

Muluta v Kalungi (Civil Application 483 of 2024) [2025] UGCA 17 (30 January 2025)

[2025] UGCA 17

BEFORE
Cheborion-Barishaki, JA, Gashirabake, JA, Asa
Mugenyi, JA/JCC

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disposal of the Applicant's appeal against the said judgment and decree of this court

- 2. If at the time of hearing this application the execution of the decree in Civil Appeal No. 314 of 2020 is already effected, a temporary injunction order restraining the respondent, its agents, servants and or persons claiming from it from alienating the suit land to any third party until the determination of the applicant's appeal to the Supreme Court.
- 3. Costs of this application be provided for
- [2] The application is premised on the grounds set out in the notice of motion and the supporting affidavit of Muluta Wilson William. The gist of which is that:
 - (a) The Applicant filed a notice of appeal challenging the Decree and orders in Civil Appeal No. 0314 of 2020.
 - (b) That there is an imminent danger and threat of execution since the decree is self-executing and therefore capable of being executed by the Commissioner Land Registration upon being served with the decree.
 - (c) The order of stay of execution being sought is intended to safeguard the Applicant's right of appeal.

[3] The respondent deposed an affidavit in reply sworn by Dr. Mumtaz Kassam, opposing the application on grounds that:

- (a) The application is moot since the decree of this court has already been enforced by the respondent and Commissioner Land Registration who has cancelled the titles as ordered by court.

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- (b) That the application lacks merit and has not met the conditions for grant of an application for stay.

[4] At the hearing of this application, the parties agreed to rely on their written submissions. Court allowed them to make oral highlights.

Representation

[5] At the hearing of the application, Mr. Nestor Byamugisha represented the Applicant. The respondent was represented by Mr. Barnabas Lumusingize and Allan Waniala. The parties filed written submissions.

Background

The Respondent filed Civil Suit No. 671 of 2014 before the High court against the Applicant and 8 other respondents. The suit was for recovery of land situated at Kalungu in Luwero District. The Respondent averred that it held a Certificate of Title for the suit land described as Freehold Volume 2 Folio 8 known as Kalungu Estate and was registered on the said Certificate of Title on 1st April, 1968. That in 2013 the Commissioner for land registration issued another Certificate of Title for the suit land and was described as Bulemezi Block 15 Plot 96 and 97. The Administrator General was indicated as the registered proprietor of the Mailo title.

17) The trial of the suit was handled by Bashaija J who dismissed the Respondent's suit with costs and also ordered cancellation of the Respondent's Freehold title.

18) The Respondent was dissatisfied with the decision of the learned Judge and appealed to this court vide Civil Appeal No. 314 of 2020 and the judgment of the High Court was set aside on the 15th August, 2024 with orders that:

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- a) The certificate of title describing the suit land as Freehold Register Volume 2 Folio 8 and known as Kalungu Estate is valid.
- b) The Mailo certificate of title describing the land as Bulemezi Block 15 Plots 96 and 97 initially registered in the names of the Administrator General and respective titles arising from subdivisions therefrom are set aside
- c) The Respondent shall pay the Appellants costs in this court and in the court below.

19) The Applicant aggrieved with the decision and orders of this court intends to appeal to the Supreme Court and now seeks to stay the execution of the decree pending the determination of his appeal to the Supreme Court.

Submissions for the Applicant

[0] In resolving this application counsel discussed the principles governing the granting of stay of execution namely;

> 1. The Applicant must establish that his appeal has a likelihood of success; or a prima facie case of his right of appeal.

> 2. The Applicant will suffer irreparable damage or the intended appeal will be rendered nugatory if a stay is not granted.

> 3. If 1 and 2 above have not been established, the Court must consider where the balance of convenience lies.

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4. The Applicant must also establish that the application was instituted without delay.

It is Counsel for the applicant who raised the issue for determination by this court as whether this application meets these principles.

- It was submitted for the Applicant that:
- 1. The notice of Appeal was filed on the 16/08/2024 through ECCCMIS following the delivery of the judgment on the 15/08/2024 and that therefore, the condition of the existence of the Notice of Appeal had been fulfilled.
- 2. The application was filed without delay since the judgment was delivered on 15/08/2024 and the Notice of Appeal was lodged promptly on 16/08/2024.
- 3. Counsel for the applicant submitted that the appeal has a high likelihood of success. It was submitted that the memorandum of appeal containing the proposed grounds of appeal and that the said grounds in the draft memorandum show that the intended appeal is not frivolous. It was further submitted that the grounds in the draft memorandum show that the appeal raises issues that merit consideration by the Supreme Court.
- 4. It was argued that the Applicant will suffer irreparable damage and the appeal will be rendered nugatory if stay is not granted. Counsel for the Applicant submitted that the orders of the court that the applicant intends to appeal are self-executing and that the Commissioner for land registration only requires to be served with the extracted decree and he will effect the cancellation of the mailo title comprised in Bulemezi Block 15 Plot 96 and

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97 by a stroke of a pen. Counsel also submitted that if the stay is not granted, the applicant will be dispossessed and liable to immediate eviction.

5. On security for due performance, counsel for the Applicant submitted that although the applicant expressed willingness to pay security for costs this court should decline to order deposit of security for costs.

Submissions of the Respondent

[13] On the other hand, counsel for the Respondent opposed the applicant's application and the submissions in support.

It was submitted that the Applicant's proposed grounds of Appeal have no merit

[14] It was submitted for the Respondent that court must balance the interest of the judgment creditor to enjoy the benefits of his or her litigation and the appellant(s) right to appeal. Counsel relied on the case of *Wilson Mukiibi V James Ssemusamba*, Civil Application No. 9 of 2003 to back his argument.

[5] It was submitted by the Respondent that the Applicant is not in possession of any part of the suit land. On the contrary, the Respondent is in full possession of the suit property. That possession is vested in the Respondent as the holder of the Freehold Certificate of Title and to this end, the Applicant has not showed any legal right to prove irreparable damage through eviction from the suit property as he alleges.

[6] It was also submitted that the applicant has not demonstrated on record that he has any interest in the suit having pleaded in his defence in the lower court that the suit land had already been subdivided.

[7] Counsel for the Respondent submitted that the present application is moot because the orders of court of appeal in Civil Appeal No. 03 14 of 2020 are self-

executing and have already been executed in accordance with the orders of court and incapable of being stayed.

Decision of court

[8] We have carefully perused the submissions of both parties.

Rule 6(2) (b) of the Rules of this court provides for the power of this court to grant orders for stay of execution and states that;

"2. Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or stay of execution but the court may;

b) In any civil proceedings where a notice of appeal has been lodged in accordance with Rule 76 of these Rules, order a stay of execution... ..on such terms as the court may think just"

[9] Therefore, the above Rules of this court empower this Court in Civil Procedure where a Notice of Appeal has been lodged per Rule 76 of the Rules of this court to grant a stay of execution on the terms it deems fit.

[20] It is also a settled principle that granting a stay of execution is discretionary and like judicial discretion, it must be exercised on well-established principles.

[21] The Supreme Court has in several cases laid down the principles governing the exercise of this discretion. (See *Hon. Theodore Ssekikubo & 3 ors V Attorney General & 4 ors* CA no. 06 of 2014) as hereunder;

- 1. That the applicant must establish that his appeal has a high likelihood of success or a prima facie case of his right to appeal.
- 2. That the applicant will suffer irreparable damages if the stay is not granted.
- 3. That the balance of convenience is in favor of the Applicant.

[22] The first condition the applicant had to prove before this court is likelihood of success of the appeal. It is trite that wherever a party to a suit is exercising its unrestricted right of appeal, it is the duty of this court to make such orders that will prevent the appeal if successful from being obligatory.

[23] Instantly, Counsel for the applicant submitted that the appellant intends to argue that court relied heavily on additional evidence for the first time on appeal to find in favour of the Respondent without evaluating it and that the court did not consider the issue of conflict of interest of the Commission for Land Registration adduced the additional evidence. Secondly that the respondent did not win on all grounds of appeal but was awarded full costs.

[24] On the other hand, Counsel for the Respondent opposed these arguments and stated that the appeal is devoid of merit and raises no substantial grounds of appeal.

[25] Upon perusal of the Memorandum of appeal, this court notes that the court in the hearing of Civil Appeal No. 314 of 2020 granted an application by the Respondent to adduce additional evidence and the evidence was adduced by the Principal Registrar of titles upon which the Applicant was allowed to cross examine the witness.

[26] This court exceptionally allowed the Applicant to cross examine the witness through whom the additional evidence was presented to court. Therefore, I find that the contention by Counsel for the applicant that the evidence was not evaluated is false and unsubstantiated since the evidence was properly put on court record and evaluated before the decision was rendered.

[27] Counsel for the Applicant argued further that the Respondent will tax its costs on the basis of the order yet the same is subject of the appeal. I have perused the record and I find no proof that the respondent has already filed their bill of costs and even if they did the orders sought intend to slay the cancellation of Mortgage interests. It

is my

considered view that court cannot slay execution of a decree merely because the applicant wishes to appeal on the grant of costs.

[28] Considering the foregoing, this court determines that the draft memorandum of appeal does not raise any triable issue with a high likelihood of success and the applicant did not demonstrate how likely it is to grant this application will render the appeal nugatory.

2. The second consideration before granting the application for stay is whether the applicant will suffer irreparable damages if the stay is not granted.

[29] Both counsel submitted that the orders of Court the applicant intends to appeal are self-executing.

[30] Counsel for the Applicant argues that the Commissioner Land Registration only requires to be served with the extracted decree and he will affect the cancellation of the title for the Applicant's plot 96 and 97 which will dispose the applicant who will become liable to immediate eviction.

[31] On the other hand, Counsel for the Respondent submitted that the applicant is not in possession of the suit property. He did not demonstrate that he is in possession either and will suffer any substantial loss or irreparable damage.

[32] In consideration of the above, I agree with Counsel for the Respondent. The Applicant has not demonstrated which portion of the suit land he would seek a stay. Court orders cannot be used as a makeshift expedient. The applicant has not furnished evidence of the portion of land whose certificate of title has not been cancelled for court to consider granting a stay of order.

[33] Applying the law to the facts before this court, I find that the Applicant is not under any threat of eviction from the suit land as he does not demonstrate possession of any part of the suit property.

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[34] As to the third condition, the respondent contended that the balance of convenience is in favour of the Respondent since he possesses the valid title.

[35] It was argued by the Respondent's counsel that this application has been overtaken by events since the cancellation and deactivation in execution of the decree has already been effected on 19th September, 2024. This was conceded by counsel for the Applicant that the Decree of this court is self-executing and according to the evidence on court record, the Commissioner for Land Registration was served with the said decree and the cancellation of the mailo title(s) was effected as was admitted by counsel for the Applicant.

[36] It was submitted for the applicant that since hereas the cancellations have been effected by the Commissioner for land registration, the title(s) for the entire land had not been cancelled. However, we note that the Applicant has not assisted this court in adducing evidence of the portion of the land whose titles have not been cancelled.

[37] We find no dispute about the cancellation and deactivation of the Mailo Certificate of Title having been effected in execution of the decree of this court. Even if this court was to grant this application, it would still be constrained because the applicant has not demonstrated nor presented any evidence to show which portion of the land the stay would be effected upon.

[38] Accordingly, the balance of convenience favours the Respondent who has the valid Certificate of Title. It is trite law that Court Orders cannot operate in *a vacuo*.

[39] The application to injunct the alienation of the Mailo interest is redundant as this court already ruled that there was no valid Mailo interest. The court cannot grant an injunction or stay an interest in land that it has already deemed not to exist in the first place. To do so would be to deterrnine appcal intended for the Supreme Court or reverse its own decision on the validity ol-the rnailo interest.

Orders

[40] The applicant has not satisfied the conditions for grant of stay of execution and the application is hereby dismissed with costs to the Respondent.

We so order.

delivered signed at Kampala this Dated, and .day of ...2025. \$amuq\$ \$\overline{\mathcal{X}}\$
Cheborion Barishaki JUSTICE OF APPEAL Christopher Gashirabake JUSTICE OF APPEAL
Dr. Asa Muge JUSTICE OF APPEAL

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