

5 **THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPLICATION NO. 222 OF 2023**

*(Arising from Civil Appeal No. 09 of 2019 and HCCS No.0428 of 2015)*

BETWEEN

10 **EMMANUEL NSABIMANA..... APPLICANT**

VERSUS

**SAM JAKANA & ANOTHER.....RESPONDENTS**

**RULING OF CHRISTOPHER GASHIRABAKE, JA**

15 **(SINGLE JUSTICE)**

**Introduction**

1.] This application was brought under, Rules 2(2), 6(2)(b), and 43(1) of the  
Judicature (Court of Appeal) Rules SI 13-10, for Orders that;

- 20 *a. An Order for a stay of execution of the orders in the Judgment in  
Hccs No.0428 of 2015 issue until the determination of Civil Appeal  
No.09 of 2019 which is pending hearing before this Court.*
- b. The status quo of the suit land be maintained as it is till the appeal  
is heard and disposed of.*
- c. Costs of this application abide by the outcome of the appeal.*

25 2.] The application is premised on the grounds laid down in the affidavit sworn  
by Mr. Emmanuel Nsabimana. It was averred that;

- a. The applicant filed an appeal against the decision of the trial Judge  
to wit Civil Appeal No. 09 of 2019.*
- 30 *b. The appeal has been fixed for conferencing interparties on 11<sup>th</sup> July  
2023.*

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- 5           c. *The execution proceedings are only meant to defeat the appeal having  
          been served 10 days after service of the conferencing of the Court of  
          Appeal notice.*
- d. *The application has been brought without delay.*
- 10          e. *The appeal shall be rendered nugatory if this application is not  
          granted.*
- f. *It is in the interest of justice and equity that the said application be  
          granted.*

3.] The application was opposed by an affidavit sworn by Ms. Tilda Jakana on the ground that it is an abuse of the Court process.

15       **Representation**

4.] Mr. Moses Kunoba holding brief for Rashid Babu who represented the applicant. Mr. Silas Baguma represented the respondents. The parties filed written submissions.

**Submissions for the Applicants**

20       5.] It was submitted for the applicant that for an application of execution to be granted the applicant must prove that a Notice of Appeal and a Memorandum of Appeal were lodged as under Rule 72 of the Rules of this Court. Counsel cited **Kyambogo University vs. Prof. Isaiah Omolo Ndiege, Civil Application No. 341 of 2013.**

25       6.] Secondly, the applicant must demonstrate that the appeal has a high chance of success. It was submitted that the applicant's Kibanja is likely to be taken considering annexures H and I, which are hearing notice and application for execution. Additionally, it was submitted that the applicant is likely to suffer irreparable damages.

5 7.] It was submitted that the third thing the applicant should prove was that the application was made without unreasonable delay. Counsel submitted that the execution proceedings were initiated on the 11<sup>th</sup> of May 2023 and this application was made on the 26<sup>th</sup>, of May 2023. Counsel Cited **Lawrence Musitwa Kyazze vs. Businge, SCCA No. 18 of 1990.**

10 8.] Lastly, it was submitted that it is in the interest of justice that the application is granted. Counsel prayed that the status quo of the suit be maintained till the appeal is heard and disposed of.

**Submissions for the Respondent**

15 9.] Counsel for the respondent submitted that for this court to grant an application for a stay of execution, the applicant has to prove that;

1. *Substantial loss may result to the applicant unless the order is made.*
2. *The application has been made without unreasonable delay.*
3. *The applicant has given security for due performance of the decree or order as may ultimately be binding upon him. See **Musiitwa***

20 ***Kyazze vs. Eunice Busingye, Civil Application No. 18 of 1990.***

25 10.] Counsel submitted that the appeal is incompetent for failure to serve the Notice of Appeal within the time provided by the rules. The Notice of Appeal was sealed and signed by the Registrar on the 10<sup>th</sup> of September 2018 but was served on the respondent on the 23<sup>rd</sup> of November 2018, which was contrary to rule 78(1) of the Judicature (Court of Appeal) Rules. This rule requires that the Notice of appeal is served within seven days upon lodgment. It was submitted that the applicant ought to have served the Notice on the 18<sup>th</sup> of September. Counsel cited **Horizon Coaches Limited Vs Mutabaazi & 3 Others, Civil Appeal No.20 of 2001**, where the Supreme Court held that the provisions of the service of notice are mandatory. Failure to adhere makes the  
30 Notice of Appeal incompetent.

5 11.] Furthermore, it was submitted that this application should not be  
granted because the applicant did not file the instant application within a  
reasonable time after the dismissal of HCMA No. 086 of 2019, by the High  
Court. The respondent had also consented to pay costs in HCMA No.086 of  
2019 by 30<sup>th</sup> September 2022 but he failed to. The Applicant also has neither  
10 paid security for the due performance of the decree nor has he shown the  
willingness to do so. Counsel for the respondent prayed that this Court reject  
the application

**Consideration of Court.**

12.] The jurisdiction of this Court to grant a stay of execution is set out in  
15 Rule 6(2) (b) of the Rules of this Court which provides that:

*"2. Subject to sub-rule (1), the institution of an appeal shall not  
operate to suspend any sentence or stay execution but the Court may:*

*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  
20 execution.....on such terms as the Court may think just".*

13.] Rule 6(2) and rule 2 (2) give this Court, the discretion, in civil  
proceedings, where a notice of appeal has been lodged in accordance with  
rule 76 of the Rules of this Court, to grant a stay of execution in appropriate  
cases and on terms that it thinks fit. This discretionary power must be  
25 exercised in a way that does not prevent a party from pursuing its appeal so  
that the same is not rendered nugatory should the appeal overturn the trial  
court's decision.

14.] In **Hon. Theodore Ssekikubo & Others vs. The Attorney General  
and Another, Constitutional Application No 06 of 2013**, the Supreme

5 Court laid down the principles to guide the Court in granting a stay of execution. It held that;

*“(1) The application must establish that his appeal has a likelihood of success; or a prima facie case of his right to appeal*

10 *(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, the Court must consider where the balance of convenience lies.*

15 *(4) That the applicant must also establish that the application was instituted without delay.”*

15.] After considering the application, affidavit in reply, and submissions, the issue for determination is whether this application presented justified reasons for granting a stay of execution.

#### **Likelihood of Success.**

20 16.] On the first issue of whether the appeal has a likelihood of success, this Court has to establish whether the applicant has raised issues on appeal that are triable by the Court. In **Gashumba vs. Nkundiye, Civil Application No. 24 of 2015**, the Supreme Court held that;

25 *“Further, in our view, even though this Court is not at this stage deciding the appeal, it must be satisfied that the appeal raises issues that merit consideration by the Court. A cursory perusal of the record particularly the judgment of the Court of Appeal as well as the Notice of Appeal reveals that the intended appeal raises the important question of res judicata, it is not therefore frivolous.”*

30 17.] The respondent had raised an issue that the appeal had no likelihood of success because he was served the Notice of appeal out of time and has a

5 likelihood of being struck out, in my view this is speculative. The Supreme Court in **Gashumba** (*Supra*) in handling a similar matter held that;

*“the fact that the applicant has not yet complied with section 6(2) of the Judicature Act has no bearing on the success of the appeal since he still has the opportunity to do so.”*

10 18.] In fact, the Supreme Court in **Gashumba** (*Supra*) had earlier advised that if the applicant was still interested in the appeal, he would apply for an extension of time within which to file the certificate as required by law. Similarly, what is of interest is that the applicant has to demonstrate that the appeal raised triable issues at appeal. To establish whether there were triable  
15 issues raised by the applicant, I perused the Memorandum of appeal which raised grounds that;

1. *The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record regarding the appellant’s interest in suit land thus occasioning a miscarriage of Justice.*
- 20 2. *The learned trial Judge erred in law and fact when he misconstrued the law regarding Powers of Attorney thus arriving at a wrong conclusion.*
3. *The learned trial Judge erred in law and fact when he held that the respondents had the authority/capacity to bring the suit, thus occasioning a miscarriage of justice.*
- 25 4. *The learned trial Judge in law and fact when he held that the appellant had no authority to purchase bibanja on the suit land.*
5. *The learned trial Judge erred in both law and fact when he held that the appellant was a trespasser on the suit land.*

19.] Considering the memorandum of appeal, I find that there are triable  
30 issues raised by the applicant. The court is satisfied that the claim is not frivolous and vexatious.

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5           **Irreparable damages**

20.]       The term “irreparable damage: is defined in **Black’s Law Dictionary, 9<sup>th</sup> Edition at page 447** as;

*“Damages that cannot be easily ascertained because there is no fixed pecuniary standard measurement”*

10       21.]       Other than the applicant stating in paragraph 5 of the affidavit in support of the Motion that there is a hearing notice and application for execution, the applicant has not adduced any evidence by affidavit that he would suffer substantial loss if the application is not granted. The applicant must demonstrate by adducing cogent evidence that if the application is not  
15       granted, there shall be substantial loss by the time the appeal is determined. This condition has not been satisfied.

**Unreasonable delay**

22.]       On whether the application was made without delay, the applicant applied for the initial application for stay of execution HCMA No. 86 of 2019.  
20       This was dismissed on the 19<sup>th</sup> of February, 2020. The applicant should have filed the instant application within a reasonable time after the High Court rejected the stay of execution. However, it is my observation that this application was brought after 3 years with no explanation for the delay. This was dilatory. I find that there was an unreasonable delay

25       **Balance of convenience**

23.]       Under balance of convenience, the Court must be satisfied that the comparative mischief, hardship, or inconvenience is likely to be caused to the applicant by refusing to grant the injunction. In **Jayndrakumar Devechand Devani vs. Haridas Vallabhdas Bhadresa & Anor, Civil Appeal [1971] EACA 11**, the Court observed  
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5           “ Where any doubt exists as to the plaintiff’s right, or if his right is not  
disputed but its violation is denied, the Court, in determining whether an  
interlocutory injunction should be granted, takes into consideration the  
balance of convenience to the parties and the nature of the injury which  
the defendant, on the one hand, would suffer if the injunction was granted  
and he should ultimately turn out to be right, and that which the plaintiff  
10           on the other, hand, might sustain if the injunction was refused and he  
should .... turn out to be right. The burden of proof that the inconvenience  
which the plaintiff will suffer by the refusal of the injunction is greater  
than that which the defendant will suffer, if it is granted, lies on the  
15           plaintiff.”

24.]       The applicant did not adduce any evidence to show that the balance of  
convenience would be in his favour. This ground fails.

#### **Security for Costs**

25.]       It is a requirement that when one applies for a stay of execution,  
security for due performance should be provided for. In **Lawrence Musiitwa**  
20           **Kyazze vs. Eunice Busingye, SCCA No. 18 /1990** Court held that;

          “the practice that this Court should adopt is that in general  
application for stay should be made informally to the judge who  
decided the case when judgment is delivered. The judge may direct  
that a formal motion be presented on notice (Order XLVIII Rule 1)  
25           after notice of appeal has been filed. He may in the meantime grant a  
temporary stay of this to be done. The parties asking for a stay should  
be prepared to meet the conditions set out in Order XXXIX rule 4(3)  
of the Civil Procedure Rules. The temporary application maybe  
30           exparte.”

26.]       The applicant has neither deposited any security for the due  
performance of the decree nor has he demonstrated the willingness to do so.  
This ground has not been satisfied.

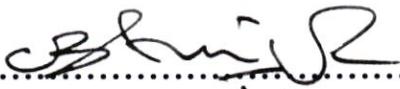
(a) I find that this application has no merit.

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- 5 (b) Costs shall abide by the outcome of the appeal.  
(c) The interim stay of execution is hereby vacated.

**I so order.**

10 Dated signed and delivered at Kampala this .....<sup>21<sup>st</sup></sup> Day...<sup>FEB</sup> of  
2024



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**C. GASHIRABAKE**

15 **JUSTICE OF APPEAL**