

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.1123 OF 2022

5 **(Arising out of Execution Miscellaneous Application No.218 of 2022)**

(All arising from Civil Suit No18 of 2015)

(Also arising from Court of Appeal Miscellaneous Application No.103 of 2021)

NAKAFFEERO

ASIYA:.....APPLICANT

10 **VERSUS**

HAJJI AMISI

LUBAMBO:.....RESPONDENT

Before Hon. Justice Alexandra Nkonge Rugadya.

Ruling.

15 This is an application brought under the provisions of **Section 98 of the Civil Procedure Act cap.71, Order 43 rule 4, and Order 22 rule 23 of the Civil Procedure Rules SI 71-1**. It seeks orders that the execution of the decree in **Civil Suit No. 18 of 2018** be stayed pending the determination of **Civil Application No.103 of 2021**, and that the costs of the application be provided for.

20 **Grounds of the application.**

The grounds of the application are contained in the affidavit in support of the application deponed by the applicant, **Ms. Nakafeero Asiya**. She stated *inter alia* that she filed **Civil Suit No.18 of 2015** against the respondent in the High Court and that judgment therein was passed against her, in her absence, and without her knowledge.

25 That although she lodged a notice of appeal in the Court of Appeal out of the prescribed time on 20th December 2019, on 15th April 2021, she also filed **Miscellaneous Application No.103 of 2021** in the Court of Appeal seeking leave to appeal out of time, and has also written to the Court of Appeal of Uganda requesting a hearing date for the same.

30 That while the respondent has since commenced the execution process, the applicant has since been served with a copy of the notice to show cause why execution should not issue and that because the suit land which is the subject of attachment and sale is where the applicant and her family derive a living, they shall be prejudiced if execution issues and that

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the applicant is likely to suffer substantial loss if the execution process is not stayed pending the determination of **Miscellaneous Application No.103 of 2021** for leave to appeal out of time.

5 In addition, that the application for leave to appeal out of time is not only meritorious, but also has a high possibility of success, and that the same has been made without unreasonable delay.

Further, that the applicant is prepared to give due performance of the decree against her and it is in the interest of justice that this application is granted.

Respondent's reply.

10 The respondent opposed the application through his affidavit in reply wherein he refuted the applicant's claim that the suit property in Banda near Kyambogo in Nakawa Division is her personal property or that she earns a living therefrom.

He averred that the suit property is his personal property and that the same was confirmed by this court in its judgment delivered on 2nd October, 2019 and that the applicant not only
15 grabbed the property from the respondent, but also started collecting rent from the tenants without the respondent's consent.

That although the applicant falsely claimed that the suit property belonged to her late Mother, a one Robinah Ssogeera who had donated it to her, yet her late mother could not have donated the same because she did not own the land, the applicant's elder sister, a one Aisha
20 Nalukwago who not only shares a mother with applicant, but is also the respondent's daughter confirmed to this court that the Late Ssogeera never donated any property to the applicant, who just grabbed it.

Additionally, that since 1998, the applicant has been illegally collecting rent from the suit premises for her own personal use, and that she has gone ahead to use the same to purchase
25 several plots of land at Bukerere Goma Sub county in Mukono District where she has constructed several rental structures, from which she collects huge sums of money, while she collects over **Ug. Shs. 30,000,000/=** per annum from the suit property at Banda, which she uses for her personal use thus it is not true that the applicant depends entirely on the suit property for a living.

30 Further, that the applicant defied this court's earlier directive to pay the respondent part of the money collected from the suit property to enable him earn a living pending the determination of the suit and that ever since this court passed judgment in the main suit in 2019, neither the respondent nor his advocates have been informed by the applicant about the fact that she has since filed an application for leave to appeal out of time.



That while the applicant has reasonable chance of success in the intended appeal, she also has no valid claim to the suit property and that this application for stay of execution also has no merit and is only intended to prolong the applicant's illegal control over the respondent's property for her unjust enrichment therefore the application should be dismissed with costs.

5 **Applicant's rejoinder**

The applicant also filed an affidavit in rejoinder to the respondent's averments in his affidavit in reply. She maintained that the suit property where she constructed 13 rental units from which she collects rent is her personal property having acquired the same from her mother who gifted it to her in 1998, and that the trial judge erred in law when he found that the respondent was the lawful owner thereof.

She went on to state that she legally collects rent from the rentals which she constructed through a loan facility that she eventually cleared sometime in 2020 thus she has not been able to earn much from the said rentals and that she does not have any other land or houses in Bukerere hence the respondent's averments are mere allegations with no evidence.

15 That the applicant has never defied the court's directives but has only appealed against the court's judgment and that unless the respondent is restrained the applicant will suffer loss since the rentals are her only source of income and she owns no other properties as alleged by the respondent.

The applicant further averred that the application for leave to appeal out of time has never been given a hearing date despite the fact that it was filed on 16th April, 2021 and several letters having been written requesting for the same, therefore applicant could not be served with an application that has no hearing date.

Further, that the entire affidavit in reply is riddled with falsehoods which should be ignored, and that both applications for leave to appeal out of time and stay of execution are not only meritorious but also have a high possibility of success.

Representation.

The applicant was represented by **M/s Isabirye & Co. Advcoates** while the respondent was represented by **M/s Lutakoome & Co. Advocates**. Both counsel filed written submissions in support of their respective clients' cases as directed by this court.

30 **Consideration of the application.**

Section 98 of the Civil Procedure Act cap.71 empowers this court to take decisions to meet the ends of justice, and an order for stay of execution is such an order. **(See: Singh vs Runda Coffee Estates Limited [1966] EA).**



Court in the case of **Lawrence Musiitwa Kyazze Vs. Eunice Busingye SCCA NO. 18 of 1990 (1992) IV KALR 55**, it was held that, an application for stay of execution pending appeal is designed to preserve the subject matter in dispute so that the right of the appellant who is exercising his/her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

For an application for stay of execution such as the instant one to succeed, the applicant is required to demonstrate that he has lodged a notice of appeal; that substantial loss may result to the applicant unless stay of execution is granted; that the application has been made without unreasonable delay; that the applicant has given security for due performance of the decree or order as may ultimately be binding upon him. (**See the case of Hon. Theodore Ssekikubo & others vs Attorney General & others Constitutional Application No. 003 of 2014**)

I shall therefore proceed to determine whether each of the above listed requirements have been complied with.

Whether there is a pending appeal.

In the case of **Attorney General of the Republic of Uganda versus The East African Law Society & Another EACA Application No.1 of 2013**, court observed that a notice of appeal is a sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases.

The applicant in the present matter annexed a copy of the notice of appeal dated 11th December, 2019 which was lodged in this court on 20th December, 2019. (**See Annexure B of the affidavit in support.**)

While **Section 79 of the Civil Procedure Act** stipulates that every appeal shall be entered within 30 days of the decree or order of court, the appellate court has the powers where good cause is shown to admit an appeal though the period of limitation as prescribed has elapsed. **See: Miscellaneous Application No.929 of 2022 Nakityo Teddy vs Nakamya Sylvia.**

In the present case, it is not in dispute that the notice of appeal filed by the applicant was filed out of time. The applicant has also demonstrated that she has since filed **Miscellaneous Application No.103 of 2021** in the Court of Appeal seeking leave to appeal out of time. A copy of the application is attached to the affidavit in support of the application, and marked **Annexure 'D'**.

It is evident from the above that an appeal/notice of appeal was filed by the applicant, *albeit* out of time and is now a subject of the validation process pending before a higher court where the possibility of success cannot be ruled out.


A careful perusal of the court system however shows that there has been no follow up on this application, from the time it was filed in April, 2021. The applicant did not therefore tell the whole truth to court when she averred that she has written reminders to that court in pursuit of that application.

- 5 The record does not reflect those efforts. It is now about two years since the said application was filed. I am disinclined therefore to grant the prayers sought in this application since they are clearly intended to both delay and defray the course of justice.

Application dismissed, with costs to the respondent.

I so order.

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Alexandra Nkonge Rugadya

Judge

19th January, 2023.

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Delivered by e-mail


19/1/2023