

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

MISCELLANEOUS APPLICATION NO. 1274 OF 2023

5 **(Arising from Miscellaneous Application No. 1202 of 2021 and Miscellaneous Cause No.**
0032 of 2023 (Consolidated)
(Arising further from Civil Suit No. 0598 of 2013)

1. **KABIITO KARAMAGI** }
2. **DFCU BANK LTD** }
10 **APPLICANTS**

VERSUS

1. **YANJIAN UGANDA COMPANY LIMITED** } **RESPONDENTS**
15 2. **NATIVE POWER COMPANY LIMITED** }

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

20 The 1st respondent was on 19th November, 2010 contracted by M/s Spencon Development
Company Ltd, the registered proprietor of the two plots of land comprised in LRV 3727 Folio 25
Plot 3 Nadiope Lane and LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya - Kampala, to
construct two apartment blocks on the two plots to be known as “Windsor Court Apartments.” In
order to finance the construction of the residential housing project of 40 apartments on that land,
25 M/s Spencon Development Company Ltd mortgaged the title deeds to the two plots to the 2nd
applicant’s predecessor in title, M/s Crane Bank Limited, as security for a series of loans. The 1st
respondent remained on site in possession of the two plots as an unpaid contractor. It as well
lodged a caveat on the property comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane Mbuya,
Kampala after M/s Crane Bank’s legal mortgage was registered. The 1st respondent subsequently
30 filed HCSS No. 598 of 2013 against M/s Spencon Development Company Ltd for the unpaid
contract sum. Judgment was on 13th February, 2015 entered in the 1st respondent’s favour for the
sum of US \$ 1,220,246 and shs. 20,000,000/= as general damages, interest of 12% pa on the

special damages from the date of filing and on the general damages at 6% pa from the date of judgement. Costs were also awarded to the 1st respondent.

The 1st respondent then applied for and obtained an order of attachment and sale of Plot 5 Nadiope Lane Mbuya, which was at the time registered in the name of M/s Spenco Development Company Ltd. The Court on 19th June, 2015 issued a warrant of attachment of Plot 5 and the property was advertised for sale in the “Daily Monitor” newspaper. Upon advertisement of the attached property for sale, M/s Crane Bank Limited, the predecessor in title of the 2nd applicant, lodged objector proceedings in the Execution Division Application No. 1797 of 2015 as mortgagee of plot 5 against the attachment and sale of the property, which application was subsequently transferred to this Division and is now Application No. 1202 of 2021. An interim order of stay of sale had been issued on 14th July, 2015 before that transfer. The order stopped the sale and release of the property from attachment until determination of the objector proceedings. The applicants attempted to lapse the 1st respondent’s caveat but on 2nd November, 2021 this court issued an order to maintain the caveat and the order was registered on the title deed as an encumbrance.

In the meantime, M/s Spenco Development Company Ltd having defaulted on its loan obligations and become insolvent, M/s Crane Bank Ltd as mortgagee, in exercise of its powers under the security documents securing the borrowing, on 28th September, 2016 placed the borrower under receivership and appointed the 1st applicant as Receiver / Manager. In October 2016, the Bank of Uganda placed M/s Crane Bank Ltd under statutory management and later under liquidation by virtue of section 88 of *The Financial Institutions Act, 2004*. On 25th January, 2017, pursuant to a Purchase of Assets and Assumption of Liabilities Agreement, the 2nd applicant acquired some of the assets and liabilities of M/s Crane Bank Limited including the M/s Spenco Development Company Limited’s loan and attendant security. Later the 2nd applicant in exercise of its powers as mortgagee, sold both plots to the 2nd respondent by an agreement of sale dated 1st September, 2021. The 2nd respondent took possession of the land.

By Miscellaneous Application No. 1202 of 2021 the applicants sought an order discharging the land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane and LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala, from attachment and sale in execution of a decree. By

Miscellaneous Cause No. 0023 of 2023 the 1st applicant further sought directions on matters concerning his functions as the Receiver / Manager of M/s Spencon Development Limited regarding the caveat lodged on the insolvent company's property comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala and the 1st respondent's occupation of land comprised
5 in LRV 3727 Folio 25 Plot 3 Nadiope Lane, Mbuya, Kampala. The 1st applicant sought removal of the caveat and recovery of general damages from the 1st respondent. Both applications were consolidated and dismissed with costs to the 1st respondent, in a ruling that was delivered on 28th July, 2023. The applicants have since filed notices of appeal against the decision and applied for certified copies of the record of proceedings.

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b. The application.

The application by Notice of motion is made under the provisions of section 98 of *The Civil Procedure Act* and Order 43 rules 4 (2), (3) and (5) of *The Civil procedure Rules* and Rule 42 (1)
15 of *The Judicature (Court of Appeal) Rules*. The applicants seek an order staying execution of the orders made in consolidated application No. 1202 of 2021 and Miscellaneous Cause No. 0032 of 2023 pending hearing of an intended appeal from that order.

c. The 1st respondent's affidavit in reply;

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In its affidavit in reply, the 1st respondent avers that the application does not raise any novel points of law which merit consideration by the Court of Appeal. The application for leave to appeal was dismissed on 18th August 2023 vide Misc. Appl. No. 1277 of 2023. It does not disclose any substantial or irreparable loss if the orders of court are not stayed. It is in the interest
25 of justice that the orders of court are implemented tin order to bring to the litigation to an end.

d. The 2nd respondent's affidavit in reply

In its affidavit in reply, the 2nd respondent avers that it is not opposed to the application and
30 grounds set out in the supporting affidavit. The 2nd respondent too is aggrieved by the ruling and

Orders arising from the said proceedings and has filed the Notice of Appeal and requested for a certified copy of the record of proceedings. It is only opposed to the prayer for costs.

5. Submissions of counsel for the applicants:

M/s Ligomarc Advocates together with M/s MMAKS Advocates on behalf of the applicants submitted that the application is for stay of execution. The notice of appeal was filed on 2nd August, 2023. It is timely, the decision was made on 28th July, 2023 and the application was filed
10 on 9th August, 2003. One of the orders was for cancellation of a sale that had already been concluded with the 2nd respondent. It would be necessary to preserve the land in its current status for if reversed on appeal the decree will be redundant. The points on appeal are wider than the parties. Substantial loss is over 100 sales under similar circumstances will be rendered void. Rectifying the sale is not unilateral, it requires cooperation of the buyer. Paragraph 2 is the
15 undertaking as to security. It is an asset of convenience for recovery. Recovery will not be affected since they may find alternative assets. The order for security should be by bank guarantee. Whether a transaction executed by an assignee in the circumstances a sale. The stay is not for preservation of right to recover money but also the sale of property

26. Submissions of Counsel for the 1st respondent.

M/s Nambale, Nerima and Co. Advocates on behalf of the 1st respondent submitted that the Court's earlier decision denying leave to appeal based on common issues of the points of law should bind the applicant. They are the same points considered in denying leave to appeal to the
25 Court of Appeal. There is no need to preserve the land. The 1st respondent has a warrant of attachment that has been outstanding for more than ten years. The decree ranks higher. It was issued in 2015. The applicant is a financial institution not in the business of buying land. Both parties are claiming enforcement of encumbrances in the land. It is not about ownership of the land. The sale was void for lack of capacity of sale. Refund is inevitable. They retain their status
30 as equitable mortgagee. The Court cannot reward the applicant for falling to follow the process of foreclosure. The court cannot consider the rest of the transactions. They have relief *inter-se*

that cannot be affected by the sale. The availability of other assets is speculative. The 1st respondent has no interest in the property and ought to deposit security for due performance.

g. Submissions by Counsel for the 2nd respondent.

M/s Muyanja & Co. Advocates and Solicitors, submitted that they associate themselves with the submissions of counsel for the applicant, since the 2nd respondent too is aggrieved by the ruling and Orders arising from the said proceedings and has filed the Notice of Appeal and requested
10 for a certified copy of the record of proceedings. They are only opposed to the prayer for costs.

h. The decision.

According to Order 43 rule 4 (3) of *The Civil Procedure Rules*, an application of this nature must
15 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
25 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.

i. A notice of appeal has been filed.

The applicant has satisfied this requirement. The applicant filed a notice of appeal on 2nd August 2023 and on 3rd August, 2023 it was as well filed in the Court of Appeal. This consideration has been satisfied.

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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
10 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. In the instant case, the
ruling was delivered on 28th July, 2023. The application was filed less than two weeks later on 9th
August, 2023. I therefore do not find any unreasonable delay in the filing this application, since
15 it was filed within two months of the decree becoming practically executable. This consideration
too has been satisfied.

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

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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
25 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. I therefore
30 have not found evidence of any unconditional steps that convey a gravity of purpose and

imminent prospect of execution of the orders that has been taken by the 1st respondent. This consideration has accordingly not been satisfied.

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

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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.

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.

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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, that 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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It was contended by counsel for the 1st respondent that the Court's earlier decision denying leave to appeal based on common issues of points of law should bind the applicants in this application. He submitted that they are the same points raised and considered in the previous application when denying leave to appeal to the Court of Appeal. However, the fact is that in the *ex-tempore* ruling delivered on 17th August, 2023 in Miscellaneous Application No. 1277 of 2023 between the 2nd applicant and the 1st respondent, leave to appeal was denied on grounds that "the intended appeal [had] no reasonable chance of success since the arguments intended to be raised [were] better addressed by a practical solution of re-registration that [had] the effect of dissolving the dispute." The Court did not have to evaluate whether or not the case was arguable on appeal or that it could be categorised as hopeless. It will be doing so for the first time in this application.

That aside, whereas to appeal from the order arising from the objector application made in Miscellaneous Application No. 1202 of 2021 is made under the provisions of section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act* and Order 22 rules 55, 56 and 57; as well as Order 52 rules 1, 2, and 3 of *The Civil procedure Rules* required the prior grant of leave to appeal, in the instant case the order sought to be appealed is in respect of Miscellaneous Cause No. 0032 of 2023 which was brought under the provisions of section 179, 180 and 195 (1) of *The Insolvency Act of 2011*, section 140 (1) of *The Registration of Titles Act* and Regulation 203 of *The Insolvency Regulations, 2013*, which does not require the prior grant of leave to appeal.

Ordinarily, the decision to consolidate two or more applications is predicated on findings that consolidation will serve systemic and perhaps the parties' interests in economy and efficiency by conserving judicial resources and providing expeditious resolution of disputes, thereby saving time, labour, and money, and in some instances lessening the risk of inconsistent results. Through consolidation, the courts seek to attain all of these benefits without unduly inconveniencing the parties or prejudicing their ability to get a just resolution. It is a tool administered to secure the just, speedy, and inexpensive determination of every suit where it is applicable.

Consolidation is not the same as hearing concurrently. Both consolidation and hearing concurrently essentially accomplish the same goal, but in slightly different ways. While hearing concurrently will result in the court issuing two separate rulings in respect of the two

applications, when two or more applications for all practical purposes are effectively consolidated, the result is a single set of proceedings that may or may not maintain the legal distinction between the multiple applications, but resulting in one ruling. An order that multiple applications be heard together (or one after the other) also guards against inconsistent findings. However, it does not provide for one set of pleadings, one set of discoveries, and one pre-trial, and it does not guarantee one trial. It does not guard against the risk that the multiple applications proceed at different paces. Further, it does not provide for the sharing of evidence among all parties to the applications.

10 On the other hand consolidation compresses two or more applications into one. It allows for one set of pleadings, one set of discoveries, a common pre-trial, and a single trial, with no prospect of inconsistent findings. Further, consolidation prevents the potential for multiple applications to proceed at different paces. One of the downsides to a consolidation order is that it requires the redrafting of pleadings, as one set of fresh, consolidated pleadings is required. The test for consolidation is stricter than the test for hearing together, as consolidation involves reconstructing two or more proceedings into one proceeding. To achieve consolidation, the court may order that one proceeding be asserted as a counterclaim in another. This helps to accomplish the goals of efficiency, convenience and limiting the risk of inconsistent decisions.

20 By an order of consolidation, separately filed applications are litigated in a joint proceeding. Where as a result of consolidation several applications are combined into one, in such a manner that they lose their separate identity, they become a single action in which a single ruling is rendered. This type of consolidation is common between the same parties over claims that might have been originally set out as separate grounds in one application. It applies to “repetitive” applications, which is common where there are multiple applications on the same claim by the same applicant(s) against the same respondent(s). In such cases the issues are so closely related that the ruling in one application will have preclusive effects on the other(s).

30 On the other hand, although consolidation results in a single set of proceedings, where the legal distinction between the multiple applications is maintained but resulting in one ruling, the applications do not necessarily lose their separate identity. Where several applications are

ordered to be tried together but each retains its separate character and requires the entry of distinct orders in the single ruling, the consolidation does not merge the multiple applications into a single action. This type of consolidation applies to “related” applications with a common nucleus of operative facts, common where there are separate applications by various applicants
5 against the same or overlapping respondents and arising out of the same transaction or series of occurrences, as well as separate applications by different parties litigating claims to the same rights, property, or *res*. Consolidation of this type does not merge the applications into a single cause, or change the rights of the parties, or make those who are parties in one application parties in another.

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In the instant case, that the two applications were consolidated is inconsequential in terms of the outcome with regard to the right of appeal since each of the applications retained its separate character and required the entry of distinct orders in the single ruling. The consolidation did not merge the two applications into a single action. Consequently, while leave to appeal was required
15 for the order of dismissal made in respect of Miscellaneous Application No. 1202 of 2021, it is not required in respect of the orders made with regard to Miscellaneous Cause No. 0032 of 2023, hence the divergent outcome with regard to the right of appeal. Moreover the considerations for granting of rejecting leave to appeal are not similar to those for a grant of stay of execution pending appeal.

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Among the grounds to be presented on appeal, the applicants intend to advance the argument that this Court erred in law and fact when it held that the 2nd applicant lacked legal capacity to sell or transfer the property comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala on ground that the 2nd applicant is an assignee of the mortgage rights attached to the property under
25 a Deed of Assignment which rights need not be registered in law. They further intend to argue that the orders made have far reaching implications regarding the 2nd applicant's entire loan portfolio that was purchased from M/s Crane Bank Limited, and hence will cause a substantial loss to the 2nd applicant. They intend to advance the argument that *The Financial Institutions Act, 2004* should override the provisions of *The Registration of Titles Act*, in relation to the transfer of
30 assets and liabilities of a financial institution that have been taken over by the Central Bank.

This particular point has weighty ramifications that go beyond the parties to the dispute; as a binding decision thereon will guide the practice of this Court in these matters. It is not necessarily confined or limited to the case at hand but is rather normative in nature, given that it would apply generally or universally to other similar situations. It is not a hypothetical or merely
5 theoretical question which is peripheral or irrelevant to the appeal. It is not such a case where the law is clearly against the intended case to be argued by the applicants, so that the applicants should reasonably expect to lose. The applicants are capable of presenting plausible argument on appeal for that Court's consideration. This Court has therefore formed an opinion that there is a reasonable basis in law and equity to support the grounds raised and that they can be supported
10 by good faith argument on appeal. The Court of Appeal could reasonably arrive at a conclusion different from that of this court. It has not been shown that the appeal is frivolous. Therefore this consideration has accordingly been satisfied.

15 v. The appeal would be rendered nugatory;

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
20 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, 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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The executable orders made include;- directing the Deputy Registrar of this Division, immediately following the end of the then running Court Vacation, to revive the process of execution of the decree by issuing a fresh warrant of attachment and sale in respect of land comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala; for the persons in
30 possession of that land to forthwith grant vacant possession, for purposes of the execution, to the bailiff appointed by the Deputy Registrar of this Division to execute that warrant; the

Commissioner Land Registration to forthwith cancel registration of the 2nd respondent as proprietor of land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane, Mbuya, Kampala and instead restore the name of M/s Spenco Development Company Limited as the registered proprietor thereof; the Commissioner Land Registration to forthwith restore the mortgage of M/s Crane Bank Limited onto the title deed to land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane, Mbuya, Kampala; and for the 2nd respondent is to forthwith deliver up the duplicate certificate title now in its possession, to the Commissioner Land Registration for purposes of that rectification.

10 As rightly argued by Counsel for the 1st respondent, the proceedings before this court were concerned with the execution of its decree by way of attachment and sale of the property of a judgment debtor, that got mired in a secured creditor's erroneous attempt as equitable mortgagee to enforce rights of direct sale only available to a registered mortgagee over the same property. The issues between the 2nd applicant and the 1st respondent in essence are issues of ranking. 15 Those issues were settled by the ruling made in accordance with Order 22 rule 59 of *The Civil Procedure Rules*, which directed as one of the conditions for sale of the land, that the sale shall be subject to the mortgage. By that order the interests of the 2nd applicant as equitable mortgagee are well catered for. It is therefore not necessary to preserve the *status quo* pending appeal, so that the rights involved in the appeal may not be lost or reduced by reason of an intervening 20 execution. Therefore this consideration has not been satisfied.

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

25 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 30 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 its appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment (see *Alice Wambui Nganga v. John Ngure Kahoro and another, ELC Case No. 482 of 2017 (at Thika); [2021] eKLR*). Since the interests of the 2nd applicant as equitable mortgagee are catered for in the order sought to be appealed, the applicants have not established any 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 applicants as the successful parties in the appeal. Therefore this consideration too has not been satisfied.

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

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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. While execution of the decree may not directly affect the merits of the appeal, it may have the potential to significantly affect the applicant's financial resources and cash flow, in which case it may affect the applicant's capacity to pursue the appeal.

25

In the instant case, it has not been demonstrated that execution of the decree will directly affect the merits of the appeal, or that it has the potential to significantly affect the applicants' financial resources and cash flow, to such an extent as may affect their capacity to pursue the appeal, yet the interests of the 2nd applicant as equitable mortgagee are catered for in the order sought to be appealed. That the 2nd applicant had sold the property to the 2nd respondent is not directly but

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rather collaterally in issue in this application and since it has not been demonstrated that the 2nd respondent's claim over the property cannot be compensated for by an award of general and special damages. On the other hand, the decree sought to be executed was rendered on 13th February, 2015 and the property has since 19th June, 2015 been under attachment. In the
5 circumstances, granting the stay would inflict more hardship to the 1st respondent than it would avoid, since it would unjustifiably prolong the process of execution that has been pending for the last eight years. This consideration militates against the grant of an order of stay of execution.

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

10

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
15 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.

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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
25 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.

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Although 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, alternatively the Court in its discretion may direct deposit of a part
5 of the decretal sum so that the decree holder may withdraw the same without prejudice and subject to the result of the appeal. Such direction for deposit of part of the decretal sum is not for the purpose of furnishing security for due performance of the decree but an equitable measure ensuring part satisfaction of the decree without prejudice to the parties and subject to the result of the appeal as a condition for stay of execution of the decree. In light of the findings made this
10 far, consideration of this factor is unnecessary.

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 1st respondent.

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Delivered electronically this 4th day of September, 2023
Mubiru.....

.....**Stephen**

Stephen Mubiru
Judge,
4th September, 2023.

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