

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.1493 OF 2022

(Arising out of Civil Suit No.156 of 2014)

EDWARD KASINZI *alias*

GATSINZI:.....APPLICANT

VERSUS

1. HUSSEIN KISIKI NYAMYALO

2. MINSA NABAGABsO

3. NDUGA

**ABDUL:.....RESPONDENT
S**

Before Hon. Justice Alexandra Nkonge Rugadya.

Ruling.

The applicant by way of motion under the provisions of **Section 33 of the Judicature Act Cap.13, Section 98 Civil Procedure Act Cap.98 cap.71, and Order 52 rules 1 & 3 of the Civil Procedure Rules SI 71-1** seeking an order staying the execution of the decree and judgment in **Civil Suit No.156 of 2014** pending the determination of the appeal, and that costs of the application be provided for.

The grounds of in support of the application are contained in the affidavit in support deponed by the applicant **Mr. Edward Kasinzi**. He states *inter alia* that on 2nd September 2022, this court presided over by **Hon. Justice Alexandra Nkonge Rugadya** delivered judgment in **Civil Suit No.156 of 2014** and that the applicant being dissatisfied with the whole decision, instructed his lawyers to file a notice of appeal, as well as a letter requesting a copy of the certified copy of the proceedings.

That while this court is vested with the mandate to issue an order staying the execution of the order and decree issued by the trial judge, the applicant avers by affidavit evidence that the respondents have since applied to have the special certificate of title cancelled as directed by this court; and that if the same was to be allowed, the respondents would dispose of the suit property, thereby rendering the appeal nugatory owing to the fact that if the special certificate title is cancelled, the suit land shall be transferred by the respondents to other parties which would make it difficult for the applicant to recover the same.



That because the applicant's intended appeal has a high chance of success, if the order for stay of execution is not granted by this court, the applicant will suffer irretrievable and substantial loss as there is a threat of execution and the said execution will render the applicant's appeal nugatory.

- 5 In addition, when the respondents got to know of the judgment, they descended onto the suit land and not only started cutting the applicant's trees but also threatened his workers with immediate eviction and that it was only the intervention of the police officers from Karire and Nakasongola Police stations that saved the applicant's developments on the land.

10 Further, that this application has been brought without undue delay and that it is just, fair, equitable, and in the interest of justice that this application for stay of execution is allowed.

The respondents opposed the application through the affidavits in reply of **Mr. Nduga Abdul**, and **Mr. Hussein Kisiki Nyamyalwo**, the contents of which are similar. They objected to the application on grounds that the application is not only premature and frivolous but that the same has no merits and moved this court to dismiss the same with costs.

- 15 That filing a notice of appeal and a letter requesting a typed record of proceedings does not automatically entitle the applicant to an order of stay of execution nor does it change the fact that the applicant's intended appeal has no merit whatsoever;

20 That it is also not true that the respondents have applied to have the special certificate of title cancelled because the same cannot happen unless a decree has been extracted yet the same has not been done since counsel for the applicant has not approved the decree as per the letter of request.

25 That because the suit land is registered in the names of the late Mitina Nakanwagi, the respondents have no intention of disposing of it because they ought to first obtain a grant of letter of administration of the deceased's estate before dealing with the land in any way; and that the intended appeal has no merit and the grounds of appeal set out in **paragraph 8 (a) (b) (c) and (d)** are merely wishful thinking by the applicant.

In addition, the applicants will not suffer any loss in the execution of the matter because the claim over the suit land is premised on fraud and illegalities which this court has not only confirmed but can also not allow to continue unabated.

- 30 According to them therefore this application was not only premature but also amounts to an abuse of court process since the respondents have not taken any steps to execute the order of this court in **Civil Suit No.156 of 2014**, and as such there is no execution to be stayed.

35 That the contents of *paragraph 10* of the applicant's affidavit in support as well as **Annexure 'C'** thereof are not correct since it does not indicate the police station or the names of any of the respondents as suspects.



Further, that the applicant shall not suffer any irreparable loss if this application is dismissed since this court correctly found that he is not the rightful owner of the suit land, which fact shall not change even on appeal.

Court even issued a permanent injunction stopping him from using the land, and that not only must the applicant prove that he will suffer irreparable loss, but also that he is willing to furnish security for due performance of the decree if this court is to grant him the order for stay of execution.

That the applicant has not shown that he is willing to furnish security for due performance of the decree, nor has he shown or proved that he will suffer any irreparable loss if the execution in this matter is not stayed.

That should court be inclined to grant this application, the applicant be ordered to pay security for due performance of the decree by depositing in court the total sums, and the rest claimed in the taxed bill of costs.

The applicant also filed an affidavit in rejoinder to the respondents' averments. He stated that the respondents did not adhere to, or respect the court's directives in regard to the schedules on submissions as they chose not to reply to this application but adopted their old submissions.

That it is the applicant's belief that he is likely to suffer irreparable damage contrary to the respondents' averments as they have moved to occupy the suit land despite the fact that on 2nd November 2022, this court issued an interim order staying the stay of execution pending the determination of the instant application thereby undermining the orders of this court and that they have since not only cleared and burned the bushes but have also brought cattle thereon and started making charcoal on the land.

Further, that because this court in its orders and decree ordered the cancellation of the special certificate of title, the same can be done at any time without any recourse to the court which presents an imminent threat and that only the court of appeal can decide whether or not the applicant's appeal has any merit or not.

That the order for deposit of due performance of the security is likely to stifle the applicant's appeal as the same is likely to be exorbitant, beyond the applicant's means yet he has an appeal based on veritable grounds and that he (the applicant) stands to go through irreparable damage since the applicants have already moved to occupy the suit land as shown in the photographs shown in the application.

Representation



As per the notice of motion as well as the affidavit in rejoinder, the applicant was jointly represented by **M/s Ahamya Associates & Advocates and KOB Advocates & Solicitors**, while the respondents were represented by **M/s Kaganzi & Co. Advocates**.

Determination of the application by court.

- 5 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 by the Supreme Court in the case of **Lawrence Musiitwa Kyazze V s Eunice Busingye Civil Application No. 18 of 1990**.

The applicant must 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)**.

a. Whether there is a pending appeal.

The applicant is required to satisfy that there is a pending appeal and that he has lodged a notice of appeal. In the case before me, it is not in dispute that the applicant lodged a notice of appeal. A perusal of the applicant's pleadings indicates that the applicant through his lawyers filed a notice of appeal in this court on 6th September, 2022 and the same was transmitted to the Court of Appeal on the same day. **(see Annexure 'A' of the affidavit in support)**. Thus, it is clear that the applicants indeed lodged an appeal therefore satisfying this requirement.

b. Whether or not substantial loss may result if the order for stay is denied.

Substantial loss cannot mean ordinary loss or the decretal sum or costs which must be settled by the losing party but something more than that. The applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is granted. **(See: Andrew Kisawuzi vs Dan Oundo Malingu HCMA 467/2013)**.

In the case of **P.K Sengendo vs. Busulwa Lawrence & Another CACA 207 of 2014**, the Court of Appeal in its ruling observed that 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 the court will exercise its discretion in favour of the applicant, so as to give benefit to the appeal to be attended to on its merits.

This court in its judgment in the main suit directed the Commissioner, Land Registration to cancel the certificate title and also cause a survey of the suit land and create 2 separate titles



in the names of the late Mitina Nakanwagi and another in the name of the administrators of the estate of the late Augustus Lwabulangwa. Court also issued a permanent injunction against the applicant and his agents.

It is not in dispute that the applicant is indeed in possession of part of the suit land and likely to be held to be in contempt of the same if this application is not granted. It is evident from the on set that the orders of this court being self-executing constitute an imminent threat and if left to stand without an express stay of execution, the permanent loss of what constitutes the property to which the applicant is rightfully entitled may be occasioned and the appeal rendered nugatory .

In light of the above, I find that the applicant is likely to suffer substantial loss unless a stay of execution is granted.

c. Whether there was unreasonable delay.

The **Supreme Court in Musiitwa Vrs Eunice Busingye CA No. 18/1990** advised that a party seeking a stay should be prepared to meet the conditions set out in **Order 43 rule 4(3)**.

In **Ujagar Singh v Runda Coffee Estates Ltd [1966] EA 263, Sir Clement De Lestang, Ag. V.P** stated;

‘ . . . 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)

The judgement by this court was delivered on 2nd September, 2022. The notice of appeal was filed on 6th September, 2022 and on the same day the applicant filed a letter to court requesting for certified copies of the proceedings.

On 12th September, 2022, **MA No. 1493 of 2022** was filed seeking a stay of execution. An interim order for stay of execution was granted vide **MA No. 1494 of 2022**. However court declined to grant the main application initially on the ground that it had not been duly served.

The applicant applied vide: **MA No. 1747 of 2022** for a review and setting aside the dismissal of the application which court granted on account of the technical error occasioned by ECCMIS the order was however set aside upon proof that there was miscommunication.

In its ruling dated 2nd November, 2022 court found that according to the Electronic Court Case Management Information System (ECCMIS) log, its directives to file submissions were uploaded and admitted on 12th September 2022 at 16:07.

However that, upon further audit of the system via the applicant's lawyer's portal, it was revealed that the said directives were never reflected on their end. It is on that basis that the present application was reinstated.

The above circumstances show that the applicant had been diligent in following up the application.

d. Security for due performance of the decree/order

In the instant case, there is nothing in the pleadings, evidence or submissions indicating that the applicant is committed to furnish security for due performance or costs. The applicant in his rejoinder indeed implored this court not to grant the security for costs as it was likely to stifle his appeal.


With all due respect however, 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 intended to show seriousness of the intended appellant in pursuing the appeal. The Supreme Court in **Musiitwa Vrs Eunice Busingye CA No. 18/1990** advised that a party seeking a stay should be prepared to meet the conditions set out in **Order 43 rule 4(3)**.


It is the view of this court therefore that considering the size of the suit land, the balance of convenience demands that stay be granted upon the condition that the applicant gives security for the performance of the decree, which appears to be a mandatory requirement under **Order 43 rule 4(3)**.

The application is accordingly granted on condition that the applicant deposits into court **Ug. x 20,000,000/- (Uganda shillings twenty million only)** as security for the performance of the decree within a period of 30 (**thirty days**) from the date of this order.

Each party to meet their costs.

I so order.


.....
Alexandra Nkonge Rugadya
Judge
23rd November 2022

Delivered by email

J
23/11/2022

