

UGANDA / JUDGMENT

Muyingo v Ssempijja & Another (Civil Application 291 of 2023) [2025] UGCA 62 (5 March 2025) [2025] UGCA 62

COURT

Court of Appeal of Uganda

BEFORE

Obura, JA

CASE / FILE NUMBER

Civil Application 291 of 2023

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
civl APPLICATION NO. 291 OF 2023 (ARTSTNG FROM CrVrL APPEAL NO. 189 OF
201e)

,t

EDIRISA MUYINGO

VERSUS

- 1. ISMAEL SSEMPIJJA
- 2. MBUGA FRANCIS RESPONDENTS

BEFORE: HON. LADY JUSTICE HELLEN OBURA, JA

RULING OF THE COURT

15 This application was brought by Notice of Motion under Rules 6 (2) (b), 42 and 43 of the
Judicature (Court of Appeal Rules) Directions SI 13-10 (Rules of this Court). The applicant seeks:

1. An order dofh rssue staying the orders and or the effects of the orders of the High Court in
HCT-0&CV-CA-No 0078 OF 2017; Edirisa Muyingo vs /smae/ Ssempijja and another, pending
disposa/ of Civil Appeal No. 189 of 2019 which is pending hearing and disposal before this
Court;
2. Cosfs of this application be provided for.

Brief Background to the Application

The brief facts that gave rise to this application as obtained from the submissions of both parties are that in 2010 the sharia court of Kampala distributed the estate of

Amiisi Ddungu. The applicant and the 1st defendant (now 1st respondent) were among the beneficiaries. The distribution was not contested to the knowledge of the 1st respondent. However, when the 1st respondent sold the portion he received as his share to the 2nd respondent in 2014, the applicant objected to the 2nd respondent's possession of the same for reason that the share he received from the estate was not lucrative enough yet he was the elder sibling and therefore the 1st respondent's share should have been his. Consequently, the applicant filed Civil Suit No. 089 of 2014 in the Chief Magistrate Court of Jt/asaka at Masaka against the respondents jointly and severally for trespass and cancellation of the sale agreement among others.

On the 13th July 2017, the Magistrate Grade 1 of Masaka Chief Magistrates' Court decided in favour of the respondents and dismissed the applicant's suit with costs. The applicant was dissatisfied with the whole judgment and the orders of the Magistrate Grade 1 and appealed to the High Court at Ji/asaka against the whole decision. The learned appellate Judge upheld the decision and orders of the Magistrate Grade 1 in its entirety, thus dismissing the appeal with costs to the respondents. The applicant was dissatisfied with the judgment of the learned appellate Judge and lodged a second appeal in this Court vide Civil Appeal No. 189 of 2019.

The respondents started the execution process by having the bill of costs in the lower courts taxed and applied for execution by way of giving vacant possession. The applicant applied for stay of execution in Masaka High Court vide Misc. Application No. 125 of 2022 on the ground that he had lodged an appeal in this Court. On the 31st day of May 2023, the High Court of Masaka delivered a ruling in which the applicant's application was dismissed for reason that he failed to prove that he would suffer any loss among others. Having failed to secure a stay of execution from the High Court of Masaka, the applicant brought this

application for stay of execution in this Court premised on the grounds set out in the Notice of Motion, but briefly are as follows;

- 1) That Civil Appeal No. 189 of 2019 has been conferenced and pending hearing.
- 2) The execution proceedings are meant to defeat the appeal in this Court.
- 3) The applicant's intended appeal raises a matter of law that require consideration by this Honorable Court.
- 4) There is an imminent threat of execution against the applicant.
- 5) This application has been presented without undue delay.
- 6) The appeal shall be rendered nugatory if the application is not granted

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7) It is in the interest of justice that this application is allowed

The application was supported by the affidavit of the applicant sworn on 1st July, 2023 in which he avers, among others, that he instituted a Civil Appeal in this Court challenging the decision of the High Court in Civil Appeal No. 0078 of 2017 and the same has so far been conferenced inter parties and the file is pending allocation of a panel for hearing. He adds that the appeal has a high likelihood of success and has been presented without undue delay. Further, that the respondent has since taken steps towards execution against the applicant when he filed both High Court Taxation Application No. 49 of 2022 which has been heard and taxed and an application for execution by way of vacant possession of the suit land. The applicant also avers that in view of the steps taken by the respondent towards the execution 15

orders, there is an imminent threat of execution of the impugned orders of the High Court and the appeal shall be rendered nugatory if the execution is not stayed. 20

The 2nd respondent in his affidavit in reply averred that he is the successful party in Civil Suit No.089 of 2014, Civil Appeal No.078 of 2017 and Miscellaneous on No.125ol

20n. He added that he purchased the suit land from the 1st respondent and he has not received any document that the applicant is the owner of the suit land nor has he received any court order restraining his activity on the land. Further, that there has never been any application for execution against the applicant but rather it was against the tenants led by

- s Nabawesi Gertrude who left the suit land peacefully. The respondent contends that the appeal has no probability of success since the applicant has failed to prove ownership of the suit land and neither will he suffer any irreparable loss if this application is not granted. Further, that there was delay of 2 months before filing this application. He concluded that the applicant has failed to establish readiness to provide security for due performance in case the appeal fails
- 10 and he has also failed to pay costs of Ushs. 10,426,000/= from both the High Court and Chief Magistrates' Court.

The 1st respondent did not file an affidavit in reply

Representation

15 20 At the hearing of this application, Mr. Moses Kwoba appeared for the applicant while the 2nd respondent appeared by himself to seek an adjournment on the instructions of his lawyer who was handling another matter in a court in Masaka. There was no appearance for the 1st respondent who was also absent. This Court did not find any valid reason to grant an adjournment to the 2nd respondent's counsel to appear since the parties had filed their respective which are on court record. So the matter was instead adjourned for ruling on notice and the written submissions of the parties have been considered in the preparation of this ruling.

Applicant's Submissions

In his written submission, counsel for the applicant alluded to paragraph 7 of the application where it was stated that the applicant instituted an appeal in this challenging the decision of the High Court in Civil Appeal No. 0078 of the 2017 and conferencing was done inter parties on 25th July 2022. He added that the appeal is only pending hearing.

Counsel also submitted that the applicant's appeal has high chances of success. He argued that according to the record of appeal, the applicant has outlined the grounds of appeal

- 5 challenging the decision of the learned appellate Judge. In addition, he has shown that the respondent has taken steps towards execution by having the bill of costs taxed and that he will suffer irreparable injury if this application is not granted. Counsel relied on the case of Davis Wesley Tusingwire vs Attorney, General Constitutional Application No. 1 of 2014 to support his submissions.
- Further, counsel submitted that the applicant has brought this application without unreasonable delay as per the decision in Lawrence Musitwa Kyazze vs Busunge SCCA No. 18 of 1990. He pointed out that this application was filed within a month's time after the High Court delivered its ruling on 31st May, 2023.
- In addition, counsel submitted that the appeal shall be rendered nugatory if the application is not granted. He argued that if execution proceedings are allowed to go on, then there will be no need to prosecute the appeal since the orders being challenged would have been executed. He therefore prayed that for the above reasons, the application be allowed and an order for stay of execution of the orders of the High Court be issued pending the hearing of the appeal before this Court. He further prayed that the status quo of the suit be maintained till the appeal is heard and disposed of and that costs of this application be granted to the applicant.
- 2no Respondent's Submissions

On the issue of whether this is a proper case for grant of stay of execution, counsel submitted that it is not a conclusive point of law that whoever files a Notice of Appeal and has submitted 5W conferencing notes is entitled to a stay of execution. He contended that in the suit filed by the applicant and the 1st appeal as well as the application filed in the High Court, the Judicial Officers who handled the matters failed to see any merit in them. He added that this matter was meant to go for court's interpretation and not for hearing on appeal or for any stay of orders. Counsel submitted that it was misconceived by the applicant, lacked merit from the start and has only been engineered to waste court's time. He therefore prayed that this application should be struck out with costs.

Regarding the appeal having a high chance of success, counsel submitted that it is highly unlikely that the applicant having lost at the trial, on 1st appeal and in each and every subsequent application he brought and also consented to pay costs arising therefrom, has high chances to succeed in this appeal. For this reason, counsel prayed that this Court finds that there is no likelihood of success of the appeal.

On unreasonable delay, counsel submitted that this application was filed after a month and a half and not after one month as contended by the applicant. He also added that this application was filed on a Sunday but he left it to the discretion of this Court to decide,

Regarding the likelihood to suffer substantial loss if the application is not granted, counsel submitted that there is no evidence that the applicant may or shall suffer irreparable loss if this application is not granted. He argued that the applicant has never personally occupied or used the suit property before since the said property was given to the 1st respondent as his portion of inheritance from his late father and he sold the same to the 2nd respondent who has been in occupation and use of it. He added that the actual loss shall vest on the 2nd respondent who actually purchased the suit land and paid valuable consideration for it believing that the 1st respondent has good title.

On whether the applicant has paid any security for costs, counsel submitted that the applicant has neither paid nor pledged any security for costs which implies that the applicant is also not sure that the appeal will succeed. He contended that rule 105 of the rules of this Court is mandatory and cannot be waived by conduct. Counsel therefore prayed that this application

5 be dismissed with costs.

Submissions in rejoinder

Counsel for the applicant reiterated his earlier submissions and rejoined to the respondent's submission as here below. On the submission that he had failed to prove ownership of the suit land, counsel submitted that this question cannot be determined in this application but on appeal which has already been filed.

On the applicant's previous unsuccessful appeal and applications, counsel submitted that applications are determined on the discretion of an individual Judicial Officer and the surrounding facts of the matter and not on the loss of previous appeals and applications.

15 As regards the applicant's consent to pay costs in the previous application, counsel submitted that according to paragraph (c) of the said consent dated 10th October, 2022 the payment of costs only concerned that very application and not the main suit.

Regarding counsel for the 2nd respondent's contention that the application was filed on Sunday 23rd July, 2023, counsel pointed out that the application was filed on Tuesday 18th July, 2023 as per the Notice of Motion and not on Sunday as argued by counsel for the respondent.

On the counsel for the 2nd respondent's submission that the applicant shall not suffer any irreparable loss, counsel submitted that the suit land belonged to his father the late Hajji Amiisi Ddunga and as a biological child and beneficiary to his late father's estate, he a direct

interest in the suit land. Counsel urged this Court to consider the application and grant the same as earlier prayed.

Court's Consideration

I have carefully considered the submissions of both counsel and the authorities cited in support of the arguments. I have also perused the court record. As stated earlier, the 1st respondent did not file an affidavit in reply and submissions. I will therefore determine this application without his input

Applications for stay of execution in this Court are governed by rule 6(2) (b) of the Rules of this Court which provides that: -

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

(a)

(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, an injunction, or a stay of proceedings on such terms as the court may think just."

The appellate courts have elaborately stated the conditions that an applicant for an order for stay of execution must satisfy to justify grant of the order. In *Hon. Theodore Ssekikubo and 4 Ors vs Attorney General & 4 Ors*, Constitutional Application No. 03 of 2014, the Supreme Court referred to its earlier decisions in *Dr. Ahmed Muhammed Kisuule vs*

Greenland Bank (in liquidation) S. C. C. A No.7 of 2010 and *Lawrence Musiitwa Kyazze vs Eunice Besigye*, Civil Application No.18 of 1990 where it stated the principles which govern the grant of stay of execution and, or injunctions as summarised below. 20

- 1. The applicant must show that that he/she has lodged a Notice of Appeal in accordance with the relevant provisions of the Rules of the Court considering the application;
- 2. The applicant must demonstrate that he/she will suffer irreparable loss if a stay is not granted;
- 3. The applicant has to satisfy court that his/her appeal has a high likelihood of SUCCESS;
- 4. The applicant must show that substantial loss may result to him/her unless the order is made.
- 5. The applicant must show that the application has been made without unreasonable delay.

As regards the 1st requirement, I note from the affidavit in support and the applicant's submission, and I have confirmed from the court record, that the applicant has satisfied this requirement by filing a Notice of Appeal and there is a pending appeal in this Court vide CACA No. 189 of 2019. I have also confirmed that the matter has already been conferenced and is pending hearing. 15

On the condition regarding bringing the application without unreasonable delay, I note that the decree whose execution the applicant is seeking to stay was issued on 13th July 2017 and the 2nd respondent who is the decree holder applied for its execution by way of vacant possession of the estate in 2019. The applicant first brought an application for stay of execution in the High Court which was unsuccessful. The ruling in that application was delivered on 30th May 2023 and this application was filed on 18th June 2023. I therefore find that this application was brought without unreasonable delay thus, satisfying this condition.

As regards the condition of high likelihood of success of the appeal and it not being frivolous, 25 the applicant need not show that the appeal will succeed and the court is to delve

into the merits of the appeal. In *American Cyanamid v Ethicon Ltd* (1975) AC 396, the House of Lords clarified that what was required for a grant of an application of this nature, is, inter alia, the demonstration by the applicant that there is a serious question to be tried by the court on appeal. See also *John Baptist Kawangavs Namyalo Kevira*

5 anor, Misc. Application No. 12 of 2017, where the court held that in determining whether the appeal has merit and a high likelihood of success, it is sufficient to establish that there are pertinent appealable grounds of appeal with a probability of success that require court's attention.

I have perused the 7 grounds of appeal set out in the Memorandum of Appeal attached to the affidavit in support. Without delving into the merits of the appeal, I note that 4 of the grounds of appeal are of mixed law and fact, while some are of facts only which fail to meet the mandatory requirement set out in sections 72 and 74 of the Civil Procedure Act (CPR) that second appeals to this Court must only be on points of law. In *Lubanga Jamada vs Dr. Ddumba Edward* (2016) UGCA f / this Court held that all the 4 grounds of the appeal were incompetent for offending sections T2 and T4 of the CPR and dismissed the suit. 10 15

As to whether the appeal is frivolous, an appeal will be considered frivolous if, prima facie, the grounds intended to be raised are without any reasonable basis in law or equity and the appeal was filed in bad faith or to cause a delay in the realisation of the fruit of judgement. ^I have browsed through the decisions of the trial Magistrate Grade 1 which dismissed the appellant's suit, and of the High Court on the appeal and the application where the applicant was consistently unsuccessful. My considered view is that though the appellant's grounds of appeal raise arguable grounds, they have limited possibility of success. Be that as it may, ^I would find that the applicant has satisfied the condition of having an merit

On whether or not the appeal will be rendered nugatory if the application is not granted, I am well aware of the decisions of this Court and the Supreme Court on the need to ensure that the applicant's appeal is not rendered nugatory. But I would hasten to add, in deserving cases that meet other conditions as set out above. In *DFCU Bank Ltd vs. Dr. Ann Persis Nakate*

5 *Lussei* CA Civil Appeal No. 29 of 2003 this Court emphasized that it is the paramount duty of court to which an application for stay is filed pending an appeal to ensure that appeal, if successful, is not rendered nugatory. In the persuasive Kenyan Court decision in *Alice Wambui Nganga vs John Ngure Kahoro and another*, ELC Case No. 482 of 2017 (at Thika); [2021 eKLR] it was held that the court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his or her appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his or her judgment. 10

My view is that this puts a duty on the court considering the application to look at the circumstances of the case and the nature of the order the applicant is seeking to stay. If the execution is for purposes of recovering costs of the suit, for example, there is no way it would render the appeal nugatory. Similarly, if the subject matter of execution can be assessed in monetary terms and has no collateral damages or other losses that is not capable of being quantified, it would not render the appeal nugatory because a successful applicant could be compensated by an award of damages. 15

- In this case, the 2nd respondent averred in paragraph 9 of his affidavit in reply that he brought the suit land in 2014 and he occupied and distributed portions of it to his family members without any interruption. Further, that he has no intention of selling his remaining portion. He also averred in paragraph 8 that there has never been any application for execution for vacant possession against the applicant but rather against the tenants led by Nabwesi Gertrude who occupied the suit land at the time he purchased it from the 1st 20 25 F er that the

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said application was not even endorsed by the court because the tenants left the suit land peacefully.

In paragraph 8 of the affidavit in rejoinder, the applicant averred in rebuttal of paragraph 9 of the affidavit in reply that the applicant is lying as the suit land is vacant and the 2nd respondent had only cleared and mutated it into several plots ready to sell them. What is clear in the rebuttal is that the applicant did not claim to be the one in possession of the suit land but confirmed that it was the 2nd respondent who cleared and subdivided it. That settles the issue of who is in possession of the suit land. It was submitted for the 2nd respondent that the suit land has been in the hands of the 2nd respondent for the last 10 years as the case was proceeding and moreover, without any order of stay of execution in the courts below without him selling it yet he would have sold it long time.

From the applicant's own averment in paragraph 8 of his affidavit in rejoinder, it is clear that the applicant has never been in possession of the suit land and therefore I see no imminent threat of execution to give vacant possession of the same. What is pending execution is recovery of costs of the suit in the lower court and costs of the appeal and applications in the High Court. In that case, if this application is denied and the execution takes place, the applicant can still proceed with his appeal and if successful, he can recover the costs paid to the respondents.

Consequently, I find that the applicant has failed to satisfy this Court that the appeal will be rendered nugatory if the order sought is not granted.

In regard to substantial loss, the applicant must show that the execution will cause an irreparably loss to him if the application is not granted and such a loss cannot be quantified by any particular monetary compensation, or that there is no exact mathematical formula to compute substantial loss. This was held in the High Court per uasive decision in *Tropical*

Commodities Supplies Ltd and others v. International Credit Bank Ltd (in liquidation) [204] 2 EA 331.

The applicant submitted that he will suffer irreparable injury because he will be evicted from the suit land which shall not be easy to get back once taken by the respondents or third parties. Conversely, the 2nd respondent submitted that the applicant has never set foot on the suit land and he (the 2nd respondent) has been in occupation and use of it since he purchased it. I have already found based on the applicant's own averment in the affidavit in rejoinder that it is the 2nd respondent who is in possession of the suit land and not the applicant. It therefore defeats logic for him to contend that he will suffer irreparable injury if he is evicted from the suit land which he is neither in occupation or possession of.

It is not true that the applicant will suffer any irreparable loss as there is no imminent execution in regard to vacant possession of the suit land. In the premises, the applicant has not satisfied this Court on this condition.

On the requirement for the applicant to give security for due performance of the decree or order, it is imperative for the court to balance the need to uphold the respondent's right to be protected from the risk that the appellant may not be able to satisfy the decree, with the appellant's right to access the courts. The reason as to why the courts order for security for costs on an appeal is to ensure that a respondent is protected from costs incurred for responding to the appeal and defending the proceeding. Courts have been reluctant to order security for due performance of the decree because the requirement is likely to stifle appeals. 15 20

See: DFCU Bank Ltd vs. Dr. Ann Persis Nakate Lussegere (supra)

In this application, the applicant has not demonstrated his readiness to provide security for due performance of the decree in the event the appeal fails. For that reason, the applicant has also failed to fulfil this condition.

5 In conclusion, the applicant has not substantially satisfied the essential requirements for grant of an order of stay of execution pending appeal. In the premises, the application fails and is hereby dismissed with costs to the 2no respondent.

I so order.

I

Dated at Kampala this .day of (V\ dA. 2025 *\^ .b

Hellen Obura

JUSTICE OF APPEAL

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