

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**FAMILY DIVISION**  
**MISCELLANEOUS APPLICATION NO.706 OF 2022**  
**(ARISING FROM CIVIL SUIT NO.283 OF 2018)**

1. **PRINCE DAVID NAMUGALA MAWANDA**  
2. **JOSEPH SSEMPEBWA**  
3. **PRINCE KASSIM KAKUNGULU**  
4. **PRINCESS NAMUKABYA NFAMBA :::::::::::::::APPLICANTS**  
**VERSUS**  
**MATHEW SSERUNKUUMA KIBUUKA ::::::::::::::: RESPONDENT**

**Before:Lady Justice Ketrah Kitariisibwa Katunguka**

**Ruling**

**Introduction.**

1. The applicants (Prince David Namugala Mawanda, Joseph Ssempebwa; Prince Kassim Kakungulu, Princess Namukabya Nfamba); brought this application against Mathew Sserunkuuma Kibuuka by way of Notice of Motion under; section 98 of the Civil Procedure Act, Cap.71; section 33 of the Judicature Act Cap.13 (as amended); and Order 52(1) and (3) of the Civil Procedure Rules, S.I 71-1); seeking orders that; an order of stay of execution be issued staying execution of the judgment, decree and orders of this honourable court in civil suit No.283 of 2018 pending the hearing and final determination of the Appeal in the above matter; and that costs of the application be provided for.
2. The grounds of this application are contained in the notice of motion and affidavit in support deposed by Prince David Namugala Mawanda (the 1<sup>st</sup> applicant); but are briefly that; on the 6<sup>th</sup> day of July, 2022 Judgment was delivered by this court in civil suit no.283 of 2018 in favour of the plaintiff (the respondent herein); to the effect that the applicants comply with orders of court in CS No.705 of 1991 within six months from the date of Judgment; failure of which, the applicants shall be committed to civil prison, that the order is likely to affect the health of the applicants who are in advanced age, hence an entitlement threat to execution since days have started; that court ordered the applicants to pay interest of 24% per month on the total calculated judgment



amount of 900,000,000/= with interest of 12% per annum from 17<sup>th</sup> January 2017 to date of this judgment and general damages amounting to Ug. Shs. 100,000,000/= (one hundred million shillings);

3. The applicants being dissatisfied with court's decision in Civil suit No.283 of 2018 intend to appeal against the said decision; and have filed a notice of appeal on 7/7/2022; and have written to this court requesting for a certified copy of the record of proceedings for the preparation of the memorandum of appeal and record of appeal; that the appeal has high chances of success; that if the application is not granted, the appeal shall be rendered nugatory; the application has been brought without delay; the applicants are likely to suffer serious injustice and irreparable damage; the applicants are willing to provide security for the due performance of the decree.
4. In reply, the respondent (Mathew Sserunkuuma Kibuuka) filed an affidavit opposing the grant of the application contending that; the applicants have not shown any special circumstance or good cause to justify the grant of the order for stay of execution; that the intention of the applicants is to deny the respondent the fruits of a successful party in the main suit being 81 years of age, suffering from hypertension; the respondent denies having commenced execution; the intended appeal has no likelihood of success; the certificate of title which the applicants undertakes to deposit as security cannot be compared to the decretal sum of 1,000,000,000/= (one billion shillings).
5. The 1st applicant filed an affidavit in rejoinder reiterating their earlier position and that they are ready to provide security for due performance of the decree in form of certificates of title for properties comprised in Mawokota Block 143 plot 36 and Buwekula Block 87 plot1 Kasanda district both valued at Ug shs 1,000,000,000/= (one billion shillings).

**Representation:**

6. The applicants are represented by counsel Kaggwa David of M/s Kaggwa & Kaggwa Advocates; whereas the respondent is represented by counsel Kasozi Joseph of M/s Mubiru Kasozi & Co. Advocates. Both counsel filed written submissions which I have considered.

**Background to the application:**

7. The respondent herein purchased one acre of land comprised in Block 255 plot 288 at Munyonyo from the late Prince George William Mawanda in 1977 at a consideration of 40,000/=; however, the seller failed/refused to transfer the land to the respondent; the respondent sued the late Prince George William Mawanda

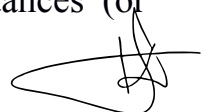
vide HCCS No.705 of 1991; before judgment was delivered, Prince George William Mawanda passed on; his executors were substituted as defendants; court found that the deceased had breached the contract; judgement was delivered in favour of the plaintiff (respondent herein) in 2017; with orders that the estate of the late Prince George William Mawanda pays 900,000,000/= (nine hundred million shillings) to the respondent; in the midst of executing the decree, it was found that the land in issue was now registered in the names of the 1<sup>st</sup> applicant herein;

8. Consequently, as a judgment creditor, the respondent vide HCCS No.283 of 2018; sued the 1<sup>st</sup> applicant along with the executors of the estate of the late Prince George William Mawanda; the defendants contended that the estate had no property having already distributed it according to the Will; this court found that; a debt takes precedence over a legatee; that the defendants were aware of the judgement debt and wilfully neglected to pay it; that the 1<sup>st</sup> defendant's (1<sup>st</sup> applicant's herein) action of transferring the properties into his names with intent to claim that the estate holds no property is a show of bad faith; court also found that the executors did not discharge their legal duties as mandated concerning the clearing of debts before distribution of the estate.
9. Court then ordered that; the defendants shall comply with the orders of court in civil suit No.705 of 1991 within six months from the date of this judgment failure of which they shall be committed to civil prison until the orders are fully complied with; the defendants shall pay interest of 24% per month on the total calculated amount of the judgment amount (Ugx 900,000,000/= with interest of 12% per annum from 17<sup>th</sup> January 2017 to the date of this Judgment, till full compliance to the orders in CS No.705 of 1991; the plaintiffs was awarded general damages of UGX. 100,000,000/= and costs of the suit.
10. The defendants being dissatisfied with court's judgment have appealed against the judgment; and have filed this application for stay of execution of court's orders in HCCS No.283 of 2018.

Neither counsel framed any issues; I shall under Order 15 Rule 1(5) of the Civil Procedure Rules; in view of the facts gleaned from the pleadings frame one issue as to; **Whether the application satisfies the grounds for the grant of an order for stay of execution;**

#### **Determination**

11. It is trite law that a successful litigant should not be deprived of the fruits of a judgment obtained in his favour, unless there are special circumstances (or



special grounds) that justify a stay of execution to be granted (see **Membe vs Mayoga[2009] 1 HCB**).

**12.**Power of court to grant a stay of execution is provided under **Order 43 Rules 1 and 4(3) of The Civil Procedure Rules** and courts have since stated the conditions to be;

- a) The applicant must show that he lodged a notice of appeal;
- b) That the pending appeal is not frivolous and has likelihood of success;
- c) That there is serious and imminent threat of execution of the decree and if not stayed the appeal will be rendered nugatory.
- d) That substantial loss may result to the applicant unless the stay of execution is granted;
- e) That the application has been made without unreasonable delay;
- f) That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

(see: **Musiitwa Kyaze vs Eunice Businge S.C.CA 18/1990; Hon Theodore Ssekikubo and Others Vs the Attorney General and Others Constitutional Application No 03 of 2014; Kyambogo University v. Prof. Isaiah Omolo Ndiege, C. A. Misc. Civil Application No 341 of 2013;**)

**13.**One of the determining factors is whether by not making an order of stay of execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal; how pertinent that factor would be, may vary according to the circumstances of each particular case. (See: **Mohamad Mustafa v Kandasami (No 2) [1979] 2 MLJ 126, at p 127**).

**14.**The onus is upon the applicant to demonstrate a proper basis for a stay of execution which will be fair to both parties; the mere filing of an appeal does not demonstrate an appropriate case or discharge of the onus; if a decree is capable of being executed it can be executed in spite of the fact that an appeal has been preferred against that decree.

I shall consider whether each of the conditions have been met by the applicant.

***a. Whether the applicant Lodged a notice of appeal.***

**15.** The record shows that a notice of appeal was filed in this court on 7/7/2022; the requirement of filing a notice of appeal has been satisfied; .

***b. That the pending appeal is not frivolous and has likelihood of success;***

**16.**The parties went into the merits of the intended appeal as well as seemingly ‘reviewing’ the judgment of this court so I have for obvious reasons chosen not to address this issue.



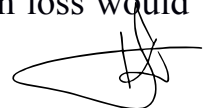
***c. That there is serious and imminent threat of execution of the decree and if not stayed the appeal will be rendered nugatory.***

17. I shall consider whether there is imminent threat of execution first and consider whether the appeal may be rendered nugatory together with whether execution may cause substantial loss to the applicants together.

Execution is a process and not an event, (see: ***Osman Kassim Ramathan v. Centaury Bottling Company Ltd SCCA No. 35 of 2019;***) the record shows that the respondent extracted a decree dated 27/7/2022 arising out of court orders in civil suit no.283 of 2018, and filled a bill of costs for taxation; this shows the beginning of the process of execution of court orders; there is a threat of execution.

***d. Whether substantial loss may occasion against the applicants unless the stay of execution is granted.***

18. The 1<sup>st</sup> applicant in his affidavit in support of the application deposes that the applicants are likely to suffer a serious injustice and irreparable damages if the respondent proceeds with the execution of arrest and committal to civil prison; which order is likely to affect their health since they are of advanced age; that payment of large sums to the respondent when there is a pending appeal will cause gross substantial loss;
19. I have carefully examined the applicants' pleadings; I find no medical report reflecting the applicant's health condition; imminent substantial loss or waste should not be imagined and court should not be left to guess; any order of court sought to halt a party from enjoying the fruit of judgment must be well founded.
20. As to whether if execution is not stayed the appeal will be ***rendered nugatory and whether there will be substantial loss*** depends on the circumstances of each case, because while in some it may be quantified, in others it may not and may be emotional attachment whose value may not be established in any particular way; so it is a matter of evidence and the facts of each case. (see ***Tropical Commodities Suppliers Ltd and Ors Vs International Credit Bank Ltd (In Liquidation) (2004)2 EA 331***)
21. 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. Substantial loss is what has to be prevented by preserving the status quo because such loss would



render the appeal nugatory. (see: *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] KLR*).

22. The guiding factor should be; that there are factors to show that if the appeal succeeds there is nothing for the successful appellant to benefit from and is totally deprived of the benefit of the suit property; whether by not making an order of stay of execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal; it is however important that the circumstances of each particular case be critically examined since granting a stay of execution is discretionary; (see *Mohamad Mustafa v Kandasami (No 2) [1979] 2 MLJ 126, at p 127*).
23. Court in HCCS No.705 of 1991 having found that the late Prince George William Mawanda breached a contract with the respondent decided that his estate pay UGX. 900,000,000/=being the market value of the suit land with interest by the estate; the circumstance of this case is that; the late Prince George William Mawanda and his beneficiaries have been deriving benefit from the suit property since 1977; there would be no substantial loss occasioned to them if the respondent is restored by way of payment of the decretal sum amounting to the value of the land; to make up for the loss of ownership and utilization of the land; since in any case money can always be returned;
24. I have also considered the age of the respondent and how long he has pursued the fruit of his judgment in vain; if the fruit of his labour is further halted it would appear as if court is overturning the decisions in HCCS No.705 of 1991, which have never been appealed against.

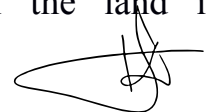
In the premises, I have not seen any justification to allow stay for fear that the appeal will be rendered nugatory or that the applicants shall suffer substantial loss;

*e. Whether the application has been made without unreasonable delay.*

25. The Judgment in HCCS NO.283 of 2018 was delivered on 6<sup>th</sup> day of July 2022; this application was filed on 28/7/2022; that is 22 days after judgment; it is undisputed that this application has been filed without unreasonable delay; however the effect of filing an application for stay execution quickly in my view should not only be considered as a positive and fair process for one party; it should balance both ways; whether the appeal process shall be quick to enable the successful party enjoy his win in my view cannot be determined at the level of filing a memorandum of appeal.



26. While courts have granted stay of execution the facts of each case should guide the discretion; the beneficiaries to the estate of the late Prince George William Mawanda have been enjoying the property since 1977; which has now been determined to belong to the respondent, the ends of justice would require that now fairness acts for the respondent who is in advanced age, to enjoy his property.
27. Therefore, I find that the circumstances call for me to exercise my inherent powers for the ends of justice to meet under section 98 of the Civil Procedure Act; and to find that quickness of filing the notice of appeal and this instant application is a technicality that if considered in this case would not serve substantive justice envisaged under article 126(2) (e) of the Constitution of Uganda.
- f. That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.*
28. Courts have held that every application should be handled on its merits and a decision whether or not to order for security for due performance be made according to the circumstances of each particular case; (see *Kawanga v Namyalo & Anor* (Miscellaneous Application 12 of 2017) [2017] UGHCCD 99);
29. The applicants undertake to provide security for due performance of the decree in form of certificates of title for properties comprised in Mawokota Block 143 plot 36 and Buwekula Block 87 plot 1 Kasanda district; allegedly valued at UGX. 1,000,000,000/=; attached a copies of survey reports marked as G1 & G2.
30. Counsel for the respondent filed written supplementary submissions contesting certificates of title; counsel contends that the two titles are not viable to be used as security for due performance of a decree; on a basis that the titles are now registered in the names of the 1<sup>st</sup> applicant; and a subject of court case against the 1<sup>st</sup> applicant vide HCCS No.11 of 2018 and HCCS No.285 of 2017.
31. I have examined both survey reports in respect of the two titles; plot 36 block 143 land at Mawokota and Block 87 plot 1 at Buwekula; the entire land is reported to be occupied by squatters; with buildings and structures belonging to squatters; registered in the names of the 1<sup>st</sup> applicant; since the land is encumbered, it has been valued at UGX. 300,000,000/=; the second land in Block 87 plot 1 at Buwekula is also said to be occupied by squatters and valued at UGX. 307,200,000/=; implying that the total value of the land is



607,200,000; which I find insufficient to cover the decretal sum of UGX. 900,000,000/=

**32.**I agree with counsel for the respondent that; the two titles are not viable properties to act as security for due performance of a decree since the land is encumbered and wholly occupied by tenants.

Therefore, the applicants have failed to satisfy this condition.

In conclusion, I find that any decision leading to further delay for the respondent to enjoy his win in CS No. HCCS No.705 of 1991 cannot be an order made to make the ends of justice meet pursuant to section 98 of the Civil Procedure Act, under which this application was brought.

In the result I find that the application for stay of execution has no merit and it is hereby dismissed with costs.



Ketrah Kitariisibwa Katunguka

Judge

23/12/2022

Delivered by email to : [advocates@kaggwalaw.com](mailto:advocates@kaggwalaw.com),  
[kasoziadvocate@gmail.com](mailto:kasoziadvocate@gmail.com)