

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
MISC. APPLICATION NO. 0946 OF 2023
[ARISING FROM HCCS NO. 0798 OF 2017]

1. MARIAM NDIWO
2. KASIDA LTD

APPLICANTS

V

HADIJA MUTYABA

[As Administratrix of the Estate of the late

Sewalu Ahamada]

RESPONDENT

BEFORE: HON. LADY JUSTICE P. BASAZA - WASSWA

R U L I N G

Representation:

Mr. Mpora Aggrey and Mr. Mpora Henry¹ for the Applicants.

Ms. Nankya Redempta² for the Respondent.

Introduction:

[1] This is a Ruling arising out of an application brought by the Applicants: **Ms. Ndiwo**
and M/s Kasida Ltd. The application is brought by motion under the provisions



¹ Both of M/s Mushagara Associated Advocates

² Of M/s Ahabwe Associated Advocates

of Section 33 of the Judicature Act³, Section 98 of The Civil Procedure Act⁴, Order 43 Rules 4 (1), (2), (3) and (5), and Order 52 Rules 1 and 3 of The Civil Procedure Rules⁵.

- [2] The Applicants seek for the following orders:
- a) That the execution of the judgment and decree in HCCS No. 0789 of 2017 be stayed pending the determination and final disposal of their appeal in the Court of Appeal.
 - b) That the costs of their application be provided for.
- [3] HCCS No. 0789 of 2017 shall hereafter be referred to as: 'The Original suit' and the Judgment and Decree therein, shall be referred to as: 'The Decision in the Original suit'.
- [4] Noteworthy is that the Applicants filed two (2) Misc. Applications: **Nos: 0945 of 2023** and **0946 of 2023**. In the former: **M.A No. 0945 of 2023** they seek for an interim Order of stay of execution of the decision in the original suit until the final disposal of the latter, main application **No. 0946 of 2023** (the present application). Although both applications were filed on the same day, clearly there was an inadvertent mistake in their numbering. The main application (the present application) ought to have had an earlier number than the application for an interim order. And not the other way round. Clearly the entries on the Judiciary ECCMIS system were done interchangeably.



³ Cap 13 (as amended)

⁴ Cap 71

⁵ S.I 71-1

- [5] That clarified, this Court will determine the present application, which will have the effect of rendering M.A **No: 0945 of 2023** redundant, and thereby overtaken by that event.

Background:

- [6] In the Original suit, the Respondent: **Ms. Mutyaba** successfully sued the Applicants: **Ms. Ndiwo and M/s Kasida Ltd**, together with a one **Mr. Semwogerere Bashir**, for *inter alia*, recovery of the suit property comprised in **LRV 987 Folio 10, Block 273 Plot 363 at Najjanunkumbi**.

- [7] On May 15, 2023 this Court delivered the decision in the original suit in the following terms:

- a) A Declaration was made that the loan / mortgage transaction over the suit property, made between Mr. Semwogerere, who held out as Haji Sewalu Ahamada, and M/s Kasida Ltd, was invalid and void *ab initio*, for fraud and illegality. The same was thereby set aside.
- b) A Declaration was made that the sale and transfer of the suit property by M/s Kasida Ltd to Ms. Ndiwo, under a purported foreclosure and sale, was invalid and void *ab initio*, for fraud and illegality. The same was thereby also set aside.
- c) A Declaration was made that Ms. Ndiwo is NOT a *bona fide* purchaser of the suit property, for valuable consideration without notice.
- d) The Commissioner Land Registration (**the CLR**) was Directed to cancel the name of **Ms. Mariam Ndiwo** as the registered proprietor of the suit property, and to reinstate the name of **Haji Sewalu Ahamada** as the registered proprietor. And a further Direction was issued, pursuant to **Section 177 of the Registration of**

M. Kasidumuny 7/8

Titles Act⁶, that a subsequent entry be made registering the name of **Ms. Mutyaba** as proprietor of the suit property in her capacity as the Administratrix of the estate of the late Haji Sewalu Ahamada.

- e) An Order of a permanent injunction was issued against **Ms. Ndiwo, M/s Kasida Ltd and Mr. Semwogerere Bashir**, their assignees, workers, servants and all who claim under them, preventing and restraining them from entering upon and dealing with / in the suit property in any manner whatsoever.
- f) **Mr. Semwogerere Bashir and M/s Kasida Ltd** were ordered to pay general damages of **UGX. 92,000,000/= (Ninety -Two Million)** to **Ms. Mutyaba**, with interest thereon, at the rate of 12% per annum, calculated from the date of the decision in the original suit, until the date of payment in full.
- g) Costs of the original suit were awarded to Ms. Mutyaba against all the Defendants in the original suit.

Grounds in support of the present application:

[8] The gist of the application by the Applicants, as per their supporting affidavits / affidavits in rejoinder sworn by Ms. Ndiwo and a one Mr. Soren Opstrup is;

- i) That they have filed a notice of appeal and a letter requesting for certified copies of the proceedings in the original suit.
- ii) That their intended appeal has a high likelihood of success, and if this application is not granted, the intended appeal will be rendered nugatory.



⁶ Cap 230.

- iii) That Ms. Mutyaba as the successful party, is in the process of executing the decision in the original suit, and has commenced the execution process.
- iv) That Ms. Ndiwo and M/s Kasida Ltd shall suffer substantial loss if the application is not granted.
- v) That Ms. Ndiwo and M/s Kasida Ltd are willing to furnish security for the due performance of the decision in the original suit as may ultimately be binding upon them.
- vi) That their application has been brought without undue delay.

Grounds in opposition to the application:

[9] By her affidavit in reply, Ms. Mutyaba opposed the application and answered:

- i) That the application is premature, misconceived and an abuse of court process. That there is no pending or eminent threat of execution to warrant a stay of execution.
- ii) That Ms. Ndiwo and M/s Kasida Ltd have not filed a competent notice of Appeal.
- iii) That there is no justification to grant the order for a stay of execution in the absence of any evidence of a pending application for execution.
- iv) That Ms. Ndiwo and M/s Kasida Ltd shall not suffer any substantial loss at all.

Issue for Determination:

[10] **Whether sufficient cause has been shown to warrant the grant of an Order of stay of Execution?**

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Submissions by Counsel

- [11] Learned Counsel for each party filed their respective written submissions. I have duly considered them. For brevity however, I will not reproduce their arguments here. I will only refer to them where and when necessary.

Analysis by Court

- [12] The purpose of an order of ~~a~~ stay of execution of court Orders and decrees pending an appeal, is simply to temporarily preserve the status quo in order not to render a pending appeal nugatory.

The Court's power to make the Order of stay of execution is discretionary. See **Order 22 Rule 26** of the CPR (below), and also see the decision in National Enterprise Corporation v Mukisa foods⁷

- [13] The power of the High Court to grant Orders of stay of execution pending appeals from the High Court to the Court of Appeal is provided for under **Order 22 Rule 26** of the CPR.

- [14] The Order and Rules cited by the Applicants: **Order 43 Rules 1 - 5 of the CPR** provide for applications for Orders of stay of execution pending appeals to the High Court, and not for Appeals from the High Court to the Court of Appeal.

- [15] **Order 22 Rule 26 of the CPR** provides that;

'Where a suit is pending in any court against the holder of a decree of the court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.'

(Underlining added)

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⁷ COA Misc. Applic. No. 7 of 1998

[16] **As a Rule of practice**, the Courts have adopted the following principles as a guide when exercising their discretion on whether or not to grant an order of stay of execution.

- i) The first principle is that the Applicant should show, subject to the facts of a given case, that he / she has lodged an appeal and that there is a high likelihood of success of the appeal.

See Dr. Ahmed Muhammed Kisuule v Greenland Bank Ltd (in Liquidation)⁸.

- ii) The second principle is that the Applicant should show that substantial loss may result to her / him, unless the order is made.
- iii) The third principle is that the application has been made without reasonable delay.
- iv) The fourth is that security has been given by the Applicant for the due performance of the Decree or Order as may ultimately be binding upon him / her / it.

See the above principles (i)-(iv) listed in Lawrence Musiitwa Kyazze v Eunice Busingye⁹.

[17] That laid down, I will now address the substance of the application.

Musambwa 7/8

⁸ SCC Applic. No. 07 of 2010

⁹ SCCA NO. 18 of 1990

[18] On the first principle, the Respondent and her Counsel contend that the Applicants have not filed a competent notice of Appeal. Learned Counsel argued that the notice of Appeal dated May 22, 2023 attached to the affidavit in support of the application, is incompetent. That it is incompetent because the Applicants failed to take the essential step of serving the same on the Respondent within the seven (7) days required under **Rule 78 (1) of the Judicature (Court of Appeal Rules) Directions**¹⁰. That the Applicants also never sought for an extension of time within which to serve the said notice of Appeal on the Respondent pursuant to **Order 51 Rule 6 of the CPR**.

For their proposition, they cited the case: **Kibalama Mugwanya v Butebi Investments Enterprises Ltd**¹¹.

[19] In answer, the Applicants and their Counsel contend that the notice of Appeal they filed is competent. They referred this court to paragraph 3 of their affidavit evidence. That paragraph is to the effect that they filed a notice of appeal and have requested for a certified copy of the proceedings. They did not however specifically respond to the question of service of their said Notice of Appeal upon the Respondent.

[20] I have looked at **Rule 78 (1) of the Judicature (Court of Appeal Rules) Directions**. That Rule requires an intended Appellant, before or within seven (7) days after lodging their notice of appeal, to serve copies thereof on all persons directly affected by their appeal. I have also looked at **Rule 82 of the same Rules**. Rule



¹⁰ S.I. 13 - 10

¹¹ COA Civ. Appeal No. 190 of 2013

82 provides for applications to the Court of Appeal to strike out a notice of appeal or an appeal on the ground that no appeal lies, or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

- [21] Pursuant to the above Rules, it is the preserve of the Court of Appeal to determine whether there has been failure by the intended Appellant to take any essential step required by the Court of Appeal Rules, and if so, whether such failure renders the Appeal incompetent.

The Kibalama Mugwanya case (supra) cited by the Respondent's Counsel is ~~also~~ in harmony with the above position.

- [22] I am also cognisant of the provisions of Rule 5 of the same Court of Appeal Rules that allow the Court of Appeal to extend the time limited by the said Rules for doing any act required by the Rules. That is whether before or after the expiration of that time. **As such, it is not place for this court to pronounce itself on the competence of an appeal on the ground of time required by the said Rules.**

- [23] It is my view that since both the High Court and the Court of Appeal have concurrent jurisdiction to grant or decline to grant an Order of stay of execution where an appeal has been lodged in the Court of Appeal, the determination of whether an appeal has a high likelihood of success or not, is a function of the Court of appeal, and not a function of this court. (Refer to Rule 6 (2) (b) of the Court of Appeal Rules).

Resubmitted 7/8

[24] 'For the High Court to decide on the competence or likelihood of success of the Appeal, would be to pre - judge the appeal. Per Wambuzi, P., (as he then was), in Mugenyi & Co. Advocates v National Insurance Cooperation¹².

[25] I will now turn to address the second principle: whether the Applicants have shown that unless the order is made, substantial loss may result to them?

[26] The meaning of '*substantial loss*' was stated by Ogoola, J., (as he then was); in Tropical Commodities Suppliers Ltd & 3 Ors v International Credit Bank Ltd¹³ that:

'it is a qualitative concept and refers to any loss, great or small, that is of real worth or value, as distinguished from loss without value or a loss that is nominal'

[27] I have carefully considered the contents of paragraphs 5 and 6 of the motion, and of the two affidavits in support of the motion filed by the Applicants, respectively. In the said paragraphs the Applicants describe what they refer to as '*substantial loss*' to them.

[28] First, I find that they have not shown any special circumstances that would justify the grant of an Order of stay of execution. That is; no substantial loss has been shown that may be occasioned.

[29] It has been held in a wealth of authorities that payment of a judgment debt by a Judgment debtor would not cause the Applicants for a stay of execution any injustice unless there are special circumstances to justify the grant of the Order.

See Kampala City Council v National Pharmacy Ltd¹⁴

Masamba H/8

¹² COA Civ. Appeal No. 13 of 1984

¹³ HCMA No. 379 of 2003 (Comm. Court)

¹⁴ [1979] HCB 215 - 216

[30] Second, taking all factors of this case into consideration, and especially taking cognizance of the fact that the subject matter of this case is immovable property; It is my view that: 'rather than grant an Order for stay of execution in the circumstances of this case, ^{instead,} it is appropriate that this Court makes orders that will serve to allay the fears of the Applicants; that by executing the Decision in the original suit, their appeal may be rendered nugatory. (Section 33 of the Judicature Act and section 98 of the CPA, applied)

[31] I take this view and approach also considering that among the Orders in the Decision in the original suit, is a self – executing Order of a permanent injunction. An Order of a permanent injunction cannot be stayed.

[32] A permanent injunction is an order that does not require execution orders under the given methods of execution under sec. 38 of the Civil Procedure Act.

It is an automatic prohibitive Order, that is already in force, and simply requires compliance. An order of stay of execution cannot be granted in respect of such a prohibitive Order. To grant the same would tantamount to revising the Order. A power this court does not possess, as it is *functus officio*.

See this principle espoused by Madrama, J., (as he then was), in Nakivubo Road Old Kampala Kisekka Market Vendors Ltd & Anor v Kayita Geoffrey and 3 Ors¹⁵

Also see Exclusive Estates Ltd v Kenya Posts and telecommunications Corporation and Anor¹⁶

Masumbani Hg

¹⁵ HCMA No. 2052 of 2017 (Executions and Bailiffs Div.)

¹⁶ [2005] 1 EA 53 (CA)

[33] In view of this court's position taken on principles one and two, it is not necessary to address principles three and four.

Decision of Court:

[34] For the reasons given, this Court declines to grant an Order of stay of execution. This application is thus disallowed.

[35] However, in order to preserve the suit property, and to allay the fears of the Applicants that their appeal may be rendered nugatory, it is hereby ordered that upon being registered as proprietor of the suit property pursuant to the Judgment and Decree in the original suit No. 0798 of 2017, Ms. Hadija Mutyaba is hereby prohibited from mortgaging, charging, selling, distributing or in any way disposing off the suit property, until the determination of the Applicants' intended Appeal to the Court of Appeal, or unless otherwise Ordered by the Court of Appeal.

(Section 33 of the Judicature Act and section 98 of the CPA, applied)

[36] Each party to this application shall bear their own costs.

I so order,



P. BASAZA - WASSWA

JUDGE

August 7, 2023

Ruling delivered via email to the parties, and uploaded on the Judiciary ECCMIS Portal.
Email to: amureyattorneys@gmail.com for the Applicants, and to ahabwejoshua@gmail.com for the Respondent.