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The Republic of Uganda

In The High Court of Uganda Holden at Soroti

High Court Miscellaneous Application No. 060 of 2022

(Arising from High Court Civil Suit No. 22 of 2015)

Oryonga Moses :: Applicant

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Versus

Etanu Osulek Thomas :: Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

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Ruling

The Application:

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This is an application brought by way of notice of motion supported by an affidavit under section 33 of the Judicature Act, Section 98 of the Civil Procedure Act, Order 22 rule 23 and Order 52 rule 1 of the Civil Procedure Rules for orders that;

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1. The execution of the decree and or orders arising from the Judgment and Orders of Hon. Justice Dr Henry Peter Adonyo delivered on the 22<sup>nd</sup> day of March 2022 against the Applicant in Civil Suit No. 22 of 2015 be stayed pending the determination of Civil Appeal No. 119 of 2022.
2. That the provision for costs be made.

5 Grounds of Application and affidavits for and against:

The grounds of the application are contained in the application and supporting affidavit sworn by the applicant. These include;

- 10 1. That the applicant is the unsuccessful party in High Court Soroti **Civil Suit No. 22 of 2015** in a judgment delivered by Hon. Justice Dr Henry Peter Adonyo in which His Lordship ordered for revocation of the letters of administration issued to the Applicant, a permanent injunction and costs.
- 15 2. That being aggrieved by the judgment and orders of the High Court, the applicant instructed his legal counsel to appeal to the Court of Appeal of Uganda against the same and the said appeal is pending hearing and determination.
- 20 3. That the applicant's appeal against the judgment has a *prima facie* likelihood of success as it raises substantial questions of law to be investigated with chances of winning the Appeal in that;
  - 20 i. In the appeal, the Applicant intends to raise the issue of locus standi to institute a suit for revocation of letters of administration.
  - ii. The applicant's appeal raises the question of customary adoption which is still alien to our jurisprudence.
  - 25 iii. The applicant intends to seek for clarification on the issue of the degree of consanguinity as held in the judgment.
  - iv. The applicant intends to seek for clarification from the Court of Appeal on the issue of the judgment relying on Teso culture without any evidence led to prove the same.
  - 30 v. The holding that the Estate of the late Obukui Yohana should remain in the hands of the Plaintiff/Respondent in effect

5 amounts to grant of letters of administration by court to the Respondent without following due process.

4. That the applicant will suffer irreparable injury not capable of being atoned by way of damages if the application is not granted and the status quo is not maintained as the property is prime, there are  
10 many beneficiaries and going by the judgment all of those beneficiaries will be deprived of their inheritance, source of sustenance, homes and their rights.
5. That the balance of convenience is in favour of the Applicant.
6. That if substantive stay of execution is not given, the appeal will be  
15 rendered nugatory.
7. That it is fair, just and equitable and in the interest of justice that the Orders sought herein be issued pending the determination of the appeal.

The respondent filed an affidavit in reply opposing the application and it  
20 stated as follows;

1. That I was the plaintiff and successful party in Soroti High Court Civil Suit No. 22 of 2015.
2. That the essence of the said suit was to challenge letters of administration granted to the applicant vide Administration Cause  
25 No. 48 of 2008.
3. That the said grant was revoked and the estate released from the administration of the applicant.
4. That the applicant being dissatisfied has appealed against the entire judgment to the Court of Appeal of Uganda at Kampala vide Court  
30 of Appeal Civil Appeal No. 119 of 2022.
5. That the applicant has subsequently filed application No. 60 of 2022 for stay of execution.

- 5 6. That my Lawyers M/s Echipu & Co. Advocates and M/s Ewatu & Co. Advocates have read and explained to me the application for stay of execution and its supporting affidavit and in reply have this to say.
7. In reply to the entire application, I am advised by my aforesaid lawyers, which advise I verily believe to be correct, that the application does not meet the required legal test for grant of stay and should summarily be dismissed.
8. In reply to paragraph 1-3 the contents thereof are not contested.
9. In reply to paragraph 4 of the affidavit, I am informed by my aforesaid lawyers, which information I verily believe to be correct, that although the likelihood of success of the appeal is a factor in determining the application for stay, it is not primary as this is a matter for the appellate court, but rather the applicant must satisfy the court that there exist sufficient reasons to deny the successful party the fruits of the judgment.
10. In reply to paragraph 5 of the affidavit, I am informed by my aforesaid lawyers, which information I verily believe to be correct, that there is no irreparable injury and damage to be suffered by the applicant, his main loss being the right as administrator pursuant to revocation of the grant and the insinuated deprivation of alleged beneficiaries is not tenable as no alleged beneficiary has sworn any supplementary affidavit to that effect.
11. In reply to paragraph 6 of the affidavit, I am informed by my aforesaid lawyers, which informed I verily believe to be correct, that the balance of convenience is in my favour as the successful party and decree holder.
12. In reply to paragraph 7, I am informed by my aforesaid lawyers, which informed I verily believe to be correct, that the appeal cannot be rendered nugatory, as there has been no demonstration that the

5 estate will cease to exist if an order for stay of execution is not granted.

13. In reply to paragraph 8 of the affidavit, I am informed by my aforesaid lawyers, which informed I verily believe to be correct, that there is no fairness, justice or equity in interfering with my enjoyment of my rights as the successful party in the circumstances of this application.

Submissions.

Counsel for the applicant submitted on whether the Application satisfies the conditions for grant of substantive stay of execution. Counsel submitted that the Jurisdiction of this Court to grant a stay of execution is set out in Order 22 r 23 & r 26, Order 52 Rules 1, 2 & 3 of the CPR, and Sec 98 of the CPA, which gives the Court, the discretion, in civil proceedings, where a Notice of Appeal has been lodged in accordance with Rule 76 of the Judicature (Court of Appeal) Rules Directions SI 13-10, to order a stay of execution in appropriate cases and on terms that it thinks fit. He cited ***Civil Application No. 24/2015 Gashumba Maniraguha versus Sam Nkundiye*** at page 6 of the Ruling.

Counsel further submitted that the supreme court has laid down the principles governing the exercise of stay of execution in. ***Constitutional Application No.06/2013: Hon Theodore Ssekikubo & Others versus Attorney General*** vide;

- (i) The Applicant must establish that his appeal has a likelihood of success or a prima facie case of his right of appeal.
- (ii) The Applicant will suffer irreparable damage or that the Appeal will be rendered nugatory if a stay is not granted.
- (iii) If 1-2 above have not been established, Court must consider where the balance of convenience lies.



- 5 (iv) The Applicant must establish that the application was instituted without delay.

With regard to establishing an appeal with a likelihood of success, counsel submitted that the law is that when unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court to make such orders  
10 for staying execution or proceedings under the judgment appealed from as will prevent the appeal, if successful from being rendered nugatory. Counsel cited ***Constitutional Application no. 07/2011 and 09/2011 Akankwasa Damian versus Uganda*** to support his argument.

- 15 Counsel submitted that the Applicant's Appeal to the Court of Appeal is bonafide, and raises serious and pertinent legal questions worth adjudication and pronouncement by the court.

These are summarized in para 2 of the Notice of Motion and para 4 of the Affidavit in support.

- 20 Counsel submitted that the Applicant will suffer irreparable damage or that the Appeal will be rendered nugatory if a stay is not granted. The Applicant states in para 5 of the Affidavit in support of his Application, that if the status quo is not maintained, the property in question is prime and there are many beneficiaries including the Applicant who will lose  
25 their inheritance, source of sustenance, homes and other rights.

Counsel further stated that the applicant has attached the Decree which stipulates the orders granted by the High Court, which by their nature are self-executing.

- 30 Counsel further submitted that the applicant is currently under the protection of an interim order issued by this court on 9th May 2022 which

5 order was to preserve the Appeal and if the stay is not granted, the interim will lapse, thus exposing the Applicant to imminent danger of execution.

Counsel stated that if the order of stay is not granted and the decree is executed, and the Applicant is successful in the appeal, the Appeal will be rendered nugatory and the reliefs obtained on Appeal will be rendered  
10 moot.

Counsel submitted that the application was instituted without delay with the judgment having been delivered on 22<sup>nd</sup> March 2022, Notice of Appeal and letter requesting for proceedings filed on 28th March 2022, Appeal filed on 11th April 2022 and the instant application filed on 27th April  
15 2022. This Application was in the circumstances filed without delay.

Counsel finally submitted that the Applicant satisfies the conditions precedent for grant of an order of stay of execution and the he need to protect his unrestricted right of appeal cannot be overstated.

Counsel for the Respondent submitted that **Order 22 rule 23 of the**  
20 **Civil Procedure Rules** is inapplicable in so far as the decree whose execution is sought to be stayed, is of this very court and has not been sent to it. That if this court were to strictly apply the law this application would be a non-starter and should have dismissed with costs.

Counsel further submitted that courts have held that such defects are  
25 curable and would not raise dust out of it. Counsel continued and stated that judicial precedent is awash with case law that although there is no specific order in the Civil Procedure Rules for stay of execution, the order now adopted by the courts is **Order 43 Rule 4(3)**.

Counsel further submitted that Counsel for the applicant has  
30 inappropriately cited a case relevant only to the **Judicature (Supreme Court Rules) Directions Legal Notice 13 of 1996**.

5 Counsel for the respondent did not dispute that a notice of appeal has been lodged and also conceded that the application was filed without unreasonable delay.

Counsel contested that the applicant will suffer substantial loss unless the stay of execution is granted. Counsel submitted that the respondent in  
10 paragraph 12 of his affidavit in reply avers that there is no substantial loss or irreparable injury or damage which can be suffered by the applicant and the respondent disputes the insinuated deprivation of any alleged beneficiaries as none has sworn an affidavit to that effect.

Counsel further submitted that what the applicant has lost is merely the  
15 right to administration following the revocation of the grant and an administrator is in the position of a trustee and is not owner of property.

Counsel further submitted that in paragraph 14 of the affidavit in reply the respondent averred that in the event that the appeal is successful it will not be rendered nugatory as there has been no demonstration that the  
20 estate comprising of customary land on which the respondent has lived all his life will cease to exist.

Counsel for respondent that the applicant losing powers of administration cannot be taken as substantial loss. Counsel relied on ***Tropical Commodities Supplies Ltd and Ors Vs. International Credit Bank (In Liquidation) (2002) 2 EA 331*** and ***Walusubi Mustafa vs Musenze Lukia Civil Appeal No. 100 of 2014*** to define what  
25 constitutes substantial loss and how it should be determined.

Counsel further submitted that in the judgment from which this application arises the applicant was faulted for indicating that he is a sole  
30 survivor in his petition on oath for letters of administration and that the



5 respondent in paragraph 12 of his affidavit denies the existence of any beneficiaries who are likely to suffer.

With regard to the likelihood of success of the appeal, counsel for the respondent submitted that without prejudice to the main appeal, Counsel for the applicant is running away from the suit which was before the High  
10 Court.

Counsel submitted that the suit was for revocation of letters of administration on account of fraud, forgery and concealment of material facts. That the High court found that some of these had been proved and the applicant on appeal does not seek to challenge any of these findings  
15 and for that reason the appeal does not have a high chance of succeeding. Counsel submitted that the grounds of appeal for consideration do not have the slightest chance of success.

With regard to security for due performance of the decree or order, Counsel submitted that the applicant has not addressed this issue in his  
20 application or affidavit in support.

Counsel submitted that **Order 43 rule 4(3)(c) of the Civil Procedure Rules** provides that no order for stay of execution shall be made unless court is satisfied that security has been given by the applicant for the due performance of the decree or order as may be ultimately be binding on  
25 him.

Counsel submitted that in ***Amon Bazira Vs Maurice Peter Kagimu MA 1138 of 2016*** where Justice Henry I Kawesa being confronted with the argument that security for costs is not a condition precedent to the grant of execution as found in ***Imperial Royale Hotel Ltd & 2 Others versus Ochan Daniel Misc. Application No.111 of 2012*** found that  
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5 it has been trite that due performance of the decree can only be secured by the provision of security for costs.

That this position was not altered in anyway by the Supreme Court decision of **Lawrence Musiitwa Kyazze versus Eunice Busingye SCA No.18/1990**.

10 Counsel submitted that payment security is a prerequisite for grant of stay of execution and cited **Sahabo v Kaneza [2020] UGHCFD 3 and Walusimbi v Musenze [2021] UGHC 15** to sustain his argument.

Counsel distinguished **Constitutional Application No.06/2013: Hon Theodore Ssekikubo & Others versus Attorney General** as  
15 relied upon by the applicant and submitted that Counsel for the applicant is falsely relying on principles of stay of execution as laid down in the **Judicature (Supreme Court Rules) Directions** which are only applicable to matters before the Supreme Court.

Counsel finally submitted that for the application to succeed it should  
20 meet all the conditions in totality and not in alternative and that this application only succeeds on notice of appeal having been filed and being filed without unreasonable delay but fails on all the rest. Counsel prayed the application be dismissed with costs.

In rejoinder Counsel for the applicant submitted that there is no specific  
25 order in the Civil Procedure Rules for a stay of execution pending an appeal from the High Court to the Court of Appeal.

The Respondent agrees with this position on page 2 line 14 of his written submissions. We are fortified by the decision of Luswata J (as she then was) in the case of **Walusimbi Mustafa vs Musenze Lukia (MA No. 22 of 2018)** in which she relied on the supreme court decision of  
30 **Francis M Micah vs Nuwa Walakira [1992-93] HCB 88** which

5 held that there is no specific provision enabling the High Court to grant a stay of execution of its decree pending an Appeal and that such mandate is present through the inherent powers of Court, for example, to preserve the status quo pending an Appeal. Counsel continued to submit that in essence, **O.43 r 4(3) of the CPR** relied upon by the Respondent to  
10 submit that an Applicant seeking a stay of execution must satisfy the conditions set therein is inapplicable as it governs stay of execution in respect of appeals to the High Court and not Court of Appeal.

Counsel further submitted that it is trite that where a party is exercising its unrestricted right of Appeal and the Appeal has a likelihood of success,  
15 it is the duty of the court to make such orders as will prevent the appeal, if successful from being rendered nugatory.

He relied on ***Walusimbi Mustafa vs Musenze Lukia MA No. 232 of 2018.***

With regard to citing a supreme court authority counsel submitted in  
20 rejoinder that the Respondent did not mention the impugned case cited by the Applicant, and for clarity and avoidance of caution the Applicant moved court to adopt the principles of stay of execution as laid out by the Supreme court in the case of ***Hon. Theodore Ssekikubo & Ors Vs AG & Ors SCCA No. 6 of 2013*** and retaliated that the principles laid down  
25 in the said case of are applicable in this court.

In rejoinder to the respondent's submission that the applicant merely lost the right to administration upon revocation of letters of administration and that the administrator is in position of a trustee and not owner, counsel for the applicant submitted that the respondent's submissions  
30 have been made without regard to the judgement and the decree arising therefrom.

5 That for clarity, the decree attached as annexure 'B' decreed the estate property to the respondent and this deprived the applicant who is also a beneficiary as conceded to by the Respondent in his plaint in paragraph 4(a) and his testimony in chief.

In that regard, if this decree is not stayed, apart from being deprived of  
10 beneficial rights the appeal will be rendered nugatory.

Counsel further submitted that courts are not in agreement on what amounts to substantial loss as explained in the authorities of **Andrew Kisawusi vs Dan Oundo Malingu HCMA 467/2013, Tropical Commodities Supplies Ltd Vs International Credit Bank Ltd**  
15 **(In Liquidation) (2004) 2 EA 331** and **Walusimbi Mustafa vs Musenze Lukia MA No. 232 of 2018** as relied on by the Respondent. Counsel stated that the declaration by the court that the respondent is the only surviving relative of the late Yowana Obukui and that he was the customarily adopted son under the Teso norms and custom and that the  
20 estate be in the hands of the respondent have far-reaching consequences on the applicant whose father as per the evidence on record of both the Applicant and Respondent during hearing of the Civil Suit No. 22 of 2015 was a brother to the late Yowana Obukui.

With regard to success of the appeal in rejoinder counsel submitted that  
25 first, the applicant in one of his grounds of appeal intends to raise the question of the Learned Judge failing to take into consideration evidence adduced by him and also his submissions and in that way will argue that the threshold of proving fraud to the required degree to enable the revocation of letters of administration was not met since his evidence  
30 which was not taken into consideration by the court while arriving at the judgment would have tilted the case in his favour. Secondly, the question of locus standi of the Respondent alone if resolved in favour of the

5 Applicant disposes off the suit and this question has a likelihood of  
success. Adoption is codified under the law and so is the degree of  
consanguinity as such there is no place for unwritten laws such as  
customary adoption. The degree of consanguinity under the succession act  
follows the paternal lineage and not the maternal lineage and thus we  
10 intend to argue that the learned judge erred in applying the same degree  
to the Respondent whose kinship is based on the maternal lineage.

In further rejoinder, Counsel submitted that the Respondent did not cite  
any law or authority on the issue of customary adoption nor were experts  
in this area brought to testify in court on the same. That this thus becomes  
15 a substantial question meriting judicial consideration and with high  
likelihood of success on appeal.

With regard to security for due performance of the decree counsel  
submitted in rejoinder that the case of **Hon. Theodore Ssekikubo &  
Ors vs AG & Ors (supra)** being a later decision of the supreme court,  
20 laid the grounds for grant of stay of execution without security for due  
performance of decree as one of the grounds.

Furthermore, in the case of **John Baptist Kawanga vs Namyalo  
Kevina & Semakula Laurence MA No. 12 of 2017** Flavian Zeija J  
(as he then was) stated that;

25 ***“I am of the view that every application should be  
handled on its own merits and a decision whether or not  
to order security for due performance be made according  
to the circumstances of each particular case. The  
objective of the legal provision on security was never  
30 intended to fetter the right of appeal. It was intended to  
ensure that the courts do not assist litigants to delay  
execution of decrees through filing vexatious and***

5 ***frivolous appeals. In essence, the decision whether to order 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.***

Counsel also submitted that in the case of ***Labeja Pirimino vs Ojera Joseph MCA No.133 of 2019***, Stephen Mubiru J held that;

10 ***“Courts though have been reluctant to order security for due performance of decree. Rather courts have been keen to order for security for costs (see Tropical Commodities Ltd & Ors Vs International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 and DFCU Bank Ltd Vs Dr Ann Persis Nakate Lussegere, CA No. 29 of 2003), because the requirement and insistence on a practice that mandates security for the whole decretal amount is likely to stifle appeals.”***

20 Counsel finally submitted that the facts of this case are that there is no monetary decretal sum, an appeal has been filed in the Court of Appeal of Uganda, there are substantial questions meriting judicial consideration and the appeal has a high likelihood of success.

25 Lastly, counsel averred that the Applicant has unrestricted right of appeal and the same shall be rendered nugatory if a stay is not granted and this court also has inherent jurisdiction in the interest of Justice to give such conditions it deems fit including security for costs as it pleases.

Decision of Court:

30 The applicant and respondent have all sufficiently submitted on the law regarding stay of execution and indeed there is no specific provision in the Civil Procedure Rules regarding stay of execution of a decree where an

5 appeal lies to the Court of Appeal, and this<sup>is</sup> an area in which court exercises its inherent powers.

The applicant and respondent all submitted on the prerequisites for grant of stay as provided in the case of **Hon. Theodore Ssekikubo & Ors vs AG & Ors (supra)** and the contention is clearly on whether the  
10 applicant's appeal has a likelihood of success, whether he will suffer substantial loss if the stay is not granted and security for due performance of the decree.

The orders in Civil Suit No. 22 of 2015 were thus;

- 15 a. The plaintiff has proven his suit on a balance of probability as against the defendant.
- b. The letters of administration granted to the defendant in respect of the estate of the late Obukui Yoana is hereby revoked accordingly.
- c. The estate of the late Obukui Yoana is to remain in the hands of the Plaintiff.
- 20 d. A permanent injunction is issued as against the respondent from interfering with the quiet enjoyment of the late Obukui's estate by the plaintiff who is the only closed relative and beneficiary of the late Obukui estate who should thus apply for letters of administration in that estate to manage in accordance with the law.
- 25 e. The costs of this suit is awarded to the plaintiff in any event.

From the above orders it is clear that the respondent was and still is in possession of the estate subject of the revoked letters of administration.

It is also clear that a permanent injunction was given to restrain anyone from disturbing the respondent's quiet enjoyment of the estate and he was  
30 directed to apply for letters of administration to the same.

5 The applicant's submission that the orders have a far reaching consequence of denying the beneficiaries of the estate their inheritance is not tenable as no evidence of the estate being mismanaged has been adduced.

10 The applicant also failed to show the loss that will be suffered by the so-called beneficiaries which he even failed to name.

I would thus find that though the appeal presents questions for determination by the Court of Appeal, such questions can be determined without the execution in the head suit being stayed especially since the Respondent has lived on the estate all his life and it is not an estate which  
15 he is possessed of only by virtue of the judgment in the head suit.

The said estate, I note, has survived throughout the period of the suit and I would find and see no reason why it won't survive the period of the appeal.

20 Accordingly, I do find that this application lacks merit and is thus dismissed with costs to the respondent.

Orders:

- This application is dismissed.
- The costs of this application is awarded to the respondent.

I so order accordingly.

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Hon. Justice Dr Henry Peter Adonyo

16<sup>th</sup> August 2022