

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

(CORAM: **OKELLO, JJSC.** )

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**CIVIL APPLICATION NO. 06 OF 2010**

**B E T W E E N**

10 **1) KITENDE APPOLONARIES KALIBOGHA**

**2) PETER KALIBOGHA**

**3) KITENDE HOSTELS PROJECT (KITHOP): ::::: APPLICANT**

**A N D**

15 **MRS. ELEONORA WISMER: ::::: RESPONDENT**

*{Suing through her lawful attorneys Mr. Aaron Muhindo and Rev. Fr. Lawrent Bwambale}*

20 *(An application arising from Civil Application No. 5 of 2010).*

**RULING OF OKELLO, JSC:**

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This is an application under rules 2(2), 6(2) (b), 41(2) and 42(1) (2), of the Rules of this court for an interim order for stay of execution and for the costs of the application to abide the result of the appeal.

30 The applicants and the respondent had fought a legal battle in High Court Civil Suit No. 49 of 2007, at Fort Portal where the applicants lost the battle. The High Court ordered as follow:

- 1) ***Judgment was entered in favour of the respondent***
- 2) ***The 1<sup>st</sup> and 2<sup>nd</sup> applicant were ordered to pay Shs. 307 million in special and general damages.***
- 3) ***The 3<sup>rd</sup> applicant to be struck off the Register of Companies and***
- 4) ***Land at Plot No. 3 - Rubaga Road and at Kasese District were decreed in favour of the respondent.***

Warrant in execution to give vacant possession of these lands to the respondent was issued. Warrants of arrest of the 1<sup>st</sup> and 2<sup>nd</sup> applicants were also issued.

The applicants appeared to have appealed against the above orders to the Court of Appeal but the appeal appears to be still pending.

As the appeal was pending, the applicants applied in the Court of Appeal vide Civil Application No. 119/2009 for stay of execution but the application was dismissed hence this application.

The application is supported by the affidavit of Appolonaries Kalibogha Kitende, the first applicant, sworn on 12<sup>th</sup> May 2010.

At the hearing of this application, the applicants were represented by Mr. Sirnji Ali while the respondent was represented by Mr. Magellan Kazibwe.

Presenting the applicants case, Mr. Ali contended that the applicants seek an interim order for stay of execution of the orders of the Court of Appeal in

Civil Application No. 119 of 2009 and of the judgment and decree of the High Court in Fort Portal Civil Suit No. 49 of 2007, pending the determination of the main application for a stay of execution.

5 Learned counsel referred me to this court’s decision in Civil Application No. 19 of 2008, **HWANG SUNG INDUSTRIES LTD. - APPLICANT - VS -**

**1. TOJDIN HUSSEIN**

**2. RAINBOW GOODS LTD } RESPONDENTS**

**3. NIZZAR HUSSEIN:**

10 Where in this court (Okello, JSC), said:

***“ . . . . . for an interim order of stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application.***

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***It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay.”***

Learned counsel then submitted that in the instant case, there are substantive  
20 applications for stay of execution pending vide Civil Application No. 5 of 2010.

He stated that though execution process has started with the 1<sup>st</sup> applicant  
25 having been arrested and a challengeable eviction of the applicants from Plot No. 3 - Rubaga Road, the execution of the orders of the High Court in Fort

Portal Civil Suit No. 49 of 2007 has not yet been completed and that therefore, the interim order can still be made.

Mr. Kazibwe opposed the application and relied on affidavit in reply of  
5 Aaron Muhindo, the LAWFUL Attorney of the respondent sworn on 17-05-2010. He contended that the evidence in that affidavit shows that the execution has already been completed and that there was nothing to stay. He pointed out that the applicants have already been evicted from Plot No. 3 - Rubaga Road as shown by Annexure 'A' to the affidavit in reply.  
10 Annexure A is a warrant to give vacant possession of Plot No. 3 - Rubaga Road, followed by clearance for eviction by the Police. Further that evidence also shows that the 1<sup>st</sup> applicant has already been arrested and committed to Civil Prison at Katojo Prison - fort Portal yesterday 17-05-2010.

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Learned counsel further contended that the affidavit evidence filed by the applicant in support of the application does not show that there is pending SUBSTATIAL application for stay of execution. He argued that in the absence of such a piece of evidence, a statement of counsel from the bar to  
20 that effect cannot be used as a substitute. He prayed that the application be dismissed with costs.

I agree with the principle stated by this court in Hwang Sung Industries Ltd.  
25 (supra) regarding grant of an interim order for stay of execution.

The applicant must show by evidence that there is pending a substantive application for stay of execution and that there is a serious threat of execution of the decree before the hearing of the substantive application for an interim order to issue.

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In the instant case, I accept the submission of counsel for the respondent that there is no averment in the affidavit in support of the application that there is pending a substantive application for stay of execution. This is not irregularity but a fatal omission which cannot be cured by counsel's  
10 statement from the bar.

On whether the execution has been completed, I do not accept the submission of counsel for the respondent that execution of the decree of the High Court in Fort Portal Civil suit No. 49 of 2007, has been completed.  
15 There is no evidence that the respondent has been placed in vacant possession of the land at Rwentutu in Kasese District nor that the warrant of arrest of the 2ns applicant has been executed. The execution of the orders of the High Court in Fort portal Civil Suit No. 49 of 2007, has, therefore, not been completed yet.

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However, as I have stated earlier, there is no evidence that there is pending a substantive application for stay in this court.

In the result this application cannot succeed.

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Accordingly, the application is dismissed with costs to the respondent.

*Dated at Kololo this: 20<sup>th</sup> day of May 2010.*

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**G. M. OKELLO**  
**JUSTICE OF THE SUPREME COURT**

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