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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 185 OF 2023

(Arising from Civil Appeal No. 314 of 2019)

BETWEEN

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1. SSERUBIRI FRANK
 2. HABIB MALIK
 3. LUTAKOME HENRY..... APPLICANTS

AND

- 15
1. SALAMA JAQUES
 2. SERAPIA SEMUHOZA ETIENNE
 3. NYABATWARE NEMA.....RESPONDENTS

RULING OF CHRISTOPHER GASHIRABAKE, JA

(SINGLE JUSTICE)

20 **Introduction**

1.] This is an application brought by way of Notice of Motion under Rules 2(2), 6(2)(b); 42 and 43 of the Judicature (Court of Appeal) Rules SI 13-10, for Orders that;

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- a. *An Order of stay of execution doth issue against the respondents in respect of Ruling and Orders obtained in High Court Misc. Application No. 205 of 2021 until the final disposal of Civil Appeal No.495 of 2022 pending in this Honorable Court.*

- b. *Costs of this application be provided for.*

2.] The application is premised on the grounds laid down in the affidavit sworn by Mr. Habib Malik. It was averred that;

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1. *There is a substantive Civil Appeal originated by a memorandum of appeal which was filed within time in this honorable court.*

C. Gashirabake

- 5 2. *The applicants filed an application for a stay of execution vide Misc. Application No. 74 in the High Court and was rejected.*
3. *There is a serious threat of Execution of the Order in HCMA No.205 of 2021 and Civil Suit No.314 of 2019 following the High Court issuance of a warrant of Arrest.*
- 10 4. *If this Application is not allowed, the Applicant will suffer substantial loss and his Appeal will be rendered nugatory.*
5. *This Application has been made without any unreasonable delay by the Applicant.*
6. *It is in the interest of Justice that this Application is allowed and the*
- 15 *status quo be preserved.*

3.] The respondents opposed the application through the affidavit of Mr. Serapia Semuhoza Etienne, where he averred that the applicants have not demonstrated they will suffer substantial loss and that they will be able to comply with the decree. It was averred that the application is an abuse of

20 court process.

Representation

4.] Mr. Emmanuel Kanaabi represented the applicants. Mr. Michael Aboneka represented the respondents.

Submissions for the Applicants

25 5.] Counsel for the applicant submitted that for an application for stay of execution to be granted, the applicant must satisfy the Court that; the appeal has a likelihood of success, and that the applicant will suffer irreparable damage if the application is not granted. Where 1 and 2 have not been established, the court must consider where the balance of convenience lies.

30 The applicant must in addition establish that the application was instituted without delay.

- 5 6.] On the first condition, counsel for the applicant submitted that the applicant in paragraphs 3,4 and 5 of the affidavit in support demonstrated that the appeal has a likelihood of success. The applicants were denied the opportunity to defend Civil Suit No. 314 of 2019. There are still serious and plausible questions of law to be determined by this Court.
- 10 7.] On whether there is a threat of substantial, counsel submitted that the respondents have secured a warrant of arrest from the High Court. The process for execution has fully commenced. This constitutes an imminent threat of execution. Counsel cited the case of **Osman Kassim Ramadhan Vs. Century Bottling Company Ltd. (Civil Application No. 35 of 2019)**
- 15 8.] Counsel submitted that the balance of convenience hinges in favour of the applicants. He contended that the application was filed without undue delay as the same was filed immediately after the dismissal of the applicant's Miscellaneous Application No. 74 of 2023. Counsel prayed that this application be granted,

20 **Submissions for the Respondent**

- 9.] Counsel for the respondents raised a preliminary objection that the 2nd respondent's affidavit in reply was defective because it had not been signed as required under section 6 of the Oaths Act.
- 10.] It was submitted for the respondents that the applicant has not adduced any evidence to show that there is an imminent threat of execution. Counsel submitted that this application ought to be dismissed following the position of the law in the case of **Kyambogo University vs. Prof. Isiah Omolo Ndiege, Civil Application No. 341 of 2013**, where Justice Kenneth Kakuru, as he then was, dismissed the application on the ground that there was no proof of impending danger.
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5 11.] It was further submitted that even if the application was not granted the applicants would not suffer any irreparable damage.

12.] Counsel further submitted that there is nothing substantial to preserve to warrant a grant of stay since the appeal is in respect of a ruling dismissing the applicants' application to set aside a default judgment. Counsel cited the
10 case of **Teddy Sseezi Cheeye & Anor versus Enos Tumusiime, Civil Application No 21 of 1996.**

13.] Counsel submitted that the appeal is frivolous and vexatious because the applicants took two years without responding to the claim. Additionally, the applicants do not have an automatic right of appeal, since the applicants
15 utilized their first recourse which was to set aside default judgment under Order 9 rule 6 by applying to set aside under Order 9 rule 12. Counsel also argued that the applicants never sought leave of Court to file the said appeal since it is not provided for under Order 44 of the Civil Procedure Rules.

14.] It was further argued that there was no evidence on record to indicate
20 that the applicants were prepared to give security for the due performance of the decree.

Consideration of Court.

15.] The power of the Court to grant a stay of execution is discretionary and is derived from Rule 2 (2) of the Rules of this Court. The rule empowers this
25 Court to make such Orders that facilitate the end of justice in any matter before it. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the trial court's decision be overturned on appeal. This principle was enunciated in

5 the decision of the Kenyan Court of Appeal in the case of **Absalom Dova vs. Tarbo Transporters [2013] eKLR**, where it stated: -

10 *“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the*
15 *two competing rights focuses on their reconciliation...”*

16.] The purpose of a stay of execution as all other interim remedies, is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in **RWW vs. EKW (2019) eKLR** addressed itself on this as hereunder: -

20 *“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived*
25 *of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.*

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”

30 17.] Before I consider this application, the applicants must prove that, there is a likelihood of success of the appeal and that the applicant might suffer a

5 substantial loss, balance of convenience, the application was made without delay, and provision of security for due performance of the decree.

18.] The respondents raised a preliminary objection that the affidavit was not dated, however, I perused and found that the affidavit was signed in accordance with section 6. This objection is therefore overruled.

10 19.] The applicant filed a memorandum of appeal to prove that the appeal raised triable issues. Indeed, at the perusal of the memorandum of appeal attached, the grounds raise triable issues of law and fact. This ground is satisfied.

15 20.] One of the applicants, Mr. Habib Malik averred in the affidavit in support that they would suffer substantial loss if the application is not granted. However, no evidence was adduced to demonstrate that they would suffer substantial loss. It is trite law under section 101 of the Evidence Act Cap 06 that he who alleges must prove. The loss does not have to represent any particular amount but refers to any loss, great or small that is of real worth. See, **Tropical Commodities Supplies Ltd and Others VS. International Credit Bank Ltd (in Liquidation) [2004]2 EA. 331**. The applicant must prove that there is the threat of substantial loss, which has not been demonstrated in this matter.

25 21.] In paragraph 8 of the affidavit in support it was averred by Mr. Habib Malik that this application was filed without delay. It was argued that the application was filed immediately after the dismissal of Miscellaneous Application No. 74 of 2023, which was dismissed on the 27th of April 2023 by the High Court. This application was filed on the 11th of May 2023. This was a reasonable time. This ground was proved.

30 22.] Lastly, the applicant has not provided evidence that they have paid security for the due performance of the decree.

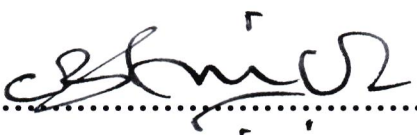
5 23.] In exercise of my discretion and in assessing the balance of convenience I decline to grant this application. Mere assertions are not evidence of the existence of the assertion.

Decision

- a) This application is dismissed.
- 10 b) Costs shall abide by the outcome of the appeal.

I so order.

15 Dated signed and delivered at Kampala this 20th Day... Oct^{ber}... of 2023

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C. GASHIRABAKE
JUSTICE OF APPEAL

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