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**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA TA KAMPALA  
LAND DIVISION**

**MISC.APP NO. 338 OF 2024**

**(ARISING FROM MISC. APP NO. 233 OF 2024)**

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**(ARISING FROM CIVIL SUIT NO. 39 OF 2005)**

**SAM KIWANUKA WALUSIMBI ::::::::::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**KATE NAKATUMBA KIWALA TAMALE ::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE: HON LADY JUSTICE IMMACULATE BUSINGYE  
BYARUHANGA**

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**RULING**

This application was brought by way of Notice of Motion under section 98 of the Civil Procedure Act and *Order 52 rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1* seeking the following orders;

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1. The execution of a decree arising out of High Court Civil Suit No. 039 of 2005 be stayed and or set aside.
2. Costs of the application be provided for.

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This application is supported by an affidavit in support deposed by the applicant **Walusimbi Samuel**, which was sworn on the 15<sup>th</sup> day of January 2024. The grounds of the application are laid out in the application and the affidavit in support of the application but briefly they are the following;

- a) That on the 21<sup>st</sup> day of November 2023, the applicant filed a Notice of Appeal before this Honourable court and the Court of Appeal.

- b) That on the 15<sup>th</sup> day of December 2023, the applicant filed appeal proceedings vide Civil Appeal No. 1482 of 2023 which is pending before the Court of Appeal.
- c) That the appeal has a high likelihood of success and shall be rendered nugatory if execution is not stayed.
- d) That the High Court ordered that the applicant leaves the suit land and hands over possession to the respondent within 90 (ninety) days from the date of judgment.
- e) That the applicant shall suffer irreparable damage if execution proceeds.
- f) That the application for stay of execution has been made without reasonable delay from the issuance of the Judgment by this Honorable Court.
- g) That the applicant is willing to furnish security for due performance of the decree as may ultimately be binding upon him.
- h) That it is in the interest of justice that the orders sought be granted.

15 The respondent filed an affidavit in reply deposed by **Kate Nakatumba Kiwala Tamale** wherein the contents of the application and the affidavit thereto were denied in total and subsequently the applicants filed an affidavit in rejoinder.

### **Background to this application**

20 According to the amended plaint filed on the 28<sup>th</sup> of June 2016, the respondent in this application averred that herself together with her late cousin S.G.K Kizito acquired the suit land jointly in 1977 as the beneficiaries of the estate of their late great grandfather Bawalenkedi of the Mamba clan.

The respondent/ plaintiff further stated that the suit property forms a portion of the larger mailo property owned by the Kabaka of Buganda as is commonly referred to as 'Kabaka's land' and the applicant/ defendant being the son and a resident of the

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area was fully aware of the plaintiff's interest. The respondent further claimed that sometime in 1997, a dispute arose between the plaintiff and her late cousin on one hand and 5 other persons namely G Kyamudugaza, R Nakintu, S suuna, F Nannono and W Muleme regarding the ownership of the said Kibanja. That the  
5 dispute which was reported to Kawaala Central Zone L.C.I on 19.05.1997 vide reference KCZ/16/97 was resolved in favour of respondent/ plaintiff and her late cousin on 05.09.1999.

That on 15/5/1997, while aware of the respondent/ plaintiff's interest on the suit property, the applicant/ defendant purportedly purchased the suit Kibanja from the  
10 above people and subsequently on 26/4/1994, the applicant/ 1<sup>st</sup> defendant applied to Buganda Land Board for lease over the suit land supported by a letter of recommendation from Kawaala L.C.I, Kasubi Parish which had no jurisdiction over the suit Kibanja as opposed Kawaala Central zone L.C. I.

That on 2/2/2000, basing on the above information, Buganda Land Board being an  
15 agent of the 2<sup>nd</sup> defendant made a lease offer to the applicant/ 1<sup>st</sup> defendant and the same was accepted and concluded on 25/4/2000 with a leasehold certificate of title vide LRV 2804, folio 20 Kibuga Block 203 plot 3265 Kawaala issued to the 1<sup>st</sup> defendant/applicant.

The respondent further pleaded that on 20/2/2004, the applicant/ 1<sup>st</sup> defendant  
20 applied to the Secretary Buganda Land Board seeking for extension of the lease to full term, claiming that he had fulfilled all the necessary conditions for a lease extension including the completion of a commercial building and attached fictitious photographs. That consequently, the 2<sup>nd</sup> defendant, acting through its agent, Buganda Land Board extended the applicant/ 1<sup>st</sup> defendant's lease to 49  
25 years.

That upon the discovery of the above, on the 24/8/2004, the respondent/ plaintiff wrote to Buganda Land Board seeking appropriate intervention but no steps were taken by them. The respondent/ plaintiff claimed that with the coming into force of the Land Act of 1998, she became a lawful occupant with security tenure over the  
5 suit Kibanja.

In reply, the applicant/ 1<sup>st</sup> defendant and 2<sup>nd</sup> defendants (Kabaka of Buganda) filed written statements of defence, wherein they denied the contents of the plaint and in particular, the applicant/ 1<sup>st</sup> defendant averred that he lawfully purchased the suit land from the former owner and that the alleged letter referred to in paragraph 6 (e)  
10 was a recommendation for another piece of land and not the suit land.

The applicant pleaded that in a bid to own the legal interest, he applied for a lease extension, which was granted basing on several correspondences including but not limited to the Chief Town Planner's report from the City Council of Kampala that the building situated on plot 3265 block 2023 Kawaala had complied with the  
15 building rules.

Having heard the main suit on its' merits and conducted a locus visit on the suit land, this court made entered judgment in favor of the respondent on the 17<sup>th</sup> day of November 2023, wherein I declared that the respondent/ plaintiff is the lawful occupant of the suit property comprised in LRV 2804 folio 20, Kibuga Block 203  
20 plot 3265, that the leasehold interest granted to the applicant/ 1<sup>st</sup> defendant be revoked, that the Commissioner Land Registration be ordered to cancel the applicant's/ 1<sup>st</sup> defendant 's name on the title deed of land comprised in LRV 2804 folio 20, Kibuga Block 203 plot 3265, that the applicant/ 1<sup>st</sup> defendant leaves the suit land and hand over possession to the respondent/ plaintiff within 90 (ninety)  
25 days from the date of issuance of the judgment, an order of a permanent injunction against the applicant/ 1<sup>st</sup> defendant and his agents, an order of general damages to a

tune of Uganda shillings 80,000,000 (Uganda shillings eighty million) be awarded to the respondent/ plaintiff, interest at a rate of 6% per annum on the award of general damages and costs of the suit.

The applicant/1<sup>st</sup> defendant in the main suit being dissatisfied with my judgment  
5 filed Civil Appeal No. 1482 of 2023 in the Court of Appeal challenging my judgment and equally filed this application vide Miscellaneous Applications Nos. 344 of 2024 for interim stay of execution and 338 of 2024 seeking a stay of execution pending the determination of the appeal in Court of Appeal.

### **Representation**

10 The applicant was represented by Counsel Kikomeko Saul and Ogomba Issa while the respondent was represented by Counsel Arthur Murangira.

### **Preliminary objection**

It was counsel for the respondent's submission that the applicant is in contempt of a valid court order. Counsel went ahead to submit that this application has been  
15 overtaken by events since it was the applicant was ordered to vacate the suit land within 90 days from the 17<sup>th</sup> of November 2023 when the Judgment in C.S. No. 39 of 2005 was issued. It is counsel for the respondent's argument that this order is self-executing as it took effect on 15<sup>th</sup> February 2024 and at that point the applicant ought to have vacated the suit land.

20 According to the Electronic Court Case Management System (ECCMIS) database, the applicant filed this application on the 13<sup>th</sup> day of February 2024, just two days before the lapse of the 90 days which would have lapsed on 15<sup>th</sup> February 2024.

Whereas, the applicant waited till the very last minute to file this instant application, the same was done two days before the 90 days lapsed. In the case of

**Betty Kizito versus Dickson Nsubunga & ors HCMA No. 25 and 26 of 2011,** the court laid out the conditions to be satisfied to prove contempt of a court order including; the existence of a lawful order, knowledge of the order, the contemnor's ability to comply and the potential contemnor's failure to comply with the order.

5 In the instant case, it was not in dispute that this court issued an order to the effect that the applicant should vacate the suit land within 90 (ninety) days from the issuance of the Judgment on the 17<sup>th</sup> of November 2023. Furthermore, it was not in dispute that the applicant knew about the said order, if anything, knowledge of the same was admitted in the instant application and the same is the basis for this  
10 application.

By filing this application to stay the said order of court before the lapse of said 90 days acted as a measure of temporarily freezing time within which to execute the Decree and in turn prevent the failure to comply with the said order. Had the applicant filed this application after the 15<sup>th</sup> of February 2024, at that point the 90  
15 days would have lapsed and hence Counsel for the respondent's submissions would be sustained, however at this point they are premature.

Counsel for the applicant filed the record of appeal in Court of Appeal on the 15<sup>th</sup> of December 2023 and as such this application could have been filed earlier. However, they still filed this application before the Order of court took effect.  
20 Whereas court went ahead to hear this matter after the lapse of 90 days, the effects of court's busy schedules should not be visited on an innocent litigant.

Therefore, in accordance with **Section 98 of the Civil Procedure Act and section 33 of the Judicature Act**, I hereby invoke the inherent powers of court to proceed and determine this application on its merits so as to ensure that the ends of justice  
25 are met. This preliminary objection is hereby overruled.

## Merits of the application

Both parties' counsel filed written submissions as directed by this Court and the same shall be considered by this court when arriving at its decision. The main issue of resolution in this application is, *whether the applicant has met the conditions for*  
5 *grant of an order for stay of execution against the Judgment and Decree of this court vide C.S. 39 of 2005 pending appeal?*

As a general principle of law, it is the duty of court to protect the interests of an unsuccessful litigant by making an order staying execution proceedings in a Judgment or Ruling being appealed against hence preventing the appeal from being  
10 rendered nugatory. In the case of ***Lawrence Musiitwa Kyazze versus Eunice Busingye S.C.C.A No. 18 of 1990***, it was held that, an application for stay of execution pending appeal is designed to preserve the subject matter in dispute so that the rights of the appellant who is exercising his/ her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

15 The conditions for grant of this type of application were laid out in the case of ***Theodore Sekikubo & ors versus Attorney General & ors SCMA No. 3 of 2014***, wherein it was held that, "In an application for stay of execution pending appeal, the applicant must show that he lodged a notice of appeal, the appeal may have a likelihood of success and the application has been made without unreasonable  
20 delay and if the stay were not granted, substantial loss may result to the applicant.

### *Condition 1: A notice of appeal has been filed*

According to annexure 'C' to the applicant's affidavit in support of the application, the applicant filed a Notice of Appeal both in this Court and the Court of Appeal Registries on the 21<sup>st</sup> day of November 2023. Therefore, this  
25 requirement has been satisfied.

*Ground 2: The application has been made without unreasonable delay.*

Applications of this nature ought to be made within a reasonable time. The issue of whether delay is unreasonable depends on the peculiar facts of each case. In the instant case, the orders in the decree sought to be executed were made by this court  
5 on 17<sup>th</sup> day of November 2023 and the Decree itself was extracted on 23<sup>rd</sup> November 2023. This instant application for stay of execution was filed on the 12<sup>th</sup> day of February 2024.

In the premises, I find that the applicants filed this application without undue delay hence this condition has equally been satisfied.

10 *Ground 3: The appeal is not frivolous and has a likelihood of success.*

In such applications, the court must be satisfied that the prospects of the appeal succeeding are not remote but that there is a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. (***See: Formula Feeds Limited & 3 others versus KCB Bank Ltd HCMS No. 1647 of***  
15 ***2022)***

In the case of ***Formular Feeds Limited versus KCB Bank Ltd (supra)***, it was held that an appeal shall be considered frivolous if prima facie, the grounds intended to be raised are without any reasonable basis in law or equity and cannot be supported by a good faith argument. Furthermore, in case of ***Commissioner Customs Uganda***  
20 ***Revenue Authority versus Kayimba CACA No. 62 of 2014***, Justice Kakuru stated that on a likelihood of success, the circumstances for consideration include; like the subject matter of a case is in danger of being destroyed, sold or in any other way of being disposed of.

According to paragraph 6 of the affidavit in support of the application, the  
25 applicant deposed that he is likely to suffer irreparable damage if execution is not



stayed. On the other hand, in paragraph 7 of the affidavit in reply, the respondent denied these claims and deposed that in the unlikely success of the appeal, the applicant can reclaim the suit land and the general damages to the tune of Uganda Shillings 80,000,000 (Uganda shillings eighty million) from the respondent.

5 Apart from annexing the first page of the record of appeal as annexure ‘D’, the applicant did not attach the memorandum of appeal to aid this court in determining the likelihood of success of the appeal. At this point in time, this court is not obligated to determine whether the grounds of appeal shall be successful, however, it must determine that the appellant has grounds of appeal which are not frivolous.

10 In the case of ***Kyambongo University vs Prof. Isaiah Omolo Ndiege Court of Appeal Civil Application No. 341 of 2013*** the Court of Appeal noted as follows;

15 *“In my view the law recognizes that not all orders or decrees appealed from have to be stayed pending appeal. It also recognizes a fact that an appeal may be determined without the court having to grant a stay of execution. However, court may stay execution where the circumstances of the case justify such a stay. It is therefore incumbent upon the applicant in every application of stay of execution to satisfy court that grounds exist for grant of a stay of execution. The assumption that once a party has filed an appeal a*  
20 *stay of execution must follow as a matter of course has no legal basis”.*

It is trite that he who alleges must prove. Without attaching a memorandum of appeal to aid court in assessing the likelihood of success of the appeal this court’s hands remain tied. However, in order to ensure that the ends of justice are met in  
25 accordance with **Section 98 of the Civil Procedure Act**, I have taken it upon

myself to peruse the record of appeal vide Court of Appeal Civil Appeal 1482 of 2023 via the **Electronic Court Case Management System (ECCMIS)**.

According to the memorandum of appeal therein, the grounds of appeal are that;

- 5           i.       ***The Learned Judge erred in law and fact when she ruled that the respondent is the lawful occupant of the suit property comprised in LRV 2804 folio 20, Kibuga Block 203 plot 3265 when she is neither the Registered Proprietor nor in possession of the suit land.***
- ii.       ***The learned judge erred in law when she ruled that the leasehold interest granted to the appellant by Buganda Land Board be revoked.***
- 10       iii.       ***The learned Judge erred in law and fact when she ordered the Commissioner Land Registration to cancel the appellant's name on the Title deed of lad comprised in LRV 2804 folio 20, Kibuga Block 203 plot 3265.***
- iv.       ***The learned Judge erred in law and fact when she awarded damages of Ugx 80,000,000 (Uganda shillings eighty million) against the appellant for fraud and trespass to land.***
- 15       v.       ***The Learned Judge erred in law and fact when she failed to properly evaluate the evidence on record before court hence arriving at a wrong decision.***

20 According to my assessment of the aforementioned grounds, the applicant was completely dissatisfied with my evaluation of evidence in the trial case vide Civil Suit No. 39 of 2005 and hence as a matter of statutory right, the applicant is appealing against my judgment on points of law and fact to the Court of Appeal for re-evaluation of the evidence. It is not the duty of this court at this point to  
25 determine whether these grounds of appeal shall be successful, but rather to determine the likelihood of success or that the same are arguable and not frivolous.

In the case of ***R Versus Ajit Singh s/o Vir Singh [1957] EA 822***, the term "**Frivolous**" was defined as the absence of seriousness or the lack of validity or legitimacy. I am of the opinion that the grounds raised by the applicant in the memorandum of appeal are arguable and valid as they relate to reevaluation of  
5 evidence to determine the true ownership of the suit land. As to whether these grounds shall succeed is an issue for determination by the full panel of Justices of the Court of Appeal.

Therefore, I find that this ground has been equally satisfied.

*Ground 4: There is a serious or eminent threat of execution of the decree or order  
10 and if the application is not granted, the appeal would be rendered nugatory*

The Court of Appeal in ***Kyambongo University vs Prof. Isaiah Omolo Ndiege (supra)***, held that one of the conditions to be satisfied in an application for stay of execution pending appeal is whether or not an Appeal will be rendered nugatory if a stay is not granted and this depends on whether or not what is sought to be stayed  
15 if allowed to happen will be reversible, or if it is not reversible, whether damages will reasonably compensate the party aggrieved, or it is in the public interest to grant a stay.

As earlier stated, it was the order of this court that the applicant vacates the suit land within 90 days from the date of issuance of the judgment. As started in the  
20 judgment of this court vide Civil Suit No. 39 of 2005, the applicant has been in occupation of the suit land for over twenty years and has been operating a washing bay and a park yard on the suit land. It is evident that if court were to enforce the decree in the said suit and execute the same, the applicant would be evicted from the suit land before the appeal is heard and disposed of and this would live room

for the suit land to be transferred to third parties before the appeal is heard and disposed of.

Therefore, it would be wise to maintain the status quo until the final determination of the appeal so that the findings of the Court of Appeal are not futile in the event  
5 that the appeal is successful. In the premise, I am satisfied that this condition has been equally met.

*Ground 5: The applicant has given security for due performance of the decree or order.*

In the ***Formula Feeds Case (supra)***, Justice Mubiru held that in granting an order  
10 of stay of execution pending an appeal, the court has to balance the need to uphold the respondent's right to be protected from the risk that the appellant may not be able to satisfy the decree, with the appellant's right to access the courts.

The instant application is for stay of execution pending the outcome of the appeal vide Court of Appeal Civil Appeal No. 1482 of 2023. In applications of such a  
15 nature, the provisions of **Order 43 rule 4 (3) (c) of the Civil Procedure Rules** have to be complied with and the same provides that;

***“No order for stay of execution shall be made under sub rule (1) or (2) of this rule unless the court making it is satisfied that security has been given by the applicant for the due performance of the  
20 decree or order as may ultimately be binding upon home or her”.***

According to the case of ***John Baptist Kawanga versus Namyalo Kevina & Anor HCMA No. 12 of 2017***, it was held that the objective of the legal provisions on security was never intended to fetter the right of appeal but rather it was intended to ensure that courts do not assist litigants to delay execution of decrees through  
25 filing vexatious and frivolous appeals. It was further held that the decision to order

for security for due performance must be made in consonance with the probability of success of the appeal.

In paragraph 7 of the affidavit in support of the application, the applicant declared his willingness to furnish security for costs if required to do so. As earlier noted, the applicant is in occupation of the suit land and continues to earn from the same to the detriment of the respondent who was adjudged the lawful owner. Therefore, it is only just that the applicant pays security for costs, in the event that his appeal is unsuccessful, the respondent's costs have to be catered for. In the premises, let applicant is ordered to pay Uganda Shillings 100,000,000 in court as security for costs under Order 43 of the Civil Procedure Rules.

In conclusion, I find that the applicant has satisfied all the essential conditions for the grant of an order of stay of execution pending appeal and I order as follows;

- a) *The Decree and Orders made vide High Court Civil Suit No. 39 of 2005 are hereby stayed pending the hearing and disposal of Court of Appeal Civil Appeal No. 1482 of 2023.*
- b) *The applicant is ordered to furnish security for costs to a tune of Ugx 100,000,000 and the duplicate certificate of title of suit land comprised in LRV 2804 folio 20, Kibuga Block 203 plot 3265. The amount of Uganda Shillings 100,000,000 shall be deposited on the court account as security within 30 days from 15<sup>th</sup> March 2024. The certificate of title shall be deposited with Registrar of this court as security within fourteen days from today.*
- c) *The applicant shall deposit the sum of money mentioned in order (b) on this Court's account and should present a receipt to the Deputy Registrar of this court who should upload the same in ECCMIS.*

*d) The applicant shall equally deposit the duplicate certificate of title of suit land comprised in LRV 2804 folio 20, Kibuga Block 203 plot 3265 with the Deputy Registrar of this Court not later than 28<sup>th</sup> March 2024.*

*e) Costs shall abide the outcome of the appeal.*

5 I so order.

Ruling delivered at High Court, Land Division via ECCMIS this **15<sup>th</sup> day of March, 2024.**

**Immaculate Busingye Byaruhanga**

10 **Judge**