

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO. 0141 OF 2024
(ARISING FROM CIVIL SUIT NO 290 OF 2015)

- 1. LUBEGA FRED**
- 2. LUBEGA GODFREY**
- 3. MULINDWA BOSCO**
- 4. BUKENYA RONALD**
- 5. NABUKENYA VIVIAN**
- 6. NAGAYI SARAH**
- 7. NABABI ROBINAH**
- 8. NAKACHWA JOAN ::: APPLICANTS**

VERSUS

- 1. ADMINISTRATOR GENERAL**
- 2. BRIGHT JUNIOUR SCHOOL LTD ::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. LADY JUSTICE NALUZZE AISHA BATALA

RULING.

Introduction:

1. This is an application by chamber summons brought under Sections 33 of the Judicature Act, Section 98 of the Civil Procedure



Act, Order 22 rule 26 of the Civil Procedure Rules (CPR) for orders that: -

- i) Stay of execution doth issue restraining the respondents and their agents or assignees from executing and or enforcing the Judgment and decree of the High Court (Land Division) of Uganda holden at Kampala by the Hon. Justice Henry. I Kawesa, dated 8th February 2023 vide HCCS No: 290 of 2015, until the hearing and final determination of Court of Appeal Civil Appeal No.2341 /2023.
- ii) Costs of the application be in the cause.

Background;

2. The applicants are beneficiaries of the estate of the late Grace Lubega that is administered by the 1st respondent. Consequently, the applicants filed HCCS No. 290 of 2015 against the respondents seeking reliefs as stated in the plaint.
3. On the 8th of February 2023 Hon Justice Henry Kawesa delivered judgement partly in favor of the applicants and respondents. The applicants being dissatisfied with part of the decision, they



appealed to the court of appeal vide Civil Appeal No. 234 of 2023.

Hence this application.

Applicant's evidence;

4. The application is supported by an affidavit deposed by the 1st applicant LUBEGA FRED on behalf of the other applicants which briefly states as follows;

- i) The applicants are beneficiaries of the estate of the late Grace Lubega that is administered by the first respondent.
- ii) That the late Grace Lubega left several properties including land described as Kibuga Block 9 Plot 204,205 207,208 and 209 land at Makerere.
- iii) The beneficiaries of the estate of the late Grace Lubega by a memorandum of understanding agreed that the estate properties including land described as Kibuga Block 9 Plot 204,205 207,208 and 209 land at Makerere be distributed equally to the beneficiaries by the Administrator General.
- iv) That in order to defeat the applicants beneficial share from the estate of the late Grace Lubega, to which they are entitled, the 1st respondent purported to distribute the estate property

contrary to the agreed memorandum of understanding signed by all the beneficiaries which had also been sanctioned by Court.

- v) That as a result of the mis administration of the estate of the late Grace Lubega, the 1st respondent fraudulently transferred the estate land comprised in Kibuga Block I Plot 204 205 207,208 and 209 land at Makerere to the 2nd respondent.
- vi) Consequently, the applicants filed HCCS No: 290 of 2015 against the respondents, on 8th February 2023, Hon. Justice Henry I. Kawesa, delivered judgment partly in our favour of the respondents and partly in Favor of the applicants.
- vii) That the applicants being dissatisfied with part of the above said Judgment and decree appealed to the Court of Appeal of Uganda against the same vide Civil Appeal No.234 of 2023.
- viii) That the applicants have a plausible appeal on merits which raises serious questions and issues with a high likelihood of success.
- ix) That the 1ST respondent's decision to implement the judgment and decree in HCCS No. 290 of 2015, well aware

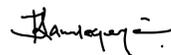
that the applicants filed an appeal specifically challenging the very orders of the judgment the respondent seeks to enforce clearly demonstrates the respondent's attempt to render our appeal nugatory.

- x) That if the order of stay is not granted, the applicants are likely to suffer a great loss by losing out on their beneficial shares in the estate of the late Grace Lubega.

1st Respondent's evidence;

5. The application is responded to by an affidavit in reply of MUYOMBA SIMON PETER who also filed a supplementary affidavit in reply on behalf of the 1st respondent which briefly states as follows;

- i) That I am the assistant administrator general.
- ii) That in the judgement vide HCCS No.290 of 2015 court made several orders to be implemented by parties which included; to distribute the suit land amongst the beneficiaries of the late Lubega Grace in compliance with the memorandum of understanding and file an inventory, the distribution to be by



way of a survey and to establish the shares of the beneficiaries.

- iii) That the applicants have proceeded to effect changes in the suit titles without fully complying with the orders of court in HCCS No.290 of 2015.
- iv) That the applicants cannot be seen to execute the judgement of court and at the same time purport to appeal against the same.

2nd respondent's evidence;

6. The affidavit in reply by the 2nd respondent is deponed by Mr. Muhwezi EMMY the managing director of the 2nd respondent which briefly states as follows;

- i) That the 1st respondent is the administrator of the estate of the late Grace Lubega.
- ii) That the judgement in HCCS No.290 of 2015 ordered that the 2nd respondent and the 9 beneficiaries should enter into a fresh sales agreement.
- iii) That the 1st respondent has then instructed a survey and has since filed an inventory. 

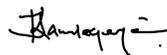
- iv) That the applicants are trying to stop distribution of the remaining estate that is due to them.
- v) That no loss would occur if the estate is distributed by the 1st respondent since they are not challenging the administration by the 1st respondent.
- vi) That there is no security that has been deposited by the applicants.

Representation;

7. The applicants were represented by Felix Kintu Ntenza of M/S Kintu Ntenza and Co advocates whereas the 2nd respondent was represented by Tumwesigye Lorna of M/S Tumwesigye Louis and Co. Advocates, there was no representation from the 1st respondent.

8. All parties filed their respective affidavits and the applicants together with the 2nd respondent filed submissions which I have considered in the determination of this application.

Issues for determination;



Whether the execution of orders arising from HCCS No. 290 2015 can be stayed pending the determination of Civil Appeal No.234 of 2023?

What remedies are available to the parties?

Issue 1. Whether the execution of orders arising from HCCS No. 290 2015 can be stayed pending the determination of Civil Appeal No.234 of 2023?

9. An application for stay of execution pending an appeal is designed to preserve the subject matter in dispute so that the right of the appellant who is exercising his or her undoubted rights of appeal are safeguarded and the appeal if successful is not rendered nugatory.

10. The underlying conditions for court to consider in an application for stay of execution pending an appeal were pronounced in the celebrated decision of ***Lawrence Musitwa Kyazze vs Eunice Busingye S.C.C.A No.18 of 1990*** and have been re-echoed in ***Theodore Sekikubo and Others vs The Attorney General and others Constitutional Application No.03 of 2014*** and these include;



- i) The applicant must show that he lodged a notice of appeal.***
- ii) Substantial loss may result to the applicant unless the application for stay is granted.***
- iii) That the application has been made without unreasonable delay.***
- iv) That the applicant has given security for the due performance of the decree or order as may ultimately be binding upon them.***

11. This honourable court will now proceed to qualify the above conditions in the instant case as follows;

12. The Applicants must show that he lodged a notice of appeal; this is a fact supported by the affidavit in support under paragraphs 10 and 11 where the applicants indicate that a notice of appeal and the memorandum of appeal vide Civil Appeal No.134 of 2023, this is a fact that is not disputed by the respondents in their evidence and submissions, this condition is satisfactorily met.



13. That substantial loss may result to the applicant unless the application for stay of execution is granted; the applicants under paragraphs 17-19 of the affidavit in support and paragraph 9 of the affidavit in rejoinder indicate that they might lose out their beneficial shares in the estate of their late father if the 1st respondent proceeds to enforce the judgement and decree, the applicants further submit that they have challenged the survey report authored on the instructions of the 2nd respondent to the detriment of the applicants.

14. The 1st respondent in his evidence under paragraph 7 that the applicants have proceeded to effect changes in the suit title without the orders of court.

15. The 2nd respondent in his submissions states that the applicants are in possession of the said land and have executed a sales agreement, further there is no proof that they have incurred or are about to incur any loss.

16. The phrase substantial loss has been interpreted by courts of law drawing reference to ***Tropical Commodities Supplies Limited & 2 others vs International Credit Bank Limited (in liquidation) (2004)EA*** where Justice Ogoola as he then was held

that “***the phrase substantial loss doesn’t represent any particular amount or size, it cannot be qualified by any particular mathematical formula***”. It refers to any loss great or small of a real worth or value as distinguished from the loss that is merely nominal.

17. The applicants submit that they are on the verge of losing out their beneficial shares since the 1st respondent intends to serve the interests of the 2nd respondent not the applicants as per the survey report. This will eventually lead to the loss of the beneficiary interests that were supposed to belong to the applicants. This condition is met by the applicants.

18. That the application has been made without unreasonable delay; the applicants in the affidavit in support under paragraphs 10 and 11 indicate how the judgement in Civil Suit No.290 of 2015 was delivered on the 8th of February 2023, the decree was extracted on the 1st of March 2023, memorandum of appeal filed on the 13th of July 2023 and the instant application filed on the 19th of January 2024. All these steps taken by the applicants to appeal and contest the execution of the decree testify to the speed that they have brought this application. There is no evidence

adduced to the contrary by the respondents in their affidavits and submissions, therefore I find this condition is met by the applicants.

19. As to whether the applicants have given security for due performance of the decree; security should be given for due performance of the decree however each case should be looked at according to its own merits, the requirement for payment of security for due performance of the decree is to ensure that the losing party does not intentionally delay execution while hiding under unnecessary applications.

20. The applicants in their submissions state that the decree sought to be stayed is not a decree for payment of money or costs therefore the requirement for depositing security for due performance of the decree does not apply. The 2nd respondent in his submissions indicate that the submission of the applicants regarding the same is misconceived.

21. I will draw reference to the decision of **John Baptista Kawanga vs Namyalo Kevina & Anor M.A No.12 of 2017** where it was held by Justice Flavian Zeija that the decision as to order for



payment of security for the due performance of the decree must be made in consonance with the probability of success.

22. In the instant case the applicants' counsel indicated in the submissions how the appeal stands high chances of success since it raises questions of law and fact that were not considered by the high court as provided for in the memorandum of appeal. Therefore, I'm persuaded by the position in ***John Baptista Kawanga vs Namyalo Kevina & Anor(supra)*** and that the appeal raises both questions of law and fact.

23. As to whether the applicants appeal holds a likelihood of success; In ***Gapco Uganda limited vs Kaweesa & Anor (MA No.259 of 2013) UGHCLD 47*** defined likely hood of success of a case to be one that, ***“the court is satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried”***

24. Under paragraph 12 of the affidavit in support, the applicants state that the appeal is not frivolous and they have a plausible appeal since it raises serious questions with likelihood of success.

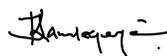
25. In reply, the respondents submit that the applicants have taken steps to execute the orders of court in Civil Suit No.290 of 2015

and the applicants intend to appeal against the same orders which included effecting changes on the suit titles.

26. The triable grounds the applicants raise for example that the Trial Judge erred in law and fact when he directed the refund of the purchase price at 100% interest from the time of execution and that the trial judge erred in law and fact when he directed the 2nd respondent to execute a fresh sales agreement upon finding a fraudulent transaction and entry to the suit land. this Honorable court finds that from the above the applicants have made a case that their appeal has a likelihood of success.

27. Accordingly, it's my finding that this application has merit and it succeeds with the following orders:

- i) The Execution of the decree from Civil Suit No.290 of 2015 against the applicants be stayed pending the determination of the applicant's appeal vide Civil Appeal No.234 of 2023.
- ii) The costs of the application to be in the cause.



I SO ORDER.

Haniya

NALUZZE AISHA BATAALA

JUDGE

2/04/2024