

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(CIVIL DIVISION)**  
**MISCELLANEOUS APPLICATION NO. 673 OF 2021**  
**(ARISING FROM CIVIL SUIT NO. 104 OF 2017)**

1. TUGUMISIRIZE ABEL
2. NEW UGANDA SECURIKO LTD ::::::::::::::::::::::::::::::: APPLICANTS

**VERSUS**

1. ISAAC MAWANDA
2. NAKASALIRWE ROBINAH
3. KATO JOHNSON                    ::::::::::::::::::::::::::::::: RESPONDENTS
4. WASWA JOHNSON  
(SUING THROUGH THEIR NEXT FRIEND NAKITYO MARY)

**BEFORE: HON. JUSTICE SSEKAANA MUSA**

**RULING**

This application was brought under Article 126(2) (c) of the Constitution of the Republic of Uganda, Section 98 of the Civil Procedure Act Cap 71, Order 43 rule 4, Order 52 rules 1, 2, 3 and 9 of the Civil Procedure Rules SI 71-1 and Section 33 of the Judicature Act seeking

1. An order for stay of execution be issued until the hearing and disposal of the applicants' appeal in the Court of Appeal of Uganda;
2. Costs of the application.

The grounds in support of this application are set out the Notice of motion and in the affidavit of the applicant's Managing Director, Hajj Zubaili Mukwaya:

1. That the applicants commenced an Appeal in the Court of Appeal of Uganda against the judgment delivered in Civil Suit N0. 104 of 2017.
2. That the Notice of Appeal and letter requesting for proceedings for purposes of prosecuting the Appeal were duly filed and served on the respondents.
3. That the applicants' intended appeal has high chances of success as it raises serious grounds of appeal.
4. That this application has been filed without reasonable delay.
5. That it is in the interest of justice that this application be granted.

In opposition to this application, the respondents through their next friend Nakito Mary (Grand Mother of the respondents and the next friend) filed an affidavit in reply wherein they vehemently opposed the application, but briefly stated:

1. That the applicants' appeal lacks merit, is an outright abuse of Court process and is only intended to delay the course of justice.
2. They further contended that this application is full of falsehoods, is incompetent since the applicants did not pay security for due performance of the decree as they claimed, and also prayed that the same be dismissed with costs since it is an attempt by the applicants to frustrate the course of justice.

3. The respondents further prayed that in the event that Court is inclined to grant the application, applicants should be ordered to deposit security for due performance of the total award including the taxed costs totaling to Ugx 218,039,200/= (Two hundred eighteen million thirty nine thousand two hundred shillings only) with this court until the hearing and final determination of Civil Appeal N0. 306 of 2021.

Both parties filed written submissions and I have considered the respective submissions. The applicant was represented by M/s Mwesige Mugisha & Co. Advocates, whereas the respondents were represented by M/s Kaganzi & Co. Advocates.

*Whether the court should stay the execution of the decree in this suit? Or Whether or not the applicants have satisfied the necessary grounds for a grant of stay of execution.*

Counsel for the applicants cited Order 43 rule 4 in regard to the principle underlying an application for stay of execution. Counsel also cited Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act which empowers the High Court to make such orders as to meet the ends of justice. Counsel further relied on the case of *Kampala City Council Authority versus Mulangira Joseph M.A* No. 26/2016 in which the grounds to be proved in an application for stay of execution were laid down, but briefly are:

1. The applicant must prove likelihood of substantial loss if the Order is not issued,
2. The application must be made without reasonable delay, and
3. Provision of security for due performance of the Decree.

Counsel further submitted that security for due performance is a condition that Court has discretion to impose, if there is any reason shown that the appellant intends to abscond. In this respect, counsel cited the case of *Stanbic Bank Uganda v Atyaba Agencies SCCA N0.31 Of 2004* where Court noted that where a Notice of Appeal or an Application or an Appeal is pending before a Superior Court, it is right and proper that an interim order for stay of execution be granted in the interests of justice and to prevent the proceedings and any order therefrom, of the Appellate Court being rendered nugatory.

On the other hand, counsel for the respondents submitted that *Order 43 rule 4 of the CPR* provides that an appeal shall not operate as a stay of proceedings under a Decree, but also provides for stay of execution on grounds of sufficient cause.

Furthermore, on the grounds warranting grant of stay of execution, counsel cited *Order 43 r. 4(3) (c)* as well as the case of *Lawrence Musiitwa Kyazze v Eunice Busingye SCCA No. 18 OF 1990* in addition to the case of *Hon. Theodore Ssekikubo & Ors v The Attorney General & Ors Constitutional Application No.03 OF 2014*.

On the ground of substantial loss occurring if stay of execution is granted, counsel submitted that the deceased was killed negligently leaving children (respondents) who need shelter, healthcare and education and that anything concerning children should be handled with priority as stated under the Article 34 of Constitution of the Republic of Uganda, Section 3(1) of the Children's Act and Article 3 (1) of the United Nations Convention on Human Rights of the Children (1992).

On the ground of depositing security for performance of the Decree, counsel cited the case of *John Baptist Kawanga v Namyalo Kevina & Anor Misc. Application N0. 12 of 2017* where Hon. Justice Dr. Flavian Zeija (as he

then was) stated that the objective of the legal provision on security was intended to ensure that Courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. Counsel submitted that the appeal is frivolous and vexatious with no probability of success, the grounds of which are devoid of any merit.

It was further submitted that should Court be inclined to grant this application, the applicants should be ordered to pay security for due performance of the Decree or Order as may ultimately be binding on them of Ugx 218,039,200/= (Two Hundred Eighteen Million Thirty Nine Thousand Two Hundred Shillings) in this Court pending hearing of the appeal.

### **ANALYSIS**

Section 98 of the Civil Procedure Act gives the High Court powers to take decisions which are pertinent to the ends of justice. And an order for stay of execution is such one as was held in *Singh V Rundah Coffee Estates Ltd* [1996] EA. An applicant seeking stay of execution must meet the conditions set out in Order 43 rule 4(3) of the Civil Procedure Rules and those espoused in *Lawrence Musiitwa Kyazze V Eunice Businge*, SCCA No. 18 OF 1990, but more pronounced in the Supreme Court case of *Hon. Theodore Ssekikubo And Ors v The Attorney General And Ors Constitutional Application* No.03 OF 2014, and these include:

- The applicant must show that he lodged a notice of appeal;
- That substantial loss may result to the applicant unless the stay of execution is granted;
- The application has been made without unreasonable delay;
- That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

I shall therefore consider if the applicants have complied with each of the requirements under Order 43 rule 4(3)

With regard to the first requirement which is to the effect that the applicant must have lodged a notice of appeal, I have clearly perused the pleadings of both the applicant and respondent on the court file. Taking a close look at the applicants' pleadings, attached to the Notice of Motion is Annexure D which is a Memorandum of Appeal dated 20<sup>th</sup> September 2021, showing the applicants' dissatisfaction with the Judgment dated 30<sup>th</sup> June 2021 and grounds for the appeal as spelt out thereunder. There is also a copy of the Notice of Appeal on the said record. Thus, it is clear that the applicants indeed lodged an appeal therefore satisfying this requirement.

In consideration of the second requirement of whether the applicant will suffer substantial loss if stay of execution is not granted, in *Tropical Commodities Supplies Ltd & 2 Others v International Credit Bank Ltd (In Liquidation)* [2004] 2 EA 331, Ogoola J. held that the phrase substantial loss doesn't represent any particular amount or size, it cannot be qualified by any particular mathematical formulae. It refers to any loss great or small, of real worth or value as distinguished from a loss that is merely nominal. It is my considered view that the Court ought to consider substantial loss claimed by an applicant in light of the particular facts raised by each case.

Counsel for the applicants submitted that under paragraph 3 of the applicants' affidavit in support of the application, the judgment passed against the applicants raises both legal and factual issues for example payment of 180,000,000/= (one hundred eighty million shillings) to the respondents in general damages and an interest of 10% per annum from the date of judgment until payment in full. More so, that the applicants

were greatly affected financially by the COVID 19 pandemic, thus payment of the said decretal sum would cause them financial loss.

On the other hand, counsel for the respondent submitted that the minors whose father was negligently killed by the applicants need shelter, education, and healthcare, and that anything concerning minors should be handled with priority and in their best interest. To this, counsel cited Article 34 of the Constitution, Section 3(1) of the Children Act and Article 3(1) of the United Nations Convention on Human Rights of the Children (1992). Counsel thus submitted that violation of the above provisions of the law will occasion loss to the respondents who are minors.

I am inclined to agree with counsel for the respondents on this requirement. Whereas the applicants claim that they were affected by the COVID 19 pandemic, it is also true that the economy in general was affected by the COVID 19 pandemic. I am not persuaded by the applicants' arguments on this requirement since they have not furnished any proof to their claim of incurring substantial loss, and I believe they merely intend to deny the respondents fruits of the judgment. On the other hand, counsel for the respondent submitted that the respondents are minors who solely depended on their father for basic needs. Taking into consideration that their father is deceased on account of the applicants, they are at a loss since they have no one to cater for their basic needs. I therefore find that the applicants have not demonstrated the substantial loss likely to be suffered. This ground accordingly fails.

Thirdly, the requirement of the application being made without undue delay; in *Sewankambo Dickson vs Ziwa Abby HCMA No. 178 OF 2005*, Court cited *Ujagar Singh Vs Runda Coffee Estates Ltd* where Sir Clement De Lestang, Ag. V.P stated:

*“..... it is only fair that an intended appellant who has filed a notice of appeal should be able to apply for a stay of execution to the Court which is going to hear the appeal as soon as possible and not have to wait until he has lodged his appeal to do so. Owing to the long delay in obtaining the proceedings of the High Court it may be months before he could lodge his appeal. In the meantime, the execution of the decision of the Court below could cause him irreparable loss,” at Page 266.*

In this case, judgment in Civil Suit No. 104 of 2017 was delivered on 30<sup>th</sup> June 2021, notice of appeal was filed on Court record on the 6<sup>th</sup> of July 2021. I note therefore that the application was filed with no inordinate delay. However, in protestation of the same, the respondent stated under paragraph 5 of the affidavit in reply that the applicants’ appeal lacks merit, is an outright abuse of the Court process and is only intended to delay the course of justice. It is my considered opinion that the grounds of appeal as laid down in the applicants’ memorandum of appeal are lacking and designed to frustrate the respondents’ efforts to enjoy the fruits of judgment. That being said, I am persuaded that the provisions of Order 43 rule 4 are mandatory and not merely directory. The position is grounded on the principle that the successful party should not without good reason be deprived of the fruits of a judgment in their favour.

The requirement for payment of security for due performance is to ensure that a losing party does not intentionally delay execution while hiding under unnecessary applications. The applicants in this case claim that they were financially hit by the COVID 19 pandemic lockdown and as such, may not be in position to pay security for performance of the decree in the event that Court is inclined to order that the same be deposited. I am therefore not convinced that the applicant will satisfy this requirement as is stated under Order 43 rule 4 of the CPR. This requirement therefore fails on the part of the applicant.

In resolution of the first issue therefore, the Supreme Court in *Musiitwa vs Eunice Busingye SCCA No. 18/1990* advised that a party seeking a stay should be prepared to meet the conditions set out in Order 43 rule 4(3). The applicants herein have not been able to satisfy two of the essential conditions to be granted a stay of execution. The grounds of this application are not sufficiently strong and have not been well substantiated to the level that would persuade me to deprive the respondents of the fruits of the judgment. This issue is therefore resolved in favour of the respondents.

This application fails and is dismissed with costs.

I so order.

**SSEKAANA MUSA**  
**JUDGE**  
**22<sup>nd</sup> August**