

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
MISCELLANEOUS APPLICATION No. 175 of 2023
[ARISING FROM MISCELLANEOUS APPLICATION No. 155 of 2023]
[ARISING FROM MISCELLANEOUS APPLICATION No. 14 of 2023]
[ARISING FROM HIGH COURT No. 8 of 2023]

1. HAWA NYENDE
2. ABUBAKER NYENDE

} APPLICANTS

VERSUS

1. KAFEERO JAMADA
2. MOHAMED ALLIBHAI
3. COMMISSIONER LAND REGISTRATION
4. MOHAMED ABDALLAH

} RESPONDENTS

BEFORE HON: JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI

Background

This application was brought by the Applicants under **Section 33 of the Judicature Act Cap 13, O.22 rule 26, O.43 rule 4 and Order 52 Rule 1& 3 of the Civil Procedure Rules S.I 71-1 for orders that:**

1. The execution of the orders in Miscellaneous Application No. 14 of 2023 against the Applicants be stayed pending the appeal.
2. That provision for costs be made.

The Applicants filed Civil Suit No. 8 of 2023 in which case they sued the Respondents for prayers inter alia safeguarding their proprietary interest in land comprised in Plot 21 Scindia Road Jinja. The Applicants subsequently filed Miscellaneous Applications No. 14 and 15 for a temporary injunction and an interim injunction respectively. The Application for an interim injunction was overtaken by events, Court heard the application for the temporary injunction filed by the Applicants on 22nd of June 2023 and the Deputy Registrar ruled in favour of the Respondents for orders that: -

- a) The Applicants shall stay or remain in occupation of their one room on condition that they pay rent including arrears to Court on the Registrar of High



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Court Account in Bank of Uganda within one month from the date of the ruling.

- b) The Applicants are restrained from holding out to be landlords of the remaining tenants on the building and other tenants must continue paying rent as before.
- c) The Applicants are mere tenants who have no business/ right to restrain the registered proprietor from dealing or transacting in the property.
- d) The Respondents are at liberty to access and where necessary to improve the suit property.

This application was supported by the affidavit of Hawa Nyende, the 1st Applicant affirmed on the 22nd day of July 2023 and briefly the grounds are: -

- a) That the Applicants are the plaintiffs in Jinja High Court Civil Suit No. 8 of 2023 wherein they seek various reliefs against the Respondents who are the Defendants therein, including among others, safeguarding the proprietary rights in land comprised in plot 21 Scindia Road, Jinja.
- b) That in order to preserve the suit land for the course of the head suit, the Applicants lodged Miscellaneous Application No.14 and 15 of 2023 seeking a temporary and an interim injunction respectively against the Respondents.
- c) That the 1st, 2nd and 3rd Respondents did not contest or even respond to the application.
- d) That during the hearing of Miscellaneous Application No. 14 of 2023, the 4th Respondent sought leave of court to be added to both the head suit and all applications arising out of the head suit which was granted by the Deputy Registrar of the High Court of Jinja.
- e) That the Applicant was advised by her lawyers of which information she believes to be correct, that the Ruling dated 22nd June 2023 by the Deputy Registrar of the High Court in Jinja in determining Miscellaneous Application No. 14 of 2023, dismissed the application and granted orders that determined all questions in controversy between the parties in the suit, created tenancy obligations between the applicants and further more affected the rights of third parties on the suit without hearing them.
- f) That the reliefs were neither pleaded by the parties nor was the evidence placed before the Learned Deputy Registrar to justify the award.
- g) That the applicants are aggrieved and dissatisfied with the Learned Deputy Registrar's Ruling as it was delivered in error.
- h) That on 30th June 2023, the applicants filed Misc. Application No. 155 of 2023 seeking to set aside the orders of the Learned Deputy Registrar.
- i) That on Sunday 16th July 2023 at 10pm in the night, the 4th Respondent together with the Police, the LC1 Chairperson of the area and his committee



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- descended upon the suit property, sealed off the shops on the property and threatened to evict the applicant's tenants unless the tenants agreed to sign tenancy Agreements with the 4th Respondent for purposes of paying him rent.
- j) That the 4th Respondent has threatened to evict the Applicants without so much of an eviction order and has locked out their tenants.
 - k) That the applicants believe that the 4th Respondent intends to evict them and therein renders their suit nugatory.
 - l) That the 4th Respondent has taken steps to enforce the orders of Court from Miscellaneous Application No.14 of 2023.
 - m) That there is a serious threat to enforce the orders of Court against the applicants.
 - n) That the applicants have brought this application without undue delay and that it's just and equitable that this application is granted.

The 4th respondent opposed this application and filed an affidavit in reply which was sworn by Mohammed Abdallah the 4th respondent on the 26th day of September 2023 and briefly the grounds are: -

- i. That in reply to the contents of paragraph 2,3,4,5, and 6 of the affidavit in support of the application, the 4th Respondent was added as a necessary party to HCCS No.8 of 2023 and all applications arising there from being the owner of the suit property comprised in FRV JJA 305 Folio 9 on Plot 21 Scindia Road Jinja City measuring 0.0460 Hectares with an equitable interest.
- ii. That in reply to the contents of paragraphs 9,10,11 and 12 of the affidavit in support of the application, the 4th Respondent was informed by his lawyers which information he believes to be true, that the averments thereof of the degree of the effects of the ruling of the Learned Deputy Registrar are mere falsehoods and misrepresentation intended to mislead and waste this Honorable Court's time.
- iii. That in specific reply to paragraphs 10 and 12 of the affidavit in support of the application, the 4th Respondent was informed by his lawyers which information he believes to be true that the Learned Deputy Registrar duly considered the pleadings and properly evaluated the evidence before him and his Ruling was sound and not in error as alleged by the applicants.
- iv. That the contents of paragraphs 15,20,21,24 and 27 of the affidavit in support of the Application are denied in toto and the applicants shall be put to strict proof of the allegations contained therein.
- v. That in reply to the contents of paragraphs 16,17,19 and 25 of the affidavit in support of the application, the 4th Respondent was informed by his lawyer which information he believes to be true that the application is premature



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before this Court as he has not commenced any execution proceedings against the applicants.

- vi. That further in reply to paragraph 25 of the affidavit in support of the application, the allegations that the applicants shall suffer irreparable damage are mere speculation, unfounded with no evidence and legal basis.
- vii. That in specific response to the contents of paragraphs 26 of the affidavit in support of the application, the applicants should be ordered to respect and comply with the orders of the learned Deputy Registrar dated 22nd June 2023 by depositing rent in Court to act as security and should also stop holding out to be landlords of the remaining tenants on the building.
- viii. That in specific reply to the contents of paragraph 18 of the affidavit in support of the application, the purported notice of demand annexed was not issued against of the applicants and as thus there is no threat of execution.
- ix. That in reply to paragraph 22 and 23 of the affidavit in support the 4th Respondent has been informed by his lawyers which information he believes to be true that the intended appeal has no likelihood of success, the same being abused on frivolous grounds and intended to delay the prosecution of the pending HCCS No.8 of 2023 before his Honorable Court.
- x. That in reply to contents of paragraph 29 of the affidavit in support of the application, the 4th Respondent was informed by his lawyer that the application does not disclose any sufficient cause to warrant the grant of an order for stay of execution and the entire application does not satisfy the conditions for grant of an order of stay of execution.
- xi. That the 4th Respondent deponed the affidavit in opposition and in reply to the application for stay of execution of the orders of the Learned Deputy Registrar arising from Miscellaneous Application No.14 of 2023.

The 1st, 2nd and 3rd Respondents did not file their affidavits in reply despite having been served with the application as per the affidavit of service of Rashid Nyende filed on 25th September, 2023.

Representation

At the hearing of the application the Applicants were represented by Counsel Mukasa Siraje Katantazi of M/s Senkumba & Co. Advocates while the 4th Respondent was represented by Counsel Daniel Mudhumbusi of M/s Muzuusa & Co. Advocates.



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Submissions

When this application came up for hearing on 28th September, 2023, both Counsel made skeletal oral submissions and later filed written submissions which have been considered in this Ruling.

Submissions by the Applicants.

The Applicants' Counsel formulated the following issues for Court's determination.

- 1. Whether the Application for stay of execution of the orders made by this Court on 22nd June 2023 should be granted pending the hearing of the appeal.**

Counsel relied on **Order 43 r.4 of the Civil Procedure Rules** which provides that;

“an appeal to the High Court shall not operate as a stay of proceedings under a Decree or Order appealed from except so far as the High Court may order, nor shall execution of a Decree be stayed by reason only of an appeal having been preferred from the Decree; but the High Court may for sufficient cause order stay of execution of the decree”.

Justice Elizabeth Ibanda Nahamya, in the case of **Equity Bank Uganda Ltd versus Nicholas Were M.A No.604 of 2013**, while explaining the above cited order noted that;

“The import of this provision is that an Appeal to the High Court does not per se operate as a stay of execution of proceedings. Rather, any person who wishes to prefer an Appeal from such a decision shall institute a stay of proceedings on such sufficient cause being shown to Court. “Sufficient cause” under the provision, leaves the High Court with the discretion to determine whether the proceedings fall within the premises”

Counsel further stated that the principles upon which stay of execution is granted are captured in a number of Authorities. (See **Kampala Capital City Authority versus Mulangira Joseph MA 26/2016 and Kawanga v Namyalo & Anor (Miscellaneous Application No. 12 of 2017.)**) The principles for an application for stay of execution as indicated in the aforementioned authorities are:

1. That 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.


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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, C.A No 341 of 2013** expanded the list to include the following principles:

5. 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

6. That the Application is not frivolous and has a likelihood of success.

7. That the refusal to grant the application for stay of execution would inflict more hardship than it would avoid.

In respect of the 1st principle which requires the Applicants to have filed an appeal, the Applicants submitted that a Notice of Appeal had been filed. In the case of **Attorney General of the Republic of Uganda versus The East African Law Society & Another EACA Application No.1 of 2013**, cited with approval in the case of **Equity Bank Uganda Ltd (supra)**, it was held that;

‘A notice of appeal is a sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases.’

The second principle for the grant of this Application requires the Applicant to demonstrate to the Court that he or she may suffer substantial loss if the Application is not granted. Counsel submitted that the Applicants will suffer substantial loss unless the application for stay of execution is granted and cited the case of **Kampala Capital City Authority v Murangira (supra)** in which Court held that;

“Substantial loss does not represent any particular size or amount but refers to any loss, great or small that is of real worth or value as distinguished from a loss that is merely nominal.”

Counsel submitted that in the instant case, the Applicants’ family obtained possession of the suit premises as a whole and sublet parts of it. That the suit premises generate income for the family and that the family has been in occupation of the premises since 1972 which is a clear indication that the Applicants stand to suffer substantial loss unless the application for stay of execution is granted.

The Applicants argued that this Application was filed without unreasonable delay since they filed a notice of appeal on the same day of the Ruling of the Learned Deputy Registrar. It was the Applicants submission that this Application was filed



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within one (1) month from the date of the Deputy Registrar's Ruling and as such, this application satisfies this principle.

The 4th principle is that the Applicants should provide security for due performance of the decree/order. The requirement of granting security for due performance as provided for under Order 43 r4 (3) of the Civil Procedure Rules, is not mandatory and due regard should be had to the fact that this is land which will not go way. In the case of **Imperial Royale Hotel Ltd & 2 Others versus Ochan Daniel Misc Application No.111 of 2012 cited in Isaac W Ochieng & Anor Vs Sarah Nakyobe Misc Application No.1619of 2021**), Court held that;

“Security for costs is not a condition precedent to the grant of stay of execution. We are 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 should be made according to the circumstances of each particular case. The objective of the legal provisions on security 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 filing 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.”

It was held in the case of **Hon Theodore Ssekikubo and Ors Vs the Attorney General and Ors Constitutional Application No 03 of 2014 cited with approval in Kawanga v Namyalo (supra)**, that the nature of decision depends on the facts of each case as situations vary from case to case. On the basis of the decision of **Hon Lady Justice Wolayo in Amuanaun Sam Vs Opolot David MA No 3 of 2014**, Court held that the status of the applicant should be put into consideration in order to decide whether security for due performance should be ordered or not. Counsel moved Court not to order for security for due performance. That the Applicants averred in the plaint that Applicants' family has been staying on the suit property since 1972 and has paid rent diligently until the Applicants discovered the fraud perpetrated against them by the 1st & 2nd Respondents.

Regarding the 5th principle, Counsel submitted that there is a serious threat of execution of a decree/order which will render the appeal nugatory. That under paragraph 14 of the affidavit in support of this Application, the 1st Applicant averred that on the night of 16th July 2023, the 4th Respondent with Police and LC personnel went to the suit property, sealed off the shops and threatened to evict the Applicants' tenants unless the tenants agreed to sign tenancy agreements with the 4th Respondent. Furthermore, in paragraph (vi) of her affidavit in rejoinder of this Application the 1st Applicant avers that a notice of eviction was served on the Applicants' tenants and the shops belonging to those tenants who refused to enter



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into new tenancy agreements with the 4th Respondent were cordoned off by the 4th Respondent's agents on 3rd July 2023, 10 days after the said orders were issued.

Applicants' Counsel submitted that the appeal is not frivolous and has a high likelihood of success which satisfies the 6th principle required to grant this application. Counsel for the applicants submitted that the Applicants grounds for the appeal are that the Learned Deputy Registrar made orders that touched on the merits of the main suit to wit

- (i) That the Applicants are mere tenants who have no business or right to restrain the registered proprietor from dealing or transacting in the property and;
- (ii) That the Respondents are at liberty to access and where necessary, improve the suit property
- (iii) That the learned Deputy Registrar determined in the favour of the 4th Respondent and gave reliefs that were neither pleaded nor had evidence placed before Court and;
- (iv) The learned Deputy Registrar entered a Ruling in favour of the 2nd and 3rd Respondents who never testified at all.

That all the above grounds disclose that the appeal is not frivolous.

The 7th principle is to the effect that the refusal to grant the application for stay of execution would inflict more hardship than it would avoid. It was the Applicants' submission that in their Pleint, the Applicants aver that their family has been residing on the suit premises for over 50 years since 1972 which is their family home. That the refusal to grant the Application would inflict more harm to them compared to the Respondents who have never occupied the premises. That the Court has powers to grant the application where it appears to be equitable to do so.

Counsel prayed to this Court to grant the application with costs having satisfied the principles for the same.

Submissions by the 4th Respondent's Counsel

Counsel for the 4th Respondent submitted that since the Applicant's Counsel had elaborately given sufficient background to the application, there was no need to delve into it. He made submissions basing on the issues for determination as proposed by learned counsel for the applicant as detailed below.

1. Whether the application for stay of execution of the orders made by this court on 22nd June 2023 should be granted pending hearing of the appeal.

Counsel for 4th Respondent submitted that it is trite law that where an unsuccessful party is exercising his or her unrestricted right of appeal, it is the duty of the Court to make such order for stay of proceedings in the judgement appealed from as this



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will prevent the appeal from being rendered nugatory. [See **Wilson vs Church (1879) volume 12Chd 454** cited with approval in **Global Capital Save 2004 Ltd and Anor vs Alice Okiror and Anor HCMA No. 485 of 2012**].

The Supreme Court of Uganda in the case of **Lawrence Musiitwa Kyazze vs Eunice Busingye SCCA No. 18 of 1990 (1992) IV KALR 55** observed that;

“An application for stay of execution pending appeal is designed to preserve the subject matter in dispute so that the right of the appellant who is exercising his/ her undoubted rights of appeal are safe guarded and the appeal if not successful is not rendered nugatory.”

The conditions that the Court should consider before allowing an application to stay execution are espoused in **Order 43 rule 4(3)** of the Civil Procedure Rules SI 71-1 to wit;

- a) *That substantial loss may result to the applicant unless the order is made.*
- b) *That the application has been made without unreasonable delay;*
and
- c) *That security has been given by the applicant for the due performance of the decree or orders as may ultimately be binding upon him or her.*

The Constitutional Court in the case of **Hon. Theodore Ssekikubo and others - Versus -Attorney General and Anor, Constitutional Application No. 06 of 2013** added another condition being that the appeal has a likelihood of success. Further the Court of Appeal in **Kyambogo University-Vs- Professor Isaiah Omolo Ndiege, CA No. 341 of 2013** expanded the list to include;

1. *That the applicant has lodged a notice of appeal.*
2. *That a substantive application for stay of execution has been filed in court and the same is pending hearing.*
3. *That the said substantive application and the appeal are not frivolous and they have a likelihood of success.*
4. *The applicant must prove 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.*
5. *That the application was made without unreasonable delay.*
6. *The applicant is prepared to grant security for due performance of the decree.*
7. *That refusal to grant the stay would inflict more hardship than it would avoid.*

Counsel for the respondent addressed each of the above conditions distinctly adopting the chronology of counsel for the applicant



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1. Whether the applicants lodged a notice of appeal.

Counsel for 4th Respondent submitted that the applicants have not filed a notice of appeal before this Court and that this Honorable court should be pleased to find as such. That Paragraph 13 and 14 of the Affidavit in support of this application affirmed by Hawa Nyende states that the Applicants filed Miscellaneous Application No.155 of 2023 seeking to set aside the orders of the Learned Deputy Registrar and the same is attached and marked "B" on the said affidavit.

Counsel argued that the Applicants had not filed any Appeal in this Court save for Miscellaneous Application No.155 of 2023 and as thus it will be erroneous to construe a Miscellaneous Application as a Notice of Appeal. That the Applicants had failed to satisfy this condition and this Honorable court be pleased to find that no such Notice of Appeal was filed.

2. Whether the applicants will suffer substantial loss.

Counsel submitted that Paragraph 25 of the affidavit in support of the application affirmed by Hawa Nyende states that the applicants will suffer irreparable loss if this application is not granted. The 4th respondent in paragraph 10 of his affidavit in reply replying to the above paragraph stated that the allegations in paragraph 25 of the affidavit in support of this application are merely speculative and unfounded with no evidence and legal basis.

He cited the case of **Uganda Revenue Authority-Vs- Mohammed Tumusiime HCMA No. 0440** of 2022 at page 4 in which Justice Ssekaana Musa in stated that;

"The substantial loss must be proved with cogent evidence in order for the court to be able to assess the impact and potential loss or handicap the organization will suffer".

Counsel submitted that the applicants have not led any evidence to prove the substantial loss they will suffer if this application is not granted. He prayed that this Court finds that this condition has not been met and that therefore the application is prematurely before Court.

3. Whether the applicants should be ordered to pay security for due performance of the decree/order.

Counsel submitted that the learned Counsel for the applicants had submitted authoritatively on the legal principles governing security for due performance of the decree which he totally agreed with. However, he totally disagreed with the tactic that was adopted by learned counsel to move Court by way of submissions with the aim of convincing Court that the Applicants should not be ordered to pay security



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for due performance of the decree. The 4th Respondent's Counsel argued that the Applicants' Counsel had as such departed from the applicants' pleadings and the applicants should not be allowed to benefit from a case not set up by them. That under Paragraph 26 of the affidavit in support of the application affirmed by the 1st Applicant, she avers that the applicants are ready and willing to provide security should this Honorable Court so order.

Counsel submitted that it was therefore procedurally improper for Learned Counsel for the Applicants to move this Court by way of written submissions in a bid to convince Court not to order security for due performance yet the applicants had bound themselves to pay the same. He further submitted that although the orders sought to be appealed from required the applicants to deposit rent including arrears in Court on the High Court bank account in Bank of Uganda within one month from the date of the Ruling, the same had not been complied with and therefore the applicants were in contempt of the orders of Court. He prayed to Court to find that the Applicants should pay security for due performance; a prerequisite for the grant of this application.

4. Whether there is a serious threat of execution of a decree/order to render the appeal nugatory.

Counsel submitted that from the onset, the orders by the Learned Deputy Registrar are not executable by the 4th Respondent and as such, the applicants cannot be seen to claim any threat of execution. That the said orders allowed the applicants to remain in occupation of their one room in the property on condition that they pay/deposit rent including arrears in Court which the applicants have never complied with to date.

He further submitted that under Paragraph 15 of the affidavit in support of the application affirmed by the 1st applicant, she avers that at about 10.00pm on 16th July 2023 the 4th Respondent together with the Police, LC1 Chairperson and his committee descended upon the suit property and threatened to evict the Applicants' tenants unless the tenants agreed to sign tenancy agreements with the 4th Respondent and pay rent to him.

Counsel submitted that under paragraph 8 of the affidavit in reply, the 4th Respondent refuted the above allegations by the applicants. Counsel submitted that the above affidavit evidence of the applicants is unreliable and tainted with falsehoods as the same was not supported by any evidence to prove the allegations. That the applicants further stated under paragraph 18 of the affidavit in support of the application that the 4th Respondent has taken steps to enforce the orders of Court in Misc. Application No. 14 of 2023 and to prove this, they attached annexure "D", a notice of demand


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for rent/arrears from the 4th Respondent. Counsel argued that that the said Notice was never issued to any of the applicants and as such, there is no threat of execution of the orders of the Ruling of the learned Deputy Registrar against the Applicants. He further submitted that this application had been prematurely filed by the Applicants.

5. Whether the appeal is frivolous and does not have a high likelihood of success.

Counsel relied on the case of **Uganda Revenue Authority-Vs- Mohammed Tumusiime HCMA No. 0440 of 2022** in which Justice Ssekaana Musa stated that;

“in the assessment of whether the appeal has a likelihood of success, this court ought not to delve into the merits of the appeal that is; prejudice the appeal but rather determine whether the appeal raises arguable points to be determined by the Court of Appeal.

Counsel submitted that the Appeal before this Court does not have a high likelihood of success as the Ruling appealed from found that the Applicants pleaded that their parents were tenants on the suit property who diligently paid rent and even attached receipts of payment of rent to Alderbridge Real Estate & Management Ltd and various law firms which rent was paid until 2020. He argued that the Applicants are mere tenants on the suit property as rightly found by the Learned Deputy Registrar in his Ruling.

6. Whether the refusal to grant the stay would inflict more hardship than it would avoid.

It was the 4th Respondent’s submission that the applicants plead in their Complaint that their deceased parents diligently paid rent which qualified them as tenants. The Applicants having acquired the property from their parents can only be tenants on the suit property. He further argued that by allowing the Applicants to remain in occupation of one room and pay their rent in the Court bank account did not in any way inflict any hardship on them since there are tenants on the property who should pay rent. He argued that on the other hand, the 4th Respondent would be disadvantaged by the grant of this application since he pleads to be the current equitable owner of the suit property having purchased the same from the 1st Respondent.

That by Court granting this Application, the 4th Respondent will be denied from exercising his right as a landlord and would not be able to continue collecting rent from other tenants who are diligently paying rent to him and as such, will cause more hardship for the 4th Respondent than it would avoid.


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Remedies

Counsel for 4th Respondent submitted that the application before Court is premature and does not satisfy any of the grounds to satisfy the grant of an order for stay of execution and prayed that the Application be dismissed with costs to the 4th Respondent.

The Applicants' submissions in rejoinder mostly reechoed the initial submissions which have been considered in this Ruling.

Consideration by Court

The law of on Stay of Execution

It is trite law that an appeal does not act as a stay of execution. When an aggrieved party is dissatisfied with any Ruling or Judgment issued by a competent Court, he or she has the right to appeal the said Ruling or Judgment. The only way an aggrieved party can stop a successful party from benefiting from successful litigation is by filing an application to a competent court for stay of execution.

The Supreme Court in **Lawrence Musiitwa Kyazze Vs Eunice Busingye SCCA No.18 of 1990(1992) IV KALR 55** noted that;

“An application for stay of execution pending appeal is designed to preserve the subject matter in dispute so that the right of the appellant who is exercising his/ her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.”

Order 43 rule 4(1) & (2) of the CPR provides that: -

(1) “An appeal to the High Court shall not operate as a stay of proceedings under a decree or order appealed from except so far as the High Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the High Court may for sufficient cause order stay of execution of the decree.”

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing from the decree, the court which passed the decree may on sufficient cause being shown order the execution to be stayed.”



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Under Order 43 rule 4 (3) of the CPR further deals with stay of execution of the decree appealable to the High Court and a stay is allowed where sufficient cause is shown. The conditions that the Court should consider before allowing an application to stay execution in **Order 43 rule 4(3)** are;

- 1) That substantial loss may result to the applicant unless the order is made.
- 2) That the application has been made without unreasonable delay and,
- 3) That security has been given by the applicant for due performance of the decree as may ultimately be binding upon him or her.

It is noted that the principles under which an application for stay of execution can succeed are well espoused in a plethora of cases which have been cited by both counsel for the Applicants and 4th Respondent. Notably in the cases of **Lawrence Musiitwa Kyazze vs Eunice Busingye, SC Civil Application No. 18 of 1990, Kyambogo University vs Prof Isaiah Omolo Ndiege Civil Application No,341 of 2013 (C.A) Justice Kenneth Kakuru JA** citing various decisions including the Supreme Court decision in **Lawrence Musiitwa Kyazze vs Eunice Busingye Civil Application No. 18 of 1990** restated the conditions for a stay of execution order as follows;

- 1) That the applicant has lodged a notice of Appeal.
- 2) That a substantive application for stay of execution has been filed in this court and is pending hearing.
- 3) That the said substantive application and the appeal are not frivolous and have a likelihood of success.
- 4) That there is a serious and imminent threat of execution of the decree or order and that if the application is not granted, the appeal will be rendered nugatory.
- 5) That the application was made without unreasonable delay.
- 6) That the applicant is prepared to grant security for due performance of the decree.
- 7) That refusal to grant the stay would inflict greater hardship than it would avoid.

That since both Counsel for the applicant and 4th respondent made submissions following the conditions as outlined above, I shall handle the issues following the same order.

1. **That the Applicant must show that he has lodged an appeal which is pending hearing.**

Order 50 Rule 8 of the Civil Procedure Rules (CPR) SI 71-1 provides that: -


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“Any person aggrieved by any order of a registrar may appeal from the order to the High Court. The appeal shall be by motion on notice.” (emphasis added.)

In the case of Kiganda **John and Another vs. Yakobo M.N Senkungu and 5 others Civil Application No. 16 of 2017, Civil Application No. 16 of 2017, (SC), Tumwesigye JSC** stated as follows:

“Therefore, in my view, the question as to whether the application for review should be treated as analogous to a notice of appeal must, as a necessary condition, be linked to deciding whether the application for review stands a reasonable likelihood of success.”

I have read the pleadings and the annexures thereto. I have also carefully taken note of the arguments of both Counsel in the instant case. I disagree with submissions of Counsel for the 4th Respondent in this regard. The Court observes that the Applicants filed Miscellaneous Application No.155 of 2023 from which this application is arising seeking to appeal against the orders of the Deputy Registrar issued under Miscellaneous Application No. 14 of 2023. Miscellaneous Application No.155 of 2023 was filed by the Applicants by Notice of Motion. It is my understanding that Miscellaneous Application No.155 of 2023 is an appeal within the meaning of Order 50 Rule 8 of Civil Procedure Rules. I find that failure to term the application as an appeal is not fatal. In this regard therefore, I find that the Applicants have demonstrated that they have lodged an appeal which is pending hearing before this Honorable Court.

2. That the said pending appeal is not frivolous and has a likelihood of success.

Regarding the second criteria, I refer to the case of **Gashumba v Nkudiye (Civil Application No. 24 of 2015) [2015] UGSC 7 (23 April 2015)** where the Supreme Court stated that: -

“Regarding likelihood of success, which is the most important consideration in our view...”. Further, in our view, even though this Court is not at this stage deciding the appeal, it must be satisfied that the appeal raises issues which merit consideration by Court. A cursory perusal of the record particularly the judgment of the Court of Appeal as well as the Notice of appeal reveal that the intended appeal raises the important question of res judicata, it is not therefore frivolous.”

In the instant case, upon careful consideration of the submissions by both Counsel, the affidavits on record, the law and the Ruling of the Deputy Registrar delivered under Misc. Application No. 14 of 2023 attached to the Applicants’ application before this Court, I have observed that that the question of ownership of the suit



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property is an important issue raised in the Appeal to be determined by this Honorable Court. I therefore find that the pending appeal is not frivolous and has a likelihood of success.

3. That there is a serious and imminent threat of execution of the decree and if not stayed the appeal will be rendered nugatory.

In the case of **Mohammed Mohamed Hamid v Roko Construction Ltd (Miscellaneous Application No. 23 of 2017) [2017] UGSC 77**, the Late Hon Justice Arach Amoko stated that: -

“Regarding the third condition, it is clear from the authorities cited above, that the law is that the applicant must adduce cogent evidence of a serious imminent threat of execution.”

In the instant case, under Paragraph 15 of the affidavit in support of the Application, the 1st Applicant avers that on Sunday 16th July 2023 at 10pm in the night, the 4th Respondent together with the Police, the LC1 Chairperson of the area and his committee descended upon the suit property, sealed off the shops on the property and threatened to evict the applicant’s tenants unless the tenants agreed to sign tenancy agreements with the 4th Respondent for purposes of paying him rent. Attached to this affidavit are photographs of the premises that were sealed off. The applicants also attached a letter dated 3rd July 2023 from the 4th Respondent through his Counsel demanding for rent indicating that the same was a directive as per the Court Order dated 22nd June 2023 and that failure to comply by the tenants would lead to eviction.

Court visited the locus on 24th October, 2023 and confirmed that indeed the tenants had been threatened with eviction if they failed to comply with the Court Order. It was discovered by Court on visiting the locus that the Applicants were threatened by the Deputy Registrar’s Order which directed them to stay in one room of the suit premises as opposed to the three rooms that comprise their family home.

From the foregoing, I am inclined to agree with the Applicants that they face a serious and imminent threat of execution of the Ruling issued under Misc. Application No.14 of 2023 that was delivered on 22nd of June 2023 and that if the same is not stayed, the appeal will be rendered nugatory.


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4. That the application was made without unreasonable delay.

In the instant case, the Ruling of the Deputy Registrar was delivered on 22nd June 2023. The Applicant then filed the appeal under Misc. Application No. 115 of 2023 on the 30th June 2022 and a Notice of Appeal was filed on the same day. The Applicants then filed the instant application under Misc. Application No. 175 of 2023 on 24th July 2023.

I am in agreement with the Applicants' submissions that the application was made without undue delay. It is observed by this Court that the applicant filed this application soon after learning about the threat of eviction indicated in the letter dated 3rd of July 2023 based on the Court Ruling of the Deputy Registrar dated 22nd of June 2023.

5. That the Applicant is prepared to grant security for due performance of the decree;

Although the Applicants regarding the grant of security for due performance of the decree prayed to this Court not to order for security for due performance on the basis that the Applicants' family has been staying on the suit land since 1972 and have paid rent diligently until they discovered the fraud perpetrated against them by the 1st & 2nd Respondents, Counsel for the 4th Respondent argued that the Applicants counsel had tactfully demonstrated the Applicants' unwillingness to pay security for costs yet the 1st Applicant in her Affidavit in Support had averred that she was willing to pay for the same.

In the case of Kawanga v Namyalo & Anor (Miscellaneous Application No. 12 of 2017) [2017] UGHCCD 99 (16 July 2017) the Hon. Justice Dr. Flavian Zeija 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 filing of 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 the 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 the case of 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



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believe he appreciates the effect of not honouring 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 case I am persuaded by the reasoning of the Hon. Principal Judge in the case of **Kawanga Vs. Namyalo supra** with regard to the Court's duty to consider the circumstances of each particular case since no case is exactly the same as the other. This Court has observed that the Orders that were issued by the Deputy Registrar in the Ruling in Miscellaneous Application 14 of 2003 in which the Applicants sought a temporary injunction were final in nature as opposed to being interlocutory orders.

In that Ruling, the Deputy Registrar ordered the Applicants to stay or remain in occupation of their one room on condition that they pay rent including any arrears in Court on Registrar of High Court Account in Bank of Uganda within one month from the date of the Ruling. Upon visiting the locus, Court observed that the Applicants were in occupation of three rooms and not one as stated in the Court Order. The Applicants are utilizing one room as a shop and two rooms behind the shop are utilized by the Applicants for residential purpose. This begs the question as to what specific room was referred to in the Order and what happens to the other two rooms not mentioned in the Order.

Court observed that also that the 4th Respondent did not follow the formal procedure of execution of court decrees. That upon extracting the decree, the 4th Respondent went ahead and served it upon on the tenants of the Applicants and also closed the businesses of two tenants instead of applying to Court for execution of the same. Therefore, in this case, ordering the Applicants to pay security for due performance of the decree where the formal procedure for execution has not been followed by the 4th Respondent would be unjust to the applicants and would also handcuff the applicants of their right of appeal. As a result, I make no order for payment of security for due performance by the Applicants.

6. That refusal to grant the application for stay of execution would inflict more hardship than it would avoid.

In the instant case, this Court has observed that there is Civil Suit No. 8 of 2023 which was filed by the Applicants and is pending Court's determination. Further this Court observed upon visiting the locus that some of the tenants living in the suit property were not paying rent reason being that they were not certain as to whom the true owner of the suit property is for purposes of paying rent i.e. whether they should pay rent to the Applicants or to the 4th Respondent. Court noted that although



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some tenants were paying rent to the 4th Respondent, some were paying rent to the Applicants while others were not paying rent at all and were only paying for utilities. Court further noted that although some of the business premises on the suit property had been closed, most of the residential units were open and were being utilized.

In the circumstances Court's refusal to grant this application would inflict greater hardship on the Applicants since there is a main suit to determine the ownership of the suit property and the same has not been heard to its logical conclusion.

I therefore accordingly allow this application for stay of execution of the Orders of the Learned Deputy Registrar in Miscellaneous Application No. 14 of 2023 with costs to the Applicants pending the hearing of the Appeal.

I so order.

Dated, Signed and Delivered at Jinja this **26th day of October 2023**


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HON LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI
JUDGE