

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**HCT – 01 – LD – MA – 0019 OF 2016-11-08**  
**(Arising from Civil Appeal No. 0031 of 2016)**  
**(Arising from KAS – 00 – CV – CS – LD 066 OF 2008)**

**MULEMBE EDWARD.....APPLICANT**

**VERSUS**

<b>KORUTARO KATO PATRICK</b> <b>BALUKU BASUKURU ALFRED</b> <b>DEO MASEREKA</b> <b>KAMBERE JOHN</b> <b>MUHINDO ALEX</b> <b>BASANDE ERNEST</b> <b>BWAHUHA YOHANA</b>	}	<b>.....RESPONDENTS</b>
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**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.**

**Ruling**

This is an application by Notice of Motion under **Orders 22 Rule 26, Order 52 Rules 1&3** of the Civil Procedure Rules, and **Section 98** of the Civil Procedure Act for orders that; execution of the judgment and decree in the above mentioned suit be stayed pending appeal and costs.

**Background**

This application arises from Civil Appeal No. 31 of 2016. The appeal is against the whole judgment and decision of the learned trial Magistrate, His Worship Mftindinda George delivered on the 13/5/2016. That the Applicant being dissatisfied with this decision lodged an appeal however, the Respondents have apportioned themselves interest in the suit land which renders the whole appeal nugatory.

The application is supported by the affidavit sworn by Muhairwe Seezi and some of the grounds are;

1. That in the conduct prejudicial to the vested interest of the Applicant in the decretal land (subject of appeal and this application), the Respondents have severally and jointly, with hardly due regard to the lawful requirements, sought to re-enter the land, conduct that is destined to render the whole appeal nugatory.
2. That the conduct of the Respondents in their quest to re-enter the land without due regard to the legal pre-requisites, is illegal and inexcusable.
3. That the appeal is destined to be rendered nugatory, yet it has good grounds with high chances of success, and that it is in the interest of justice that an order of stay of execution be granted restraining the Respondents from executing the orders and judgment pursuant to KAS – 00 – CV – CS – LD – 066 of 2008.

The Respondents opposed the application through affidavit sworn by Bwambale B. E. Ikanga a legal Representative of the 7<sup>th</sup> Respondent and on behalf of all the Respondents. He also contested the legality of the affidavit in support of the application since it was sworn in Kampala and Commissioned in Fort Portal.

M/s Abaine-Buregyeya & Co. Advocates appeared for the Applicant and Counsel Nyaketcho Julian for the Respondents.

#### **Opinion on all grounds:**

The Respondents raised preliminary objections on points of law the first being that the application was incurably defective for having been instituted under **Order 22 Rule 26** of the Civil Procedure Rules as opposed to **Order 43 Rule 4** of the same Rules. Counsel for the Respondents cited the case of **Mugenyi & Co. Advocates versus National Insurance Corporation [1992-1993] H.C.B 82**, where it was held that;

*“An appeal pending in a higher Court against the earlier decision of the Court is not a suit in that Court and could not be a basis of an application for stay of execution within the measuring of Rule 26 of Order 19 now Order 22 Rule 26 of the Civil Procedure Rules.”*

That in the circumstances the instant application should be struck out with costs. That the proper Order and Rule for stay of execution when there is a pending appeal is **Order 43 Rule 4** of the Civil Procedure Rules which lies down three conditions that must be satisfied to merit the application and the same were discussed in the case of **Joseph Owoko versus Edward Mugalu [1970] H.C.B 332**.

**Order 43 Rule 4(3)** of the Civil Procedure Rules provides that;

*“(3) 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.”*

**Order 22 Rule 26** of the Civil Procedure Rules provides:

*“Where a suit is pending in any court against the holder of a decree of the court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.”*

Counsel for the Respondents also submitted that the Applicant did not prove any of the above conditions to justify stay of execution. Thus, the application is devoid of merit and should therefore be dismissed with costs.

**Section 98** of the Civil Procedure Act provides that;

*“Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*

In the case of **National Housing and Construction Corporation versus Kampala District Land Board & Another, No. 6 of 2002 at P. 8-9** it was stated that Court has discretionary Powers to stay execution.

In the same case at P. 14-15 it was held that;

*“The Court may stay execution, grant injunction or stay proceedings. The important point is filing of the Notice of Appeal.”*

Counsel for the Applicant on the other hand submitted that the Respondents have re-entered the suit land and interfered with the status-quo and the purported execution is illegal and its effect renders the whole appeal nugatory. That upon the Applicant lodging the appeal, the Respondents were stopped from averring that the substantive appeal had not been filed. That the none availability of the lower Court file does not deter Court from hearing and determining the application on the sufficiency of the notice of appeal. That Counsel for the Applicant has taken all the steps possible to obtain the lower Court proceedings but has often been told that they were not ready.

Further, that this application rises justifiable reasons to wit, that the Respondents severally and jointly are in the process of illegally executing the judgment, a conduct that is pre-judicial to the Applicant’s interest.

In regard to the affidavit Counsel for the Applicant submitted that it was a clerical error and did not make it incurably defective. That what mattered is that the affidavit was commissioned. Counsel also cited **Article 126(e)** of the Constitution of the Republic of Uganda, 1995 and the case of **M.B Nandala versus Father Lyding [1963] E.A at P. 710**. That justice should be dispensed without undue regard to technicalities.

In the case of **Banco Arabe Espanol versus BOU, Civil Appeal No. 8 of 1998**, that;

*“...a general trend is towards taking a liberal approach in dealing with defective affidavits. This is in line with the Constitutional directive enacted in article 126 of the Constitution that courts should administer substantive justice without undue regard to technicalities Rules of Procedure should be used as handmaidens of justice but not to defeat it.”*

Counsel for the Respondent on her a second preliminary objection stated that, the affidavit was sworn in Kampala and Commissioned before a Magistrate in Fort Portal. That an affidavit is a serious document and there was no clerical error apparent at all and is therefore a false document for it was sworn in Kampala and the Magistrate in Fort Portal signed it.

Counsel for the Respondents also disagreed with the submissions of Counsel for the Applicant and submitted that it is mandatory to have the place where the oath was taken indicated as opposed to severing it all together which would make the affidavit incurably defective as per **Section 6** of the Oaths Act, Cap. 19 which provides that;

*“Every Commissioner for Oaths or Notary Public before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”*

**Section 5** of the Oaths Act provides that;

*“Every Commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”*

That therefore the place where the oath was taken is mandatory and must be indicated as was held in the case of **Richard Mwirumubi versus Jada Limited, HCCA No. 978 of 1996** that;

*“...the place or date where or when the oath or affidavit was taken or made must be contained in the jurat and the provision is mandatory.”*

Also, in the case of **Coffee Marketing Board Ltd versus Bukyenkye Coffee Factory (U) Ltd [1996] H.C.B 59**, it was held that;

*“Section 8 of the Oaths Act which provides that the name of the place where the affidavit was deponed from is mandatory. Failure to comply with the same renders the affidavit defective, and is incurable defective.”*

However, a distinction must be drawn between a defective affidavit and failure to comply with a statutory requirement. A defective affidavit is, for example, where the deponent did not sign or date the affidavit. Failure to comply with a statutory requirement is where a requirement of a statute is not complied with. In my view, the latter is fatal. (See: **Kasaala Growers Co-operative Society versus Kakooza & Another, SCCA No. 19 Of 2010.**)

In my opinion, the affidavit is incurably defective and Counsel did indeed proceed under the wrong provision of the law but the form of the application is correct. Thus, without prejudice and in the interest of justice the execution should be stayed pending the appeal in reference to **Article 126(e)** of the Constitution of the Republic of Uganda and the holding in **Idah Iterura versus Joyce Muguta, SCCA No. 2 of 2006 at 6-7** as cited by Counsel for the Applicant where it was stated that;

*“...in the sense that the current status quo should be maintained until we hears and determine the appeal now pending in this Court...”*

In a nut shell, I order that execution be stayed pending the hearing of the appeal. Costs in the cause.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**14/11/16**