



held in contempt of court for violation of the order of court vide HCMA No. 23 of 2021.

- b) On 20<sup>th</sup> December 2021, the court delivered its ruling in the said matter wherein it found the Applicant herein to be in contempt of the said Order of court.
- c) The Applicant is dissatisfied with the findings of court in HCMA No. 133 of 2021 and he has instructed his Lawyer to appeal to the Court of Appeal of Uganda against the said ruling and /or Orders of court.
- d) On 20<sup>th</sup> December 2021 the Applicant filed a Notice of Appeal against the said decision of court in HCMA No. 133 of 2021 and also requested for a typed record of proceedings to enable him prepare for the intended appeal.
- e) The Applicant's intended appeal raises important matters of law which shall be rendered nugatory if the execution of the impugned ruling is not stayed pending determination of the said appeal.
- f) The Applicant stands to suffer substantial loss if the impugned Order is executed as he has been condemned to pay colossal sums of money or risk imprisonment in civil prison which will substantially affect the operations of his businesses, reputation and quality of life if imprisoned.
- g) It is in the interest of justice that the execution of the contempt of court Order be stayed pending the determination of the preferred appeal since this application has been instituted without any unreasonable delay.



In opposition to the grounds in support of the application, the Chief Operations Officer of the Respondent deponed that;

- a) The Orders of Contempt of Court issued by this Honorable Court in Miscellaneous Application No. 133 of 2021 were lawfully issued and cannot be impugned as stated by the Applicant.
- b) This application is not supported by any evidence in proof of threat of execution.
- c) The Applicant is to- date deemed to be in further contempt of court orders since 20<sup>th</sup> December 2021 and no efforts were made to fix this application.
- d) No evidence of substantial loss to be suffered by the Applicant has been adduced.
- e) This application is incurably defective and does not disclose any grounds on which it is premised in the Chamber Summons.
- f) This application is incurably defective and does not disclose any grounds on which it is premised in the Chamber Summons.
- g) The balance of convenience cannot tilt in the Applicant's favor for undermining orders of this Honorable Court and its integrity.
- h) No evidence has been adduced to show how payment of money to court can result into irreparable /or substantial loss and it would be speculative to allow this application.
- i) In the event that there was an appeal lodged by the Applicant, the same would not be rendered nugatory in any way because the subject matter of the appeal relates to abusing the integrity

of the court and this cannot be alienated or disposed of in any way like real property.

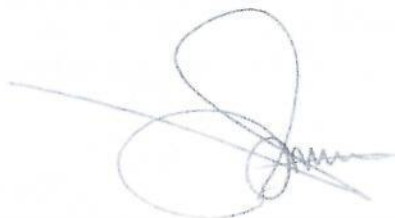
- j) The Applicant has not furnished willingness to deposit all the amount ordered to be paid as a fine to this court as security for due performance of the court orders.
- k) Unless UGX. 300,000,000 is deposited in this court as security for due performance of the orders of this court issued in MA No. 133 of 2021, then this application is blunt and does not satisfy conditions for the grant of orders sought.

In rejoinder, the Applicant reiterated the averments in the affidavit in support of the application but added that;

- a) The Applicant is willing and ready to furnish security for costs and/or due performance of the orders of court that this court will deem appropriate.
- b) The Applicant has since filed and served on to the Respondent a copy of the Memorandum of Appeal outlining his intended grounds of appeal.

### **Representation**

At the hearing of this application, the Applicant was represented by Betunda Yusuf (Advocate). The Respondent was jointly represented by KBW Advocates, M/S Kanduho & Co. Advocates and Katende, Sserunjogi & Co. Advocates.





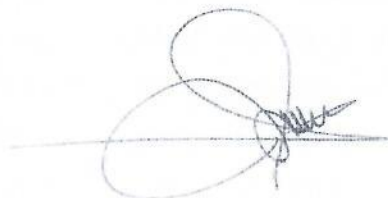
## The Law

The principles under which an application of stay of execution can succeed were well espoused in the Supreme Court decision of **Lawrence Musiitwa Kyazze vs. Eunice Busingye, Supreme Court Civil Application No. 18 of 1990**, but more pronounced in the Supreme Court Case of **Hon. Theodore Ssekikubo & Ors vs. The Attorney General & Ors, Constitutional Application No. 03 of 2014**. They include:

1. The applicant must show that he lodged a Notice of Appeal
2. That substantial loss may result to the applicant unless the stay of execution is granted
3. That the application has been made without unreasonable delay.
4. That the Applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

The Court of Appeal in **Kyambogo University vs. Prof. Isaiah Omolo Ndiege, CA No.341 of 2013** expanded the list to include:

5. There is a serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory.
6. That the Application is not frivolous and has a likelihood of success. That the refusal to grant the stay would inflict more hardship than it would avoid



### **Consideration of the application**

**The 1st principle:** The Applicant must show that he lodged a Notice of Appeal. I refer to paragraph 12 of the Applicant's affidavit in support of the Application wherein the Applicant deponed that the Notice of Appeal and letter requesting for the typed record of proceedings had been filed and copies thereof attached as annexure D & E respectively. On inspecting the attached Notice of Appeal, it is evident to me that the Notice of Appeal was lodged in the court registry on 21<sup>st</sup> December 2021 which is one day after the decision and Orders of the High Court in Miscellaneous Application No 133 of 2021. This was a period well within the timelines for filing a Notice of Appeal. I therefore, find that the Notice of Appeal was competently lodged as required by law.

**The 2nd Principle** is that substantial loss may result to the Applicant unless the stay of execution is granted. In the case of ***Pan African Insurance Co. Ltd vs International Air Transport Association HCMA No. 86 of 2006***, it was held that; the deponent in an application for stay of execution must go a step further to lay the basis upon which court can make a finding that the applicant will suffer substantial loss. That it should go beyond the vague and general assertions of substantial loss in case the order of stay is refused. The Applicant must also demonstrate to court's satisfaction that such substantial loss if any cannot be atoned for in damages. See also; ***Andrew Kisawuzi vs Dan Oundo, Misc. Application No. 467 of 2013***

In the instant application, the loss feared is to a tune of UGX. 300,000,000 (Three Hundred Million Shillings) which this court ordered against the Applicant, in Miscellaneous Application No. 133 of 2021, having found him in contempt of court Orders. In the alternative, this court granted the Applicant's prayer in Miscellaneous Application No. 133 of 2021 that the Applicant herein be committed to Civil Prison for a period not exceeding six (6) months to crack a whip against him for



his wanton contempt of court. This court also ordered for costs against the Applicant herein. These orders were made mindful of the fact that a life was lost as a result of the said contempt of court orders.

All contempt proceedings are matters between the court and the alleged contemnor. Any person who moves the machinery of the court for contempt only brings to the notice of the court certain facts constituting contempt of court. After furnishing such information he or she may still assist the court, but it must always be borne in mind that in contempt proceeding there are only two parties, namely, the court and the contemnor. **See; Nsangiranabo v Col. Kaka Bagyenda and Anor (Civil Miscellaneous Application 671 of 2019).** In the circumstances, the Applicant is required to pay a tune of UGX. 300,000,000 or in the alternative be committed to civil prison for a period of 6 months. I am mindful that substantial loss does not represent any particular amount or size; it cannot be quantified by any particular mathematical formula. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without a value or a loss that is merely nominal (**see Tropical Commodities Suppliers Ltd and others v. International Credit Bank Ltd (In Liquidation) [2004] 2 EA 331**). The Applicant is not likely to suffer substantial loss given that the UGX.300, 000, 000 once deposited in court can be recoverable upon succeeding on appeal. If the contemnor choses to "hold his own keys to civil prison", in the alternative, the appeal would still not divest him of the consequences of imprisonment in the event that he succeeds.

**The 3rd principle** is that the Application for stay of execution should be made without unreasonable delay. It is clear from the record that the instant Application was filed in the High Court at Mubende on 23<sup>rd</sup> December 2021 which is just two days after the decision and Orders of Court in Miscellaneous Application No. 133 of 2021 was delivered. I find that the Application for stay of execution has been brought without unreasonable delay.



**The 4th principle** is that the Applicant has given security for due performance of the decree or order as may ultimately be binding upon him. In determining whether or not security for costs is a requirement in an application for stay of execution, each case ought to be weighed on its own merits. Particularly in the case of *John Baptist Kawanga v. Namyalo Kevina & Anor (Miscellaneous Application No.12 of 2017)* I have stated before and I hereby restate that;

***"I am of the view that every application should be handled on its merits and a decision whether or not to order for security for due performance be made according to the circumstances of each particular case. The objective of the legal provisions on security was never intended to fetter the right of appeal. It was intended to ensure that courts do not assist litigants to delay execution of decrees through filling vexatious and frivolous appeals. In essence, the decision whether to order for security for due performance must be made in consonance with the probability of the success of the appeal. There can never be cases with similar facts. As it was held in the case of Hon Theodore Sekikubo cited above, the nature of decision depends on the facts of each case, as situations vary from case to case. I am persuaded by the decision of my sister Judge Hon Lady Justice Wolayo in Amuanaun Sam Vs Opolot David MA No 3 of 2014 that the status of the applicant should be put into consideration in order to decide whether security should be ordered or not.***

In this application, the Applicant in paragraph 14 of the affidavit in rejoinder deponed that he is willing and able to furnish security for costs and/or due performance of the orders that this court will find and deem appropriate. I however notice that the Applicant's Counsel in submissions attempted to depart from the Applicant's earlier expression of readiness to furnish security for costs /and or due performance of the orders of court in Miscellaneous Application No. 133 of 2021. Counsel for the Respondent on the other hand was of the view that in the event that this court is inclined to grant this



application, the Applicant should be ordered to deposit the entire sum of UGX. 300,000,000 (Three Hundred Million Shillings) as security for due performance per the supreme court decision of **Lawrence Kyazze Musiitwa vs. Eunice Busingye SCCA No. 18 of 1990.**

I am certainly mindful that the practice of ordering security for the entire decretal sum has the effect of stifling possible appeals. However, as I stated in **Kawanga v. Namyalo Kevina & Anor (supra)** the nature of the decision depends on the facts of each case, as situations vary from case to case. In this particular case, the Applicant has demonstrated readiness and ability to furnish security for costs and/or due performance in paragraph 14 of the affidavit in rejoinder. There is no indication that the Applicant is by his status incapable of furnishing the decretal sum if this court finds it appropriate and the facts in this particular case are anomalous - this is the situation where I made a finding that in utter disobedience of court orders, there was an unfortunate incident of loss of life in execution of actions constituting contempt of court orders. Clearly, if the Applicant had not acted wantonly as he did, death would never have resulted.

**The 5th principle** is that 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. The rationale for granting a stay of proceedings is stated in **Wilson v Church (1879) 12 Ch. D 454** which rationale has been applied in Uganda that:

***"As a matter of practice, where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings in the judgment appealed from as will prevent it from being rendered nugatory"***

It therefore follows that applications of this nature are intended to preserve the status quo pending the hearing of the substantive



matter. The term "status quo" has always been used to mean the prevailing situation as at the time of filing the application for stay of execution so that the substantive appeal can be determined on merit. As at the time of filing this application, execution had not yet ensued. I find that there is imminent threat of execution because in any case when orders of court are handed down, the only expected course that follows is execution of those Orders.

**The 6th principle** is that the application is not frivolous and has a likelihood of success. At this stage, it is not necessary for me to look at the merits of the Appeal substantively as this would be a preserve of the Appellate Court. What suffices is a determination whether there are grounds of appeal meriting adjudication by the Appellate Court. The Applicant attached a Memorandum of Appeal to his affidavit in rejoinder with six intended grounds of appeal as follows:

- a) *The learned trial judge erred in law and fact when he held that non attachment of the order of court alleged to have been violated to an application for contempt of court is not fatal;*
- b) *The learned trial judge erred in law and fact when he purported to raise and resolve an issue on judicial notice that was neither pleaded and /or addressed by the parties in their submissions.*
- c) *The learned trial judge erred in law and fact when he failed to apply the principles relating to the application of judicial notice;*
- d) *The learned trial judge erred in law and fact when he descended in the arena by purporting to extend and give details of the order of court alleged to be violated when they were neither pleaded and /or addressed by the parties in their submissions.*



- e) The learned trial judge erred in law and fact when he failed to evaluate the affidavit evidence that was before him in H.C.M.A No. 133 of 2021 and thereby reached a wrong conclusion that the Appellant was aware of the existence of the impugned court order and its various extensions.
- f) The learned trial judge erred in law and fact when he failed to determine whether there could be a valid extension of the order of court alleged to be violated before setting aside the order of court staying the proceedings of the suit from which it arose.

Whether or not the above grounds are meritless is not for the determination of this court at this stage as doing so would amount to descending into the arena of determining the merits of the intended appeal. Determining merits thereof is a preserve of the Court of Appeal.

In the result, I allow this application on the condition that the Applicant furnishes security for due performance to a tune of UGX. 300,000,000 (Three Hundred Million Shillings). The peculiar circumstances necessitating this condition have been laid out in this ruling.

Cost of this Application shall abide the outcome of the appeal.

I so order.

Dated at Kampala this 15<sup>th</sup> day of August 2022

  
Flavien Zeija (PhD)  
**PRINCIPAL JUDGE**