

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

**MISCELLANEOUS APPLICATION NO. 1375 OF 2016  
(ARISING FROM EMA NO. 06 OF 2016)**

**(ARISING FROM CIVIL SUIT NO. 01/2011 CHIEF MAGISTRATE'S COURT OF  
NABWERU)**

**1) NASSOLO JANE**

**2) NANTALE TABISA**

**3) KYAMUMU JUSTINE**

**4) ZALWANGO FLORENCE ..... APPLICANTS/APPELLANTS**

**VS.**

**PAUL KISEKKA SSAKU ..... RESPONDENT**

**BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

**RULING**

This was an application made under S.98 C.P.A, 0.22 and 0.52 rr1,2 and 3 C.P.R. The Applicants seek an order staying execution of the decree in Civil Suit 01/2011 pending the disposal of Civil Appeal 48/2015, at the High Court Land Division.

Costs of the application were also applied for.

The grounds for the application are that:-

- There is a pending Civil Appeal of 8/15 in the Land Division of the High Court filed by the Applicants.
- The Respondent is threatening execution.
- The Applicants will suffer irreparable loss if execution is not stayed and the appeal will be rendered nugatory.
- It is in the interests of justice that the application be allowed.

The application is supported by the affidavit of the First Appellant Nassolo Jane.

There is an affidavit in reply deponed by the Respondent Paul Kisekka Ssaku, where it is contended among other things that no appeal has been filed against the judgment within the prescribed time. No memorandum of appeal was annexed to the application. The Applicants' notice of appeal only indicates intention to file appeal which was never filed.

It was argued that a notice of appeal is not an appeal.

5 When the notice to show cause was served upon the Applicants, they failed to appear in court to inform it that they had filed an appeal.

That the application is defective and has no reasonable chance of success and it is only intended to cause unnecessary delay of the execution of the decree against the Applicants.

10 The First Applicant filed an affidavit in rejoinder contending that they applied for a typed copy of proceedings from the Chief Magistrate's Court at Nabweru- Annexure "A".

15 A notice of appeal was filed at the Land Division and later a memorandum of appeal in Civil Appeal 48/15 – Annexure B (memo filed on 29.10.15). Commencement of execution proceedings by the Respondent threatens the Applicants' interests in the suit land and will render the appeal nugatory.

It is therefore in the interests of justice that the pending execution be stayed.

20 When the application was called for hearing, Counsel for the Respondent insisted on raising a preliminary objection.

25 He submitted that the judgment the Applicants seek to stay was delivered on 27.03.15 in the presence of both Counsel. Thereafter, the appeal was supposed to be filed within thirty (30) days. However, no appeal was filed within the prescribed time.

30 The Judgment Creditor/ Respondent applied for execution of the decree and notice to show cause was issued to the Applicants. The Applicants and their Counsel did not appear in answer to the notice to show cause.

Counsel argued that the appeal cannot be filed after time within which to file has passed, without leave of court therefore that the appeal was filed out of time.

35 Further that, an intending Appellant can be excused if the proceedings were applied for within the prescribed time. But according to the affidavit in rejoinder, the letter applying for proceedings is dated 14.07.15 and was filed on 31.07.15.

40 The proceedings were therefore applied for when the time within which to appeal had expired. Judgment was delivered on 27.03.15.

Further that, the letter applying for proceedings was not commissioned by the Commissioner of Oaths. It has no Jurat and therefore cannot be a proper annexure and ought to be rejected.

45 The memorandum of appeal was also not served on the Respondent at the time the motion was served.

50 The notice of appeal was filed in October 2015, when the time to appeal had expired. And that the memo of appeal was also not commissioned by the Commissioner of Oaths and therefore not a proper annexure.

It was insisted that there is no appeal since it was filed out of time without leave. The application is defective and should therefore be dismissed with costs to the Respondent.

In reply, Counsel for the Applicant stated that the notice of appeal was filed on 27.10.15 and the memorandum on 29.10.15 – Civil Appeal 28/15.

5 That the argument that there is no pending appeal is premature as it can only be raised before the Appellate Court.

Otherwise that, the annexures to the application indicate that there is a pending appeal before the Land Division.

10 Failure of the Commissioner of Oaths to put a Jurat on the Annexures cannot be taken out on the Applicants.

Substantive justice should be administered without undue regard to technicalities.

15 Counsel prayed for dismissal of the objection with costs.

In rejoinder, it was asserted by Counsel for the Respondent that, Counsel for the Applicant had not explained why the appeal was not filed within time.

20 And that, since it is the duty of Counsel to ensure that the documents filed are proper, the Commissioner cannot be blamed.

He prayed as before.

25 I have heard the submissions of both Counsel, gone through the affidavits for and against the application and given all of them the best consideration I can in the circumstances. I find that I am more persuaded by the submissions of Counsel for the Respondent, for the following reasons:-

30 The judgment intended to be stayed was delivered on 27.03.15.

The letter applying for proceedings is dated 14.07.15.

The memorandum of appeal was filed on 29.10.15.

35 Without any indication as to when the proceedings were availed to the Applicants, it is apparent that the memorandum of appeal was filed out of time without leave of court.

40 While the lack of Jurat on the letter applying for proceedings could have been taken to be an oversight of the Commissioner of Oaths, which would not have been blamed on the Applicants, the memorandum of appeal attached to the affidavit in rejoinder and to the motion raises suspicion.

45 The affidavit in support of the motion is dated **27<sup>th</sup> June 2016**. It was deponed before Nathan Okwakol, Commissioner of Oaths. However, the memorandum of appeal attached hereto as Annexure has a Jurat to that effect that – **“This is annexure “C” referred to in the affidavit / statutory declaration of Nassolo Jane Sworn /delivered before me on 13<sup>th</sup> November 2015 at Kampala.”**

50 The Commissioner of Oaths signing the Jurat is **Namuddu Janet** and not Okwakol Nathan before whom the supporting affidavit was sworn.

The memorandum of appeal attached to the affidavit in rejoinder as Annexure “B” also has the same Jurat referring to annexure “C” allegedly referred to in the affidavit deponed on 13.11.15 before Namuddu Janet yet the Commissioner for Oaths of the affidavits in rejoinder dated 31.10.16 is Babu Rashid.

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Apart from those inconsistencies making the attachments suspicious, it is evident that the appeal was filed out of time without leave of court as no document was attached to indicate that time within which to appeal was extended or that there is an application to that effect pending before court. (Land Division).

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It has been established by decided cases that ***“an application for stay or execution is to be made to the High Court if sufficient cause is shown, before the time within which to appeal expires”*** – Refer to **Saudi & Another vs. Ali Mukenya [1987] HCB 51.**

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For those reasons, I agree with Counsel for the Respondent that there is no appeal and execution cannot be stayed on basis of a nonexistent appeal.

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The submission of Counsel for the Applicants that these are matters that should only be dealt with on appeal is rejected on the ground that the Supreme Court has held that ***“issues of execution are not to be determined by a separate suit but by court dealing with execution”***. – Refer to **Sinba (K) Ltd and 4 Others vs. UBC C.A 03/2014.**

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The objections of Counsel for the Respondent are upheld for all those reasons and the application is dismissed with costs to the Respondent.

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**FLAVIA SENOGA ANGLIN**  
**JUDGE**  
**05.06.17**