



THE REPUBLIC OF UGANDA

10

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

**Miscellaneous Applications Nos. 66 and 67  
of 2020**

15

*Arising from Miscellaneous Application No. 66 Of 2020  
Arising from Civil Application No. 67 of 2020  
Arising from Miscellaneous Application No. 427 of 2019.*

20

**KRONE Uganda Limited :::::::::::::::::::::::::::::::::: Applicant**

**Versus**

**KERILEE Investments Limited :::::::::::::::::::::::::::::::::: Respondent**

25

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

**Ruling of Court**

30

The applicant filed a substantive application vide **Miscellaneous  
Application No. 66 of 2020** and an interim application vide  
**Miscellaneous Application No. 67 of 2020** seeking for orders  
that stay of execution be granted against the orders of the High  
Court in **Miscellaneous Application No. 427 of 2019**. At the

hearing, both the interim and the substantive applications were consolidated.

35 The applicant seeks to stay the order of Hon. Justice Henrietta Wolayo in **High Court Miscellaneous Application No. 427 of 2019** in which it was ordered, that the applicant deposits with the Deputy Registrar of the High Court, Kampala, an irrevocable bank guarantee of 60% of the decretal sum, within two weeks of the date  
40 of the ruling.

**Background:**

The facts of the applications, as could be discerned from the pleadings are as follows:

The respondent contracted the applicant to supply 60,000 tons of  
45 Wolfram Ore on several dates and it was agreed that the payment for the wolfram would be made in advance. The respondent advanced the applicant USD 450,000 for 50 tons of wolfram to be exported to the United Kingdom for which the applicant had to avail all documents to the courier for the shipment to be made.  
50 The applicant handed the consignment to the respondent but without the support documents.

The respondent sued the applicant vide **HCCS No. 365 of 2015** for an order of specific performance requiring the applicant to furnish the respondent with the relevant export documents, a  
55 declaration that the applicant's failure to get an export permit to the respondent infringes its economic rights and an order to get and avail an export permit to enable it export its 50 tons of wolfram to the United Kingdom. The applicant applied for third party proceedings against the Attorney General and the Commissioner



60 of the Department of Geological Survey and Mining in the Ministry  
of Energy and Mineral Development of which a 3<sup>rd</sup> party notice was  
given to indemnify the applicant 100% of the respondent's claim.

The applicant and the respondent entered into a consent judgment  
in the said suit to the effect that the liability to pay the decretal  
65 sum of USD 975,750 would be met by the Attorney General and  
the Commissioner of the Department of Geology Survey and  
Mining in the Ministry of Energy and Mineral Development.

The applicant's case is that the consent judgment was procured  
under duress and non-disclosure of material facts. The Attorney  
70 General refused to pay the decretal sum and the respondent  
instead commenced execution proceedings against the applicant  
in the suit, hence this application for an order of stay of execution.

The grounds upon which the application is premised are set out in  
the affidavit of Isingoma Kakiiza Amooti, a director of the applicant,  
75 and in the Notice of Motion and are that:

- 1. The applicant has filed a Notice of Appeal in both the High Court of Uganda and the Court of Appeal together with a letter requesting for a record of proceedings in Miscellaneous Application No. 427 of 2019.**
- 80 **2. That the applicant is aggrieved by the Ruling and Orders of the High Court Execution Division in Miscellaneous Application No. 427 of 2019; Krone Uganda Limited versus Kerilee Investments Limited, or in the alternative but without prejudice, parts of the Ruling and some of the**  
85 **orders, and has instructed its legal counsel to appeal to this honourable Court against the same.**

90 **3. That the applicant has filed a main application seeking for inter alia, stay of execution and/or effecting of the Ruling and orders of the High Court Execution Division in Miscellaneous Application No. 427 of 2019; Krone Uganda Limited Versus Kerilee Investments Limited pending the hearing and determination of the applicant's Appeal which has high chances of success.**

95 **4. That if the interim order of stay of the order in Miscellaneous Application No. 427 of 2019 in this application is not granted pending the hearing and determination for the main application, the appeal to the Court of Appeal shall be rendered nugatory.**

100 **5. That the application has been made without unreasonable delay as judgment was entered on 27<sup>th</sup> February, 2020.**

**6. That the applicant is bound to suffer gross injustice, if the Execution of judgment and orders are not stayed in the interim as the intended execution will occasion irreparable damage against the applicant.**

105 **7. That it is fair, just, equitable and in the interest of justice that this Honorable Court grants the interim orders sought.**

110 In reply, the respondent filed an affidavit sworn by Mr. John Wambi, the respondent's General Manager, on the 20<sup>th</sup> March, 2020, opposing the application. The main thrust of his averments is, that the application is incurably defective and premature and ought to be struck out with costs.



### **Representation:**

115 At the hearing of the application, learned counsel, Mr. Baziira Anthony appeared for the applicant while learned counsel, Mr. Winfred Niwagaba appeared for the respondent.

### **Applicant's Submissions:**

120 Counsel submitted that the jurisdiction of this Court to grant a stay of execution is provided for by Rules 6(2) (a), (b) and 42 (1) of the Judicature (Court of Appeal Rules) Directions, which give this Court discretion to stay execution on such terms as the Court deems fit.

125 Counsel relied on the cases of **Hon Theodore Ssekikubo and 3 others Versus the Attorney General and 4 others; Supreme Court Constitutional Application No. 6 of 2013** and **Gashumba Maniraguha Versus Sam Nkudiye Supreme Court Civil Application No. 24 of 2015**, which set out the grounds for Court to consider in an application for stay of execution. These include;  
130 the Applicant having lodged a Notice of Appeal, the intended appeal raising triable issues with a strong likelihood of success or ~~a~~ showing prima facie case of his/her right to appeal, that the Applicant will suffer irreparable damage or that the intended appeal will be rendered nugatory if a stay is not granted; and the  
135 Applicant must also establish that the application has been instituted without delay.

Counsel argued that the applicant lodged their Notice of Appeal and a letter requesting for a record of proceedings was filed in this Court on the 11<sup>th</sup> of March, 2020. He further submitted that the  
140 intended appeal raises triable issues and has a strong likelihood

of success. The first application for stay of execution was made to the High Court first under **Miscellaneous Application No. 427 of 2019**, pursuant to **Rule 42(1) of the Rules of this Court**. It was however granted with the order that the applicant deposits with  
145 the Deputy Registrar of the Execution Division an irrevocable bank guarantee of 60% of the decretal sum within two weeks from the date of the ruling. The applicant's previous counsel, Songon & Co. Advocates, applied for leave to appeal the decision in this Court vide **Civil Application No. 63 of 2020**.

150 That the application for leave was set for hearing on 27<sup>th</sup> March 2020, when the COVID-19 pandemic hit this country and the whole world resulting in Courts of law, like other institutions in the country not operating normally. Parties in this Application were thus directed to file written submissions. In the application  
155 for leave to appeal, Counsel raised various grounds, amongst which is, that the notice to show cause was issued but never served on the applicant and the respondents forged the stamp and signature of Katarikawe & Co. Advocates. In addition, counsel argued that although the application for leave is still pending  
160 before this Court, Court should invoke its powers under **Rule 42(2)** of the Court of Appeal Rules to grant a stay of execution and safeguard the right of appeal.

The applicant was, before filing this application, subjected to execution process by which the respondent, through Tropical  
165 General Auctioneers, purported to attach and sale the applicant's factory/warehouse comprising of a wolfram processing plant, shaking table, crusher and roller crusher.



Counsel contended that the respondent has taken steps to resume the execution process against the applicant's property by extracting a Court order dated 3<sup>rd</sup> March, 2020 and by also writing a letter to the Registrar, High Court Execution Division, dated 11<sup>th</sup> March 2020, requiring him to renew the warrant of execution,

**Respondent's Case:**

In reply, Counsel relied on the case of **Hon Theodore Sekikubo and 3 others Vs the Attorney General and 4 others; Supreme Court Constitutional Application No.6 of 2013** on the principles governing stay of execution. A stay should be granted, when amongst other reasons, the applicant is exercising the unrestricted right of appeal and when the appeal has a likelihood of success.

Counsel argued that in this case, the applicant has no right of appeal because an order passed under **O.22 rule 23 (3)** of the **Civil Procedure Rules** is not appealable as of right and therefore, the applicant has no automatic right of appeal in this case.

Counsel for the respondent argued that the applicant can only appeal to this Court upon first seeking leave of the High Court under **O. 44 Rules 2 and 3 of the Civil Procedure Rules** and under **O.44 Rule 1(3)**, of the Civil Procedure Rules. He submitted that no such application was made at the High Court at the time of the ruling or in writing within 14 days from the date of the ruling. He relied on the Supreme Court decision of **Dr. Sheikh Ahmed Mohamed Kisule Vs Greenland Bank, Civil Appeal No. 11 of 2020**, on the consequences of non-compliance by the Applicant with the mandatory requirement of obtaining leave to appeal.

195 Counsel for the respondent also further submitted that it is trite  
law that in a decree for payment of money, the applicant is always  
required to provide security for due performance of the decree  
under **0.22 Rule 23(3) Civil Procedure Rules**. The applicant in  
this case had not provided such security for due performance of  
200 the Court decree issued by Court against the said applicant. This  
Court therefore cannot exercise its discretion in favour of such  
applicant.

Counsel thus prayed that the applications for stay of execution be  
dismissed with Costs.

205 **Consideration of Court:**

The jurisdiction of this Court to grant a stay of execution is set out  
in Rule 6(2) (b) of the Rules of this Court which provides that:

***“2. Subject to sub-rule (1), the institution of an appeal  
shall not operate to suspend any sentence or stay  
210 execution but the Court may:***

***a)....***

***b) in any civil proceedings, where a notice of appeal has  
been lodged in accordance with rule 76 of the Rules of  
this Court, order a stay of execution, an injunction, or a  
215 stay of proceedings on such terms as the Court may  
think just”.***

The Rule gives this Court, the discretion, to grant a stay of  
execution, however, the discretion must be exercised on well-  
established principles. The Court has, in a number of cases laid



220 down the principles governing the exercise of the discretion conferred by Rule 6(2) (b) of this Court.

The overriding consideration is that it is a paramount duty of a Court of law with competent jurisdiction, to which an application for stay of execution pending appeal is made, to see to it that the appeal, if successful, is not rendered nugatory. **Hon. Theodore Ssekikubo & Others vs. The Attorney General and Another (Supra)**, clearly elaborated on this duty by restating the principles as follows:

230 ***“(1) The applicant must establish that his appeal has a likelihood of success; or a prima facie case of his right to appeal***

***(2) It must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.***

235 ***(3) If 1 and 2 above has not been established, Court must consider where the balance of convenience lies.***

***(4) That the applicant must also establish that the application was instituted without delay.”***

Before considering whether the application falls within those principles, it is necessary to first address the point of law raised by counsel for the respondent on the absence of the right of appeal on the part of the applicant. The respondent's Counsel submitted, that this application arises out of an order granted by the High Court under **O. 22 rule 23(3) of the Civil Procedure Rules**, which is not appealable to this Court as of right. The applicant can only

245

appeal to this Court after obtaining leave under **O. 44 rules 1(3), 2 and 3 of the Civil Procedure Rules**. No such application was made orally at the time of the delivery of the ruling or in writing immediately within the 14 day time frame from the date of delivery  
250 of the ruling stipulated under **Rule 40 (2)(a) and (b) of the Court of Appeal Rules**.

The applicant, on his part, argues that an application for leave is pending before this Court vide Civil Application No. 63 of 2020 and was scheduled for hearing on 27<sup>th</sup> March 2020, but given the  
255 pandemic in the country, the parties were directed to file written submissions. This application was filed by the applicant's previous counsel. He argues that the application for leave raises various grounds to merit consideration by this Court for instance, the notice to show cause was issued but never served upon the  
260 applicant. The respondents forged the stamp and signature of Katarikawe & Co Advocates to show that service was done and in addition, the application to set aside the consent judgment, is pending before the commercial Court.

I have carefully considered the arguments of both counsel and it  
265 is well stated law, that appellate jurisdiction is a creature of statute. The applicant filed this application for stay and also filed an application for leave to appeal, which is also pending before this Court. From the record, the applicant was represented by Songon & Co. Advocates who, after the Court decision, did not orally or in  
270 writing, seek leave to appeal the decision within the stipulated 14 days. Counsel filed **Civil Application No. 63 of 2020** seeking leave to appeal the decision of Court and the application is pending



before this Court. The application was fixed for hearing on the 27<sup>th</sup> of March 2020, but owing to the COVID19 pandemic, the parties  
275 and their respective Counsel were directed to file written submissions and await judgment/ruling on notice.

The Supreme Court, in **Banco Arabe Espanol Vs. Bank of Uganda, SCCA No. 8 of 1998** held that:

280 ***“A mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Such mistake, or as the case may be, constitutes just cause entitling the trial judge to use his discretion so that the matter is considered on its merits.”***

Likewise, in the case of **Mutaba Barisa Kweterana Ltd VS. Bazirakye Yemiya and Another, C.A C.A No. 158 of 2014**, this Court held that a mistake or inadvertence of counsel  
285 should not be visited on an innocent litigant.

It is my considered view that the failure to seek leave within the stipulated time was a mistake of the applicant’s previous counsel  
290 and should not be visited on the innocent litigant. The application for leave is pending determination in this Court. In the meantime it is important to safeguard the applicant’s right of appeal. In the result, this preliminary objection is over-ruled.

As already stated in the **Hon. Theodore Ssekikubo & Others vs. The Attorney General and Another (supra)** case, for an  
295 application for stay of execution to be granted, there should exist three elements, the first being lodgment of a Notice of Appeal. It is evident, that the applicant lodged a Notice of Appeal in this Court

on 11<sup>th</sup> March 2020 in accordance with **Rule 76 of the Rules of**  
300 **this Court.**

Secondly, the intended appeal is against the order of the High Court granting stay of execution with a condition that the applicant deposits with the deputy registrar of the Execution Court Division an irrevocable bank guarantee of 60% of the decretal sum  
305 of USD 586,450 within two weeks of the date of the ruling.

The applicant's intended appeal seeks to challenge the legality and propriety of the trial Court's proceedings and order in **Miscellaneous Application No. 427 of 2019**. At the same time the consent Judgment from which this order arises is being  
310 challenged in the Commercial Court.

It is the duty of Court to which an application for stay of execution pending appeal is made, to see to it that the intended appeal is not rendered nugatory. The fact that the applicant's application for leave to appeal is pending ruling in this Court should not have a  
315 bearing on the outcome of this Application since no decision has as yet been made in that application.

The applicant should prove that he will suffer irreparable damage and the intended appeal will be rendered nugatory, if execution is not stayed. The evidence on record indicates that the applicant was  
320 subjected to execution process by which the respondent, through Tropical General Auctioneers purported to attach and sale the applicant's factory/warehouse comprising of a wolfram processing plant, shaking table, crusher and roller crusher to recover the USD 975,750. This may be repeated by the respondent, at great cost to  
325 the applicant, if no order to stay execution is issued now.



Accordingly this application for stay of execution of the orders of the High Court in **Miscellaneous Application No. 427 of 2019** is hereby allowed. Execution is stayed pending the determination of **Civil Application No. 63 of 2020** for leave to appeal or until  
330 further orders of this Court.

As to costs, each party is to bear its costs of this Application.

It is so ordered.

Dated at Kampala this 30<sup>th</sup> day of July..... **2020**.

335



.....  
**Remmy Kasule**  
**Ag. Justice of Appeal**

340

345

350