

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**MISC APPLICATION NO. 038 OF 2023**  
**(ARISING FROM HCT-01-LD-CS-018 OF 2019)**

**MAYANJA AHMED** ..... **APPLICANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF THE**  
**UGANDA MUSLIM SUPREME COUNCIL** ..... **RESPONDENT**

**BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO**

**RULING**

**Introduction**

The applicant filed this application by way of Notice of Motion under Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 43 rules 1 and 4 of the Civil Procedure Rules (CPR) seeking the following orders:

- a) That execution of orders in the judgement decree in Land Civil Suit No. 018 of 2019 be stayed pending determination of the intended in the Court of Appeal.
- b) That the prevailing status quo as at the time of judgement in the main suit be maintained until the hearing and disposal of the intended appeal in the court of appeal.
- c) That the costs of this application be provided for.

The grounds for this application are set out in the affidavits of Mayanja Ahmed, the applicant, and Shakila Kijumba, the wife of the applicant, the gist of which is that; -

- i. The applicant was a defendant in **Land Civil Suit No. 018 Of 2019** which was heard and determined by this Honorable Court on the 31<sup>st</sup> day of March 2023.

- ii. The respondent herein was a successful party in **Land Civil Suit No. 018 Of 2019** and was declared the owner of part of the suit land save for the homestead and the access road which was found to be part of the estate of the late Uthman Aligaweesa, the father of the applicant.
- iii. Dissatisfied with the judgement, the applicant, through his lawyers, M/S Kaahwa, Kafuuzi, Bwiruka & Co. Advocates and M/S Balinda & Co. Advocates, filed a Notice of Appeal together with the letter requesting for the typed proceedings and certified copies of the judgement.
- iv. That on the 28<sup>th</sup> day of April 2023, a mob led by the trustees of the respondent unlawfully, wrongfully, and violently carried out an execution by cutting down the banana plantation and other crops, the eucalyptus trees acting as the boundary between the applicant's home and the mosque, destroyed a pit latrine, fenced off the applicant's homestead and blocked the access road without following the proper procedures.
- v. That the appeal is premised on plausible grounds with high chances of success
- vi. That the applicant is willing to furnish security for the due performance of the decree
- vii. That it is in the interest of justice this honourable court stays execution of the orders in **Land Civil Suit No. 018 Of 2019** pending the determination of its appeal in the court of appeal.

The respondent did not file its affidavit in reply despite the applicant having effected service on the respondent's counsel as per affidavits of service dated 25<sup>th</sup> June 2023, and 15<sup>th</sup> August 2023.

## **Background**

The applicant was the defendant in Land Civil Suit No. 18 of 2019 before this honourable court wherein the court made, inter alia, the following declarations: -

- (a) That plaintiff (the respondent herein) is the lawful owner of the land comprised in Burahya Block 106 Plot 13 at Bukwali.
- (b) That the semi-permanent house on the suit land and occupied by the defendant (the applicant herein) belongs to the estate of the late Uthman Aligawesa and the defendant has a right to occupy the same and the applicant is entitled to occupy the enclosure of the homestead and his access to the main road

The applicant herein being dissatisfied with the judgement and orders given by this court in Land Civil Suit No. 18 Of 2019 delivered on the 31<sup>st</sup> of March 2023, filed a notice of appeal in this court and a letter requesting a certified copy of the judgement and record of proceedings to enable him to file a memorandum of appeal. The notice of appeal was lodged in this court on the 4<sup>th</sup> of April 2023.

It appears that on the 28<sup>th</sup> day of April 2023, the respondent representatives descended on the suit land, damaged some of the properties on the suit, fenced off the plaintiff's homestead, and blocked the access road, which prompted this application.

## **Representation and hearing.**

The applicant was represented by Mr. Richard Bwiruka of Kaahwa, Kafuuzi, Bwiruka & Co. Advocates. Neither representatives of the respondent nor its counsel in Land Civil Suit No.18 of 2019 appeared in court. Counsel for the applicant filed submissions that have been considered in this ruling.

## **Submissions by counsel for the Applicant**

Counsel for the applicant submitted that the law on stay of execution pending appeal is provided for under order 43 rules 1 and 4(3) of the civil procedure rules which gives court the discretion to stay execution of the decree, or order appealed from where the applicant presents sufficient reason.

Counsel submitted that the principles governing the exercise of the discretion to grant stay of execution orders were laid in the case ***John Baptist Kawanga Vs Namyalo Kevin and Ssemakula Lawrence MA NO. 51 of 2021***, to wit; -

- (a) That the applicant must establish that his appeal has a likelihood of success or a prima facie case of his right to appeal.
- (b) That the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if the stay is not granted
- (c) If the two of the above are not established, the court must consider where the balance of convenience lies.
- (d) That security has been given by the applicant for due performance of the decree or order as may ultimately be binding upon him or her.
- (e) That the application was filed without delay.

Counsel for the applicant referred this court to the case of ***Kyambogo University Vs Prof. Isaiah Ndege CA No.341 of 2013*** which was cited by this court in the case ***Biryabarema Deogratiuous V Kyarisima Mildred, MA. No. 037 of 2022*** where the above principles were expanded to include;-

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- (a) A serious threat or imminent threat of execution of the decree or order, and if the application is not granted then the appeal will be rendered nugatory.

- (b) That the application is not frivolous and has a likelihood of success
- (c) The refusal to grant a stay would inflict more hardship than it would avoid.

The applicant's counsel argued that as far as the first principle is concerned, the applicant filed a notice of appeal together with a letter requesting typed and certified copies of judgment and proceedings in this court on the 3<sup>rd</sup> day of April 2023.

On the second principle, counsel stated that there is a serious threat of execution as per the affidavits in support of the application. Counsel referred this court to the annexures to the affidavit in support of the application deposed by the applicant which showed his banana plantation being cut down, the pit latrine destroyed, the access road blocked and his homestead fenced off (***Annexures D1-D5***).

On the principle of the appeal not being frivolous, counsel for the applicant argued that the applicant's envisaged grounds of appeal are that; this court wrongly adjudged that the land on which the homestead of the applicant sits belongs to the late Uthman Aligawesa and the applicant only possesses only usufruct rights whereas not; and that court erred when it awarded costs of the suit and counterclaim to the respondent yet it rightly found that the land on which the applicant homestead sits does not belong to the respondent albeit being titled land.

Counsel for the applicant referred this court to the case of ***Lawrence Musitwa Kyazze Vs Eunice Busingye SCCA No. 18 of 1990*** where the Supreme Court held that it is a trite law that where a party is exercising its unrestricted right to appeal, and the appeal has a likelihood of success, it's a duty of court to make such orders as it will prevent the appeal from being nugatory if successful.

The applicant's counsel further submitted that the applicant is willing to furnish the court with security for the due performance of the decree as stated in paragraph 23 of the affidavit in support of the application deponed by the applicant.

Counsel for the applicant argued that the respondent representatives had destroyed the properties of the applicant on the suit land without following the proper procedure of executing judgements since they never applied for execution of the decree of orders of court and no notice to show cause why execution should not issue was served on the applicant. Counsel referred this court to the case of ***Mukula International Vs His Eminence Cardinal Nsubuga and Anor (1982) HCB 11*** where the court held that **“a court of law cannot sanction what is illegal and illegality once brought to the attention of court ...”**

### **Consideration by Court**

The general principle is that where an unsuccessful party is exercising their unrestricted right of appeal, it is the duty of the court to make such order for staying proceedings in the judgment appealed from as this will prevent the appeal from being rendered nugatory. (See ***Wilson Vs Church (1879) volume 12Ch d 454*** followed in ***Global Capital Save 2004 Ltd and Anor VS Alice Okiror & Anor HCMA No.485/2012***.)

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.

Much as there is no specific provision enabling the High Court to grant a stay of execution of its decree pending appeal, the Supreme Court advised that such mandate is present through the inherent powers of the Court, for example, to preserve the status quo pending an appeal. (See **Francis M Micah Vs Nuwa Walakira(1992-93) HCB88**).

**Order 43 rule 4 (3) of the Civil Procedure Rules** deals with the 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 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.

The Constitutional Court in her decision in **Hon. Theodore Ssekikubo and others Vs Attorney General and Anor, Constitutional Application No. 06 of 2013**, added that their appeal has a likelihood of success.

Furthermore, the Court of Appeal in **Kyambogo University Vs Professor Isaiah Omolo Ndiege, CA No. 341 of 2013** the Court of Appeal expanded the list to include; -

- I. The applicant must prove that there is a serious or imminent threat of execution of the decree or order and if the application is not granted, the appeal will be rendered nugatory.
- II. That the application is not frivolous and has a likelihood of success.
- III. That refusal to grant the stay would inflict more hardship than it would avoid.

The rationale for these conditions is to maintain the status quo of the property that is at stake, and to preserve the intended appeal and not to render it nugatory.

In the case of ***National Enterprise Corporation Vs Mukisa Foods HCMA No. 7 of 1998***, the court stated thus:

*“As a general rule, the only ground for stay of execution pending appeal 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 instant application, it is evident that the applicant filed a notice of appeal in this court. A copy of the notice of appeal was annexed to the affidavit in support of the application and marked as annexure “B.” which was lodged in this court on 12<sup>th</sup> April 2023. It was the applicant’s submission that the notice of appeal was subsequently transmitted to the Court of Appeal. Therefore, this condition has been met.

As to whether the applicant will suffer a substantial loss, it can be deduced from the affidavits in support of the application that the applicant's homestead is on the suit land. The homestead had a toilet and a banana plantation which was partly destroyed. Under paragraph 4 of the affidavit deponed by the applicant, it is alleged that the representatives of the respondent attempted to block the access road to the applicant's homestead.

Hon Justice Flavian Zeija in the case of ***John Baptist Kawanga (supra)*** quoting the case ***Tropical Commodities Supplies Ltd and 2 others Vs International Credit Bank (in Liquidation) (2004) 2 EA 333, Ogoola J (as he then was)*** held that: ***“the phrase substantial loss does not represent any particular amount or size; it cannot be qualified by any particular mathematical formula. It refers to any loss great or small; of real worth or value as distinguished from the loss that is nominal.”***



I believe this homestead has occupants who need to use the access road to access it. Therefore, this condition is met as well.

As to whether this application was made without reasonable delay, I find that the threat of execution was made on the 28<sup>th</sup> of and this application was filed in this court on the 5<sup>th</sup> of May 2023. A notice of appeal had already been lodged in this court on the 12<sup>th</sup> of April 2023. There is nothing to show that the respondent had earlier applied for execution and that a notice to show cause why execution should issue was issued and served to the applicant. Therefore, I find that this application was made without any reasonable delay.

On the issue of a serious or imminent threat of execution of the decree in Land Civil suit No. 018 of 2019, if the application is not granted, the affidavits in support of the application show a serious threat of execution. The attached **annexures D1-D5**, show that the homestead was fenced off, the banana plantation cut down as well and the eucalyptus trees that formed the boundaries of the suit land. There is a photo that, according to the applicant, shows one of the representatives of the respondent on the suit land digging holes in the suit land. I am therefore convinced that there is a serious threat of execution, and this ground is satisfied.

On the issue of whether the intended appeal has a high likelihood of success, there was no memorandum of appeal attached to the application and submissions thereto. Hon Justice Flavian Zeija in the case of **John Baptist Kawanga (supra)** quoting the case of **GAPCO Uganda Ltd Vs Kawesa Another MA No.25 of 2013 UHCLD 47** defined the likelihood of success of the case as this: “**the court is satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried.**”

While no memorandum of appeal was attached to the applicant's pleadings, counsel for the appellant submitted that the applicant intends to raise two grounds, to wit; (i) that this honorable court wrongly held that the land on which the homestead of the applicant sits belongs to the estate of the late Uthman Aligawesa and that the applicant only possessed usufruct right, whereas not, and (ii) that the court erred when it awarded costs to the respondent yet it rightly held that the land on which the homestead of the applicant sits does not belong to the respondent as it has has a certificate of title.

What is important at this stage is not to determine the merits of the grounds of appeal, as that is the jurisdiction of the Court of Appeal. This court is ***functus officio*** in Land Civil Suit No. 018 of 2019 and its duty in this application is to be satisfied that there is a genuine legal issue or argument that is not frivolous or merely speculative. I therefore find that the intended appeal is not speculative or frivolous but based on genuine questions of the law or fact.

On the issue of the status quo, the applicant stated that the status quo has changed from the time of Judgment. He contends that the respondent's agents on the 28th of April 2023 changed the status quo by cutting down the banana plantation and other crops, the eucalyptus trees acting as the boundary marks between the applicant's home and the mosque. They also destroyed a pit latrine, fenced off the applicant's homestead and blocked the access road without following the proper procedures. Accordingly, the status quo prevailing at the time of judgment is no longer available to the applicant. There is also a need to avoid bloodshed between the applicant and the respondent. The only status quo to be maintained therefore is the one pertaining at the time of the application.

The applicant, in his affidavit in support of the application, stated that he was ready to provide security for the due performance of the decree, but the applicant did not go ahead to deposit the same. In the case of **John Baptist Kawanga (supra)** Hon Justice Flavian Zeija stated thus:

***“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 was never intended to fetter the right of appeal. It was intended to ensure that courts do not assist litigants to delay execution of decrees through filling vexatious and frivolous appeals. In essence, the decision whether to order for security for due performance must be made in consonance with the probability of the success of the appeal.”***

I find the above passage persuasive and since I have already found that the intended appeal is not merely speculative and that the applicant has a homestead on part of the suit land, I shall not order for security of due performance.

I take notice that the attempted execution by the representatives of the applicant did not follow the right procedures. Courts of law have time and again condemned litigants who effect court decrees through fraud or without following proper procedures. Justice Kenneth Kakukulu (as he then was) in the case of **Kyambogo University (Supra)** quoting the Supreme Court of Uganda in **Francis Hansio Micar vs. Nuwa Walakira Civil Application No. 9 of 1990**, observed as follows:

***“It would be unwise in some circumstances to defeat a statutory right of appeal by for example demolishing the subject matter of a suit so that the appeal is rendered nugatory. Again stay may be necessary***

***when it comes to the notice of any court that an alleged fraud has been practiced upon it effecting its decree or when courts action is in doubt through want of jurisdiction.”***

Consequently, this application is allowed with the following orders:

- (i) The execution of orders in the judgement decree in Land Civil Suit No. 018 of 2019 is stayed pending the determination of the appeal.
- (ii) The status quo prevailing at the time of filing this application should be maintained to avoid bloodshed.
- (iii) Each party shall bear its own costs of this application.

It is so ordered.

Dated at Fort Portal this 29<sup>th</sup> day of September 2023



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**Vincent Emmy Mugabo**  
**Judge**