

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPLICATION NO. 100 OF 2023**

*(Arising from Civil Appeal NO.0093/2023)*

**1. KARE DISTRIBUTION LTD**  
**2. KAREGEYA GEOFFREY.....APPLICANTS**

**VERSUS**

**NCBA BANK UGANDA LIMITED.....RESPONDENT**

**CORAM: HON. MR. JUSTICE OSCAR JOHN KIHKA, JA**

(Sitting as a Single Justice)

**RULING OF COURT**

This application was brought under Rule 2 (2), Rule 6(2) (b), 43(1) and 44(1) of the Judicature (Court of Appeal Rules) Directions SI 13-10 seeking for orders that;

1. A Temporary Injunction be issued against the Respondent, her agents/workers/ servants restraining them from selling, alienating or dealing in any way with suit properties vide land comprised in Kibuga Block 3 Plots 749 and 751 at Makerere, Kawempe Division, Kampala with developments thereon and the motor vehicles vide;

- i) UAX 073Q EICHER Truck 10-75, engine E411CDFE031684, Chassis number MC2A5FRC6FE316382.
- ii) UAX 583Q EICHER Truck 10-75, Engine number E411CDFE032229, Chassis number MC2A5FRC7E316682.
- iii) UAX 586Q EICHER Truck 10-75, Engine number 41D841583, Chassis number MC223FRCOE1290829.
- iv) UAX 586Q EICHER Truck 10-75 Engine number E411CDFE032226, Chassis number MC2A5FRC2FE316685
- v) UAX 220Q EICHER Truck 10-75, Engine number E411CDFE031685, Chassis MC2A5FRC9FE316375.
- vi) UAX 587Q EICHER Truck 10-75, Engine number E411CDFE031689, Chassis number MC2F5RC8FE316383.
- vii) UAX 077Q EICHER Truck 10-75, Engine number E411CDFE031680, Chassis number MC2A5FRC7FE316374.

viii) UAX 319C FORD RANGER D/cabin 2.2D, Engine number PF2HPFK52040, Chassis number 6FPPXXMJ2PFK52040,

until hearing and determination of the Applicants' Civil Appeal No. 0093 of 2023 pending before this court.

2. Costs of this application be provided for.

### **Background**

The background to this application as can be ascertained from the pleadings and the affidavits filed by the parties to this application is the following;

The 1<sup>st</sup> Applicant sometime in 2017, appears to have obtained three loan facilities from the then Commercial Bank of Africa Uganda Limited. The facilities availed to the Applicant were the following;

- A. MG178100628 for the loan of UGX 3,800,000,000/= payable over a period of 84 months.
- B. MG1708100629 for the loan of UGX 1,400,000,000/= payable over a period of 24 months, and
- C. MG1731700773 for the loan of UGX 230,000,000/= for 24 months.

The 1<sup>st</sup> Applicant also obtained a bank overdraft to a tune of UGX. 800,000,000/= which brought the Applicants' total obligation to UGX 6,230,000,000/= as the principal amount payable.

The aforementioned loans were secured by land comprised in Kibuga Block 3 Plots 749 and 751 at Makerere, Kawempe Division, Kampala with developments thereon and a number of motor vehicles.

It would appear that the Applicants defaulted on the payment of the loans which then resulted in the filing of High Court Civil Suit No. 637 of 2018 by the said Applicants. A consent judgement was entered in that suit, the terms of which, in a nut shell, the Applicants acknowledged indebtedness to the Respondent, and a payment schedule was agreed upon.

The Applicant then filed Miscellaneous Application No. 1015 of 2018 seeking to set aside the consent judgement which application was dismissed by Justice Wangutusi on the 19<sup>th</sup> day of August 2021. The Applicant being dissatisfied with the orders dismissing Miscellaneous Application No. 1015 filed Civil Appeal No. 245 of 2021 which is pending in this court.

The Applicants further filed Miscellaneous Application No. 1670 of 2022 in the High Court Commercial Division, arising out of High Court Civil Suit No. 637 of 2018 wherein they sought to prove to the court that they had paid all the outstanding loan obligations. The Respondents in response filed Miscellaneous Application No. 0135 of 2023 wherein they sought to have

Miscellaneous Application No. 1670 of 2022 struck out/dismissed for being vexatious, an abuse of court process and for failure to disclose a cause of action.

Hon. Justice Mubiru on the 15<sup>th</sup> of February 2023 struck out Miscellaneous Application No. 1670 of 2022. It is against that decision that the Applicants then filed Civil Appeal No. 93 of 2023 in this court which is pending determination.

This application for temporary injunction thus arises from Civil Appeal No. 93 of 2023.

The grounds of the application, as stated in the Notice of Motion and affidavit in support of the application sworn by **Karegeya Geoffrey**, the 2<sup>nd</sup> Applicant, on the 20<sup>th</sup> of March 2023 are briefly as follows;

1. *The applicants obtained the suit loans from Commercial Bank of Africa Uganda Limited which later in 2020 sold her assets and liabilities to NC Bank Limited that changed her name to NCBA Bank Limited that changed her name to NCBA Bank Uganda Limited (the Respondent herein).*

2. *The applicants fully paid off the suit loans to zero balances before Commercial Bank of Africa Uganda Limited sold off her assets and liabilities to the Respondent bank but the Respondent continues to hold the suit properties which were pledged as securities to illegally clog the applicant's right of redemption.*

3. *The applicants applied to the lower court to compel the Respondent to release the suit properties but the proceedings were struck out without being heard on merit.*

4. *The applicants have since filed an appeal vide Civil Appeal No. 0093 of 2023 in this court which appeal is pending hearing before this court.*

5. *The applicants have also filed a substantive application for Temporary Injunction vide Civil application No. 100 of 2023 which is pending hearing before this honorable court.*

6. *The Respondent and his agents, employees, servants or persons acting on her behalf and instructions are threatening to alienate and dispose the suit properties to third parties before the underlying substantive application and the appeal are heard and determined.*

7. *The Respondent disposes off the suit properties to create third parties' interests, it will occasion grave miscarriage of justice since the main application and subsequently the underlying appeal will have been rendered nugatory to the detriment of the applicants.*

8. *That the suit properties are in eminent danger of being alienated and disposed of by sale to third parties if the Respondent is not restrained from doing so which will adversely affect the applicants since their substantive*

application for Temporary Injunction will be rendered nugatory and of no relevance.

9. That the applicants' substantive application and the underlying appeal have high chances of success and shall both be rendered nugatory if this application for temporary injunction is not granted.

10. That the applicants will suffer substantial loss/irreparable injury if this application is not granted.

11. That it is in the interest of justice that this application be granted to maintain the status quo of the suit properties until the applicants' main application is heard and determined.

The Respondent filed an affidavit in reply deponed by **Erinah P. Nantege**, opposing the application and briefly stated that;

1. That the Respondent filed Misc. Application No.0135 of 2023 seeking an order to strike out and /or dismiss Misc. Application No.1670 of 2022 for being frivolous, vexatious and an abuse of Court process, and for failure to disclose a cause of action.

2. That the trial Judge, the Hon. Justice Stephen Mubiru, heard Misc. Application No.0135 of 2023 on 15th February 2023 and struck out Misc. Application No. 1670 of 2022 with costs to the Respondent herein.

3. That there is no basis for seeking an interim order of injunction on property which was not the subject matter in Misc. Application No. 0135 of 2023.

4. That there was no positive order issued by the trial Judge that is capable of being injuncted.

5. That the Applicants have never cleared their loan obligations with the Respondent.

6. That to-date, outstanding loan sums in excess of Ug. Shs. 8,000,000,000/= are still outstanding and have never been cleared by the Applicants.

7. That the Application is a clear abuse of Court process as the Applicants are fully aware that their loan obligations to the Respondent have never been cleared but they are falsely alleging that they cleared the same.

8. That as can clearly be noted under paragraph 4 of the Affidavit in support of Motion on Notice, the properties in respect of which the Applicants are seeking an injunction are mortgage properties.

9. That the Applicants have not complied with Regulation 13(1) of the Mortgage Regulations, 2012 which requires payment of security deposit 30%, of the outstanding amount, in a case like this where they are seeking interim relief from Court by way of stoppage of sell of the mortgage property.

10. That the Applicants application is a disguised application for stay of execution of a Decree of the High Court in High Court Civil Suit No. 637 of 2018. The trial Judge dismissed the 1st Applicant's application seeking to set aside

the Consent Judgment in High Court Civil Suit No. 637 of 2018 and against which order the 1st Applicant preferred a separate appeal before this Honourable Court, Civil Appeal NO. 245 of 2021, which is still pending before this Honourable Court.

### **Appearances**

When this application came up for hearing, **Counsel Hillary Kaburisa** appeared for the Applicants, while **Counsel James Kyazze** appeared for the Respondents. The 2<sup>nd</sup> Applicant was in court while the Respondent was unrepresented. It has to be stated that **Counsel Hillary Kaburisa** withdrew from the conduct of the matter after the submissions were filed.

Both parties filed written submissions which were adopted by the court and which I have carefully considered in making this decision.

### **Applicants' Submissions**

Counsel for the Applicants started off by highlighting the jurisdiction of this court in as far as the granting of injunctive orders is concerned. He cited Rules 2(2) and 6(2)(b) of the Judicature (Court of Appeal Rules) Directions as the provisions of the law which give this court the jurisdiction to grant injunctions.

Counsel for the Applicants then cited a number of authorities which decided on the factors that this court should take into account for the grant of temporary injunction orders. In particular, he relied on the case of **Grace Bamuranye & 5 Others vs Dr. Kasirivu Atwoki & 5 Others Civil Application No. 44 of 2008** where this honourable court held that for an application for an order of an injunction to succeed it must be shown that;

- (a) There is a prima facie case in favour of the applicants
- (b) If the application for an order of injunction is not granted, then the applicants will suffer irreparable damage
- (c) Court will look at the balance of convenience.

Counsel then submitted that all the above three conditions had clearly been made out by the Applicants in this application.

Regarding the prima facie case, Counsel for the Applicant relied on the case of **Godfrey Sekitoleko & 4 Others Vs Seezi Peter Mutabazi & 2 Others** which held that ***"..what is required is for the court to be satisfied that the claim is not frivolous or vexatious and that there are serious questions to be tried"***

Counsel argued that the applicants are challenging the decision of the trial judge when he struck out Misc. Application 1670 of 2022 which was not before him and without considering the pleadings therein and in the process occasioned a grave miscarriage of justice as the Applicants' right to a fair hearing was denied. Counsel further argued that the appeal is challenging the trial judge's finding that the suit loans were written off whereas not. He referred to the memorandum of appeal which was attached to the affidavit in support of the application and which expounded on the error of the trial judge.

Counsel contended that the grounds contained in the memorandum of appeal raised serious triable issues that ought to be investigated, given that the lower court denied the Applicants a chance to argue the triable issues by striking out their pleadings.

Counsel concluded this point by contending that Applicants had therefore made out the existence of a prima facie case with serious and arguable grounds in the underlying appeal and in the application that had been struck out.

With regard to the issue of irreparable damage, counsel referred to Black's Law Dictionary 9<sup>th</sup> Edition which defines irreparable damage to mean ***"...damages that cannot easily be ascertained because there is no fixed pecuniary standard of measurement"***

Counsel also referred to the case of **City Council of Kampala vs Donozio Musisi Sekyaya C.A.CA No.3 of 2000** which held ***"In the instant appeal the appellant relied on "irreparable" loss. In our understanding that word means loss that cannot adequately be atoned for by the payment of money"***

Counsel also relied on the case of **Grace Bamurangye & 5 Others Vs Dr. Kasirivu & 5 Others** where it was held that ***"...in order for the applicants to succeed ...they must satisfy us that if the order of injunction they are seeking is not granted, then they will suffer irreversible damage that cannot be addressed by payment of monetary compensation"***

Counsel then proceeded to reproduce paragraphs 12 to 21 of the affidavit in support of the application in the bid to show that the Applicants had satisfied the ground of irreparable damage. He argued that the quoted paragraphs of the affidavit had proved that the Applicants' properties were in danger of being alienated by the Respondent since they (the Respondent) have continued to withhold them upon being fully paid their loans.

With regard to balance of probability, Counsel argued that having established a prima facie case and having proved that the Applicants will suffer irreparable damage, the balance of justice rhymes in favour of the Applicants.

### **Respondent's Submissions.**

Counsel for the Respondent in reply to the Applicants' submissions framed five issues;

- a) Whether there are positive orders arising from the ruling of Hon. Justice Stephen Mubiru in Misc. Application No. 135 of 2023.
- b) Whether the Applicants were required to and have complied with the provisions of the Mortgage Regulations, 2012 requiring payment of a security deposit of 30% of the out standing sum before interim relief by the court can be granted.
- c) Whether the Applicants are required to comply with the provisions of Rule 42 (1) of the Rules of this Court.
- d) Whether the Court of Appeal at this point in time has jurisdiction to entertain prayers to restrain or stay orders of the High Court in EMA 3032 of 2018
- e) Whether the Applicants have fulfilled the conditions for the grant of a temporary injunction.

Addressing court on the first issue, Counsel for the Respondent objected to the application on account of the fact that there was no basis for seeking for an order of an injunction on property which was not the subject matter in Misc. Application No. 0135 of 2023. Counsel argued that the Respondent filed Misc. Application No. 0135 of 2023 in the High Court seeking an order to strike out Misc. Application No. 1670 of 2022 for being frivolous, vexatious and abuse of Court process. He submitted that the said application was heard on the 15<sup>th</sup> of February 2023 by Hon. Justice Stephen Mubiru and resulted in the striking out of Misc. Application No. 1670 of 2022.

He further argued that the decision of the trial Judge resulted in a negative order of striking out Misc. Application No. 1670 of 2022. He relied on the case of **Ssemwanga Charles Vs Nazziwa Aisha & 2 Others Civil Application No. 20 of 2022** where it was held that *".....a negative order can only be set side when the appeal succeeds but cannot be stayed..."*

Counsel therefore contended that the present application was incompetent as there was no order capable of being injuncted. He further relied on the case of **Faustino Ntambara Vs Jack Kityo Segawole, Misc. Application No. 150 of 2021** in support of his submission on the competence of the present application.

With regard to the 2<sup>nd</sup> issue, Counsel for the Respondent argued that the Applicants were required to have complied with Regulation 13 (1) of the Mortgage Regulations of 2012 which requires payment of security deposit of

30% of the outstanding amount in a case like this where the Applicant seeks to stop the sale of mortgaged property. He relied on the case of **Ganafa Peter Kisawuzu Vs DFCU Bank Ltd Civil Application No. 0064 of 2016** in support of his submission on this point.

On the 3<sup>rd</sup> issue, Counsel for the Respondent argued that the present application contravenes the provisions of Rule 41 (1) of the Rules of this Court which provides that where an application may be made either to court or the High Court, it shall first be made to the High Court.

Counsel for the Respondent argued that the present application should have first been made to the High Court which was not done. He relied on the case of **Ganafa Peter Kisawuzu Vs DFCU Bank Ltd Civil Application No. 0064 of 2016** which held that the Court of Appeal and the High Court have concurrent jurisdiction in applications for stay of execution, and that such applications must first be filed in the High Court. They can only be filed in the Court of Appeal if there are special circumstances.

Counsel further argued that no reason had been advanced by the Applicants as to why they had not complied with the provisions of Rule 42 (1) of the Rules of this Court and that there were no special circumstances put forward by the Applicants that would require this Court to entertain the present application.

Counsel for the Respondent also argued that the Applicants' application is a disguised application for stay of execution of a decree in High Court Civil Suit No. 637 of 2018 where a Consent Judgement had been entered. The Applicants, Counsel submitted, filed Miscellaneous Application No. 1015 of 2018 seeking to set aside the consent judgement which application was dismissed by Justice Wangutusi on the 19th day of August 2021. The Applicant being dissatisfied with the orders dismissing Miscellaneous Application No. 1015 filed Civil Appeal No. 245 of 2021 which is pending in this court.

Counsel for the Respondent argued that by filing this application the Applicants' intention was to achieve a stay of execution of the Decree in High Court Civil Suit No. 637 of 2018. Counsel contended that this application arose from EMA 3032 of 2018 in which the High Court issued warrants of attachment and sale of properties the subject of this application. Counsel contended that correct court to issue an order for stay of execution in the High Court where matters regarding execution are still pending and not this court.

With regard to the 4<sup>th</sup> issue, Counsel for the Respondent argued that the present application effectively seeks to restrain the sale of the suit properties that was ordered by the High Court in EMA 3032 of 2018 which arose from High Court Civil Suit No. 637 of 2018. Counsel submitted that the Applicants have never appealed against the order for attachment issued in EMA 3032 of 2018. Thus, the Court of Appeal at this point in time does not have



jurisdiction to entertain prayers to restrain or stay orders issued by the High Court in EMA No. 3032 of 2018.

Counsel for the Respondent relied on the case of **Male Mabirizi Kiwanuka Vs Attorney General CACA No. 40 of 2022** which in effect held that appellate jurisdiction only springs from statute. Counsel prayed that this Court finds that it does not have the jurisdiction to entertain prayers to restrain or stay orders issued by the High Court in EMA No.3032 of 2018.

With regard to the 5<sup>th</sup> issue, Counsel for the Respondent in a nut shell, argued that the Applicants had failed to fulfil all the conditions required for the grant of a temporary injunction.

### **Applicant's Submissions in Rejoinder.**

The Applicant filed submissions in rejoinder opposing the points of law raised by the Respondent. They were however prolix and went into matters that had not been raised by the Respondent.

### **Consideration of the Application**

Before I proceed with the merits of this application, I will first consider the preliminary points of law that were raised by Counsel for the Respondent.

The first point of law was framed by Counsel for the Respondent as follows;

### **Whether there are positive orders arising from the ruling of Hon. Justice Stephen Mubiru in Misc. Application No. 135 of 2023.**

As stated before, Counsel for the Respondent objected to the application on account of the fact that there was no basis for seeking for an order of an injunction on property which was not the subject matter in Misc. Application No. 0135 of 2023. Counsel argued that the Respondent filed Misc. Application No. 0135 of 2023 in the High Court seeking an order to strike out Misc. Application No. 1670 of 2022 for being frivolous, vexatious and abuse of Court process. He submitted that the said application was heard on the 15th of February 2023 by Hon. Justice Stephen Mubiru and resulted in the striking out of Misc. Application No. 1670 of 2022.

He further argued that the decision of the trial Judge resulted in a negative order of striking out Misc. Application No. 1670 of 2022.

The Applicants in their submissions on rejoinder did not address this point at all. They instead chose to dwell on their argument that the suit properties were the subject matter of this application.

First of all, it is common ground that the Applicants filed Misc. Application No. 1670 of 2022 seeking *inter alia* declarations that they had fully serviced

the loans obtained from the Respondent Bank, and orders directing the Respondent to unconditionally release and surrender all the Applicants' motor vehicles, and for an order vacating the warrant of attachments issued in respect of the suit properties pledged as securities. A copy of Misc. Application No. 1670 of 2022 was attached as annexure 22 to the affidavit in support of the Applicants' application.

The Respondent then filed Miscellaneous Application No. 0135 of 2023 wherein they sought to have Miscellaneous Application No. 1670 of 2022 struck out/dismissed for being vexatious, an abuse of court process and for failure to disclose a cause of action. This application was attached to the Respondent's affidavit in reply as annexure "A".

Both the Applicant and the Respondent have deponed in their respective affidavits that Miscellaneous Application No. 0135 of 2023 was heard on the 15th of February 2023 by Hon. Justice Stephen Mubiru and resulted in the striking out of Misc. Application No. 1670 of 2022. It is against that decision that the Applicants then filed Civil Appeal No. 93 of 2023.

The present application therefore arises out of Civil Appeal No. 93 of 2023.

The issue is whether the order arising of the ruling of Justice Stephen Mubiru was a negative order. This is crucial, because once it is determined that the order is negative, the competence of this application comes into question.

A copy of the said order was attached as annexure "23" to the Applicants' affidavit, and in part it reads as follows:

***"...This matter coming up for hearing this 15<sup>th</sup> day of February, 2023 before His Lordship Hon. Justice STEPHEN MUBIRU ....***

***IT IS HEREBY ORDERED THAT:-***

- 1. Miscellaneous Application No. 1670 of 2022 is accordingly struck out with costs to the applicant.***
- 2. Costs of this application too are awarded to the applicant***
- 3. Leave to appeal to the Court of Appeal is hereby granted to the Respondents.***

***Given under my hand and seal of this Honorable Court this 15<sup>th</sup> day of February 2023***

***JUDGE"***

It is the aforementioned order that is the subject of Civil Appeal No.93 of 2023 which was filed by the Applicants. The Applicants attached the Memorandum of Appeal in Civil Appeal No. 93 of 2023 as annexure 26 to their affidavit in support of the application. The concluding prayer in the Memorandum of Appeal reads as follows;

***“ ...WHEREFORE, the appellants pray that this appeal is allowed, Ruling and orders of the trial court be set aside, Misc. Application No.1670 of 2023 and the underlying one M.A No. 1758 of 2022 be reinstated and heard on merits before another judicial officer, the respondent pays costs of the appeal in this court and the court below...”***  
(Emphasis mine)

It is therefore clear that the order which is the subject of Civil Appeal No. 93 of 2023 and therefore the subject of this application, was one for striking out Misc. Application No. 1670 of 2022. The appeal seeks to set aside the said order and reinstate Misc. Application No. 1670 of 2022. This order, in my view, is not one that is capable for execution.

I have read the case of **Ssemwanga Charles Vs Nazziwa Aisha & 2 Others Civil Application No. 20 Of 2022** which was referred to by Counsel for the Applicant. In that case, Hon. Justice Madrama was faced with circumstances almost similar to the present application and had this to say;

***“.....What the Applicant has before this court for stay of execution is a negative order of dismissal of the Plaintiff’s suit in the Chief Magistrate’s Court. There was no order capable of execution which can be stayed.....Further a negative order can only be set aside when the appeal succeeds but cannot be stayed.....In the premises the Applicant’s application is incompetent because there is no order or decree which is capable of execution in the modes provided for under section 38 of the Civil Procedure Act and the application is hereby dismissed with costs to the Respondent.”***

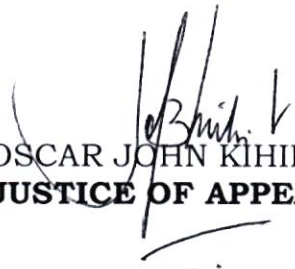
Given that the order, which is sought to be stayed in the present application, is negative and therefore not executable, I equally find that this application is incompetent. I would therefore uphold the preliminary point of law raised by the Respondent.

There is no need, in my view, to consider the rest of the preliminary points as this point of law disposes of the application.

This application is therefore dismissed with costs to the Respondent.

I so order

sDated this.....<sup>4<sup>th</sup></sup>..... day of .....<sup>May</sup>.....2023

  
OSCAR JOHN KIIHIKA  
**JUSTICE OF APPEAL**