

permanent injunction, general damages and costs against the applicants herein. Judgment was entered in favour of the respondent prompting the applicants to file Civil Appeal No. 36 of 2023 in this court against the decision of the High Court. The applicants also filed this substantive
5 application for stay of execution of the orders of the High Court in Civil Suit No. 003 of 2017.

Representation

At the hearing of this application, Samuel Nsubuga represented the applicants while Daniel Okalebo represented the respondent.

10 The parties agreed to canvass the application by way of written submissions.

Submissions of Counsel

Samuel Nsubuga, Counsel for the applicant relied on **rule 6(2) (b) of the Judicature Court of Appeal Rules (Directions) SI 13-10** to submit that this court can stay the execution of a judgment where a notice of appeal has been
15 filed in accordance with **rule 76** of the rules of this court.

Counsel outlined the conditions which must be met before court can issue an order to stay execution which include the existence of a valid notice of appeal, substantial loss, unreasonable delay and payment of security. Counsel submitted that the applicants attached a notice of appeal to the
20 affidavit of Sam Osenyi. He implored this court to find that the above conditions have been satisfied. It was counsel's submission that the 1st, 3rd and 4th applicants are presently in occupation of the suit land which they use for cultivation of crops, the 2nd applicant has a family home on the suit land

and that the respondent is threatening to evict them from the land. Counsel contended that substantial loss does not represent any amount or size, and it cannot be quantified by any particular mathematical formula but rather, it is a qualitative concept. Counsel invited court to find that the applicants are
5 likely to suffer substantial loss if execution of the decree is not stayed. Counsel submitted that the High Court delivered its ruling dismissing the application for stay of execution on 16th August 2023 and the applicants filed the instant application on 25th August 2023. He averred that this application was been filed without unreasonable delay and that although the applicants
10 have not furnished any security for due performance of the decree, they undertake to if imposed as a condition for the grant of stay of execution. Counsel urged this court to be pleased to allow the applicants' application for stay of execution pending the determination of the appeal.

Counsel for the Respondent's submission was a restatement of the
15 conditions to be fulfilled for a grant of stay of execution. He commenced with whether the applicant had made a case that his appeal had a likelihood of success. He submitted that the applicant ought to have demonstrated that the appeal is not frivolous or vexatious. He made the case that an appeal ought to be seen to present grievous issues which merit consideration by the
20 court. Counsel contended that the applicants in their affidavits in support made no mention of any likelihood of success of the intended appeal. Instead but they only managed to make a vague statement that the appeal would be rendered nugatory if the application is not granted.

On the condition of substantial loss, counsel submitted that the application must demonstrate that the loss will not be capable of monetary atonement. Counsel contended that the applicants' crops do not amount to substantial loss and that the respondent can monetarily compensate the same. He submitted that the loss of crops is not irreparable.

Counsel submitted that this application has no merit and was merely filed to frustrate the respondent from realising the fruits of the judgment.

In rejoinder, counsel for the applicants reiterated his earlier submissions on the conditions for grant of a stay of execution.

Determination of the Application

I have carefully considered the Notice of Motion, the affidavits together with the submissions and cited authorities by both counsel.

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:

"Subject to sub-rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may in any civil proceedings where a notice of appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction or stay of proceedings as the court considers just.

The grant of a stay of execution is a discretionary rule, though courts would ordinarily grant a stay of execution where real and substantial justice requires it or where an injustice would be the resultant effect of a decision.

5 The principles upon which courts rely to grant an order for a stay of execution have been underscored in multiple cases, however I shall consider **Hon. Ssekikubo & Ors v Attorney General & Ors Constitutional Application No. 03 of 2014** and they include the applicant showing that he lodged a notice of appeal; that substantial loss may result to the applicant unless the stay is granted; that the application has been made without
10 unreasonable delay and finally that the appeal has a high likelihood of success.

Whether the applicants have lodged a notice of appeal

The applicants, by affidavit evidence, averred that they lodged a notice of appeal on the 9th of November 2022, which was duly served on the
15 respondents. The respondent did not object to this assertion. It is not disputed that there exists Civil Appeal No. 36 of 2023 which on the face of the record was filed without delay. I find that to the extent that the appeal exists and was filed on time, the first condition has been fulfilled.

Whether the applicants would suffer substantial loss

20 There exists on the record, affidavit evidence to the effect that the applicants continue to cultivate the disputed land and particularly that the 2nd applicant currently lives on this land with his family. The respondent on the other hand avers that the applicants only carry out cultivation on the disputed land therefore that any eviction can easily be compensated

monetarily and that the 2nd applicant has land where they currently cultivate crops, and he was previously staying on the said land before he shifted to the disputed land.

I am persuaded by the Court of Appeal of Kenya in **Absalom Dova v Tarbo**

5 **Transporters [2013] eKLR**, whose view was that:

10 *“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of 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 two competing rights focuses on their reconciliation...”*

15 The Court while balancing the interest of the applicant not to be left worse off and ensuring that the decree holder gets full benefit of his decree must satisfy itself that no party would suffer undue prejudice. However, I must add that the fact that execution might issue does not mean that the applicant will suffer substantial loss. The applicant must establish other
20 factors, which show that irreparable harm will result which will affect his status as the successful party in the appeal.

In **Wilson Mukiibi v James Semusambwa SCCA No. 9 of 2003**, it was decided that it must be shown by clear evidence that if execution proceeds, there may be some irreparable loss caused.

25 Irreparable loss, which the court must prevent by a grant of an application of this nature, is not every harm that may possibly be suffered by the applicant.

It is only that harm which cannot be compensated by an award of damages.
(See **America Cyanamid Co Ltd v Ethicon Ltd** [1975] AC 396).

In the instant case, the applicants alluded to the fact that they are carrying out cultivation on the suit land and that the 2nd applicant currently lives on
5 the same with his family.

I have no basis to find that the applicants will suffer irreparable loss, which cannot be atoned by an award of damages in case the appeal is to succeed. As noted in the authorities above, substantial loss must amount to that loss that cannot easily be atoned for in monetary terms, but in this case, if the
10 applicants were to succeed in their appeal, the loss could be remedied by an award of damages. In any case, this condition has not been satisfied by the applicants.

Whether the appeal has a likelihood of success

Counsel for the applicants did not argue this point in his submissions but
15 submitted in rejoinder that it is not a prerequisite for the court at this stage to consider whether the appeal has a likelihood of success. The applicants in their affidavit merely stated that if the application is not granted, the appeal would be rendered nugatory.

I am cognizant of the fact that it is not necessary at this stage to pre-empt
20 the consideration of matters necessary in deciding whether or not the appeal would succeed, neither is it incumbent on the applicants to demonstrate the possibility of success of the appeal but they have to prove that the appeal is not frivolous and vexatious. They ought to demonstrate that their appeal raises serious questions of law and fact. I also note that courts should not

make it common practice to deprive a successful litigant of the fruits of his judgment in anticipation of the outcome of the appeal. (See **The Annot Lyle (1886) 11 PD 114 at 116**).

In my view, the applicants have failed to present arguable reasons upon which this court could make a consideration that their appeal is likely to succeed. This condition has not been satisfied either.

It was in contention whether the application was brought without unreasonable delay. I however found that the applicants filed their application in a timely fashion.

Regarding the furnishing of security for due performance of the decree, the applicants in their affidavit averred that they were willing and able to furnish security for due performance of the decree.

However, having found that the applicants have not met the more pertinent conditions for the grant of an order of stay of execution, I am disinclined to allow the application. The application is therefore dismissed.

I make no order as to costs.

Dated at Kampala this 31st day of January 2024.



CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL