

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(EXECUTION AND BAILIFFS DIVISION)**

5 **MISCELLEANOUS APPLICATION NO. 738 OF 2016**

**(ARISING OUT OF CIVIL SUIT 141 OF 2012)**

10 **PASTOR KYALIGONZA SABASTIAN ..... APPLICANT**

**VERSUS**

**TAMALE DEOGRATIUS ..... RESPONDENT**

15

**BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

**RULING**

20 This Application for stay of execution pending appeal was made under S. 64 (e) and S. 98 C.P.A, and S.39 (2) of the Judicature Act, and 0.48, rr 1 and 3 C.P.R.

The application was supported by an affidavit of the Applicant and there is an affidavit in rejoinder by the Respondent.

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The grounds of the application are that the Applicant lost civil suit 141/12 and filed a notice of appeal against the judgment.

30 Typed and certified copies of the judgment and record of proceedings were applied for to enable the Applicant file the Appeal – letter dated 20.10.15. But to date the proceedings have not been availed.

The Appeal raises important matters of law and has a high likelihood of success. And that since the application was made without delay; it ought to be allowed in the interest of justice.

- 5 Counsel submitted that the Applicant is in possession of the property – where he has a church. And if execution is not stayed, he will suffer irreparable damage yet he has been in the location for seventeen years.

Counsel relied upon the case of **Gashumba vs. Nkundiye CA. 24/15**, where it was held that  
10 ***“where an application is made for stay and a notice of appeal is lodged in, court can grant stay of execution pending appeal.”***

It was then prayed that the application be granted with costs to the Applicant.

- 15 In reply, the Respondent opposed the application referring to the affidavit in reply and the affidavit in rebuttal of the rejoinder.

Counsel for the Respondent stated that the law under which the application was made was not applicable to the circumstances. That the application ought to have been made under 0.43 r 4 (3)  
20 C.P.R – which sets out the grounds upon which court can stay execution pending appeal.

It was then argued that the Applicant had not satisfied any of those grounds and there is no pending appeal before this court arising from civil suit 141/12, as there is no memorandum of appeal as required by 0.43 r 1 C.P.R.  
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That therefore, the Applicant cannot claim that there is an appeal without any memorandum of appeal having been filed. While there is a notice of appeal, it cannot be said that there is a pending appeal.

- 30 The appeal referred to in the notice of appeal, Counsel argued was filed in the Chief Magistrate’s Court of Mengo as C.A 44/15 but there is no appeal in the High Court.

The case of **Abu Wamboya vs. Sulaiman Gidima HCC MA 27/97** was cited to support grounds upon which court can grant orders of stay of execution; which include the application having been brought without unreasonable delay.

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It was then sated that the judgment in civil suit 141/12 was delivered on 30.09.15 in a typed form. From then Applicant did not take any initiative to file a proper appeal before the High Court and did not apply for stay of execution. The application for stay filed before this court was filed without any formal appeal.

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Further that, the likelihood of success of the Appeal cannot be relied upon to allow the application without any appeal for court to refer to. – See the case of **British India General Ins. Co. Ltd vs. D. Solanki HCMA 0543/97** which emphasizes *“the likelihood of success of the appeal.”*

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Commenting about the letter written to the Chief Magistrate’s Court applying for the record of proceedings and the typed copy of the judgment, Counsel referred court to paragraphs 6 and 7 of the affidavit in reply which she contends were not contested.

20 Counsel argued that if the Applicant was interested in filing the appeal, he would have done so using the copy of the judgment that was availed on 30.09.15.

It was also emphasized that the application for stay was only filed to frustrate execution of the decree in Civil Suit 141/12, as it was only filed after application for execution had been lodged.

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Further that the Applicant had not given any security for due performance of the decree as required by 0.43 r 4 (3) (c) C.P.R.

30 And that the Applicant’s alleged attempts to pursue the record of proceedings have been disputed by the Respondent in the affidavit in rebuttal of the rejoinder.

It was then prayed that the application be dismissed with costs.

In rejoinder, it was submitted for the Applicant that while the application may have been made under the wrong law, that was done in error. And that case law has established the principle that  
5 ***“where an application is brought under the wrong law, the irregularity is not fatal to the application and can be ignored and the right law inserted.”*** See **Saggu vs. Road Master Ug. Ltd [2000] EA LR 255.**

Counsel Prayed court to consider the application under the right provisions of the law, that is,  
10 0.43 rr 1 and 5 C.P.R and Article 126 (2) and (e) Constitution.

While agreeing that there has to be a memorandum of appeal, it was the contention of Counsel that when it comes to stay of execution, a notice of appeal is sufficient to commence an appeal. He relied on the case of **Attorney General vs. East Africa Law Society and Another**  
15 **Application 61/14** where it was held that ***“a notice of appeal is a sufficient expression of an intention to file an appeal and as such is sufficient to form the basis for the grant of orders to stay execution.”*** The same decision was also made in the case of **Equity Bank Ug Ltd vs. Nicholas Were, Miscellenous Application 604/13.**

20 Counsel added that it is not in dispute that a notice of appeal was filed in this case, and that while there was a number inserted on it, that was done in error by the court and it does not invalidate the notice of appeal.

Denying any alleged delay in filing the appeal, it was pointed out that the judgment was  
25 delivered on 30.09.15 and notice of appeal was filed on 05.10.15, and a request for the record of proceedings and judgment was made within the time prescribed by law.

The record of proceeding was persued since then, but before the proceedings could be obtained, the Bill of Costs was taxed without notice to the Applicant and the file was transferred to High  
30 Court for execution.

It was emphasized that the Applicant is willing to provide security for costs in a form of a land agreement and log book of a motor vehicle.

Earlier prayers were reiterated, stating that otherwise the appeal will be rendered nugatory.

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Counsel for the Respondent asserted that the case of **Equity Bank (Supra)** refers to appeals from the High Court to the Court of Appeal and not to appeals from Magistrate's Courts.

Upon giving the submissions of both Counsel the best consideration, I can in the circumstances,  
10 the following issues were framed for determination:-

1) Whether citing the wrong law in an application is fatal.

2) Whether the application should be allowed.

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The issues shall be determined in the order that they have been set out.

**1) Whether bringing an application under the wrong law is fatal.**

20 As pointed out by Counsel for the Respondent and rightly so, the application for stay of execution was made under SS 64 (e) and 98 of the CPA, S. 39 (2) of the Judicature Act and 0.48 rr 1 and 3 of the Civil Procedure Rules.

Indeed the provisions are not applicable to the circumstances of the present case, where the  
25 Applicant is seeking a stay of execution. The applicable law is 0.43 r 4 (3) C.P.R.

Be that as it may, decided cases have established that the citing of a wrong law is not fatal to an application. It has been held by the Court of Appeal that "**where an application omits to cite any law at all or cites the wrong law but the jurisdiction to grant the order exists, the  
30 irregularity or omission can be ignored and the correct law inserted.**" Refer to **Saggu vs. Roadmaster Cycles (U) Ltd (Supra)** where the cases of **Nanjibhi Prabhudas & Co Ltd vs.**

**Standard Bank Ltd [1968] EA and Re Christine Namatovu Tebajjukira [1992-93] HCB 85** were considered.

For those reasons court finds that the citing of the wrong laws did not prejudice the application,  
5 more so as the right law under which the application ought to have been made was referred to,  
that is 0.43 r 4 (3) C.P.R and will be relied upon in determining the application.

The objection is accordingly over ruled.

10 **2). Whether the application should be allowed.**

0.43 r 4 (1) provides for stay of proceedings under a decree or order appealed from. The  
provision clearly indicates that ***“an appeal to the High Court shall not operate as a stay of  
proceedings under a decree or order appealed from except as far as the High Court may order,  
15 nor shall execution of a decree be stayed by reason only of an appeal having been preferred  
from the decree; but the High Court may for sufficient cause order stay of execution of the  
decree.”***

0.43 r 4 (3) C.P.R sets out the conditions that must be satisfied before an order for stay of  
20 execution is made. These are:-

- a) That substantial loss may result to the party applying for stay of execution unless the order is made;
- 25 b) The application has been made without unreasonable delay; and
- c) That security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.

See also the case of **Abu Wamboya vs. Sulaiman Gidima HCMA 27/97. Mhalo Kamia J, and British India General Insurance Co. Ltd vs. Dolatrai Solanki (Supra)** where the grounds for stay of execution were reiterated.

5 In the present case, Counsel for the Respondent argued that the Applicant had not fulfilled any of those conditions set out in 0.43 r 4 (3) C.P.R. She prayed for dismissal of the application for the reasons already set out herein.

10 However, it is apparent from the submissions of Counsel for the Applicant and from the record that the Applicant filed a notice of appeal and also applied for proceedings. Courts are still divided as to where exactly such notice of appeal should be filed. But the fact remains that it was filed.

15 That the certified copy of proceedings was requested for from the lower court, but have never been availed is not disputed. Though the record indicates that the Respondent applied for execution six months from the time judgment was delivered – the East African Court of Justice has held that ***“a notice of appeal is sufficient expression of an intention to file an appeal, and that such action is sufficient to find the basis for grant of orders of stay in appropriate cases.”*** – See **Attorney General of Uganda vs. The East African Law Society and Another EAC J Application 1/2013.**

20 There is nothing in this case to indicate that the failure to get the proceedings was due to any fault of the Applicant. He is accordingly entitled to the benefit of doubt and not to be penalized for the default of court. The file from the lower court is attached to the execution file and the proceedings have never been typed.

25 The Application for stay of execution was filed on 20.04.16 and the lower court file was forwarded to High Court Execution Division on 11.04.16 and was received on 12.04.16. Therefore the application for stay was filed without unreasonable delay. It could not have been filed before the application for execution otherwise there would have been nothing to stay.

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The Applicant has further made it clear that he is willing to provide security for due performance of the decree, indeed he offered to furnish a land agreement and a motor vehicle log book as security. However, court is of the view that, that is not sufficient security for due performance. The Applicant is accordingly directed to deposit Shs. 1,500,000/- which is half of the damages  
5 that were granted to the Respondent and Shs. 6,350,000/- being half of the taxed costs of the suit, for due performance of the decree within two weeks.

It is also further ordered that the lower court file be returned to Mengo Court, to enable the Applicant obtain the typed proceedings and file the appeal within one month from today's ruling.  
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The application is allowed on those terms.

The costs of the application to abide the outcome of the appeal.

15 Upon failure of the Applicant to meet any of the conditions within the set timelines, execution will issue.

20 **Flavia Senoga Anglin**  
**Judge**  
**18.10.16**