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THE REPUBLIC OF UGANDA

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IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

Miscellaneous Application No. 122 of 2019

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*(Arising out of Miscellaneous Application No. 121 of 2019: Arising out of Court
of Appeal Civil Appeal No. 277 of 2017)*

Between

Ssentongo Denis :: Applicant

VERSUS

20 **Kagimu Bashir :: Respondent**

**Coram: Hon. Mr. Justice Remmy Kasule, Ag. JA sitting as a
single Justice**

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RULING OF THE COURT

This application is for an Interim Order to stay execution pending
disposal of **Court of Appeal Miscellaneous Application No. 121**

of 2019, the substantive Application to stay execution. It is brought under Section 33 of the Judicature Act, Section 98 of the
30 Civil Procedure Act and Rules 2(2), 6(2), 42(2), 43(1) (2), 44(1) of the Judicature (Court of Appeal Rules) Directions.

The applicant is an appellant in **Court of Appeal Civil Appeal No. 277 of 2017** challenging the High Court Masaka (Keitirima, J.) Judgment whereby the said High Court upheld the Judgment of
35 the trial Grade I Magistrate, Masaka Chief Magistrate's Court, in Land Civil Suit No. 068 of 2010.

In the said Civil Suit, the applicant, as plaintiff, sued the respondent, as defendant, for vacant possession, permanent injunction and general damages for trespass. The applicant
40 asserted that he was the beneficial owner by purchase of a house comprising of a number of rooms at Nakayiba-Nyendo, Masaka Municipality and that in May, 2010, the respondent (defendant) without any lawful claim had entered the applicant's store room, occupied the same without the permission and/or consent of the
45 applicant, thus causing loss and damage to the applicant.

On 25.04.2016 after a full trial of the suit, the trial Grade I Magistrate, delivered Judgment in the suit holding that the applicant, as plaintiff, was not the beneficial owner of the particular store-room, the subject of the dispute, on the suit
50 premises and that the respondent was the landlord of the applicant, who was merely a kibanja owner on the respondent's land. Accordingly the respondent was not a trespasser on the suit property of which he was already in possession and owner. The

trial Magistrate thus dismissed the applicant's suit with costs to
55 the respondent.

Dissatisfied with the Judgment of the Grade I Magistrate, the applicant, as the appellant, lodged at the **High Court (Masaka) Civil Appeal No. 35 of 2016**.

On 15.09.2017, the High Court at Masaka, (Keitirima, J.) upheld
60 the Grade I Magistrate Court Judgment by dismissing the applicant's appeal with costs to the respondent. The applicant then lodged **Civil Appeal No. 277 of 2017**, as a second appeal, to this Court challenging the decisions of the High Court and that of the trial Magistrate Grade I Court. This appeal is still pending
65 determination in this Court. The applicant as appellant filed his written submissions on 22.10.2018 and the respondent filed his on 28.11.2018. The conferencing in the appeal was concluded on 17.07.2019. The appeal thus awaits being given a hearing date.

While the appeal is still pending in this Court, on 02.11.2017 the
70 Magistrate Grade I, Masaka, taxed the respondent's Bill of Costs in **Civil Suit No. 068 of 2010** and allowed the same at shs. 4,153,000= payable by the applicant who is also appellant in the Appeal. Further, on 11.01.2018, the Assistant Registrar, High Court, Masaka, taxed the respondent's Bill of Costs in **High Court, Masaka, Civil Appeal No. 35 of 2016** and allowed the same at
75 shs. 3,771,500= again payable by the appellant/applicant.

Though the Deputy Registrar, High Court, Masaka, had issued to the appellant/applicant an interim order to stay execution vide
High Court, Masaka, Miscellaneous Application No. 64 of 2018,
80 this interim order became vacated when the substantive **High**

Court Miscellaneous Application 221 of 2017 was discussed on 12.02.2019, by the High Court, Masaka (Nabisinde, J) when the said Court refused to grant to the appellant/applicant a substantive order of stay of execution. The learned Judge held
85 that the order of stay, if issued by Court, would stop the appellant/applicant from paying the taxed costs of the **Grade I Magistrate's Civil Suit No. 68 of 2010** and those of the **High Court, Masaka, Civil Appeal No. 35 of 2016**, which costs did not, according to the holding of the learned Judge, amount to damages
90 that cannot be atoned for in monetary terms and as such their payment by the appellant/applicant, whether by execution or otherwise, cannot amount to a substantial loss. The learned Judge further held that there was no need for Court to issue an order of stay of execution since both the Grade I Magistrate and the High
95 Court at Masaka had held that the respondent was already in possession of the suit property.

The applicant, dissatisfied with the High Court (Masaka) Judgment that upheld the Magistrate Grade I Judgment and also being further dissatisfied with the High Court order refusing to order a
100 stay of the High Court Judgment that upheld the Grade I Magistrate's Judgment, appealed to this Court in **Civil Appeal No. 277 of 2017**. He also lodged in this Court **Miscellaneous Application No. 121 of 2019** seeking a substantive stay and this **Application No. 122 of 2019** for an interim order of stay. Each
105 one of these applications is supported by the applicant's affidavit in support.

Counsel Bruno Sserunkuma appeared for the Applicant at the hearing of the Application for the interim order of stay. The respondent as well as his Counsel were absent. According to the
110 affidavit of service filed on record, the Firm of Advocates of Counsel for the respondent was served on 2nd August, 2019 with the Hearing Notice for the hearing date of 7th August, 2019. The respondent's firm of Advocates rejected the said service on the grounds, according to the affidavit of the process server, filed on
115 the Court record, that it was short notice and that their Counsel handling this particular application was not in chambers and further that the said Firm of Advocates had lost contact with the respondent.

This Court has perused the Court record of the application, the
120 subject of this Ruling, as well as that of the substantive application for a stay and that of the appeal from which both applications arise. There is nothing on record in each one of those court files to the effect that the respondent's Counsel Ms. Iragaba, Lukwago & Co., Advocates, communicated to Court that they had lost
125 contact with their client, the respondent, and as such they no longer had his instructions in the matter. It is the duty of Counsel who is on Court record as representing a party to the cause, to receive and act in compliance with Court process that is being served on such Counsel for and on behalf of the party such
130 Counsel is on record as representing. If Counsel on record has any observation or complaint about the served Court process, such Counsel ought to make arrangements to appear before Court in person, or through another Counsel holding brief, and communicate to Court that observation or complaint and seek for

135 appropriate prayers based on the prevailing circumstances. It is
unacceptable for Counsel who is on Court record as representing
a party to a cause to reject or to instruct his/her staff to reject
Court process under circumstances as was done in this case. This
Court thus refused to adjourn the application by reason of the
140 absence of the respondent and his Counsel. Court proceeded with
the hearing of the application in the absence of both of them.

Counsel for the applicant, relying on the applicant's affidavit in
support, submitted that the applicant had made out a case to be
granted the interim order of stay. He had lodged in this Court the
145 substantive application to stay execution as well as an appeal
challenging the Judgments of the lower Courts. Both the
substantive application to stay execution and the appeal, whose
conferencing was completed, are pending being given hearing
dates for due determination by this Court.

150 Learned Counsel further submitted that the respondent had in fact
carried out a threat to execute against the applicant by arresting
him and committing him to Civil prison for failure to pay the taxed
costs and it had been the Deputy Registrar, High Court, Masaka,
by issuing an interim order to stay execution that the applicant
155 had been saved from being committed to civil prison. With the
decision of the High Court, Masaka, dismissing the applicant's
application for a substantive order to stay execution, the threat of
the applicant being arrested and committed to civil prison for non-
payment of Court costs is now a real one once again. Indeed the
160 applicant had been summoned to appear before the High Court,
Masaka, on 19.03.2019, 10.09.2019 and 21.05.2019 to answer to

the Court's Notice to show cause why Execution should not issue against him. Thus the threat of Execution is very real.

165 Lastly, Counsel submitted that the grant of an interim order of stay will not make the respondent suffer any injustice. Applicant's Counsel thus prayed that this Court issues an interim order of stay of the orders of the trial Magistrate Grade I Court whose Judgment was upheld on appeal by the High Court, Masaka.

170 In considering the merits or demerits of this application, this Court appreciates the legal position that an interim order is one that the Court issues intended to be operative for only a short period until a substantive Application to stay Execution is determined. An interim order is thus a stop gap measure to ensure that the substantive application is not rendered nugatory. Interim orders
175 are thus resorted to in cases of urgency and are issued in order: to achieve the ends of justice. The Court of Appeal has inherent powers to issues interim orders under Rule 2(2) of its own Rules.

An interim order to stay, though usually based on the same facts and circumstances, has basic differences from a substantive
180 application to stay that may be made by Court under Rule 6(2)(b) which provides that this Court may:

*"In any civil proceedings, where a Notice of Appeal has been lodged in accordance with Rule 76 of these Rules, order a stay of execution, an injunction or a stay of proceedings on such
185 terms as the Court may think just".*

In the Supreme and Court of Appeal Courts, in the normal course of things, an application for an interim order is heard by a single Justice of the Court. A party dissatisfied with the decision of a

single Justice may then contest that decision by making a
190 Reference of the same to a full Bench of the Court. The further
difference is that an interim order is granted pending disposal of
the substantive application, and not the appeal. It is the
substantive application that is granted pending disposal of the
appeal: See: **Supreme Court of Uganda Civil Reference No. 07**
195 **of 2016: Zubeda Mohamed & Another vs Laila Kaka Wallia &**
Another.

As to the principles that the Court entertaining an application for
an interim order has to consider, the Supreme Court has held that
the granting of interim orders is to help parties to a cause to
200 preserve the status quo and then have the main issues in dispute
determined by the full Court in accordance with the set Rules of
the Court. See: **Supreme Court Civil Application No. 5 of 2013:**
Yakobo Senkungu & Others vs Cerencio Mukasa.

It is now settled that a Court determining an application for an
205 interim order has to consider whether or not there is a substantive
application pending in Court, whether there is a serious threat of
execution or some other threatening act before determination of
the substantive application. Finally Court has to consider whether
there is a Notice of Appeal filed in Court. See: **Supreme Court**
210 **Civil Application No. 19 of 2008: Hwang Sung Industries Ltd**
vs Tajdin Hussein and 2 others.

In resolving whether or not there has been compliance by the
applicant with the above set out considerations, the Court
determining the application for an interim order under Rule 2(2) of
215 the Judicature (Court of Appeal Rules) Directions, exercises very

wide discretion to make such orders as may be necessary to achieve the ends of justice, particularly the preservation of the right of appeal of a party to a cause: See: **Supreme Court Constitutional Application No. 04 of 2014: Hon. Theodore Ssekikubo & Others vs The Attorney General & Others**. The exercise of this wide discretion, of necessity, vests in the Court determining the interim application, judicial power to consider, in addition to the set out above main considerations, other circumstances and aspects appropriately having a bearing to the application, so as to ensure that the ends of justice are met. Such a Court may, for example, find it appropriate, to consider whether or not, inspite of the Notice of Appeal having been lodged, the applicant has any right of appeal in the matter or whether or not the applicant is not resorting to such an application so as to cause inordinate delay to the prejudice of the opposite party, or whether or not, the applicant is not guilty of dilatory conduct in his/her prosecution of the application, and/or other relevant matters.

In determining whether or not this application should be allowed, this Court notes, by way of background that the applicant lodged in the **Chief Magistrate's Court, Masaka, Civil Suit No. 68 of 2010** against the respondent. The applicant, as plaintiff in the suit, claimed to be a beneficial owner by purchase from one Peter Bunyaga on 04.12.2008 of a house at Nakayiba-Nyendo, Senyange Division, Masaka Municipality. The house was comprised of a commercial room in front, a residential room at the back and two other additional rooms. Prior to the purchase, the applicant had been a tenant of the premises and had, during the tenancy, constructed the two additional rooms on the premises. The

applicant asserted in the suit that in May, 2010 the respondent,
245 defendant to the suit, without any lawful claim and without the
applicant's permission, forcibly entered one of the rooms of the
applicant's house and occupied the same. The applicant thus
instituted the suit against the respondent to have vacant
possession of the premises as well as general damages for trespass
250 and costs of the suit.

The respondent, by way of defence to the suit, claimed to have
acquired lawful title and legal possession to the suit property
including the room in dispute.

The Grade I Magistrate, Masaka, heard all the evidence in the case
255 and dismissed the same against the applicant in favour of the
respondent in a judgment dated 25.04.2016.

The applicant appealed the decision of the Magistrate Grade I to
the High Court, Masaka, through **Civil Appeal No. 35 of 2016**,
which appeal was also dismissed against the applicant in favour of
260 the respondent in a Judgment delivered on 15.09.2017.

Dissatisfied, the applicant appealed to this Court against the High
Court Judgment through **Civil Appeal No. 277 of 2017** preceded
by a Notice of Appeal lodged on 20.09.2017.

In the meantime of the above stated developments in the court
265 proceedings, on 02.11.2017 the Magistrate Grade I Masaka, taxed
and allowed the respondent's Bill of costs in the suit dismissed
against the applicant at shs. 4,153,000= . On 11.01.2018 the
Assistant Registrar taxed and allowed the respondent's Bill of
Costs of the appeal in the High Court, Masaka, at shs.
270 3,771,500=again against the applicant.

In October, 2017 the applicant lodged **Miscellaneous Application No. 221 of 2017** in the High Court, Masaka, seeking to stay execution of the High Court Decree in **Civil Appeal No. 35 of 2016**. Before this Miscellaneous Application for stay was disposed
275 of, execution proceedings were carried out against the applicant who was arrested by Court bailiffs demanding of him to pay the taxed costs of the High Court appeal and those of the suit in the Magistrate's Court. The Applicant successfully sought an interim order of the High Court, Masaka, issued by the Court's Deputy
280 Registrar, vide **Miscellaneous Application No. 64 of 2018**, ordering stay of execution against him. However, on 12.02.2019, the High Court Judge, Masaka, determined the applicant's substantive application to stay execution by dismissing the same, thus the interim order to stay execution issued by the High Court,
285 Masaka Deputy Registrar in **Civil Application No. 64 of 2018** also elapsed. Thereafter execution proceedings by way of summons to show cause why execution should not issue have been served upon the applicant to appear in Court on 19.03.2019, 10.04.2019 and 21.05.2019.

290 This Court having considered the above facts, the law that governs issuance of an interim order, the pleadings of the parties and the submissions of Counsel for the applicant finds that the applicant lodged a Notice of Appeal intending to appeal to this Court of Appeal, the Judgment of the High Court, Masaka, on 26.09.2017
295 through the High Court, Registry, Masaka. Subsequently on 30.11.2017 **Civil Appeal No. 277 of 2017** was lodged in the Court of Appeal and the same is at conferencing stage. The applicant

has thus satisfied the requirement of having lodged a proper and competent Notice of Appeal to and in this Court.

300 There is also on record of this Court **Miscellaneous Application No. 121 of 2019** whereby the applicant is seeking an order of stay of execution of the decree of the **High Court, Masaka, Civil Appeal No. 35 of 2016**, whereby the High Court, Masaka, upheld the Judgment of the **Grade I Magistrate's Court, Masaka, Civil Suit**
305 **No. 68 of 2010**, pending the determination by this Court of **Civil Appeal No. 277 of 2017** in which the applicant is the appellant against the respondent. The requirement of the existence of a substantive application for stay of execution pending disposal of the appeal, has thus been satisfied by the applicant.

310 It is not denied that the applicant has a right of appeal to this Court. There is also no assertion that the applicant has been guilty of dilatory conduct or that he is pursuing the applications and the appeal for the sake of merely causing delay to the prejudice of the respondent.

315 The evidence adduced by the applicant before this Court also establishes that the applicant was and is being subjected to execution process whereby he was going to be committed to civil prison for non-payment of the taxed costs of the appeal to the High Court, Masaka as well as those of the Masaka Grade I
320 Magistrate trial Court. The evidence of the applicant that he has been served with Notices summoning him to attend the High Court at Masaka on the dates of 19.03.2019, 10.04.2019 and 21.05.2019 to show cause why execution should not issue against him, has not in any way been disproved. This Court accepts the said

325 evidence and holds that the applicant has satisfactorily proved
that a serious threat of execution exists against him, while his
substantive application to stay execution as well as his appeal in
this Court remain pending determination.

In conclusion this Court is satisfied that the applicant has make
330 out a case to be granted an interim order of stay of execution.
Accordingly this application is allowed. An interim order is hereby
issued in the following terms:

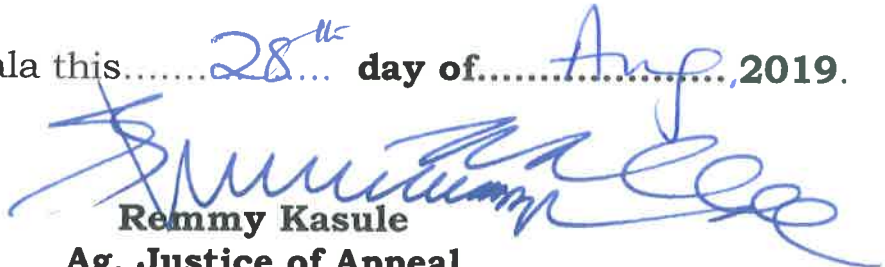
- 335 i) The execution of the decree of the High Court, Masaka in
Civil Appeal No. 35 of 2016 and **Masaka Chief
Magistrate's Grade I Court Judgment/Decree in Civil
Suit No. 68 of 2010** is hereby stayed pending disposal of
the applicant's Court of Appeal substantive application for
stay **No. 121 of 2019** or final disposal of **Court of Appeal
Civil Appeal No. 277 of 2017**, whichever is earlier in
340 being disposed of.
- ii) The order to pay taxed costs is part and parcel of the Court
decree that is herein stayed and as such any recovery of
taxed costs from the applicant is also stayed in the terms
stated in number (i) above.
- 345 iii) Given the fact that the litigation in the Courts of law
between the applicant and the respondent began almost
nine (9) years ago, the Civil Registry of this Court, as well
as all Counsel for the parties to the suit, are called upon
to have both the substantive application for stay of
350 execution **No. 121 of 2019** and the Appeal **No. 277 of
2017** fixed for hearing at the earliest possible.

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As to costs of these proceedings, the same shall abide the outcome of the substantive application for stay of execution **No. 121 of 2019** or Court of Appeal **Civil Appeal No. 277 of 2017**, whichever is disposed of earlier.

It is so ordered.

Dated at Kampala this.....^{28th}... day of.....^{Aug}....., 2019.



Remmy Kasule
Ag. Justice of Appeal

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