

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(LAND DIVISION)**

**MISCELLANEOUS APPLICATION NO.479 OF 2021**

**(ARISING FROM HIGH COURT CIVIL SUIT NO.811 OF 2018)**

**1. SHEM MPANGA MUKASA**

**2. LIVINGSTONE NTAMBAZI MUKASA**

***(Administrators of the Estate of the Late***

***Christopher Kisitu***

***Mukasa):.....APPLICANTS***

**VERSUS**

**KIZZA CLESSY BARYA:.....RESPONDENT**

**Before: Justice Alexandra Nkonge Rugadya.**

**Ruling.**

**Introduction:**

This application is brought by way of Notice of Motion, under **Section 33 of the Judicature Act Cap. 13, Section 98 of the Civil Procedure Act Cap. 71 and Order 43 rule 4 & Order 31 rules 1 & 2 of the Civil Procedure Rules S.I 71-1.**

The application seeks the following orders that:

1. ***The applicants be granted a stay of execution of the judgment and decree in High Court Civil Suit No.811 of 2018: Shem Mpanga Mukasa & 2 others vs Kizza Clessy Barya, pending determination of the applicants' appeal against the decision of this court pending in the Court of Appeal.***

2. ***Costs of this application be provided for.***



**Grounds of the application:**

The grounds in support of the application are contained in the affidavit of the 1<sup>st</sup> applicant, Mr. Shem Mpanga details of which are on record.

Briefly, that the applicants instituted **High Court Civil Suit No.811 of 2018** against the respondent for recovery of certificates of title in respect of land comprised in **Kibuga Block 11, plot 796 at Kabowa and Kyadondo Block 71 plot 96 at Bujumbo and Sengo**.

Further, that there is an eminent threat of execution as the orders made in the suit are self-executing; the respondent has already extracted a decree to execute the same; the applicants will suffer irreparable loss; the intended appeal will be rendered nugatory if this application is not granted; the intended appeal has high chances of success; there is no need for the applicants to deposit security for due performance of the decree as the two certificates of title are in the custody of the respondent; and that it is in the interest of justice that the application for stay of execution of the judgment and orders in **High Court Civil Suit No.811 of 2018** be stayed pending determination of the intended appeal.

The respondent, Mr. Kizza Clessy Barya in his affidavit in reply deponed, *inter alia*, that this application does not disclose any legal grounds to merit a grant of stay of execution of the appeal; that the appeal is incompetent and cannot be the basis for a stay of execution; that the respondent has not filed any bill of costs in **HCCS No.811 of 2018** against the applicants and therefore there is no imminent threat of execution.

Further that the applicants have not disclosed any special circumstances to show that they will suffer substantial or irreparable loss beyond the decretal awards as it is within the respondent's means to pay in the unlikely event that the appeal succeeds.

The applicants have not indicated any readiness to provide security for the due performance of the decree as **Block 71 plot 96 at Bujumbo and Sengo** is caveated by the respondent and cannot be used as security; and that the certificate of title for the land in **Block 11 plot 796 at Kabowa** is held subject to the applicants' paying the decretal sum arising from the judgment in **HCCS No.811 of 2018** and cannot therefore be used as security for costs.

In rejoinder, the applicants averred that they have demonstrated valid grounds to grant stay of execution and that the appeal was competently filed and can be based on to stay execution proceedings.

That the applicants have demonstrated that they shall suffer irreparable loss since the subject matter of appeal is estate land which is of sentimental value and part of the land at Kabowa is at a high risk of being sold by the respondent.





Further, that the respondent already has security for due performance of the decree as both titles were in his custody and can easily sell them off through the execution process in case the applicants fail to settle the sums in the intended appeal.

**Representation:**

- 5 The applicants are represented by ***M/s Nsubuga & Co Advocates*** while the respondent is represented by ***M/s Barya, Byamugisha & Co. Advocates***

Both parties through their lawyers filed written submissions, the details of which are on court record.

**Consideration of the issues:**

- 10 An applicant seeking stay of execution must meet the conditions set out ***in O. 43 r.4 (3) of the Civil Procedure Rules*** and those espoused in the case of ***Lawrence Musitwa Kyazze Vs Eunice Businge, Supreme Court Civil Application No 18 of 1990***, but more pronounced in ***the Supreme Court Case of Hon Theodore Ssekikubo and Ors Vs The Attorney General and Ors Constitutional Application No 03 of 2014***.

- 15 They include:

1. ***that the applicant has lodged a notice of appeal;***
2. ***that substantial loss may result to the applicant unless the stay of execution is granted;***
- 20 3. ***that the application has been made without unreasonable delay;***
4. ***that the applicant has given security for due performance of the decree or order as may ultimately be binding upon him/her.***

I will deal with ***issue No. 3*** first.

- 25 **Issue 3: Whether the application has been made without unreasonable delay.**

I have carefully read and noted all the arguments and points by either side, which I need not reproduce here, but which I considered crucial in determining this application..

- Where an appeal is to be preferred, and a stay of execution is to be sought by an intending appellant, the requirement to file the application without unreasonable delay becomes a  
30 mandatory requirement.

Court noted in this instant application that the respondent's concern had been focused on the argument that the notice of appeal had been filed out of time. No submissions were therefore made by him on the issue as to whether or not there had been an unreasonable delay that point.



As duly observed by this court, the applicants filed two applications: for a stay and an interim stay of execution (**MA No. 479 and MA No. 480 both of 2021**). Each of these was filed on 18<sup>th</sup> March, 2021. However submissions from either side were available only in respect of **MA No. 479 of 2021**, the main application.

5 It was also noted from the court record that the judgment of this court was made on 25<sup>th</sup> January, 2021. The applicants relied on a notice of appeal bearing the stamp of this court and a date of 23<sup>rd</sup> February, 2021, as per **Annexure G**.

10 Thus given the fact that the applications had been filed about less than two months after the judgment was made and since in any case no objection was raised by the respondent relating to this issue, I find that the application for stay was filed in court without any unreasonable delay.

**Issue 1: Whether the applicant filed a notice of appeal;**

15 The main issue for determination in this application however is whether an order for stay of execution should be granted pending the hearing and determination of the appeal. The respondent however contended that the applicants could not rely on an appeal that did not exist.

**Section 98 of the CPA** under which the application is brought gives this court inherent powers to take decisions which are pertinent to the ends of justice; and an order for stay of execution is such one (**see the case of Singh v Runda Coffee Estates Ltd [1966] EA**).

20 As noted earlier, the applicants relied **annexure 'G'**, as proof that a notice of appeal had been lodged against the decision of this court.

25 It was declared in: **Ujagar Singh v Runda Coffee Estates Ltd [1966] EA 26** that it is only fair that an intended appellant who has filed a notice of appeal should be able to apply for a stay of execution as soon as possible and not have to wait until he has lodged his appeal to do so.

Owing to the usual delays encountered in obtaining the proceedings of the court, it may be many months before a party dissatisfied with the decision of court could lodge his/her appeal against it. In the meantime, he or she must face the reality that the execution of the orders/decrees of the court would not be ruled out.

30 **Rule 76(1) of the Judicature (Court of Appeal Rules) Directions S.1 13-10** provides that any person who desires to appeal to court shall give notice in writing, which shall be lodged in duplicate with the registrar of the High Court. **Rule 76 (2)** thereof further states that a notice of appeal must be filed within fourteen days after the date of decision it is desired to appeal.





**Rule 77** adds another key element, that on receipt of a notice of appeal the registrar of the High Court shall immediately send one copy to the registrar, (defined under **rule (3) (a) and (n)**) to mean *registrar* of the Court of Appeal. The question as to when the 14 days begin running therefore becomes pertinent.

- 5 As noted by this court, judgment was entered in favor of the respondent on 25<sup>th</sup> January, 2021. The applicants filed a notice of appeal on 23<sup>rd</sup> February, 2021 in this court. The Court of Appeal endorsed the notice on 4<sup>th</sup> March, 2021, about seven or so days later.

**Rule 2 (b) of Guidelines For Online Hearings in the Judiciary of Uganda, Office Instruction No.2 of 2020**, cited by counsel for the applicant, provides:

- 10 *In the case of rendering judgments time shall begin to run as soon as the judgment is delivered by any court of law and transmitted using any modes notified to the parties.*

In *paragraph (c)* of the guidelines, it is clear that these guidelines are applicable in respect to all court hearings. They have similar application, no matter what on-line tool may be adopted by court.

- 15 The applicants in their affidavit in rejoinder provided a copy of the said rules, for which I am grateful. They also appended to the pleadings a copy of the email notification from this court marked **Annexure 'A'**, for delivery of its judgment. It was dated 10<sup>th</sup> February, 2021, which thus renders baseless the contention that there was no proof of such notification.

- 20 Thus as per the above rules since the time in this case only started to run from the date the judgment was transmitted to the parties, which was 10<sup>th</sup> February, 2021 and in the absence of any substantial evidence to believe otherwise, I find that the notice of appeal was filed in this court within 13 days after transmission of the judgment, and in compliance with **rules 76(1) and (2)**, cited above.

- 25 In passing, I also noted that the present application was filed on 18<sup>th</sup> March, 2021, after another application, not dissimilar to the present one was filed, vide: **Miscellaneous Application No.67 of 2021** in the Court of Appeal, on 9<sup>th</sup> March, 2021. However, since the applicants availed it to court by way of a rejoinder, it was clear that the respondent had not been availed any opportunity to respond to it. I chose to disregard it therefore in considering this application.

- 30 All in all, I am duly satisfied that as per the requirements of the law as cited, the notice of appeal had been filled in this court in thirteen days after receipt of the judgment via email, within the period as prescribed by the **rules and guidelines**.

**Issue No. 1** therefore is answered in the affirmative.



**Issue No. 2: Whether the applicants will suffer substantial loss.**

In relation to this issue, the applicants contended that the effect of orders in **HCCS No.811 of 2018** would lead to loss of the estate property which property is of sentimental value.

5 It is property where their late father resided and tilled the land. That unless this application is granted, the threat to execution by the respondent may render her intended appeal nugatory

Counsel for the applicants submitted that the orders of this court specifically *order 2* directed that a sale of the suit property be executed by the defendant/respondent after 120 days if the applicants fail to settle the defendant's awarded sums within the said period of time.

10 That since the certificates of title for the suit property are in the custody of the respondent as stated under *paragraph 23* of the affidavit in support, the respondent is likely to execute the decree before determination of the appeal; and that the applicants will lose the suit property because the land is likely to be disposed of by the respondent to third parties. That the execution of the decree will alienate the suit land from the applicants; and the appeal shall  
15 be consequently rendered nugatory.

This argument is strengthened by the decision of ***P.K Sengendo v Busulwa & Anor Court of Appeal Civil Application No.207 of 2014*** wherein it was observed that where the subject matter is property capable of permanent alienation and therefore capable of causing the appeal to be nugatory for transfer, then the court will exercise its discretion in favor of the  
20 applicant so as to give benefit to the appeal to be attended to on its merits.

The existence of the likelihood to suffer substantial was however disputed by counsel for the respondents who relied on the case of ***Editor in Chief of the New Vision Newspaper v Ntabgoba CACA No.63 of 2004*** for the submission that the applicant must plead and prove that the victorious party is not likely to be able of refunding the decretal sums in the event of  
25 a successful appeal.

**Consideration of the issue:**

All the arguments related to this issue are duly noted. Indeed, substantial loss does not mean the ordinary loss of decretal sums which must be settled by the losing party and which every judgment debtor is necessarily subjected when he or she loses the case and is deprived of  
30 property in consequence. It must be something more which the applicant has not pleaded or proven.

Thus the applicant has to go a step further to lay the basis upon which court can make a finding that he/she will suffer substantial loss as alleged; beyond the vague and general assertion of substantial loss in the event a stay is not granted. (***Pan African Insurance Co. (U) Ltd v International Air Transport Association H/Ct Miscellaneous Application No.***  
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**86 of 2006** which was relied in the case of **Uganda Bookshop Ltd & Anor v Willington S.K Makumbi HCMA NO.101 of 2018**).

5 The phrase does not represent any particular amount or size, it cannot be qualified by any particular mathematical formula. It refers to any loss great or small: of real worth or value as distinguished from a loss that is merely nominal. (**Tropical Commodities Supplies Ltd & 2 others v International Credit Bank Ltd (In Liquidation) [2004] 2 EA 331**).

In the instant case, the respondent confirms in the affidavit in reply that the certificate of title of the suit property is in his possession and is being held subject to the payment of the decretal sums arising from the judgment in **HCCS No.811 of 2018**.

10 It is undisputed that the applicant is in physical possession of the suit land; which implies that the likelihood of eviction pursuant to the execution cannot be far-fetched.

Counsel for the respondent also maintained that under **section 95 of the CPA** no execution can commence until bill of costs is filed and taxed by court. Be that as it may, that proposition though key, is for some reason not one of the criteria to be considered under **order 43 4(3)**  
15 **of the CPR**, before a stay is granted.

Thus in **SBI International Holdings AG (U) Ltd versus COF International Co. Ltd C.A.C.A No.183 of 2018**, it was observed that execution is a process. It is common parlance that the decrees are prepared for purposes of execution. (**See also; Banco Arabe Espanol versus Bank of Uganda Civil Appeal No.42 of 1998**).

20 Since the decrees issued by court in this case are self-executing I am therefore inclined to grant the application, also on account of the fact that the property comprised in **Block 11 plot 796 at Kabowa** is at a high risk of being sold before the appeal is disposed of, in execution of the court orders. It is likely to result in the permanent loss of the property and inflict irreparable hardship to the applicants

25 The applicants in my opinion need not wait until a bill of costs is filed and taxed for the threat of execution to surface. An order such as the one in this present case which prescribes the time within which it is to be executed, by itself constitutes a threat.

If it is left to crystallize, without an express order of stay, nothing will succeed in prevailing over the respondent to prevent him from exercising the rights accruing to him from the  
30 judgment.

In view of the above, I find that the applicants are likely to suffer substantial loss unless stay of execution is granted. **Issue No. 2** therefore also succeeds.



**Issue No. 4: Whether security has been given by the applicant for the due performance of the decree.**

The payment of security for costs is intended to operate as a shield against the filing of frivolous and vexatious appeals which may never succeed, yet have an effect in escalating trial costs. It is therefore often a necessary ingredient of applications of this nature to bring evidence that proves that the intended appeal is likely to succeed.

In ***John Murray (publishers) Ltd & 10 others Vs G. W. Senkindu & Anor HCCS No. 1018 of 1997*** this court in an application for security for costs had this to say:

***"I think the first consideration in application of this nature is whether the respondent has goods and or Chattles of his in the jurisdiction of this court which are sufficient to answer the possible claim of the other litigant which would be available to execution when the court will order him to give security for costs (see the words of Lord Halsbury in the classic case of Apollinaris Company's Trade Marks [1091] 1 ch.1)***

As earlier noted, the respondent in his affidavit in reply confirmed to this court that he was in possession of the certificate of title for the property at Kabowa and it was subject to the applicants paying the decretal sum.

In light of the above authorities, I am inclined to agree with counsel for the applicants that there is no need for the applicants to provide security for due performance since the respondent already has the certificate of title, and which in my opinion is being held for all intents and purpose of satisfying the decree of court; and as such can suffice as appropriate security for due performance of the decree.

The likelihood of success of the applicants' appeal is challenged by counsel for the respondent solely on the ground that the intended appeal has no chance of success since the notice of appeal was not properly lodged in the Court of Appeal as it was lodged out of time, contrary to the provisions of ***Section 79 (1) of the CPA***, and ***Rule 76 (2) of the Judicature (Court of Appeal Rules) Directions S.I 13-10.***

That the applicants did not attach any evidence to prove that the email notifying them of the judgment was received by them on 10<sup>th</sup> February, 2021. The above arguments have however been addressed in part.

But that being said, it is not the function of this court to express an opinion as to whether or not the appeal is likely to succeed, as it would in effect be prejudging the appeal. (***See: Wambuzi P (as he then was) as was observed by Mugenyi & Co. Advocates versus National Insurance Corporation CA No.13/1984 by Wambuzi P.***)





In the final result, I find that the applicants have established sufficient cause to warrant the grant of a stay of execution pending the determination of the intended appeal in the Court of Appeal.

5 This application is hereby granted. Costs abide the outcome of the appeal. **Miscellaneous Application No.480 of 2021** is overtaken by events.

I so order.

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**Alexandra Nkonge Rugadya**

**Judge**

15

**10<sup>th</sup> May 2021.**

Delivered by email  
4/5/2021.  
  
J.