

UGANDA / JUDGMENT

Mukaaya v Ssekamwa (Civil Application 1146 of 2023) [2024] UGCA 240 (2 May 2024)

[2024] UGCA 240

COURT

Court of Appeal of Uganda

BEFORE

Monica K. Mugenyi, JA

CASE / FILE NUMBER

Civil Application 1146 of 2023

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THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Monica K. Mugenyi, JA, sitting as a Single Judge)

CIVIL APPLICATION NO. 1146 OF 2023

(Arising from Civil Application No. 1139 of 2023 & Civil Appeal No. 1131 of 2023)

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MUKAAYA WILLIAM

APPLICANT

VERSUS

SSEKAMWA SANDE

 $\overline{1}$ **RULING****A. Introduction**

- 1. This Application was brought under Rules 2(2) 6(2)(b) and 43 of the Judicature (Court of Appeal Rules) Directions S.l 13-10 ('the Court of Appeal Rutes'), and section 98 of the Civil Procedure Act. The Applicant seeks an interim order restraining the Respondent and his agents, employees, assignees or persons claiming or deriving authority therefrom from selling, transferring, distributing, transacting or in any way dealing with the property comprised in Busiro Block 40 Plot 50 at Lutisi, Namayumba town council in Wakiso district

('the suit land') until the determination of the substantive application for a temporary injunction, Clvl Application No. 1139 of 2023, that is pending before the Court.

- 2. The Application is supported by an affidavit deposed by the Applicant and lodged in this Court on 30th October 2023, in which the Applicant claims that the suit land is in imminent danger of sale to third parties yet it bears his seasonal crops from which he derives sustenance and therefore if the application is not granted he stands to suffer irreparable damage.
- 3. The Application is opposed by the Respondent who relies on an affidavit of reply deposed by himself and another affidavit deposed by Mr. Godfrey Tamale, both of which were lodged in the Court on 16th November 2023. The Respondent avers that he was never served with a Notice of Appeal in this matter and the Applicant ceased to be in possession of the suit land on 2nd May 2023, hence the status quo has since changed. On the other hand, Mr. Tamale avers that the Applicant has his share of land in Busiro block 40 Plot 50 in respect of which he is the registered proprietor; was evicted from the suit land on 4th May 2023, and his only intention is to deprive his sisters of their share in their father's estate.
- 4 In an affidavit in rejoinder deposed on 29th November 2023, the Applicant maintains that the Notice of Appeal was served on the Respondent; he (the Applicant) is still in occupation and use of the land, and the persons stated to be in possession by

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the Respondent have never occupied the land as any attempts at occupation have been successfully repulsed.

- 5. At the hearing of this Application, the Respondent was represented by Mr. Aggrey Bwire, while no appearances were registered for the Applicant.

B. Parties' Legal Arguments

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- 6. Learned Counsel for the Applicant cites the parameters for the grant of temporary injunctions as laid down in *Ghill Arlassman Brwn & Co Ltd (1973) EA 358* to argue that insofar as temporary injunctions seek to preserve the status quo, the Applicant's occupation of the suit land should be maintained. In his view, the balance of convenience lies with the Applicant yet the suit land is in imminent threat of excavation, sale and distribution by the Respondent. It is further argued that there is a pending appeal in this Court with a high likelihood of success, and given that the Applicant cultivates seasonal crops on the land from which he derives income, he stands to suffer irreparable damage if this Application is not granted.

- 7. Conversely, learned Respondent Counsel contends that there is no competent appeal as the Notice of Appeal relied on by the Applicant offends rule 76(5) of the Court of Appeal Rules given that it was never served on the Respondent. Counsel further argues that the status quo of the property changed and cannot be preserved as the correct beneficiaries thereof had not only taken physical possession of the land but had since sold it to a third party, Mr. Ronald Mutesasira. Furthermore, it is proposed that the requirements for the grant of a temporary injunction have not been satisfied as no memorandum of appeal or ruling was attached to the Application to enable this Court assess whether a prima facie case has been established and, since the suit property has already been alienated, a grant of the orders sought would condemn third parties unheard.
- B. By way of rejoinder, it is argued that the Notice of Appeal was duly served on the Respondent through the Local Council Chairman as his lawyers declined to receive it. It is further argued that the Notice of Appeal does not offend rule 76(5) of the Court's Rules and, in any case, the Respondent does not illustrate how he was prejudiced by the inclusion of the term 'civil appeal' for purposes of securing an

Appeal Number. This is opined to be a mere technicality that is devoid of merit and should be ignored.

9. The Applicant refutes the Respondent's claim that he was removed from the suit land, denies any change in the status quo and implores Court to make a locus in quo visit to best answer who is in possession and utilisation of the suit land. He asserts that the grant of a temporary injunction by the High Court on 4th July 2023 vide Miscellaneous Application No. ¹ 33 of 2023 that was granted is proof that the Respondent's claims that he lost possession on 4th May 2023 are baseless and misleading. He reiterates that the application establishes a prima facie case with a probability of success, ineparable harm will be suffered which cannot be compensated by damages and the balance of convenience lies in his favour as the person in occupation of the suit land.

C. Court's determination

10. In terms of the points of law raised by the Respondent, having carefully considered the pleadings on record, it becomes apparent that the Notice of Appeal in this matter does offend Rule 76(5) of the Court of Appeal Rules insofar as it cites the Civil Appeal registration number and parties rather than the particulars of the suit that is the subject of appeal. In *Herbert Semakula Musoke & Anor vs Lawrence Nabamba & 2 Others*. Civil Application No. 22 of 2019 (SC) such a Notice of Appeal was adjudged to be fatally incompetent. It was held

> We find also that the Respondents' Notice of Appeal offended Rule 72(5) of the Rules of this Court as it was not in conformity with the First Schedule to the Rules. Form D in that schedule requires the heading to be as in proceedings appealed from. Properly it should have reflected the Court of Appeal and not the Supreme Court. We do not accept the submissions of the Respondents that that was a typographic error and that as such not fatal. Rule 76(5) of the Rules states:

- (5) A Notice of Appeal shall be substantially in Form D in the First Schedule to these rules and shall be signed by or on behalf of the appellant. Our underlining for emphasis.

Cleady the above rule is couched in mandatory terms and failure to comply with it impairs the competence of the Notice of Appeal.

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11. To compound matters, the impugned Notice of Appeal was not properly served on the Respondent. There is no affidavit of service on record that lays out the basis for recourse to service upon the Local Council Chairperson or proof of such service at all. The foregoing procedural points of law would dispose of this Application but for completeness, I shall address the merit thereof.

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- 12.1 am constrained to observe forthwith that this being an application for interim orders, I am not at liberty to interrogate the merits of either the substantive application that is pending determination by the fully constituted Court or the issues for determination on Appeal that have been alluded to by both parties.
- 13. The grant of interim injunctive reliefs is governed by Rule 2(2) of the Court of Appeal Rules. That procedural rule recognizes this Court's inherent power to 'make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court ... and shall be exercised to prevent abuse of the process of any court caused by delay.¹ In <u>Theodore Ssekikubo</u> & 2 Others v Attorney General & 4 Others, Constitutional Application No. 4 of 2014 the preservation of parties' right of appeal was adjudged by the Supreme Court to speak to the ends of justice. In that case, the court did also allude to the role of interim orders in preserving the status quo so as to allow for the determination of the issues in contention between the parties by the full court. See also Uganda Revenue Authority v Nsubuga Guster & Another, Miscellaneous Application No. 16 of 2018 on the preservation of parties' right of appeal as an end of justice.

- 14. Additionally, it is now trite law that for an application for interim orders of stay of execution to succeed there must be substantive application for the same relief in respect of a pending Appeal, as well as imminent threat of execution of the lower court's orders before the determination of the substantive application. The existence of a Notice of Appeal filed in accordance with the applicable rules of procedure is a sine qua non. See *Patrick Kaumba Wiltshire v Ismail Dabule*, Civil Application No. 3 of 2018 (SC) and *Theodore Ssekikubo & 2 Others v The Attorney General & 4 Others* (supra).
- 15. The circumstances of the present Application are that there is a pending substantive application – *Civil Application No. 1139 of 2023*. However, the Notice of Appeal filed in this Court on the 24th of October 2023 has been adjudged to be incompetent. Even if this procedural gaffe on the part of the Applicant was to be considered to be of no prejudice to the Respondent, there is the question as to whether there is in fact any imminent threat of alienation of the land.

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- 16. In paragraph 5 of his affidavit, the Applicant avers that he is in physical possession and utilisation of the land and has his residential home on it, and produces photographic evidence to that effect. He does also adduce a letter of eviction as supposed proof of imminent danger of alienation from the suit land. That letter does confirm that as at 12th October 2023, the Applicant was still in occupation of the suit land, rebutting the Respondent's assertions to the contrary.
- 17.1 am alive to the decision in **Gladys Mukula v Rosemary Nabukenya** (Administratrix of the Estate of the Late Maria Lwiza Nalongo Nanyonga), Miscellaneous Application No. 211 of 2020 where an interim injunction was issued solely to avert the possible transfer of the suit property to third parties thus alienating it before the determination of the pending Appeal. Similarly in *Patrick Kaumba Wiltshire v Ismail Dabule* (supra), an interim order was adjudged to be necessary to 'preserve the status quo until the substantive application for a temporary injunction is heard and determined.'
- 18. In this case, however, the suit property has already been alienated to a third party therefore it would be superfluous to issue any interim orders that seek to preserve the Applicant's alleged interest in the land. The status quo ante has already changed and courts do not issue orders in vain.

D. Conclusion

- 19. In the result, for the foregoing reasons, I am regretfully unable to grant the prayers sought and would hereby dismiss this Application. Each party shall bear its own costs.

It is so ordered.

Civil Application No.1146 of 2023

Dated and delivered this . D. $\mathbb{L}$ day of

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*Monica K. Mugenyi **Justice of Appeal**

This judgment was signed before this judge ceased to hold that office.

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Prepared on 14 October 2026 · Esheria