

- THE REPUBLIC OF UGANDA**
IN THE HIGHCOURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO. 2419 OF 2023
(ARISING FROM MISCEELLANEOUS APPLICATION NO. 2418 OF 2023)
(ARISING FROM MISCELLANEOUS APPLICATION NO.2417 OF 2023)
(ALL ARISNG FROM CIVIL SUIT NO. 211 OF 2011)

Background

2. The brief background of the application is that the applicants are beneficiaries of the Estate of the Late Joseph Kasana. The 1st and 2nd respondents were parties to Civil Suit No. 211 of 2011 that entered into a consent judgment between them in respect of LRV 4194 Fol. 15 Kyadondo Block 273 Plot 275 however the applicants were not party to the same. The applicants applied to set aside the consent judgment and decree of court as well as an application for temporary stay of execution.
3. It is on that basis that the applicants proceeded to apply for interim stay of execution and moved court by formal letter for an ex-parte order for interim stay pending disposal of Miscellaneous application 2418 of 2023 the substantive application for temporary stay.

Applicants evidence:

4. The grounds on which the application is based are contained in the notice of motion and the affidavit deponed by **Kaluma Godfrey** the 2nd applicant. In a nutshell the grounds are as follows;
 - a) That the applicants have filed an application to set aside the consent judgment dated 10th February 2015 and the sale of the suit land by the 3rd respondent to the 4th respondent and they have also sought orders that High court Civil Suit No 211 of 2011 be restored, heard de novo whilst adding them as plaintiffs thereto
 - b) That the applicants have also filed an application for a temporary stay of execution restraining the respondents from evicting them from the suit land and indeed, the same is pending determination by this court.
 - c) That the respondents have already commenced execution proceedings against the applicants and indeed, an eviction order was issued by this honourable court directing the applicants to vacate the suit land by 18th August 2023.

- d) That the applicants were not parties to Civil suit No 211 of 2011 and are on the verge of being evicted without being heard.
- e) That there is need to preserve the status quo of the subject matter pending the disposal of the substantive application for temporary stay of execution and the main application for review of the consent judgment dated 15th February 2015.
- f) That the applicants are facing eminent danger of eviction by the respondents from the suit land that forms and constitutes the estate of their late father.

Respondents evidence

- 5. It should be noted that none of the respondents filed an affidavit in reply to the applicants' affidavit in support of the motion and counsel for the 2nd respondent disclosed to court that he did not intend to object to the application.

Representation.

- 6. At the hearing, the applicants were represented by Charles K Mbogo of Mbogo & Co Advocates whereas the 2nd respondent was represented by Muyimbi Derrick whereas the other respondents had no representation despite being served with hearing notices. The parties did not file submissions but regardless the court will proceed and determine the application.

Determination of the application.

- 7. The applicants should note that invoking an interim procedure must neither be taken as an alternative to, or substitute for, the procedure for obtaining a stay. The interim order ought to be made only in compelling circumstances, to prevent defeat of justice, and strictly

pending ascertained hearing of a substantive application by court. (See **Kato and Anor Vs Nalwoga (Civil Application No 12 of 2011) [2011] UGSC 23.**

8. The rationale for orders of this nature is to preserve the right of the applicant to have his or her application heard and to ensure that the main application is not rendered nugatory. This rationale applies to stay of execution, stay of proceedings and injunctions (See **Wilson Vs Church (1879) Vol 12 Ch. D 454**)
9. The law on grant of an application for interim stay of execution was settled by the Supreme Court in **Hwang Sung Industries Ltd Vs Tajdin Hussein and others Civil Application No 19 of 2008** wherein it was stated that the applicant ought to establish the following;
 - a) *That there is a substantive application pending in court*
 - b) *That there is a serious threat of execution before the hearing of the substantive application.*
 - c) *That if the application is not granted it would render the substantive application nugatory.*
10. I will therefore proceed and determine the application in light of the above principles bearing in mind that the application stands unopposed given the fact that there is no affidavit in reply for the respondents. The long-standing position of the law is that where facts are sworn to in an affidavit and they are not denied or rebutted by the opposite party, they are deemed admitted. (See **Samwiri Massa v Rose Acen [1978] HCB 297**)
11. That there is a substantive application pending before court. In the instant case, the applicant filed a substantive application for temporary stay of execution (Miscellaneous Application 2418 of 2023) from which the instant application emanated and it is pending hearing before this court. I find this requirement established by the applicants.
12. That there is a serious threat of execution before hearing of the substantive application. The genesis of this case is that the applicants were not party to the main suit that culminated

into a consent judgment between the 1st and 2nd respondent. The consent judgment being a judgment of court can be the subject of an execution. What has to be determined in this case is whether the said execution would in one way or another affect the applicants and whether there is a serious threat to set such execution in motion?

13. In paragraph 23 of the affidavit in support, it is deponed that the 2nd respondent applied for execution of the consent judgment and indeed, the same was to be executed by attachment and sale of matrimonial property situate on the suit land. A warrant of attachment and sale of the suit land was issued by this court.
14. However, the contents of paragraphs 28, 29 and 31 of the same affidavit seem to suggest that the suit land was already sold to the 4th respondent which suit land is the subject of the application. The applicants also state in their affidavit under paragraph 33 that a notice of eviction endorsed by the registrar was issued against them directing them to vacate the suit land by 18th August, 2023. I will not delve deep into the nitty-gritties of the notice of eviction. It is my view that despite the fact that the land was sold to the 4th respondent, there was something else left to be done to wit evicting the occupants on the said land even when they were never party to the main suit.
15. It is the finding of this court that there is a threat of execution because the said notice of eviction affects the applicants. I therefore find this requirement established.
16. That if the application is not granted, it will render the substantive application nugatory. This is the overriding objective when it comes to applications of this nature. I believe the applicants having established the first two requirements I find this requirement established as well. If this application is not granted to maintain the status quo, the substantive application to wit Miscellaneous Application 2418 of 2023 will be rendered nugatory in my view.

17. I have also noted that learned counsel for the applicant also proceeded and filed a letter to move court to grant an ex-parte interim stay of execution. I did not consider the letter because such procedure was very strange at law especially where the applicants chose to file an inter-parties' application for interim stay of execution in this court.

18. In the premises, it's to the finding of this honourable court that the application has merit and it is granted with the following orders.

- i) An interim order to stay execution maintaining the status quo doth issue against the respondents pending the determination of the substantive application for temporary stay of execution before this honourable court.
- ii) Costs of this application shall abide the outcome of the substantive application.

I SO ORDER

NALUZZE AISHA BATALA

JUDGE

26th/09/2023