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High Court of Uganda

Miscellaneous Application No. 32 of 2022

(Arising from Civil Appeal No. 44 of 2015)

(Arising from Ngora Land Civil Suit No. 22 of 2004)

10 The Registered Trustees of Soroti Catholic Diocese :::::::::::::::::::: Applicant

Versus

Echodu John Robert and 2 Ors :::::::::::::::::::: Respondents

Before: Hon. Justice Henry Peter Adonyo

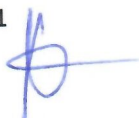
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Ruling

This is an application by way of Notice of Motion brought under Order 43 rule 4(2) & (3), Order 52 rule 1,2 & 3, section 98 Civil Procedure Act and section 33 of the judicature Act for orders that;

- 20 a) The execution of the decree in High Court Civil Appeal No. 44 of 2015 be stayed pending the hearing and determination of the Applicant's appeal in the Court of Appeal.
- b) Costs of this application be provided for.

The grounds of this application are contained in the affidavit of Reverend Father Stephen Jorem Abacu, the Chairman Land Commission at Soroti
25 Catholic Diocese. They include;



- 5 1. That the applicants are not satisfied with decision of Court in High Court Civil Appeal No. 44 of 2015 delivered on the 25th day of January 2021.
2. The applicants have filed a Notice of appeal and an appeal against the decision in High Court Civil Appeal No. 44 of 2015 vide Civil Appeal
10 No. 216 of 2021.
3. That the appeal has a high likelihood of succeeding and there
4. That the Respondents have filed a Notice to show cause why execution should not issue which is coming up for hearing on 28th April 2022.
5. That the Applicants shall suffer substantial and irreparable loss if this
15 application is not granted.
6. That the Applicants appeal in the Court of Appeal shall be rendered nugatory in the event of execution prior to the disposal of the appeal.
7. That the Application has been made without unreasonable delay.
8. That it is in the interest of justice that the Application be allowed.

20 The 1st Respondent in reply stated;

1. That the appeal has no merit and has no likelihood of success.
2. That the applicant should show cause why execution should not issue instead of filing this application.
3. That the applicant has not demonstrated to the satisfaction of court the
25 substantial loss or injury it is most likely to suffer when execution in respect of Civil Appeal 44 of 2015 is carried out.
4. That there has been reasonable delay in filing the application as the judgment was delivered on the 25th day of January 2021 and a period of more than a year has elapsed.

- 5 5. That the appeal in the Court of Appeal cannot be rendered nugatory as it will be heard on its merits inter parties.
6. That the applicant filed MA 57 Of 2021 for stay of execution and the same was dismissed.
- 10 7. That the dismissal order in respect of MA 57 of 2021 was neither set aside nor appealed against by the applicant.
8. That it was not proper for the applicant to file another application for stay of execution of the decree in Civil Appeal No. 44 of 2015 when the applicant did not apply to set aside the said dismissal order in respect of MA 57 of 2021 and neither appealed against the said dismissal order.
- 15 9. That the application ought not to be granted because the applicant has not furnished security of costs.

The 3rd respondent swore and affidavit in reply on her behalf and on behalf of the 2nd respondent from whom she had written authority. She reiterated the same statements made by the 1st Respondent and I see no reason to repeat them here.

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In rejoinder the Applicant stated;

- 25 1. That I have been advised by my lawyers that the Appeal in the Court of Appeal has merit as it raises matters of law such as failure by the High Court being the 1st appellate court to take Judicial Notice of administrative changes in the remaining and geographical boundaries of Local Government Administrative Units and failure to pronounce itself on the doctrine of Limitation and Laches in favour of the Applicant inter alia.
- 30 2. That the applicant will suffer substantial loss and injury such as likelihood of demolition of the Church Building on the suit land if the

5 instant application is not granted owing to the impending threat by the Respondents to execute the Judgment arising from Civil Appeal No. 44 of 2015 which the Applicant is challenging in the Court of Appeal.

10 3. That earlier there was no need and or urgency to file the instant application since the Respondents had not taken any steps to execute Civil Appeal No. 44 of 2015 till the Applicant was served on 21/02/2022 with Notice to Show Cause Why Execution should not issue.

15 4. That it was only after the Applicant was served with the said Notice that it became necessary and urgent to file the instant application to stay execution pending the disposal of the Appeal filed by the Applicant in the Court of Appeal.

5. That there is no time limit for applying for stay of execution pending appeal as long as there is threat of execution before the disposal of an appeal as it is in the instant case.

20 6. That the instant application meets the legal threshold for the grant of an order for stay of execution pending appeal.

25 7. That regarding MA No. 57 of 2021 which was earlier dismissed by Court due absence of both parties at the time of hearing there was no threat of execution of Civil Appeal No.44 of 2015 and there is no impediment to filing of the instant application.

30 8. That following the filing of MA 57 of 2021 just before the second lockdown in 2021 they were informed by a one Martin Shikuku, the then clerk at the High Court Registry that it was only the Judge who could fix the said application for hearing and advised to wait for the fixing of the same.

5 9. That when they subsequently followed up, the said case file could not
be traced at the High Court Registry after the lifting of the lockdown
despite concerted efforts by Counsel for the Applicants to trace the said
case file but were surprised on 4th May 2022 when they found out after
filing the instant application and were served with Affidavits in Reply
10 thereto that MA 57 of 2021 had been dismissed on 3rd November 2021.

Submissions.

Counsel for the Respondent in their submissions raised an issue on the
propriety of this application.

15 Counsel submitted that the applicant filed Misc. Application No. 57 of 2021
arising from Civil Appeal No. 44 of 2015 and it was for stay of execution and
when the application came up on 3rd November 2021, it was dismissed with
dismissal order attached to the respondents' affidavit in reply and marked
'A' and that the applicant did not file an affidavit in rejoinder to rebut its
existence or contents. This is contained in the affidavits of the respondents
20 specifically in paragraphs 14 and 15.

Counsel further submitted that in view of the dismissal of Misc. Application
No. 57 of 2021 on 3rd November 2021, the applicant ought to have filed
another application in the Court of Appeal and not in the High Court.

25 That the order in Misc. Application No. 57 of 2021 has not been appealed
against or set aside by any court.

That the present application was filed on 28th March 2022 which is four
months after the dismissal of the application for stay and it was over one year
since judgment had been entered against the applicant clearly showing that

5 this application is not only improperly filed before the court but was frivolous and vexatious, lacking in merit and ought to be dismissed with costs.

Counsel for the applicant submitted that the application is properly before this court arguing that the dismissal of the said application was due to the errant behavior of the then Court Clerk who kept away the file and hid
10 information from the applicant regarding the fixing of the application for hearing as contained in the affidavit in rejoinder of Reverend Father Stephen Jorem Abacu.

In making this submission counsel for the applicant cited *Elite International Tobacco (U) Ltd v Marchfair Stationery (U) Ltd*
15 *HCMA No. 323 of 2001 (1997-2001) UCLR 253* where it was held that since

***“...the Court Registry caused the delay by delaying to fix the hearing date, and this mistake of the Court would not be visited o the litigant. The applicants showed due diligence
20 in the instant case by regularly checking with the Court Registry. Their application was therefore properly before the Court and would be heard on its merits.”***

Counsel submitted that the same principle should be apply to the instant application.

25 Counsel further submitted that the fact that Misc. Application No. 57 of 2021 was dismissed did not bar or preclude the applicant from filing a fresh application given that the same was not disposed of on merit and the attached order to the affidavits in reply of the Respondents is silent under which Order and Rule of the Civil Procedure Rules the said application was

5 dismissed. Consequently, counsel argued that the applicant was perfectly in order to file the instant application as there was no legal impediment to filing the same.

Having carefully considered the arguments of the parties in this respect, I would find that this application is properly before this court because my
10 interpretation of the record of proceedings in Misc. Application No. 57 of 2021 is that it was dismissed for want of prosecution and improper service onto the respondents.

I would thus agree with the applicant that there is no legal impediment to the application being filed again. I would thus disagree with the argument of
15 counsel for the respondent in this respect.

Coming to the merit of this application, it is the submission of the counsel for the applicant that the principles under which an application for stay of execution can succeed is well enunciated in ***Dr. Ahmed Muhammed Kisuule v Greenland Bank (In Liquidation) [2011] UGSC 5, Hon. Theodore Ssekikubo & Others V The Attorney General & Others Constitutional Application No. 03 of 2014, Lawrence Musiitwa Kyazze v Eunice Busingye SCCA No. 18 of 1990 and Kyambogo University v Prof Isaiah Omolo Ndiege CACA No. 341 of 2013*** as
20 well as under Order 43 rule 4(3) of the Civil Procedure Rules.

25 Counsel submitted that these principles include;

1. *The applicant must show that they lodged a notice of appeal, and the appeal is not frivolous and has a likelihood of success.*

To substantiate the above point, Counsel submitted that the applicant had attached a notice of appeal and that the appellate judge in determining

5 ownership and location of the suit land relied on the wrong application of the doctrine of laches/ limitation and failed to take judicial notice of the changes in subdivisions and naming of Local Government Administrative units.

Counsel for the Respondent did not contest the filing of a notice of appeal but, strongly submitted that the appeal was frivolous and vexatious for the
10 following reasons;

- a) The appeal entirely relies on a temporary license which is not a document protected by the registration of titles act and was erroneously relied on by the trial magistrate. (page 5 of the judgment).
- 15 b) The temporary license did not contain any acreage and the claim for five acres by the applicant herein was not proved. (page 6 and 7 of the judgment).
- c) The alleged occupational license was of a different place. The suit land is in Okorom and the occupational license was for Obosai. No
20 evidence of name change was adduced by the applicant herein in the Magistrates Court and in the High Court.
- d) The High Court did not make any orders for the demolishing of the church building as alleged by the applicant.

2. *That substantial loss may result to the applicant unless the stay of*
25 *execution is granted.*

Counsel for the applicant submitted that substantial loss here does not refer to a particular amount of money, but it was a loss that cannot be properly quantified by any mathematical formula.

5 That it is a qualitative concept and the nature of the orders granted in the High Court appellate judgement by their quality and purpose are far reaching.

That there is a risk of the church building on the suit land being demolished. That the judgment affects the entire community that worships in and obtains
10 spiritual nourishment from the said church if the same is demolished.

Counsel for the respondent in reply submitted that the issue as to whether the applicant will suffer irreparable loss has not been proved in evidence.

Counsel further submitted that the judgment of the High Court at page 3, paragraph 5 confirms that the church was given 20 meters by 20 meters by
15 the respondents and the respondents do not intend to demolish the church and so there is no risk of demolishing the church as alleged by the applicants.

That the notice to show cause and the application for execution is not in respect of demolishing the church but for the respondents to recover costs of the appeal which were decreed to them and only costs and nothing else and
20 the application for execution made under Order 22 of Civil Procedure Rules is clear on this.

Counsel further submitted that the applicant's affidavit in support does not show how it will suffer irreparable loss which cannot be compensated. But that on the contrary, the respondents will suffer serious financial loss in form
25 of additional costs and expenses to defend the appeal which the applicant will not be able to meet unless the applicant is ordered to deposit security for the due performance of the decree.

- 5 3. *That the application has been made without unreasonable delay.*

Counsel for the applicant submitted that on 25th of January 2021 the High Court delivered a judgment in Civil Appeal No. 44 of 2015. The Notice of appeal was filed on 8th February 2022, the notice to show cause why execution should not issue was taken out on 21st December 2021 and served
10 on the applicant on 21st February 2022.

That given that the applicant had earlier in April 2021 filed an application for stay of execution which was misplaced in the High Court Registry, the instant application was lodged without unreasonable delay in view of the circumstances.

- 15 Counsel for the Respondent in reply submitted that the applicant filed this application over one year from the date of the judgment.

That all along counsel for the applicant appeared in court for taxation of the bill of costs, notice to show cause were issued and he did not take any steps to file and prosecute the application.

- 20 Even that an application, vide, Misc. Application No. 57 of 2021 for stay of execution which was filed was dismissed by this Court on 3rd November 2021 and it took counsel for the applicant over four months to file this application with all these pointing to serious dilatory conduct on the part of the applicant and his counsel.

- 25 4. *There is serious or imminent threat of execution of the Decree or order and if the application is not granted, the appeal would be rendered nugatory.*

Counsel for the applicant submitted that there is already a notice to show cause why execution should not issue and this presents a real risk of having

5 the permanent church building on the suit land demolished in execution of the High Court Judgment/decreed.

Counsel for the respondent in reply submitted that the applicant attached a notice show cause to show that there is imminent threat of execution. However, there is no warrant of execution issued against the applicant for
10 the alleged demolition of the church. And the decree in civil appeal no. 44 of 2015 did not order for the demolition of the church building. In fact, one garden was decreed to the applicant. The applicant has not attached any notice or warrant of eviction or demolition.

Counsel further submitted that the applicant's submission on serious threat
15 is grossly misleading and diversionary and only intended to misguide this honourable court because the respondents are only seeking the payment of the taxed costs.

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

20 Counsel for the applicant submitted that security for due performance is not a condition precedent for granting stay of execution as per ***Imperial Royale Hotel Ltd & 2 Ors v Ochan Daniel HCMA No. 111 of 2012.***

Counsel submitted that there is no requirement under the rules or the law to make deposit for security for due performance of the decree before the court
25 can exercise its discretion and grant stay.

Counsel further submitted that the rationale in ***John Baptist Kawanga v Namyalo MA 12 of 2017*** and ***Margaret Kato v Nahwoga MA 11 of 2011*** is that security for due performance should not be a fetter on the right of an applicant to pursue an appeal.

5 Counsel for the respondents in reply submitted that in the alternative and without prejudice, if this Honourable Court is to grant a stay against the respondents, the same should be conditional, submitting that in ***Lawrence Musiitwa Kyazze v Eunice Busingye, SCCA 18 of 1990***, the court emphasized the need to furnish security for due performance of the decree.

10 Counsel further submitted that on the one hand, the respondents have a judgment in their hands which has not been set aside, and on the other hand, the applicants have a notice of appeal with the scales of justice only balancing if a deposit of the taxed costs is ordered otherwise, the pursuit of justice will be left in limbo and so given the fact that the appeal against the respondents

15 lacking merit, this application is one where any stay should be granted subject to provisions of security for costs and so the applicant should be ordered to deposit **Ugx 29,339,600/-** claimed in the bill of costs for the due performance of the decree if this court is inclined to grant the order of stay.

20 6. *That refusal to grant stay would inflict more hardship than it would avoid.*

Counsel for the applicant submitted that if stay is not granted it would inflict more hardships on the applicant given that there is a risk of the church building being demolished.

25 The principles under which an application of stay of execution can succeed were well espoused in the case of ***Lawrence Musiitwa Kyazze Vs Eunice Busingye, Supreme Court Civil Application No 18 of 1990***, but more pronounced in the Supreme Court Case of ***Hon Theodore Ssekikuubo and Ors Vs The Attorney General and Ors Constitutional Application No 03 of 2014*** and ***Kyambogo***

5 ***University Vs Prof. Isaiah Omolo Ndiege, CA No 341 of 2013*** to include:

1. The applicant must show that he lodged a notice of appeal.
2. That substantial loss may result to the applicant unless the stay of execution is granted.
- 10 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.
5. 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
15 nugatory.
6. That the application is not frivolous and has a likelihood of success.
7. That refusal to grant the stay would inflict more hardship than it would avoid.

From the submissions above and considering the pleadings herein, I would
20 find that the applicant has proved that a notice of appeal was filed in the Court of Appeal.

However, principle s2 and 5 have not been proved by the applicant. The applicant has failed to prove that there is a threat of execution of the decree and that substantial loss may result unless the stay is granted. The applicant
25 is basing their application on an alleged possibility of demolition of the church structure and a notice to show cause why execution should not issue.

However, the respondents in their submissions clearly state the notice is regarding the bill of costs that arose from the appeal and no warrant for

5 execution has been taken out, furthermore the perusal of this court orders show that this Honourable Court **DID NOT** make any orders for the demolishing of the church. Belonging to the applicant as the judgment of this Court in Civil Appeal No.44 of 2015 does not show or include an order for the demolition of the church. Furthermore, in determination of the appeal ,
10 it was found that the Church had been given land measuring 20×20 meters and the respondents would have no right and to claim the same and thus would have no legal right to demolish the church.

My finding is that the notice to show cause why execution should not issue relied on by the applicant is only in respect of a taxed bill of costs and not the
15 land and there is no evidence whatsoever that there is an impending threat of execution. No warrant of execution has been issued or even applied for.

I have also found that there is no evidence of any threat of execution on record and there is no evidence that if the orders of this court is not stayed the main application and the appeal would be rendered nugatory.

20 This is because **Black's Law Dictionary Sixth Edition** defines execution as the

“Process issuing from a court in a civil action authorising the sheriff or other competent officer to carry out the court’s decision in favour of the prevailing party”

25 The same dictionary defines stay of execution as follows: -

“The stopping or arresting of execution on a judgment that is of the judgment creditor’s right to issue execution, for a limited period”.

Execution in law refers to a process by which a successful party in a civil matter enforces the decree or order. This usually entails attachment of

5 property to recover judgment debt, order of eviction, order requiring vacant possession of land amongst others.

The purpose of an order of stay of execution is to preserve the *status quo* and protect the applicants' right of appeal from being rendered nugatory.

In ***National Enterprise Corporation versus Mukisa Foods***
10 ***Miscellaneous Civil Application No. 7 of 1998*** this Court held as follows at page 7;

"The Court has power in its discretion to grant stay of execution where it appears to be equitable so to do with a view to temporarily preserving the status quo.

15 *As a general rule the only ground for stay of execution is for the applicant to show that once the decretal property is disposed of there is no likelihood of setting it back should the appeal succeed".*

The Supreme Court of Uganda in ***Civil Application No. 9 of 1990; Francis Nansio Micar vs. Nuwa Walakira*** observed that:

20 *"It would be unwise in some circumstances to defeat a statutory right of appeal by for example demolishing the subject matter of a suit so that the appeal is rendered nugatory. Again, stay may be necessary when it comes to the notice of any court that an alleged fraud has been practiced upon it effecting its decree or when courts action is in doubt*
25 *through want of jurisdiction".*

The instant facts show no threat of execution or action that will render the intended appeal nugatory as no building is subject to demolition.

- 5 The only fact execution the respondents are interested in is of the taxed Bill of Costs and a notice to show cause why execution should not issue was extracted in that regard.

Order 22 rule 19 of the Civil Procedure Rules provides thus;

- (1) Where an application for execution is made—
- 10 (a) more than one year after the date of the decree; or
- (b) against the legal representative of a party to the decree,
- the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him or her to show cause, on a date to be fixed, why the decree should not be executed against him or her; except that
- 15 no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application
- 20 being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him or her.
- (2) Nothing in subrule (1) of this rule shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice
- 25 prescribed in that subrule if, for reasons to be recorded, it considers that the issue of the notice would cause unreasonable delay or would defeat the ends of justice.

In respect of the Notice to Show Cause, which was issued by this court, the applicant had to simply appear and show cause why execution of the bill of

5 costs should not issue, with any failure on their part to show cause resulting into execution. This is simple process which must be followed by the applicant instead of the filing this application.

Invariably, I would find that there is no threat of execution or substantial loss that will be suffered by the applicant if this application is denied.

10 With regard to the success of the appeal (principle 6) the applicant is appealing on the grounds that the appellate judge wrongly applied the doctrine of laches, the fact that the High Court judge failed to take judicial notice of the changes in subdivisions and naming of local government administrative units and the fact that the applicant has been in occupation
15 of the suit land since 1929 by way of occupational licence which is a legal instrument granted by the colonial government.

The respondents find the appeal frivolous because the temporary occupation licence the applicant seeks to rely on is not a document protected by the Registration of Titles Act, does not contain any acreage, is for a different
20 place and that the High Court did not make any orders for demolition of the Church. I would find that all these are appealable grounds even though there is no memorandum of appeal on record. The substantiality of all these thus ought to be determined by the Court of Appeal and not his court.

Regarding the issue of unreasonable delay in filing this application, I would
25 find that the applicant gave sufficient reason as to why there was delay in the filing of the application as seen in their affidavit in reply and rejoinder.

Consequently, this application would succeed in part and fail in part with the following orders issued.

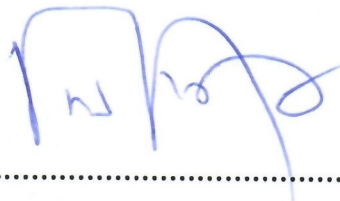
5 There was no need for this application as the notice to show cause was merely requiring the applicant to appear in court to show cause why execution as to costs should not issue.

There was and there is no threat of demolition of the church owned by the applicant given the fact that there is no order at all by this court to that effect
10 as seen from the judgment of this court.

The refusal to grant this application will not inflict any hardship on the applicant.

Accordingly, in the whole, this application would fail with no order as to costs.

15 I so order.



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Hon. Justice Dr Henry Peter Adonyo

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14th July 2022