

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPLICATION NO 62 OF 2014**  
**ARISING OUT OF CIVIL APPLICATION NO. 61 OF 2014**  
**(ARISING FROM HIGH COURT MISCELLANEOUS CAUSE NO 49 OF 2013)**

**COMMISSIONER CUSTOMS**  
**UGANDA REVENUE AUTHORITY.....APPLICANT**  
**VERSES**  
**KAYUMBA EMILE OGANE**  
**T/A ETS OGANE COMPANY.....RESPONDENT**

**RULING OF**  
**HON. JUSTICE KENNETH KAKURU (Single Justice)**

This is an application for an interim order of stay of execution pending the hearing and determination of the substantive application for stay of execution of an order of the High Court in High Court of Uganda Nakawa ***Miscellaneous Application No. 049 of 2013.***

The application is brought under ***Sections 10*** and ***12*** of the ***Judicature Act Cap 13*** and ***Rules 2, 6 (2) b*** and ***43*** of the Rules of this Court.

The grounds of the application are set out in the notice of motion as follows;-

1. *“The applicant filed a notice of appeal against the ruling and decision in Miscellaneous Cause No. 049 of 2013 delivered on the 24<sup>th</sup> day of February 2014.*
2. *The applicant further applied and requested for typed and certified copies of the judgment and record of proceedings in the suit to enable it prepare the Memorandum of Appeal.*
3. *That the applicant has been served with the court order and has no protection against execution of the order by the respondent.*
4. *That the application for stay of execution filed by the applicant will be rendered nugatory if an interim stay is not granted and the respondent executes the order.*
5. *The applicant shall suffer substantial loss if the 832 pieces of ivory are released unless the interim stay of execution is made.*
6. *That the 832 pieces of ivory are also exhibits vide criminal case No. 0016 of 2013, Chief Magistrate’s court Buganda Road attached to the Anti-corruption Division.*
7. *It is the interest of justice that an interim stay of execution of the order is granted pending the final disposal of the application for stay of execution.*
8. *That this application is of urgent nature and made in good faith, requiring court’s intervention in the interim.*
9. *That it just, fair and equitable that the order sought are granted.”*

The above grounds are supported by the affidavit of one ***Haluna Mbeeta*** who is stated to be an advocate employed with the applicant at its legal services and Board affairs Department. The affidavit expounds on the grounds already set out in the notice of motion.

The respondent filed an affirmation in reply dated 3<sup>rd</sup> March 2014, it is affirmed by one ***Nakawooya Sarah*** who is stated to be an advocate practicing with the firm of ***Geoffrey Nangumya and Company Advocates*** who are said to be Advocates for the respondent. Court was informed from the bar that the respondent is now outside the jurisdiction of this Court.

At the hearing of this application ***Mr. Farouq Kitaka*** learned counsel together with Mr. ***Abdusalaam Waiswa*** appeared for the applicant. ***Mr. Geoffrey Nangumya*** assisted by ***Ms. Sarah Nakawooya*** appeared for the respondent.

It was submitted for the applicant that a notice of appeal has been filed in this Court and that a letter requesting for the lower Court record and proceedings has been filed at the High Court and served upon the respondent.

That the appeal is neither frivolous nor is it vexatious and as such it has likelihood of success. It was submitted further that the appeal raises serious issues of law that require determination by this Court.

It was submitted that there is a serious threat of execution of this order of Court and if this application is not granted and the above order is executed the subject matter of the appeal which is 832 pieces of ivory will be removed from the jurisdiction of this Court and that would render the main application and appeal nugatory. Counsel prayed for this appeal to be allowed.

In reply Mr. Nangumya submitted for the respondent that the application does not meet the legal requirements for grant of an order of stay of execution. That the applicant has no interest in the subject matter and therefore it cannot suffer irreparable loss or damage. That the applicant has not shown that the execution of the order is real and imminent. He further submitted that the appeal will not be rendered nugatory if this Court does not grant this order of stay of execution.

He further submitted that the reference to criminal prosecution proceedings pending before a Magistrate's Court is of no effect as the legal issues in respect of the criminal charges have been resolved in favour of the respondent by the High Court.

He cited the case of *Akright Projects Ltd versus Executive Property Holdings and 12 others, Supreme Court Civil Application No. 3 of 2011* and *Kato and another vs Nuulu Nalwoga, Supreme Court Civil Application No. 12 of 2011*.

He submitted that no special circumstances exist for grant of an interim order of stay of execution.

The law in respect of grant of stay of execution has been discussed in a number of decisions of this Court before and recently in *Civil Application No. 341 of 2013 Kyambogo University vs. Prof. Isaiah Omolo Ndiege*. I will not repeat here what was extensively discussed in the Ruling of this Court in that application.

Suffice to say, **Section 10** of the Judicature Act is not applicable in this case. What is applicable is **Section 12 (1)**. An application for stay of execution is an interlocutory cause. A single Justice of this Court therefore can grant a substantive order of stay of execution under this section of the Judicature Act, **Rule 53 (2) b** of

the Rules of this Court notwithstanding, as the Judicature Act takes precedence over the Rules of this Court.

In the case of *Hwang Sung Industries Ltd vs Tajdin Hussein and others*, *Supreme Court Civil Application No. 19 of 2008*, it was held by G.M Okello JSC ( as he then was) as follows;-

***“For an application for interim order it suffices that a substantive application is pending and that there is some threat of execution before the hearing of the pending substantive application. It is not necessary to preempt consideration of the matters necessary in deciding whether or not to grant the substantive application for stay”***

In the case of *Akrigh Project vs Executive Property Holding and 12 others* (Supra), Justice Kitumba (JSC) held that;-

***“The Court in addition to considering that a notice of appeal has been filed and that there is a substantive application has to consider whether there are special circumstances to warrant such an interim order. An example of that would be the immediate destruction of the suit property”***

The Supreme Court in *Civil Application No. 9 of 1990 Francis Mica vs. Nuwa Walakira* observed that;-

***“It would be unwise in some circumstances to defeat the statutory right of appeal for example by demolishing the subject matter of a suit so that the appeal is rendered nugatory.”***

In the case of *Teddy Sseezi Cheeye and Another vs. Enos Tumisiime Court of Appeal Civil Application No. 21 of 1996* this Court while considering

circumstances Court should take into account before granting a stay of execution put it this way:-

***“Such include where the subject of a case is in danger of being destroyed, sold or in anyway disposed of.”***

In *National Enterprise Corporation versus Mukisa Foods Miscellaneous Application No. 7 of 1998* this Court held that;-

***“The Court has power in its discretion to grant stay of execution where it appears to be equitable to do so with view of temporarily preserving the status quo.***

***As a general rule the only ground for stay of execution is for the applicant to show that once the decretal property is disposed of there is no likelihood of getting it back should the appeal succeed.”(Emphasis added)***

In this particular application I am satisfied that the applicant has lodged a notice of appeal within time. That a letter requesting for proceedings was filed in Court and a copy served on the respondent herein. Having looked at the ruling and order of the lower Court I am satisfied that there exists serious issues of law to be determined by this Court on appeal and therefore the appeal is not frivolous neither is it vexatious.

I also note that this application was made without undue delay.

I am also satisfied that there exists special circumstances for grant of stay of execution in this matter. The subject matter is a consignment of ivory said to have been impounded while in transit. It is clear therefore that if the said ivory is

released to the respondent in compliance with the High Court order, that would render the appeal nugatory as the ivory is likely to be moved outside the jurisdiction of this Court.

It is also very important to consider that the same consignment is a subject of criminal proceedings before the Anti-Corruption Division of the High Court where the ivory is required as an exhibit.

If this application is not granted, the said criminal proceedings would be jeopardized, as these exhibits are likely to be removed from the jurisdiction of that Court. I do not agree with Mr. Namgumya that the High Court order in a civil matter had the effect of disposing of a criminal matter pending before a Criminal Court.

However, I agree with him that the applicant has no pecuniary interest in the subject matter. Nonetheless the applicant has sufficient legal interest in the matter as a statutory body responsible for overseeing imports and exports of goods in this Country.

For the reasons I have given I am satisfied that the applicant has proved that special circumstances exist which warrant grant of an order of stay of execution pending appeal.

I would like to clarify here that since I have entertained this application under **Section 12** of the Judicature Act exercising the powers of this Court to hear and determine a substantive application for stay of execution.

I hereby grant a substantive order of stay of execution pending appeal and not an interim-order.

This ruling disposes of both applications No. 61 and No. 62 of 2014. This is to save time and to avoid abuse of Court process.

The costs of both applications shall abide the results of the appeal.

Before I take leave of this matter I would like to make the following observations;-

At the hearing of this application both counsel seemed unprepared to argue the application. There is need for learned counsel to prepare well before coming to this Court.

I was availed a copy of the pleadings in the High Court. The respondent herein describes himself as “**a male adult Ugandan of sound mind**” in his affidavit in support of the notice of motion. However, in the affirmation in reply filed in this Court by the same respondent affirmed by Nakawooya Sarah his advocate, she states as follows “**The respondent is a foreigner and the properties of foreigners in transit from neighbouring countries lawfully identified and described must be protected by the Courts**”

I am left wondering which of the two persons is telling the truth on oath. Needless to say one of them is being untruthful.

The learned Judge also seems to have based at least part of his ruling on the fact that the applicant before him is a foreign national, yet the applicant in that case in his own affidavit describes himself as a Ugandan citizen. Suffice to say on the face of it the ruling has glaring errors and contradictions.

It is very important that parties coming before Courts of law be truthful, and that this Court will not take lightly untruthful statements of litigants.



**Dated at Kampala** this 3<sup>rd</sup> day of March 2014.

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**HON. JUSTICE KENNETH KAKURU, JA**