

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 89 OF 2023

(Arising out of Civil Application No. 26 of 2021)

5 **1. YAHAYA YUSUF**
2. NURDIN YUSUF
3. BASHIR YUSUF ::: APPLICANTS

VERSUS

10 **1. SAUDA NABUNYA**
2. REHEMA NANFUKA
3. MAYI NAKUBULWA
4. GALIKUWA MICHAEL ::: RESPONDENTS

BEFORE: HON JUSTICE OSCAR KIHKA, JA

(Sitting as a single Justice)

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RULING OF COURT

This application was brought under Article 128 of the Constitution, Rules 2(2), 6(2) (b), 42(2) and 43(1) & (2) of the Judicature Court of Appeal Rules Directions seeking for orders that;

20 1. A temporary injunction Order doeth issue restraining the Respondents, their agents, servants and all attorneys or persons acting on their behalf from executing and/or enforcing the judgment and orders of the High Court delivered by Hon.

Justice Batema N.D.A on the 2nd day of November 2022 until the determination of Civil Appeal No. 532 of 2022.

2. Costs of the application abide the result of the appeal.

Background

5 The background to the application, as can be determined from the Applicants' pleadings which, in my view, were somewhat clumsily crafted, is as follows;

10 The Applicants, on or about the 8th day of August 2000, entered into a tenancy/lease agreement with the 1st, 2nd and 3rd Respondents for the lease of the suit land comprised in Block 123 Plot 1177 East Buganda for a period of 49 years. The Applicants took possession of the suit land and constructed thereon a petrol station and other related developments. The Applicants had also paid to the 1st, 2nd and 3rd Respondents the agreed premium.

15 The Applicants were apparently prevented from registering their lease interest in the suit land by the 1st, 2nd and 3rd Respondents, who in turn appear to have transferred the suit land to the 4th Respondent to the detriment of the Applicants' interests. The 4th Respondent then attempted to evict the Applicants, consequent upon which the
20 Applicants filed High Court Civil Suit No. 26 of 2021 in Mukono High Court wherein they sought a permanent injunction restraining the Respondents from dealing or exercising any right in the suit land. The Applicants also prayed for a number of declarations pertaining to the suit land, amongst which was a declaration that the

transaction between the 1st, 2nd and 3rd Respondents and the 4th Respondent was unlawful, irregular and fraudulent.

From the pleadings and evidence on record, it appears that the suit was dismissed for failure to disclose a cause of action. However, the decree attached does not reflect this. According to the decree, on the 5 2nd day of November 2022, Hon Justice Batema ordered and decreed as follows;

1. That the rent agreement between the parties is cancelled.
2. The Plaintiffs are ordered to pay the rent arrears to the 4th Defendant from the date he became their Land lord.
3. The Commissioner Land Registration is hereby to ordered to cancel the Certificate of Title illegally issued for the land comprised in East Buganda Block 123 Plot 1177 land at Kayunga in Kayunga District,
4. That the 4th Defendant is free to survey and register the land he bought into his names.
5. Costs of the suit are awarded to the Defendants.

Being dissatisfied with the judgement and orders of Hon. Justice Batema, the Applicants filed a notice of appeal, applied for record of proceedings and subsequently filed Civil Appeal No. 532 of 2022 in the Court of Appeal.

On the 30th of January 2023, the 4th Respondent through his advocates, M/s Senteza & Co Advocates, wrote a letter to the Applicants demanding for rent arrears totaling to the amount of Uganda Shillings 170,000,000/=with effect from 23rd March 2020.

The Applicants were given 14 days within which to pay the monies demanded.

The Applicants now seek a temporary injunction Order restraining the Respondents, their agents, servants and all attorneys or persons acting on their behalf from executing and/or enforcing the judgment and orders of the High Court delivered by Hon. Justice Batema N.D.A on the 2nd day of November 2022 until the determination of Civil Appeal No. 532 of 2022

The grounds in support of this application are set out in both the Notice of Motion and affidavit in support of **Yahaya Yusuf** which briefly states;

1. That the Applicants filed Civil Suit No. 26 of 2021 in the High Court of Uganda at Mukono against the Respondents and the same was dismissed on grounds that it did not disclose a cause of action.
2. The Applicants filed an appeal in this court against the judgment of Hon. Justice Batema N.D.A on the 2nd of November 2022 and the same is pending hearing before this court.
3. The said appeal challenges the High Court decision that the Applicants pay rent to the 4th respondent.
4. The Applicants have a valid subsisting equitable lease and/or running tenancy on the suit land having hired and paid for the same from the 1st, 2nd and 3rd Respondents.
5. That the Applicants have paid rent until 2031 and are in active possession and use of the suit land.

6. During the subsistence of the tenancy, the Applicants discovered that the 1st, 2nd and 3rd Respondents had fraudulently transferred the suit land to the 4th respondent's names.

5 7. The 4th respondent is now demanding for rent through M/S Senteza & Co. Advocates by a letter dated 30th January 2023 and are at a risk of being evicted.

10 8. In order to ensure that the appeal is not rendered nugatory, the Applicants are seeking for a temporary injunction to stop the respondent from executing the decree we appealed against.

9. The appeal has a high likelihood of success and in order to protect the applicant's interests in the land, a temporary injunction should be issued to stop the respondent from disposing of the property.

15 The respondent did not file any affidavit in reply.

When this application came up for hearing on the 24th of March 2023, the applicant was represented by Counsel Ishaq Dhakaba while the respondent was unrepresented, despite having been duly served. The application was thus heard *ex parte*.

20 Counsel for the Applicants filed written submissions which, with the leave of court, were adopted as submissions on record.

Applicant's submissions

Counsel Dhakaba submitted that the conditions for an applicant to prove before the grant of an order of a temporary injunction were laid

out in **Shiv Construction Vs Endesha Enterprises Ltd Supreme Court Civil Appeal No. 34 of 1992** to wit; there is a prima facie case

with a probability of success; the applicant will suffer irreparable injury which would not adequately be compensated for in damages

5 and lastly, if the court is in doubt, it would decide an application on a balance of convenience Counsel argued that the Applicants have an appeal pending hearing before this court and at this stage, court does not delve deep into the merits of the case to see if the applicant has a plausible case but rather, court determines that the claim is
10 not frivolous or vexatious.

Counsel submitted that the applicant will suffer irreparable injury that cannot be adequately compensated in damages. Counsel relied

on the 1st applicant's affidavit in support of the application and argued that the Applicants have already received a demand notice to
15 pay rent yet the question of the subsisting tenancy between the Applicants and the 1st, 2nd and 3rd Respondents has not yet been answered on appeal by this court. That the Applicants have a subsisting tenancy and have paid rent till 2031 and receipts of the same are attached to the applicant's affidavit in support of the
20 application. Counsel argued that the Applicants will suffer irreparable damage if this application is not granted.

Counsel contended that there is a threat to evict the Applicants for alleged non-payment of rent by the 4th respondent irrespective of the appeal. Counsel relied on Section 29(2) of the Landlord and Tenant

25 Act 2022 which gives the landlord powers to re-enter the rented

property and take possession and submitted that the 4th respondent has indicated this as his course. Counsel prayed that this court exercise its powers under Rule 6(2) (b) of the Rules of this court

5 **Consideration of the application**

The jurisdiction of this Court to grant an injunction is set out in **Rule 6(2) (b)** and **Rule 2(2)** of the **Judicature Court of Appeal Rules Directions SI13-10** which mandates the Court to grant a stay of execution, an injunction or order a stay of proceedings on such terms
10 as the Court may deem fit. This Court has inherent powers to make such orders as may be necessary for attaining the ends of justice.

I must note that this is a substantive application for the grant of an order of a temporary injunction that is being entertained by a single judge of this Honourable Court. This court has held in **Uganda
15 Revenue Authority Vs National Social Security Fund Civil Application No. 43 of 2023**, that a single Justice of Appeal does have jurisdiction to hear and determine this substantive application for a temporary injunction.

For a temporary injunction to be granted, court is guided by certain
20 principles which were laid out in the case of **Shiv Construction V Endesha Enterprises Ltd S.C. Civil Appeal No. 34 of 1992** where it was held that;

“The applicant must show a prima facie case with a probability of success. An injunction will not normally be granted unless the

applicant might otherwise suffer irreparable injury, which could not be compensated in damages. When the court is in doubt it will decide the application on the balance of convenience.”

Thus, the rules governing the grant of a temporary Injunction are;

- 5 1. *The granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of.*
2. *The conditions for the grant of the interlocutory injunction are;*
 - 10 i. *Firstly that, the applicant must show a prima facie case with a probability of success.*
 - ii. *Secondly, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.*
 - 15 iii. *Thirdly if the Court is in doubt, it would decide an application on the balance of convenience.*

An order for a Temporary Injunction is granted so as to prevent the ends of justice from being defeated. The applicant, in the Notice of Motion, prayed for an order of a temporary injunction against the Respondents from executing the judgment of the High Court in Civil
20 Suit No. 26 of 2021. In essence, the Applicants seek to stay the execution of the Judgment and Orders of the High Court in Civil Suit No. 26 of 2021.

Rule 2(2) of the Rules of this Court grants this court powers to make such orders as are necessary to attain the ends of justice. It provides;

2. Application.

5 *(2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be*
10 *exercised to prevent abuse of the process of any court caused by delay.*

I shall, under **Rule 2(2)** above, proceed to determine the merits of this application. The Supreme Court of Uganda in the case of **Hon. Theodore Ssekikubo & Others vs Attorney General & Others**
15 **Constitutional Application No. 6 of 2013**, re-stated the principles governing grant of stay of execution to be as follows;

(1) Applicant must establish that his appeal has likelihood of success or a prima facie case of his right of appeal.

20 *(2) That the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.*

(3) If 1-2 above have not been established, Court must consider where the balance of convenience.

The main issue for determination by this Court is whether the applicant has adduced sufficient reasons to justify the grant of a stay of execution.

The first consideration is ***whether the Applicants have demonstrated to this court that the appeal has a likelihood of success***. The Supreme Court in the case of **Gashumba Maniraguha vs Sam Nkudiye Civil Application No. 24 of 2015**, held that the likelihood of success, is the most important consideration in an application for stay of execution.

10 The Applicants, in the affidavit deponed by the 1st applicant paragraphs 5 and 6 stated, that the Applicants have a valid subsisting tenancy on the suit land having paid rent until 2031 to the 1st, 2nd and 3rd Respondents and attached copies of the agreement and payment receipts.

15 The Applicants are in active possession and during the tenancy, they discovered that the 1st, 2nd and 3rd Respondents had fraudulently transferred the suit land to the 4th respondent's name and the 4th respondent is now demanding for payment of rent. The 1st applicant has attached a draft Memorandum of Appeal marked annexure 'M'

20 to his affidavit and from my brief reading of the grounds of appeal, the applicant raised pertinent issues that would call for Court of Appeal to determine whether the trial Judge did not misdirect himself. Considering this set of facts, it is my considered view that the Applicants have demonstrated a prima facie case which merits

25 consideration by this court.

Whether Applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.

Counsel for the applicant has submitted that the Applicants are in active possession of the suit and have already paid rent to 2031.

5 The 4th respondent is however demanding rent from the Applicants and they are at a risk of being evicted from the land.

In **Giella v. Cassman Brown & Co. [1973] E.A 358**, it was held that by irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or
10 damage must be substantial or material one that is; one that cannot be adequately atoned for in damages.

The applicant, in paragraph 2 of his affidavit in support of the application, stated that they filed Civil Suit No. 26 of 2021 and the same was dismissed. The 1st applicant attached the plaint marked
15 annexure 'K' to the affidavit and in the plaint, the applicant/plaintiff claimed that both parties entered into an agreement for hiring the suit land comprised in Block 123 Plot 1177 East Buganda in which the same was hired for a period of 49 years. The applicants immediately took possession of the said suit land and developed it
20 and constructed a petrol station thereon. I reiterate that the 4th respondent is already demanding for rent and the applicants, who are running a petrol station on the suit property, are at a risk of being evicted.

In the case of **American Cynamide vs Ethicon [1975] 1 ALL E.R. 504** it was held;
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“The governing principle is that the court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant’s continuing to do what was sought to be enjoined between the time of the Application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no Interlocutory Injunction should normally be granted...”

10 The 1st applicant has demonstrated in his affidavit in support of the application that the Applicants will suffer irreparable damage if they are evicted by the 4th respondent despite having paid rent to 2031. It is trite that where a party is exercising its unrestricted right of appeal, and the appeal has likelihood of success, it is the duty of the Court to make such orders as it will prevent the appeal, from being rendered
15 nugatory, if successful.

Balance of Convenience

● In the **Osman Kassim Vs Century Bottling Company Ltd Civil Appeal 34 of 2019**, the Supreme Court had this to say when it was
20 considering the issue of balance of convenience;

*The status quo is that the Court of Appeal has dismissed the applicant’s appeal with costs to the respondent. He is in the process of filing an appeal to this Court against that decision. However, in the absence of any document indicating the grounds
25 of the intended appeal on record, we are of the view that the*

balance of convenience favors the respondent which has a Judgment in its hands"

In the instant case, the Applicants have attached a Memorandum of Appeal which states the grounds upon which the appeal is premised.

5 Secondly, the Applicants are in possession of the suit property and carrying out business thereon.

It is therefore my considered view that the Applicants meet the conditions for the grant of an order of stay of execution. I thus allow this application and make the following orders;

10 1. An order of stay of execution is hereby granted restraining the Respondents, their agents, servants and all attorneys or persons acting on their behalf from executing and/or enforcing the judgment and orders of the High Court delivered by Hon. Justice Batema N.D.A on the 2nd day of November 2022 until
15 the determination of Civil Appeal No. 532 of 2022.

2. Costs shall abide the outcome of the appeal.

I so order

20 Date this 25th day of April 2023

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OSCAR JOHN KIHKA
JUSTICE OF APPEAL

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