

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.929 OF 2022

5 **(Arising out of Civil Appeal No.26 of 2016 and Miscellaneous Application No. 2001 of 2018)**

(Arising from Makindye Chief Magistrates Court Civil Suit No.77 of 2008)

NAKITYO TEDDY:.....APPLICANT

10 **VERSUS**

NAKAMYA SYLVIA

**(Administrator of the Estate of the
Late BENNA**

15 **MUWANGA):.....RESPONDENT**

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

Introduction:

20 The applicant proceeding by way of Notice of motion under the provisions of **Section 98 of the Civil Procedure Act Cap.71, Order 43 rules 4 & 5 and Order 52 rules 1, 2 & 3 of the Civil Procedure Rules SI 71-1** seeks orders that:

- 25 **1. Execution of the judgement & orders of the trial judge be stayed until final disposal of the appeal and/or or further orders of this honourable court;**
- 2. Costs of the application be in the cause.**

Grounds of the application.

The grounds upon which this application is premised are contained in the affidavit in support deposed by Ms. Nakityo Teddy, the applicant who stated *inter alia* that judgement in respect of **Civil Appeal No.26 of 2016** was delivered on 4th June 2018 while on 10th March 2022.

30 The ruling in **Miscellaneous Application No.2001 of 2018** was delivered, in favour of the respondent in which it was declared that the "muzigo" was part of the *kibanja* which the deceased gave his wife as described in the deed, and that the entire structure housing the



"muzigo" as well as that part of the *kibanja* as described in the deed, was that of the respondent and her biological children.

That being dissatisfied with the judgement, the applicant's counsel not only lodged a notice of appeal but also applied for a certified copy of the proceedings with a view of lodging an appeal against the decision of this court but the same have never been availed to the applicant to date.

That the applicant intends to contest the findings of the trial judge on appeal because there are serious questions of law to be canvassed in the Court of Appeal with a high probability of success and that the execution by the respondent unless stayed, would occasion irreparable loss to the applicant since the respondent intends to use the decree and orders of this honourable court to enable execution in **High Court (Family division)** considering **Civil Suit No. 162 of 2020** fixed for hearing of a notice to show cause why execution should not issue on the 25th May 2022.

In addition, that the applicant has since lodged an objection to the contents of the decree in **Miscellaneous Application No.2001 of 2018** before the trial judge, having found that the same is not reflective of the ruling/final orders of this court and that that the applicant's appeal shall be rendered nugatory should execution be levied when the matter is pending appeal

Further, that the applicant shall suffer undue loss and embarrassment should such execution be issued since there is an imminent threat of the applicant's eviction from the suit property from which she derives livelihood therefore it is in the interest of justice that this application is granted.

The respondent opposed the application through her affidavit in reply wherein she stated that it is not true that her lawyers **M/s Kaganzi & Co. Advocates** were served with the said notice of appeal and that neither were they notified of the fact that the court has not availed the applicants a copy of the record of proceedings to enable them proceed with the appeal as alleged in *paragraph 4* of the affidavit in support.

She also stated that the alleged appeal has no chances of success because the applicant has no right of appeal in either **Civil Appeal No. 26 of 2018** or **Misc. Application No. 2001 of 2018** and that this application is premature because there is no evidence of a serious or threat of execution of either **Civil Appeal No. 26 of 2016** or **Misc. Application No. 2001 of 2018** as alleged by the applicant, who will not suffer any irreparable loss if this application for stay of execution is not granted.

That there is neither any fault nor mistake on the face of the orders in **Misc. Application No.2001 of 2018 or Civil Appeal No. 26 of 2018** and that the applicant also did not demonstrate any serious question to be tried in the intended appeal.

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In addition, that the alleged appeal which has no chances of success is a wastage of court's time since the applicant has no right of appeal in either case thus the allegations that the appeal will be rendered nugatory is misconceived and there is unreasonable delay which cannot be sanctioned by this honourable court because the decision in **Civil Appeal No. 26 of 2016** was made by this Honourable Court 4 years back.

Further, that the allegation that execution in the family division of the High Court in **Civil Suit No. 162 of 2020** was based on the decision of this court is misconceived and that the applicant would have filed such application if any in High Court Family Division if that is the case, but she did not.

In rejoinder, the applicant in through affidavit evidence averred that the notice of appeal and letter requesting for the record of proceedings were duly filed on the 18th May 2022 and served on the respondent's counsel **M/s Sserwadda and Co. Advocates** 8th June 2022 and that based on the advice of her lawyers, the appeal lodged in the Court of Appeal is not only as of right, but also has a high likelihood of success.

That there is a serious threat of execution emanating from **High Court (Family Division) Civil Suit No. 162 of 2020** which execution is based on the decree/orders of this court in **Civil Appeal No. 26 of 2016** and **Misc. Application No. 2001 of 2018** because the 2 cases have a bearing in the decisions and execution in High Court (Family Division) **Civil Suit No. 162 of 2020** because the subject matter in both cases is the same.

That the provisions of the **Civil Procedure Rules** that dictate that all decrees/orders extracted in court must first be approved by both counsel/ parties and should reflect all the final orders of the decision/ ruling of the court were never complied with when extracting the order in **Misc. Application No. 2001 of 2018**.

Further, that because the applicant's rights of appeal have not been exhausted, her appeal will be rendered nugatory if this application is not granted and that based on the advice of her lawyers, the **Judicature (Court of Appeal Rules) Directions 5.1 13-10** allow her to file an application for extension of time within which to serve a notice to show cause and/or validate the appeal that is currently before the Court of Appeal of Uganda thus staying execution of the orders of this court shall consequently preserve the subject matter in **High Court (Family Division) Civil Suit No. 162 of 2020** and shall preserve the applicants rights of appeal before the Court of appeal.

Representation:

The applicant was represented by **Counsel Casper Tevin Okiru**, an advocate practicing with **M/s Prudens Law Advocates** while the respondent was represented by **M/s Kaganzi & Co. Advocates**. Both counsel filed written submissions in support of their respective client's cases as directed by this court.



Consideration of the application:

Section 98 of the CPA gives the High Court inherent powers to take decisions to meet 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*).

- 5 In **Lawrence Musiitwa Kyazze Vs. Eunice Busingye SCCA NO. 18 of 1990 (1992) IV KALR 55**, it was held 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 safeguarded and the appeal if successful, is not rendered nugatory.
- 10 In **Francis M. Micah Vrs Nuwa Walakira (1992-93) HCB 88** that there is no specific provision enabling the High Court to grant a stay of execution of its decree pending an appeal save through the inherent powers of court, intended for example to preserve the *status quo* pending an appeal.

15 In the view of this court by virtue of **Order 43 rr. 4(2)** powers of court to stay execution of its decree can be allowed where sufficient cause is shown and if the applicant seeking stay of execution meets the conditions set out in **O. 43 r.4 (3) of the Civil Procedure Rules** and those espoused in the case of **Lawrence Musiitwa Kyazze Vs Eunice Businge, Supreme Court Civil Application No 18 of 1990 (supra)**.

20 The applicant must therefore show that he lodged a notice of appeal; that substantial loss may result to the applicant unless the stay of execution is granted; that the application has been made without unreasonable delay; that the applicant has given security for due performance of the decree or order as may ultimately be binding upon him. (*See also; Hon Theodore Ssekikubo and Others Vs Attorney General and Ors Constitutional Application No 03 of 2014*).

25 I shall therefore proceed to determine whether each of the above listed requirements have been complied with.

1. Whether there is a pending appeal:

In the case of **Attorney General of the Republic of Uganda versus The East African Law Society & Another EACA Application No.1 of 2013**, it was held that;

- 30 **'A notice of appeal is a sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases'.**

The applicant in the present matter annexed two notices of appeal. (*See: Annexure 'E' and F' of the affidavit in support of the application*).



a) Notice of Appeal for MA No. 2001 of 2018: (Annexure E):

The notice of appeal for **MA No. 2001 of 2018** was lodged in this court on 23rd March, 2022. The actual date on which it was received by the Court of Appeal is 24th of March, 2022, while the ruling from which the applicant seeks to appeal was delivered via e-mail by this court on the 10th March 2022.

The ruling made *vide* **MA No. 2001 of 2018** was a clarification on the appellate decision by this court passed *vide* **Civil Appeal No. 26 of 2016**. The respondent in her affidavit in reply objected to this application stating that the said notice of appeal was never served on her or her lawyers and that the applicant did not have a right of appeal.

Counsel for the respondent in the submissions argued that the decision in **Misc. Application No.2001 of 2018** is an order for which the applicant ought to have sought leave of court to appeal from, but did not.

Order 44 rule 1 of the CPR lists a number of orders in respect of which an appeal lies as of right. By virtue of **Order 44 rule 2 of the CPR**, no appeal lies from any other order except with leave of court.

With due respect, the rejoinder made by the applicant's counsel which court found lacking failed to sway this court into believing that the orders under **MA No. 2001 of 2018** fall within the category of those orders where an appeal would lie as of right. These were covered under **Order 44 rule 2 of the CPR**, which would require the applicant to seek prior leave of this court before filing the appeal.

In any case, the clarification made in that application ought not to have been perceived as distinct from the orders passed by this court, in its appellate jurisdiction which were intended to throw light on court's decision.

The applicant therefore appears to be contesting in the intended appeal court's interpretation of its own decision. I would therefore discard the prayers sought in respect of **MA No. 2001 of 2018**.

b). Notice of Appeal for CA No. 26 of 2016 (Annexure F):

As clarified by this court, the orders to be executed emanated not from **Misc. Application No.2001 of 2018** but from the decision of this court on appeal made *vide*: **Civil Appeal No. 26 of 2016**, dated 4th June, 2018.

The notice of appeal in this case was filed on 18th May, 2022, and indeed this was almost 4 years after it was passed. The respondent's claim was that since **Civil Appeal No. 26 of 2016** was delivered on 24th August 2018, there was unreasonable delay on the part of the applicant to file the appeal.



Indeed this court was quick to note that although the main decision in respect of which the clarification was sought is contained in **Civil Appeal No. 26 of 2016**, the applicant never deemed it necessary to appeal against it until years later, giving it an appearance of more or less as an afterthought.

5 **Section 79 of the Civil Procedure Act** stipulates that every appeal shall be entered within 30 days of the decree or order of the court. The appellate court however has the powers where good cause is shown, to admit an appeal though the period of limitation as prescribed has elapsed.

10 It therefore goes without saying that the applicant ought to have secured prior leave of court to appeal out of time, which she did not do. According to the respondent, the intended appeal was incompetent and the notice of appeal misconceived, and has no likelihood of success as the applicant did not demonstrate the *prima-facie* case of her right to appeal in both instances.

15 The applicant in rejoinder however pointed out that an application for extension of time within which to appeal/validation of the appeal was pending before the Court of Appeal. A copy of the said application was attached to the affidavit in rejoinder, and marked as **Annexure 'H'**.

It is evident from the above therefore that an appeal was filed by the applicant, albeit out of time and is now a subject of the validation process pending before a higher court, where the possibility of its success cannot be ruled out.

20 The Court of Appeal in the case of **P.K Sengendo vs. Busulwa Lawrence & Another CACA 207 of 2014** noted that,

25 *"if what was sought to be executed was payment of a sum of money, generally courts will deny stay. Reason being that money can always be returned. But where the subject matter was property capable of permanent alienation and therefore capable of causing the appeal preferred to be nugatory, for example, transfer, then court will exercise its discretion in favor of the applicant, so as to give benefit to the appeal to be attended to on its merits".*

In those circumstances as highlighted, the above principle would apply to this application.

2. Whether or not substantial loss may result if the order of stay is denied:

30 The arguments in submission by the applicant's counsel include an eminent threat of eviction from the suit property by the respondent. Furthermore, that the denial of a stay order may also result in substantial loss.

35 Indeed should the application for validation of the appeal succeed after the execution of the orders in **Civil Appeal No.26 of 2016** is already carried out, the appeal would be rendered nugatory; and similarly, should the appeal succeed substantial such loss may be occasioned to the applicant.



3. Whether there was unreasonable delay:

On the principle that the applicant is required to satisfy the requirement that the application has been made without unreasonable delay in ***Ujagar Singh v Runda Coffee Estates Ltd*** [1966] EA 263, Sir Clement De Lestang, Ag. V.P had this to say:

‘ . . . 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 long delay in obtaining the proceedings of the High Court it may be many months before he could lodge his appeal. In the meantime, the execution of the decision of the court below could cause him irreparable loss.’

(See also: ***Sewankambo Dickson versus Ziwa Abby High Court Miscellaneous Application number 178 of 2005***)

As pointed out earlier, the judgement in ***Civil Appeal No.26 of 2016*** was delivered over 4 years ago on 24th August 2018. As to whether or not the circumstances as highlighted in this application justify the stay of execution of a judgment that was passed 4 years earlier is an issue that is now intertwined with or pegged on the decision in the application pending before the Court of Appeal, a discussion of which this court should not preempt.

Ultimately therefore, the stay of execution cannot be in respect to the appeal but rather in respect of the pending application for validation of the appeal.

4. Security for due performance of the decree/order:

A party seeking a stay should be prepared to meet the conditions as set out in ***Order 43 rule 4(3)(c) of the CPR***. The said rule makes it a mandatory requirement for the applicant to furnish security for costs for due performance of the decree.

In the instant case however, there is nothing in the pleadings, evidence or submissions indicating that the applicant is committed to furnish security for due performance or costs. The requirement for payment of security for costs is to ensure that a losing party does not intentionally delay execution while hiding under unnecessary applications. It is intended to show seriousness by the intended appellant in pursuing the appeal.


In the final result, the orders of court are made as follows:

1. ***Execution of the judgement and orders of this court vide CA No. 26 of 2016 is stayed, pending the hearing and determination of the application before the Court of Appeal for validation of the appeal, or until further orders are issued by court.***



2. The application for stay of execution is allowed on condition that the applicant deposits in court Ugx 25,000,000/= (Ugx twenty-five million), within a period of twenty one days from the date of this order.

5 I so order.


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Alexandra Nkonge Rugadya
10 **Judge**
7th September, 2022.

Delivered by email
Chikanga J
8/9/2022

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