THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.SC.)

CIVIL APPLICATION No.2 OF 2006

BETWEEN

IDAH ITERURA ..... APPLICANT

AND

JOYCE MUGUTA ..... RESPONDENT

(An application arising from Supreme Court Civil Appeal No.5 of 2006)

RULING OF THE COURT

This application was brought under the old Rules 5 (2) (b) and 41 (1) and (2) of the Rules of this Court. The applicant, Idah Iterura, seeks for an order of this Court to stay execution of decrees of the High Court in Mbarara circuit HCS No.33 of 1995 and in the Court of Appeal Civil Appeal No.22 of 2002 pending disposal of the appeal lodged in this Court.

The grounds in support of the application are set out in the notice of motion and the supporting affidavit of the applicant sworn on 21st July 2006. In summary the applicant seeks stay of execution because –

- The respondent has threatened to sell part of the disputed land on which the applicant's principal home is situated.
- The respondent threatens to demolish the applicant's houses on the disputed land.
- The respondent seeks to evict applicant from the disputed land.
- If execution is carried out, the pending appeal will be rendered nugatory.

The respondent Joyce Muguta and one Georgiana.K. Majungu swore affidavits in reply to that of the applicant. In her affidavit the respondent opposes the application, pointing out how her late husband won the suit in Mbarara High Court and a subsequent Civil Appeal in the Court below. She also points out how she obtained execution orders in Mbarara and obtained possession of her husband's Kibanja. Majungu is not a party to the proceedings. But in her affidavit she opposes the application because the estate of her late husband is affected. Indeed both the respondent and Majungu aver in effect that execution has been substantially carried out in that each has been placed in her

husband's portion of the Kibanja. What remains is recovery of costs against the applicant.

The facts of this application may be stated as follows:
The applicant and the respondent are widows. Their husbands were brothers who owned a piece of land upon which they lived each having his own home in a separate homestead on a customary Kibanja. The three brothers were Ismail Muguta, husband of the respondent, Joab Majungu and Yesse Itetura. The last was the husband of the applicant. As a result of a dispute among the three, the first two brothers filed a suit in the High Court, at Mbarara, against the last brother. Before the suit was decided, Joab Majungu died. The suit was heard and decided by Musoke Kibuka,J., in 2001. The suit was eventually decided in favour of Ismail Muguta. Yesse Itetura appealed to the Court of Appeal (Civil Appeal No.22 of 2002), which in 2005 upheld the decision of the High Court. Meantime Ismail Muguta, a respondent in the appeal also died in 2004 and his widow, the present respondent in this application obtained letters of administration on 24th March, 2004 before the Court of Appeal decided the appeal in 2005 in favour of her late husband. As fate would have it, in the meantime the husband of the applicant who had himself filed in this Court Civil Appeal No.5 of 2002 also died. The present applicant obtained letters of administration to his estate and so she is now his legal representative in the present proceedings.

The present respondent moved High Court in Mbarara for orders of execution to proceed against the applicant to recover costs in High Court and of the Court of Appeal and finally to get vacant possession of land. The applicant instituted these proceedings seeking for orders of stay of the said execution pending disposal of the appeal in this Court. In a rejoinder affidavit the applicant states that the High Court erred when it granted orders for execution first because the respondent had not by then got letters of administration and second because Tujunga is not a party to the proceedings as the suit against him abated when he died.

The question of lack of the capacity on the part of the respondent was solved when upon oral application by the respondent's counsel to substitute the respondent in place of her late husband, we allowed the substitution since Mr. Katembeko, counsel for the applicant, had no objection to the substitution.

On the merits of the application, Mr. Muhwezi for the applicant, submitted that the judgment of the High Court has not been complied with in that the Registrar of Titles has not in fact rectified the certificate of title in conformity with the orders of the High Court. This is presumably due to the fact that the respondent had not obtained letters of administration and also because the suit against Majungu abated following his death before judgment in the High Court was delivered. Mr. Muhwezi prayed that we stay execution so as to maintain the status quo.

In reply Mr. Katembeko opposed the application on three principal grounds.

- First that the application should have been made to the Court of Appeal in the first instance. He relied on Rule 40 of the Rules of this Court and on **J.W.R.Kazzora Vs. M.L.S. Rukuba Supreme Court** Civil Application No.4 of 1991.

- Secondly, the application was made belatedly. This is because the Court of Appeal dismissed the applicant's appeal on 19/8/2005. Notice of intended appeal was filed on 30/8/2005. This application was only filed as late as July, 2006. The appeal to this Court was instituted on 20/7/2006 without certificate from the Registrar of the Court of Appeal indicating when proceedings were ready for collection. Since the appeal in this Court should have been filed on 16/10/2005, Mr. Katembeko argues, the appeal as it is now is incompetent, having been filed out of time.

- Thirdly, Mr. Katembeko argued that the format of the appeal violated Rule 81 (3) so it is futile to grant any stay. He relied on the case of the **Bank of Uganda Vs Banco Arabe Espanola** Supreme Court Civil Application 20/98.

He prayed for application to be dismissed with costs.

In our view there is insufficient material with regard to the third point about the format of the memo of appeal. We cannot make our decision on the basis of Mr. Katembeko's statements from the bar.

With regard to the two remaining contentions, Mr. Muhwezi replied first that S.134 of RTA requires a legal representative to be put on certificate. As regards Mr. Katembeko's contention on the competence of the appeal, Mr. Muhwezi argued that a separate notice of motion should have been filed under Rule 78 of the Rules of this Court. He, correctly, argued further that there was no evidence to support Mr. Katembeko. We agree that we do not have the necessary evidence, other than counsel's statement from the bar, showing whether or not the appeal in this Court was filed out of time.

Under Rule 5 (2) (b), once a notice of appeal has been filed and served and subject to any other facts of a particular case, this Court may order a stay of execution. Further these proceedings have peculiar facts. The parties are related and the dispute concerns shared family Kibanja. It would be in the interests of all concerned to maintain the status quo until the appeal filed in this Court is determined. Further, although this sort of application should have started in the Court of Appeal, as argued by Mr. Katemboko, we will not strike it out on that ground, but we will reluctantly allow the application. We order that execution be

stayed in the sense that the current status quo be maintained until we hear and determine the appeal now pending in this Court or until further orders from this Court. Consequently the interim order of stay granted by a single judge on 27th July, 2006 lapses.

We make no order as to costs.

Delivered at Mengo this 5th day of July 2007.

J.W.N.TSEKOOKO
JUSTICE OF THE SUPREME COURT

A.N.KAROKORA
JUSTICE OF THE SUPREME COURT

J.N.MULENGA
JUSTICE OF THE SUPREME COURT

G.W.KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

B.KATUREEBE
JUSTICE OF THE SUPREME COURT