

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA**

AT KAMPALA

**MISCELLANEOUS APPLICATION NO. 154 OF 2013
(ARISING FROM CIVIL SUIT NO. 87 OF 2009)**

**1. BEATRICE MATOVU IGA MUSISI }
2. JOANITA NAMULINDWA MATOVU } :::::APPLICANTS/DEFENDANTS**

VERSUS

C. R. PATEL ::::: RESPONDENT/PLAINTIFF

AND

**MISCELLANEOUS APPLICATION NO. 295 OF 2013
(ARISING FROM CIVIL SUIT NO. 87 OF 2009)**

COMMISSIONER LAND REGISTRATION ::::: APPLICANT/DEFENDANT

VERSUS

C. R. PATEL ::::: RESPONDENT/PLAINTIFF

RULING BY HON. MR. JUSTICE JOSEPH MURANGIRA

1. Introduction

1.1. The applicants in Miscellaneous Application No. 154 of 2013 through their lawyers Mulira & Co. Advocates and the applicant in Miscellaneous Application No. 295 of 2013 through her lawyers Department of Land Registration, Ministry of Lands, Housing and Urban Development; filed their respective said applications against the respondent. Both applications are supported by affidavits.

1.2. The respondent through his lawyers Kwesigabo, Bamwine & Walubiri Advocates filed in Court affidavits in reply and supplementary affidavits to the said applications.

1.3. Facts of the case

1.3.1 The applicants filed their respective applications seeking for orders of stay of execution of the decree of this Court in HCCS no. 87 of 2009 between the parties.

1.3.2 The Respondent filed two affidavits in reply in opposition to the Applications as follows:

a) The Respondent deponed and filed an affidavit in reply in opposition to Miscellaneous Application No. 154 of 2013 on 25/03/2013.

b) The Respondent deponed and filed an affidavit in reply in opposition to Miscellaneous Application No. 295 of 2013 on 10/05/2013.

1.3.3 An affidavit/ in sur rejoinder to the affidavit in rejoinder of Beatrice Matovu Iga Musisi was deponed and filed by counsel for the Respondent on 26/03/2013.

2. Arguments by the parties

2.1 Counsel for the applicants in Miscellaneous Application No. 154 of 2013 submitted that:

In his affidavit sworn on the 17th Day of May, 2013, Mr. Yeremiah Osinde, a court clerk in the firm of M/s Mulira & Co. Advocates, stated that on the 28th of January 2013, he was given a notice of appeal went missing from the court file before the Registrar had signed it. In view of this he was, able to serve Council for the respondent only with the letter requesting for the record of proceedings within the time inscribed.

The respondent swore an affidavit dated 25th March, 2013 in which he maintained that he was a bonafide purchaser for value of the suit land without notice of any fraud affecting it and as such he was protected by law. Accordingly he averred that the Judge correctly cancelled the appellant's title deed. He also averred that the applicants had neither filed a notice of appeal nor served it on him. Further he maintained that the intended appeal had no merit and that the applicants had not given security for costs.

In an affidavit in sur rejoinder Mr. Bernard Bamwine confirmed that the respondent had not been served with a notice of appeal.

Order 22 rule 26 of the CPR provides

“where a suit is pending in any Court against the holder of a decree of the court in the name of the person against whom the decree was passed, the Court may on such terms as to security or otherwise, as it thinks fair, stay execution of the decree until the pending suit has been decided.”

The applicants admitted that the notice of appeal was not served on the respondent within the time provided but this is not fatal to the appeal. In Court of appeal Civil Application No. 17 of 1969 – Mugo & others vs Wanjiru and another 1970 E.A.L.R at page 481 the notice of appeal had not been served on the other party. The Court of Appeal held that the fact that the notice of appeal had not been served did not deprive the Court of power to extend the time for filing the appeal.

This means that failure to serve the notice of appeal does not mean that the appeal is not there as Counsel for the respondent has tried to argue. This case is binding on the High Court and as such ought to be followed.

The power to extent the time for service of notice of appeal is given to the court of appeal under Section 5 of the Judicature Act. The High Court cannot pre-empt this power by making an order which will render nugatory an application by the applicants in the Court of appeal by the applicants to extend the time.

The only course open to an aggrieved party regarding the notice of appeal is to file an application to strike it out under section 82 of the Judicature Act. But this right is only given to a person who has been served with a notice of appeal. It follows therefore that this right is not open to the respondent since he was not served.

The respondent has averred that he is a bonafide purchaser for value. The applicants will not contest this avornment because it is not relevant to the issue raised by the appeal. The 1st applicant has shown in her affidavit that there are two title deeds in respect of the same piece of land. What is relevant is to decided which title deed must be cancelled not whether or not the respondent's title deed is tainted with fraud.

It is the applicants' contention that their title deeds are protected under Section 64 and 176 of the Registration of Titles Act and as such the Court was wrong when it ordered cancellation of their Certificates. Since the Court made a decision on this matter it cannot revisit it indirectly by holding that the applicants cannot succeed because the respondent is a bonafide purchaser for value.

In view of the above the appeal is in existence despite imperfection of non-service of the notice of appeal which can be validated by extension of time. Secondly, the applicants' contention that their title deed not be cancelled should be considered by the Court of Appeal.”

In reply, Counsel for the respondent, Mr. Peter Mulira submitted that there are two applications which were consolidated, Miscellaneous Application No. 154 of 2013, and Miscellaneous Application No. 295 of 2013. That no submissions have been filed and served for Miscellaneous Application No. 295 of 2013, that so he shall take it that the submissions are the only ones for both applications and responded as such.

Counsel for the respondents argued that both applicants never served on him or his client (respondent) a notice of appeal as required by law. That, therefore, there is no appeal to talk of. He further argued that the applicants brought their respective

applications belatedly. He prayed that the applicants' respective applications be dismissed with costs.

In final reply, Mr. Peter Mulira, Counsel for the applicants in Misc. Application No. 154 of 2013 maintained his arguments that his clients' application is properly before this Court. He prayed that the arguments by the respondent's Counsel be ignored and the applications be allowed with costs.

In respect of miscellaneous application no. 295 of 2013. Counsel for the respondent submitted that the Commissioner Land Registration never complied with the Court directives. That is, she never filed in Court her written submissions.

I seem to agree with the above submissions by Counsel for the respondent. When I perused the Court record in Misc. Application No. 295 of 2013, there is written submissions filed on record by Beatrice Iga Matovu (the 1st applicant in Miscellaneous Application no. 154 of 2013). That is an indication that the Commissioner Land Registration never filed in Court her submissions as directed by Court.

Throughout the said submissions the arguments are in support of the 1st applicant in Misc. Application No. 154 of 2013. There is no 1st applicant in Misc. Application No. 295 of 2013. In the premises, therefore, I hold that the Commissioner Land Registration never filed in Court her submissions in support of her case. Thus, the submissions by Counsel for the respondent were not challenged by the Commissioner Land Registration.

3. Resolution of the said applications by Court

3.1 The law governing stay of execution is settled in a number of authorities handed down by this Court and appellate Courts in Uganda.

According to the case of **Lawrence Musitwa Kyazze –vs- Eunice Busingye**, Civil Application No. 18 of 1990, the Supreme Court was clear that “**the parties asking**

for a stay should be prepared to meet the conditions set out in Order XXXIX Rule 4(3)”. Even where the application is filed in the Supreme Court, again the parties “should be prepared to meet the conditions similar to those set out in Order XXXIX Rule 4(3) [now O. 43 r. 4(3)]”.

In view of the mandatory requirements of the applicable O. 43 r. 4(3), the Applicants herein must satisfy Court, *inter alia*, that:

- a) Substantial loss may result to the Applicant unless the order of stay of execution is made.
- b) The Application has been made without unreasonable delay.
- c) Security has been given by the Applicant for **the due performance of the decree or order as may ultimately be binding on the Applicant.**

3.2 APPEAL

In order for somebody to apply for a stay of execution, there must be an appeal.

There is no evidence that an appeal has in fact been filed. The applicants submitted that Mr. Yeremiah Osinde, a Court Clerk in the firm of the applicants’ Counsel swore an affidavit on 17/05/2013 stating that the notices went missing from the court file before they were signed by the Registrar.

However, the said affidavit was not filed and served on us. What I have on the Court record is an affidavit in rejoinder by the Beatrice Matovu Iga Musisi dated 25/03/2013 alleging that two Notices of Appeal were filed by the Applicants. These Notices of Appeal are attached to the said affidavit, but neither of them is sealed nor marked as required under Section 7 (Rule 8 to the Schedule hereto) of the Commissioner for Oaths Act and the Commissioner for Oaths Rules made thereunder. The said Section and Rule provide that:

“All exhibits to affidavits shall be securely sealed to the affidavits under the seal of the Commissioner and shall be marked with serial letters of identification”.

Therefore, these attachments are not evidence and are therefore not properly before Court.

Further, attached to the affidavit in rejoinder sworn by Beatrice Iga Matovu Musisi, annexure “A” thereof is a notice of appeal, dated 28th day of January, 2013 and on page 2 of that notice of appeal, the same was lodged in the High Court of Uganda on 5th February, 2013. There is no indication or evidence to show that this notice of appeal was ever filed in the Court of Appeal Rules of Uganda. Thus, pursuant to Rule 76 (2) of the Court of Appeal which provides that a notice of appeal shall be lodged in the Court of Appeal within fourteen (14) days from the date of the judgment/decreed or Order, the said notice of appeal was filed in Court out of time. In those circumstances, it would be a nullity.

As for annexure “B” to the said affidavit in rejoinder, which is a notice of appeal allegedly filed in the High Court of Uganda by the Commissioner Land Registration, does not have a receiving Stamp by the High Court Registry, Land Division; There is no endorsement on it by the Registrar of the Court and on it there is no stamp of the Court of Appeal which would indicate that the said notice of appeal was ever filed in the Court of Appeal.

Worst of all, that notice of appeal was signed by the Commissioner Land Registration on 18th January, 2013 long before the Judgment she is appeal against was not yet delivered. To that extent there is no appeal that was filed by Commissioner Land Registration.

All the applicants conceded that the Notices of Appeal were not served on the respondent contrary to Rule 78(2) of the Judicature (Court of Appeal) Rules. The Applicants cite the case of **Mugo and others vs. Wanjiru and Another** [1970]

E.A.L.R. 481 to defend their non-service of the notice. However, the case of *Mugo* is not applicable to this particular matter. In that case, the defendant died prior to judgment without the knowledge of the advocates. The appellant filed a Notice of Appeal but the advocate for the deceased respondent refused to accept service. The court also held that normally the sufficient reason for an extension of time must relate to the inability or failure to take the particular step. The case is therefore about extending the time to file an appeal where the appellant has filed a Notice of Appeal but has failed to serve it. The case does not deal with an application for stay of execution without evidence of filing an appeal.

Further to the above, mere filing of a notice of appeal is not a good ground for granting a stay of execution. Indeed Rule 6(2)(b) of the Court of Appeal Rules states that the institution of an appeal shall not operate to stay execution. Again, Rule 78 (I) of the Court of Appeal Rules, which provides:-

(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies of it on all persons directly affected by the appeal; but the Court may, on application, which may be made ex-parte, direct that service need not be effected on any person who took no part in the proceedings in the High Court.”

was never complied with by the applicants in each of the two said applications. The end result, therefore, would be that the said applications are a nullity. It should be noted that the aforesaid provision is mandatory. The applicants ought to have served their respective notices of appeal to the respondent within seven days after filing in Court their said notices of appeal, which they failed to do.

In the absence of proof that the notices of appeal were filed and served, there is no basis of Court granting a stay of execution. The application would, therefore, on this requirement fail.

3.3 SUBSTANTIAL LOSS

One of the requirements for granting a stay of execution as stated in hereinabove is that the Applicants must show that they will suffer substantial loss and irreparable damage if the application is not granted. The applicants have not addressed court on this core requirement of the law. The issue of substantial loss was also not addressed in the affidavits of the applicants. The reason is that no substantial loss will in fact be incurred by any of the applicants if a stay of execution is not granted. There is no evidence that any substantial loss will be incurred. The First and Second applicants can always recover from the person who took their land and sold it as they allege. The Commissioner for Land Registration does not suffer any substantial loss by implementing the Court Orders.

Since there is no proof of substantial loss, these two applications would fail.

4.3 APPLICATION MADE WITHOUT UNREASONABLE DELAY

This requirement presupposes that the applicants filed a notice of appeal. The applicants in their submissions state that the notices of appeal were not served on the respondent “within the time provided”, but it is my considered opinion that they did not serve any notice of Appeal on to the respondent nor his Counsel.

In the judgment of HCCS No. 87 of 2009 between the parties from which this application arises, it was decreed that:-

“

- (a) The plaintiff is the bonafide purchaser for value of the suit lands without notice of any fraud.**
- (b) The 1st defendant is directed to cancel the registration of Leonard Ddumba Matovu as proprietor of Kibuga Block 10 plot 584 and Kibuga Block 2 plot 144, the suit properties.**
- (c) The 1st defendant is directed to reinstate the plaintiff as the registered proprietor of Kibuga Block 10 plot 584 and Kibuga Block 2 plot 144, the suit properties.**

- (d) The 1st defendant is directed to reinstate the special certificates of title in respect of Kibuga Block 10 plot 584 and Kibuga Block 2 plot 144 in the names of the plaintiff.**
- (e) The 1st defendant is directed to hand over to the plaintiff the special certificate of title for Kibuga Block 10 plot 584 which she took from the plaintiff.**
- (f) The directives on (b), (c), (d) and (e) above shall be complied with by the 1st defendant as soon as practicable but not later than (10) days from the date of this judgment.**
- (g) General damages of Shillings 40,000,000/= (fourty million shillings) are awarded to the plaintiff.**
- (h) Costs of the suit are awarded to the plaintiff.**
- (i) Interest on (g) and (h) at 25% p.a is awarded from date of this judgment till payment in full.”**

Order (f) above is very clear. That is, the above said orders were to be complied with within 10 (ten) days from the date of the delivery of the said judgment. The judgment was delivered on 21st day of January, 2013. Wherefore, any application for stay of execution of the said orders would have been instituted in Court by the 30th January, 2013.

The miscellaneous application no. 154 of 2013 between the parties was filed in Court on 25th February, 2013. Then, miscellaneous application No. 295 of 2013 between the parties was filed in Court on 4th April, 2013. Certainly, therefore, the applicants unreasonably delayed to file in Court their respective miscellaneous applications. In the circumstances of the case, these two applications ought to be dismissed. In the case of **D.A Lubega Byaayi & anor vs Makambira Olive Kigongo & anor, Miscellaneous Application No. 263 of 2007**, Court found the delay of 3 months to file an application No. 263 of 2007, Court found the delay of 3 months to file an application for reinstatement to be long and inordinate and dismissed the application. In another case of **Stone Concrete Limited vs Jubilee Insurance**

Company Limited, Miscellaneous Application No. 358 of 2012, Court found the delay of 1 (one) year and 4 (four) months to be unreasonable and declined to grant the application.

Therefore, as the notices of appeal have still not been served as I write this ruling the delay of the applicants goes without saying. On this requirement by the law, too, these two applications would fail.

3.5 SECURITY

The Applicant is required to give **security for the due performance of the decree or order** when applying for stay of execution.

However, the Applicants have not provided any security as required. They are being asked to surrender certificates of title, but they have failed to do this. They should surrender the titles without fail, if the applicants in miscellaneous application No. 154 of 2013 were to be entertained by this Court.

3.6 These two applications are affected by procedural law.

The two said applications were filed in Court without a statement of summary of evidence, list of documents, list of witnesses and list of authorities each applicant intended to adduce and rely on. The applicants' failure to file the said statement together with the said applications contravenes Order 6 rule 2 of the Civil Procedure rules, which provides that:

**“Rule 2 –items to accompany pleading.
Every pleading shall be accompanied by a brief summary of evidence to be adduced, a list of witness, a list of documents and a list of authorities to be relied on”.**

Wherefore, the said applications are bad in law. In these circumstances the said two consolidated applications would fail.

In premises, the said two (2) applications have no merit. They ought to fail.

4. Conclusion

In the result and for the reasons given hereinabove, in this ruling and in consideration of the affidavits evidence adduced by both parties:

- (a) Miscellaneous Application No. 154 of 2013 between the parties is dismissed with costs to the respondent.
- (b) Miscellaneous Application No. 295 of 2013 between the parties is dismissed with costs to the respondent

Dated at Kampala this 7th day of June, 2013.

sgd
Murangira Joseph
Judge