

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
CIVIL APPLICATION NO.212 OF 2023  
*(Arising Out of Civil Appeal No.276 of 2019)*  
*(Arising from High Court Civil Suit No.480 of 2016)*

**BETWEEN**

UGANDA REVENUE AUTHORITY..... APPLICANT

**AND**

MOHAMMED TUMUSIIME .....RESPONDENT

**RULING BY CHRISTOPHER GASHIRABAKE, JA.**

**(SINGLE JUSTICE)**

**Introduction**

- 1.] The applicant filed this application by way of Notice of Motion under Rules 2(2), 6(2)(b), 42 and 43 of the Judicature (Court of Appeal Rules) Directions) SI 13-10. (hereafter referred to as the rules of this court) seeking for an Order of stay of execution to be issued against the respondent and his agents staying execution and or any enforcement against the applicant in respect of the judgment in HCCS No. 480 of 2016 until an appeal of the same is disposed. The applicant prayed for costs to be provided.
- 2.] The Application is supported by an affidavit deponed by Hilda Bakanansa Walaga. The grounds of application were that, the applicant lodged an appeal with triable issues before this court vide Civil Appeal No.276 of 2019. The applicant further averred that if this application is not granted it

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will suffer irreparable loss. Additionally, it was averred that the balance of convenience favours the applicant since there is a serious and imminent threat of execution of the decree. It was averred that the application was filed within reasonable time and the applicant demonstrated willingness to pay security for due performance of the decree.

### **Representation.**

3.] The applicant was present in Court and not represented. The respondent was represented by Mr. Akakimpa Godfrey. The respondent was not in Court. Both parties filed submissions that were adopted by this Court.

### **Submissions**

4.] Counsel cited the case of **URA Vs NSSF, CACA No. 43 of 2023**, in which this court cited the case of **Lawrence Musiitwa Kyazze vs Eunice Busingye SCCA No. 18 of 1990**, which restated the conditions for a stay of execution order as follows;

1. *That the Applicant must show that he has lodged an appeal which is pending hearing*
2. *That the said pending appeal is not frivolous and it has a likelihood of success.*
3. *That there is a serious and imminent threat of execution of the decree and if not stayed the appeal will be rendered nugatory.*
4. *That the application was made without unreasonable delay.*
5. *That the Applicant is prepared to give security due performance of the decree and;*

6. *That refusal to stay would inflict grater hardship than it would avoid.*
7. *The power to grant or refuse a stay is discretionary.*

5.] In the case of **Theodore Ssekikubo & others Vs AG & Others SCCA No. 6 of 2013**, the Supreme Court held that;

1. *Appeal has likelihood of success or prima facie case of right of appeal*
2. *The appellant will suffer irreparable loss damage or Appeal will be rendered nugatory if stay not granted.*
3. *If 1 and 2 are not established, then balance of convenience.*

#### **Whether the Appeal has likelihood of success?**

6.] Counsel for the applicant referred to paragraphs 18, 19 & 20 of the affidavit in support of the application. The Applicant being dissatisfied with the judgment of the High Court filed an appeal in this Court vide Civil Appeal NO. 276 of 2019, which is pending hearing. It was submitted that the appeal has a high likelihood of success being that the Court of Appeal held in the case of **URA Vs Murisa Amon, Court of Appeal, Civil Appeal No. 128 of 2018** that once a prima facie case is established against an accused person, there can be no successful claim for malicious prosecution. In this case, a prima facie case was established against the respondent and relying on the case of **URA Vs Murisa Amon (Supra)** by the Court of Appeal, the Appeal has a high likelihood of success.

7.] In response, counsel for the respondent referred to paragraph 8 of the affidavit in opposition of the Application, the respondent averred that his prosecution was malicious from the start. Under paragraph 6 of the reply, counsel argued that the respondent demonstrated how the owner of the goods suspected to have been smuggled appeared in court and owned his case. Paragraph 7 of the same affidavit clarified that the applicant did not have a case against the respondent. Counsel argued that the case of **URA Vs. Murisa Amos**, (*Supra*) is distinguishable. Counsel invited this Court to find that the appeal has no likelihood of success.

#### **Suffer irreparable loss damage**

8.] Counsel for the applicant referred to paragraphs 21, 22, 23, 24, 25, & 26 of the Affidavit of Bakanansa Hilda Walaga in support of the Application to support the submission that the Applicant will suffer irreparable loss or the appeal will be rendered nugatory if stay is not granted. In the case of **Wilson Vs. Church (1879) Vol. 12 Ch D 454** also followed in **DFCU Bank Ltd. Vs. Dr. Ann Persis Nakate Lussejere, CACA No. 29 of 2003**, it was emphasized there, that it is the paramount duty of a court to which an application for stay of execution pending an appeal is made, to see that the appeal, if successful, is not rendered nugatory. Justice Ogoola in the case of **Tropical Commodities Suppliers Ltd. & Ors V. Credit Bank (in liquidation) (2003 2 EA 331)**, held that:

*“Substantial loss does not represent any particular amount or size; it cannot be quantified by any particular mathematical formula. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without a value or a loss that is merely nominal”.*



9.] In the case of **National Enterprise Corpn. V. Mukisa Foods (Misc. App. No. 7/1998)** Court of Appeal held that:

*“The court has power in its discretion to grant stay of execution where it appears to be equitable so to do with a view to temporarily preserving the status quo. As a general rule the only ground for stay of execution is for the applicant to show that one the decretal property is disposed of there is not likelihood of getting it back should the appeal succeed”.*

10.] Counsel for the applicant submitted that the Applicant will suffer irreparable loss / damage if stay of execution of the judgment and orders issued by the High Court in Civil Suit No. 480 of 2016 is not granted. The sums claimed by the respondent are colossal, yet he has no known source of income or assets equivalent to the sums awarded. In the judgment of Civil Suit No. 480 of 2016, the respondent argued that he had lost his job and had no source of income thus having no known source of income.

11.] It was submitted that in the judgment of Civil Suit No. 480 of 2016, the respondent was denied special damages on grounds that there was contradictory evidence regarding his different residences, as per the charge sheet and witness statement, thus making it difficult to trace him to pay any amount that is likely to be awarded after the appeal. In counsel’s view, the respondent’s whereabouts are unknown which will make it hard to recover the amounts once the appeal is successful. The appeal shall be rendered nugatory if stay is not granted.

12.] Counsel for the respondent on the other hand argued that under paragraph 11 & 13 of the applicant’s affidavit in support of the application, it states that on 8<sup>th</sup> July 2022, the respondent served the notice to show cause



and that on 9<sup>th</sup> May 2023, the same was for mention. Under paragraph 12, the applicant indicates that the Application for stay of execution was dismissed with costs on 24<sup>th</sup> April 2023, by the High Court. Under paragraph 14 (f) of its affidavit, the applicant indicates that the respondent's counsel wrote a demand notice inter-alia proposed additional bill of costs arising from the dismissed application of stay at High Court.

13.] Additionally, there is no evidence furnished by the applicant to demonstrate irreparable loss. Counsel cited the case of **Walusimbi Mustafa vs. Musenze Lukia, Miscellaneous Application No. 2342 of 2018**, where Justice Eva Luswata in approval of the case of **Andrew Kisawuzi Vs. Dan Oundo Malingu, HCMA No. 467 of 2013**, held that;

*“...substantial loss cannot mean ordinary loss or the decretal sum of costs which must be settled by the losing party but something more than that.... The applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is granted”.*

14.] The principle here is that substantial loss is not just any form of loss that you merely state, as asserted by the applicant. It must be material and must be proved. There is no evidence whatsoever that indicates an impending eminent threat of execution. No warrant of execution has been issued or applied for and in the absence of such, counsel invited court to hold that this Application is premature, a waste of court's time since there is no evidence that if an order is not granted, the main appeal will be rendered nugatory. See **Kyambogo University vs. Prof. Isaiah Omolo Ndiege, Civil Application No. 341 of 2013**.

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### **Balance of convenience**

15.] Under this, counsel for the applicant referred to paragraphs 18 & 29 of the affidavit in support of the application and argued that the applicant demonstrated the balance of convenience was in their favour as follows:

- a) *It has lodged an appeal which is pending hearing.*
- b) *That the said pending appeal is not frivolous and it has a likelihood of success.*
- c) *That there is a serious and imminent threat of execution of the decree and if not stayed the appeal will be rendered nugatory.*
- d) *That the application was made without unreasonable delay.*
- e) *That the Applicant is prepared to give security due performance of the decree and;*
- f) *That refusal to say would inflict grater hardship that it would avoid.*

16.] Counsel prayed that this Court finds that the balance of convenience favours the grant of the orders sought.

17.] Counsel for the respondent invited this court to think of the respondent who was subjected to malicious prosecution in 2007, counsel argued that it is now 16 years and no justice has been availed to him. That the balance of convenience would be to allow the respondent to enjoy the fruits of his judgment.

### **Security due to performance of the decree;**

18.] The applicant did not make any submissions on this condition.

19.] Counsel for the respondent cited the case of **Lawrence Musiitwa VS. Eunice Busingye** (*Supra*), where court stated that the applicant cannot merely miss a requirement to pay security for due performance. Under paragraph 30 of the affidavit in reply, the respondent prayed that if this court is to allow the application, the applicant should be ordered to deposit Ugx. 200,000,000 with court as security for due performance.

### **Consideration of Court**

20.] 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 execution but the Court may:*

*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.... on such terms as the Court may think just”.*

21.] Rules 6(2)(b) and 2(2) give this Court, the discretion, in civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of the Rules of this Court, to order stay of execution in appropriate cases and on terms that it deems fit. This must be done judiciously. It is in the interest of justice that whenever it is necessary to preserve the status quo, Court should grant the stay such that the appeal is not rendered nugatory just incase the appeal succeeds.

22.] I agree with the submissions of both counsel with regard to conditions for grant of stay of execution and the cited cases. I will refer to the Supreme Court decision in the case of **Hon. Theodore Ssekikubo & Others**

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**vs. The Attorney General and Another, Constitutional Application No 06 of 2013**, which restated the conditions as follows;

*“(1) The application 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.*

*(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.”*

**Likelihood of success.**

23.] It was the applicant’s argument that since there is an established prima facie case against the accused in the criminal case, then there can be no successful claim for malicious prosecution. When the court looks for triable issues they are not considering the merits of the case but whether the appeal raises issue that are not frivolous and vexatious. In the case of **American Cyanamid Co. vs. Ethicon Ltd, 1975, AC 396**, the house of Lords held that;

*“the general rule that one must establish a probability or a strong probability, is not correct. One must look at the whole case to see whether there is a question to be tried ...”*

24.] To establish whether there is a question to be tried by this Court, I looked at the court documents filed but more so the memorandum of appeal

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that clearly gives the grounds of the appeal. The grounds of appeal in this case are that;

- 1. The learned Judge erred in law and fact when he held that the appellant acted without reasonable or probable cause.*
- 2. The learned Judge erred in law and fact when he held that malice was clearly inferred from the appellant's failure to consult the law and conduct proper investigations as a cautious and prudent person would have.*
- 3. The learned trial judge erred in law and fact when he disregarded the lacunas and inconsistencies in the respondent's evidence and held that the defendant was entitled to general damages.*

25.] A look at the grounds of appeal, the appeal raises triable issues that are not frivolous and vexatious. This ground therefore has been satisfied.

**Suffering irreparable damages.**

26.] To exercise its discretion in favor of a party seeking orders for stay pending an appeal in this court, court must be satisfied that loss will result on the applicant if the order is not granted. The assessment of irreparable loss varies from case to case. Court of Appeal of Kenya while addressing a similar issue in **Shell Ltd vs. Kibiru and Another (1986) 1 KLR 410**, held that;

*“The appeal is to be taken against a judgment in which was held that the present respondents were entitled to claim damages due to the negligence of the present applicant.*

*It is a money decree. An intended appeal does not automatically operate as a stay. The application for stay made before the High Court failed because the first conditions set out in Order XLI rule 4*

*of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts.*

*It's usually a good rule to see if Order XLI rule 4 of the Civil Procedure Rules can be substantiated if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money."*

27.] I have considered the averments and submissions of the applicants, and I find that the applicant has demonstrated that it will suffer irreparable damage if the application is not granted. It was averred in the affidavit in support of the application, paragraph 14, that the applicant was required to pay the respondent a total sum of Ugx. 148,353,596, broken down as follows;

1. Ugx. 20,784,600 as per the taxed bill of costs.
2. Ugx. 114,478,996 being general damages of Ugx 50,000,000 and interest of 17% since the date of judgment on 12<sup>th</sup> July 2019.
3. Ugx. 13,090,000 being the proposed additional bill of costs.

28.] It is true that the respondent's claim is colossal. The applicant averred that the respondent had said in the lower Court that having lost his job he lost all his sources of income. He had no known source of income. The

respondent disputed the allegation and stated that he had picked up. He however did not adduce any evidence to this effect. I am convinced that even when the money is defined, considering the financial status of the respondent, the applicant would suffer substantial loss if the application is not granted, whereas if the appeal does not succeed, the applicant has the financial ability to pay the respondent.

**Reasonable time.**

29.] Following the dismissal of the suit at Nakawa Court, the applicant filed the first application for stay vide HCMA No. 0440 of 2022, but the same was dismissed on the 24<sup>th</sup> April 2023. The applicant then lodged this application on the 24<sup>th</sup> May 2023. I find that this was within reasonable time and the condition was met.

**Balance of convenience.**

30.] In the **American Cynamid Co.** case (*Supra*) while assessing the balance of convenience Court held that;

*“so unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any prospect of succeeding in his claim for a permanent injunction, at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the grant relief that is sought.*

*As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do*

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*what was sought to be enjoined between the time of the application and the time of the trial.*

*If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.*

*It is where there is doubt as to the adequacy of the remedies in damages available to either party or to both, that the question of balance of convenience arises. it would be unwise to attempt to even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.*

31.] The facts of this case are that the respondent was an employee of the applicant. In 2007, he was arrested and prosecuted vide Criminal Case No. 499 of 2007. The respondent was acquitted following the dismissal of the case. The respondent then filed HCCS No. 480 of 2016, against recovery of



Ugx 67,000,000/= damages for malicious prosecution and unlawful termination of employment. On the 12<sup>th</sup> July 2019, the High Court delivered judgment in favour of the respondent awarded him the following: -

*a. general damages of Ugx 50,000,000/=*

*b. interest on (a) at rate of 17% from date of judgment till payment in full.*

*c. costs*

32.] On the 05<sup>th</sup> May 2023, the respondent demanded that the applicant pays a total of Ugx. 148, 353, 596 as stated earlier. Guided by the **American Cynamid** case (*supra*) the balance of convenience is in favour of the applicant. I acknowledge the fact that the case has stayed in court for 17 years now, however because the respondent in the High Court stated that he had no source of income, it puts him in a tricky position of not being able to pay the said money if the appeal succeeded. In his response to the allegation of inability to pay, the respondent argued that his financial state had improved, however he did not adduce any evidence to this effect. On the other hand, the respondent would easily recover from the applicant if the appeal failed. It is my considered opinion that the balance of convenience is in favour of the applicant.

### **Security for due performance.**

33.] The applicant demonstrated the willingness to deposit security for due performance. It has been held that an applicant for stay of execution should always be ready to pay security for due performance of the decree. (See; the case of **Lawrence Musiitwa Kyazze vs. Eunice Busingye, SCCA No. 18**

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/1990). This is intended to protect the respondent from intentional delay by the applicant to deny the respondent from enjoying the fruit of his judgment.

34.] Having considered all the requirements, I now exercise my discretion to grant this application on condition that the applicant deposits security for due performance with the Registrar of this Court.

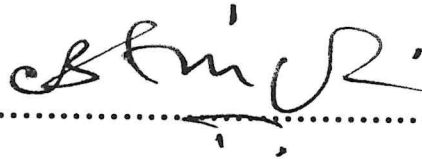
35.] The application is granted on the following grounds;

1. *Deposit of security for performance to a tune of Ugx. 50,000,000/= (Fifty million shillings, only), within one month.*

2. *Costs will abide the outcome of the appeal*

**I so order.**

Dated, signed and delivered at Kampala this .....<sup>02</sup> Day.....<sup>Sept</sup>..... of 2023



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**C. GASHIRABAKE. JA.**

