

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 1473 OF 2023

(ARISING FROM CIVIL APPEAL NO 061 OF 2023)

**NAMATOVU ROSEMARY (Administrator Of The Estate Of The
Late Matovu David) ::::::::::::::::::::::::::::::::::: APPLICANT**

VERSUS

1. NAKAKANDE WINNIE

2.SSESANGA CAROL ::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE; HON. LADY JUSTICE NALUZZE AISHA BATALA

RULING

Introduction.

1. Namatovu Rosemary (Administrator of the Estate of the late Matovu David) herein after referred to as the applicant brought this suit by way of notice of motion against **Nakakande Winnie**




and **Ssesanga Carol** hereinafter referred to as the respondents under Section 33 of the Judicature Act Cap 13, Section 35 and 98 of the Civil Procedure Act, Order 43 Rule 4 and Order 52 Rules 1 and 3 of the Civil Procedure Rules as discerned from the notice of motion for orders that;

- a) The judgment in Civil Suit No 048 of 2020 be set aside pending determination of the appeal.
- b) The execution of orders and decree in Civil Suit No 048 of 2020 be stayed pending determination of the appeal.

Applicant's evidence.

2. The application is supported by the affidavit deposed by **Mrs. Namatovu Rosemary** which sets out the grounds for the application and briefly is as follows;

- i. That the applicant is dissatisfied with the ruling delivered in the Chief Magistrate Court Vide Civil Suit No 48 of 2020.
- ii. That the applicant has lodged an appeal before this honorable court challenging the judgment and decree in



Civil Suit No 48 of 2020 and the same has not been set for determination.

- iii.** That substantial loss may result to the applicant unless the order of stay of execution is made.
- iv.** That application has been made without unreasonable delay.
- v.** That it is just and equitable that this application has been made.

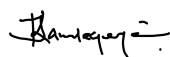
Respondents' evidence.

3. The 2nd respondent responded to the application by filing an affidavit in reply to the application deposed by Mrs. **Nassanga Carol** which briefly states as follows;

- i.** That I have been informed by my lawyers Pace Advocates that they shall at the commencement of the hearing raise a preliminary objection to the effect that the application is barred in law and incompetent before this court as it ought to have been before the court which passed the decree as provided for by law and the same cannot stand before this court.



- ii.** That I have been advised by my lawyers PACE Advocates whose advice I verily believe to be true that the Application before court is incompetent, premature, misconceived and devoid of any merit as there is no pending suit before court between us and the applicant to be subject to the present application.
- iii.** That the application is brought under the wrong procedure by notice of motion instead of Chamber summons as provided by law and the same cannot stand before this court.
- iv.** That the applicant cannot suffer irreparable damage and substantial loss at all since there is no pending execution before court to warrant a stay of execution as prayed by the applicant.
- v.** That the applicant using the purported appeal as a delaying tactic so as to prevent us from enjoying the fruits of the judgment.



Representation.

4. The applicant was represented by **Mrs. Nakato Juliet** of M/S Nan Advocates whereas there was no representation from the respondents despite being served. Both parties filed their affidavits which I have considered in the determination of this application

Issues for determination;

- 1. Whether there are sufficient grounds to warrant stay of execution pending appeal?***

Resolution and determination of the issues;

Issue 1; Whether there are sufficient grounds to warrant stay of execution pending appeal?

5. An application seeking for stay of execution must meet the conditions set out in Order 43 rule 4(3). The conditions were laid down in the case of **Lawrwnce Musiitwa Kyazze V Eunice Busingye** Supreme Court Civil Application No 18 of 1990 and these include;

- a) The applicant must show that he lodged an appeal.***



b) That substantial loss may result to the applicant unless stay of execution is granted.

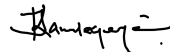
c) That the application has been made without unreasonable delay.

d) That the applicant has given due security for the due performance of the decree or order as may ultimately be binding upon him.

6. I will now proceed to consider if each of the requirements in order 43 rule 3 of the Civil Procedure Rules have been complied with by the applicant.

a. Whether the applicant has lodged a notice of appeal?

7. The applicant under paragraph 4 of the affidavit in support of the application states that she filed a notice of appeal on the 24th day of May 2023 which is yet to be determined and has high chances of success. A copy of the notice of appeal was attached and marked annexure “C”. On the other hand, the respondent did not challenge the notice of appeal and its existence.

8. The applicant has in this regard proved the existence of a notice of appeal. The ground has been satisfied. 

b. Whether the applicant will suffer substantial loss?

9. In Tropical Commodities Supplies Ltd & 2 ors V International

Credit Bank Ltd (In Liquidation) [2004] 2 EA 331, Ogoola J (As he then was) held that ***“The phrase substantial loss does not represent any particular amount or size; it cannot be qualified by any particular Mathematical formula. It refers to any great loss or small of real worth or value as distinguished from a loss that is merely nominal”***

10. The applicant in paragraph 6, 7 and 8 of the affidavit in support of the application states that there is a serious threat of execution that the respondents are advancing to demolish the infrastructures on the suit land and by this the applicant will suffer substantial loss unless the order for stay of execution is made.

11. Counsel for the applicant submitted that drawn from the decree dated 13th of July 2023 the respondent was awarded an order to demolish the toilets and bathrooms on the suit land within 30 days from the date of the judgment. He also further states that demolishing the infrastructure will affect the applicant's income raised from the rentals. He also stated that the toilets are made of

Bamidele

bricks and cement and considering that a bag of cement is UGX 30,000 and a brick is UGX 400 points to substantial loss.

12. However, the applicant does not show in any way that there is a serious threat of execution that shall lead to the alleged substantial loss.

13. The 2nd respondent under paragraph 6 and 7 of the affidavit in reply contends that they have never tried nor advanced to demolish the said infrastructures on the land and that there is no pending execution before court to warrant a stay of execution as prayed by the applicant and for this reason the ground of substantial loss is far-fetched.

14. The general rule is that courts should not order a stay where there is no evidence of an application for execution of the decree.
(See Baguma Paul t/a Panache Associates V Eng Karuma Kagyina MA No 460 of 2020)

15. In the instant case, the applicant did not show in any way that the respondents have gone to execute the decree or even apply for execution of the same. The position of the law is once an appeal is pending and there is a serious threat of execution, the court intervenes to serve the purpose of substantive justice. **(Hwang**

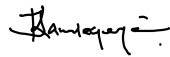


**Sung Industries Ltd V Tadjudin Hussein and Ors SCCA No 79
of 2008)**

16. The condition is thus not fulfilled. This ground fails and subsequently this court need not proceed any further.

17. Consequently, the application is found to lack merit and is dismissed accordingly with costs to the respondents.

I SO ORDER.



NALUZZE AISHA BATALA

JUDGE

(30th/11/2023)