

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA**  
**CIVIL APPLICATION NO 1083 OF 2023**  
**(Arising From Civil Suit No.0053 Of 2018)**

**RWAMULAGO MOSES:..... APPLICANT**

**VERSUS**

**MAGULU GEORGE :..... RESPONDENT**

**RULING OF CATHERINE BAMUGEMEREIRE, JA**

**(SITTING AS A SINGLE JUSTICE)**

**Introduction**

The applicant brought this application by way of Notice of Motion under rules 6 (2) (b), 42 (1) & (2) of the **Judicature (Court of Appeal Rules) Directions SI 13- 1** (herein after referred to as the Court of Appeal Rules), and order 52 (1 ) & (3) of the **Civil Procedure Rules SI 71 -1** seeking orders that:

1. An order of stay of execution doth issue staying execution of the decree of Civil Suit No. 53 of 2018 pending hearing and determination of Civil Appeal No. 140 of 2021 by the Court of Appeal.
2. Costs of this Application be provided for.

The grounds in support of this application are contained in the affidavit of the applicant but briefly state:

1. That the applicant was the Defendant in HC Civil Suit No. 53 of 2018 wherein the High Court sitting at Mpigi entered judgment in favor of the Respondent on the 21<sup>st</sup> day of December 2020.
2. That the applicant being dissatisfied with the entire decision of the High Court at Mpigi, lodged a notice of appeal in this honourable court on the 22<sup>nd</sup> day of December 2020.
3. That the applicant lodged a memorandum of appeal in this honourable court and lodged an application for stay of execution in the High Court, to protect the appeal from being rendered nugatory, which application was not granted by the High Court.
4. The applicant then lodged this application for stay of execution in this honorable court having been denied the same in the High court.
5. That the appeal raises serious triable questions of law and fact and has a high possibility of success.
6. That the applicant shall suffer irreparable damage if the stay is not granted as the appeal shall be rendered nugatory.
7. That the balance of convenience is in favour of the applicant and it is fair, equitable and in the interest of justice that the application is granted.

### **Respondent's reply**

The respondent swore an affidavit in reply and averred that:

- a) The alleged Appeal is subject to Civil Application No. 176 of 2022 seeking to strike it out for being incompetent before this Honourable Court but the application is yet to be fixed despite requests.
- b) The applicant first filed Misc. Application No.015 of 2021 and Misc. Application No.016 of 2021 in the High Court but it was dismissed for want of prosecution.
- c) The applicant filed another Misc. Application No. 001 of 2023 in the High Court over the very same issue of stay of execution, which was dismissed for want of prosecution. (Copy of the application is attached marked annexure “b”).
- d) The applicant was properly served with court process for execution in person and through his advocates but has at all times ignored.
- e) The execution in regard to the decretal sum was completed with the attachment of the cows, as admitted in paragraph 11 of the applicant’s affidavit.
- f) The applicant in the abuse of court process brought armed soldiers of the Uganda People’s Defence Forces who surrounded the High Court at Mpigi in a bid to cause the release of the attached animals.
- g) Before the Deputy Registrar, the applicant’s daughter executed a bond to pay the decretal sum by 30<sup>th</sup> Oct. 2023.
- h) The application is not only brought in bad faith but is also an abuse of court process.
- i) The applicant’s appeal lacks merit especially where it failed to comply with the law.

## **Brief Background**

The applicant was sued by the respondent vide High Court Civil Suit No.53 of 2018 in the High Court of Uganda, Holden at Mpigi. Judgment was delivered in favour of the respondent and the applicant being dissatisfied with the judgement, filed a notice of appeal in this honourable court on 22<sup>nd</sup> December 2020. The applicant then filed both the substantive and interim applications for stay of execution in the trial court vide Misc. Applications No. 15 of 2021 and No.16 of 2021 respectively. Both applications were dismissed by the High court, hence this application for stay of execution.

### **Representation**

At the hearing of this application, Brian Rubyahayo together with Crispus Asiimwe appeared for the applicant while John Paul Baingana appeared for the respondent. Both parties were absent.

Both counsel asked court to adopt their written submissions in the determination of this application. Court granted the prayer.

### **Submissions of Counsel**

Brian Rubyahayo for the applicant submitted that the current status quo in respect of the subject matter of the pending appeal and in the context of the orders rendered by the High Court in Civil Suit No.53 of 2018, all pending determination of the appeal is that the applicant is still in possession of the suit property.

He contended that all the orders of the High Court have not been executed and it is in the interest of justice that an order of stay of execution issues to

maintain this status quo until hearing and disposal of the appeal pending before this honourable court.

On the issue of jurisdiction of this honourable court in the instant application, counsel submitted that the applicant had filed the substantive  
5 application for stay in the High Court but the same was dismissed with costs, hence filing the same in this honourable court.

He further argued that the threshold for the grant of an order of stay of execution was laid down in **Theodore Ssekikubo and others v Attorney General & Ors Supreme Court Civil Application No.06 of 2013** as follows:

- 10 a) *The applicant must establish that his appeal has a likelihood of success, or a prima facie case of his right of appeal.*
- b) *That the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.*
- c) *If 1-2 above have not been established, the Court must consider where the*  
15 *balance of convenience lies.*

Regarding the first condition, counsel submitted that in paragraphs 3 and 6 of the affidavit in support of the application, the applicant swore that there is a pending appeal in this honourable court and the same raises triable questions of both law and fact, with high chances of success. He added that  
20 the memorandum of appeal sets down the grounds upon which the pending appeal is premised, which grounds raise pertinent issues for determination by this Honourable Court.

On the condition that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted, it was counsel's

contention that the respondent has already started on the process of execution of the orders of the High Court and refusal by this honourable court to grant an order of stay of execution would leave the respondent at liberty of executing the trial court's orders.

5 Regarding the condition of the balance of convenience, counsel submitted that in **paragraphs 8,9 and 14** of the affidavit-in-support, the applicant stated that the suit land is where the applicant and his family live, they have stayed on the same for more than 30 years, and it is their only source of livelihood. It was counsel's assertion that evicting the applicant from the suit  
10 land would render him and his family homeless, hence the balance of convenience tilting in his favour.

Further, counsel submitted that the application was instituted without unreasonable delay. It was counsel's submission that upon the trial court delivering judgement in favour of the respondent, the applicant immediately  
15 lodged a notice of appeal and also filed both the substantive and interim applications for stay of execution vide Miscellaneous Application No. 15 of 2021 and Miscellaneous Application No.16 of 2021. Counsel submitted that it was only upon refusal to grant the said application for stay of execution by the trial court that the applicant decided to file the same in this honourable  
20 court.

John Paul Baingana for the Respondent raised a preliminary objection to the effect that; the applicant's supplementary affidavit was filed after the filing of the respondent's reply, which is an abuse of Court process especially where

the respondent had no opportunity to reply thereto. Counsel added that the supplementary affidavit was filed without leave of Court. It was counsel's contention that the only party allowed to file a supplementary affidavit according to rule 51 of the Court of Appeal Rules is the person on whom a Notice of motion has been served. Rule 51 (2) provides thus -

*"Any person referred to in sub rule (1) of this rule may with leave of a judge lodge one or more supplementary affidavits."*

Counsel cited **Mutembuli Yusuf v Nangwomu Moses Musimba & anor Election Petition Appeal No. 043 of 2016**, where the Court of Appeal held that a supplementary affidavit can only be filed with leave of Court.

On the second preliminary objection, counsel argued that under rule 41(1) of the Court of Appeal rules, an application for stay of Execution should first be made and determined in the High Court. He submitted that an application for stay of execution was made in the High Court but it was dismissed for want of prosecution. It was counsel's argument that the law envisages filing, prosecuting and final determination. Counsel submitted that the application is incompetent before this Court for failure to exhaust the options at the Lower Court.

Counsel submitted that in the case of an order for stay of execution, this application does not meet the minimum threshold for grant of an order for stay of execution. He cited **Kyambogo University v Prof Isaiah Omuto Ndiege Civil Appeal No.314 of 2013** where court outlined the conditions for the grant of stay of execution:

On the first condition, counsel submitted that the applicant ought to have lodged a notice of appeal in accordance with rule 76 (5) of the Rules of this court which provide that; ***“A notice of appeal shall be substantiality in form D in the first schedule to these Rules and shall be signed by or on behalf of the appellant.”***

It was counsel’s argument that the applicant’s notice of appeal did not comply with the provisions of the rules since it was not served upon the respondent as envisaged by rule 76 (5) above.

It was counsel’s submission that annexure “B” was served on M/s JP Baingana & Associated Advocates on the 4<sup>th</sup> February 2021, thirty-five days after the endorsement by the Registrar.

Counsel submitted that the Notice of Appeal does not comply with Form D of the first schedule as required by rule 76, thus on that ground, the application ought to be dismissed.

On the second condition of likelihood of success, counsel contended that the appeal will never see the day light, considering, that it was a flawed process in view of the pending application and the failure to comply with rule 76 of the Court Rules especially Form D of the first schedule to the Rules and rule 78 of the rules of this Court.

Further, counsel averred that the grounds of appeal are about the impressions of the Judge in regard to its own witness CW1. In addition, counsel submitted that the purported title attached to the Rejoinder does not prove that the applicant is the proprietor of Plot 8, and that the



impugned title is a joint interest without any severance, thus the suit cannot be entertained by a purported sole proprietor in a joint tenancy.

Counsel then argued that this matter had no likelihood of success on appeal because in paragraphs 8 and 9 of the applicant's affidavit in support, he  
5 merely deponed that he has been on the suit land for thirty (30) years and that evicting him will make him homeless. Counsel contended that that is utterly false because the trial Judge found that the applicant had forcefully chased the respondent from his land and destroyed his property.

Further, counsel argued that there is no cogent evidence of substantial loss  
10 that would be occasioned by the time the appeal is determined.

Counsel submitted that filing this application was not filed without due delay. He argued that the was filed application seven (7) days to the end of the ninety (90) days granted to the applicant by law which is deep into execution and therefore dilatory conduct.

15 On the issue of balance of convenience, counsel submitted that legal title to the suit land belongs to the respondent, which was the finding of the Lower Court. Further, that the balance of convenience lies with the respondent considering that the title is conclusive evidence of ownership of land.

Counsel submitted that the applicant has not made out any case for the  
20 grant of the stay of execution, thus he prayed that the application be dismissed it and vacate the extempore interim order granted to the Applicant.

In the alternative, counsel submitted that the applicant be ordered to deposit UGX 100,000,000 (One hundred million shillings only) as security for due performance of the Decree.

### **Applicant's Rejoinder**

- 5 In response to the preliminary objections, counsel submitted that although the supplementary affidavit was served on the respondent a day after he had filed his affidavit in reply, the respondent still had an opportunity to respond to the supplementary affidavit since pleadings had not yet been closed.

10 On the issue of jurisdiction, counsel submitted that the application is properly before this honorable court. Counsel contended that the dismissal of the application for stay in the High court did not prevent the applicant from filing the same application in this court.

On the merits of the application, counsel reiterated his earlier submissions.

### **Determination of the Application**

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

I shall start by addressing the preliminary objections raised by counsel for the respondent. In the first preliminary objection, counsel contended that the applicant's supplementary affidavit was filed after the filing of the respondent's reply without leave of court, which was an abuse of court  
20 process. It is on record that the applicant's supplementary affidavit was served onto the respondent on 24<sup>th</sup> October 2023, a day after the respondent had filed his affidavit in reply. However, pleadings had not fully closed since

the applicant had not filed his affidavit in rejoinder. The respondent had opportunity to reply to the supplementary affidavit. I therefore find that there was no abuse of court process, thus this preliminary objection is overruled.

- 5 The second preliminary objection concerned the filing of this application in the High Court. Counsel's submission was premised on **rule 42(1) of the Rules of this Court**. This rule requires that such an application be brought before the trial court. **Rule 42 (1)** provides that, "**whenever an application maybe made either in the court or in the High Court it shall be made**  
10 **first in the High Court.**"

It is on record and not disputed that the applicant first applied for stay of execution in the High Court at Mpigi, but the application was dismissed. The applicant then filed the instant application in this court, which is acceptable under **rule 42 (2) of the rules of this court**, which provides that:

- 15 "Notwithstanding sub-rule (1) of this rule, in any civil or criminal matter, the court may, on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any act as the justice of the case requires, or entertain an application under rule 6(2) (b) of these Rules, in order to  
20 safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court."

In the instant case, the applicant endeavoured to apply for stay of execution in the High Court but it was dismissed. Basing on rule 42 (2) of the Court of

Appeal Rules cited above, in order to safeguard the right of appeal, I would let the applicant's application stand. The preliminary objection is accordingly overruled. I will proceed with the merits of the application.

Turning to the substantive application for stay of execution, the jurisdiction  
5 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  
10 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.**

(See **Kyambogo University v Prof. Isaiah Omolo Ndiege CACA No. 341 of 2013**), where this court indicated the conditions for the grant of the order of  
15 stay of execution. The court listed them to include;

***"There is a serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory, that refusal to grant the stay would inflict more hardship than it would avoid. That the application was made without  
20 unreasonable delay."***

The principles on which courts rely on to grant stay of execution were underscored in **Hon. Ssekikubo & ors v Attorney General & ors Constitutional Application No. 03 of 2014**. The court laid down the principles to include the following: -

1. That the applicant must show that he lodged a notice of appeal
2. That the substantial loss may result to the applicant unless the stay is granted
3. That the application has been made without unreasonable delay
- 5 4. That the appeal has a high likelihood of success.

I shall consider the criteria above to determine whether the applicants have adduced sufficient reasons to justify the grant of the instant application.

Regarding the question whether the applicant has lodged a notice of appeal;  
10 a stay of execution is grounded on the pendency of an appeal. In this application I note that the High Court delivered its judgment on 21<sup>st</sup>December 2020. The applicant lodged a Notice of appeal on 30<sup>th</sup> December 2020 as per annexure B of the applicant's affidavit in support. A memorandum of appeal was lodged in this Court on 10<sup>th</sup> May 2021. Counsel  
15 for the respondent however argued that the appeal is not valid because the applicant did not comply with rule 76 (5) of the rules of this court which required the notice to comply with form D. the respondent in his affidavit averred that he filed Misc. Application No. 176 of 2022 challenging the said appeal, for being incompetent but the application is yet to be fixed.

20 This court is under no obligation to and should not be seen to pre-empt the full merits of Misc. Application No. 176 of 2022 at this point in time. By the applicant filing a Notice of appeal and a Memorandum of Appeal, the first condition was satisfied.

As to the second condition of substantial loss, **Tropical Commodities Suppliers Ltd & Ors v International Credit Bank Ltd (in liquidation)** [2004] 2 EA 331 enunciates the principle to be considered in considering whether substantial loss would be suffered.

- 5    *“Substantial loss refers to that loss that cannot be quantified by any particular monetary compensation, or that there is no exact mathematical formula to compute substantial loss.”*

The onus is on the applicant to satisfy this Court that a refusal of stay would be unjust and inequitable. He must show cogent reasons to deny the  
10    respondent enjoyment of his success at the Court below.

In the present case, the applicant in paragraph 11 of his affidavit in support stated that the respondent applied for execution, which was granted by the High Court. He also stated that cattle were attached in fulfillment of the decree. The respondent in his affidavit in reply averred that execution in  
15    regard to the decretal sum was completed with the attachment of the cattle. However, it is on record in paragraph 11 of the applicant’s supplementary affidavit that the attached animals were released from execution by the High Court and they were taken back to the applicant’s farm in Gomba. Further, the respondent deponed that the applicant’s daughter executed a bond to  
20    pay the decretal sum before the Deputy Registrar at the High Court by 30<sup>th</sup> October 2023. The applicant also confirmed that he is still in possession of the disputed land. It is my observation that the process of execution is underway.



It is not enough to merely allege that there will be substantial loss. It must be proved that such loss cannot easily be quantified in monetary compensation. The applicant averred that the disputed land constitutes his home from which he derives sustenance together with his family. An  
5 eviction by the respondent would render them homeless. In the circumstances, I find that the applicant is likely to suffer substantial loss.

Regarding whether the substantive appeal has a likelihood of success, I once more reiterate that it is not necessary at this stage to pre-empt the consideration of matters necessary in deciding whether or not the appeal  
10 would succeed, neither is it incumbent on the applicant to demonstrate the possibility of success of the appeal but he has to prove that the appeal is not frivolous and vexatious. He has to show that their appeal raises serious questions of law and fact.

In **Stanley Kang'ethe Kinyanjui v Tonny Ketter and 5 Ors (2013) e KLR**,  
15 cited with approval in **Beeline Travel Care (u) Ltd & anor v Finance Trust Bank CACA No. 67 of 2023** the Court of Appeal of Kenya found that;

*"An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not  
20 frivolous. In considering an application brought under Rule 5(2) (b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.*

I had a granular look at the applicant's memorandum of appeal which in my view raises arguable questions that ought to be determined on their own  
25 merits. I therefore find that this condition has been met.

Regarding the question whether the balance of convenience lies with the applicant, I have considered the fact that the grounds of appeal raised are potent with questions that require answers. I have found, as above that the applicant is likely to suffer irreparable substantial loss and that the appeal would be rendered nugatory if this application failed. Consequently, I find that the balance of convenience tilts more into the applicant's favour.

There was a question whether the application was made without any unreasonable delay. I find that from the documentation, the applicant duly filed a notice of appeal and lodged an application for stay of execution in the High Court, which was summarily dismissed. He then instituted the present application before this court.

Following my earlier observations above, I find that this application satisfies the conditions precedent to the issue of an order of stay of execution. As a result, I conclude as here below:

1. **An order of stay of execution is hereby issued staying execution of the decree of Civil Suit No. 53 of 2018 pending hearing and determination of Civil Appeal No. 140 of 2021 by the Court of Appeal.**
2. **Costs shall abide the outcome of the appeal.**

Dated at Kampala this 24<sup>th</sup> day of January 2024.



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**HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE**  
**JUSTICE OF APPEAL**