

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – MA – 00111 OF 2023

(ARISING FROM HCT – 01 – CV – MA – 098 OF 2023)

5 **(ORIGINATING FROM KYENJOJO CIVIL SUIT NO. 028 OF 2022)**

AKUGIZIBWE ISALAH ::: APPLICANT

VERSUS

MUGISA ROBERT ::: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA

10 **RULING**

The applicant brought this application under section 98 of the Civil Procedure Act and Order 43 rule 4 (1), 3 and 5 of the Civil Procedure rules for orders that:

1. **Execution of the orders in Kyenjojo Civil Suit No. 028 of 2022 be stayed pending the outcome of Misc. Application No. 098 of 2023 for leave to appeal out of time.**
2. **That the costs of taking out the application be provided for.**

The application is supported by the affidavit of the applicant who stated as follows:

1. That judgment in Civil Suit No. 028 of 2022 was delivered on 25th August 2023 in the absence of the applicant and his advocate on a date where the Chief Registrar had directed that all matters be adjourned. That as such, the applicant and his advocate did not attend court on the date the judgment was

delivered. That unknown to him, judgment was entered against him on 25th August 2023.

2. That he later secured a copy of the judgment where his current lawyer filed Misc. Application No. 098 of 2023 for leave to appeal out of time.
- 5 3. That before the application for leave could be heard and disposed of on merits, the Respondent commenced execution where a notice to show cause was served upon the applicant requiring him to appear on 1st December 2023 to show cause why he should not be arrested and committed to civil prison to recover a sum of Shs 17,040,000/=.
- 10 4. That there is imminent threat of execution and the applicant shall suffer substantial loss if he is arrested and committed to civil prison. That the application was made without inordinate delay and it is in the interest justice that it is allowed and the orders it seeks.

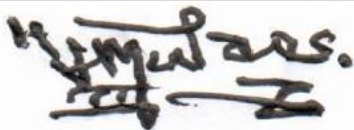
Hearing and Representation:

15 The Respondent was served with the motion per the affidavit of service on record and didn't respond. On the 26th day of February 2024, issued an order allowing the applicant to proceed and present the application exparte. *Mr. Patrick Nyakaana* appeared for the applicant and he filed written submissions which I have considered in this ruling.

DECISION:

20 Order 43 Rule 4 (1), (2) and (3) of the CPR states as follows:

Stay by High Court.



(1) An appeal to the High Court shall not operate as a stay of proceedings under a decree or order appealed from except so far as the High Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the High Court may for sufficient cause
5 order stay of execution of the decree.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing from the decree, the court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub rule (1) or (2) of this rule unless the court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

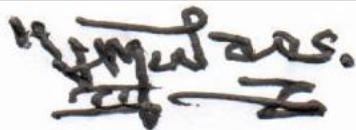
(c) that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.

In **Lawrence Musiitwa Kyazze -Vs - Eunice Busingye, SC. Civil Application No. 18 of 1990**, it was stated that “Parties asking for a stay” should satisfy the
20 following:

“(1) That substantial loss may result to the applicant unless the order is made.

(2) That the application has been made without unreasonable delay.

(3) That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.”



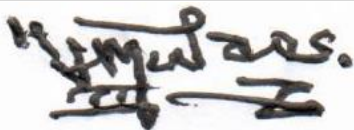
In *Kyambogo University Vs. Prof. Isiah OmoloNdiege, C.A.C.A No. 341 of 2013* Justice Kakuru observed that in an application for stay of execution the applicant must prove in addition to other grounds; (a) *That there is a serious and imminent threat of execution of the decree or order and (b) That refusal to grant the stay would*
5 *inflict greater hardship than it would avoid.*

(i) Substantial loss may result to the applicant unless the order is made:

Learned counsel for the applicant contended applicant was a court bailiff who
10 executed a lawful process of court. That judgment entered against him was in breach of the legal protection offered to officers of court while executing court process. That allowing the execution to proceed will cause loss to him

In **Tropical Commodities Suppliers Ltd 2 Others –Vs - International Credit**
15 **Bank Ltd (In Liquidation), Misc. Application No. 379 of 2003**, the term ‘substantial loss’ for purposes of stay of execution was described thus:
“Hence, the question needs to be asked as to what in law constitutes “substantial loss”. In my view, substantial loss need not be determined by a mathematical formula whose computation yields any particular amount. Indeed, Jowitt’s
20 *Dictionary of English Law (2’ Edn.) Vol. 2, p. 1713, carefully defines the analogous concept of “substantial damages” as: “damages which represent actual loss, whether great or small, as opposed to nominal damages.”*

Substantial loss is any loss or substantial inconvenience that a party may be
25 subjected to. In this case there is a notice to show cause why the applicant should



not be committed to civil prison to recover a sum of Shs 17040,000/= per a copy of the notice to show cause attached to the motion as annexure D.

5 I consider that allowing execution to proceed for recovery or the applicant's committal to civil prison to recover a sum of Shs 17,040,000/= will cause substantial loss or inconvenience and hardship to the applicant and at the same time render the application for leave to appeal out of time nugatory and so the appeal.

(ii) Serious and imminent threat of execution of the decree or order:

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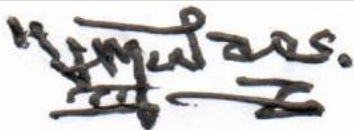
In this case, there is a notice to show cause why execution should not issue against the applicant by way of committal to civil provision to recover a sum of shs17.040.00/= as part of the sum decreed to the Respondent. I find that the threat of execution in the current suit is imminent and unless stayed, the respondent will go ahead and execute and have the applicant committed to Civil Prison. This ground is therefore proved.

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(iii) That the application has been made without unreasonable delay:

20 In this case, the Respondent extracted a notice to show cause why execution should not issue on 20th November 2023. The said notice was served on 29th November 2023 upon the applicant's former lawyers, M/s Kaahwa, Kafuuzi, Bwuruka & Co. Advocates. The Applicant was to appear in the lower court to show cause on 1st December 2023. (See annexure D). The applicant filed the current application for stay on 13th December 2023. The application was filed without reasonable delay

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within two weeks from the time the notice to show cause was effected upon his former lawyer.

(iv) That the applicant has given security for due performance of the
5 decree or order:

Order 43 rule 4 (3) (c) of the Civil Procedure rules makes it a requirement that a party who is desirous of securing a stay must be willing to deposit in court security for due performance of the decree.

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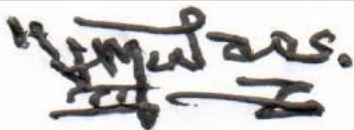
In **Shem Mpanga Mukasa & Anor Vs. Kizza Clessy Barya, Misc. Application No. 479 of 2021** the Hon. Lady Justice Nkonge Rugadya stated thus: *“The payment of security for costs is intended to operate as a shield against the filing of frivolous and vexatious appeals which may never succeed yet have an effect in escalating trial costs.”*
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In **Misc. Application No. 105 of 2020, Kisaalu Joseph & 10 others Vs. Nakintu May & Anor**, the Hon. Lady Justice Victoria Nakintu Nkwanga Katamba added thus: *“The condition requiring an applicant to deposit security for due performance is established under Order 43 Rule 4 (3(c)). Security for due performance has been interpreted to mean the entire decretal sum and it is intended to protect the judgment creditor in the event that the appeal is unsuccessful”*. The Learned Judge further stated that: *“Courts though have been reluctant to order security for due performance of the decree. Rather Courts have been keen to order security for Costs (see Tropical Commodities Supplies Ltd and*
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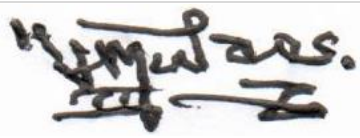


others v. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 and DFCU Bank Ltd v. Dr. Ann Persis Nakate Lussejere, C. A Civil Appeal No.29 of 2003), because the requirement and insistence on a practice that mandates security for the entire decretal amount is likely to stifle appeals.” Security for costs or due performance of the decree operates as an insurance cover that is meant to indemnify the judgment debtor in the event the appeal fails without recourse to vigorous processes of recovering such costs.

In **Amon Bazira Vs. Maurice Pater Kagimu, Land Division Misc. Application No. 1138 of 2016**, the Hon. Justice Henry I. Kawesa stated as follows: *“It has been trite that due performance of the decree can only be secured by the provision of security for costs.* This position was not altered in anyway by the Supreme Court decision of **Lawrence Musiitwa Kyazze versus Eunice Busingye SCA No.18/1990.**

The requirement to deposit security for cost should not be used as a punishment to the Applicant or used as a mechanism to frustrate his appeal by ordering security for costs which the applicant may not be able to pay. Court must make an independent assessment of the facts and the parties before it prior to ordering for security for costs. (See: **The New Vision Publishing Corporation & 2 others Vs. Peter Kaggwa, HCMA 127 of 2006**).

I find that this is a proper case to order the applicant to pay security for due performance of the decree.



This application succeeds with the following orders:

1. That an order doth issue staying the execution of the decrees and orders in Kyenjojo Civil Suit No. 028 of 2022, Mugisa Robert – versus – Akukizibwe Isaiah pending the determination of Misc. Application No. 098 of 2023 or the appeal in the event Misc. Application No. 098 of 2023 is granted by court.
2. The stay is granted on condition that the applicant deposits in court a sum of Shs 8,500,000/- as security for due performance of the decree within two months from the date of this ruling and failure whereof execution shall issue against him.
3. That the costs of this Application shall abide the outcome of the appeal in the Court of Appeal.

It is so ordered.



Vincent Wagona
High Court Judge
FORT-PORTAL

DATE: 27/03/2024

