

**Luyombya v Luyombya (Miscellaneous
Application 1271 of 2023) [2024]
UGHCFD 91 (27 September 2024)**
[2024] UGHCFD 91

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Ruling.

Introduction.

- 1. Mariam Luyombya *(herein called 'the applicant'*) sued Luyombya Nasser(herein called *'the respondent'*); seeking orders that: - The Registrar of Titles does cancel the names of Nasser Luyombya from the certificates of title of the land comprised in Kyadondo Block 266, plot 966 at Seguku and Kyadondo Block 269, plot 155 at Lweza ('the lands) and substitute therefor the names of Mariam Luyombya; and that costs of this application be provided for.
- 2. The grounds of the application are in the affidavit deposed by Nkangabwa Juma Ssaki, the applicant's lawful attorney; and briefly that: - by decree of this court, the lands together with the land comprised in Kyadondo Block 269, plot 156 and untitled land at Abayita Ababiri developed with rental apartments (the other land) were found to be matrimonial property and ordered to be shared equally between the applicant and the respondent ('the parties') as per judgement in Divorce Cause No.41 of 2016; by warrant of this court, the bailiff was ordered to distribute the four

lands to the parties; the decreed properties were duly distributed by the bailiff and the applicant shared and accepted the lands while the respondent shared and accepted the other lands and a return duly filed in court;

- 3. The respondent refused to hand over the duplicate certificate of title of the lands and to furnish the applicant with other requirements to enable the applicant transfer the lands into her names; the respondent continues to occupy all the properties and exclusively derive income there from; the respondent's application for stay of execution in the Court of Appeal was rejected and Court of Appeal found that the execution in this court was complete; the respondent has been adjudged by the Court of Appeal to be in contempt of orders of this court by refusing to so handover; the respondent has also defied the order of the Court of Appeal; the applicant has no alternative remedy to enforce the orders of the court and enjoy the fruits of her litigation as it is in interest of justice.
- 4. The respondent filed an affidavit in reply opposing the application because it offends *Lis pendens* rule/doctrine; and the same should be dismissed with costs; it is an abuse of court process and that the applicant has not come with clean hands; that he was never served nor did he participate in the issuance of the warrants of attachment; and has since filed Civil Suit No.310 of 2023 challenging the said warrants of attachment and the suit is ongoing in this court;

- 5. He denies knowledge of any sharing agreement; the applicant has never requested anything from him; whereas his application for stay of execution was dismissed by the Court of Appeal; he has since made a reference against the said ruling to a panel of three justices and the same is pending hearing; the applicant's sale of land comprised in Kyadondo Block 266 plot 966 at Seguku in total disregard of legal process made her hands dirty and therefore estopped from approaching the court of equity.
- 6. In rejoinder the applicant reiterates her averments in the affidavit in support and further asserts that her application is not frivolous, vexatious and bad in law or an abuse of court process and that it does not offend the **Lis pendens** rule; the applicant

is before this court with clean hands desiring that she enjoys the fruits of her litigation by having the two properties she shared under Divorce Cause No.41 of 2016 transferred into her names.

Representation:

- 7. The applicant is represented by counsel Byamugisha Nester of M/s Barya, Byamugisha & Co. Advocates; the respondent is jointly represented by M/s Jamil, Mugalula & Co. Advocates and M/s Crane Associated Advocates.

Preliminary objections:

- 8. I shall first consider Counsel for the respondent preliminary objections to the effect that; the application offends the **lis pendens** rule; and that it is an abuse of court process.

****Whether the application is barred by the law on account of lis pendens rule?****

- 9. Counsel for the respondent cited section 6 of the Civil Procedure Act and the case of **Springs International Hotel Vs. Hotel Diplomate Ltd; HC Civil Suit No.227 of 2011** and **Krone Uganda Limited V. Kerilee Investment Limited (2021) UGCommC 16**; and submitted that; - the matter in issue in the present application is also directly and substantially in issue in the proceedings in the Court of Appeal Civil Appeal No.505 of 2022, Civil Reference N0.12 of 2023; and the legality of warrants of attachment which the applicant purports to derive interests from, are subject of Civil Suit No.310 of 2023. Further, the parties in the present application are the same as those in the pending suits; before courts having jurisdiction to grant the reliefs sought.

Court's determination:

- 10. **Black's Law Dictionary 11th Edition page 1117** defines the term **'lis pendens'* as 'A pending lawsuit.' The **lis pendens** rule is provided for under **Section 6 of the Civil Procedure Act Cap.282** that; **"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit"*

or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed."

- 11. The requirements for the plea of **lis pendens** are: there must be pending litigation; between the same parties or their privies; based on the same cause of action; in respect of the same subject-matter*;* before a court with jurisdiction; but this does not mean the form of relief claimed in both proceedings must be identical. (see: **Schuette v Schuette (HC-MD-CIV-MOT-GEN-2019/00376) [2020] NAHCMD 426**);
- 12. The test applied when determining whether the suit offends the *lis pendens* rule was well laid out in **Springs International Hotel Ltd V Hotel Diplomate Ltd and another; Civil Suit No. 227 of 2011** as: a) **whether the matter(s) in issue in the instant suit are directly and substantially the same as the matters in issue in a previously instituted suit**; b) **whether the parties in the previous suit are directly or substantially the same as in the subsequent suit**; and c) **whether the suit is proceeding or pending in the same or any other court having jurisdiction to grant the reliefs claimed.**
- 13. The applicant herein filed for divorce against the respondent in this court vide **Divorce Cause No.41 of 2016** (**Mariam Luyombya Versus Luyombya Nasser**); concerning matrimonial property which is in contest in the instant application; court ordered that; **"The parties shall share in equal proportions all the properties comprised in Kyadondo Block 269 plot 155 and 156 land at Lweza, Kyadondo Block 266 plot 966 land at Seguku and Kibanja in Abayita Ababiri with rental apartments."** Being dissatisfied with court's findings on matrimonial property, the respondent lodged an appeal to the Court of Appeal vide Civil Appeal No.505 of 2022 (**Luyombya Nasser Vs. Mariam Luyombya**) seeking that the Judgement and the Decree be set aside; the suit be retried on its own merit.
- 14. The respondent further filed **Civil Application No.172 of 2023** (**Luyombya Nasser Vs. Mariam Luyombya**); for stay of execution of decree in Divorce Cause No.41 of 2016 until the disposal of the aforesaid Appeal No.505 of 2022; the application was heard and dismissed by a single Justice; the respondent being dissatisfied with the decision of a single Justice of Court of Appeal, has, through his counsel for the

respondent addressed Registrar of Court of Appeal seeking that the application for stay of execution is referred to a panel of three Justices of appeal under rule 55(1)b of the Judicature (Court of Appeal) Rules.

- 15. Further evidence shows that the respondent has, before this application, filed **HCCS No.310 of 2023** in this court against the applicant herein (**Luyombya Nasser Vs. 1. Muwanga Jackson, 2. Kizza Shakirah and 3. Mariam Luyombya**); contesting the sale of land comprised in Kyadondo Block 266 plot 996 land at Seguku; the said HCCS No.310 of 2023 is still under hearing.

- 16. In **Bellamy v IDeG & J 566** it was held: *"The doctrine of lis pendens intends to prevent not only the defendant from transferring the suit property when litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party..."*
- 17. I have considered the evidence adduced; and I find that the parties herein are the same parties as those in the pending suits to wit; **Civil Appeal No.505 of 2022**, **Civil Reference arising out of Civil Application No.172 of 2023**; the parties also appear in **HCCS No.310 of 2023**. The subject matter in the current application and the pending suits is the matrimony properties as decreed in Divorce Cause No.41 of 2016; the Court of Appeal and this court are endowed with the jurisdiction to determine the issues raised in the pending suits.
- 18. While an appeal is not a stay of execution, an application for stay of execution can not be ignored; in this case the application for stay of execution was dismissed by this court; a subsequent one was also dismissed by a single justice of appeal; the respondent has made reference to a panel of 3 justices of appeal; the application for stay of execution is therefore yet to finish its course.
- 19. That there is a reference to a panel of three justices of appeal has not been denied by the applicant; that the property subject of this application is subject of the appeal and the attendant application for stay is not in question; therefore the issue as to

whether the orders of this court in DC No.41/2016 should be stayed or not, have not been fully exhausted by the Court of Appeal;

- 20. Entertaining the applicant's prayer for cancellation of the names of the respondent from certificates of title of land in Kyadondo Block 266, plot 966 at Seguku and Kyadondo Block 269, plot 155 at Lweza would offend the lis-pendens rule.

The preliminary objection is upheld.

The application is dismissed on account of pendency of stay of execution proceedings before the court of appeal; each party shall bear their own costs.

I so order.

Ketrah Kitariisibwa Katunguka;(Judge). 27/09/2024.

Delivered by email this 27th Day of September 2024, by email to: [baryajadv@yahoo.com] (mailto:baryajadv@yahoo.com)[,mugzjami@gmail.com](mailto:mugzjami@gmail.com)

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