

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC. APPLICATION NO. 110 OF 2022
(ARISING FROM CIVIL SUIT NO. 0046 OF 2021)

- 5 **1. SAMUEL KABAGAMBE NTUNGWA**
 2. ANDREW KATO NTUNGWA
 3. BILLY TASH NTUNGWA :::::::::::::::::::::::::::::: APPLICANTS

VERSUS

FLORENCE KEKIBUGA NTUNGWA :::::::::::::::::::::::::::::: RESPONDENT

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BEFORE: HON JUSTICE VICENT WAGONA

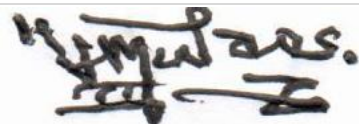
RULING

Introduction:

This ruling follows an application brought under Section 98 of the Civil
15 Procedure Rules, Section 33 of the Judicature Act, Orders 43 rules 4 (2) (3)
(4) and (5) and Order 52 rules 1 and 2 of the Civil Procedure Rules seeking:

1. An order staying execution of the decree and orders in Civil Suit No.
0046 of 2021 until the determination and disposal of an intended appeal
to the Court of Appeal.
- 20 2. That the costs of taking out the application be provided to the
Applicant.

Background:

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The trial court delivered judgment in HCT-01-CV-CS-46-2021 on 14th September 2021.

5 On 10th October 2022, a notice of appeal was filed by the applicants herein at the High Court in Fort-portal. This notice of appeal was filed out of time.

On 17th November 2022, this application was filed seeking an order staying execution of the decree and orders in Civil Suit No. 0046 of 2021 until the determination and disposal of the intended appeal to the Court of Appeal.

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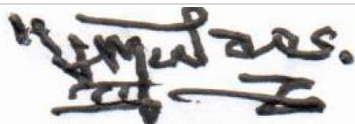
On 17th February 2023, the applicants filed Misc. Appln. No. 007 of 2023 seeking orders to the effect that: the notice of appeal filed on 17th November 2022 be admitted out of time; and extension of time to appeal against the orders in the trial judgment of 14th September 2022 be granted.

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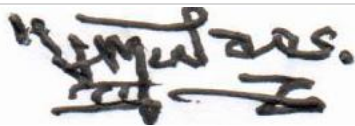
The sequence of events was therefore that judgment was delivered on 14th September 2022; then a notice of appeal was filed out of time on 10th October 2022; then, an application for stay of execution was filed on 17th November 2022; finally an application for extension of time within which to appeal was
20 filed on 17th February 2023.

The Grounds:

The grounds in support of the application are contained in the affidavit of Samuel Kabagambe Ntungwa, the 1st Applicant who averred thus:



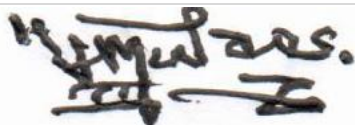
1. That on the 11th day of October 2022, through the applicant's lawyer's M/s Ngamije Law Consultants & Advocates, they were served with a decree in Civil Suit No. 0046 of 2021.
2. That they were not given judgment notices and thus judgment was delivered in the applicant's absence. That being dissatisfied, through their lawyers, they filed a notice of appeal and a letter requesting for the certified copy of the record of proceedings and judgment for the intended appeal.
3. That they were advised by their lawyer, Counsel Mugisha Rwakatooke that since they had requested for a typed record of proceedings from this court, the days within which to appeal start running from the date the record is provided.
4. That the intended appeal has high chances of success. That the Applicants being beneficiaries of the late Ntungwa Samuel, depend on the land the subject matter of the intended appeal for their livelihood, through grazing cattle, cultivation and are resident thereon. That they are likely to be deprived of their entitlements and the estate is likely to be put to waste or alienation by the Respondent and as such they will suffer substantial loss if the application is not granted.
5. That the Respondent had involved police to threaten to arrest the applicants, evict them from the land being part of the estate of the late Ntungwa Samuel where they are beneficiaries, even before going through the lawful procedure. That at the time of filing this application, the Respondent had not served the Applicants with a bill of costs.



6. That the applicants are willing to furnish reasonable security for costs as shall be determined by court after the bill is taxed. That the Applicant will suffer irreparable damage if this application is not allowed. That the application has been brought without any inordinate
5 delay and that it is just, fair and equitable that the application is allowed.

The application was opposed by the Respondent through her affidavit in reply dated 7th March 2023 in which she contended thus:

1. That the application at hand is overtaken by events as the distribution
10 of the estate of the late Samuel Ntungwa already took place and an inventory was filed in court. That the 1st Applicant consented to the distribution and requested the administratrix to accord him a soft settlement plan of UGX 300,000/= as rent of three (3) months to enable him shift from the matrimonial home to his portion of land allocated to
15 him and he did relocate with his family.
2. That some beneficiaries like Esther Ntungwa took possession of their shares and sold them off.
3. That the Respondent's lawyer would at trial raise a preliminary point of
20 law to the effect that the notice of appeal was filed out of time without leave of court and the same should be expunged thus rendering this application incompetent, vexatious, bad at law and a wastage of court's time.



4. That the applicant acknowledged in paragraph 7 that execution against them had not commenced and therefore there is nothing to stay since the Respondent had not applied for execution.

5. That this application is premature, incompetent and wastage of court's time. That the application does not adduce the grounds for stay of execution and reasons why a stay should be granted and thus it should be dismissed with costs.

Representation:

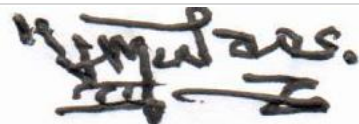
M/s Ngamije Law Consultants & Advocates represented the Applicants while M/s Kasumba, Kugonza & Co. Advocates represented the Respondent. Both parties filed written submissions which I have considered.

Issues:

1. Whether the affidavit in support of the application is incurably defective.
2. Whether the application for stay should be granted.
3. Remedies available.

RESOLUTION:

Issue One: Whether the affidavit in support of the application is incurably defective.



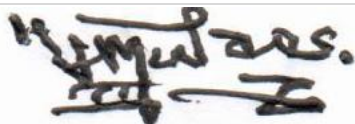
Counsel for the Respondent raised a point of law on the competency of the affidavit in support of the application. Learned Counsel for the Respondent contended that the 1st Applicant who deponed an affidavit in support of the application claimed to do it on behalf of all the others without written authority as required under Order 1 rule 12 of the Civil Procedure Rules. Counsel cited a number of authorities to the effect that an affidavit deponed on behalf of another person without written authority is defective and a nullity and liable to be struck out with costs. It was submitted that the failure to adhere to Order 1 rule 12 (1) of the Civil Procedure Rules renders an affidavit incompetent and liable to be struck out and he cited the case of *Kaheeru Yasin & Anor Vs. Zinorumuri David, HCMA No. 82 of 2017*. Counsel thus invited court to find that affidavit in support of the application was incompetent and liable to be struck out and consequently the application itself. There was no response on this issue by Counsel for the Applicants

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Order 1 rule 12 (1) of the Civil Procedure Rules provides thus:

Appearance of one of several plaintiffs or defendants for others.

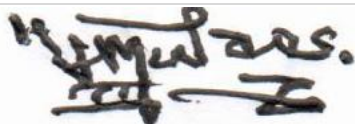
(1) Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for that other in any proceeding.

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(2) *The authority shall be in writing signed by the party giving it and shall be filed in the case.*

The courts have consistently held that an affidavit which is deponed on behalf of another without the written authority as required under Order 1 rule 12 (1) is incurably defective and liable to be struck out. (See ***Kaheru Yasin & Anor v Zinorumuri David MA 82/2017; Taremwa Kamishani & Ors v Attorney General MA 38/2012; Kaingana v Dabo Boubon [1986] HCB 59***).

10 In this case, the affidavit deponed by the 1st Applicant did not state that he was swearing the affidavit on his behalf and on behalf of the 2nd and 3rd applicants. The 1st Applicant was deponing in his own capacity in respect of facts known to him although those facts applied to all the applicants. Where there is more than one party to an application, there is no requirement that all
15 must swear affidavits in support of the application or give written authority. The affidavit of one of the parties is sufficient as long as the deponent depones to facts within his or her knowledge and does not purport to swear the affidavit on behalf of the rest without written authority. A party to a suit does not require authority to depone an affidavit in support of a suit as long
20 as it's not done on behalf of others who have not authorized him to do so. (See ***Esemu Nicholas & Anor Vs. Mwitaniwa Charles, HCMA No. 952 of 2020***). I therefore find that this objection is without merit and it is overruled.

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Issue 2: Whether the application for stay should be granted.

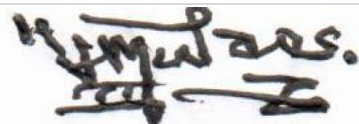
Learned Counsel for the applicant submitted that the import of a stay was stated in *Walusimbi Mustafa Vs. MusenzeLukia, HCMA No. 232 of 2018* thus:

“The general principle is that where an unsuccessful party is exercising their unrestricted right of Appeal, it is the duty of Court to make such order for staying proceedings in the judgment appealed from as will prevent the appeal from being rendered nugatory.”

Counsel further cited the case of *Lawrence Musiitwa Kyazze Vs. Eunice Busingye SCCA No. 18 of 1990 (1992) KALR 55* where it was 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 successful is not rendered nugatory.’

Learned Counsel submitted that the Applicants have lodged an appeal against the decision of this court and a copy of the notice of appeal was attached as annexure **B1** to the affidavit in support of the application and that further they wrote a letter requesting for the record of proceedings and a copy is attached as **B2**.



It was submitted that the Respondent had extracted a decree was in in process of tampering with the status quo and threatening the interests of the Applicants which would render their appeal nugatory.

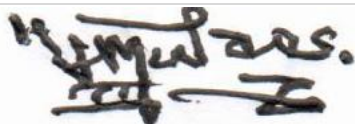
5 Counsel contended that the application meets the requirements for grant of a stay of execution and that the applicants had demonstrated willingness to comply with the orders of court in the event the application for stay is allowed.

10 In response Counsel for the Respondent submitted that the appeal alluded to by the Applicants was filed out of time and the applicant never filed an application for extension of time prior to filing this application. That since the appeal was filed out of time it should be dismissed with costs.

15 Learned Counsel further contended that the application is overtaken by events as a distribution of the estate was already done by the administrator and the beneficiaries took their respective shares and some have since sold their shares. Counsel thus asked court to dismiss the application with costs.

20 **CONSIDERATION OF MERITS OF THE APPLICATION BY COURT:**

The import of a stay of execution was explained by Manyindo DCJ (as he then was) in **Lawrence Musiitwa Kyazze Vs. Eunice Busingye, SCCA No. 18 of 1990** relying on the case of **Erin Properties Ltd Vs. Cheshire County**

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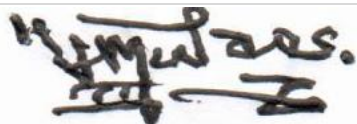
Council, (1974) 2 ALLER 448 thus; “...where a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal if successful is not rendered nugatory”

5 Therefore, the main import of stay of execution is to maintain or preserve the status quo pending the determination of an appeal so that the same is not rendered nugatory by allowing one of the parties to execute. This is because execution has the effect of changing the status quo which most times is the basis of the objection to the decision by the parties on appeal. Therefore, a
10 stay is meant to protect the status of affairs or the status of the subject matter until the determination of the appeal.

Stay of execution of an order or decree passed by the High Court is governed by Order 43 rule 3 of the Civil Procedure Rules and Rule 72 of the Court of
15 Appeal Rules. An appeal does not operate as a stay of execution. A party who desires to stay the execution of the orders of the court must apply in the trial court that made such orders or signed the decree in this case the High Court.

Order 43 Rule 4 (3) of the CPR states as follows:

20 *No order for stay of execution shall be made under sub-rule (1) or (2) of this rule unless the court making it is satisfied—*
(a) that substantial loss may result to the party applying for stay of execution unless the order is made;



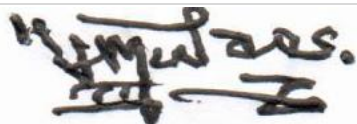
(b) that the application has been made without unreasonable delay;
and

(c) that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.

The Supreme Court observed in *Dr. Ahmed Muhammed Kisule Vs. Greenland Bank (in Liquidation), Supreme Court Civil Application No. 7 of 2010*, that there must be proof of lodgment of an appeal in the appellate court. In case of the Supreme Court, the applicant should have lodged a notice of appeal in the Court of Appeal.

In *Kyambogo University Vs. Prof. Isiah Omolo Ndiege, C.A.C.A No. 341 of 2013* Justice Kakuru (JCA as he then was) observed that in an application for stay, the applicant must prove the following grounds: *that there is a serious and imminent threat of execution of the decree or order and; that refusal to grant the stay would inflict greater hardship than it would avoid.*

I must emphasize that where a stay of execution is intended to preserve the status quo pending determination of an appeal then it is a mandatory requirement that there must be a valid and competent appeal pending. In my view the existence of a competent appeal is what vests an applicant with locus to apply for stay of execution pending the determination of an appeal.

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Proof of lodgment of an appeal:

Rule 76 of the Civil Procedure Rules provides thus:

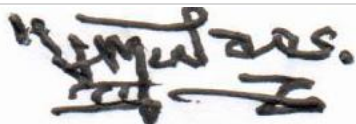
5 ***Notice of appeal in civil appeals.***

(1) *Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the High Court.*

10 (2) *Every notice under sub rule (1) of this rule shall, subject to rules 83 and 95 of these Rules, be lodged within fourteen days after the date of the decision against which it is desired to appeal.*

15 (3) *Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision; and where it is intended to appeal against a part only of the decision, it shall specify the part complained of, state the address for service of the appellant and state the names and addresses of all persons intended to be served with copies of the notice.*

20 It is elaborate from the above rule that an appeal to the court of appeal is commenced by way of a notice of appeal lodged in the in the High Court. Sub rule 2 adds that the appeal has to be filed within fourteen (14) days from the date of the decision. Sub rule 2 uses the verb shall which makes it a mandatory requirement and in the event the same is not filled within the 14 days, then leave should be sought to appeal out of time. (See ***Shell (U) Ltd***



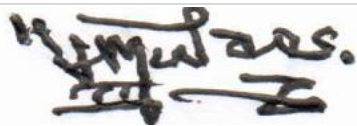
Vs. Captain Naem Shair Chaudry, Court of Appeal Civil Appeal No. 32 of 20120).

In this case judgment was delivered on 14th September 2022 as acknowledged
5 by the applicants in the notice of appeal attached as **B1**. The Notice of Appeal
was filed on 10th October 2022 after 26 days from the date of the judgment.
The appeal was thus filed out of time. Since the applicants were out of time,
they ought to have filed an application for extension time within which to
appeal.

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As already pointed out, the sequence of events was that judgment was
delivered on 14th September 2022; then a notice of appeal was filed out of
time on 10th October 2022; then, an application for stay of execution was
filed on 17th November 2022; finally an application for extension of time
15 within which to appeal was filed on 17th February 2023.

The Applicants filed an application on 17th February 2023 for leave to appeal
out of time Vide HCMA No. 007 of 2023. I find that the said application
could not validate this application for stay of execution which had been
20 earlier filed on 17th November 2022 when there was no valid appeal pending.
There is no evidence of leave having been granted for extension of time
within which to appeal at the time when this application for stay of execution
was filed. I find that there was no competent appeal pending at the time when
this application for stay of execution pending the determination of an appeal



was filed. If there is no such appeal, then the Applicants cannot talk about a stay of execution pending the determination of an appeal. The other grounds are pegged on the existence of a valid and competent appeal and will not be delved into.

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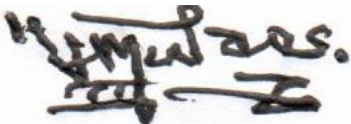
The applicants have failed to justify their application to the required standard and it fails. I find that the subsequent one (HCT – 01 – CV – MA 011 of 2022) for interim stay is thus overtaken by events, has not merit and its accordingly dismissed. This application therefore fails and I make the following orders:

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- 1. That HCT – 01 – CV – MA 0110 of 2022 is hereby dismissed with costs awarded to the Respondent.**
- 2. That HCT – 01 – CV – MA 0111 of 2022 is overtaken by events and is hereby dismissed forthwith.**

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It is so ordered.



Vincent Wagona

High Court Judge

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23.03.2023

