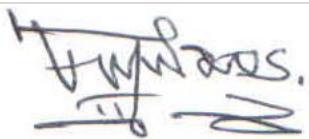


2. That through his lawyers Kesiime & Co. Advocates, on 4th July 2023, he filed and served the Respondent with Civil Appeal No. 26 of 2023 against the decision of the deputy registrar. The hearing of the appeal happened on 18th October 2023 and its pending ruling.
3. That he was surprised when on the 17th of November 2023, his lawyer was served with a notice to show cause why execution should not issue even after the appeal against the decision of the Deputy Registrar had taken place.
4. That the pending appeal seeks to set aside the decision of the Deputy Registrar and will be rendered nugatory if a stay of execution is not granted. That the application was presented without inordinate delay and has high chances of success. That he will suffer substantial loss if the execution taken place prior to the determination of his appeal.

The application was served upon the Respondent per the affidavit of service on record deposed by Tamale Dominic Wasswa, a process server attached to the chambers of M/s Kesiime & Co. Advocates. Mr. Wasswa detailed the manner in which service was done and attached a return of service which was duly stamped / acknowledged by the Respondent's Lawyers. The Respondent did not oppose the application and he did not offer an explanation as to why he was unable to file the reply within the required statutory time. I am satisfied that service was proper and thus I shall consider this application exparte.

Representation and Hearing:

M/s Kesiime & Co. Advocates appeared for the applicant and filed written submissions which I have duly considered herein.



Issue:

Whether this is a proper application for grant of an order of stay of execution of the decree in Election Petition No. 10 of 2021 pending the determination of Civil Appeal No. 26 of 2023.

Consideration by Court:

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

Stay by High Court.

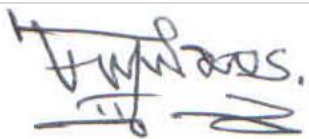
4 (1) An appeal to the High Court shall not operate as a stay of proceedings under a decree or order appealed from except so far as the High Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the High Court may for sufficient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

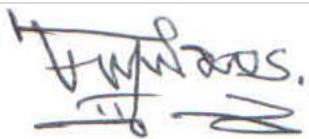
(3) *That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.”*

The Supreme Court in *Dr. Ahmed Muhammed Kisule Vs. Greenland Bank (in Liquidation), Supreme Court Civil Application No. 7 of 2010*, stated that there must be proof of lodgment of an appeal in the appellate court. In the case of the Supreme Court, the applicant should have lodged a notice of appeal in the Court of Appeal.

In *Kyambogo University Vs. Prof. Isiah Omolo Ndiege, C.A.C.A No. 341 of 2013* Justice Kakuru observed that in an application for stay 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 inflict greater hardship than it would avoid.*

I will be guided by the above principles in determining this application.

(i) **Proof of lodgment of an appeal:**



This application arises from an appeal against the taxation award by the Deputy Registrar. The applicant attached a copy of the notice of motion where he appealed against the decision of the deputy Registrar as a taxing officer. He went ahead to stated that the said application was heard and pending ruling. This was not contested by the Respondent. I therefore find that the applicant proved this requirement.

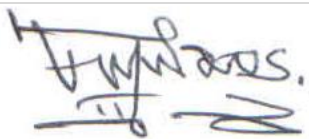
(ii) Substantial loss may result to the applicant unless the order is made:

In Tropical Commodities *Suppliers Ltd 2 Others –Vs - International Credit 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 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.”

It is deponed by the applicant that there is a notice to show cause why execution should not issue. That in the event a stay is not granted, the Respondent shall proceed to execute and recover the sum in the taxed bill which is objected to by the applicant. That he will suffer loss and prejudice if the Respondent is allowed to proceed with execution pending the determination of the pending taxation appeal.

I have glanced at the taxation file and established that there is indeed a notice to show cause why execution should not issue and a warrant issued by the Deputy Registrar. The applicant has indeed been arrested and later released by the registrar since there is a pending appeal against his taxation decision and the application for

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stay of execution. Therefore if a stay is not granted, the applicant shall suffer loss as he will be forced to pay a sum which he disputes. Therefore this ground is proved to the required standard.

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

The applicant in this case was arrested and later released by the registrar on account of the pending appeal. Therefore the risk of execution and recovery of the sum indicated in the decree is imminent. This ground is therefore proved.

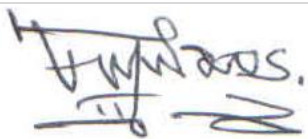
(iv) That the application has been made without unreasonable delay:

The applicant filed the application for stay of execution immediately he was served with a notice to show cause per the affidavit of service and the annexures thereto. This ground is therefore proved.

(v) That the applicant has given security for due performance of the 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. 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.”*

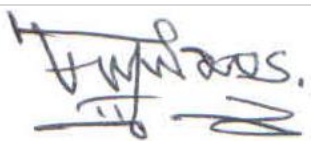
In *Misc. Application No. 105 of 2020, Kisaalu Joseph & 10 others Vs. Nakintu May & Anor*, the Hon. Lady Justice Victoria Nakintu Nkwanga Katamba added thus: *“The condition requiring an applicant to deposit security for due*



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 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 recovery. 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.*”

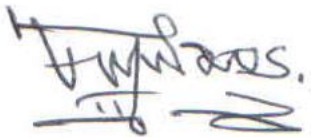
The requirement to deposit security for costs should not be used as a punishment to the Applicant or used as a mechanism to frustrate his appeal by ordering security for costs which the applicant may not be able to pay. Court must make an independent assessment of the facts and the parties before it prior to ordering for security for costs. (See: *The New Vision Publishing Corporation & 2 others Vs. Peter 20 Kaggwa, HCMA 127 of 2006.*

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In the present case, the applicant seeks a stay of execution of the taxation bill pending the determination of the taxation appeal where the applicant contests the amount awarded as costs. The appeal is merely pending ruling that will issue in due course; therefore no injustice or prejudice shall be suffered by the Respondent if a stay is granted without security for costs. I shall thus not order any security for costs. This application therefore succeeds with the following orders;

- 1. An order doth issue staying the execution of the decree in Election Petition No. 10 of 2021 pending the determination of Taxation Appeal No. 26 of 2023.**
- 2. The order for stay shall remain in force until the determination of Taxation Appeal No. 26 of 2023.**
- 3. No order is made as to costs.**

I so order.



Vincent Wagana

High Court Judge / Fort-Portal

Date: 08/04/2024

