

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.2067 OF 2022

5 ***(Arising out of Miscellaneous Application No.1493 of 2022)***

(All arising from Civil Suit No.156 of 2014)

EDWARD KASINZI *alias* GATSINZI:.....APPLICANT

10 **VERSUS**

1. HUSSEIN KISIKI NYAMAYALWO

2. MINSA NABAGABO

3. NDUGA ABDUL:.....RESPONDENTS

15

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

Introduction:

20 This application is brought by motion under the provisions of **Section 33 of the Judicature Act Cap.13, Section 98 of the Civil Procedure cap.71 and order 52 rules 1, 2, & 3 of the Civil Procedure Rules SI 71-1** seeks orders that;

- 25 **1. The orders in Miscellaneous Application No.1493 of 2022 be varied and the amount required to be paid as a condition for stay of execution be reduced from Ugx. 20,000,000/= (twenty million shillings) to at least Ugx. 10,000,000/= (ten million shillings);**



2. *That the period of payment of the new varied amount be enlarged from 1 month to at least 4 months;*

5 3. *Parties bear their costs.*

Grounds of the application:

The grounds in support of the application are contained in the affidavit in support of the applicant, **Mr. Edward Kasinzi** who stated *inter alia*; he was the defendant in **Civil Suit No.156 of 2014** which was determined in favour
10 of the respondents; and that being dissatisfied with both the orders and judgment in the said suit, filed a notice of appeal and letter requesting for the typed record of proceedings.

That the applicant also filed **Miscellaneous Applications No.1493 of 2022 & Miscellaneous Application No.1494 of 2022** seeking an interim stay as
15 well as the substantive stay of execution of the orders and judgment of this court in the main suit and that on 23rd November 2022, this court granted the application for stay of execution on grounds that the applicant pays **Ugx. 20,000,000/= (Twenty Million shillings)** in a period of 30 days from the date of the ruling.

20 That the applicant has since the delivery of the judgment in the main suit incurred immense costs in trying to see to it that the respondents do not execute the orders of this court in the main suit without the appeal being heard, by engaging his lawyers at a fee, to file applications for stay of execution as well as engaging other law enforcement agencies, since the
25 respondents were already in the process of executing the orders of this court and that they had cut down the applicant's crops, destroyed his property, and also chased away his workers from the land and that the same has immensely caused the applicant financial loss.

In addition, the applicant prayed that the amount of **Ugx. 20,000,000/=**
30 **(twenty million shillings)** required to be paid by him prior to appealing be reduced to **Ugx. 10,000,000/= (ten million shillings)** since he is interested in prosecuting the appeal in the Court of Appeal, and that period of 30 days



be enlarged from 1 month to 4 months because the amount required to be paid by the applicant in the said 30 days is so exorbitant that if it is not reduced, the same would tantamount to granting the applicant justice with one hand and taking the same away with the other.

- 5 Further, that the applicant also got to know of the ruling long after it had been delivered because this court granted the application for stay of execution on 23rd November 2022, but the same was emailed to the applicant's counsel on 29th November 2022 including the condition that the applicant pays **Ugx. 20,000,000/= (twenty million shillings)** in 30 days and that although the
10 said ruling was delivered by email on 23rd November 2022, the applicant's counsel did not receive the same until he complained.

It was acknowledged that there was an error with the emailing system inspite of the fact that the applicant raised the said complaint after the respondents had commenced execution proceedings.

- 15 That because the applicant's counsel was emailed on 29th November, 2022, yet the applicant was supposed to pay the decretal sums in 30 days, from the date of the ruling, the late email has greatly affected the applicant who has spent money and time in a bid to prevent the unlawful execution of the orders of this court.
- 20 Yet there was a subsisting interim order stopping the said execution; and that by the time the said email was delivered to the applicant's counsel, he had less than 30 days within which to deposit the security as ordered by this court, which time had partially lapsed from the time the ruling was delivered to the time the ruling was delivered.
- 25 That this court is clothed with the jurisdiction to vary its own orders to have the amount of **Ugx. 20,000,000/= (twenty million shillings)** reduced to at least **Ugx. 10,000,000/= (ten million shillings)** as well as the period of payment of the same from 1 month to 4 months since the applicant was only notified of the said orders on 29TH November 2022.



That considering the fact that this application has been brought without undue delay, it is only just, fair, and equitable and in the interest of justice that this application is allowed.

The respondents opposed the application through the affidavits in reply of **Mr.**

5 **Hussein Kisiki Nyamalwo**, the 1st respondent, and **Mr. Nduga Abdul**, the 3rd respondent, the contents of which are very similar.

In their respective affidavits in reply, the 1st and 3rd respondents objected to the application on grounds that not only is the same bad in law but it is also an abuse of court process and that the same should be dismissed with costs.

10 That because this court is *functus officio* as it has already determined **Miscellaneous Application No. 1439 of 2022** thus it cannot vary the orders issued in the application for stay of execution which was granted on condition that the applicant deposits in court **Ugx. 20,000,000/= (Uganda Shillings twenty million only)** as security for costs in 30 (thirty) days from the date of
15 the order.

That while the applicant's averments in *paragraph 6* are not well within the 1st respondent's knowledge, the applicant has not attached any evidence proving that he spent or paid any money to his lawyers and in reply to *paragraph 7* of the affidavit in support of the application, the 1st respondent
20 averred that the contents therein are false since none of the respondents herein have ever cut down any crops on the suit land or executed the orders of this court in the main suit.

In addition, that it is the applicant who on 3rd October 2022 invaded the suit land which according to the decree and orders of this court belongs to estate
25 of the late Mitiina Nakanwagi, started chasing the occupants thereof and further proceeded to commence criminal cases against the said occupants on grounds of alleged malicious damage, and trespass yet he knew that the land did not belong to him.

It is him who went onto the suit land claiming that he had won the same and
30 declared that he would never let the respondents utilize the suit land after



which he started erecting structures, and planting more crops on the suit land which he was not using before this court delivered its judgment.

That according to the applicant's averments during the visit to the locus, he has significant resources from which he can easily raise money to comply with the ruling of this court in **Miscellaneous Application No.1493 of 2022** therefore he cannot claim to have failed to pay the decretal sum therein.

That the applicant has deliberately refused to comply with the conditions for stay of execution of the decree in **Civil Suit No.156 of 2014** issued in **Miscellaneous Application No.1493 of 2022** irrespective of the fact that the applicant alleges that his lawyers received the ruling in issue on 29th November, 2022, which still left him with at least 23 days within which to comply with the orders of this court.

That while the conditional grant of the application cannot be varied by this court, the applicant's only option is to seek the leave of this court to appeal and that the applicant is not only wasting, but also abusing court's time and orders by faulting this court for late emailing yet he has not provided any reason why he is not able to pay the decretal sum within the decretal sum within the timelines issued by this court.

That the applicant shall be put to strict proof of the allegations that the respondents have since commenced execution since the letters attached to the affidavit in support marked **Annexure 'F'** do not prove the same and that it is clear from this application that even if the ruling of this court had been emailed to the applicant on 23rd November 2022, he would not have been able to meet the conditions set out therein.

That the applicant has not provided any sufficient reason why he cannot pay the **Ugx 20,000,000/=** as security for due performance, or cause for enlargement of time by this court, and that while the subject matter in the main suit measures approximately 980 acres 640 of which were decreed to belong to the estate of the late Hajjat Mitina Nakanwagi, the land in the area is valued at approximately **Ugx. 5,000,000/= (five million shillings)** per acre thereby placing the value of the suit land at **Ugx. 4,900,000,000/= (four**

billion nine hundred million shillings) and that because this court awarded the respondents costs of the suit which according to the filed bill of costs amounts to a total of **Ugx. 386,680,000/= (three hundred eighty-six million six hundred eighty thousand shillings)**, the sum of **Ugx.**

5 **20,000,000/= (twenty million shillings)** is approximately only 0.38% of the total value of the subject matter and costs claimed by the respondents.

Thus there is no justifiable reason as to why the applicant cannot pay the same in spite of the fact that the same does not constitute meaningful security for due performance.

10 That the applicant has since filing the notice of appeal and letter requesting for proceedings not taken any steps to prosecute his appeal and has instead resorted to filing frivolous and vexatious applications in an attempt to unjustifiably deny the respondents the fruits of the judgment in their favour.

That not only does this application lack merit, it is also an abuse of court
15 process and should be dismissed with costs in the interest of justice because it was filed with the sole intention of denying the respondents the fruits of the judgement in their favour.

The applicant also filed an affidavit in rejoinder to the averments contained in the 1st and 2nd respondent's affidavits in reply opposing his application. He
20 stated that the respondents have not adhered to, or respected court's directives on the schedules regarding the filing of submissions and the reply as ordered by this court, and that while this application seeks orders to vary and review the orders of this court, this court is not *functus officio* and that the respondent's acts are overwhelmingly geared towards depriving the
25 applicant of the developments on his land.

That the applicant who has kept his peace as he pursues his appeal has never chased any of the respondents or their agents from the suit land since this court decreed that the applicant also has an interest in the said land and that the applicant only filed this application seeking this court's leniency and
30 indulgence so as to have the security deposit reduced, and the time for payment of the security be extended.



Further, that although the applicant is a farmer dealing in perishables, having a farm should not be used by the respondents to mislead this court that the applicant has money to pay the security deposit and that the respondents are using calculations full of assumptions which is not allowed in this court which
5 has the discretion to not only order any award or money to be paid but to also vary amount ordered.

Additionally, that while this court is not *functus officio*, the applicant can file any application to the High Court seeking any orders thus the instant application is not a waste of time or frivolous and has merit.

10 **Representation:**

The applicant was represented by ***m/s KOB Advocates & Solicitors*** and ***Ahamya Associates & Advocates***, while the respondents were represented by ***m/s Kaganzi & Company Advocates***.

Both counsel filed written submissions in support of their respective client's
15 cases, as directed by this court.

Consideration of the application:

I have carefully read and considered the pleadings, evidence and submissions of both counsel, the details of which are on the court record. The main issue for consideration is whether this application is properly before this court, and
20 whether or not the same merits the prayers sought.

Before I delve into the merits of this application, both parties hereto have in their evidence and submissions raised pertinent issues that ought to be addressed by this court.

The applicant in his affidavit in support and submissions in support of the
25 application that he only got to know of the ruling after it had been delivered because this court granted the application for stay of execution on 23rd November, 2022.



The same was emailed to the applicant's counsel on 29th November, 2022 and that the applicant's counsel did not receive the same until he complained and it was acknowledged that there was an error with the emailing system

5 According to **Annexure 'E'** of the applicant's affidavit in support of the application which is a print out of the applicant's counsel's emailing log, the email for delivery of the ruling was sent out to both the applicant's and respondents' counsel on 29th November 2022 contrary to the applicant's averments that seem to suggest that the ruling was delivered to the respondents before his counsel received the same.

10 Although the ruling of this court was signed on 23rd November 2022, it was not delivered until 29th November 2022 at 10:33 am by email sent out to the applicant via his counsel's email to wit; ahamya@yahoo.co.uk, while the respondents received the same via kaganzilester@kacadvocates.com.

15 This is a fact that is not denied by either the applicant or his counsel. It is not in dispute that the ruling of this court was delivered on 29th November 2022. The 30 days within which the applicant ought to have paid the sum ordered by this court started to run then, and not on the day the judgement was signed.

Now to the merits of this case.

20 The condition requiring an applicant to deposit security for due performance is established under **Order 43 Rule 4 (3(c) of the Civil Procedure Rules**.

The Supreme Court in **Musiitwa Vrs Eunice Busingye CA No. 18/1990** advised that a party seeking a stay should be prepared to meet the conditions set out in Order **43 rule 4(3)**.

25 Security for due performance has been interpreted to mean the entire decretal sum and it is intended to protect the judgment creditor in the event that the appeal is unsuccessful.

The applicant in the instant case seeks an order varying the amount of **Ug. Shs. 20,000,000/= (Uganda Shillings twenty million only)** he was ordered
30 to pay as security for costs, and that the same be reduced to **Ug. Shs.**

10,000,000/= (Uganda Shillings ten million only), and that the time within which to pay the same be extended from 30 days to at least 4 months.

It is now settled that the applicant's right to be heard on appeal has to be balanced with the respondent's right to costs, and the right to enjoy the fruits of one's judgment without being unnecessarily frustrated.

Court must strive to maintain a balance between the need to have a successful party enjoy the fruit of his victory and at the same time to ensure that the unsuccessful party who has appealed would not be incapacitated as not to pursue his legitimate constitutionally guaranteed right to appeal against the judgment.

As it was held in the case of **Hon Theodore Ssekikubo and Ors Vs The Attorney General and Ors Constitutional Application No 03 of 2014**, the nature of decision depends on the facts of each case, as situations vary from case to case.

In light of the above, it is the opinion of this court that in comparison with the size and value of the suit land as well as costs, the amount of **Ug. Shs. 20,000,000/= (Uganda Shillings twenty million only)** that the applicant was directed to pay by this court is more than fair.

The applicant has not demonstrated any ability to fulfil the conditions of the order for stay, to show willingness to comply or show some seriousness, by at least depositing a part of the money as he awaited the decision of this court in relation to this matter.

Already almost 3 months have since passed after the receipt of the ruling in **Miscellaneous Application No. 1493 of 2022**. That creates an impression that he wishes that the four months should start counting from date of delivery of this ruling, which is quite absurd.

The discretion of court under **section 98 of the CPA and section 33 of the Judicature Act** as cited by him ought to be exercised judiciously, also bearing in mind that litigation cannot be endless. This is the same court that issued orders for a stay, conditional upon fulfilment of certain conditions.



It cannot be the same court, relying on those same discretionary powers to issue other orders to handle what appears to be a veiled appeal against its own decision. It is also the finding by this court that this application is intended to further delay the execution of the judgment.

- 5 I am therefore disinclined to grant this application. It is dismissed, with costs to the respondents.

.....*Alexandra*.....

Alexandra Nkonge Rugadya

10 **Judge**

29th March, 2023.

*Delivered by e-mail
Alexandra
29/3/2023*

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