

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA**

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{Coram: Odoki, C.J., Tsekooko, Katureebe, Tumwesigye & Kisaakye, JJSC.}

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Misc.CivilApplicationNo.17of2011.

Between

**PAUL KAMYA
APPELLANT**

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And

**1. KAMPALA DISTRICT LAND BOARD
2. SADRUDINALIRAZAK
PANJWANI {ADMINISTRATOR
RESPONDENTS
OF THE ESTATE OF THE LATE
ALIRAZAK NAZARALIPANJWANI}**

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25 *{Notice of Motion seeking for stay of execution of the decision and Decree of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ., Mpagi-Bahigeine & Kavuma, JJA.) dated 01ST June, 2011 in Civil Appeal No. 83 of 2006}*

RULING OF COURT:

30 Paul Kamya, the applicant, who has instituted a Notice of Appeal intending to appeal against the decision of the Court of Appeal dated 01st June, 2011, has filed a Notice of Motion under Rule 6(2)(b) of the Rules of this Court seeking for an order of this Court to stay execution of the said decision of the Court of Appeal. The Notice of Motion is supported by an affidavit sworn on 22nd July, 2011, by the applicant.

35 Mohamood Noordin Thobani, a holder of powers of attorney from Sadrudin Alirazak Panjwani, the second respondent, has sworn an affidavit in reply to the affidavit of the applicant. He strongly opposes the application.

We ought to mention at this stage that through our own effort we have discovered that on 22/07/2011, i.e., the time of instituting this motion, the applicant instituted a separate Miscellaneous Application No. 18 of 2011
40 against the same present respondents seeking for a grant by this Court of an order of interim stay of execution. Parties were represented by the same advocates. They appeared before one of us (as a single judge) on 26/08/2011 and consented to grant of an interim order of stay. The Court granted the order which is still subsisting.

Although we are not considering the merits of the intended appeal, it is helpful to give background to the motion. The facts agreed upon between the parties in the Court of Appeal are that Alirazak Nazarali Panjwani was the registered proprietor of a 49 year lease that commenced on 01st January, 1929, over the property comprised in, and formerly known as, LRV 99 Fol.22 Plot 2, Makerere Road (hereinafter referred to as the suit property).

Like many other Asians, Mr. Panjwani was expelled from Uganda in 1972 by the Idi Amin regime and he died in Canada on 26th June, 1974. On 05th May, 1995, the 2nd respondent, Sadrudin Alirazak Panjwani, a son of the deceased, was granted by the High Court of Uganda, Letters of Administration to the Estate of Alirazak Nazarali Panjwani and on the 27th July, 1995, he (2nd respondent) obtained a Certificate Authorizing Repossession of the suit property which was registered under Instrument No. 30054 on 19th March, 1999. By virtue of the provisions of the Expropriated Properties (Repossession and Disposal) Regulations (SI No. 06 of 1983), the term of the lease was extended up to 27th July, 2001.

On 13 December, 2002, Lirazak Nazarali Panjwani allegedly applied for a special certificate of the title through the firm of Kityo and Co., Advocates. It seems that during June, 2004, one Bazilio Lukyamuzi purportedly acting under a power of attorney granted by Alirazak Nazarali Panjwani sold the suit property to the applicant who was registered as proprietor under Instrument No. 344341. The applicant's proprietorship was cancelled when it became apparent to the Registrar of titles, after the 2nd respondent raised the issue among other things, that the lease had already expired. On 24th August, 2004, the 2nd respondent applied to Kampala District Land Board (the Board) for extension / renewal of the lease over the suit property. On 10th November, 2004, the applicant also applied to the Board for the lease over the same suit property.

Sometime in March, 2005, the Board offered a lease on the suit property to the applicant. On 11th March, 2005, the Board communicated to the 2nd respondent its decision and reasons for not granting him lease.

On 16th March, 2005, the 2nd respondent obtained leave from the High Court of Uganda to institute proceedings against the Board. On 14th July, 2005, the building on the suit property was demolished. By consent, the applicant was joined as a party to the suit. The High Court heard the parties and in its judgment delivered on 21st April, 2006, granted the prerogative orders of certiorari quashed the decision to award the lease on the suit property to the applicant and granted mandamus, ordering that the lease be awarded, on exactly the same terms, to the 2nd respondent. Kampala District Land Board and the applicant jointly appealed to the Court of Appeal, which dismissed the appeal. A Notice of Appeal bearing the names of Kampala District Land Board and the applicant was belatedly lodged in the court. However and strangely enough in the body of that Notice of Appeal, it is stated that it is only the applicant who intends to appeal.

Messrs Matovu & Matovu, Advocates, on behalf of the applicant instituted the Notice of Motion and has filed written arguments in support of the motion. Messrs Makeera & Co., Advocates, representing the 2nd respondent, likewise lodged written arguments on behalf of the 2nd respondent.

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The 1st respondent which did not file an affidavit in reply to the affidavit of the applicant appears not to be a party to these proceedings. This is because there is no evidence of its intention to participate in these proceedings although a copy of the Notice of Motion bears a Kampala City Council and District Land Board stamp suggesting that either the City Council or the District Land Board was served with the Notice of Motion on 23rd February, 2012. In the notice, it was clearly stated that the motion would be heard on 26th March, 2012. There is an affidavit of service on the Court file showing that indeed both respondents were served. Secondly on the hearing day neither the City Council nor the Board (1st respondent) had a representative in Court.

15 We would like to point out that although the title of the Notice of Appeal indicates that it is the Kampala District Land Board and the present applicant who are the intending appellants, in the body of the notice it is stated clearly that it is the applicant alone who intends to appeal. No reason has been given why Kampala District Land Board was inserted in the Notice of Appeal as the first appellant.

20 We would have left the matter at that but counsel for the applicant suggests both in the applicant's affidavit supporting the motion and in the written arguments that the Board does not wish to appeal.

The Notice of Appeal was drawn by Matovu & Matovu, Advocates. It definitely indicates that the applicant is the only one who intends to appeal. With respect, we think that for proper operation of judicial work, lawyers drawing court pleadings should be careful when preparing the pleadings. In our opinion pleadings must specify the parties who are expected to participate in Court proceedings in Court. Again although the affidavit was drawn by a lawyer who should distinguish between an appeal and a suit, in several places the affidavit describes the appeal as a suit!!

30 Counsel's Arguments:

In the written submissions in support of the application for stay of execution, counsel for the applicant bases the application on three points.

35 First counsel submits that the applicant has filed a notice of appeal and has requested for the record of proceedings so as to formulate grounds of appeal. Counsel further contends that the intended appeal involves

pertinent and substantial questions of law regarding the rights of the applicant as a lessee and the powers and the jurisdiction of the High Court in matters of Judicial Review with a great likelihood of success.

Secondly, the applicant fears that the 1st respondent may help the 2nd respondent to execute the decree. This would render the appeal nugatory. Counsel relies on Afaro vs. Uganda Breweries SCCA 12 of 2008 where Okello JSC. held that ***“It is important that when a party pursues his / her right of appeal, the appeal if successful, should not be rendered nugatory.”***

Thirdly, learned counsel contends that an award of damages will not be sufficient to compensate the applicant in the event that he loses the suit premises. Counsel relies on **Nganga vs. Kimani [1969] EA page 67** for the ***view that in applications for stay of execution, court should consider whether substantial loss would arise from not granting the same and whether the dictates of justice demands so.***

In reply, counsel for the second respondent contends that the applicant’s application has not established the requirements for stay of execution. Learned counsel relies on a number of authorities. These include **Rule 6(2) (b)** of the Rules of this Court, **National Housing & Construction Corporation vs. Kampala District Land Board & Another** (Supreme Court Civil Appeal No. 06 of 2002), **Dr. A.M. Kisuule vs. Greenland Bank** (in liquidation) (Supreme Court Civil Application No. 10 of 2010 and **L.M. Kyazze vs. E. Busingye** (Supreme Court Civil Application No. 18 of 1990). The latter case sets out three principles which an application for stay of execution should fulfill. These principles have been applied in the decisions cited above. These are —

- 1) That substantial loss may result to the applicant unless the stay of execution is granted.
- 2) That the application has been made without unreasonable delay.
- 3) That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

Both in the 2nd respondent’s affidavit in reply and in his counsel’s submissions, it is contended in effect that in the Court of Appeal it was in fact the 1st respondent (the Board) and not the applicant who was the substantive appellant. In other words, the applicant has nothing to protect pending the hearing of the intended appeal because in its decision, the Court of Appeal decided the appeal essentially between the present two respondents and as the 1st respondent has not appealed the application is not bona fide and it is intended to deny the 2nd respondent the fruits of the judgment.

Consideration:

We are forced to make some observations first for the sake of clarity. Initially we thought that the Notice of Appeal had been filed out of time since the decision in Court of Appeal was made on 11th June, 2011 and

Notice of Appeal was filed on 21st July, 2011. Because of this, on our own initiative we searched and established that the applicant sought leave of this Court through **Supreme Court Miscellaneous Application No. 14 of 2011** and was granted the leave to file the Notice of Appeal out of time. Secondly, as already mentioned, we also discovered that with the consent of both parties one of us had granted an interim order of stay on 26th August, 2011 in **Supreme Court Miscellaneous Application No. 18 of 2011** between the same parties. Neither of these two pertinent decisions are mentioned nor alluded to in the Notice of Appeal, in the Notice of Motion nor the supporting affidavit. Indeed even in the written submissions nothing is said about the two decisions yet this should have been done to make our decision making process quicker.

10 Now regarding the first argument of the applicant, there is no dispute that the applicant filed a joint Notice of Appeal which, as stated earlier, was done with leave of the Court because it was filed late. Although a request for proceedings appears to have been made, it appears that no further step has been taken thereafter. Applicant's counsel has not actually pointed out the pertinent and substantial questions of law to be argued in the intended appeal. The rights of a lessee are known and the powers and jurisdiction of the High Court in
15 relation to judicial review are known and set out in our statutes.

Further the 2nd respondent contends in effect that in the Court of Appeal the grounds of appeal related to the rights of the 1st respondent and not the applicant and that as the 1st respondent has not appealed against the decision of the Court of Appeal, the intended appeal by the applicant will not be based on any pertinent issue.
20 We have noted that in the Court of Appeal the memorandum of appeal contained six grounds of appeal which were reduced into five issues which the Court decided essentially in favour of the 2nd respondent. However, at the moment we are not obliged to consider the merits of the intended appeal.

We have already mentioned in this ruling, that the same present parties on 26/08/2011 appeared before one of
25 us and by consent of their respective Advocates an interim stay of execution in **Supreme Court Miscellaneous Application No. 18 of 2011** was granted.

It reads this way:—

- “ 1. *That an interim order doth issue against the respondents in executing decree of the lower courts, pending the hearing and disposal of Miscellaneous Application No. 17 of 2011 for stay of execution before the full bench.*
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2. *That the Applicant deposits half of the costs taxed in High Court in favour of the 2nd respondent i.e., 5,897,227/= (Five Million Eight Hundred Ninety Seven Thousand Two Hundred Twenty Seven Shillings Only) with the Supreme Court Registrar.*
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3. *No orders for costs.*”

Neither party has complained about its effect so far. In the circumstances we think it is just that the application is granted on the same terms as ordered by a single judge of this court on 26/08/2011. We so order.

Dated at Kampala this29th.....day ofJanuary 2013

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B.J. Odoki
The Chief Justice.

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J.W.N. Tsekooko
Justice of the Supreme Court.

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B.M. Katureebe
Justice of the Supreme Court.

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J. Tumwesigye
Justice of the Supreme Court.

E. Kisaakye
Justice of the Supreme Court.