

UGANDA / JUDGMENT

Osman v Maishala (Civil Application 61 of 2024) [2024] UGCA 293 (11 October 2024)  
[2024] UGCA 293

COURT

Court of Appeal of Uganda

BEFORE

Kihika, JA /JCC

CASE / FILE NUMBER

Civil Application 61 of 2024

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 61 OF 2024

(Arising from Civil Appeal No. 22 of 2024)

JUMA OSMAN ::::::::::::::::::::::::::::::

VERSUS

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MAISHALA MIRAJI ::::::::::::::::::::::::::::::

BEFORE: HON JUSTICE OSCAR KIHIIKA, JA \*(Sitting as a single Justice)\*

RULING OF COURT

This application was brought under Rule 2(2) and 6(2)(b) of the Judicature (Court of Appeal Rules) Directions seeking for orders that;

- 1. An Order granting a stay of execution of a Judgment and decree passed against the Applicant in Civil Suit No. 114/2019 by the High Court of Uganda at Mbale pending appeal.
- 2. Costs of and incidental to this application abide the result of the impending appeal.

The application is supported by the affidavit of JUMA OSMAN sworn on the 1<sup>st</sup> of February 2024. The grounds upon which this application is premised are laid out in the Notice of Motion and the affidavit in support and are briefly that;

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- 1. The Respondent instituted a suit against the Applicant in the Chief Magistrates Court of Busia and judgment was entered for the Respondent.
- 2. The Applicant was dissatisfied with the decision and filed an appeal in the High Court Mbale vide Civil Appeal No. IL4 of 20t9.
- 3. The High Court dismissed the appeal with costs and the Applicant filed an appeal in this court vide Civil Appeal No. 22 of 2022 pending hearing.
- 4. The Respondent threatens to execute the decree of the Magistrates Court seeking to evict the Applicant from the residential premises and the tenants from the commercial building and a notice to show cause was recently issued by the trial; court.
- 5. The Applicant filed an application for stay of execution in the High Court and it was dismissed with costs.
- 6. The appeal will be rendered nugatory if execution ensues against the Applicant.
- <sup>7</sup>. The Applicant's appeal has a high likelihood of success as can be deciphered from the grounds pf appeal in the Memorandum of Appeal filed in this court.
- 8. The balance of convenience lies in favor of the Applicant who has had unintern-rpted possession and occupation of the suit land since he was born in 1966.

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The Respondent filed an affidavit in reply deponed by MAISHALA MIRAJI sworn on the 25th of March 2024 opposing the application on the grounds that;

- 1. The instant application is illegal and unsustainable at law since it arises from a non-existent appeal vide Civil Appeal No. 22 of 2022 which was filed and served out of time.
- 2. Tlrle lower court certified the record on 27th April 202L but the Memorandum of Appeal was deliberately filed on 24th April 2022 after over 9 months and above the 60 days prescribed by the law.
- 3. The Respondent was declared the rightful owner of the suit property, which includes a commercial building and will suffer substantial loss if this application is granted as it will deny him the fruits of his judgment.
- 4. The Applicant has not demonstrated that his appeal has a likelihood of success.
- 5. The security for due performance of the decree alluded to by the Applicant is not sufficient in this case and the Applicarr.t should be ordered to deposit substantial security.

## Representation

At the hearing of this application, Mr. Peter Nagemi appeared for the Applicant, while Mr. Ngobi Balidawa appeared for the Respondent. Both parties filed written submissions and the same were adopted as the legal arguments.

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## Consideration of the application

I have carefully considered the affidavits and the submissions of both parties. I have also perused the authorities provided by counsel for which I am grateful.

Rule 21(1) of the Judicature (Court of Appeal Rules) Directions S. 13- 10 grants this court powers to make such orders inter alia as may be necessary for achieving the ends of justice.

The jurisdiction of this court to grant a stay of execution stems from Rule 6(1)(p) of the Rules of this Court which provides that;

### 6. Suspension of sentence and stay of execution.

- (2) Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay 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 principles upon which an application for an order for stay of execution is granted were clearly stated by the Supreme Court in *Hon. Theodore Ssekikubo & Others vs. The Attorney General and Another*, Constitutional Application No 06 of 2013 as follows:

"In order for the Court to grant an application for a stay of execution;

Paragraph 7 of (1) The applicant must establish that his appeal has a likelihood of success; or a prima facie case of his right to appeal

- (2) It must also be established that the Applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.
- (3) If 1 and 2 above have not been established, Court must consider where the balance of convenience lies.

**(4) Tholt ttic Appltcant must al"so establtsht that the appltcatlon ura,s tnsttttted utlthout delag."**

The issue for determination by the Court is whether the Applicant has adduced sufficient reasons to justify the grant of a stay of execution.

The Respondent raised a preliminary objection in paragraph 5 of the affidavit in reply, regarding the validity of the Applicant's appeal and stated. that the Applicant did not serve the Respondent the Memorandum of Appeal within the prescribed time. In addition, counsel argued that the High Court at Mbale certified the Record of Appeal on 27th April 2021, but the Memorandum of Appeal and the Record. of Appeal were only filed on 24th April 2022, 9 months over and above the 60 days prescribed under the law.

The Applicant did not file an affidavit in rejoinder addressing this issue but argued in the submissions that the Applicant's counsel wrote a letter to the Respondent's counsel to consent to validation of

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the Memorandum and Record of appeal in lieu of an application for extension of time. The Applicant's counsel referred to one Civil Application No. 11 of 2022 for extension of time but the same was neither attached to the affidavit nor referred to as a pending application before this court. I have taken the initiative to check the Eccmis system and found no results for that particular application in the names of the parties before me.

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It appears to me that the Applicant sought to validate the Record and Memorandum of Appeal, which had been filed 9 months out of time, with a letter to the Respondent marked annexure 'A' to the submissions of the Applicant. This procedure is alien to the rules of this court. It must be reiterated that for an application for stay of execution to be allowed, the Applicant must demonstrate that the intended appeal has a probability of success. For an appeal to raise a prima facie case, the appeal must be validly before court.

The Applicant has not demonstrated to this court that there's an application for validation of the Notice of Appeal or extension of time, that is pending hearing apart from mentioning one Civil Application No. 11 of 2022, which has not been attached to this application. As it stands now, sadly, the Applicants have no appeal pending in this court; and validation or extension of time cannot be granted within the ambit of this application for stay of execution. Likewise, I am doubtful that validation or extension of time can be obtained by a mere letter to the opposite counsel to consent to a validation.

Ordinarily, a formal application would have to be filed and then opposing counsel could consent to the application being granted.

I therefore find this application void of merit and dismiss it for the reasons given above.

This application is thus dismissed with costs to the Respondent.

I so order.

Jl^ Dated this ... .t . tl.. . ... day of 2024

o JUSTICE O KIHKA / ?

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Prepared on 14 October 2026 · Esheria