

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

MISCELLANEOUS APPLICATION NO. 613 OF 2017

5 **(ARISING FROM HIGH COURT CIVIL SUIT 120 OF 2016)**

KAMPALA CAPITAL CITY AUTHORITY ----- APPLICANT

VS

1) LUKYAMUZI INVESTMENTS LTD

2) ATTORNEY GENERAL

10 **3) UGANDA LAND COMMISSION**

4) COMMISSIONER LAND REGISTRATION -----RESPONDENTS

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

By this application brought under S.33 of the Judicature Act, S.98 Civil Procedure Act
15 (CPA), and 0.52 rr 1 and 2 Civil Procedure Rules (C.P.R), the Applicant sought orders of this
court staying execution of the judgment and orders of Justice Bashaija, delivered on 28.02.17,
pending the disposal of the appeal.

Costs of the application were also applied for.

The grounds of the application are that:-

- 20 1) The Applicant being aggrieved by the judgment and orders in Civil Suit 120/16 has filed
a notice of appeal against the said decision and has applied for a typed and certified
record of proceedings ad judgment.
- 2) The First Respondent has extracted a decree from the said judgment and commenced the
process of execution against the Applicant.
- 25 3) The Fourth Respondent has demanded for the Certificate of Title of the suit land for
cancellation.
- 4) The Applicant has brought this application at the earliest opportunity and without
unreasonable delay.

- 5) Execution of the decree before the intended appeal is heard and disposed of will render the appeal nugatory; because if the appeal were to succeed, the Applicant will have great difficulty in reversing the orders made in HCCS 120/16.
- 6) The Applicant's intended appeal raises serious points of law that are of general importance, which merit hearing before the Court of Appeal.
- 7) It is in the interests of justice that court exercises its inherent discretion and grants this application.

The application is supported by the affidavit of Caleb Mugisha, the Ag. Director Litigation Services in the Directorate of the Applicant.

- 10 There is an affidavit in reply deposed by Richard Adrole, Senior State Attorney in the Second Respondent's Chambers. He states interalia that:-

The First Respondent filed C.S. 120/16 against the Attorney General and Others seeking for reinstatement of the Certificate of Title comprised in LRV KCCA 27 Folio 18, Plot 10A- 16A Naguru Link, Kampala District.

- 15 The Attorney General and the Third Respondent counter claimed against the Applicant and sought for cancellation of the Applicant's title comprised in FRV 402, Folio 21, Plots 10A- 16A.

Judgment was given and court ordered:-

- 20 - Cancellation of the First Respondent's certificate of title comprised in LRV KCCA 27, Folio 18, Plots 10A – 16A, Naguru Link, Kampala, for being unlawful.
- The Fourth Respondent was ordered to reinstate the First Respondent on the Register in respect of the suit land comprised in FRV 402, Folio 21, Plots 10A – 16A Naguru Link in the names of the Applicant.
- 25 - The Applicant, Second and Third Respondents were directed to give vacant possession of the suit land to the First Respondent.

In compliance with the court order, the Fourth Respondent on 10.03.17 reinstated the First Respondent's names on the title comprised in LRV KCCA 27, Folio 18, Plots 10A-16A under instrument No. 493244 – Annextures "A" and "B".

On 27.03.17, the Fourth Respondent informed the Solicitor General that the certificate of title for the Applicant had been cancelled in compliance with the court orders- Annexure C.

The orders of the High Court have been complied with and there is nothing left to be stayed by this court.

- 5 Without any memorandum of appeal to enable this court determine whether the intended appeal raises triable issues, the application cannot be allowed.

There is no evidence to demonstrate that the Second and Third Respondents are incapable of compensating or reimbursing any monies paid in damages in case the appeal succeeds.

- 10 The reliefs sought by the Applicant have been overtaken by events.

The application was called for hearing on 04.05.17 in the presence of Counsel for the Applicant and Counsel for the First Respondent; and a representative of the First Respondent. The 2nd, 3rd – 4th Respondents were absent.

- 15 Since the affidavits of service filed on 24.04.17 indicated that all Respondents had been served and receipt of service acknowledged, court allowed hearing to proceed in the absence of the 2nd – 4th Respondents.

Counsel for the Applicant then went through the provisions of the law under which application was made and the orders sought.

- 20 Referring to the supporting affidavit, she submitted that the purpose of the application was to preserve the subject matter in dispute so as to safe guard the rights of the Applicant to exercise what Counsel termed as “**an undoubtable right of appeal**”, so that if the appeal succeeds, it is not rendered nugatory.

The case of **Nalwoga vs. Edco Ltd & Another MA 07/13** was cited in support.

- 25 It was then contended that, the courts have also stated the conditions to be considered in applications of this nature Counsel relied upon the case of **Gashumba vs. Nkundiye MA 24/15** where it was held that “**for court to grant application for stay of execution, the following conditions have to be satisfied:-**

1) Likelihood of success of appeal or prima facie case of right of appeal.

2) *Likelihood of suffering irreparable damage or that appeal will be rendered nugatory if stay is not granted.*

3) *If 1 and 2 are not established, then court should consider balance of convenience.*

4) *Application was filed without unreasonable delay.”*

5 In respect of the **likelihood of success**: Counsel stated that, the Applicant obtained a lease from Kampala District Land Board in 2000. The lease was later converted to freehold. - paragraph 8 of affidavit in support.

The Applicant is in possession of the land and has been in possession of the same for over 30 years and the land serves several public functions.

10 Further that, the Applicant will suffer irreparable damage as the land serves as a recreation ground for several public functions including hosting Uganda Manufacturers Association (UMA) during their annual Trade Show Exhibits.

The stay is also sought against orders of special and general damages.

15 If the stay is not stayed, Counsel argued, it will be very difficult to recover the said money from the Respondent. – Paragraph 11 of the supporting affidavit.

Balance of Convenience: The Applicant has been in possession of the land for over 30 years, utilizing the same for recreation. The Respondent is not in possession of the land.

20 This application was filed on 20.03.17, soon after judgment was given. And that, court has discretion in civil proceedings where a notice of appeal has been lodged in accordance with the Civil Procedure Rules, to grant stay of execution in appropriate cases and in the terms it deems fit. – The case of **Gashumba vs. Nkundiye (Supra)** restated in the case of **Hon. Sekikubo & Others vs. Attorney General & Another Constitution Appl. 06/13** were relied upon.

25 It was pointed out that, while title was cancelled, there are still other pending orders not yet executed, that includes order of vacant possession, payment of special and general damages and interest therein.

Also that the Applicant has filed a notice of appeal and requested for typed record of proceedings- paragraph 6 affidavit in support.

A decree was extracted for purposes of pursuing the appeal.

While the Respondent contends that there is no appeal due to lack of a memorandum of appeal, decided cases are to the effect that ***“lodging a notice of appeal is sufficient to commence an appeal”***. – See **Equity Bank vs. Were MA 604/13**.

That in that case, Court also referred to Article 126 (2) (e) of the Constitution and stated that
5 ***“it would ordinarily be convinced by that argument and note that there was an appeal if it is proved that notice of appeal was properly filed before the court”***.

It was then contended that the Applicant filed a notice of appeal and the orders the Applicant seeks to stay are challenged. And the appeal has a likelihood of success.

If stay is not granted, the Applicant will suffer irreparable damage as it may not be able to
10 recover from the First Respondent after suffering the consequences of breach of contract with the several clients leasing the same land.

The appeal will also be rendered nugatory, Counsel added. And it will be more inconveniencing for the Applicant, if the application is not allowed since the Applicant is and has been in possession for over 30 years and has several contracts with several entities for use
15 of the suit land.

Court was implored to exercise its discretion and grant the orders sought on terms deemed fit in the circumstances. It was also prayed that costs abide the outcome of the appeal.

In reply, Counsel for the First Respondent submitted that the application before court is incompetent as it is made under general provisions of the law which grant general remedies
20 and discretionary powers of court.

He pointed out that, the enabling law for such applications is 0.43 r 4 C.P.R together with rule 4 of the Court of Appeal Rules. He argued that, where there is a specific enabling law, then court cannot proceed under general provisions of law.

However, without prejudice to the foregoing, Counsel submitted that according to paragraph
25 3 of the affidavit in reply, the First Respondent is the registered proprietor of the suit land, having been reinstated by a decree in C.S. 120/16- See Annexure “A” Certificate of Title, and paragraph 7 and 8 of the affidavit in reply plus Annexures C₁, C₂, C₃, D₁ and D₂. All indicate that the Respondent’s interests in the title was reinstated.

That since cancellation of the Applicant’s title has already happened; there is nothing to stay
30 in so far as reinstatement and cancellation is concerned.

Further that, while the Applicant contends that they have filed an appeal with triable issues with a probability of success, the triable issues were not identified. That the Applicants should have filed a memo of appeal to enable court ascertain if appeal has merit. This cannot be done by just looking at the notice of appeal.

- 5 And while the Applicant applied for the record of proceedings, the grounds of appeal do not emanate from the proceedings but from the judgment which the Applicant already has.

Therefore that, Counsel contended, the Applicant has failed to prove that they have an arguable appeal or that it would be rendered nugatory if the order is not granted.

- 10 The likelihood of suffering irreparable injury for having been in possession for over 30 years was also dismissed by Counsel for the First Respondent; contending that no further evidence to that effect had been furnished.

- He pointed out that, the history of the suit is that there were two competing titles. First Respondent has a title issued by Uganda Land Commission, while the Applicant has a title issued by Kampala District Land Board. Therefore, Counsel concluded, the Applicant cannot
15 say that it has been in possession for over 30 years.

Also that, the claim that the property is used for recreation, and that the Applicant has several contracts with other parties and will therefore suffer irreparable damage and appeal will be rendered nugatory is all evidence from the Bar as it is not indicated in the affidavit in support. – Paragraphs 12, 13 and 14 of the affidavit in reply were referred to.

- 20 That 0.43 r 4 (3) (a),(b) and (c) C.P.R sets out conditions to be met if an application of this nature is to be granted. The case of **Haji Ali Cheboi vs. Kiroko Mesulam, MA 104/14 (CA)**, and **Dr. Ahmed Muhammed Kisuule vs. Greenland Bank in Liquidation CA 07/10-** where the case of **Lawrence Musiitwa Kyazze vs. Eunice Busingye** was cited were relied upon to enumerate the conditions which include:-

- 25 **1) Substantial loss may result to the Applicant.**

But that the affidavit in support of the Applicant does not demonstrate that such loss will be suffered if application is not granted.

- And that the Applicant has not demonstrated that if general and special damages are paid to the First respondent, the First Respondent has no capacity to refund the same in case appeal is
30 successful. Paragraph 11 of the supporting affidavit is a plain averment.

- 2) Application was brought without unreasonable delay:**

It was the submission of Counsel that by the time this application was made, the reinstatement of First Respondent and cancellation of the Applicant's title had already taken place. The land is vacant and by virtue of being the registered proprietor, the First Respondent is in constructive possession of the land.

5 **3) Security for due performance of the decree:**

The Applicant does not offer to give security for due performance Counsel argued.

Therefore that, the Applicant has failed to fulfill the conditions set out in 0.43 r 4 C.P.R and the application should be dismissed with costs to the First respondent.

10 In rejoinder, Counsel for the Applicant submitted that the law under which the application was brought has similar remedies. And that where the wrong law is cited, applications exists in law and court will apply the right law in the circumstances.

Article 126 (2) (e) of the Constitution was also referred to for the principle that ***“substantive justice should be administered without undue regard to technicalities”***.

Therefore that the citing of the wrong law should be disregarded.

15 **First Respondent being registered proprietor of the property:** it was asserted that, the proprietorship of the First Respondent is as a result of one of the orders in the judgment which Applicant is appealing as a result of the cancellation of the Applicant's title held for over 15 years undisturbed.

20 It was also pointed that, to say execution is complete is not true when only cancellation of title has been done and the other orders are not yet affected. It was emphasized that, it is those orders which the Applicant seeks to stay.

Also that, the 30 years referred to in paragraph 8 of the supporting affidavit raise a triable issue in respect of the rights of a bonafide occupant of the land.

25 **Irreparable damage will be suffered by the Applicant:** It was stated that, considering possession of over 30 years, the issue of the land for recreational activities interalia, it follows that there are contractual obligations between the Applicant and the people using the land for different functions, for which Applicant may be held liable for breach of contract if vacant possession is given to the First Respondent.

Competing Titles: It was pointed out that the Applicant's title was issued in 2003 whereas that of the First Respondent was issued in 2013, a difference of 10 years. The only reason First Respondent was reinstated was that its title had earlier been cancelled.

The likely inability of the First Respondent to refund is not the only issue the Applicant seeks to present. As already indicated there are other orders.

Commenting about the lack of structure on the land and the constructive possession of the First Respondent, Counsel reiterated that the suit land is a recreational ground and serves the purpose even without structures. The Applicant is in actual possession of the land and that is why vacant possession was ordered.

10 **Security for due performance:** It was submitted that the Applicant is a Government Body that is exempted from furnishing security for due performance under 0.43 r 6 C.P.R.

Earlier prayers were reiterated adding that the court could give conditions deemed fit.

The following issues have been raised by the application:-

15 **1) Whether the application is incompetent for being brought under general provisions of the law,**

2) Whether the application should be allowed.

The issues will be dealt with in that order.

Alleged incompetence of the application:

20 As earlier stated in this ruling the application was made under S.33 Judicature Act and S.98 CPA and 0.52 C.P.R; hence Counsel for the First Respondent's argument that the application is incompetent for failure to cite the specific enabling provisions.

But as rightly pointed out by Counsel for the Applicant, ***“citing of the wrong law is not fatal to the application”***, because courts have repeatedly stated that ***“the right law can always be inserted”***.

25 In this case 0.43 r 4 C.P.R is the right law under which the application ought to have been brought and court will take that into consideration when determining the next issue of this application.

And that is not to say that court may not invoke its inherent powers under the general provisions of the law where circumstances warrant so.

It should always be borne in mind that ***“rules of procedure were meant to be hand maidens of justice but not to defeat it”***. And Article 126 (2) (e) of the Constitution clearly enjoins courts ***“to administer substantive justice without undue regard to technicalities”***.

Being able to insert the right law, it cannot be said that injustice will be occasioned to any of
5 the parties in this case.

The objection of Counsel for First Respondent in that respect is accordingly overruled. And this court finds that the application is properly before court.

Whether the application should be granted.

It is true as submitted by Counsel for the First Respondent that 0.43 r 4 C.P.R sets out
10 conditions that have to be satisfied before court makes an order for stay of execution.

The conditions were enumerated by Counsel for the First Respondent and have already been set out in this ruling. There is therefore no need to repeat them. Refer to case of **Haji Ali Cheboi vs. Kiroko Mesulam, (Supra), Dr. Ahmed Muhammed Kisuule vs. Greenland Bank (Supra)** and **Gashumba vs. Nkundiye (Supra)**

15 However, I take cognizance of the fact that decided cases have emphasized that ***“court has discretion to grant stay of execution where sufficient cause has been shown. But that, this power ought to be exercised judiciously and where it appears equitable to do so, with a view to temporarily preserving the status quo”***.

This court is also aware that ***“the guiding principles (conditions for grant of stay) depend on
20 the individual circumstances and merit of each case. The individual circumstances of each case will determine whether the case falls within the scope and parameters of any other laid down principle”***. – See **David Wesley vs. Attorney General Constitution Appl. 61/14** and **East African Development Bank vs. Blueline Enterprises Ltd [2006] 2 EAS (CAT)**.

In the present case, it is not disputed that judgment was given against the Applicant in C.S
25 120/16. Execution proceedings were commenced by the First Respondent who was then reinstated on the title in dispute.

The Fourth Respondent has demanded the certificate of title of the Applicant for cancellation and the First Respondent is seeking for vacant possession of the suit land in addition to being paid the damages and costs decreed by court.

30 The Applicant filed a notice of appeal in addition to applying for certified copy of the proceedings.

As earlier indicated, it is the argument of the First Respondent that the application has been overtaken by events and that there is no appeal and no memorandum of appeal has been filed.

However, it has been held that ***“a notice of appeal is sufficient expression of an intention to appeal and such action is sufficient to found the basis for grant of orders of stay in appropriate cases”***. – Refer to **Attorney General vs. East African Law Society & Another**
5 **EACJ Appl. No. 01/3**

The submissions of Counsel for the First Respondent in this respect are therefore over ruled.

While the First Respondent was reinstated on the title as directed by court, it is not disputed that vacant possession of the same has not yet been effected. The Applicant is therefore still
10 in possession. It is not the reinstatement of the title to the First Respondent that the Applicant seeks to stay, since it is already complete. What is sought to be stayed is the eviction of the Applicant who has taken necessary steps to appeal the decision of court, and who claims to have contracts with other parties making use of the disputed land.

The inherent powers of the court provided for under S.98 CPA and S.33 Judicature Act can
15 be rightly invoked in the circumstances of this case to stay the order for vacant possession and payment of the damages and pending the disposal of the Applicant’s appeal.

It would be unfair to deny the Applicant a chance to be heard on appeal and the possibility of suffering irreparable damage cannot be ruled out considering there are third parties involved in the equation.

20 It is apparent that the application was made without unreasonable delay as the orders sought to be stayed were made in a judgment that was delivered on 28.02.17 and the application was filed on 20.03.17.

While no security for due performance of the decree has been offered by the Applicant, court could direct it to be deposited save that under 0.43 r 6 C.P.R ***“no such security can be***
25 ***required from any Public Officer sued in respect of any act alleged to be done in official capacity”***.

This court also finds that the intended appeal of the Applicant raises triable issues in respect of the two titles that were held by the Applicant and the First Respondent over the land and when they were issued, and in respect of the third parties using the disputed land with
30 authority of the Applicant and who were not parties to the original suit.

The Balance of Convenience therefore, demands that the application be allowed for all the reasons set out herein.

The eviction of the Applicant from the disputed land is stayed pending the determination of the appeal together with the payment of the damages and interest ordered by the trial court.

- 5 Costs of this application will abide the outcome of the appeal.

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FLAVIA SENOGA ANGLIN
JUDGE
23.08.17