

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.0915 OF 2023

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(Arising from Civil Suit No.240 of 2008)

BENEDICT MALE:.....APPLICANT

VERSUS

1. NSUBUGA SAMUEL

2. GEORGE WILLIAM SEMIVULE:.....RESPONDENTS

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Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

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The applicants by way of notice of motion brought this application under the provisions of **Sections 33 & 38 of the Judicature Act cap.13, Sections 64 (e) & 98 of the Civil Procedure Act cap.71, and Order 22 rule 23 (1) & Order 52 rules 1 & 2 of the Civil Procedure Rules SI 71-1** seeking orders that the execution of the decree or orders arising from the judgment and orders in **Civil Suit No.240 of 2008** be stayed pending appeal, and costs of the application be provided for.

Grounds of the application:

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The grounds of the application are contained in the affidavit in support of the application deponed by **Mr. Benedict Male**, the applicant but briefly are that the applicant was the plaintiff in **Civil Suit No.240 of 2008** wherein he sought a declaration that he was the lawful owner of the suit land comprised in **Busiro Block 314 plot 448 & 340**, a permanent injunction against the respondents, general damages, and costs of the suit.

That this court in its judgement in **Civil Suit No.240 of 2008** delivered on 31st May 2022 among other things, ordered that the 2nd respondent's purchase of the land comprised in **Busiro Block 314 plot**

448 from the respondent was lawful and that the applicant being dissatisfied with the said decision lodged an appeal contesting the orders of this court.

That the respondents are threatening to execute the decree against the applicant by disposing of the suit land, which actions will be detrimental to the applicant thereby causing irreparable loss and suffering.

That the applicant's appeal shall be rendered nugatory if the execution of the orders and decree of this court in **Civil Suit No.240 of 2008** is not stayed yet the applicant's appeal has high chances of success in the court of appeal.

That the applicant is prepared to abide by any conditions that may be made by court including furnishing security for due performance of the decree and that as a requirement of the Court of Appeal, the applicant has paid security for costs thereby showing his intention to prosecute his appeal.

That not only is it just, but also equitable that an order of stay of execution be granted pending the hearing and disposal of the appeal.

The respondents opposed the application through the affidavit in reply deposed by the 1st respondent, Mr. Nsubuga Samuel who stated *inter alia* that the respondents were the defendants in **Civil Suit No.240 of 2008** which was heard and determined on 31st May 2022.

That while the respondents are aware that the applicant filed this application seeking to stay the execution of the judgement and decree of this court, the execution thereof has nothing to do with the respondents since the said decree made it clear that the estate property reverts to the estate of the late Erinesti Nsubuga and that the respondents are not administrators thereof and that no threats to execute the said decree have been made against the applicant by the respondent

Additionally, the administrators of the estate of the late Erinesti Nsubuga are known to the applicant and that that from 31st May 2022, this court vested the suit land in the hands of the said administrators who have since taken possession from the 2nd respondent.



That neither the applicant nor his agents are in possession of the suit land as was found in the judgement of this court since the applicant admitted that he had since relocated to another area in 2008 as the 2nd respondent had chased away his people.

5 That the administrators took the judgement and orders of this court with a lot of vigilance, took possession of the suit land, registered themselves as the proprietors thereof, subdivided it, and they have since sold off parts thereof to other third parties as well and that the applicant has at all times known that the administrators of the estate were not only in possession, but were also enjoying the fruits of the judgment which prompted the applicant's son, a one Erick Male to break down the buildings on the property that did not belong to him.

10 That the eminent threat or danger that the applicant seeks to protect himself against through an order of stay of execution passed the moment the land moved into the hands of the administrators who have since subdivided it and sold it off.

Thus an order against the respondents shall be useless and that this application is not only fundamentally flawed, but also incompetent as it reveals no grounds for grant of the orders sought.

15 Further, that the applicant was paid the debt of **Ug. Shs. 6,600,000/= (Uganda Shillings six million six hundred thousand only)** by the administrators of the Estate of the late Erinesti Nsubuga as ordered by court which amount he received through his mobile money account.

20 That while there is no order of the Court of Appeal requiring the applicant to pay security for costs, the applicant has no competent appeal before the Court of Appeal, and that the applicant shall suffer no irreparable loss in the event that this application is not granted.

Determination of the application.

Section 98 of the Civil Procedure Rules SI 71-1 gives this court inherent powers to take decisions which are pertinent to the ends of justice; and an order of stay of execution is such a decision. **(See: Ujagar Singh vs Runda Coffee Estates Ltd [1966] 1 EA 263)**

25 In **Francis M. Micah vs. Nuwa Walakira (1992-93) HCB 88** court held that there is no specific provision enabling the High Court to grant a stay of execution of its decree pending an appeal.



The same court advised however that such mandate is present through the inherent powers of court, for example to preserve the *status quo* pending an appeal.

In the spirit of **Order 43 rr. 4(2)** therefore, and in respect of every court to which an application for stay of execution is filed, powers to stay execution of its decree is allowed where sufficient cause is shown by the applicant.

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 as espoused in the case of **Lawrence Musiitwa Kyazze Vs Eunice Businge, Supreme Court Civil Application No 18 of 1990**.

They include: *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. An appeal pending:

Regarding the first requirement, it is not in dispute that the applicant lodged an appeal in the Court of Appeal and that the same has not yet been fixed for hearing, and is pending determination.

The applicant adduced in evidence a copy of the notice of appeal lodged in this court on 17th June 2022, and transmitted to the Court of Appeal on 20th June 2022.

The applicant then filed **Civil Appeal No.198 of 2023** in the Court of Appeal on the same day. Attached to the affidavit in support of the application is a copy of the Memorandum of Appeal detailing the grounds upon which the appeal is premised.

It is the finding of this court therefore that the applicant satisfied the first requirement.

b. Likelihood of incurring substantial loss:

Secondly, the applicant is required to prove that substantial loss may result to the applicant unless the stay of execution is granted.



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The phrase does not represent any particular amount or size; it cannot be qualified by any 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 vs International Credit Bank Ltd (In Liquidation) [2004] 2 EA 331*)

5 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, then the court will exercise its discretion in favour of the applicant, for the appeal to be attended to on its merits.

10 In the present case, the respondents in their affidavit in reply clearly stated that the suit land has since been transferred into the names of the administrators of the estate of the late Erinești Nsubuga who have since sold off the same to third parties.

15 It was also the respondents' undisputed evidence that the applicant is not in possession of the suit land. The 1st respondent further averred through affidavit evidence that the applicant has since been paid **Ug. Shs. 6,600,000/= (Uganda Shillings six million six hundred thousand only)** by the administrators of the estate of the late Erinești Nsubuga, being payment of the debt accumulated by the estate owing to the borched sale of the suit land to the applicant.

20 Evidence to that effect was presented to show that the applicant on 9th May, 2023 received money on his mobile account, which was paid to him in two instalments. On 10th May, 2023 Mr. Israel Njajaba one of the administrators of the estate of the late Erinești Nsubuga wrote to this court informing it about the said money received by the applicant in settlement of the monies, as per order of this court.

25 This court on the 1st June, 2023 received the rejoinder by the applicant which was filed on ECCMIS on 4th August, 2023 in which he refuted the contents of the affidavit in reply. The applicant while admitting that he had received the money however presented evidence in his rejoinder to prove that he had returned the money on 10th May, 2023, the same day on which Mr. Njajaba had written to court to notify it that the money had been paid to the applicant, as directed by this court in its judgment.



The administrators of the estate were neither parties to the suit nor to this application and therefore could not respond to these assertions. But also noted of course was the fact that the respondent were not able to respond to the assertions which were presented in the rejoinder.

Suffice to note however, that *Annexure D* was sufficient proof of such refund transaction, bearing a stamp of MTN, dated 18th May, 2023.

The applicant relying on various attachments: *Annexures A, B1, B2, B3, and C* further claimed that the respondents had mutated the suit land, causing various purchases/transfers, despite being aware of the existence of the notice of appeal which had been served onto their lawyers on 20th June, 2022 (**Civil Appeal No. 198 of 2023**).

To show his seriousness in challenging the decision of this court, the applicant also went ahead to present a copy of a cheque (*Annexure E*) by which he claimed to have paid a sum of **Ugx 200,000/=** to this court through DFCU bank, as security for costs. Court could not however readily ascertain the truthfulness of this claim since the copy of the cheque attached by the applicant (*Annexure E*) had neither a date nor signature and was not certified by the bank.

But be that as it may, the evidence by the applicant demonstrates that the application was filed as soon as the applicant got to realise that there was on going execution of the court decree, a few days after he had received money from Njajaba and transfers made between the period of 2nd May, 2023 and 12th May, 2023, which proved that there was serious threat of execution.

In ***Kyambogo University vs Prof. Isaiah Omolo Ndiege CA No. 341 of 2013*** court held that serious or eminent threat of the execution of the decree or order rendering the appeal nugatory is another ground which justifies the grant of an order of stay.

In light of the above findings as highlighted, I am inclined to agree therefore that there is serious and eminent threat of execution of the orders of this court which may render the appeal nugatory. It is for those reasons that I would allow this application for the stay of further execution of the orders made by this court vide: ***Civil Suit No. 240 of 2008.***



Since furnishing security of costs is a pre-requisite to the granting of this application, in exercise of the court's discretion as granted by law, the applicant is to pay a sum of **Ugx 2,300,000/=** within a period of 30 days, from date of delivering this ruling.

No further transfers for the land, the subject of the pending appeal are to be made by the respondents
5 or their agents, till court orders otherwise.

Each party to bear its own costs.

I so order.



Alexandra Nkonge Rugadya

10 **Judge**

11th August, 2023.

Delivered by email
11/08/2023
Alexandra
J.

