

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(FAMILY DIVISION)**

**MISCELLANEOUS APPLICATION NO. 321 OF 2023
(ARISING FROM CIVIL SUIT NO. 62 OF 2020)**

NAKAKANDE RESTY ::::::::::::::::::::::: APPLICANT/PLAINTIFF

VERSUS

1. KIMERA AUGUSTINE

2. MUSA SEMAKULA ::::::::::::::::::::::: RESPONDENTS/DEFENDANTS

RULING: BEFORE HON. LADY JUSTICE CELIA NAGAWA

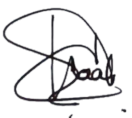
1.0 The Application.

1.1 The Applicant brought this Application by Notice of Motion under **Section 98 of the Civil Procedure Act, Cap. 71 and Order 52 Rules 1 & 3 of the Civil Procedure Rules S1 71-1** seeking orders that;

- a) The Execution of the Decree in Civil Suit No. 63 of 2020 be stayed pending the hearing and determination of the Civil Appeal in the Court of Appeal.
- b) Costs of the Application be provided for.

1.2 The Application was supported by an affidavit deposed by the Applicant containing the grounds on which the Application is based but briefly they are that;

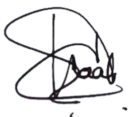
- a) Judgement was entered against the Applicant by this Honorable Court in Civil Suit No. 63 of 2020 on the 18th day of July, 2023.
- b) The Applicant immediately instructed M/S KGN Advocates to appeal to the Court of Law.



- c) The Applicant's Lawyer indeed informed this Honorable Court of the intended appeal by lodging an Appeal on the 27th day of July, 2023.
- d) The Applicant's Lawyer also wrote to this Honorable Court a letter dated 27th July, 2023 praying for certified copies of Judgement and Proceedings to enable him to prepare and file an Appeal to the Court of Appeal but the same has never been issued.
- e) In the circumstances, there is a threat of Execution against the Applicant and this would render the intended Appeal nugatory.
- f) It is just and equitable that the Execution of the Decree and Order against the Applicant is stayed.

1.3 The 1st Respondent was served and filed an Affidavit in Reply on the 23rd February, 2023. He opposed the Application based on the following grounds;

1. That the Application does not meet the conditions for the grant of the orders sought.
2. That there is no proof that the applicant shall suffer substantial loss.
3. No security for due performance of the decree has been lodged in this court.
4. There is no serious or eminent threat of execution.
5. That to date, the Applicant has failed to comply with the orders of the Court.
6. That the Application is intended to keep the Applicant on the suit land from which she collects rent of 2,340,000/= from the rental properties.



7. That the Applicant has been collecting the said rent since 2018 and converting it to her use to the detriment of the other beneficiaries in the Estate.
8. That this will frustrate the winding up of the administration of the Estate of the late Nalongo Christine Kyavaawa to which the 1st Applicant is an Administrator.
9. That if the Application is granted, the rental proceeds should be deposited at this Honorable Court.

1.4 The 2nd Respondent filed an Affidavit in Reply in Opposition of this Application on 25th January, 2024. He opposed the Application based on the following grounds;

- a) That execution cannot be stayed because the decree issued by this court has been partially executed.
- b) That the 2nd Respondent had already completed the transaction of Sale as directed by this Honorable Court and the suit land comprised at Kyadondo Block 270 Plot 972 was transferred into his name.
- c) The 2nd Respondent has already applied to UMEME to have the two electricity lines changed into his name from the Late Nalongo Christine Kyavaawa.
- d) The Applicant has not taken any positive step towards prosecuting the intended appeal apart from the Notice of Appeal that was filed at this court.
- e) The Applicant intends to delay the realization of the fruits of the decree in the main suit since she has the suit land and is currently collecting rental dues from the tenants.



- f) The land comprised in Kyadondo Block 217 Plot 972 at Kiwatule was decreed to be transferred to the 2nd Respondent upon completion of the sale transaction, however, the Applicant has failed to pick up the money or avail her bank details for the 2nd Respondent to do so.
- g) That the suit property decreed to the 2nd Respondent has several rental units, the Respondent only owns one house, and the rest of the houses belong to other beneficiaries.
- h) In fulfillment of the decree, all other beneficiaries received the shares and handed over their interests to the 2nd Respondent, however, it is the applicant possession of the suit property has continued to collect rental dues from the tenants.
- i) That it would be unjust and a miscarriage of Justice if the Application is granted.

2.0 Representation.

- 2.1 The Applicant was represented by Counsel Gilbert Nuwagaba of M/S KGN Advocates, Kampala.
- 2.2 The 1st Respondent's affidavit in reply and submissions were filed by M/S Ayigihugu & Company Advocates, Kampala.
- 2.3 The 2nd Respondent was represented by Counsel Hamza Muwonge of M/S MSM Advocates at MSM Chambers, Kampala.

3.0 Issue to be determined by this Court?

- 1. Whether Execution of the Decree in Civil Suit No. 63 of 2020 should be stayed pending the hearing and determination of the Civil Appeal in the Court of Appeal?**



4.0 Submissions by Counsel.

4.1 The Applicant filed written Submissions on 26th October, 2023 and the 2nd Respondent filed written Submissions in Reply on the 21st of February, 2024. The 1st Respondent filed his written submission on 23rd February 2024. A rejoinder was supposed to be filed on 29th February, 2024 but instead it was filed on 7th March, 2024 and brought to this court's attention on 11th March, 2024. That being the case, I still commend Counsel for their arguments in their efforts to have the matter resolved in favor of their respective clients. I have read and analyzed these submissions and evaluated the evidence presented by the parties as required by Law. All pleadings, evidence and submissions have been considered in determination of this application.

5.0 Determination by Court.

Whether Execution of the Decree in Civil Suit No. 63 of 2020 should be stayed pending the hearing and determination of the Civil Appeal in the Court of Appeal?

5.1 **Order 43 rule 4 (3) of the Civil Procedure Rules SI 71-1** provides for stay of execution of the decree appealable to the High Court and a stay is allowed where sufficient cause is shown. The conditions that the court should consider before allowing an application to stay execution are provided for under **Order 43 rule 4(3):**

- 1) That substantial loss may result to the applicant unless the order is made.
- 2) That the application has been made without unreasonable delay and,



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

- 5.2 The position is that where an unsuccessful party is exercising their unrestricted right of appeal, it is the duty of the court to make such order for staying proceedings in the judgment appealed from as this will prevent the appeal being rendered nugatory. **(See Wilson Vs Church (1879) volume 12 Ch d 454 followed in Global Capital Save 2004 Ltd and Anor VS Alice Okiror & Anor HCMA No.485/2012.**
- 5.3 The Supreme Court in **Lawrence Musiitwa Kyazze Vs Eunice Busingye SCCA No.18 of 1990(1992) IV KALR 55** noted 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 in exercising his/ her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.
- 5.4 The considerations of the court in such cases were set out in **Kyambogo University Vs Professor Isaiah Omolo Ndiege, CA No. 341 of 2013** as relied on by the Applicant, where the Court of Appeal expanded the list to include;
- I. The applicant must prove that there is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory.
 - II. That the application is not frivolous and has a likelihood of success.
 - III. That refusal to grant the stay would inflict more hardship than it would avoid. The rationale for these conditions is to maintain the status quo of the property that is at stake if the stay of execution



is not granted, and to preserve the intended appeal and not to render it nugatory.

5.5 This Court will consider each Condition for Stay of Execution examining the arguments by the Applicant in support of the ground and the arguments by the 1st and 2nd Respondents in opposition of each ground. It has already been established that the Applicant lodged a Notice of Appeal at this Court on 27th July, 2023.

a) That Substantial Loss may result to the Applicant unless the Stay of Execution is granted.

5.6 The Applicant submitted that she has been staying on the suit land and that she derives her sustenance from the same as there are shops from which she derives rent. The Applicant relied on Justice Ogola's (*Rtd*) judgement in **Walusimbi Mustafa V Musenze Lukera HCMA No. 232/2018** to state that Substantial Loss does not represent any particular amount or size for it cannot be quantified by mathematical formulae. It refers to any loss great or small which is of real worth or value as distinguished from loss without a value or that which is merely nominal. The Applicant submitted that it is clear that she will suffer substantial loss when she loses her home and the sustenance she collects from the rent.

5.7 The 1st and 2nd Respondents, in their respective submissions submitted that the Applicant has not adduced any evidence to prove that she will suffer any substantial loss if execution is not stayed, there is no reasonable ground as to why Execution should not issue. The 1st Respondent went on to state that there is not even an averment that the Applicant shall suffer loss let alone one that can be termed *substantial*.



5.8 The 1st Respondent relied on the case of **Shell Ltd V Kiburu and Another (1986) 1 KLR 410** where the court stated that *“If there is no evidence of substantial loss to the applicant, it would be a rare case where the Appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money or in this case, the fruits of their successful judgement.”*

5.9 On his part, the 2nd Respondent relied on Justice Mubiru’s Judgement in **Formula Feeds Limited & Others V KCB Bank Limited, HCMA No. 1647 of 2022** to state that *“Substantial” though cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. 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. The loss ought to be of a nature that cannot be undone once inflicted.*

6.0. Determination.

6.1. The court’s role in an Application for a Stay of Execution is to balance the interests of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his or her appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his or her judgment (**see Alice Wambui Nganga v. John Ngure Kahoro and another, ELC Case No. 482 of 2017 (at Thika); [2021] eKLR**).

- 6.2. In the Adjudication of disputes by the Court, it is well known that there will be a successful and unsuccessful party. The unsuccessful party will suffer a loss as a result of that decision. Execution is the tool by which the Successful Party enjoys the fruits of the Judgement. The court considered the 14 beneficial interests of the estate where Civil Suit No. 63 of 2020 arose, the Memorandum of Understanding entered into between the Applicant and the 2nd Respondent and determined the best remedy upon consideration of the facts and evidence presented. The loss stated to be occasioned to the Applicant is a direct result and fruit of the Judgement in Civil Suit No. 63 of 2020.
- 6.3. The court is further inclined to agree with the averment of the 1st Respondent wherein he submitted that the Applicant would not suffer loss but inconvenience as she has options including compensation for developments on the suit property by the 2nd Respondent. It was the 2nd Respondent's evidence that she has refused to collect the money or provide bank details on which the money can be deposited.
- 6.4. The Applicant's burden was not to prove that loss would be occasioned as that is expected by every unsuccessful litigant, it is to prove that the loss occasioned would be substantial as to necessitate a stay of execution until the determination of the Appeal. The Applicant did not present this court with any evidence of loss substantial, beyond that of any other unsuccessful litigant. In this instance, the court finds that the Applicant has not proved substantial loss.

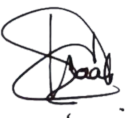
b) The Application has been made without unreasonable delay.

- 6.5. The Applicant submitted that she filed a Notice of Appeal on the 27th day of July, 2023 and wrote a letter to this Court requesting a certified



copy of the Judgement and the Record of Proceedings and they have not yet been issued to her.

- 6.6. The 2nd Respondent on his part argued that there is no execution to be stayed as the decree has already been partly executed. The decree was enforceable on 17th August, 2023 and this Application was filed on 26th October, 2023.
- 6.7. In regard to the applicant/plaintiff not having a record of proceedings, the record of proceedings were typed and printed on 1st August, 2023, no action was taken by the applicant to pay and collect the proceedings as it is the norm, she can still find them on file. This is therefore not a reason for not having this court's proceedings since no follow up made and no payment was ever made for the certified copies as demanded.
- 6.8. This court finds that while ordinarily, 2 months is not an unreasonable time, as a vigilant litigant with a goal to Appeal the court's decision, the Applicant should have acted in haste as the 2nd Defendant/Respondent could not have been reasonably expected to delay his entitlement to Execute. In the time that the Applicant took to file a Stay of Execution, the 2nd Respondent had already begun to carry out Execution. The Applicant has already applied to UMEME to have the two electricity lines changed into his name from the Late Nalongo Christine Kyavaawa. This is evidenced by the Supply Application/Agreement Forms dated 22nd September, 2023 marked Annexure "C" on the 2nd Respondent's Affidavit in Reply. In essence, the Applicant's Application then becomes one to Stop Execution rather



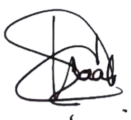
than to Stay it as it has already begun. There is no application for execution filed before this court to give vacant possession.

- 6.9. I have also noted as per Annexure “B” of the Affidavit in Reply filed by the 2nd Respondent that he has already transferred the Certificate of Title into his names as a registered proprietor as per Instrument No. KCCA-0010889. In addition to communicating to the applicant in regard to money to be collected or where to have it deposited. The Applicant did not need the Record of Proceedings to file an Application for Stay that she claims to have caused the delay. The Applicant ought to have filed the Application for Stay of Execution as soon as he filed the Notice of Appeal. The steps taken by the 2nd Respondent to start execution cannot be undone or stalled. In that regard, this ground fails.

c) That the appeal is not Frivolous and has a high likelihood of Success.

- 6.10. This determination is not within the knowledge of this court and can therefore not be determined at this point. The Applicant presented the Notice of Appeal marked Annexure “B” on their affidavit supporting this Application. There is no Memorandum of Appeal containing the grounds on which the Appeal is based. The Notice of Appeal does not contain these grounds and therefore this court cannot and should not ascertain whether or not the Appeal has a high likelihood of success.

d) There is a serious or imminent threat of execution of the decree or order and if the application is not granted the appeal would be rendered nugatory.



- 6.11. The Applicant contended that there is an imminent threat of execution. She presented two letters from the 2nd Respondent marked annexures “D” and “E” on her affidavit in Support of the application, wherein she was given 14 days to vacate the suit property.
- 6.12. The 1st Respondent submitted that the Applicant had not adduced any evidence of imminent execution and therefore this condition for a grant of stay has not been fulfilled.
- 6.13. In Opposition to this, the 2nd Respondent argued that an imminent threat is a condition that is reasonably certain to place the Applicant’s interest in direct peril and is immediate and impending and not merely remote, uncertain, or contingent. He argued that it had not been shown that the Applicant could not reasonably be compensated for any loss or damage occasioned. To this end, the Applicant has not proved that her Appeal will be rendered nugatory if this Application is not granted.
- 6.14. An imminent threat is one that is yet to occur or is set to happen. In this case, as has been earlier discussed, the process of Execution already commenced. This means that there is no threat, but rather there is an ongoing process in fulfillment of the decree and directives of this court by the 2nd Respondent. This issue is therefore overtaken by events.

e) That refusal would inflict more hardship than it would avoid.

- 6.15. The Applicant submitted that she has been residing on the suit property for the past years and it is also where she derives her



sustenance. She averred that vacation from the premises and denial of this Application would cause her hardship.

6.16. The 1st Respondent submitted that the Applicant is not a loser as is the ordinary judgment debtor. The Judgement is Civil Suit 63 of 2020 upholds the Memorandum of Understanding which gives the Applicant options. By the Judgment, the Applicant can either retain the land by paying the 2nd Respondent, or accept compensation for her developments on the land and vacate it. He submitted that the Applicant may be inconvenienced, but that is not a hardship.

6.17. The court finds that the scales of hardship fall towards the 2nd Respondent. The 2nd Respondent entered into a Memorandum of Understanding with the Applicant by which he obtained ownership of the suit property. The 2nd Respondent is also a successful Judgement debtor who has been frustrated in his bid to obtain the fruits of the Judgement in his favor. The Applicant continues to collect rent from the suit property and refuses to vacate the premises. In that regard, the scale of hardship leans toward the Respondents and not the Applicant. This Condition is therefore not met.

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

6.18. The Applicant relied on the case of **John Baptist Kawaga V Namyalo Kevina & another Misc. Application 12 of 2017** to state that the court has recently migrated from the past strict interpretation of **Order 43 of the Civil Procedure Rules SI 71-1**. The court in this case



emphasized the view that every application should be handled on its own merits and that the circumstances on whether security for due performance be made according to the circumstances of each particular case. She further contended that the objective of the provisions on security was never intended to fetter the right of appeal.

6.19. The court has considered the fact that the Applicant has not succeeded in proving the other grounds for a stay of execution and in that regard, this ground is rendered moot.

7. Conclusion.

7.1. In the final result, the court determines as follows.

1. This Application for Stay of Execution of the decree in Civil Suit No. 63 of 2020 is hereby denied.
2. The Execution of the Decree in Civil Suit No. 63 of 2020 shall proceed.
3. Failure to comply with the Decree and Orders in Civil Suit No. 63 of 2023 shall amount to Contempt of Court.
4. Costs awarded to the 1st and 2nd Respondents.

I so Order.

Dated, signed and delivered via Email this 11th day of March, 2024.



**CELIA NAGAWA
AG. JUDGE**