

UGANDA / JUDGMENT

Muhammad Musanje v Kigaba Bukenya Erismus (Miscellaneous Application 72 of 2025) [2025] UGHC 378 (27 May 2025) [2025] UGHC 378

COURT

High Court of Uganda

BEFORE

Godfrey Himbaza, J

CASE / FILE NUMBER

Miscellaneous Application 72 of 2025

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT LUWERO

HCT-17-LD-MA-0072-2025

(Arising from Miscellaneous Appeal no. 0009 of 2024)

(Arising from Misc. Application no. 0265 of 2024)

(Arising from Civil Suit no. 0271 of 2023)

MUHAMMAD MUSANJE (Suing as the Administrator of the Estate of Late Abudala
Kamani Lugunywa) ::::::::::::::::::::::::::::::

VS

KIGABA BUKENYA ERISMUS ::::::::::::::::::::::::::::::

BEFORE HON. JUSTICE GODFREY HIMBAZA**RULING.****Introduction**

- This application was brought by Notice of Motion filed in this court on 4th 1. March, 2025 under section 98 of the Civil Procedure Act Cap 282, section 37 of the Judicature Act Cap 16 and 0.52 rule 1, 2 and 3 of the Civil Procedure Rules SI 71-1. The application sought for orders that;
- The Counterclaim proceedings in HCT-17-LD-CS-0271-2023 be (a) stayed pending the determination of the Applicant's intended appeal.
- The proceedings in HCT-17-MA-0265-2024 be stayed pending the (b) determination of the applicant's intended appeal.
- The orders in HCT-17-LD-ML-0009-2024 be stayed pending (c) determination of the applicant's intended appeal.
- Costs of the application be provided for. (d)

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- 2. The grounds in support of this application are contained in the affidavit of the applicant. The respondent filed an affidavit in reply to the application opposing the application and the orders sought therein.
- 3. When the application came up for hearing on 25th April, 2025, the parties were given schedules for filing written submissions which they did. The same have been considered by the court in this ruling.

Representation

The applicant was represented by Mr. Kituuma Magala from Kituuma - Magala & Co. Advocates whereas the respondent was represented by Mr. Bwire Dennis from M/s Sage Advocates

Background to the application

- 4 The applicant is the administrator of the estate of late Abdalla Kamani Lugumya who is the registered proprietor of the suit land described as Bulemezi Block 490 plot 3 measuring approximately 590 acres situate at Namuningi and Kamira in Luweero District.

- On 29th August, 2023 the Applicant filed Civil Suit No. 0271 of 2023 against the Respondent and the Commissioner Land Registration which was admitted in court on 30th August 2023 at 12:48pm. On 13th September, 2023 and 1st September 2023 the Applicant for some reason, decided to withdraw the suit and filed a Notice of Withdrawal in both Court Registry and on ECCMIS respectively as and against the respondent and the same was admitted and or modified by the learned Deputy Registrar on 18th September, 2023 at 12:51 pm.
- The respondent filed a Written Statement of Defence and Counterclaim on 18th September 2023 at 4:40 pm (after withdrawal of the suit), which was admitted and or modified by the same learned Deputy Registrar on 19th September 2023 at 5:06 PM. On 13th November 2023, the respondent filed Miscellaneous Application no.0330 of 2023 seeking for temporary injunction against the applicant and the then counsel for the applicant raised a preliminary point of Law at its hearing that, the application would not stand because the Counter claim to which it arose was not valid and 6th

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or competently before court having been filed while there was no suit whatsoever against the Respondent pending on the account of the applicant.

- 7. The learned Assistant Registrar summarily overruled the objection and went ahead and set down the counterclaim for hearing and entertained Misc. Application 0330 of 2023 in which he issued an interim order of injunction against the applicant.
- 8. Upon the applicant being dissatisfied with the ruling of the learned Assistant Registrar, he instructed his advocates to file an appeal before this Court vide Misc Appeal no. 0009 of 2024 which was heard by my learned sister Lady Justice Henrietta Wolayo and the same was dismissed with costs.
- 9. On 27th February 2025, the applicant filed a Notice of Appeal to the Court of Appeal vide COA-OO-CV-0146-2025 and later a Memorandum of Appeal. The Applicant has therefore filed this application seeking an order of Stay of proceedings in the Counter claim and an attendant application for contempt of court on the grounds that, he has filed a meritorious appeal which is yet to be determined by the Court of Appeal and that there is a danger of the appeal being rendered nugatory if the counterclaim is left to proceed.

Issues for determination

The issues for determination are;

- I) Whether this application merits grant of an Order of Stay of Proceedings in the Counterclaim and attendant application until the determination of COA-OO-CV-CA-0146-2025 pending at the Court of Appeal.
- II) What remedies are available,

Submissions of the Applicants' Counsel on issue no.1.

10. Counsel for the applicant in his submissions cited Black's Law Dictionary

I, 4th Edition at page 1583 which defines a stay to connote 'stopping' or an 'halt',

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act of arresting a judicial proceeding by order of a Court. He quoted the following text;

"It refers to the temporary suspension of the regular order of proceedings in a cause, by direction or order of the court usually to await the action of one of the parties in regard to some omitted step or some act which the court has required him to perform as relates to the suit."

- 11. Counsel for the applicant further relied on the case of Theodore Ssekikuubo & Ors Vs. Attorney General & Ors. Constitutional Application no. 6 of 2013 Supreme Court (Unreported), where their Lordships, the Justices of the Supreme Court re-stated the principles to be followed while exercising judicial discretion for Court to order a stay of proceedings as follows;
- a) The Applicant must establish that his/her appeal has a likelihood of success or there is a prima facie case that merits consideration by court.
- b) The applicant will suffer irreparable damages or that the appeal will be rendered nugatory if a stay is not granted.
- c) If the court is in doubt, it must consider the case on a balance of convenience
- 12. On whether the Applicant has established a prima facie case or the likelihood of success, Counsel relied on the case of Rashidah Abdul Hanali Vs. Suleimani Adrisi HCMA No. 011 of 2017 where Justice Stephen Mubiru had the occasion to expound on what amounts to a prima facie case as follows;

"What amounts to a prima facie case was explained in Godfrey Sekitoleko & 4 Ors Vs Seezi Peter Mutabazi & 2 Ors; Court of Appeal Civil Appeal No. 65 of 2011 (2001-2008) HCB 80 that what is required is for the court to be satisfied that the claim is not frivolous or vexatious and that there are serious questions to be tried"

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- 13. Counsel contended that in line with paragraph 10 of the applicant's affidavit in support, his appeal is not frivolous nor vexatious. Counsel also referred to the grounds of appeal in his Memorandum of Appeal to prove that the appeal is not frivolous nor vexatious.

- L4. On whether the applicant will suffer irreparable damages or if the appeal shall be rendered nugatory if the stay of proceedings is not granted, he further relied on the case of Theodore Ssekikubo & ors vs. Attorney General & ors (Supra) where the court observed as follows;

"It is trite that where a party is exercising its unrestricted right of Appeal and the Appeal has a likelihood of success, it is the duty of the Court to make such orders as well to prevent the appeal from being rendered nugatory"

- Counsel referred to Paragraph 11 of the affidavit in support where the deponent stated that hearing HCT-17-CS-O271-2023 and HCT-17-LD-MA-O265-2024 before disposing off the current appeal would render the appeal nugatory and would cause irreparable injuries to the applicant. 15.
- On the question of balance of Convenience, counsel for the applicant relied on the case of Timothy Alvin Kahoho and the Secretary General of the East African Community, Application no. 5 of 2012 (Arising from reference no. L of 2012), in which the Justices of the East African Court of Justice stated as follows; 16

"Balance of convenience means the prejudice to the applicant if the injunction or the stay is refused as weighed against the prejudice to the Respondent if the order is granted"

Counsel averred that it was not in dispute that the applicant is the Administrator of the estate of the late Abdallah Kamani Lugumya who was/ is the rightful owner and registered proprietor of the suit land described as Bulemezi Block 490 plot 3 situate at Namuningi and Kamira in Luwero District. Further that the applicant is in possession of the suit land with a number of bibanja holders as can be seen in paragraph 12 of his affidavit in support. 17. W,P

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- 18. Counsel relied on the case of Lydia Katahigwa Vs Eunice Atuhairu, Court of Appeal Civil Application no. 649 of 2022 in which Justice Kihika stated that to make a proper decision whether the balance of convenience favours the Applicant or not, court must weigh the loss or exposure of risk that the applicant faces in the event that the orders are denied and the damage which could be suffered if it is not granted.
- 19. Counsel submitted that the applicant's property comprised in Bulemezi Block 490 Plot 3 shall be subjected to the estranged Counterclaim exposing the applicant to high risks together with the bibanja holders who have permanent structures and use the land for their survival hence the balance of convenience is in their favour.

Submissions of the Respondent on issue no. I

- 20. The respondent in his submissions objected to the application firstly on the ground that the applicant did not have an automatic right of appeal to file his appeal to the Court of Appeal. Counsel opined that the issue for determination by this honourable court is whether the applicant has a right of appeal and if so whether this is a proper case for grant of a stay of proceedings.
- Counsel cited O.44 Civil Procedure Rules which provides for orders that are appealable as of right and that the said orders do not include a dismissal of an appeal arising from a preliminary objection ruling of the Assistant Registrar in an interim order application. 21.
- Counsel further submitted that court had previously stayed the proceedings in HCCS No. 0271 of 2023 and Misc. Application no 0265 of 2024 by its order dated 19th November 2024 vide Misc. Application no. 220 of 2024, therefore the same Court cannot grant a second order of stay of proceedings as this will contravene the principle and doctrine of res judicata. Counsel cited section 7 of the Civil Procedure Act in support of his argument. 22.

On the issue of whether the applicant has a prima facie appeal with a likelihood of success counsel argued that since the appeal was filed 23. 'tila' SIPage

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without leave of Court, then there cannot be a prima facie case. Counsel further argued that filing of the instant application by the applicant amounts to an abuse of court process. He argued that the appeal is frivolous and an attempt to delay the disposal of the main suit.

Resolution of preliminary points of law,

24. Before delving into this application, I shall first address the points of law raised by the respondents in his submissions, to wit;

a) The application is res Judicata as it was already filed and determined before this honourable court

25. Section 7 of the Civil Procedure Act provides as follows;

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try the subsequent suit or the suit in which the issue has been subsequently and has been heard and finally decided by that court (emphasis mine)"

26. The respondent in his submissions conceded that the applicant had initially sought for a stay of proceedings before Hon. Lady Justice Henrietta Wolayo, which lapsed upon dismissal of Miscellaneous Appeal no. 0009 of 2024. The question to determine here is whether the previous grant of stay of proceedings before Hon. Lady Justice Henrietta Wolayo is a bar to

the applicant, to apply for stay of proceedings again. My view is that the learned lady Justice granted a stay of proceedings vide Misc Application no.220 of 2024 pending the determination of Misc. Appeal no. 0009 of 2024. When she dismissed the appeal, the order of stay of Proceedings lapsed. Once the applicant decided to lodge an appeal against the dismissal of the appeal by Hon Justice Wolayo, as a second appeal to the Court of Appeal, it gave the applicant a fresh right to apply for stay of proceedings pending the determination of the appeal in the Court of Appeal. ll,,@

- 27. It is therefore my considered view that section 7 of the Civil Procedure Act does not apply in the instant case as there was no finality in the decision of the court. The order of stay was only valid as long as the appeal subsisted in court. Once the appeal was dismissed, the order effectively lapsed. Accordingly, I do not find merit in the above point of law.
- bl There is no competent appeal because the applicant did not seek leave to appeal to the Court of Appeal since there is no automatic right of appeal.
- 28. Appeals to the Court of Appeal are governed under the Judicature (Court of Appeal Rules) Directions. Rule 76 (1) of the said rules provides as follows;

"Any person who desires to appeal to the Court of Appeal shall give notice in writing which shall be lodged in duplicate with the Registrar of the High Court".

- 29 An appeal is a creature of statute, therefore where there is no automatic right of appeal provided for under the Law, a party is supposed to apply for leave to appeal. See Shah Vs Attorney General. The respondent in his arguments contends that the instant appeal is invalid and or incompetent, for failure to seek leave to file the same since it is an appeal against an order that is not envisaged under O.44 of the Civil Procedure Rules which provides for orders that are appealable as of right.
- Counsel for the applicant on the other hand submits that the appeal is competent since it is against the orders of Hon. Justice Wolayo, which was final. In his submissions counsel averred as follows; 30.

"...as a matter of law we submit that there was no reason for the applicant to seek leave to appeal because the order as delivered on 20th February 2025 was a final order which extinguished the rights of the applicant as against the respondent especially after the withdrawal of the suit against him".

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- 31. The issue that is posed before me is whether the appeal that was filed by the applicant in the Court of Appeal vide COA-OO-CV-CA-O146-2025 is incompetent for failure to seek leave to appeal. In my view, this is an issue that is not within the mandate of this honourable court to

determine but rather within the mandate of the Court of Appeal itself since it touches on the competence of the Applicant's appeal. In fact, the Judicature (Court of Appeal Rules) directions give the respondent an opportunity under Rule 82 to apply to strike out the Notice of Appeal on grounds that the appeal is not competently before the Court. An attempt by this honourable court to resolve that issue would therefore be tantamount to usurping the powers of the Court of Appeal which would be setting a very dangerous precedent. I accordingly overrule the above point of law.

Resolution of the main issues;

- 1) Whether this application merits grant of an Order of Stay of Proceedings in the Counterclaim and attendant application until the determination of COA-OO-CV-CA-0146-2025 pending at the Court of Appeal.
- 32. In resolving this issue, I shall determine whether the applicant's application has fulfilled the conditions that were set out by the Supreme Court in the case of Theodore Ssekikuubo & Ors Vs Attorney General & ors (supra) which were stated as follows;
 - a) The Applicant must establish that his/her appeal has a likelihood of success or there is a prima facie case in his or her appeal.
 - b) The applicant will suffer irreparable damages or that the appeal will be rendered nugatory if a stay is not granted.
 - c) If Court is in doubt, it must consider the case on a balance of convenience.
- 33. The applicant's grounds of appeal in the Court of Appeal are stated as follows;

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- \$a)\$ The learned Appellate Judge erred in Law when she found that non service of the defendant/respondent with the Notice of Withdrawal of the suit rendered the Counterclaim competent/valid.
- Having held that the suit stands withdrawn on the date the notice of \$\mathbf{b}\$ withdrawal is filed, the learned appellate judge erred in Law when she held that the Plaintiff had to effect service of the Notice on the Defendant
- The learned appellate judge erred in law when he held that service of \$c)\$ the Notice of Withdrawal of a suit electronically via ECCMIS is not sufficient unless done in compliance with O.5 CPR.

Prima facie case/appeal with a probability of Success \$a)\$

- 34. By Prima facie case that has a high probability of success, it means that the applicant must prove to court that his or her appeal is not frivolous or vexatious. It does not mean that the applicant must prove that he or she has a good appeal on the merits at this stage. The court is not bound to prove the grounds of appeal as that role is only for the appellate court.
- 35. Under paragraph 7 of the applicant's affidavit in support, the applicant states as follows;
 - "7. THAT my lawyers have filed a Notice of Appeal and also written a *letter requesting for a typed and certified record of proceedings plus* the ruling (Copies of the Notice of Appeal and letter are attached and marked Annexure C1 and C2 respectively)."
- 36. In my view, the main issue for determination by the Court of Appeal is 'whether a *Notice of Withdrawal* becomes effective upon being endorsed by *court or upon being served onto the opposite party.* 'I find that this is a very serious question that merits determination by the Court of Appeal. It is also my considered view, that the Court of Appeal shall provide guidance on the issue of service of court documents which have been filed on ECCMIS. I have noted that the Counterclaim was filed on 18th September 2023 at 4:40 pm, after the Notice of Withdrawal was filed and endorsed by

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court. Does it mean the respondent did not see the Notice of withdrawal before filing the Counterclaim?

- 37. Even though the respondent may not have seen the Notice of Withdrawal on the day he filed the Counterclaim, there was an option to withdraw the Counterclaim at the time the respondent became aware that the applicant had withdrawn the suit. This would not attract costs against him nor would it prejudice his right to file the counterclaim in form of a fresh suit as the Counterclaim is a distinct suit on its own.
- 38. In the case of Ugaada Revenue Authority Vs John Imaniraguha HCMA No. 860 of 2023- Justice Richard Wejuli cited the Halabury's Laws of England 4th Edition at page 437 as follows;

"A stay of proceedings arises under an order of the court which puts the stop or stay on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the action taking place, where the court thinks it is just and convenient to make the order to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of Court process. The order is made generally in the exercise of the Court's discretionary jurisdiction and by way of summary process, that is without a trial on the substantive merits of the case and at any rate in the exercise of its inherent jurisdiction, an order for stay of proceedings is made very sparingly and only in exceptional circumstances. "

- 39. The import is that the granting of a stay of proceedings is a discretionary power vested in the court. It operates within the Court's discretionary jurisdiction.
- 40. Ordinarily, a withdrawal of a suit does not affect a counterclaim because they are two separate suits. The exceptional circumstance in the instant 'rtg case however, is the fact that the counterclaim was filed after the suit had 11 lPage

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been withdrawn. To me, the counterclaim cannot stand in the circumstances without a main suit.

- 41. Having looked at the grounds of appeal and the questions that the applicant seeks the Court of Appeal to determine, I have no scintilla of doubt in my mind that the appeal does not pass off as a frivolous and vexatious appeal. I therefore find, that the applicant has satisfied the first requirement that he must prove a prima facie case with a likelihood of SUCCESS
- bl The second ground to prove is irreparable damage or that the appeal shall be rendered nugatory.
- 42. Counsel for the applicant relied on the case of Theodore Ssekikuubo & anor. Vs. Attorney General & Ors (Supraf where the Supreme Court had this to say;
- "It is trite that where a party is exercising its unrestricted right of appeal, and the appeal has a likelihood of success, it is the duty of the court to make such orders as well to prevent the appeal if successful from being rendered nugatory."
- 43. Counsel for the applicant averred that under paragraph 11 of the affidavit in support, that hearing HCT-17-CS-0271-2023 and HCT-17-LD-MA-0265-2024 before disposing off the current application would render the pending appeal nugatory.
- 44. The respondent on the other hand submitted to the contrary on the issue of irreparable damage. He averred that the respondent is the one that is likely to suffer irreparable damages given that the applicant and his agents have acted lawlessly by beating up the respondents' workers, killing the respondents' animals and that these complaints are all over in several letters on record. He concluded that the respondent is instead likely to suffer irreparable damage if the counter claim and the applications are stayed.

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- 45 According to Black's Law Dictionary 9th Editlon irreparable damage is defined as damage that cannot be easily ascertained because there is no fixed pecuniary standard measurement.

- 46. I have looked at the nature of the Counterclaim and the application that the applicant seeks to be stayed. I have also considered the arguments of the respondent that the applicants' agents are beating up his workmen and killing his animals. I note that Misc Application 0265 -2024 which is an application for contempt of court arises from HCT- 17-LD-CS-027 1- 2023 which, the applicant is seeking to stay. I have also looked at the application for contempt of court and I have not seen in the application and the affidavit in support, where the respondent states that the applicant and his agents have been cutting his animals and beating up his workers. All the application states, is that the applicant herein has been planting eucalyptus trees in the suit land.
- 47 As I already stated earlier, the applicant has decided to pursue his unrestricted right of appeal against the ruling of Hon. Lady Justice Henrietta Wolayo. It is my considered view that continuing to hear and entertain the Counterclaim and the application for contempt of court orders would render the appeal nugatory if the applicant emerged successful in the Court of Appeal. The respondent can still seek for reliefs from the Court of Appeal in the exercise of its appellate jurisdiction. For the reasons given above, I find that the applicant has also proved the ground on irreparable damage and the likelihood of the appeal being rendered nugatory.

Balance of convenience

The applicant relied on the East African Case of Timothy Alvin Kahoho Vs The Secretary General of the East African Community Application no. 5 of 2012, in which it was held that the balance of convenience means the prejudice to the applicant if the injunction is refused weighed against the prejudice to the respondents if the order is granted. 4B

Findings

- 49. Counsel argued that the applicant is the Administrator of the estate of late Abdallah Kamani Lugumya who was the rightful owner and registered proprietor of the suit land described as Bulemezi Block 490 Plot 3 situated at Namuningi and Kamira in Luwero District. That he is in possession with a number of bibanja holders as per paragraph 12 of the applicant's affidavit in support.
- 50. In response, the respondent also claims to be in possession of the land but did not controvert the applicant's claim that he is the registered owner of the suit land. Having found that the applicant is the registered owner of the land in dispute, it would only be fair that his appeal be heard before determination of the counterclaim. I accordingly find that the balance of convenience leans in favour of the applicant.

Issue no 2: What remedies are available.

- 51. In light of the above findings, this application hereby succeeds with the following orders;

- a) The Counterclaim proceedings in HCT-17-LD-CS-O271-2023 are hereby stayed pending the determination of the Applicant's intended appeal.
- b) The proceedings in HCT-17-MA-O265-2024 are hereby stayed pending the determination of the applicant's intended appeal.
- c) The orders in HCT-17-LD-ML-0009-2024 are hereby stayed pending determination of the applicant's intended appeal.
- d) Each party shall bear its own costs.

I so Order Date IS of MAY2025 GO Ag. E

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Prepared on 13 October 2026 · Esheria