

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)**

**MISCELLEANOUS APPEAL NO. 003 OF 2015
ARISING FROM EMA NO. 929 OF 2016**

**(ARISING FROM MISC. APPLICATION NO. 1178 OF 2014)
(ARISING FROM MISC. APPLICATION NO. 117 OF 2015)
(ARISING FROM CIVIL SUIT NO. 577 OF 2014)**

KESI INVESTMENTS LIMITED APPELLANT

VERSUS

ERIMU COMPANY LTDRESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This ruling arises out of a notice to show cause issued to the Appellant Company arising out of an application to give vacant possession of the suit land.

The file was referred to me by the Registrar of the Division on 20.05.16.

The parties and their Counsel appeared before court on 05.07.16.

Counsel for the Appellant informed court that the parties had held a meeting but had failed to agree and were therefore before court to hear the application.

While court noted that the matter was before it on notice to show cause, Counsel for the Appellant contended that, the orders which the Appellant is seeking to extract arise out of an application that was heard exparte. That the Respondent had filed Miscellenous Application No. 520/16 before the Land Division, seeking to set aside the orders and ruling the Applicant seeks to execute.

Further that, there is a ruling by the High Court Nakawa that is Miscellenous Application 716/14 arising from **Civil Suit 366/14 Erimu & Co vs. KCB & 2 Others**, which entitles the Respondent in the present matter to be reinstated in the disputed Kibuga Block 17, Plot 215.

5 It is the same piece of land where the Applicant seeks to execute the said exparte ruling and order dated 08.04.16, Counsel argued.

He pointed out that, the order in Miscellenous Application 716/14 from Nakawa High Court reinstated the Respondent after establishing that the Applicant's predecessor in title fraudulently
10 secured a consent judgment and evicted the Respondent; ruling dated 16.03.16.

The order from Nakawa Court was executed by the Execution Division and the Respondent has taken physical possession of the land although the Appellant keeps on bringing their security personnel to the land.
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It was asserted that since the order by the Appellant was secured exparte and the Respondent has orders reinstating him on the land which the Appellant brought when there was a subsisting court injunction, the Appellant cannot be regarded as innocent and therefore execution should not issue.
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Counsel for the Appellant submitted in reply that, they were relying on the affidavit in rejoinder of Peninah Kalemera, Managing Director of the Applicant. She pointed out that, the application before court is seeking to enforce a ruling of the High Court. And that application No. 522/16 filed by the Respondent seeking to set aside the orders and ruling of the Land Division had been
25 served on the Applicant, but there is no stay of execution obtained before the Registrar and neither has any application for stay of execution been filed.

Further that, the submission that the High Court reinstated the Respondent is submission from the bar. The order available, Counsel argued does not address reinstatement. It is a general
30 order indicating that consent was fraudulently obtained and it is therefore null and void. The order does not specifically reinstate the Respondent.

Also that, the Respondent has attempted to use administrative means to be reinstated – referred to letter dated 16.05.16, where they were advised to vacate orders on appeal.
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It was argued by Counsel that the order issued at Nakawa was declaratory in nature and the ruling of the Judge the Respondent seeks to enforce indicates that Mudenge was never served.

Commenting about paragraph 4 of the affidavit in rejoinder, Counsel stated that the
40 Respondent's affidavit is false as there is no attachment to any hearing notice to prove inability of Counsel to proceed that day.

The hearing notice attached – paragraph 5 – was served on the Respondent on 04.03.16 and was received in protest indicating that Counsel would be appearing in another matter. It was served ten days before the hearing.

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While the matter was adjourned to another date, the Respondent did not appear.

And that the ruling obtained at Nakawa is one to which the Applicant is not a party and the Respondent has never applied to add the Applicant to any of the cases before court.

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Counsel prayed court to allow the Appellant to go ahead with execution and get vacant possession of the property with costs.

In rejoinder, it was argued by Counsel for the Respondent that, the Miscellenous Application before Nakawa High Court may not specifically talk of reinstatement but it vitiates the earlier eviction and was executed and the Respondent has vacant possession.

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Referring to the letter of 16.05.16, Counsel contended that the Applicant was not being sincere in respect of the correct date.

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Also that the hearing notice served on the Respondent was for 15.03.16 when Counsel was at another court. He reiterated earlier prayers.

However, Counsel for the Appellant insisted that the affidavit in rejoinder shows Counsel was before court in another case and not the one referred to.

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Whether execution should be stayed that is whether respondent has established sufficient cause for stay of execution.

It is trite law that, ***“the court may exercise its discretionary powers in considering an application for granting a stay of execution.”***

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An application for stay of execution has to establish any one of the three circumstances to enable a court to grant a stay order. These are:-

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- I) Whether the appeal has, prima facie a likelihood of success.
- II) Whether the refusal of staying execution is likely to cause substantial and irreparable injury to the Applicant, or
- III) On a balance of convenience.

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Refer to **Magunga vs. National Bank of Commerce Ltd [2007] 2EA 285 (CAT)**.

5 After hearing the arguments of both Counsel, the following have been established by court: - The orders sought to be executed were granted exparte. There is an application pending before the Land Division seeking to set aside the ruling and orders the Applicant seeks to execute.

10 There is an allegation of fraud in the consent judgment out of which all the other applications arise.

The Respondent was reinstated into the suit land and is in occupation otherwise the Applicant would not be seeking vacant possession.

15 While there is no application for stay of execution as rightly pointed out by Counsel for the Applicant, the Respondent was summoned to court to show cause why vacant possession of the land should not be given to the Appellant and this court finds that sufficient cause has been shown.

20 There is also no appeal in the circumstances of this case but there is an application before the Land Division seeking to set aside the exparte ruling and orders of court leading to the execution.

To refuse to stay execution in the circumstances may result into substantial loss or irreparable injury to the Respondent who is in possession.

25 The balance of convenience demands that application for stay of execution be allowed and the Respondent and Applicant given a chance to prosecute the matter pending before the Land Division.

30 The argument as to **whether Counsel for the Respondent had sufficient cause for failing to appear when the application sought to be executed was called for hearing** will best be determined by the Land Division.

The application for stay of execution by the Respondent is allowed for all those reasons.

35 Execution is hereby stayed pending disposal of the application before the Land Division.

Costs to abide the outcome of that application.

40 **FLAVIA SENOGA ANGLIN**

JUDGE
12.01.17