

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL MISCELLANEOUS APPLICATION NO. 0017 OF 2023

(Arising from Civil Appeal No. 0009 of 2021)

10 **(Arising from Civil Suit No. 0052 of 2009)**

DAVID BAMUHIGA:.....APPELLANT

VERSUS

1. CHARLES NDYANABANGI

2. JUNIOR NDYNABANGI

15 **3. MARTIN NDYANABNGI:.....RESPONDENTS**

BEFORE: HON. JUSTICE SAMUEL EMOKOR

RULING

20 The Applicant brings the instant application by Chamber Summons under
Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act, Order
22 Rules 23(1), 26 and 89 of Civil Procedure Rules seeking orders that stay of
 execution doth issue restraining the 2nd Respondent, his agents/servants or any
 employees and any one acting rightly under him from executing the decree in
 25 Civil Appeal No. 0009 of 2021 until the final determination of Civil Appeal No.
 0307 of 2023 and that provision be made for costs.

The application is supported by the affidavit of the Applicant who avers that he is
 dissatisfied with the Judgment and orders of the learned Judge of the High Court
 of Uganda at Kabale in Civil Appeal No. 0009 of 2021 and has lodged an appeal

5 against the said Judgment in the Court of Appeal and to this effect attached a notice of Appeal as annexure “B”.

That on the 20/04/2023 the Applicant lodged a Memorandum of Appeal in the Court of Appeal but due to many cases at the latter Court the same is pending Registration and that the appeal has a high like hood of success. That the 2nd
10 Respondent intends to execute the decree in Civil Appeal No.0009 of 2021 and has filed an application for execution fixed for hearing on 26/04/2023 and that if the same is not stayed Civil Appeal No.0307 of 2023 shall be rendered nugatory and the Applicant stands to suffer substantial loss since the suit land constitutes his matrimonial home and that it is just and equitable that this application is
15 granted.

The 2nd Respondent filed an affidavit in reply to the application and avers that the instant application is filed in bad faith to delay the 2nd Respondent from executing the decree in HCCA No. 0009 of 2021 as the successful party and that the instant application is misplaced before this Court since it seeks stay of execution in Civil
20 Suit No.0009 of 2021 which suit is nonexistent before this Court and that there is no appeal yet to warrant grant of Notice of Appeal and not the appeal itself. The 2nd Respondent further avers that he is only executing costs in HCCA No. 0009 of 2021 and the same has nothing to do with the Applicant’s matrimonial home. That the subject matter of the main suit from which HCCA No. 0009 of 2021 arises is
25 an access road which does not form the Applicant’s matrimonial home since his home is titled and the said access road in dispute is well demarcated which renders the Applicant’s intended appeal with no chance of success. That the Respondent is recovering costs of UgX 4,210,000/= which amount was reached

5 at by consent of both parties and their respective Counsel and that the instant application is only an afterthought.

The Applicant rejoined to the same.

At the hearing of this application Mr. Twesigye Abraham appeared for the Applicant while Ms Nasiima Patience represented the 2nd Respondent both
10 Counsel proceeded by way of written submissions.

Submissions of Counsel

It is the Submission of Counsel for the Applicant that Court of Appeal draft Appeal No. DRFTCOA – 00 – CV – 307 – 203 as per Annexure (on the affidavit in support of the application be ignored by his Court since there is a substantive and formal
15 Court of Appeal Civil Appeal No. 156 of 2023 as per the record of Appeal that is already served upon Counsel for the 2nd Respondent.

Counsel contends that the Respondent well knowing that this application for stay of execution is pending before this Court illegally proceeded and acted on orders of the lower Court to facilitate Murambi Auctioneers and High Court Bailiffs to
20 construct an access road on the Suit property and that the Applicant had filed two application for stay of execution vide Miscellaneous Application No. 0010 of 2023 in the Chief Magistrates' Court at Kabale and the instant Application both of them in respect of the same subject matter to wit. Whether to execute by constructing a road on the Applicant's land. Counsel further submits that to the Applicants
25 shock and dismay on 01/09/2023 the bailiff well knowing that there is a pending application for execution illegally constructed an access road on the Applicant's plot 109 Block 3 even without following the due legal process of regular execution.

5 That the Applicant has already embarked on the process of appealing against the ruling and orders of the learned Magistrate Grade 1 in erroneously dismissing the Applicant's application for stay of execution vide miscellaneous application No. 0016 of 2023.

It is therefore Counsel's prayer that this Court finds the conduct of the 2nd
10 Respondent to be a total abuse of Court process, premature and intended to deliberately curtail justice and that this Court be pleased to issue orders that it deems fit and proper to protect and preserve the said pending appeal before the Court of Appeal.

Turning to the instant application it is the submission of the Applicant's Counsel
15 that the grounds to be proved in this application for stay of execution were laid out by the Supreme Court in **Hon. Theodre Ssekikubo and 03 others** versus **Attorney General and 04 others. Constitutional application No. 0006 of 2013** in which the Court stated that the grounds for stay of execution are:

-The Applicant must establish that there is an Appeal with a likelihood of
20 **success.**

-The Applicant will suffer substantial loss if the application is not granted.

-The Appeal will be rendered nugatory if the application is not granted.

-The application was instituted without delay.

On the first consideration it is the submission of Counsel that the Applicant under
25 paragraph 3 of his affidavit in support of the instant application avers that he has filed an Appeal vide COA No. 156 of 2023 before the Court of Appeal and that the

5 same has higher chances of success. That in paragraph 5 he depones that the 2nd
deponent intends to construct an access road through his titled land and that the
Applicant has annexed to his application a certificate of title indicating that the
Applicant is the registered proprietor who has been issued with a building permit
and building plans to construct a house on land where the 2nd Respondent
10 unlawfully constructed an access road and that the same was issued by Kabale
Municipal Council on 17/03/2023.

It is the argument of the Applicant's Counsel that there is demarcated or gazetted
access road on his land which is plot 109 Block 3 and that the Respondent has not
paid any compensation to him over the same as **per Article 26(b)(1)** of the
15 **Constitution.**

The Applicant therefore submits that Civil Appeal No. 156 of 2023 has a high
likelihood of success.

On the 2nd consideration Counsel submits that the Applicant depones in
paragraph 7 of his affidavit that he will suffer substantial loss since the land in
20 issue is where his matrimonial home is built and that he has invested money to
acquire the said building permit, building plans, hiring a surveyor to open
boundaries and that at all this cost the Applicant a lot of money and if the instant
application is not granted the Applicant will suffer irreparable loss.

On the 3rd consideration it is the submission of Counsel that the Applicant avers
25 that Civil Appeal No. 156 of 2023 shall be rendered nugatory if execution of the
decree in HCCA No. 0009 of 2021 is not stayed and that Civil Appeal No. 156 of
2023 is pending hearing before the Court of Appeal.

5 The Applicant also submits that the instant application has been brought without undue delay.

Counsel for the Respondent in her written submissions in reference to the execution before the Chief Magistrates Court submits that the same does not form part of the issues to be determined in this Court and that Counsel for the Applicant
10 submits on the same from the bar as they did not form the Applicant's evidence in his affidavit in support and rejoinder. Counsel therefore prays that the same is ignored by this Court.

On whether the Applicant has proved that his pending appeal before the Court of Appeal has likelihood of success it is the submission of Counsel that the Applicant
15 attached annexures which were never part of his evidence at trial nor appeal before this Court and that the said annexures are not applicable since the access road in dispute does not fall within the Applicant's title but outside and thus does not form part of the Applicant's land as alleged.

Further Counsel submits that issues for execution in this Court is for recovery of
20 costs resulting from HCCA No. 0009 of 2021 not land as alleged by the Applicant thus issues of matrimonial property or ownership don't arise here. Counsel therefore contends that the Applicant has not discharged his burden.

It is also the contention of Counsel that there is no appeal that will be rendered nugatory if the instant application is not granted.

25 Counsel for the Respondent also argues that the Applicant has not proved the loss that he will suffer if this application is not granted since the access road in dispute

5 does not form part of the titled land owned by the Applicant and that the execution before this Court is only in respect of costs not land.

Counsel contends that the Applicant will suffer no loss if he pays the 2nd Respondent's costs since the same can be refunded if at all he wins the appeal before the Court of Appeal which according to the Respondent's Counsel is a
10 meritless appeal.

Counsel therefore prays that the instant application is dismissed with costs to the 2nd Respondent.

Determination.

This Court on the 28/02/2023 in HCCA No. 0009 of 2021 dismissed the
15 Applicant/Appellant's appeal. It is not in dispute that the Applicant has since then lodged an appeal against the same before the Court of Appeal vide Civil Appeal No. 156 of 2023.

It is also not in dispute that the Applicant before the Chief Magistrates Court filed **miscellaneous application No. 0010 of 2023** seeking stay of execution of the
20 decree in Civil Suit No. 0052 of 2009 but the same was dismissed following which on the 01/09/2023 a Court bailiff constructed an access road on what the Applicant now claims to be his plot on 109, Block 3.

The Applicant has since then filed before the Chief Magistrates Court **miscellaneous application No. 0016 of 2023** seeking leave to appeal against the
25 ruling and orders in MA No. 0010 of 2023 and also filed **miscellaneous application No. 0018 of 2023** seeking orders to set aside the execution of the bailiff carried out on the 01/09/2023 amongst the orders.

5 It would appear that the lower Court is yet to pronounce itself on the above applications.

In putting the instant application into its proper context I would agree with the Respondents Counsel that the only issue for stay of execution before this Court is the taxed bill of costs to the tune of UgX 4,210,000/= as per the application for
10 execution annexed to the Applicant's affidavit in rejoinder to this application.

I would agree with both Counsel that the conditions to be satisfied by the Applicant in matters of this nature were laid down by the Supreme Court in **Hon Thloedre Ssekikubo and others** versus **Attorney General and 04 others [supra]**

I am sufficiently satisfied that the Applicant has lodged an appeal before the Court
15 of Appeal vide Civil Appeal No. 156 of 2023 against the decision of this Court in Civil Appeal No. 0009 of 2021. I would agree with the Respondent that the evidence that the Applicant demonstrates that he will adduce before the appellate Court was never tendered before the trial Court nor before this Court on appeal and as such I will make no finding on the likelihood of the Appeal succeeding since
20 the same relies heavily on the discretion of the Appellate Court allowing the Applicant/Appellant to tender in additional evidence.

On whether the Applicant is likely to suffer substantial loss if the instant application is not granted the Court in **Tropical commodities supplies ltd (in liquidation) [2004] 2 EA 33**, held that substantial loss does not represent any
25 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.

5 Regarding financial loss that one may suffer upon being compelled to pay a Judgment debt specifically, Justice **Mubiru in Junaco [T] ltd and o2 others** versus **DFC Bank ltd HCMA No. 0027 of 2023** made the following observation:

10 *“‘substantial’ though cannot mean the ordinary loss to which every Judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence.*

The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.

15 *The loss ought to be a nature which cannot be undone once inflicted... for that reason execution of a money decree is not ordinarily stayed since satisfaction of a money decree does not amount to substantial loss or irreparable injury to the Applicant where the Respondent is not impecunious, as the remedy of restitution is available to the Applicant in the event the appeal is allowed”*

20 The present Applicant has not demonstrated how payment of the taxed sum of UgX 4,210,000/= will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.

There is no evidence that the loss that the Applicant will suffer in complying with the taxed bill cannot be undone. The remedy of restitution is indeed available to the Applicant in the event that he is successful in Civil Appeal No. 156 of 2023.

25 It is therefore my finding that the Applicant has not demonstrated that he will suffer substantial loss if this application is not granted.

5 In view of the above I do not find it necessary to consider the last two grounds of this application since doing so will merely be for academic purposes.

In the result it is my finding that the instant application lacks merit and the same is hereby dismissed with costs to the 2nd Respondent.

Before me,

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SAMUEL EMOKOR
JUDGE
28/02/2024.

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