THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISC. APPLICATION NO. 051 OF 2023

(ARISING FROM CIVIL SUIT NO. 0046 OF 2021)

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

VERSUS

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

BEFORE: HON JUSTICE VICENT WAGONA

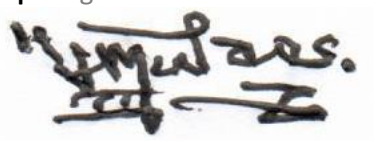
RULING

Introduction:

The Applicants brought this application under Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act, Orders 43 rules 4 (2) (3) (4) & (5) and Order 52 rules 1 & 2 of the Civil Procedure Rules for orders that:

1. **An order be issued staying execution of the decree and orders in Civil Suit No. 0046 of 2021 until the determination and disposal of the Civil Appeal No. 224 of 2023 in the Court of Appeal.**
2. **That the costs of taking out the application be provided to the Applicants**.

The Grounds:



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

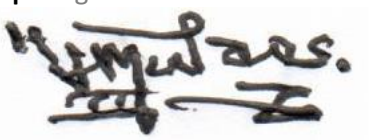
1. That the applicants filed Civil Appeal No. 224 of 2024 in the Court of Appeal against the decree, judgment and orders of this court in Civil Suit No. 0046 of 2021.

2. That the applicants are beneficiaries of the estate of the late Samuel Ntungwa and are in occupation and possession of the subject matter in the intended appeal, thus the status quo should be maintained; and that the appeal to the Court of Appeal has high chances of success.

3. That the applicants are depending on the suit land for survival through grazing cattle cultivation and staying thereon and that they are likely to be deprived of their entitlement; and there are fears that the estate shall be put to waste and or alienated by the Respondents.

4. That the applicants shall suffer substantial loss if the application is denied. That the Respondent has involved police threatening to arrest the applicants and evict them from the land even before going through the lawful procedure for execution of the decree.

5. That the applicants are ready and willing to deposit a reasonable amount as security for costs and shall suffer irreparable/substantial loss in the event the application is denied. That the application has been brought without



any inordinate delay and that it is just, fair and equitable that the application is allowed.

The response:

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 and the supporting affidavit are incompetent and res-judicata since a similar application that is Misc. Application No. 110 of 2022 was filed and rejected by court with costs rendering the current application res-judicata.

2. That the application at hand is overtaken by events since the state of of the late Samuel Ntungwa was distributed on 20th December 2022 and an inventory filed to that effect as such there is no estate of the late to warrant a stay or to be alienated by the Respondent.

3. That there is no notice to show cause why execution should not issue and there is no proof of the alleged eviction as such there is nothing to stay.

4. That the applicants received their respective shares as such no loss shall be sustained. That the continuous applications filed by the applicants demonstrate their ill will.

5. That the applicants are guilty of inordinate delay since the estate was distributed in 2022 and nothing was left to be shared, save for costs of the suit,

which have never been paid by the applicants. That she has been put at great expense of defending several frivolous applications as such the one in issue should be dismissed with costs.

Representation and Hearing:

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

Issues:

1. **Whether the application is res-judicata.**
2. **Whether the application for stay should be granted.**
3. **Remedies available.**

RESOLUTION:

Issue No. 1: Whether the application is res-judicata.

Section 7 of the Civil Procedure Act Cap. 71 provides thus: ***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit inwhich the issue***

has been subsequently raised, and has been heard and finally decided by that court.

The authors of the **Black's Law Dictionary 10th Edition** defines gave broad contours of **"res judicata"** as: ***"An issue that has been definitely settled by judicial decision…the three essentialsare (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privy with the original parties…"***

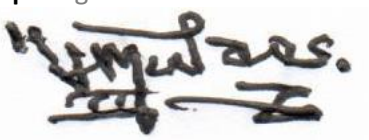
The Supreme Court in ***Karia and AnorVs. Attorney General & others (2005) 1 E.A 83 and Mansukhal Ramji Karia & Anor Vs. Attorney General & others, Supreme Court Civil Appeal No. 20 of 2002*** gave the elements to be proved in a plea of res-judicata to include:

(a) ***There has to be a former suit or issue decided by a competent court.***

(b) ***The matter in dispute in the former suit between the same parties must also be directly or substantially in dispute between the parties in the suit where the doctrine of res-judicata is pleaded as a bar.***

(c) ***The parties in the former suit should be the same parties or parties under whom they or any of them claim litigating under the same title.***

In ***Mansukhal RamjiKaria (supra), Tsekooko JSC*** cited with approval the position in HCCS 553 of 1966 **(Ismail Karshe Vs Uganda Transport Ltd) cases on Civil Procedures and Evidence,** Vol.3 page. 1, where



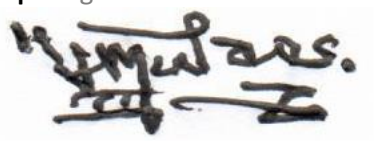
Sir Udo Udoma, former Chief Justice of Uganda, put it this way: ***Once a decision has been given by a Court of competent jurisdiction between two persons over the same subject matter, neither of the parties would be allowed to re-litigate the issue again or to deny that a decision had in fact been given subject to certain conditions. In my opinion this is a correct summary of S.7."***

Therefore, re-judicata arises where a court with competent jurisdiction has already pronounced itself on the subject matter between the parties.

In this case, Mr. Kasumba, learned counsel for the Respondent argued that the current application is res-judicata since it raises issues which were adjudicated upon between the same parties in the former application vide No. 110 of 2022 which was dismissed with costs.

I have considered the ruling in Misc. Application No. 110 of 2022 which is attached to the Respondent's affidavit in reply as annexure C2. The said application was filed by the applicants herein seeking a stay of execution. The application was struck out on the sole basis that there was no pending appeal from where it could arise since the alleged appeal filed by the applicant was filed outside the statutory time without seeking leave. The applicants later filed an application for leave to appeal out of time which was allowed and they filed an appeal. It did not in my view preclude the applicants from filing this application for stay after following the due processes and procedures under the law. I therefore find no merit in the point of law raised and the same is hereby overruled.

Issue No. 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*."**

He 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 indicated under paragraphs 2 – 12 of the affidavit in support of the application that they lodged Civil Appeal No. 224 of 2024 in the Court of Appeal against the decision of this court in Civil Suit No. 0046 of 2021. That the applicants are in occupation of the suit land as such the status quo should be maintained. That the appeal in the Court of Appeal has high chances of success and the Respondent is in the process of tampering with the status quo. That the application meets the criterion for grant of stay of execution and thus it should be granted.

In response counsel for the Respondent submitted that the current application is overtaken by events since the estate was distributed and an inventory filed in court. That some of the beneficiaries have since sold off their shares and others hired out

theirs to third parties. That the Respondent has not commenced any process of execution thus the current application is premature and does not satisfy the grounds for stay of execution. Counsel asked court to dismiss the application with costs for being incompetent before Court.

Consideration 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 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 a successful is not rendered nugatory"***

I agree with the position by the Hon Lady Justice Eva Luswata, J (as she then was) in ***Walusimbi Mustafa vs. Musenze Lukia, Misc. Application No. 232 of 2018*** that where a party is exercising unrestricted right of appeal, court bears the duty to make such orders to stay proceedings in the judgment appealed from to prevent the appeal from being rendered nugatory. However, I wish to add, that the exercise of such discretion should not be exercised within the confines of the law and guidance from the courts of record which have been laid down from time to time.

Stay of execution is provided for under Order 43 Rule 4 (3) of the CPR which states as follows:

> ***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.

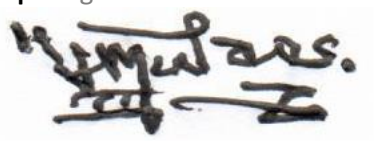
In ***Lawrence Musiitwa Kyazze -Vs - Eunice Busingye, Civil Application No. 18 of 1990,*** the Supreme Court observed that: ***"Parties asking for a stay"*** should satisfy the following:

(1) That substantial loss may result to the applicant unless the order is made.

(2) That the application has been made without unreasonable delay.

(3) That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

The Supreme Court further 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 observed that in an application for stay the applicant must prove the following grounds: *(a) That there is a serious and imminent threat of execution of the decree or order and (b) That refusal to grant the stay would inflict greater hardship than it would avoid.*

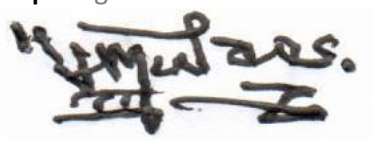


The applicant in this case proved that he lodged an appeal against the decision of this court in the Court of Appeal and attached annexure B1 being the memorandum of appeal. This fact is not disputed by the Respondent as such it was proved by the applicant.

However, after perusal of the record motion, the supporting affidavit and the reply and the annexures thereto, I am not satisfied that the applicants proved that they shall suffer irreparable injury, that there exists a serious and imminent threat of execution of the decree or order and that the refusal to grant the stay would inflict greater hardship than it would avoid.

It was not disputed by the applicants that Court issued several orders in Civil Suit No. 046 of 2021 which included the Respondent filing an inventory in Court within two (2) months from the date of the ruling. The Respondent exercising her powers as an administrator distributed the estate and each beneficiary was given an ascertained share and she filed an inventory to that effect. This in my view means that the estate of the late Samuel Ntungwa was distributed and in these circumstances, if the applicants were not satisfied with the distribution or the inventory that was filed, the legal remedy available to them would be to challenge it in court and not seeking a stay of execution.

Whereas the applicants claim they are in possession of land forming part of the estate, the estate per the inventory filed on 20th December 2022, was distributed and the Respondent had powers to do so as an administrator and there was no order stopping her from doing so. I cannot undo or reverse the lawful actions of the



administrator in an application for stay of execution. Any attempts to stay such actions by the administrator are overtaken by events save if they are challenged through a court action.

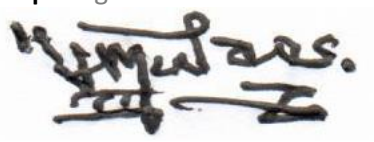
Further I have perused the record in Civil Suit No. 46 of 2021 and I have not found any document by the Respondent filed to execute the decree in Civil Suit No. 46 of 2021. The applicants allege that the Respondent is contacting police to evict them. This alone does not demonstrate that the Respondent has commenced any execution as provided for under the law.

In addition to the afore-stated, I find that the grant of the application will cause more difficulty to the Respondent and third parties who have acquired interests in land forming part of the estate after the distribution of the same by the administrator. The denial of this application in my view would not cause any hardships to the Applicants since they were given their shares under the distribution deed which they are at liberty to use as well as other beneficiaries who in law are also entitled to their shares after the lawful distribution.

Lastly, the application was brought with inordinate delay since it seeks to stay actions that already took place and as such it is overtaken by events.

I therefore find no merit in this application and it is hereby dismissed with costs awarded to the Respondent.

It is so ordered.



Vincent Wagona

High Court Judge

FORTPORTAL

5

DATE: 11th/10/2023