

5 appellant and the respondent share a common boundary to their two pieces of land. The appellant's land is Block 224 Plot 3344 whereas that of the respondent is Block 224 Plot 3542 located at Muyenga in Kampala.

10 The appellant's contention is that the access route to its plot of land existed before the respondent acquired its plot, and that, therefore, it has a right to continue using it. The respondent had placed construction equipment including an excavator and a container in front of its gate to stop the appellant from passing through its land.

15 Both parties filed suits in the High Court against each other which were later consolidated. The respondent filed Misc. Applications No. 328 and No. 329 of 2015 for a temporary injunction pending the disposal of the head suit and for an interim order maintaining the status quo pending the disposal of the application for a temporary injunction.

20 The appellant, on the other hand, filed Misc. Application No. 330 of 2015 for a temporary injunction to stop the respondent from blocking the access to its land. This application was heard by Kwesiga, J, who granted it on 24th April, 2015 by ordering the removal of all blockades and re-opening of the access route.
25 However, the temporary injunction granted by the learned judge was to last only up to 29th May, 2015 when the head suit would by that time be disposed of by the learned judge himself.

5 Being dissatisfied by the ruling of the High Court judge, the respondent applied to the Court of Appeal for an interim order and a substantive order for stay of execution. Both the interim application and the substantive application were granted by a single justice and by the Court of Appeal respectively. However, the order
10 by the Court of Appeal staying execution of the High Court judge's order was granted by that court after the judge's order had expired.

The appellant being dissatisfied with the ruling of the Court of Appeal filed its appeal to this court on 10 grounds which were framed as follows.

- 15 1. The Honourable Justices erred in law when they ignored and/or failed to make findings or pronouncements on the preliminary points of law raised by the appellant at the hearing of the application.
- 20 2. The Honourable Justices erred in law and fact when they stayed the orders of the trial judge after finding that the question of likelihood of success of the Respondent's appeal was moot.
3. The Honorable Justices erred in law and fact when they stayed the orders of the trial judge which had expired.
- 25 4. The honorable Justices erred in law and fact when they allowed the application and granted orders which were not prayed for in the application.

- 5 5. The Honorable Justices erred in law and fact when they found that upholding the order of the trial judge would give the appellant false, premature and psychological victory before the trial court considers all the issues involved in the dispute.
- 10 6. The Honorable Justices erred in law and fact when they ordered the Respondent to leave its equipment where it was and the appellant to continue using the route it uses in ferrying its building materials until the trial court decides the consolidated suits on merit.
- 15 7. The Honorable Justices erred in law and fact when they relied on an “emissary report” prepared by a stranger before the hearing of the suits.
- 20 8. The Honorable Justices erred in law and fact when they suggested that justice will be served if the case is handled by a different judge without any allegation of wrong doing or bias against the judge who was handling it.
9. The Honorable Justices erred in law and fact when they ordered costs of the application to abide the outcome of the main trial.
- 25 10. The Honorable Justices erred in law and fact when they failed to evaluate the evidence on record and thus came to the wrong conclusion.

The appellant prayed court to make the following orders.

- 5 1. Allow the appeal and set aside the orders of the Court of Appeal in Civil Application No. 103 of 2015.
2. The High Court/trial Judge renews the order issued on 24th April, 2015 in the High Court (Land Division) Misc. Application No. 330 of 2015 pending the final determination of the consolidated suits.
- 10 3. Costs of this appeal be paid by the respondent in this court and the court below.

Submissions of Counsel

At the hearing of the appeal, Mr. Sadi Seninde and Ms. Aniwa Kayemba appeared for the appellant while Mr. Caleb Alaka appeared for the respondent. Both parties filed written submissions covering all the 10 grounds.

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Learned counsel for the appellant submitted that for an application for stay of execution to succeed the applicant should demonstrate to court that the pending appeal has high chances of success. Counsel argued that though the Court of Appeal was alive to the preconditions for the grant of an order for stay of execution, it erred when it stayed an expired order of the trial court after finding that the issue of whether the appeal had a likelihood of success was moot because the order from which the appeal and the application emanated had since expired.

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5 On the issue of the court having stayed an expired order, counsel submitted that the issue of the expiry of the order was brought to the attention of the Court of Appeal and was not a new matter; that the trial court's order was attached to the application for stay of execution as Annexure D, and that during the hearing, counsel for
10 the appellant brought it to the notice of the court that the order which was being sought by the respondent had only three days to expire, and that the learned Justices of Appeal acknowledged that the order was for a short time and had since expired. Counsel argued that since the order sought to be stayed had expired, there
15 was nothing to stay.

In response, learned counsel for the respondent submitted that the learned Justices of Appeal were alive to the principles governing the grant of orders for stay of execution. He cited the case of **Hon. Ssekikubo & 4 Ors vs. Attorney General & 4 Ors**, Constitutional
20 Application No. 03 of 2014, to support his argument about the principles which must be satisfied for an application for stay of execution to succeed.

Counsel further contended that the Court of Appeal having found that the issue regarding the likelihood of success of the appeal was
25 moot, the court exercised its discretion relying on other considerations which included the fact that the respondent would suffer irreparable loss if the order for stay was not granted. The balance of convenience lay with the respondent, counsel argued.

5 On the expiry of the impugned order, counsel contended that the issue was neither pleaded nor canvassed during the hearing in the Court of Appeal. Counsel contended further that the order which was intended to last up to 29th May 2015 was subject to extension.

Counsel argued that an appellate court should not interfere with
10 the exercise of discretion of a trial court unless it is satisfied that the trial court misdirected itself on some matter, or it is manifest from the case as a whole that the trial court was wrong in the exercise of its discretion which resulted in failure of justice. Counsel cited the cases of **Banco Arabe Espanol vs. Bank of Uganda**, SCCA
15 No. 08 of 1998 and **Themis Nakibuuka Sebalu vs. Peter Sematimba and 2 Others**, SCCA No. 15 of 2015 in support of his argument. Counsel further submitted that the appellant had not demonstrated that by the Court of Appeal allowing the application, it misdirected itself in some matter and hence came to a wrong
20 conclusion.

Consideration of the appeal.

This appeal is based on 10 grounds but the essential grounds necessary for the disposal of this appeal are, in my view, grounds 2 and 3. The appellant's complaint in the two grounds above
25 mentioned is that the learned Justices of Appeal erred when they granted the respondent's application for stay of execution when the trial court's order on which the respondent's application for stay was based had expired.

5 Rule 6(2)(b) of the Judicature (Court of Appeal Rules) Directions governs the grant of applications for stay of execution to that court. It states as follows:

10 **“In any proceedings where a notice of appeal has been lodged in accordance with rule 76 of these rules [the court may] order a stay of execution....on such terms as the court may think just.”**

Section 10 of the Judicature Act provides that **“An Appeal shall lie to the Court of Appeal from decisions of the High Court prescribed by the Constitution, this Act or any other law.”**

15 The order for stay of execution was discussed in the case of **Somali Democratic Republic vs. Anoop S. Sunderlal Trean**, SCCA No. 11 of 1988 where this court stated:

20 **Where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court to make such orders for staying proceedings under the judgment appealed from as will prevent the appeal from being nugatory. But the court will not interfere if the appeal appears not to be bona fide or there are other sufficient exceptional circumstances.**

25 This position has been reiterated in many decisions of this court such as **Lubega vs. Attorney General and 2 Others**, SCCA No. 13 of 2015, **Hwang Sung Industries Ltd vs. Tadjin Hussein and 2 Others**, SCCA No. 19 of 2008, and **National Housing and**

5 **Construction Corporation vs. Kampala District Land Board,**
SCCA No. 6 of 2002.

These cases set minimum conditions which must be satisfied by an applicant for grant of stay of execution. These are:

- 10 • That the applicant has filed a notice of appeal in accordance with rule 72 (2) of the Judicature (Court of Appeal rules) Directions.
- That the applicant has shown that the appeal has a high likelihood of success.
- 15 • That the applicant will suffer irreparable damage or the appeal will be rendered nugatory if the application is not granted.
- The court must consider where the balance of convenience lies in order to grant or not to grant the application.

In their ruling, the learned Justices of Appeal stated:

20 **...there is no doubt that the applicant filed a Notice of Appeal dated and received in this court on 27th April, 2015.**

On likelihood of success of the appeal, it seems to us that this issue is now moot because the order appealed was for a short period and has since expired.

25 **On the other hand, we find that the applicant is likely to suffer substantial and irreparable loss if the order is not**

5 **granted and the balance of convenience seems to be in its
favour.**

It is clear from the above quotation from the ruling of the learned
Justices of Appeal that they were aware that the order of the High
Court judge on which the application for stay of execution had been
10 based had expired. It had expired almost 3 months from the date of
their ruling. What is most perplexing is that with full knowledge of
the expiry of the trial judge's order the learned Justices of Appeal
still went ahead to decide the application.

There could not be an appeal against the impugned High Court
15 order to the Court of Appeal when that order was no longer in
existence. Consequently other conditions required for lodging the
application such as whether the notice of appeal had been filed,
whether there was likelihood of the success of the appeal, whether
the applicant would suffer irreparable loss if the High Court order
20 was executed, e.t.c became irrelevant as they ceased to have a
ground on which to stand.

The respondent's right of appeal against the High Court order was
extinguished on 29th May, 2015 when the order expired.
Consequently the Court of Appeal had no jurisdiction to determine
25 the application in accordance with rule 6(2)9b) of the Judicature
(Court of Appeal Rules) Directions, and section 10 of the Judicature
Act cited above. Accordingly, the ruling of the Court of Appeal and
the orders the court issued in respect thereof were null and void
and of no effect.

5 Learned counsel for the respondent's argument that the hearing of
the respondent's application for stay of execution commenced in the
Court of Appeal before the order expired, or that the High Court
order could be extended if the applicant satisfied that court that it
was necessary to do so, has no merit because the point at issue is
10 the ruling of the Court of Appeal in respect of the application and
not when the hearing of the application started. Furthermore, since
the High Court's order had not been extended there was no order
for the respondent to complain about.

As the resolution of grounds 2 and 3 disposes of the appeal, I find it
15 unnecessary to discuss the rest of the grounds in this appeal.

Accordingly, I would allow this appeal and set aside the orders of
the Court of Appeal.

I would not grant the appellant's prayer asking this court to order
the High Court to renew the order issued on 24th April, 2015 in
20 Misc. Application No. 330 of 2015 pending the final determination
of the consolidated suits because the jurisdiction to do so belongs
not to this court but to the High Court which made the order and
set the conditions which had to be satisfied for its possible renewal.

5 I would order costs in this appeal and in the Court of Appeal to be paid by the respondent.

Dated this24th.....day ofNovember...2017

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Jotham Tumwesigye
JUSTICE OF THE SUPREME COURT

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA**

(Coram: Katureebe CJ; Tumwesigye; Arach-Amoko; Mwangusya; Opio-Aweri;
JJSC)

CIVIL APPEAL NO. 019 OF 2015

BETWEEN

**BISMILLAH TRADING LIMITED APPELLANT
AND
FALCON ESTATES LIMITED RESPONDENT**

(Appeal against the Judgement of the Court of Appeal at Kampala before Kavuma, DCJ; Nshimye and Mwondha, JJA, Civil Appeal No.0103 of 2015, dated 20th day of August, 2015)

JUDGMENT OF KATUREEBE, CJ

I have read, in draft, the judgment of my brother, Tumwesigye, JSC and I agree with him that this appeal should succeed on the grounds he has elaborated in his judgment. I also agree with the orders he has proposed.

As the other members of the Court agree, the appeal is allowed.

The orders of the court of Appeal are hereby set aside.

The respondent shall bear the costs in this Court and in the court of Appeal.

Dated at Kampala this 24th day of NOVEMBER 2017


Bart M. Katureebe
CHIEF JUSTICE

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

(Coram: Katureebe; C.J, Tumwesigye Arach-Amoko;
Mwangusya; Opio-Aweri; JJ.S.C).

CIVIL APPEAL NO. 019 OF 2015

BETWEEN

BISIMILLAH TRADING LIMITED:.....APPELLANT

AND

FALCON ESTATES LIMITED:..... RESPONDENT

(Appeal against the Judgment of the Court of Appeal at Kampala before
Kavuma, DCJ; Nshimye and Mwondah, JJ.A., Civil Appeal No. 0103 of 2015,
dated 20th day of August, 2015)

JUDGMENT OF OPIO-AWERI, JSC

I have had the benefit of reading in draft the judgment of my learned
brother, Hon. Justice Tumwesigye, JSC, and I agree with his findings
and decision that this Appeal ought to be allowed.

I also agree with the Orders proposed.

Dated at Kampala this..... day of.....2017.

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OPIO-AWERI,
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

(Coram: Katureebe; C.J, Tumwesigye; Arach-Amoko; Mwangusya;
Opio- Aweri; JJ.S.C)

CIVIL APPEAL NO. 0019 OF 2015

BETWEEN

BISIMILLAH TRADING LIMITED APPELLANT

AND

FALCON ESTATES LIMITED..... RESPONDENT

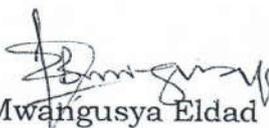
*(Appeal from a ruling of the Court of Appeal at Kampala before Kavuma D.
DCJ; Nshimye and Mwondha JJ.A., in Civil Appeal No 103 of 2015 dated
20th August 2015)*

JUDGMENT OF MWANGUSYA, JSC

I have had the opportunity of reading in draft the Judgment of
Tumwesigye JSC.

I agree with the Judgment that the appeal should be allowed. I
also agree with the orders proposed.

Dated this ^{24th} day of ^{NOVEMBER} 2017


Mwangusya Eldad

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: Katureebe, CJ, Tumwesigye, Arach-Amoko,
Mwangusya, Opio-Aweri, JJSC;)

CIVIL APPEAL NO. 19 OF 2015.

BETWEEN

BISIMILLAH TRADING LIMITED:.....APPELLANT

AND

FALCON ESTATES LIMITED:.....RESPONDENT

{Appeal from the Ruling of the Court of Appeal at Kampala (Kavuma, DCJ; Nshimye and Mwendha, JJA) in Civil Appeal No. 103 of 2015 dated 20th August, 2015.}

JUDGMENT OF M.S.ARACH-AMOKO, JSC

I have had the benefit of reading in draft the Judgment of my learned brother, Hon. Justice. Tumwesigye, JSC, and I agree with his findings and decision that this Appeal ought to be allowed. I also agree with the orders he has proposed.

Dated at Kampala this ^{2nd} day of ^{NOVEMBER} 2017


.....
M.S. ARACH-AMOKO
JUSTICE OF THE SUPREME COURT