

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.990 OF 2022

5 ***(Arising out of Miscellaneous Application No.593 of 2022)***

(Arising out of Miscellaneous Application No.2034 of 2021)

(All arising from Civil Suit No.1015 of 2021)

1. PRINCE KAMANYA MUHAMMAD

2. PRINCESS AMINA MBIRO

10 **3. PRINCESS REHEMA NALUMANSI *(Administrators of the Estate of the Late PRINCE NUHU MBOGO)*.....APPLICANTS**

VERSUS

MUSE AFEWERK TEKLE.....RESPONDENT

15 ***Before: Lady Justice Alexandra Nkonge Rugadya.***

Ruling.

Introduction:

This is an application for leave to appeal against the ruling of the learned Assistant Registrar ***Miscellaneous Application No.593 of 2022*** issued on
20 14th June 2022 brought under the provisions of ***Section 33 of the Judicature Act cap.13, Section 98 of the Civil Procedure Act cap. 71, and Order 44 rules 1 (u), 2, 3, & 4 as well as Order 50 rule 8 of the Civil Procedure Rules SI 71-1.*** It also seeks that costs of the application be provided for.

25 ***Grounds of the application:***

The grounds of the application are contained in the affidavit in support deponed by **Mr. Kamanya Muhammad**, the 1st applicant herein. He stated

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inter alia that he was informed by his lawyers that he has a right of appeal, and that the registrar omitted justice by granting the respondent's application to erect a perimeter wall on the suit land in the existence of an order of a temporary injunction.

- 5 That granting of the above mentioned application to the respondent altered the status quo of the suit land thereby rendering the subsisting order of temporary injunction nugatory and that because the intended appeal has a likelihood of success, it not only fair, but also in the interest of justice that this application is granted.

10 **Respondent's reply:**

The respondent filed an affidavit in reply opposing the application. He stated that the learned Assistant Registrar granted the prayers of constructing a perimeter wall on the suit land to protect and maintain the *status quo* as it was prone to being alienated by third parties and trespassers, and that while
15 the applicants consented to the grant of the order for a temporary injunction maintaining the status quo vide; **Miscellaneous Application No.2034 of 2021**, the orders of the learned Assistant Registrar in **Miscellaneous Application No.593 of 2022** only expounded on the afore mentioned consent order.

- 20 That the applicant's appeal does not have any chances of success owing to the fact that the contents of the order were varied after all the parties had been heard by the trial Registrar, after evaluation of the submissions in **Miscellaneous Application No.593 of 2022**.

That the orders arising therefrom expressly state that all the parties involved
25 in the matter are free to progressively access and inspect the suit land to ensure that there is no excavation or construction on the land, which shows that the learned Assistant Registrar passed the order in favour of all parties.

Additionally, that since the order against which the applicants seek to appeal was already agreed to by all parties, there was no need to institute this
30 application in the first place, and that this application is not only an abuse of court process, but it is also misconceived, and should be struck off.

Further, that the respondent is prejudiced by the delay of the proceedings in the main suit vide **Civil Suit No.1015 of 2021**, the finalization of which this application seeks to further delay and that because this application has no probability of success, the main suit shall be rendered nugatory thus the respondent's right to a fair hearing shall be heavily clogged and prejudiced by this application.

Rejoinder:

The applicants also filed an affidavit in rejoinder to the averments set out in the respondent's affidavit in reply. He averred that it is not true that the respondent wants to protect the suit land but only intends to unfairly use court processes to gain an unfair advantage so as to prevent the applicants from accessing the suit land which belongs to the estate of the late Prince Nuhu Mbogo and that it is the new known strategy of the land grabbers who want to use the court process to gain what does not belong to them.

That although the applicants consented to the application for a temporary injunction, they did not consent to varying of the same and that the respondent, his agent a one Muhumuza Moses are known land grabbers with tens of cases in the Land Division, and want to use this court to fence of land that does not belong to them.

That the applicants filed this application seeking leave to appeal owing to the fact that the learned Assistant Registrar varied an order of court which had earlier on been consented to and that the respondent's reply to this application is a fraudulent, frivolous, vexatious abuse of court process owing to the fact that the respondent cannot rely on the grant of powers of attorney attached to the affidavit in reply because the contents thereof are different from the contents of the original grant attached to the suit and as such it should be struck off from the record.

In addition, that the respondent is not only being tricky, dishonest and cunning but also seeks to unfairly use this court to manoeuvre and take over the applicant's property which is why he now seeks to block the applicant's right of appeal and access to the land.



Further, that since it is the respondent who filed the suit against the applicants, it is his duty to expeditiously fix the main suit for hearing therefore his assertions are intended to confuse this court because this application emanates from his endless filing of parallel matters so as to confuse his principle in so far as his agent participated in the sale of the suit land.

Further, that it is not only in the interest of justice but also necessary that this application is granted for the applicants to exercise their right to appeal.

Representation.

The applicants were represented by **M/s Lubega Ssakka & Co. Advocates** while the respondent was represented by **M/s M. Mugimba & Co. Advocates**. Both counsel filed written submissions in support of their respective clients' cases as directed by this court.

Consideration of the application:

I have carefully read and perused both Parties pleadings and arguments and will take them into consideration in determining this application.

The law governing the application for leave to appeal is set out in **Order 44 rule 2 of the Civil Procedure Rules** which provides that;

“An appeal under these rules shall not lie from any order except with leave of the court making the order or of the court to which an appeal would lie if leave were given.”

Order 44 Rule 3 of the **Civil Procedure Rules** provides that applications for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from.

In the case of the case of **Sango Bay Estate vs Dresdner Bank & Attorney General [1971] EA 17Spry V.P** stated the principle upon which an application for leave to appeal may be granted as follows:

“As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it



appears that there are grounds of appeal which merit serious judicial consideration....”

(See also: Herbert Sekandi t/a Land Order Developers v Crane Bank Ltd HCMA No 44 of 2007)

5 From the foregoing decision, the applicant in an application for leave to appeal against orders not appealable as of right, has to prove that the intended appeal raises substantial questions of law meriting consideration by the appellant court.

10 In the case before me, the grounds intended to be raised on appeal for this court to determine as set out in counsel for the applicant’s submissions are that;

1. The learned trial Registrar erred in law and fact when he granted an order varying the temporary order of injunction in Miscellaneous Application No.593 of 2022;

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2. That the learned trial Registrar erred in law and fact when he altered the status quo of the suit land by allowing the respondent to erect a perimeter wall in the suit land;

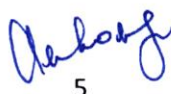
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3. That the learned trial Registrar erred in law and fact when he failed to address his mind to the fact that the order that the respondent sought to vary had its contents consented to by all parties.

25 The applicants’ main point of contention relates to the orders of the learned Assistant Registrar varying the order of a temporary injunction which presumably led to the alteration of the status quo.

The application raises points that the applicants want the appellate court to deal with; including the determination of the validity of the variation of the order, as well as the alteration of the *status quo* which in my opinion is a question that merits consideration by the appellate court. They refer to an

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earlier interim order **MA No. 2034 of 2021** which they however did not attach.

The suggestion is that there is already an earlier interim order requesting for maintenance of *status quo*. From the record, on 22nd November, 2021, the applicant's counsel had written to this court raising a complaint about the respondent's act of constructing a wall on the suit land.

The details on what happened thereafter are scanty. What is clear is that on 15th January, 2022 the respondent filed **MA No. 593 of 2022** by which the order to erect the wall was granted by the Assistant Registrar.

Court at this stage is not required to analyse whether the grounds of the proposed appeal will succeed, but merely whether there is real prospect of success. (**See: Swain v Hillman [2001] 1 All ER 91**).

It is the finding of this court therefore that there are compelling questions of fact and law raised by the applicants which merit judicial consideration so as to warrant the grant of the prayers sought herein.

The application is hereby allowed in the following terms;

1. The applicants are hereby granted leave to file an appeal against the ruling and orders of this court in Miscellaneous Application No.593 of 2022 within a period of fourteen days from the date of this ruling;

2. An order restraining any further construction on, alienation of, or further damage of the suit land until the intended appeal is filed does issue;

3. Miscellaneous Application No.989 of 2022 seeking an interim restraining the respondent from alienating, damaging, and erecting a perimeter wall on the suit land until determination of this application is hereby over taken by events;

4. Costs in the cause.



I so order.

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Alexandra Nkonge Rugadya.

5 **Judge**

9th May, 2023.

Delivered by email





9/5/2023