

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.205 OF 2023

(Arising out of Civil Suit No.464 of 2017)

JOSEPH BALIKUDEMBE::APPLICANT

VERSUS

DR. FRANCIS MAYANJA BUGEMBE:.....RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

This application brought by way of notice of motion under the provisions of **Section 33 of the Judicature Act cap.13, Section 98 of the Civil Procedure Act cap. 71, and Order 43 rule 4, & Order 52 rules 1 & 3 of the Civil Procedure Rules SI 71-1** seeks orders that;

1. *An order doth issue against the respondent, his agents, servants, and persons claiming under him staying the execution and implementation of the decree and all orders of this court in High Court Civil Suit No.464 of 2017: Dr Francis Mayanja Bugembe vs Joseph Balikudembe, and further restraining the respondent and his agents from evicting or otherwise dispossessing the applicant and taking over possession of the suit property situate at Kyadondo Block 195 plot 1448 (now 4806) at Kyanja Kampala Capital City until the final disposal of the applicant's appeal to the court of appeal against the said judgment and decree;*

2. Costs of the application be provided for.

Inhalt

Grounds of the application.

The grounds in support of the application are contained in the affidavit in support thereof deposed by the applicant, **Mr. Joseph Balikudembe**. He stated that he was the unsuccessful party in **HCCS 464 OF 2017** filed against him by the respondent in whose favour judgment was entered and wherein court made orders that the applicant had no equitable interest in the suit property situate **at Kyadondo Block 195 plot 1448 (now 4806) at Kyanja Kampala Capital City** whereon he was a trespasser and court further ordered that the applicant pays compensation of **Ugx. 40,000,000/=**, general damages of **Ugx. 20,000,000/=**, mesne profits of **Ugx. 20,000,000/=**, punitive damages of **Ugx. 20,000,000/=**, interest of 15%, and costs of the suit to the respondent or the estate of the late Yosia Mayanja which is currently being administered by the respondent.

That the applicant being dissatisfied with the judgment and orders of this court, and being desirous of appealing against the same in the court of appeal instructed his lawyers to commence an appeal in the Court of Appeal and that his counsel has since lodged a Notice of Appeal as well as a letter requesting for typed and certified copies of proceedings and the judgment to enable him prepare and file the appeal to the Court of Appeal.

That there is an urgent threat of execution of this court's decree and orders because they are not only executable but also entitle the respondent to cause the applicant's eviction or dispossession from the suit property and also recover the sums decreed yet it is the same orders and decree that the applicant seeks to challenge before the Court of Appeal and that there is very little likelihood that that his appeal shall be heard before execution.

That because the suit property is developed with a storeyed commercial building constructed by the applicant who has been in possession of the same since 2012 with tenants, if an order of stay of execution in the terms sought herein is not granted, he as at a great risk of being evicted or dispossessed, and the property alienated by the respondent before the determination of the appeal which appeal which will be rendered nugatory.



In addition, that all the monetary awards made by this court including compensation, general & punitive damages, mesne profits and costs of the suit are all pegged on the determination of the legality of the applicant's acquisition of the suit land which is one of the issues set to be determined in the intended appeal thus if execution is effected and the applicant succeeds on appeal, it will not be possible for the applicant to recover the land, or the sums decreed by court from either the respondent or third parties, and that since the reliefs sought in the appeal directly impact on the orders granted by this court, the reliefs sought shall be rendered nugatory if execution is allowed to proceed as the suit property and commercial building will have been alienated, and irrecoverable.

That based on the advice of his lawyers, the applicant believes that because his intended appeal is not only plausible, and meritorious but also raises pertinent points of law which merit reconsideration by the Court of Appeal with a high likelihood of success, the imminent threat and danger lies in the fact that the intended appeal may not be disposed of soon thus the need to protect the applicant's unrestricted right to appeal by preserving the status quo as well as the suit property through an order of stay of execution lest the applicant shall be dispossessed, the suit property alienated and rendered irrecoverable even irrespective of whether he succeeds in the appeal.

Further, that the respondent who intends to execute judgment and decree of this court shall not hesitate to do so as he has since commenced the execution process by extracting the decree by extracting the decree which has been served upon the applicant's lawyers for approval while the respondent's agents have since been inspecting the suit property in preparation of the intended prosecution.

That the respondent shall not be prejudiced as the application for stay of execution has been made without undue delay as the judgment of this court was delivered on 23rd June 2023 and that the orders of stay of execution are intended to safeguard the applicant's right of appeal, and not to render the same nugatory and that the applicant is not only ready, but also willing and



able to furnish security for due performance of the decree which will be binding on him in such reasonable terms as this court may direct.

That the balance of convenience lies in the applicant's favour since the respondent who sold him the land has never been in possession or occupation of the same since 2012 and all the developments on the suit land were constructed by the applicant thus the respondent shall not be inconvenienced by the grant of the stay of execution of the orders of this court.

The applicant further averred that he will suffer substantial loss if the order of stay of execution is not granted as the reliefs sought in the intended appeal will be rendered nugatory since he is in possession of the suit property, and that the stay of execution will safeguard his right to appeal thereby preventing the appeal from being rendered nugatory.

That it is just, fair and equitable that an application for an order of stay of execution pending appeal is issued.

The applicant also filed a supplementary affidavit in support of the application wherein he stated that while court finally endorsed and sealed the decree in **HCCS No.464 of 2017**, the respondent also filed a bill of costs which has been fixed for taxation, and an application for execution of the decree and orders of this court vide **Execution Miscellaneous Application No.0034 of 2023** which was also fixed for hearing.

That it is now apparent that despite having been served with the notice of appeal, the respondent is determined to conclude execution before the appeal is determined which will render the same nugatory.

Respondent's reply.

The respondent opposed the application through his affidavit in reply wherein he objected to the application on grounds that this application for stay of execution as well as the applicant's appeal are frivolous, vexatious and devoid of merit as the same are calculated to deny the respondent the fruits of his judgment.



That while the applicant has not attached a cause list to show that the intended appeal may not be disposed of soon, the applicant's intention is to waste the respondent's years in court without getting any justice, and that the respondent should not be denied the fruits of his judgment if the applicant fails to meet the conditions for this application.

That the respondent has no agents inspecting the property in preparation for immediate execution and that while the applicant has not attached any proof of the same, the respondent will be prejudiced because he will be deprived of the use of his land by being condemned to wait for the appeal to be disposed of yet the applicant is not the owner of the land.

In addition, that the balance of convenience does not favour the applicant since the agreement of sale of land was repudiated but the applicant took possession of the land which he had not fully paid for, and started constructing thereon without any right thereby denying and depriving the respondent of the ownership of his land since 2012 and causing him great inconvenience which is why he sued the applicant and patiently waited for court's judgment.

Further, that the respondent who is in need of owning what belongs to him shall be greatly inconvenienced by the stay of execution and that the applicant who has not made any deposit for due performance of the decree, forcefully constructed on the land despite several interventions from KCCA, and a court order compelling him to stop constructing therefore he cannot suffer any loss.

That the applicant who has been defiant in his actions cannot claim that it is just, fair and equitable for this application to be granted and that the mere statement of likelihood to suffer substantial loss without proof of such loss leaves a lot to be desired by this court to substantiate this ground thus it is neither just, nor fair for this application to be granted.

The applicant did not file an affidavit in rejoinder to the averments set out in the respondent's affidavit in reply.

Representation.



The applicant was represented by **M/s Magna Advocates** while the respondent was represented by **M/s ASB Advocates**. Both counsel filed written submissions in support of their respective client's cases as directed by this court.

5 **Determination of the application by court.**

I have carefully read the pleadings, evidence and submissions of both counsel the details of which are on the court record and which I have taken into account in determining whether this application discloses grounds for stay of execution.

10 **Section 98 of the CPA** gives the High 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***).

An applicant seeking stay of execution must meet the conditions set out in **Order 43 rule 4 (3) of the Civil Procedure Rules**, and those espoused in the
15 case of **Lawrence Musiitwa 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**.

The applicant must show that he lodged a notice of appeal; That substantial
20 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.

a. Whether there is a pending appeal.

25 The applicant is required to demonstrate that there is a pending appeal, and that he has lodged a notice of 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;



‘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’.

In this case, 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 27th January 2023. ***(See Annexure ‘B1’ of the affidavit in support of the application)***. Thus it is clear that the applicant lodged an appeal therefore satisfied this requirement.

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

The phrase substantial loss doesn’t 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. ***(See: Tropical Commodities Supplies Ltd & 2 others v International Credit Bank Ltd (In Liquidation) [2004] 2 EA 331)***

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

“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 favour of the Applicant, so as to give benefit to the appeal to be attended to on its merits”.

This court in its judgement in the main suit issued a declaration that the applicant had no equitable interest in the suit land and that he was a trespasser on the suit land constituting part of the estate of the late Yosiya Mayanja which is currently being administered by the respondent.

Court also orders the applicant to pay compensation of ***Ug. Shs. 40,000,000/- (Uganda Shillings forty million only)*** to the estate of the late



Yosia Mayanja for irregularly acquiring the suit land, general damages of **Ug. Shs. 20,000,000/= (Uganda Shillings twenty million only)**, mesne profits of **Ug. Shs. 20,000,000/= (Uganda Shillings twenty million only)**, and punitive damages of **Ug. Shs. 20,000,000/= (Uganda Shillings twenty million only)**, interest of 15%, as well as costs of the suit.

It is not in dispute that the applicant is in possession of the suit land, and is likely to be held in contempt of court if the decretal sums are not paid by him, and this application is not granted. It is also not in dispute that the respondent has since commenced the execution process having filed **Execution Miscellaneous Application No.0034 of 2023** which has been fixed for hearing and may result in the attachment of the applicant's properties, or arrest.

The applicant has expresses the likelihood of his eviction from the property by the respondent who according to the applicant has his agents inspecting the property in preparation for sale of the same. While no evidence has been led to prove the same, this court is inclined to believe that there is a threat of the same being alienated by the respondent. Accordingly, it is the finding of this court that the applicant is likely to suffer substantial loss if this application is not granted.

c. Whether there was unreasonable delay.

In the case of **Ujagar Singh v Runda Coffee Estates Ltd [1966] EA 263** court held 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 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.'

The judgment in the main suit was delivered on 23rd January 2023, and this application was filed on 31st January 2023. The applicant also filed

Miscellaneous Application No.206 of 2023 seeking an interim stay of execution pending the determination of this application.

The applicant has clearly been diligent in following up on this matter and filed this application without unreasonable delay.

5 **d. Security for due performance of the decree.**

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)**. The applicant in his affidavit in support of the application intimated to this court that he is not only ready, but is also willing
10 to furnish security for due performance of the decree.

Counsel for the applicant in his submissions prayed for reasonable terms in regard to this requirement and suggested that the security for due performance of the decree be set at **Ug. Shs. 15,000,000/= (Uganda Shillings fifteen million only)**.

15 It is now settled that the applicant's right to be heard on appeal has to be balanced with the respondent's right to costs, and the right to enjoy the fruits of one's judgment without being unnecessarily frustrated. Court must strive to maintain a balance between the need to have a successful party enjoy the fruit of his victory and at the same time to ensure that the unsuccessful party
20 who has appealed would not be incapacitated as not to pursue his legitimate constitutionally guaranteed right to appeal against the judgment.

Considering the size of the suit land, location and commercial value of the same, this application is accordingly granted on condition that the applicant deposits 10% of the decretal sum in court as security for due performance of
25 the decree within 30 days from the date of this ruling.

Accordingly, **Miscellaneous Application No.206 of 2023** seeking an interim stay of execution is hereby overtaken by events.

Each party to bear its own costs.

I so order.



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Alexandra Nkonge Rugadya.

5 **Judge**

13th April, 2023.

Delivered by mail
Alexandra N
17/4/2023