

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 1647 OF 2022

5 **(Arising from Civil Suit No. 0289 of 2014)**

**1. FORMULA FEEDS LIMITED }
2. GICHOHI NGARI }
3. ANNE WANGUI GICHOHI } APPLICANTS
4. SAMSON GICHOHI NGAI }**

10 **VERSUS**
KCB BANK LIMITED RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

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On or about 30th June, 2011 the 1st applicant borrowed a sum of shs. 3,700,000,000/= from the respondent, secured by title deeds to eighteen (18) plots of land severally registered in the name of the 1st and 2nd applicants, a debenture and personal guarantees of its directors, who include the 3rd and 4th applicants. Subsequently, the 1st and 2nd applicants sued the respondent seeking, *inter*
20 *alia*, a declaration that the mortgage deed they had executed with the respondent was a nullity, the debenture deed executed in favour of the respondent was unenforceable, the personal guarantees executed by the 2nd applicant together with others were unenforceable, and recovery of a sum of money. Before the suit could be heard, the parties entered into a partial consent judgment by which the 1st and 2nd applicants admitted liability to the respondent in the sum of
25 shs. 2,159,000,000/= The respondent then commenced execution of the partial decree by way of attachment and sale of the eighteen (18) plots of land mortgaged to it, situated at Wattuba and Katalamwa registered in the name of the 1st and 2nd applicants.

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In the meantime, hearing of the rest of the claim proceeded resulting in a judgment which was delivered partly in favour of the 1st and 2nd applicants on 10th February, 2016. By that decision, the mortgage deed was declared null and void, the debenture unenforceable, the personal guarantees enforceable, but it was declared that the 1st applicant was indebted to the respondent in the sum of shs. 4,272,740,116/= with interest accruing thereon at the rate of 21% per annum

from the date of judgment until payment in full, as well as the costs of the suit. The 1st and 2nd applicants appealed the decree, to the Court of Appeal.

5 The Court of Appeal in its judgment delivered on 8th July, 2019 upheld the decision of the trial court and found, *inter alia*, that being non-citizens, leasehold title deeds ought to have been issued to the 1st and 2nd applicants, instead of the mailo land title deeds. By the time of that decision, the respondent had completed execution of the partial decree by way of attachment and sale of the eighteen (18) plots of land at Wattuba and Katalemwa registered in the name of the 1st and 2nd applicants, to M/s Southgate Properties Limited. However in a decision delivered by the
10 then Executions Division of this court on 26th August, 2020 those sales were declared illegal and were set aside on account of the fact that being non-citizens, The 1st and 2nd applicants were incapable of owning mailo land and therefore the land was not available to attachment in execution of the decree. The respondent was directed to refund the purchase price to the buyer. A permanent injunction was issued restraining the respondent from dealing with the land in any
15 way and from evicting the 1st and 2nd applicants from the land. The buyer, M/s Southgate Properties Limited, was directed to deliver up all the certificates of title to the court for safe custody and subsequent transmission to the Commissioner Land Registration for cancellation of that registration and their return thereafter to the 1st and 2nd applicants for rectification.

20 The respondent sought a review of the orders which application was dismissed in a ruling delivered on 4th February, 2021. The court however construed the pronouncement by the Court of Appeal as a recommendation towards rectification of the titles to cater for the 1st and 2nd applicants' interest in the land. Although the Judge in the Executions Division had ordered M/s Southgate Properties Limited as purchaser to deposit the title deeds into the custody of court, it
25 so happened that it was the respondent instead who delivered the title deeds into the custody of this court on 18th December, 2020. Thereafter, by a letter dated 29th March, 2021 the Deputy Registrar of the court submitted them to the Commissioner Land Registration for implementation of that order, where after they were to be returned to the custody of the court, for onward transmission to the 1st and 2nd applicants to cause the rectification directed by court. By the time
30 the duplicate certificates of title were delivered into the custody of the court and transmitted to the Commissioner Land Registration, the 2nd applicant had previously applied for and obtained

special certificates of title to the eighteen (18) plots of land. Thereafter, between 28th April, and 10th May, 2021 the 1st and 2nd applicants caused a transfer of the titles into the names of the Woodlane Properties Estates Limited and Ms. Namakula Annet.

5 The respondent then sought orders that the 1st and 2nd applicants together with the Commissioner Land Registration be cited for contempt of court, that the 2nd applicant be detained in civil prison for contempt of court and that the title deeds to the eighteen (18) plots of land issued by the Commissioner Land Registration to the 1st and 2nd applicants in contravention of a court order be cancelled. In a ruling delivered on 12th September, 2022 this Court, *inter alia*, found that both the
10 1st and 2nd applicants were guilty of contempt of court by flouting the order of the now defunct Executions Division and directed that if within a period of fourteen (14) days from the date of the ruling the 2nd applicant would not have caused the surrender to the Commissioner Land Registration of all title deeds to the land, duly executed all documents required for conversion of the mailo certificates of title to leaseholds registered in the names of the 1st and 2nd applicants
15 respectively and paid all the fees and taxes required for the completion of that process, and presented to court proof of discharge of each of the said obligations within the said period, the 2nd applicant was to forthwith be committed to civil imprisonment, to be kept in custody until he had so complied, or until further orders of this court.

20 In the meantime, the respondent has taken steps towards execution of the judgment of this court delivered 10th February, 2016 by which it was declared that the 1st applicant was indebted to the respondent in the sum of shs. 4,272,740,116/= with interest accruing thereon at the rate of 21% per annum from the date of judgment until payment in full, as well as the costs of the suit. That decision was upheld by the Court of Appeal. The applicants appealed further to the Supreme
25 Court. The mode of execution sought by the respondent is by way of arrest and imprisonment of the guarantors of the loan. Having issued personal guarantees for that borrowing, the 2nd, 3rd and 4th applicants contend that execution by way of their arrest and imprisonment as civil debtors will compromise their pending appeal to the Supreme Court.

b. The application.

This application is made under the provisions of section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Rules* and Order 43 rules 4 (1), (2), (3), and (5) of *The Civil Procedure*
5 *Rules*. The applicants seek an order of stay of execution, pending the determination of the appeal. It is the applicants' case that on 30th September 2022 the respondent filed an application for execution of the decree in Civil Suit No. 289 of 2014 in this Court vide EMA No. 0279 of 2022 by way of arrest and detention of the 2nd, 3rd and 4th applicants. Execution before
10 determination of the appeal now pending before the Supreme Court will render that appeal nugatory, yet the appeal has a high likelihood of success in light of the illegality and breach of contract involved in the transaction. The three applicants shall thereby suffer substantial loss and lose their personal liberty in incarceration if this application is not granted. The applicants have so far paid a total of shs. 30,000,000/= out of the taxed costs of shs. 71,726,801/= The applicants are willing and able to furnish security for the outstanding balance on the taxed costs amounting
15 to shs. 41,726,801/= Delay I depositing the amount in Court was occasioned by negotiations that had been ongoing with the respondent with a view to settlement of the dispute. The pending appeal is due to be heard by the Supreme Court on 14th February, 2023.

c. The affidavit in reply;

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By its affidavit in reply the respondent avers that the decretal sum has since delivery of the judgment accumulated to shs. 10,104,983,074/=. By a reference to the Court from the decision of a single Justice of the Supreme Court, the applicants were ordered to deposit in court before the hearing of the appeal, security for costs in the sum of shs. 100,000,000/= and the outstanding
25 balance on the taxed costs in the sum of shs. 141,726,801/= in any event within 45 days of the ruling delivered on 24th March, 2022. The applicants have to-date not complied with the order. As a result of that non-compliance, the applicants are in contempt of court and the pending appeal is unlikely to succeed. The applicants will not suffer substantial loss and the application is brought in bad faith.

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d. Submissions of counsel for the applicants.

M/s Gem Advocates on behalf of the applicants submitted that there is a pending appeal in the Supreme Court No. 13 of 2020. That appeal is pending hearing on 14th February, 2023. The applicants will suffer substantial loss. They suffer to pay the sum of 10,000,000,000/= before the appeal is heard. The application is timely. They have demonstrated readiness and willingness to deposit security for costs. They have paid about shs. 30,000,000/= out of shs. 71,000,000/= that was taxed as costs. Loss of liberty is irreversible. For attachment and sale, the property will be irreplaceable. They have land valued 7.5 billion. The balance of convenience is in their favour.

10 The respondent has insisted on inability to honour costs orders. The bank did not pay for equipment as it was obliged to by the underlying contract. The appeal after reference reconsidered the automatic dismissal on noncompliance with the costs order. The panel held that an appropriate application had to be made after the 45 days for depositing the costs had elapsed. The respondent bank has not made such application.

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e. Submissions of counsel for the respondent.

M/s H & G Advocates together with M/s Kabayiza, Kavuma, Mugerwa and Ali Advocates, on behalf of respondent submitted that the appeal is unlikely to succeed. It was conditioned upon the applicant depositing shs. 141,726,801/= by application of the respondent in the Supreme Court, No. 38 of 2020 on 24th March, 2022 the applicant was ordered to deposit shs. 100,000,000/= as security for costs; it also ordered the applicant to pay the balance of shs. 41,726,801/= to be paid within 45 days. To-date the applicant has not fulfilled that condition of the right of appeal. Default will result in dismissal. They have not had the goodwill. They have not surrendered the title to realise the decretal sum. The decretal sum is spiralling. In *Mulindwa George William v. Kisubika Joseph, S. C. Civil Application No. 28 of 2014* it was held that failure to deposit security for costs ordered by Court without a plausible explanation, renders the chances of succeeding on appeal very limited.

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f. The decision.

According to Order 43 rule 4 (3) of *The Civil Procedure Rules*, an application of this nature must be made after notice of appeal has been filed and the applicant should be prepared to meet the conditions set out in that Order including; - furnishing proof of the fact that substantial loss may result to the applicant unless the stay of execution is granted; that the application has been made without unreasonable delay; and that the applicant has given security for due performance of the decree or order as may ultimately be binding upon him (see *Lawrence Musiitwa Kyazze v. Eunice Businge, S. C. Civil Application No 18 of 1990*).

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The Court of Appeal in *Kyambogo University v. Prof. Isaiah Omolo Ndiege, C. A. Misc. Civil Application No 341 of 2013* expanded the considerations to include: - there is serious or imminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory; that the appeal is not frivolous and has a likelihood of success; that refusal to grant the stay would inflict more hardship than it would avoid.

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i. A notice of appeal has been filed.

The applicant have satisfied this requirement. It is not in dispute that the applicants filed an appeal to the Supreme Court; Civil Appeal No. 13 of 2020 which is fixed for hearing on 14th February, 2023. The applicants have satisfied this requirement.

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ii. The application has been made without unreasonable delay.

Applications for a stay of execution ought to be made within a reasonable time. Whether delay is unreasonable will depend on the peculiar facts of each case. Delay must be assessed according to the circumstances of each case. The reckoning of time to determine if a delay is unreasonable begins at the time the decree or order is sealed and becomes enforceable.

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In the instant case, the decree sought to be executed was rendered on 10th February, 2016. The application for its execution was filed on 30th September, 2022. This was after a series of

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intervening appeals and applications, which explains the delay when reckoned from the date of the decree. The instant application was filed on 9th November, 2022 only a couple of months after execution of the decree was sought. I therefore do not find any unreasonable delay in the filing this application. The applicants have satisfied this requirement too.

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iii. The appeal is not frivolous and has a likelihood of success;

An appeal by itself does not operate as a stay of proceedings under a decree or order appealed from nor should execution of a decree be stayed by reason only of an appeal having been preferred from the decree (see Order 43 rule 4 of *The Civil Procedure Rules* and Rule 6 (2) of *The Judicature (Court of Appeal Rules) Directions*). In other words, the ordinary rule is that an execution of the decree need not be stayed pending an appeal unless the appellant shows good cause. A presumption lies in favour of the integrity of the proceedings of any court of general jurisdiction. The administration of justice rests largely upon the presumption of the law that a court, acting within its jurisdiction, has acted impartially and honestly, and with integrity such that a final judgment of a court of general and competent jurisdiction is always presumed to be right.

The court must be satisfied that the prospects of the appeal succeeding are not remote but that there is a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There should be a sound, rational basis, founded on the facts and the law, and a measure of certainty justifying the conclusion that the appellate court will differ from the court whose judgment has been appealed against; that the appellate court could reasonably arrive at a conclusion different from that of the trial court.

The appeal will be considered frivolous if *prima facie* the grounds intended to be raised are without any reasonable basis in law or equity and cannot be supported by a good faith argument. If there is a strong showing that the appeal has no merit, which is strong evidence that it was filed for delay or not in good faith. Additional evidence indicating a frivolous appeal is the applicant's conduct of prior litigation which may show that the appeal is merely part of a series

of suits, applications and appeals over the same subject matter in which the applicant has engaged with no success or no chance of success. The prior litigation or procedural history can be used to establish the lack of merit in the present appeal or the bad faith of the applicant in filing the present appeal.

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The applicants have not provided court with the memorandum of appeal of the pending appeal to the Supreme Court. It is only in the motion and during submissions for this application that counsel for the applicants has adverted to the arguments they intend to raise on appeal which appear to relate to illegality and breach of contract. It is therefore not possible to assess whether they have an arguable case on appeal. Being a second appeal during which matters of law or mixed law and fact only may be argued (see Rule 30 of *The Judicature (Supreme Court Rules) Directions*), I have formed the opinion that that it is not possible on the material before me to determine whether or not there is a reasonable basis in law and equity to support the grounds intended to be raised and that they can be supported by good faith argument. It is therefore not possible to determine that the Supreme Court could reasonably arrive at a conclusion different from that of both the trial court and of the Court of Appeal. The applicants have failed to prove this requirement.

iv. The appeal would be rendered nugatory;

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Nugatory means “of no force or effect; useless; invalid.” In this context, the term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid, it also means trifling. Whether or not an Appeal will be rendered nugatory if a stay is not granted depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible, whether damages will reasonably compensate the party aggrieved, or it is in the public interest to grant a stay. This may include all cases where it is necessary to preserve the status quo pending appeal, in aid of and to preserve the appellate power, so that the rights involved in the appeal may not be lost or reduced by reason of an intervening execution of the judgment.

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If the judgment is of a nature to be actively enforced by execution and its execution does not delay or impair the character of the appeal, a stay will ordinarily not be granted. Satisfaction of a money decree does not ordinarily pose the danger of rendering a pending appeal nugatory, where the respondent is not impecunious, as the remedy of restitution is available to the applicant in the event the appeal is allowed. The presumption then is that payment made to the respondent in execution of the decree will be reversible in the event of the applicant succeeding on appeal. If it is not reversible, it has not been shown that damages will not reasonably compensate the applicants, or that it is in the public interest to grant a stay. The respondent has not been shown to be impecunious. The applicants have failed to prove this requirement too.

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- v. There is serious or imminent threat of execution of the decree or order and if the application is not granted.

Imminent threat means a condition that is reasonably certain to place the applicant's interests in direct peril and is immediate and impending and not merely remote, uncertain, or contingent. An order of stay will issue only if there is actual or presently threatened execution. There must be a direct and immediate danger of execution of the decree. There should be unequivocal evidence showing that unconditional steps as to convey a gravity of purpose and imminent prospect of execution of the decree, have been taken by the respondent. Steps that demonstrate a serious expression of an intent include; extracting the decree, presenting and having a bill of costs taxed, applying for issuance of a warrant of execution and issuing a notice to show cause why execution should not issue. The applicant has not adduced evidence of this in the application. The respondent has not refuted the applicants' averment that an application for execution of the decree was filed on 30th September, 2022. I therefore find that the applicants have satisfied this requirement.

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- vi. Substantial loss may result to the applicant unless the stay of execution is granted.

Substantial loss does not represent any particular size or amount but refers to any loss, great or small that is of real worth or value as distinguished from a loss that is merely nominal (see *Tropical Commodities Supplies Ltd and Others v. International Credit Bank Ltd (in Liquidation)*)

[2004] 2 EA 331). “Substantial” though cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. The loss ought to be of a nature which cannot be undone once inflicted.

The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his or her appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his or her judgment (see *Alice Wambui Nganga v. John Ngure Kahoro and another*, ELC Case No. 482 of 2017 (at Thika); [2021] eKLR). For that reason, execution of a money decree is ordinarily not stayed since satisfaction of a money decree does not amount to substantial loss or irreparable injury to the applicant, where the respondent is not impecunious, as the remedy of restitution is available to the applicant in the event the appeal is allowed. The respondent has not been shown to be impecunious nor the fact that execution of the decree will have any irreversible effect. The applicants have failed to prove this requirement too, as far as recovery of the monetary award is concerned.

As regards the mode of execution sought by the respondent; which is by way of arrest and detention in civil imprisonment of the applicants as guarantors of the loan, the foreign policy objective under state policy No. xviii and Article 287 of *The Constitution of the Republic of Uganda, 1995* promotes the respect for international law and treaty obligations. Article 11 and 21 of *The International Covenant on Civil and Political Rights* (ICCPR) to which Uganda is signatory provides that no one should be imprisoned merely on grounds of inability to fulfil contractual obligations. To commit a debtor to prison who through poverty is unable to satisfy the judgment debt is contrary to the purpose of civil imprisonment which is to coerce payment. Its only real effect on an impoverished debtor is that of punishment. It is a punishment that can be avoided by a debtor who is able but unwilling to pay, for satisfaction of the judgment remains within his power. But it becomes mandatory against one without the means to pay. It discriminates between the one and the other. Poverty-stricken judgment debtors should not be consigned to jail.

In the instant case, it has not been demonstrated that any of the applicants is impoverished to the extent of being unable to fulfil their contractual obligations to repay the debt. Considering the factual and procedural history of this litigation by which the applicants have gone to great lengths to avoid the perfection of the securitization of the 1st applicants borrowing, thereby putting assets previously in their name beyond the reach of the respondent, apparently the respondent is left with no choice but to cause their arrest and imprisonment as a method to coerce payment. The applicants have failed to prove that in the circumstances, their imprisonment will cause substantial loss.

10 vii. The applicant has given security for due performance of the decree or order.

In granting an order of stay of execution pending an appeal, the court has to balance the need to uphold the respondent's right to be protected from the risk that the appellant may not be able to satisfy the decree, with the appellant's right to access the courts. It is the reason that courts have been reluctant to order security for due performance of the decree. This requirement has been interpreted as not operating as an absolute clog on the discretion of the Court to direct the deposit of some amount as a condition for grant of stay of execution of the decree in appropriate cases, more particularly when such direction is coupled with the liberty to the decree holder to withdraw a portion thereof in part satisfaction of the decree without prejudice and subject to the result of the appeal.

Courts have instead been keen to order security for Costs (see *Tropical Commodities Supplies Ltd and others v. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 and *DFCU Bank Ltd v. Dr. Ann Persis Nakate Lussejere, C. A Civil Appeal No. 29 of 2003*), because the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals. The purpose of an order for security for costs on an appeal is to ensure that a respondent is protected for costs incurred for responding to the appeal and defending the proceeding, which therefore implies such an order does not adequately meet entirely the purpose of security for due performance of the decree. In the case of a money decree, furnishing security for due performance of the decree denotes providing depositing the disputed amount.

The applicants have undertaken to furnish such security. The court has a duty in exercise its discretion to grant stay of execution of a money decree, to balance the equities between the parties and ensure that no undue hardship is caused to a decree holder due to stay of execution of such decree. For that reason, the applicants have to some extent, satisfied this requirement too.

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viii. Refusal to grant the stay would inflict more hardship than it would avoid.

The Court has the duty to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his or her judgement. No doubt it would be wrong to order a stay of proceedings pending appeal where the appeal is frivolous or where such order would inflict greater hardship than it would avoid (see *Erinford Propertied Ltd. v. Cheshire County Council* [1974] 412 All ER 448). It is also a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his or her judgement.

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Apart from the averments that the applicants stand to suffer irreparable loss if execution ensues, the applicants have not offered evidence of objective facts from which it can be deduced that in the circumstances of this case, execution will cause significant difficulty, expense or disruption, beyond that to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. I therefore have not found evidence to show that that execution of the decree would cause significant difficulty, expense or disruption, beyond that to which every judgment debtor is necessarily subjected when he or she loses his or her case and is deprived of his or her property in consequence. If granted, the order is therefore likely to inflict greater hardship than it would avoid. The applicants have an outstanding unfulfilled order that required them to deposit in the Supreme Court a sum of shs. 100,000,000/= and the outstanding balance on the taxed costs in the sum of shs. 141,726,801/= in any event within 45 days of the ruling delivered on 24th March, 2022. That order to-date remains unfulfilled almost a year later, with the result that the appeal is now fixed for hearing tomorrow, 14th February, 2023 before compliance. Rendering an additional conditional order of stay of execution would not only be an exercise in futility, but it would also cause undue

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hardship to the respondent who since 10th February, 2016 has been unable to recover any part of the decretal sum, now said to be in the region of to shs. 10,104,983,074/=.

5 In conclusion, the applicants have not satisfied the majority of the essential requirements for the grant of an order of stay of execution pending appeal. Consequently, the application fails and is hereby dismissed with costs to the respondent.

Delivered electronically this 13th day of February, 2023

Mubiru.....

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.....**Stephen**

Stephen Mubiru
Judge,
13th February, 2023.