

UGANDA / JUDGMENT

Nakibus J. Lakara v Akim Sondit Musiwa (Miscellaneous Application 420 of 2019) [2025] UGCA 232 (7 July 2025)

[2025] UGCA 232

COURT

Court of Appeal of Uganda

BEFORE

Buteera, DCJ, Obura, JA, Kihika, JA /JCC

CASE / FILE NUMBER

Miscellaneous Application 420 of 2019

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA [CORAM: RICHARD BUTEERA, DCJ; HELLEN OBURA, JA & OSCAR KIHICA, JAJ

MISC. APPLICATION NO. 420 OF 2019

(ARISING FROM HIGH COURT CIVIL APPEAL NO. 172 OF 2014)

NAKIBUS J LAKARA ::::::::::::::::::::

VERSUS

AKIM SONDIT MUSIWA ::::::::::::::::::::

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RULING OF THE COURT

This is an application brought under Sections 10 and 12 of the Judicature Act, Cap 13, and Rules 2, 6(2) (b), and 43 of the Court of Appeal Rules. The applicant seeks the following orders:

- 1. An order for stay of execution of the orders of the High Court of 15 Uganda sitting at Mbale in Civil Appeal No. 172 of 2018, pending the hearing and determination of the intended appeal.
- 2. That costs of this application be provided for.

The application is supported by an affidavit sworn by the applicant, the substance of which is summarized as follows: 20

The applicant avers that the respondent instituted Civil Suit No. 20 of 2012 before the Chief Magistrate's Court at Mbale, seeking vacant

possession of land comprised in Plot 14, Busoga Lane, Mbale District. The suit was dismissed by the trial court. Dissatisfied, the respondent lodged Civil Appeal No. 172 of 2014 in the High Court at Mbale.

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- The High Court allowed the appeal and declared the respondent the S rightful owner of the suit property. The Court directed the applicant to vacate and hand over possession within thirty (30) days from the date of judgment, being 3rd December, 2019.
- Being dissatisfied with the decision, the applicant filed a notice of appeal and applied for a stay of execution pending the determination 10 of the appeal. He contends that the respondent has already commenced execution proceedings, including extracting a certified copy of the judgment and decree.

The applicant further deposed that he and his family have occupied the suit property for over thirty (30) years, and should execution 15 proceed, they risk losing their home before the appeal is heard. He asserts that the appeal would be rendered nugatory if the stay is not granted. He also states that he has filed a notice of appeal and a letter requesting proceedings to facilitate the appeal process.

In reply, the respondent filed an affidavit opposing the application. 20 His response is summarized as follows:

The respondent argues that the application is frivolous, vexatious, and an abuse of court process, having been served late on the day of hearing. He also challenges the supplementary affidavit for having been filed without leave of court.

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He contends that obtaining a certified judgment and decree does not constitute an essential step in execution and thus does not warrant a stay. He further argues that the applicant will not suffer any substantial loss, claiming the applicant is no longer in physical occupation of the suit premises, as he is a serving army officer stationed elsewhere, and that his family currently resides in Kampala.

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According to the respondent, the current occupants of the property are mere proxies of the applicant, who has unlawfully occupied the

- land for over three decades without paying rent. He maintains that 10 the applicant has not demonstrated seriousness in prosecuting the appeal, noting that since filing the notice of appeal in December 2019, he has taken no further steps such as filing a memorandum of appeal or actively pursuing the record of proceedings.
- The respondent further avers that the appeal lacks triable issues and 15 has no likelihood of success. He urges this Court to dismiss the application, arguing that court orders must be respected and that litigation must come to an end. He contends that the application is a deliberate tactic to delay the realization of his judgment.
- In rejoinder, the applicant clarified that the supplementary affidavit 20 was filed to inform the Court about recent developments regarding the execution of the High Court judgment, which occurred after the initial affidavit had been filed and could not have been included earlier.

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The applicant explained that service was made on the respondent's current counsel on Monday, 27th January 2025. This was shortly after learning, on 24th January 2025, through a notice of change of advocates, that they were now representing the respondent. Previous

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efforts to serve the respondent's former counsel were unsuccessful, S as they denied having instructions in the matter.

Further, the applicant stated that the respondent has actively pursued execution of the High Court judgment. Specifically, on 28th November 2024, the respondent filed an application for execution in

the High Court at Mbale. This application was not served on the 10 applicant or his counsel. It was heard *ex parte* by the Registrar, and an eviction/demolition order was issued on 8th December 2024.

The applicant refuted the respondent's claims that he is not in occupation of the suit property, stating that such claims are

- speculative. He emphasized that the property has long been the 15 subject of a legal dispute, which is now before the Court of Appeal in Civil Appeal No. 0042 of 2025. The applicant maintains that the respondent's claim to ownership is being challenged on grounds of fraud.
- He further noted that although the memorandum of appeal has been 20 prepared, it is pending endorsement by the Registrar before it can be served on the respondent along with the record of appeal.

The applicant clarified that while the High Court judgment was delivered on 3rd December 2019, this application was promptly filed on 30th December 2019 upon learning that the respondent had

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taken steps to execute the judgment. He also explained that while his counsel followed up on scheduling the matter, the timing of the hearing is dependent on the court's calendar.

Lastly, the applicant emphasized that the execution proceedings were conducted without any notice to him or his counsel. No evidence of service was presented by the respondent. He maintained his earlier assertions and urged the Court to grant the orders sought.

Representation

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At the hearing of the application, the applicant was represented by

Mr. Nuwamanya Justus and Mr. Patrick Kabagambe while Mr. Denis 10 Mugoda represented the respondent. Court gave the respective schedules to both counsel. Submissions were filed and this court has considered them in the writing of this ruling.

Submissions for the applicant

- Counsel raised two issues to be determined in this application; 15
- 1. Whether the application discloses grounds for the grant of a stay of execution pending appeal?
- 2. What remedies are available to the parties?

On whether the application discloses grounds for the grant of a stay of execution, counsel submitted that the law on stay of execution is 20 in rule 2(2) and 6(2) (b) of the Judicature (Court of Appeal Rules) Directions S. I 13-10 which provide that: -

"Nothing in these rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to

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make such orders as may be necessary for attaining the ends of justice..."

Counsel further relied on rule 6(2)(b) which provides that the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may 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.

Counsel referenced *Lawrence Musiitwa Kyazze v Eunice Busingye* SCCA No. 18 of 1990 and *Hon. Theodore Ssekikubo and Ors v 10 The Attorney General and Ors* Constitutional Application No. 03 of 2014 where court set out the conditions for grant of stay:

- a. The applicant must show that he lodged a notice of appeal
- b. That substantial loss may result to the applicant unless the order is made

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- c. That the application has been made without unreasonable delay
- d. That security for costs has been given by the applicants.

On the first ground, counsel submitted that the applicant filed his notice of appeal together with a letter requesting for certified copies of the transcribed record of proceedings and judgment in the High Court on 11th December 2019. He added that the notice of Appeal was filed in the Court of Appeal on 16th December 2019 and served upon the respondent on 17th December 2019. He relied on *AG v E. A Law Society & Anor* EACJ Application No. 1 of 2013 for the proposition that a notice of appeal is sufficient expression of the

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\$BA\$ \$BA\$ intention to appeal and the notice is sufficient action for court to find a basis for grant of stay of execution. Counsel submitted that the applicant has satisfied this condition.

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- On whether there will be substantial loss if the stay is denied, counsel submitted that the respondent filed an application for execution of S the judgment and decree of the High Court on 28th November 2024 and the application was heard ex parte by the Registrar, who issued an order for eviction/demolition on 8th December 2024. Counsel submitted that if the impending execution is not stayed, the respondent will evict the applicant and his family from the suit 10 property and demolish it. This will cause him and his family to vacate their home which they have occupied for the last 37 years since 1988.

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Counsel submitted that the notice of motion was received by this court on 30th December, 2019 but it was only served upon counsel for the respondent on the morning of 27th January, 2024 when the matter came up for hearing. Counsel added that on 24th January 2024 they filed a notice of change of advocates and the same was served upon the applicant's advocates yet no service of the current application was effected on them until the time of the hearing.

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On the third preliminary objection, counsel submitted that this application was prematurely filed in this court. Counsel relied on rule 42 (1) to submit that whenever an application may be made either in $\$42\$$ 10 this court or the High Court, it shall be made first in the High Court. Counsel argued that it is only when the application for stay has been denied in the High Court that a fresh application can be made to the Court of Appeal.

Counsel prayed that this application be dismissed and the applicant 15 be advised to file an application in the High Court at Mbale.

Without prejudice to the objections, counsel submitted on the merits of the application.

On the ground of whether a notice of appeal has been filed, counsel agreed that a notice of appeal was filed in the High Court at Mbale 20 and served upon the respondent in 2019. Counsel however argued that to date, he has never been served with a memorandum of appeal or the record. Counsel submitted that there should be an end to litigation thus the applicant cannot be allowed to benefit from a notice which was filed in 2019 and later remembers to benefit from 25

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the same in 2025 when court threatens to weed out the application. Counsel prayed that the court finds that no appeal lies in this court thus the application should be dismissed.

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On whether substantial loss will occur, counsel contended that the applicant has not demonstrated to court the substantial loss he will S suffer if execution proceeds. Counsel submitted that the respondent refutes the allegations by the applicant that him and his family stay in the suit property. Counsel asserted that the applicant a serving army officer left Mbale a long time ago with his wife and the persons currently staying in the suit property are mere proxies of the 10 applicant. Counsel submitted that the applicant has not proved this condition thus the application should be dismissed.

On the ground of unreasonable delay counsel submitted that the applicant was not vigilant in seeking justice in a timely manner since no such application was first made at the time of delivery of the 15 judgment. He added that the applicant rushed to file the same in this court without any special circumstances warranting it to be filed in this court and not the High Court first.

On the issue of security for due performance of the decree, counsel submitted that the 200,000/= paid by the applicant as security for 20 costs and not for due performance. Counsel argued that the property in dispute is situate in the heart of Mbale town, whose value goes for UGX 400,000,000/= thus it is only fair that the applicant be ordered to deposit security for costs in a tune of UGX 200,000,000/= as a condition for stay to be granted. 25

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on whether the appeal has a tikelihood of success, counser submitted that the instant appeal has no likelihood of success because in law, no appeal lies before this honorable court. counsel added that the appeal raises no serious questions of law which need to be investigated by this court hence the appear has no likelihood of success.

on whether there is threat of execution, counsel submitted that there is no order of execution t.l.at has been issued by the court at Mbale that can act as a threat of execution and the allegations by the

applicant a'e mere speculations and should be ignored by this court. Counsei submitted that the respondent who holds judgment is at liberty to benelit from the fruits of his judgment unless there is any impediment to that effect. 10

counsel implored this court in exercise of its discretion to dismiss this application with costs to the respondent. 15

Submissions in rejoinder

In response to the preliminarjz objection that the supprementar5r afhdavit be struck out, counsei submitted that when the matter came up for hearing on 27th January 2025, counsel erroneously omitted to seek leave of court to have the supprementar5r affidavit admitted during hearing. counser submitted that he made efforts to remedy this lapse through the appricant's written submissions of 7ft February 2025 and prayed that court should not visit the mistake of co,nsel on the litigant. counser prayed that court exercises its,

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discretion to see that the ends of justice are met by considering the supplementary affidavit in reaching its decision.

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On the second preliminary objection, counsel submitted that the respondent's counsel submitted from the bar that the applicant was at all material times aware that they were counsel in the matter and as such ought to have served them the instant application earlier than was done. Counsel submitted that the respondent filed their notice of change of instructions in court on 24th January 2025. He submitted that the applicant's lawyer became aware of the new representation on the evening of 24th January 2025 when served with a Notice of Instructions.

Counsel submitted that the respondent did not suffer any prejudice in the circumstances to warrant the prayers sought.

On the objection that the application was filed prematurely in this court, counsel submitted that rule 42(1) should be read in its 15 entirety. Counsel submitted that while rule 42(1) provides for filing in the High Court, rule 42(2) provides for circumstances where this court may entertain such applications notwithstanding the fact that no application has been made in the high court.

Counsel prayed that this court finds it fit that the circumstance in 20 this application is one that merits this court's exercise of discretion under rule 42 (2) of the Rules of this Court, to entertain the instant application.

On the rest of the grounds counsel for the applicant reiterated his earlier submissions. 25

Consideration of the Application

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We have carefully considered the Notice of Motion; the attendant affidavits together with the submissions and authorities cited by both counsel and those not cited but are relevant to this application.

We shall start by addressing the preliminary objections raised by S counsel for the respondent.

On the First Preliminary Objection: The objection challenges the applicant's supplementary affidavit for being filed without prior leave under **Rule 44(2) and (3)**.

- In *Banco Arabe Espanol v Bank of Uganda* [1999] 1 EA 22; The 10 Court held that procedural irregularities may be waived or cured if the interests of justice require it and there is no prejudice to the other party.
- The Court finds that the omission was a procedural lapse attributable to counsel, not the applicant. There was no evidence that the 15 respondent would be prejudiced. In the interest of substantive justice, the affidavit is allowed to stand. The first preliminary objection is overruled.

On the Second Preliminary Objection: The objection concerns noncompliance with **Rule 50(1)** on timely service. It is evident that the 20 notice of change of instructions was filed and served three days before the hearing. Thereafter, the applicant's counsel served the application. While the timing may not have strictly complied with the two-day requirement, the delay was minimal in view of the change of 25

Advocates. In line with Article 126(2)(e) of the Constitution, which 13

enjoins courts to administer justice without undue regard to technicalities, and considering the absence of demonstrable prejudice, this Court declines to strike out the application on this ground. The second preliminary objection is also overruled.

On the Third Preliminary Objection, counsel contended that the S application was prematurely filed in this Court in contravention of Rule 42(1) .

While we agree with the principle that **Rule 42(1)** generally requires a party to first seek relief in the High Court, this rule is not absolute.

- **Rule 42(2)** expressly provides that this Court may, in the interests of 10 justice, entertain applications under Rule 6(2)(b) without prior recourse to the High Court. This provision is intended to safeguard the right of appeal in appropriate circumstances. As was held in *Olok Francis v Rev. William Pasha*, CA Civil Application No. 059 of
- 2015; the Court of Appeal retains discretion under Rule 42(2) to 15 consider such applications where justice demands it.

In the circumstances, and in order to prevent a possible miscarriage of justice, we find that the application is properly before this Court under Rule 42(2). The **third preliminary objection is accordingly**

overruled. 20

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Having overruled the preliminary objections, we shall now proceed to determine the matter on its merits.

The principles on which this court would rely to grant a stay of execution were stated in *Hon. Ssekikubo & Ors v Attorney General*

& Ors Constitutional Application No. 03 of 2014. The court held:-25

- 1. That the applicant must show that he lodged a notice of appeal.
- 2. That the substantial loss may result to the applicant unless the stay is granted.
- 3. That the application has been made without unreasonable delay.
- 4. That the appeal has a high likelihood of success.

We shall consider the criteria above to determine whether there is sufficient ground for the grant of the instant application.

Whether a Notice of Appeal was Filed

We find that the applicant filed a notice of appeal on 11th December 10 2019 and served it on the respondent on 17th December, 2019. In AG v E. A Law Society & Anor, EACJ Application No. 1 of 2013 it was held that:

"A notice of appeal is sufficient expression of the intention to appeal and the notice is sufficient action for court to find a basis for grant of 15 *stay of execution.*"

We agree with this position that a notice of appeal is sufficient expression of an intention to file an appeal. The existence of a valid notice of appeal satisfies the preliminary condition under Rule 6(2)(b). While there are concerns about delay in prosecuting the appeal, these are distinct from the issue at hand and do not invalidate the notice itself. We find that the first requirement has been satisfied.

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Whether Substantial Loss Will Occur

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The dispute in this matter is in respect of a house in which the applicant and his family have lived for 37 years.

The Applicant's counsel submitted that should the pending execution not be stayed, the respondent will evict the applicant and his family S from the suit property and demolish it. The eviction and demolition of the suit property will cause the applicant and his family the loss of a home that they have occupied for 37 years. The applicant and his family according to counsel, will suffer irreparable damage that cannot be compensated by damages. 10

We are of the view that the head of a home does not have to stay at the house personally all the time. A family and a home is wider in the African sense. There are many family members that stay in the home when the head of the family is present and when the head of the family goes out working elsewhere.

In our view the purpose of a stay of execution is to preserve the status quo and protect the applicants' right of appeal from being rendered nugatory.

In National Enterprise Corporation versus Mukisa Foods, Miscellaneous Civil Application No. 7 of 1998 this Court held as follows at page 7;

> "The Court has power in its discretion to grant stay of execution where it appears to be equitable so to do with a view to temporarily preserving the status quo.

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As a general rule the only ground for stay of execution is for the applicant to show that once the decretal property is disposed of there is no likelihood of setting it back should the appeal succeed".

The Supreme Court of Uganda in Civil Application No. 9 of 1990; *Francis Hansio Micar vs. Nuwa Walakira* observed as follows:

"It would be unwise in some circumstances to defeat a statutory right of appeal by for example demolishing the subject matter of a suit so that the appeal is rendered nugatory. Again stay may be necessary when it comes to the notice of any court that an alleged fraud has been practiced upon it effecting its decree or when courts actions is in doubt through want of jurisdiction".

On the facts of this case, this Court finds that the applicant demonstrated that execution is imminent. The risk of eviction and 15 demolition is sufficiently demonstrated. If execution proceeds, it will irreparably affect the applicant's proprietary interest, thereby rendering the appeal nugatory. The second condition has thus been satisfied.

Whether the Application Was Made Without Delay 20

In the instant matter, the judgment was delivered on 3rd December 2019. On 16th December, 2019 the applicant filed his Notice of Appeal in the Court of Appeal. The notice of appeal was filed 13 days after Judgment and was served upon the respondent on 17th December 2019. The instant application for stay was filed on 30th December

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2019, shortly after the notice of appeal. While there has been delay in prosecuting the appeal itself, the application for stay was lodged in time. The delay raised by the respondent pertains to filing in the Court of Appeal before first applying to the High Court. However, as already ruled under the third preliminary objection, Rule 42(2) *mathsf{S}* permits this Court to entertain such applications where the circumstances justify safeguarding the right of appeal. The third condition has been satisfied.

Security for Due Performance

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The applicant has deposited \$UGX\$ 200,000/=, which the respondent 10 contends is insufficient considering the value of the suit property. While the sum paid was under Rule 103(1) as security for costs, no separate security for due performance has been paid. In *Margaret Kato and Anor v Nuulu Nalwoga*, SC Civil Misc. Application No. 11 of 2011, Court held; 15

"There is no requirement under our rules, for an applicant to make a deposit of security for due performance of a decree, before the Court can exercise its powers under rule 6(2)(b). The court is only required to exercise its discretion as it may consider just. The practice in the past of this Court to impose this condition in some cases is only a rule of practice based on case law."

The applicant in the instant application has expressed willingness to comply with any reasonable conditions that the Court may impose.

The Court will therefore grant the stay on condition that the applicant deposits UGX 10,000,000/= (Ten Million Shillings) as security for due performance within 30 days from the date of this ruling.

Likelihood of Success

On this issue the applicant submitted that at this stage all the $\mathbf{S}$ applicant has to show is that there are serious questions to be tried and that the action is not frivolous or vexatious.

The applicant listed a number of questions of law for determination by the Court of Appeal. They are laid out in the applicant's memorandum of appeal. 10

The Respondent submitted that there is no serious question for the Court of Appeal to consider.

We find guidance from the Supreme Court decision in *Dr. Ahmed Muhamed Kisule vs GreenLand Bank*, Court of Appeal Civil Application NO. 10 of 2010. 15

> "In our view, even though this Court is not at this stage deciding the appeal, it must be satisfied that the appeal raises issues which merit consideration by Court. A cursory perusal of the record particularly the judgment of the Court of Appeal as well as the Notice of appeal reveal that the intended appeal raises important question of resjudicata. It is not therefore frivolous".

We are satisfied that in the instant application there are serious points of law for the Court of Appeal to consider.

We are not going to consider them on their merits at this stage.

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We are of the view that the interest of justice demands that the issues in dispute should be heard and determined on appeal.

The applicant has met this condition to warrant a stay.

The existence of an eviction and demolition order dated 8th December 2024 confirms a real and immediate threat of execution. The respondent's assertion that there is no such threat is not supported by the record. The Court is therefore satisfied that execution may proceed unless stayed.