

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA FAMILY  
DIVISION  
MISCELLANEOUS APPLICATION NO. 754 OF 2022**

**(ARISING FROM CIVIL SUIT NO. 114 OF 2015)**

**NAKIBINGE CHARLES :::::::::::::::::::::::::::APPLICANT**

**VERSUS**

**KAMYA KEVIINA NANDAULA:::::::::::::::::::::RESPONDENT**

**Before: Lady Justice Ketrah Kitariisibwa Katunguka.**


**Ruling .**

**Introduction**

1. Nakibinge Charles and Katerega Glazio unsuccessfully sued Kamya Kevina Nandaula, Kiwanuka Haruna and Lumaama Henry in CS No. 114/2015; Judgment was delivered against the plaintiffs (including Nakibinge Charles the applicant in this case), on 23<sup>rd</sup> February 2018; being dissatisfied with the orders and judgment of this court Nakibinge Charles and another filed Civil Appeal No, 323/2020 which is pending hearing; he now brings this application for stay of execution pending the hearing and determination of the appeal and for costs of the application to be provided for.

2. The background and grounds of the application are contained in the Notice of Motion and the Affidavit in support deposed by Nakibinge Charles the applicant and are briefly that; the applicant's appeal raises arguable grounds; the respondent is executing the duties of administration of the estate before determination of the appeal; on 4<sup>th</sup> February 2020 the respondent while asserting her authority as an administrator on the strength of the judgment sought to evict the beneficiaries of the estate of the late Balimunamba Jemusi;

3. The respondent while using her powers of administration has made attempts to exhume the remains of deceased persons from the estate land at Masajja with clear intentions of disposing of the estate property without any consent of other beneficiaries of the estate of the late Balimunamba Jemusi; unless the execution is stayed by this honourable court the estate property will be wasted and the applicant stands to suffer substantial loss; the application has been brought without undue delay; it is just and equitable that this application is granted in the terms sought.



4. The application is also supported by; the judgment in CS No. 114/2015; a copy of the notice of appeal filed on 9<sup>th</sup> March 2018; Memorandum of Appeal in CS 323/2018 filed in court of appeal of Uganda on 21/12/2018; eviction notice for premises located at Masajja A, dated 4<sup>th</sup> February 2020 and photographs presumably of graves;

5. The application is opposed by the respondent who filed an affidavit in reply contending that the application is a nullity for having been served out of time; the affidavit in support of the application is full of falsehoods and should not be relied on;

6. This application and the intended appeal are frivolous; the application is void and does not warrant sufficient grounds for granting the orders sought; there is no valid appeal because the notice of appeal was filed out of time, 16 days from judgment and the said appeal has never been served on the respondent; it does not raise arguable grounds but just a tool for abuse of court process; the letters were an attempt to notify the tenants of the said applicant about the judgment of court which they refused to heed to and are still in occupation of the premises to date irrespective of various court pronouncements; the applicant has not provided any security for due performance of the decree; the property referred to as estate property was given to a one Lumaama Sunday; the applicant has been brought as an afterthought;

### **Representation .**

7. The applicant is represented by counsel Stewart Kamya while the respondent is represented by counsel Aliinda Jerry.

Both counsel filed written submissions; the counsel for the applicant submitted on the following issues:

1. Whether there is a pending appeal with arguable grounds or likelihood of success;
2. Whether the applicant will suffer substantial loss;
3. Whether the application has been made without unreasonable delay;
4. Whether there is serious or eminent threat of execution of the decree or order;
5. Whether the applicant has given security for due performance of the decree or order;

Counsel for the respondent framed the following issues:

1. Whether the circumstances of the case warrant the grant of an order for stay of execution;
2. Whether the applicant has satisfactorily demonstrated and or met the conditions for the grant of stay of execution;
3. The remedies available;

8. A look at both sets of issues framed by both counsel shows that counsel for the applicant framed issues in accordance with the legal principles on stay of execution while the counsel for the respondent has summarised them. I shall for clarity determine the matter following the issues as framed by counsel for the applicant.

9. Counsel for the respondent raised a preliminary objection on the validity of the summons served on her; and argued that the summons was served out of the 21 days required by order 5 rule 2 of the Civil Procedure Rules so is invalid and should be struck off; counsel for the applicant did not seek to file submissions in rejoinder so did not address this objection. I shall address the preliminary objection and depending on the outcome then address the merits of the application.

***Court's ruling on preliminary objection:***

1. The record shows the application was filed on 11<sup>th</sup> August 2022; counsel Bwire when he appeared in court on 22/11/2022 told court that they were served on 18/11/2022 and filed their reply on 21/11/2022; there is a letter dated 9<sup>th</sup> September 2022 from Ms Mbeeta, Kamya & Co. Advocates praying that the application be given a date;
2. The application itself being an invitation to appear in court on a given date to be given by court, could only be served on the respondent when it was ready; the readiness in this case was determined by court when it gave a date; it was incumbent upon the applicant to pray for leave to serve the application out of time in the same application for a date; in this case the leave was never sought;
3. **In Senkubuge and Another v Kibirango (Civil Miscellaneous Application 1704 of 2019) [2021] UGHCLD 108 (02 August 2021);** where an application was served out of time without leave; court dismissed the application citing the Supreme court in **Kanyabwera versus Tumwebwa SCCIVIL APPEAL NO. 6 OF 2004;** for the position that all provisions under O 5 r1 of the Civil Procedure Rules are of strict application since a penalty accrues upon default;
4. In the Kanyabwera case(supra), the issue was whether service was made or not since there was no affidavit of service yet the trial court had gone ahead to proceed exparte and later dismissed an application by way of review, to set aside the exparte ruling.
5. In the case at hand the respondent was served she so acknowledged through her counsel; but her contention is that the notice of motion was served out of time; The penalty for failure to serve out of time under O.5 r1(3)(a) of the Civil Procedure Rules, is dismissal of the application.
6. In this case, the Applicant having defaulted on service of the application upon the Respondent within the prescribed time, the notice of motion, having expired and

never renewed by seeking leave to serve out of time, is defective. I find that this application ought to be dismissed.

The preliminary objection therefore succeeds.

In the result, this application is hereby dismissed with costs to the Respondent.



Ketrah Kitariisibwa Katunguka

Judge

15/02/2023

Delivered by email to:ssego23@gamil.com,alindajerry@gmail.com