dissatisfied with an ex-parte judgment/ruling and orders thereof can only apply to the same court to set aside or vary the judgment but no appeal can lie. It is my considered view that it is not for courts of law to dictate to aggrieved parties what course of post judgment remedy they should consider. The parties should be given the leeway to decide what post judgment remedy better suits their intended expectations. The authority of ***Mohammed Albhai vs. W.E Bukenya Mukasa & Anor, Civil Appeal No. 56 of 1996*** cited by Counsel for the Respondents in support of his contention has nothing similar to the facts of the present application. In that case the Supreme Court was considering whether or not the appellant not having been a party in the original proceedings which resulted in the consent judgment sought to be reviewed had no right to present the application for review under Section 83 and 101 of CPA and Order 42 r 1of the Civil Procedure Rules. The preliminary question in the present application to which I have already rendered an answer is whether a party aggrieved by an ex parte judgment /ruling has a right to apply for leave to appeal against the judgment /ruling and the orders arising therefrom.

The fourth preliminary point of law is that a party who does not file a defense puts himself or herself out of court which does not wait for him or her to raise a point of law not raised in the pleading. Counsel for the Applicant submitted that the order to proceed ex-parte in Miscellaneous Application No.86 of 2017 was issued by the trial judge on 24th February 2021 when the same day in the morning, the Applicant's Advocate had appeared before the Learned Registrar in the presence of the Respondents' Advocate and informed court that an affidavit in reply had not been filed since the Applicant (Respondent therein) intended to raise points of law.

I disagree with the assertion that a party who does not filed an affidavit in reply cannot to raise a point of law which was not raised in the pleadings. It must be emphasized from the onset that this case relates to a land dispute. It is now a cardinal principle of the law that land matters should be resolved on merits and the substance of the dispute be investigated on merits. In the case of **Alhaji Yahaya Balyejusa vs. Development Finance Ltd CACA No. 34 of 2000**, the Court of Appeal held that it is a cardinal principle as far as possible as litigation of land matters is concerned, they should be resolved on merits. The court of appeal in Alhaji Yahaya Balyejusa vs. Development Finance Ltd (supra) cited with approval the case of **Nicholas Rousous Vs. Gulam Hussein Habib SCCA No. 9/1993** where it was held that administration of justice requires that the substance of the disputes be investigated on their merits and that errors, late filings of court pleadings and lapses should not necessarily debar a litigant from pursuing his right. See also the case of **Fredrick Kabugo Sebugulu vs. Administrator General Court of Appeal Civil Appeal No. 69/2010**, where the Court of Appeal cited with approval the case of Alhaji Yahaya Balyejusa vs. Development Finance Ltd (supra). Therefore, the fact that Counsel for the Applicant insinuated to the court that the Applicant intended to raise preliminary points of law was sufficient testimony that the Applicant had intentions to participate in the proceedings. Consequently, the trial judge was in violations of the Applicant's right to be heard under Article 28 of the Constitution when he proceeded in the matter ex parte thereby denying the Applicant the right to be heard.

In any case an illegality once brought to the attention of court must be dealt with. **The case of Makula International Ltd vs His Eminence Cardinal Nsubuga & Anor Civil Appeal No. 4 of 1981** which is also still good law is to the effect that a court of law cannot sanction what is illegal, and illegality once brought to the attention of court overrides all questions of pleading, including any admission made thereon. Since it had been brought to the attention of court that there was a point of law to be raised, it was wrong for court to dismiss such request without a hearing. To do so would amount to sustaining an illegality on court record. For the reasons fore stated, this preliminary point of law equally fails. In any case, the civil procedure rules are very clear. If a party intends to raised a point of law, he does not have to file a defence. He instead notifies court of the intention to raise a point of law.

In the affidavit of Mr. Ronnie Kyazze for the Applicant, the Applicant contested the powers of attorney which the deponents for the Respondents relied on to be clothed with authority to depone the said affidavits in reply. First, the affidavit sworn by Busuulwa Francis for the 5th Respondent was contested on the ground that it was in respect of Civil Suit No. 165 of 2012 and any applications and appeals arising therefrom and not Civil Suit No.75 of 2013 from which the instant proceedings arise. The affidavit of King Rogers Murungi was equally protested on grounds that the power of attorney was granted to him in respect of land comprised in FC 9064 and PC No. 6840 which was allegedly nonexistent at the time. Counsel for the Applicant invited court to strictly construe the powers of attorney to give them their ordinary meaning while Counsel for the Respondents seemed to adopt a wider interpretation to the effect that since Civil Suit No. 165 in respect of which the Powers of Attorney was granted stayed in favor of Civil Suit No. 75 of 2013 where in the 5th Respondent's claim was still in issue, the said powers of attorney should be construed to also cover Civil Suit No. 75 of 2013. As regards the affidavit of King Rogers Murungi for the 1st to 4th Respondents, Counsel for the Respondents submitted that land comprised in FC 9064 and PC 6840 existed by 4th January 2019 when powers of attorney were made in favor of King Rogers Murungi jointly with another. That FC 9064 is reflected in the ruling in Misc. Application No. 86 of

2018 at page 5 paragraph 2 and this FC is what was decreed in Misc. Application No. 86 of 2018 in favor of the 1st-4th Respondents.

I have considered submissions by both counsel and I opine thus;

Section 146(1) of the Registration of Title Act states:

"(1) The proprietor of any land under the operation of this Act or of any lease or mortgage may appoint any person to act for him or her in transferring that land, lease or mortgage or otherwise dealing with it by signing a power of attorney in the form in the Sixteenth Schedule to this Act."

"BLACK'S LAW DICTIONARY defines "power of attorney" as "an instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of act on behalf of principal ... an instrument authorizing another to act as one's agent or attorney ... such power may be either general (full) or special (limited)."

The Supreme Court decision in ***Fredrick J.K Zaabwe v. Orient Bank & 5 Others Civil Appeal No.4 of 2006*** is very instructive in respect to the scope that powers of attorney should stretch. What is key to note is that a power of attorney is issued by the donor to the donee for the latter to act not for himself but as an Agent and for the benefit of the former. The case of ***IMPERIAL BANK OF CANADA Vs. BEGLEY [1936] 2 All ER 367***also quoted with approval in Fredrick Zabwe (supra), is good authority for the principal that where an agent, who has been given a power of attorney to do certain things, uses the power to do something for a proper purpose, but the act done is for the agent's own purposes to the exclusion and detriment of the principal, the actions of the agent will be outside the scope of the power of attorney and are not even capable of ratification by the principal. In strictly construing the powers of attorney, nothing should be read into it that would render the purpose and effect of the instrument either to go beyond

or contrary to that which was intended. **In the same case, Katureebe JSC (as he then was) quoted the author of *FRIDMAN'S LAW OF AGENCY***, at page 66 thus:-

"In short the authority conferred by a power of attorney is that which is "within the four corners of the instrument either in express terms or by necessary implication." Hence, powers of Attorney cannot therefore, extend to a property other than that for which they were granted. Doing so would be attempting to bind the principal to commitments beyond his express or implied authorization. The preliminary point of law in respect to the impugned powers of attorney ought to succeed.

Be that as it may I will now proceed to determine the application on its merits. The principles under which an application of stay of execution can succeed were well espoused in the case of ***Lawrence Musiitwa Kyazze Vs. Eunice Businge, Supreme Court Civil Application No 18 of 1990***, but more pronounced in the Supreme Court Case of ***Hon Theodore Ssekikubo and Ors Vs The Attorney General and 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:

1. 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

2. That the application is not frivolous and has a likelihood of success.

3. That refusal to grant the stay would inflict more hardship than it would avoid.

The first principle is that applicant must show that he lodged a Notice of Appeal. Section 76 of the Civil Procedure Act and Order 44 Rule 1 of the Civil Procedure Rules specify Orders which are appealable as of right. Miscellaneous Cause No. 17 of 2021 from which the instant omnibus application for leave to appeal and stay of execution arise is not among the matters whose Orders are appealable as of right. As such, the intending Appellants have to first obtain leave of court in accordance with Order 44 rules 2, 3 and 4 of the Civil Procedure Rules. In the circumstances, it would unnecessary to require any proof of Notice of Appeal before the necessary leave is granted to lodge it.

In order to grant or disallow an application for leave to appeal, the key test as enunciated in the case of **Sango Bay Estates Ltd & Others v Dresdner Bank A.G [1971] E.A 70** is whether there are arguable grounds of appeal. In that case, Spry V-P stated and I quote;

> ***"leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration but where, as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out."***

I hasten to add that it is not for court at this stage to consider matters which may in any way prejudge the issues which may arise at the appeal or

amount to a review of its own ruling. It suffices that there are grounds the merit consideration of the appellate court.

The Applicants fault the learned trial judge on eleven grounds of appeal as evidenced in paragraph 8 of the affidavit of Mr. Ronnie Kyazze in support of the application and reproduced in this ruling above. Without delving into the merits, I am persuaded that the Court of Appeal needs to for example determine whether the application for review was incompetent for having been served outside the time prescribed by law without any extension being sought within 15 days after the expiry of the 21 days prescribed. The court of Appeal would also be faced with the determination of whether the trial court misdirected itself in finding that the alleged unpaid consideration was due on 24th September 1912 and hence the Respondent's suit filed in the year 2013 after 101 years was barred by the law of limitation and hence untenable. These and many other grounds raised by the Applicant call for consideration by the court of appeal in my view. This in essence addresses the 2nd principle which is to the effect that the appeal is not frivolous and has a likelihood of success.

The 3rd principle is that there is a serious threat of execution of a decree to render the appeal nugatory. In the case of ***P.K Sengendo v. Busulwa Lawrence, CACA No. 207 of 2014 wherein*** Kakuru JA held while quoting with approval the case of ***National Enterprise Corporation v Mukisa Foods (Miscellaneous Application No. 7 of 1998)*** thus:

> ***"The Court has power in its discretion to grant a stay of execution where it appears to be equitable to do so with the view to temporarily preserving the status quo. As a general rule the only ground for stay of execution is for the Applicant to show that once the decretal property is disposed of, there is no likelihood of getting it back should the appeal succeed"***

In the current application, the Respondents have demonstrated eagerness to execute the orders in Misc. Application 86 of 2018. As earlier highlighted herein, the Commissioner Land Registration already wrote to the Registrar High Court seeking for a confirmation to execute the orders relating to

creation of Mailo interest in favor of the Respondents and evidently questionable Mailo Titles seem to have been issued if the evidence presented by the Respondents in this regard is anything to go by. If the execution is fully effected, the Applicant is will eventually be evicted, bringing the entire business to shambles. As such the decision of the court of Appeal even though in the Applicant's favor, would have been overtaken by events. I am in the same measure convinced that the Applicant likely to suffer substantial loss if this application is not granted.

The 4th principle is that the application should be brought without unreasonable delay. Counsel for the Applicant submitted that the Applicant learnt about the presence of the ruling, the subject of this application only on 16th April, 2021, the same not having been communicated by court earlier. That the instant application was filed five days later on 21st April, 2021. Counsel for the Respondents did not labor to contest this fact. From the record I observe that the ruling in Miscellaneous Application No.86 of 2018 is dated 7th April, 2021 and the extracted orders dated 12th April 2021. The present application was indeed filed on 21st April 2021 as submitted by Counsel for the Applicant. I therefore find that this application was brought without unreasonable delay.

The 5th principle is that the applicant should provide security for due performance of the decree. Counsel for the Applicant submitted that the Applicant Company has been conducting sugar business on the suit land for decades and currently holds a factory, staff camp and substantial acres of grown sugar cane. Counsel for the Respondents did not submit to the contrary. I find therefore that the Applicant Company is reputable enough to be able to comply fully with any eventual orders of the Court of Appeal in the event that the Court of Appeal finds in favor of the Respondents. As such, I will make no orders as to security for costs.

The 6th principle is that refusal to grant the stay would inflict more hardship than it would avoid. The sugar cane plantations coupled with the factory and other developments on the land are the fulcrum of the Applicant's business. If the same were destroyed, there is no guarantee that the Respondents would be in position to fully restore the Applicant to its lost fortune. On the other hand, the Respondents would in my view easily recover the suit land and any other orders that the Court of Appeal may deem necessary to make.

In the result, leave is granted to the Applicant to appeal to the court of appeal and as a consequence, stay of execution is granted pending the determination of the appeal.

Costs of the application shall abide the decision of the court of appeal.

Date at Kampala this 28th Day of October 2021

Flavian Zeija (PhD)

PRINCIPAL JUDGE

THE REPUBLIC OF UGANDA

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BEFORE: THE HON. JUSTICE DR. FLAVIAN ZEIJA

RULING

This application is for stay of execution. It is brought under S. 64(e)& 98 of the CPA, S.33 of the Judicature Act, Order 43 Rule 4, Order 44 Rule 1(2),3 and 4, Order 52 Rules 1and 3 of the Civil Procedure Rules S.I 71-1.

It is seeking for orders that:

a) The execution and enforcement of the Ruling and Orders of this Honorable Court issued in Miscellaneous Application No. 86 of 2018 (arising out of Civil Suit No. 75 of 2013) be stayed pending the hearing and determination of the Applicant's Appeal against the said ruling and orders to the Court of Appeal.

b) Leave be granted to the Applicant to lodge an appeal in the Court of Appeal against the decision of Hon. Justice Batema N.D.A delivered on the 7th April 2021, in Miscellaneous Application No. 86 of 2018

c) Costs of this Application be provided for.

The application was supported by the affidavit deponed by Mr. Ronnie Kyazze, the Applicant's Head Legal /Company Secretary. Briefly the grounds in support of the application are that;

1. The Applicant is aggrieved by the ruling and orders issued in Miscellaneous Application No. 86 of 2018 wherein court ordered that all subsisting titles created out of the suit land to wit; FC 7240 of 407.75 acres of Samwiri Kiwanuka Katiginya and FC 9064 of 474 acres of Misusera Kamya Omukabya be cancelled by the Registrar of Titles and that the Registrar of Titles be ordered to register the 1st to 4th Respondents(applicants therein, for FC 9064 of 474 acres and the 5th Applicant for FC7240 of 407.75 acres in Mailo Tenure.

2. The Applicant has through its lawyers, M/S H&G Advocates filed before this court a Notice of Appeal and a letter dated 16th April 2021applying for a typed copy of typed and certified ruling and order and a copy of the certified record of proceedings in the above matter to be able to formally file the appeal.

3. The Applicant was surprised to learn that on page 3 of the ruling in MA 086 of 2018, an order was granted to the Respondents on 7th April, 2021 to proceed ex-parte for failure to file a reply within the prescribed time, yet Counsel for the Applicant had on the same day intimated to court presided over by the Learned Registrar that he intended to raise points of law against the grant of the application whereupon the matter was adjourned to Monday 19th April 2021 at 9.00 am for hearing.

4. That the Applicant's intended appeal has high and reasonable chances of success with valid grounds of Appeal which merit serious judicial consideration by the Court of Appeal interalia that;

   a) The Learned Trial Judge erred in law and fact when he failed to find that the application for review was incompetent for having been served outside the time prescribed by law without any extension being sought within 15 days after the expiry of the 21 days prescribed.
   b) The Learned Trial Judge erred in law and fact when he found that the Applicant (Respondent therein) had put himself outside the jurisdiction of Court for failure to file a reply yet the Applicant's Counsel was on 24th February, 2021 in court and ready to oppose the grant of the application on grounds of points of law that did not require filing of an affidavit in reply.
   c) The Learned Trial Judge erred in Law and fact when he on 12th April, 2021 issued and executed the extracted Order in the matter that included an order ***"That the Respondents give vacant possession of the suit land to the Applicants"*** when the said particular order was not any of the orders in the ruling delivered on 7th April, 2021.
   d) The Learned Trial Judge erred in law and fact when he issued the above said order when he was functus officio and further without being moved for consequential orders by the Applicant.
   e) The Trial Judge erred in law and fact when he erroneously held that there was no evidence that the Governor had paid the consideration to Mr. Kamya for the suit land when there was no any obligation on the part of the Governor or the Protectorate Government to make any payment or consideration to Mr. Kamya in acquisition of the suit land.
   f) The Learned Trial Judge erred in law and fact and reached an erroneous finding that there was a lease for 99 years in favor of the Applicant which has expired whereas not.
   g) The Learned Trial Judge erred in law and fact when he failed to find that the alleged unpaid consideration (which is denied) if any was purportedly due on 24th September, 1912 and hence the

Respondents' suit only filed in 2013 was barred by the Law of Limitation and hence untenable.

h) The Learned Trial Judge erred in law and fact when he allowed the application for review without determining satisfying himself that the Respondents had discovered any new and important matter or evidence which was not in their knowledge by the time the decree or judgment in H.C.C.S No. 75 of 2013.

i) The Learned Trial Judge erred in law and fact when he erroneously found that the Applicant was a trespasser on the suit land for over 60 years without considering that the Applicant was a bonafide purchaser for value.

j) Having found that the Applicant was not party to the alleged fraud, the Trial Judge erred in law and fact when he went on to order for cancellation of title in FRV 64 Folio 18 at Kasenso whose title is unimpeachable unless fraud is attributable to the registered proprietor.

5. The Respondents have already submitted and delivered a copy of the order to the Commissioner Land Registration for cancellation of the Applicant's title

6. That if an order of stay of execution is not granted as prayed herein, the Commissioner Land Registration will proceed to cancel the Applicant's title to the Applicant's substantial detriment and prejudice and the cancellation will render the Appeal nugatory.

7. The Applicant's land forms the heart of the Applicant's sugar cane business with chunks and chunks of sugar cane plantations thereon, a staff camp and stores and hence the Applicant is bound to suffer irreparable and substantial loss of grown sugar cane, loss of 882.39 Acres of land and livelihood if a stay of execution is not granted.

8. The title for the suit land was pledged by the applicant to M/s Bank of Baroda to secure substantial credit sums that were granted to the Applicant to run its business and the order for cancellation of title will

dislodge the mortgage on the title and hence render the said credit facilities due and payable immediately and this will further cripple the Applicant Company completely.

9. The Applicant will suffer a substantial and un imaginable huge economic loss that is irreparable and can never be atoned for in damages whatsoever if the stay of execution of the said orders is not granted immediately.

10. That if execution is not stayed, the Applicant's title to the suit land will be cancelled and the Applicant evicted from the said land, rendering the appeal nugatory.

11. This application has been brought without undue delay

The grounds in opposition are contained in the affidavit in reply deponed by Busuulwa Francis, an Attorney to the 5th Respondent, acting on the Powers of Attorney granted to him to prosecute this matter on behalf of the 5th Respondent. The affidavit in reply in respect to the 1st to 4th Respondents was deponed by King Rogers Murungi on the authority of powers of Attorney granted to him by the 1st to 4th Respondents. Briefly, the grounds which are similar for all the defendants combined are that;

1. That the present application is barred in law on grounds that;

    a) The court order was already fully executed on 19th April, 2021 before the filing of an application for interim order which was filed on 21st April, 2021 and issued on 11th May, 2021.
    b) The court order had further been executed by the Registrar of Titles in favor of the 5th respondent by creating a Mailo certificate of title for her under Kyaggwe Block 171 Plot 1 for the decreed 407.75 acres (165.0142 hectares) and she has since transacted on the land by subdividing it and selling to various third parties who got their respective certificates of title.

c) That a party in a court cause who is dissatisfied with an exparte judgment / ruling and orders thereof can only apply to the same court to set aside or vary judgment / ruling upon such terms as may be just, but not to apply for leave to appeal, hence the Notice of Appeal and intended leave to appeal are legally inconsequential as no appeal can lie.

d) It is trite law that a party who does not file a defense puts himself or herself out of court which does not wait for him or her to raise a point of law not raised in a pleading.

e) The application discloses no reasonable Cause of Action against the Respondents because the Applicant neither appeared nor applied for a review of the judgment cancelling its freehold certificate of title FRV 64 Folio 18 in the head suit No. 75 of 2013.

f) The Applicant also lacks locus standi to file this application since it no longer has legal interest, neither in the expired lease nor in the FRV cancelled certificate of title, which has twice been cancelled.

g) Though the Applicant is still in possession of the suit land, it is in trespass as declared in the ruling and a mere declaration is neither executable nor capable of being stayed.

In a rejoinder, the Applicant deponed that;

1. The mandate given to the Busulwa Francis in the power of Attorney to swear an affidavit on behalf of the 5th Respondent, if any, was given in respect of Civil Suit No. 165 of 2012 and not Civil Suit No. 75 of 2013 from which the instant proceedings arise. Accordingly, there is no affidavit in reply duly filed by the 5th Respondent in the instant matter.

2. The Certificates of Title purportedly created for land comprised in Kyaggwe Block 171 Plot Nos. 1 and 37 at Namasagga are not titles created pursuant to the court order in Misc. Application No. 86 of 2018 wherein Court ordered for the creation of Mailo titles in favor of the Respondents

3. Instead, the said titles which are believed to be unauthentic are purportedly created under the judgment of this Honorable Court in Civil Suit No. 75 of 2013 wherein court did not order for creation of Mailo Titles but rather a Leasehold title for 99 years in favor of the Applicant Company.

4. It is therefore not true that the application for stay of execution of the Orders in Miscellaneous Application No. 86 of 2018 has been overtaken by events. Further, the Applicant is still in possession of the suit land, a fact acknowledged by the Respondents.

5. The purported Certificate of Title for land comprised in Kyaggwe Block 171 Plot 37 land at Namasagga was purportedly issued and registered in the name of the 5th Respondent on 23rd April 2021 yet the Survey Deed Plan for the same land was only created and issued by both the Cartographer and Commissioner Surveys and Mapping on 15th June 2021 well after the certificate of title was purportedly issued which is highly erroneous, irregular and unauthentic.

6. The interim Order for stay of execution of this Court issued by the Hon. Principal Judge on 11th May 2021 staying the execution and enforcement of orders in MA. No. 86 of 2018 was duly communicated to the Commissioner Surveys & Mapping and the Registrar Mukono before the said deed plans were created and issued on 15th June 2021.

7. The irrevocable Powers of Attorney purportedly granted to a one Rogers Murungi by the 1st -4th Respondents on 4th January 2019 was in respect of purported land comprised in FC 9064 and PC No. 6840 which was non-existent as found by this court in its judgment in HCCS No. 75 of 2013. As such, the said powers of attorney were premised on a nonexistent subject matter.

8. The Certificate of Title for land comprised in Kyaggwe Block 171 Plot 2 at Kasenso believed to be unauthentic is purportedly issued under the orders of court in HCCS No. 75 of 2013 wherein court ordered for creation

of a 99 year lease for the Applicant. The same applies to purported Block 171 Plot 17 annexed as R6 to the affidavit in reply for the 1st-4th Respondents and which was purportedly issued on 16th June 2021 way after this court had already issued an interim order for stay of execution of orders in MA. No. 86 of 2018.

9. It is false for the deponents of the said affidavits in reply to state that the orders in M.A No. 86 of 2018 have since been executed as ordered by court whereas not.

10. The Applicant has a right and locus to file the instant application since the Applicant is entitled to its leasehold interest in the suit land for a period of 99 years as decreed by court in H.C.C.S No. 75 of 2013.

Representation

M/s H & G Advocates represented the Applicant

M/s The Muhwezi Law Chambers Advocates represented the Respondents.

Preliminary points of Law

From the onset, the pleadings of both parties to this application raise some pertinent preliminary points of law which this court is enjoined to dispose of first. The immediate point of law raised by Counsel for the Respondents is that the orders of court were fully executed on 19th April, 2021 way before the filing on 19th April, 2021 and grant of the interim application for stay of execution on 11th May 2021. Counsel for the Applicant disputed the authenticity of the Certificates of Title purportedly issued in execution of court's orders. He submitted that the impugned Titles were not issued pursuant to the orders in M.A No. 86 of 2018 and invited court to examine the entries on the Titles attached for Kyaggwe Block 171 Plot. Nos. 1, 2, 17

and 37 which show that the fictitious Titles were issued pursuant to the Order in Civil Suit No. 75 of 2013 and not orders in M.A No.86 of 2018.

Upon examining the record, I notice that the only order capable of being executed altering entries on Certificates of Title in regard to Civil Suit No. 75 of 2013 is on page 27, where the trial judge directed that the Commissioner Land Registration cancel the Defendant's Title (Applicant's herein) in respect of the free hold tenure and the same should be substituted with a leasehold tenure from the relevant authority for a period of 99 years. It therefore follows that no other entry or cancellation can by virtue of the orders arising from Civil Suit No. 75 of 2013 can be allowed to stand as it would be non-existent. On the other hand, the orders arising out of Misc. Application No. 86 of 2018, **extracted and signed on 12th April 2021** are to the effect that the suit land reverts to the Respondents and that all subsisting Titles Certificates of Title thereon be cancelled by the Registrar of Titles.

The question to determine at this stage is whether the purported cancellations and entries of Mailo interest on Block 171 Plots 1, 2, 17 & 37 were made by virtue of the orders arising from Civil Suit No. 75 of 2013 or M.A No.86 of 2018.

First, the entry on Block 171 Plot 1, was made on **23rd April 2021** in favor of the 5th Respondent. Secondly, the entry on Block 171 Plot 2 was made in favor of the 1st -4th Respondents on **23rd April 2021**. Both entries on Plot 1 and 2 were made by virtue of the orders purportedly arising out of Civil Suit No. 75 of 2013.

Thirdly, the first entry on Block 171 Plot 17 was made in favor the 1st -4th Respondents as joint tenants on **16th June 2021** and later transferred to a third party on **12th July, 2021.**

Fourthly, the entry in Block 171 Plot 37 was made in favor of the 5th Respondent on **23rd April 2021** by virtue of court order in Civil Suit No. 75 of 2013 and later transferred to a third party on **6th July 2021.**

By letter dated 14th April, 2021, the Commissioner Land Registration wrote to the Registrar High Court at Mukono requesting for a confirmation and authentication of the orders in Misc. Application No. 86 of 2018. There is no record of the Registrar issuing the requested confirmation, the basis of which the Commissioner Land Registration intended to act on the orders of court in M.A No. 86 of 2018. Just one Week after the said letter of inquiry on **21st April 2021** is when the Applicant filed the present application. One then wonders on what authority the Commissioner Land Registration could have acted if at all.

However, what is clear is that this court issued an order for interim stay of execution on 11th May 2021 and the same was duly served on the Commissioner Land Registration and received on **14th May 2021.** It is also evident that the purported entries on Plot 1& 2 were supposedly made on the foundation of Civil Suit No. 75 of 2013 which does not contain any such orders for the impugned entries. As such this court does not recognize the impugned Titles as authentic legal instruments. The entries on Plot 17 and 37 suffer the same fate for being purportedly entered when there was an interim order for stay of execution duly brought to the attention of the Commissioner Land Registration and still subsisting. I am unable to agree with Counsel for the Respondents that such perpetuations could have been effected without foul play. The Respondent's preliminary point of law that the orders of court in M.A No. 86 of 2018 were already fully executed fails with the greatest contempt that it deserves. If anything was done to achieve the purported maneuvers at the Land Registry in Mukono, whatever was done was done to the detriment of the Respondents and the subsequent transferees of such maneuvers.

The second point of law raised by Counsel for the Respondents is that the Applicant has no locus standi to file the instant application on the basis of having lost its right in the suit property by reason of the promulgation of the 1995 Constitution which did not allow non- Ugandan citizens to own freehold interest in land. Moreover, the Applicant obtained the said freehold title in 2007 against the spirit of the constitution.

Whereas I agree that by law, non-Ugandan citizens cannot own freehold interest, I do not agree that it necessarily deprives them of the right to own any other interest in land. To say that the Applicant has no locus standi would tantamount to saying that the Applicant has no case worth listening to. I am unable to agree. The Applicant has a legal grievance which this court is enjoined to grant audience in light of the sacrosanct right to a fair hearing enshrined in the Constitution of Uganda, 1995. It is in the interest of justice that the Applicant who is incidentally still in possession of the suit land be given their day in court to explain the circumstances under which the freehold title was granted in favor of the Applicant who is a non-citizen. The preliminary point of law on lack of locus standi fails.

The third preliminary point of law by the Respondents is that a party who is dissatisfied with an ex-parte judgment/ruling and orders thereof can only apply to the same court to set aside or vary the judgment but no appeal can lie. It is my considered view that it is not for courts of law to dictate to aggrieved parties what course of post judgment remedy they should consider. The parties should be given the leeway to decide what post judgment remedy better suits their intended expectations. The authority of ***Mohammed Albhai vs. W.E Bukenya Mukasa & Anor, Civil Appeal No. 56 of 1996*** cited by Counsel for the Respondents in support of his contention has nothing similar to the facts of the present application. In that case the Supreme Court was considering whether or not the appellant not having been a party in the original proceedings which resulted in the consent judgment sought to be reviewed had no right to present the application for review under Section 83 and 101 of CPA and Order 42 r 1of the Civil Procedure Rules. The preliminary question in the present application to which I have already rendered an answer is whether a party aggrieved by an ex parte judgment /ruling has a right to apply for leave to appeal against the judgment /ruling and the orders arising therefrom.

The fourth preliminary point of law is that a party who does not file a defense puts himself or herself out of court which does not wait for him or her to raise a point of law not raised in the pleading. Counsel for the Applicant submitted that the order to proceed ex-parte in Miscellaneous Application No.86 of 2017 was issued by the trial judge on 24th February 2021 when the same day in the morning, the Applicant's Advocate had appeared before the Learned Registrar in the presence of the Respondents' Advocate and informed court that an affidavit in reply had not been filed since the Applicant (Respondent therein) intended to raise points of law.

I disagree with the assertion that a party who does not filed an affidavit in reply cannot to raise a point of law which was not raised in the pleadings. It must be emphasized from the onset that this case relates to a land dispute. It is now a cardinal principle of the law that land matters should be resolved on merits and the substance of the dispute be investigated on merits. In the case of **Alhaji Yahaya Balyejusa vs. Development Finance Ltd CACA No. 34 of 2000**, the Court of Appeal held that it is a cardinal principle as far as possible as litigation of land matters is concerned, they should be resolved on merits. The court of appeal in Alhaji Yahaya Balyejusa vs. Development Finance Ltd (supra) cited with approval the case of **Nicholas Rousous Vs. Gulam Hussein Habib SCCA No. 9/1993** where it was held that administration of justice requires that the substance of the disputes be investigated on their merits and that errors, late filings of court pleadings and lapses should not necessarily debar a litigant from pursuing his right. See also the case of **Fredrick Kabugo Sebugulu vs. Administrator General Court of Appeal Civil Appeal No. 69/2010**, where the Court of Appeal cited with approval the case of Alhaji Yahaya Balyejusa vs. Development Finance Ltd (supra). Therefore, the fact that Counsel for the Applicant insinuated to the court that the Applicant intended to raise preliminary points of law was sufficient testimony that the Applicant had intentions to participate in the proceedings. Consequently, the trial judge was in violations of the Applicant's right to be heard under Article 28 of the Constitution when he proceeded in the matter ex parte thereby denying the Applicant the right to be heard.

In any case an illegality once brought to the attention of court must be dealt with. **The case of Makula International Ltd vs His Eminence Cardinal Nsubuga & Anor Civil Appeal No. 4 of 1981** which is also still good law is to the effect that a court of law cannot sanction what is illegal, and illegality once brought to the attention of court overrides all questions of pleading, including any admission made thereon. Since it had been brought to the attention of court that there was a point of law to be raised, it was wrong for court to dismiss such request without a hearing. To do so would amount to sustaining an illegality on court record. For the reasons fore stated, this preliminary point of law equally fails. In any case, the civil procedure rules are very clear. If a party intends to raised a point of law, he does not have to file a defence. He instead notifies court of the intention to raise a point of law.

In the affidavit of Mr. Ronnie Kyazze for the Applicant, the Applicant contested the powers of attorney which the deponents for the Respondents relied on to be clothed with authority to depone the said affidavits in reply. First, the affidavit sworn by Busuulwa Francis for the 5th Respondent was contested on the ground that it was in respect of Civil Suit No. 165 of 2012 and any applications and appeals arising therefrom and not Civil Suit No.75 of 2013 from which the instant proceedings arise. The affidavit of King Rogers Murungi was equally protested on grounds that the power of attorney was granted to him in respect of land comprised in FC 9064 and PC No. 6840 which was allegedly nonexistent at the time. Counsel for the Applicant invited court to strictly construe the powers of attorney to give them their ordinary meaning while Counsel for the Respondents seemed to adopt a wider interpretation to the effect that since Civil Suit No. 165 in respect of which the Powers of Attorney was granted stayed in favor of Civil Suit No. 75 of 2013 where in the 5th Respondent's claim was still in issue, the said powers of attorney should be construed to also cover Civil Suit No. 75 of 2013. As regards the affidavit of King Rogers Murungi for the 1st to 4th Respondents, Counsel for the Respondents submitted that land comprised in FC 9064 and PC 6840 existed by 4th January 2019 when powers of attorney were made in favor of King Rogers Murungi jointly with another. That FC 9064 is reflected in the ruling in Misc. Application No. 86 of

2018 at page 5 paragraph 2 and this FC is what was decreed in Misc. Application No. 86 of 2018 in favor of the 1st-4th Respondents.

I have considered submissions by both counsel and I opine thus;

Section 146(1) of the Registration of Title Act states:

"(1) The proprietor of any land under the operation of this Act or of any lease or mortgage may appoint any person to act for him or her in transferring that land, lease or mortgage* or otherwise dealing with it *by signing a power of attorney in the form in the Sixteenth Schedule to this Act."

"BLACK'S LAW DICTIONARY defines "power of attorney" as "an instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of act on behalf of principal ... an instrument authorizing another to act as one's agent or attorney ... such power may be either general (full) or special (limited)."

The Supreme Court decision in ***Fredrick J.K Zaabwe v. Orient Bank & 5 Others Civil Appeal No.4 of 2006*** is very instructive in respect to the scope that powers of attorney should stretch. What is key to note is that a power of attorney is issued by the donor to the donee for the latter to act not for himself but as an Agent and for the benefit of the former. The case of ***IMPERIAL BANK OF CANADA Vs. BEGLEY [1936] 2 All ER 367***also quoted with approval in Fredrick Zabwe (supra), is good authority for the principal that where an agent, who has been given a power of attorney to do certain things, uses the power to do something for a proper purpose, but the act done is for the agent's own purposes to the exclusion and detriment of the principal, the actions of the agent will be outside the scope of the power of attorney and are not even capable of ratification by the principal. In strictly construing the powers of attorney, nothing should be read into it that would render the purpose and effect of the instrument either to go beyond

or contrary to that which was intended. **In the same case, Katureebe JSC (as he then was) quoted the author of *FRIDMAN'S LAW OF AGENCY***, at page 66 thus:-

"In short the authority conferred by a power of attorney is that which is "within the four corners of the instrument either in express terms or by necessary implication." Hence, powers of Attorney cannot therefore, extend to a property other than that for which they were granted. Doing so would be attempting to bind the principal to commitments beyond his express or implied authorization. The preliminary point of law in respect to the impugned powers of attorney ought to succeed.

Be that as it may I will now proceed to determine the application on its merits. The principles under which an application of stay of execution can succeed were well espoused in the case of ***Lawrence Musiitwa Kyazze Vs. Eunice Businge, Supreme Court Civil Application No 18 of 1990***, but more pronounced in the Supreme Court Case of ***Hon Theodore Ssekikubo and Ors Vs The Attorney General and 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:

1. 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

2. That the application is not frivolous and has a likelihood of success.

3. That refusal to grant the stay would inflict more hardship than it would avoid.

The first principle is that applicant must show that he lodged a Notice of Appeal. Section 76 of the Civil Procedure Act and Order 44 Rule 1 of the Civil Procedure Rules specify Orders which are appealable as of right. Miscellaneous Cause No. 17 of 2021 from which the instant omnibus application for leave to appeal and stay of execution arise is not among the matters whose Orders are appealable as of right. As such, the intending Appellants have to first obtain leave of court in accordance with Order 44 rules 2, 3 and 4 of the Civil Procedure Rules. In the circumstances, it would unnecessary to require any proof of Notice of Appeal before the necessary leave is granted to lodge it.

In order to grant or disallow an application for leave to appeal, the key test as enunciated in the case of **Sango Bay Estates Ltd & Others v Dresdner Bank A.G [1971] E.A 70** is whether there are arguable grounds of appeal. In that case, Spry V-P stated and I quote;

> ***"leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration but where, as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out."***

I hasten to add that it is not for court at this stage to consider matters which may in any way prejudge the issues which may arise at the appeal or

amount to a review of its own ruling. It suffices that there are grounds the merit consideration of the appellate court.

The Applicants fault the learned trial judge on eleven grounds of appeal as evidenced in paragraph 8 of the affidavit of Mr. Ronnie Kyazze in support of the application and reproduced in this ruling above. Without delving into the merits, I am persuaded that the Court of Appeal needs to for example determine whether the application for review was incompetent for having been served outside the time prescribed by law without any extension being sought within 15 days after the expiry of the 21 days prescribed. The court of Appeal would also be faced with the determination of whether the trial court misdirected itself in finding that the alleged unpaid consideration was due on 24th September 1912 and hence the Respondent's suit filed in the year 2013 after 101 years was barred by the law of limitation and hence untenable. These and many other grounds raised by the Applicant call for consideration by the court of appeal in my view. This in essence addresses the 2nd principle which is to the effect that the appeal is not frivolous and has a likelihood of success.

The 3rd principle is that there is a serious threat of execution of a decree to render the appeal nugatory. In the case of ***P.K Sengendo v. Busulwa Lawrence, CACA No. 207 of 2014 wherein*** Kakuru JA held while quoting with approval the case of ***National Enterprise Corporation v Mukisa Foods (Miscellaneous Application No. 7 of 1998)*** thus:

> ***"The Court has power in its discretion to grant a stay of execution where it appears to be equitable to do so with the view to temporarily preserving the status quo. As a general rule the only ground for stay of execution is for the Applicant to show that once the decretal property is disposed of, there is no likelihood of getting it back should the appeal succeed"***

In the current application, the Respondents have demonstrated eagerness to execute the orders in Misc. Application 86 of 2018. As earlier highlighted herein, the Commissioner Land Registration already wrote to the Registrar High Court seeking for a confirmation to execute the orders relating to

creation of Mailo interest in favor of the Respondents and evidently questionable Mailo Titles seem to have been issued if the evidence presented by the Respondents in this regard is anything to go by. If the execution is fully effected, the Applicant is will eventually be evicted, bringing the entire business to shambles. As such the decision of the court of Appeal even though in the Applicant's favor, would have been overtaken by events. I am in the same measure convinced that the Applicant likely to suffer substantial loss if this application is not granted.

The 4th principle is that the application should be brought without unreasonable delay. Counsel for the Applicant submitted that the Applicant learnt about the presence of the ruling, the subject of this application only on 16th April, 2021, the same not having been communicated by court earlier. That the instant application was filed five days later on 21st April, 2021. Counsel for the Respondents did not labor to contest this fact. From the record I observe that the ruling in Miscellaneous Application No.86 of 2018 is dated 7th April, 2021 and the extracted orders dated 12th April 2021. The present application was indeed filed on 21st April 2021 as submitted by Counsel for the Applicant. I therefore find that this application was brought without unreasonable delay.

The 5th principle is that the applicant should provide security for due performance of the decree. Counsel for the Applicant submitted that the Applicant Company has been conducting sugar business on the suit land for decades and currently holds a factory, staff camp and substantial acres of grown sugar cane. Counsel for the Respondents did not submit to the contrary. I find therefore that the Applicant Company is reputable enough to be able to comply fully with any eventual orders of the Court of Appeal in the event that the Court of Appeal finds in favor of the Respondents. As such, I will make no orders as to security for costs.

The 6th principle is that refusal to grant the stay would inflict more hardship than it would avoid. The sugar cane plantations coupled with the factory and other developments on the land are the fulcrum of the Applicant's business. If the same were destroyed, there is no guarantee that the Respondents would be in position to fully restore the Applicant to its lost fortune. On the other hand, the Respondents would in my view easily recover the suit land and any other orders that the Court of Appeal may deem necessary to make.

In the result, leave is granted to the Applicant to appeal to the court of appeal and as a consequence, stay of execution is granted pending the determination of the appeal.

Costs of the application shall abide the decision of the court of appeal.

Date at Kampala this ..... Day of 2021

Flavian Zeija (PhD)

PRINCIPAL JUDGE