

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

**MISCELLANEOUS APPLICATION No. 0027 OF 2023**

5 **(Arising from Civil Suit No. 0930 of 2022)**

1. JUNACO (T) LIMITED }  
2. JUSTINIAN LAMBERT } .....  
APPLICANTS

3. VEDASTINA JUSTINIAN }

10 **VERSUS**

DFCU BANK LIMITED .....  
RESPONDENT

**Before: Hon Justice Stephen Mubiru.**

**RULING**

15. Background.

On 20<sup>th</sup> March 2018, the 1<sup>st</sup> applicant was granted three facilities constituting: a Performance Guarantee Limit of shs. 1,197,425,600/=; an Import Loan Facility Limit of US \$ 2,000,000 equivalent to approximately shs. 7,420,000,000/= and an unsecured Invoice Discounting Facility  
20 Limit of shs. 200,000,000/= the purpose of which was to enable the 1<sup>st</sup> applicant perform the conditions of a contract to supply water meters to National Water and Sewerage Corporation under specific terms and conditions contained in the Loan Facility agreement. On 24<sup>th</sup> June 2019, Facility 2 was varied to avail the 1<sup>st</sup> applicant an Import Loan Facility Limit of US \$ 2,800,000. The first two facilities were valid for a period of 18 (eighteen) months while Facility 3 was valid  
25 for a period of 12 (twelve) months.

The said facilities were payable immediately upon demand by the respondent and were secured by: a fixed and floating charge over the 1<sup>st</sup> applicant's assets; personal guarantees of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants; a 50% upfront cash cover on each Performance Guarantee issued; and a 30%  
30 upfront cash cover on each Letter of Credit issued. The respondent considering the applicants to have defaulted on their obligations, filed a summary suit against them seeking recovery of shs. 12,817,499,272/= Upon hearing the application for leave to appear and defend the suit, filed by

the applicants, Court entered a partial judgment in the sum of shs. 5,478,421,071/= in favour of the respondent and granted leave to the applicants to defend the rest of the claim.

b. The application.

5 The application by Chamber Summons is made under the provisions of section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act* and Order 22 rules 23 (1) and 89 (1) of *The Civil Procedure Rules*. The applicants jointly and severally seek an order of stay of execution restraining the respondent, its servants, agents or any person acting under its authority, from attaching funds held by the applicants or any third party on their behalf, in execution of a  
10 partial decree entered in this suit until the final disposal of an appeal filed against that decree. It is the applicants' case that although a partial judgment in the sums of shs. 5,478,421,071/= was on the 25<sup>th</sup> November, 2022 entered against them in favour of the respondent, they have since filed a notice of appeal to the Court of appeal seeking to challenge that decision and applied for a record of proceedings for purposes of filing the appeal. While the said appeal is pending  
15 determination and has a high probability of success, the respondent has applied for execution under EMA No. 003 of 2023 and also seeks to garnishee the applicants' funds under MA. No. 002 of 2023. Granting the two applications would render the pending appeal nugatory.

c. The affidavit in reply;

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The respondent contends that the application is filed in bad faith and is intended to frustrate the Respondent's effort to recover the sums due and owing under the order. There is nothing pleaded to demonstrate high likelihood of success of the appeal. There is no evidence to show that the applicants will suffer substantial loss by complying with the order to pay sums of money  
25 awarded by Court. The applicants have not adduced evidence to show that they will not be able to recover the sums if they succeeded in the appeal against the Respondent, which is a financial institution. The applicants have not presented or undertaken to present any security for due performance of the order as required by law. A party that obtained a decree should not be deprived of fruits of that decree except for good reason.

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d. Submissions of counsel for the applicants.

5 M/s T-Davis Wesley and Co. Advocates on behalf of the applicants submitted that the applicants are dissatisfied with part of the decision and a notice of appeal has been filed and request for the proceedings has been made. The applicants seeks to contest the quantum; the monetary award is contested. They are taking more than they are entitled to. In the absence of an account the amount cannot be determined.

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e. Submissions of counsel for the respondent.

M/s S & L Advocates, on behalf of respondent submitted that the applicants are not resident in the country. The respondent has sought to garnishee funds due to the applicants. They have not provided undertaking of due performance. In *Mabu Commodities Limited v. Nakitende H.C. Misc. Application No. 530 of 2020* Justice Musa Sekaana. Substantial loss needs cogent evidence. In absence of any books of accounts of the applicant the court is not persuaded by mere statements that the company will suffer any substantial loss. In *Andrew Kisawuzi v. Dan Oundo Malingu H. C. Misc. Application No. 467 of 2013* it was held that substantial loss cannot mean ordinary loss or the decretal sum or costs which must be settled by the losing party but something more than that. The applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is granted. In *Twinamasiko Onesmus v Agaba Aisa and another H. C. Election Petition 702 of 2021* Justice Ajiji observed that to jurats appearing on different pages when they could have fit on the same page with the last text of the paragraphs, is a sloppy practice with fraudulent intent. The assumption is that the affirmant did not appear before the commissioner foe oaths and the affidavit was not read to him. Court observed that the practice of placing the jurat on a separate page leaving a gap or much space between the last paragraph of the affidavit and the jurat where it could have fitted were treated as a fraudulent intent and a sloppy practice where lawyers take advantage of such drafting to have unsuspecting declarants and affirmants to sign what they have not been read back to and understood.

f. Submissions in reply by counsel for the applicants

5 The applicants reiterate the grounds of the application. The right of appeal should be unfettered as was held in *Theodore Sekikubo and Four others v. Attorney General, Constitutional Application No. 3 of 2014* such that an order of stay should issue pending the determination of the main issues between the parties. In *China Henan International Corporation Group Company Limited v. Justus Kyabahwa C.A. Civil Application No. 101 of 2020*, the Court of Appeal held  
10 that it is necessary to preserve the right of appeal by maintaining the status quo in order not to render the appeal nugatory.

g. The decision.

15 According to established jurisprudence, 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 Order 43 rule 4 (3) of *The Civil Procedure Rules*, 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  
20 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*).

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  
25 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.

i. A notice of appeal has been filed.

The applicant have satisfied this requirement. The applicants filed a notice of appeal on 30<sup>th</sup> November, 2022 and applied for certified copy of the record of proceedings.

ii. The application has been made without unreasonable delay.

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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 partial judgment was rendered on 25<sup>th</sup> November, 2022. The application was filed slightly over a month later on 10<sup>th</sup> January, 2023. I therefore do not find any unreasonable delay in the filing this application.

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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

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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.

5 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,  
10 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.

15 The applicants have not provided court with a draft memorandum of appeal of the intended appeal to the Court of Appeal. They also have not adverted to the arguments they intend to raise in support of those grounds. It is therefore not possible to assess whether they have an arguable case on appeal. Having perused the judgment, 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  
20 and equity to support the grounds raised and that they can be supported by good faith argument. It is therefore not possible to determine that the Court of Appeal could reasonably arrive at a conclusion different from that of the trial court. The applicant has failed to prove this requirement.

25 iv. 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  
30 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 applicant, or that it is in the public interest to grant a stay. The respondent has not been shown to be impecunious. The applicant has 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.

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The applicants have presented evidence which shows that the respondent has applied for execution under EMA No. 003 of 2023 and also seeks to garnishee the applicants' funds under MA. No. 002 of 2023. This unequivocal evidence shows that unconditional steps conveying a

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gravity of purpose and imminent prospect of execution of the partial decree, have been taken by the respondent. The applicants have therefore satisfied this requirement.

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

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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.

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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.

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vii. The applicants have 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

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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  
5 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  
10 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  
15 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 not undertaken to furnish such security, yet the court has a duty in exercise its discretion to grant stay of execution of a money decree, to balance the equities between the  
20 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 failed to prove this requirement too

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

25 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  
30 [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.

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 the execution 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.

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.

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Delivered electronically this 29<sup>th</sup> day of March, 2023  
**Mubiru**.....

.....**Stephen**

Stephen Mubiru  
Judge,  
29<sup>th</sup> March, 2023 pm

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