

b. The application.

The application is made under the provisions of section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act* and Order 52 rules 1 and 2 of *The Civil Procedure Rules*. The applicant
5 seeks an order of stay of sale of land comprised in Kyadondo Block 255 Plot 898 at Munyonyo until the final determination of the appeal. The grounds for seeking that relief are that there is both a suit and an appeal pending before this court relating to that property which constitutes her matrimonial home. In the suit, the applicant seeks to challenge the legality of the mortgage on account of forgeries and fraudulent acts involved in its creation. She has appealed the order
10 requiring her to deposit 30% of the amount claimed by the respondent on the basis that the order was unjustified. If the order is not granted she will have been denied her right to own property and to challenge fraudulent and illegal transactions relating thereto. It is necessary to maintain the status quo until her rights to the home have been adjudicated.

15c. Affidavit in reply

By the respondent's affidavit in reply, it is contended that the applicant has connived with her husband, Mr. Mande Constant as the respondent's debtor, to defeat exercise of the respondent's power of sale as mortgagee of that property. The applicant duly consented to the transaction by
20 executing the standard spousal consent form and a statutory declaration in support of her husband's application for the credit facilities against the security of their matrimonial home. She at all material time was fully aware of the transaction and consented to it. The application is part of a design by both husband and wife to delay recovery of money borrowed against that security.

25d. Submissions of counsel for the applicant.

M/s T. Odeke Company Advocates on behalf of the applicant submitted that the applicant being dissatisfied with the condition attached to grant of a temporary injunction issued on 30th November, 2021 requiring her to deposit 30% of the amount claimed before 30th December, 2021, appealed
30 the decision which appeal is still pending before this court. That condition was not justified since the mortgage was created without her consent but rather on the basis of forgery and fraud

committed by collusion between the two respondents, taking advantage of her being an illiterate person. It was erroneous for the registrar to have conditioned the grant of the interim injunction upon the applicant depositing 30% of shs. 817,173,740/= (hence shs. 245,152,122/=) in light of the illegalities involved in procuring the loan. That the applicant's husband Mr. Mande Constant had previously been involved in litigation with the respondent was irrelevant. It is necessary to grant the application to prevent the sale taking place before the appeal against that order is disposed of, which will render the appeal nugatory.

e. Submissions of counsel for the respondents.

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Mr. Brian Kajubi on behalf of the respondents submitted that the application is not grounded in law and is based on wrong facts. It is a disguised repetition of Misc. Application No.1327 seeking to extend and later stay an order which was granted but later expired because it was conditional. The order had a condition. The applicant cannot challenge the 30% in isolation of the order and that is contrary to what the Registrar granted. The application is bad in law because the applicant wants court to extend an order which expired by staying it. There is no order to be stayed. In *Amrit Goyal v. Harichand Goyal and 3 Ors C.A. Civil Application No. 109 of 2004* relating to an appeal against an order of payment of security of costs. The memorandum was struck out for being bad in law because the applicant purported to exercise pursuit of a non-existent remedy for non-compliance of a court order. It was decided that where an order for performance of an act is issued by court the party is to comply or apply for extension and since the applicant did not apply to extend to be given more time within which to comply, that application was rendered untenable and irregular and the same was dismissed. In *Willis International Engineering and Contractors Ltd & Anor v. DFCU Bank H.C. Miscellaneous Application No. 1000 of 2015* it was held that the jurisdiction of the High Court in respect of mortgages should be exercised in conformity with written law being the Mortgage Act and the Regulations made thereunder. The application is made purely based on *The Civil Procedure Rules* and Act. The primary law was the Mortgage Regulations. They didn't file an application for extension of the order and therefore the application should be dismissed.

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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. The applicants filed a notice of motion on 21st December, 2021 appealing the decision of the Registrar delivered on 30th November, 2021 granting a temporary injunction restraining the respondent from selling the mortgaged property, conditional on the applicant depositing a sum of shs. 245,152,122/= by 30th December, 2021. That appeal is fixed for hearing on 4th April, 2022 at 9.00 am. The applicant has therefore 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 ruling was rendered on 30th November, 2020. The application was filed on 22nd December, 2021. I therefore do not find any unreasonable delay in the filing this application.

iii. 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 an order be stayed by reason only of an appeal having been preferred from the order (see Order 43 rule 4 of *The Civil Procedure Rules*). In other words, the ordinary rule is that an execution of an order need not be stayed pending an appeal unless the appellant shows
10 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. It must be shown that that the case is arguable on appeal or that the case
15 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
20 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 and therefore the application will not be granted. Additional evidence indicating a frivolous appeal is the applicant's conduct of prior litigation which may show that the
25 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. Such evidence has not been furnished by the respondent.

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In the applicant's appeal, she seeks an order setting aside that issued by the Registrar on 30th November, 2021. She desires an order staying the sale unconditionally. She contends that in imposing the condition, the learned Registrar failed to consider the fact that the applicant is illiterate and her pending suit is based averments of fraud, forgery and illegalities in the transaction leading to the mortgaging of the land. Having perused the ruling, I have formed the opinion that there is a reasonable basis in law and equity to support the grounds raised and that they can be supported by good faith argument. It is therefore possible that this Court *prima facie* could reasonably arrive at a conclusion different from that of the Registrar. The applicant has satisfied this requirement too.

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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 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. The sale of mortgaged property does not ordinarily pose the danger of rendering a pending appeal nugatory, where the respondent is not impecunious. The presumption is that such sale will be reversible in the event of the applicant succeeding on appeal. If it is not reversible, the presumption is that damages will reasonably compensate the applicant.

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In the instant case, the applicant seeks only to enforce her right of occupancy as a spouse of the mortgagor. The mortgagor has previously failed to secure a stay of the sale by mortgagee, yet the applicant's right of occupancy is compensable in damages in lieu of re-instatement, in the event of her succeeding in the pending suit and appeal. It is of course true that ordinarily relief against illegal termination of rights of occupancy is reinstatement where no special impediment in the way of awarding the relief is clearly shown, but there are exceptions to the general rule, where the Court in exercise of its discretion can award compensation in lieu of reinstatement. Feasibility of reinstatement in the changed circumstances and the comparative hardship of the mortgagee and the occupant, particularly with reference to financial implications, are some of the considerations.

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Those are matters determined after receipt of evidence, oral or documentary, on the question of grant of relief by way of reinstatement or compensation in lieu of reinstatement. They cannot be pre-determined and since the respondent has not been shown to be impecunious, the applicant has failed to satisfy this requirement.

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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.

10 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 order. There should be unequivocal evidence showing that unconditional steps as to convey a gravity of purpose and imminent prospect of execution of the order, have been taken by the respondent. Steps that demonstrate a serious
15 expression of an intent include; extracting the order, 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.

20 Instead, it is a fact that the applicant succeeded in securing a temporary injunction order only that it was conditioned on the applicant depositing a sum of shs. 245,152,122/= by 30th December, 2021. The applicant never complied with the condition. She now seeks a stay of the sale after her failure to comply with the order granting an injunction against the impending sale. A condition precedent is a stipulation that must be satisfied before the injunction could come into effect. Relief that is the subject of a condition precedent is contingent on the performance of that obligation. It
25 is therefore apparent that a conditional order has a limited lifespan until satisfaction of the condition precedent. If the condition is not satisfied before the specified time, the relief does not vest. Failure to perform the condition precedent, extinguishes the relief and discharges the order. It was therefore incumbent upon the applicant to apply for extension of time, in the event of her failure to meet that condition by the stipulated date, and to disclose the facts or circumstances
30 which collectively are of such weight and persuasiveness as to convince the court to extend the time for compliance with the condition. This she never did, opting instead to let the order lapse.

Once a court order has lapsed it can neither be extended nor enforced. A stay of execution cannot be sought on basis of an order that has lapsed. It follows that there cannot be a serious or imminent threat of execution of the order if the application is not granted. The applicant therefore has failed to prove this requirement too.

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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 or damages 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 applicant has failed to prove this requirement too.

vii. The applicant has given security for due performance of the 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 applicant has 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 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 applicant has failed to prove this requirement too

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.

5 Apart from the averments that the applicant stands to suffer irreparable loss if execution ensues,
the applicant has not offer 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 spouse to a judgment debtor is necessarily subjected when he or she
loses his or her case and is deprived of his or her property in consequence. Moreover, exposure to
10 this eventuality arises from a background of a mortgage over the property, rendering the equitable
basis for staying an eviction upon default, at probably its weakest. This is because a property owner
who mortgages it has advance notice that it may be sold off in the event of default. I therefore
have not found evidence to show that that execution would cause significant difficulty, expense or
disruption, beyond that to which every spouse of a 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
15 order is therefore likely to inflict greater hardship than it would avoid.

In conclusion, the applicant has 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 21st day of February, 2022

.....Stephen Mubiru.....
Stephen Mubiru
Judge,
21st February, 2022.

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