

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

MISC. APPLICATION. 927 OF 2021

(Arising from HCT-LD-CA-43-2020 & CIVIL SUIT NO.066 OF 2014)

NDAWULA SAMMUEL.....**APPLICANT/APPELLANT**

VERSUS

MUTABAZI JOSEPH.....**RESPONDENT**

BEFORE: HON. MR. JUSTICE TADEO ASIIMWE

RULING

This application was brought under 2(1), 2(2) & 42(1) of the judicature (court of appeal rules, I. 13-10, Section 98CPA & O.52 RULES 1 & 3 of the CPR.

The applicant is seeking for an order for stay of execution of the decree and orders arising from High court civil appeal No. 43 of 2022 be stayed pending hearing and determination of the intended appeal in the court of appeal. An order maintaining the status quo of land comprised in kyadondo block 265, plot 6535, Land at bunamwaya (the suit land) and costs of the application.

The application is supported by an affidavit sworn by Mr. NDAWULA SAMMUEL the applicant.

The grounds of the application as contained in the notice of motion and affidavit in support and briefly are that;

1. That Judgement in civil appeal no. 43 of 2020 was delivered on the 28th day of April, 2021 against the applicant and among the orders granted in favor of the respondents, the applicants were directed/ordered to pay costs both in the high court and lower court.

2. That being dissatisfied with the above said judgement, the applicant has appealed against the said judgement by filling a notice of appeal against the judgment in HCCA no. 43 of 2020 and has by letter dated 10th may, 2021, requested for the typed

record of proceedings and duly served the said notice of appeal and letter on the respondent's advocates.

3. That the appellant/plaintiff filed civil suit no. 0066 of 2014 seeking specific performance to the effect that the respondent transfers to him property comprised in Busiro Block 265 plot 6535 at Bunamwaya (the suit property pursuant to the contract between the parties dated 17th September, 2012 and the said suit having been dismissed and the appeal against the said dismissal having failed, the suit property is in danger of being alienated or transferred to third parties and if that happens, the intended appeal will be rendered nugatory..

4. That the appeal has high chances or likelihood or probability of success.

5. That the respondent has extracted the decree in the main suit as the first step of commencement of execution.

6. That the applicant will suffer a substantial and an irreparable injury if this application is not granted.

7. That the applicant undertakes to deposit in to court 10% of the taxed costs as security for due performance of the decree in satisfaction of a condition for the grant of the order of stay of execution.

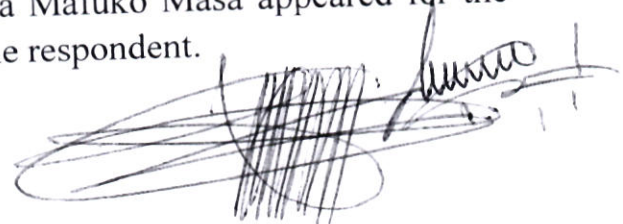
8. That the orders sought are necessary to achieve the ends of justice.

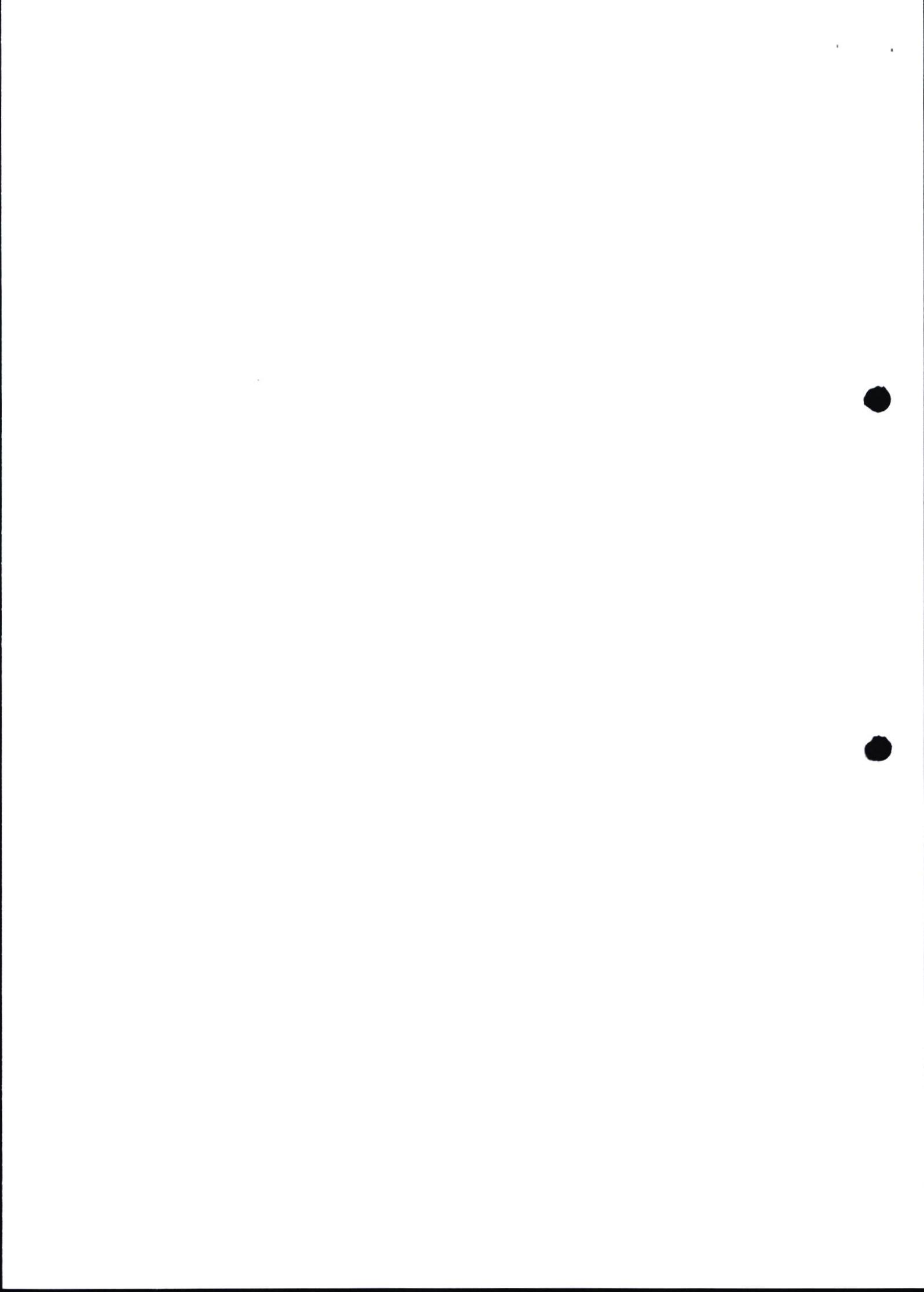
9. That the balance of convenience is in favor of the applicant in the circumstances.

10. That it is just and equitable that orders sought be granted.

On the other hand, an affidavit in reply was deposed by Mr. MUTABAZI JOSEPH the respondent. The gist of his response is that the application is marred by falsehoods that there is no threat of execution against the applicant hence the application is premature, misconceived, frivolous, vexatious, and bad in law, a total abuse of court process. That the applicant has not paid security for due performance. That the application is brought in bad faith, wrong provisions of the law and that the same should be struck out.

At the hearing of this application, Counsel Yona Mafuko Masa appeared for the applicants while Counsel Ruyondo represented the respondent.

A large, dark, handwritten signature or scribble, possibly representing the respondent's counsel, is located at the bottom right of the page. It consists of several overlapping, dense lines of ink.



Court directed both parties to file written submissions which they did and I shall consider them in this ruling.

In his submissions the applicant's counsel argued that there is a pending appeal which is meritorious and is likely to succeed because it presents issues and serious grievances or errors of law which merit consideration by the appellate court. He further submitted that there is an eminent threat of execution since the decree has been extracted and that it poses a threat to irreparable loss to the applicant. That he undertakes to furnish 10 percent of security for costs since the bill of costs has not been taxed.

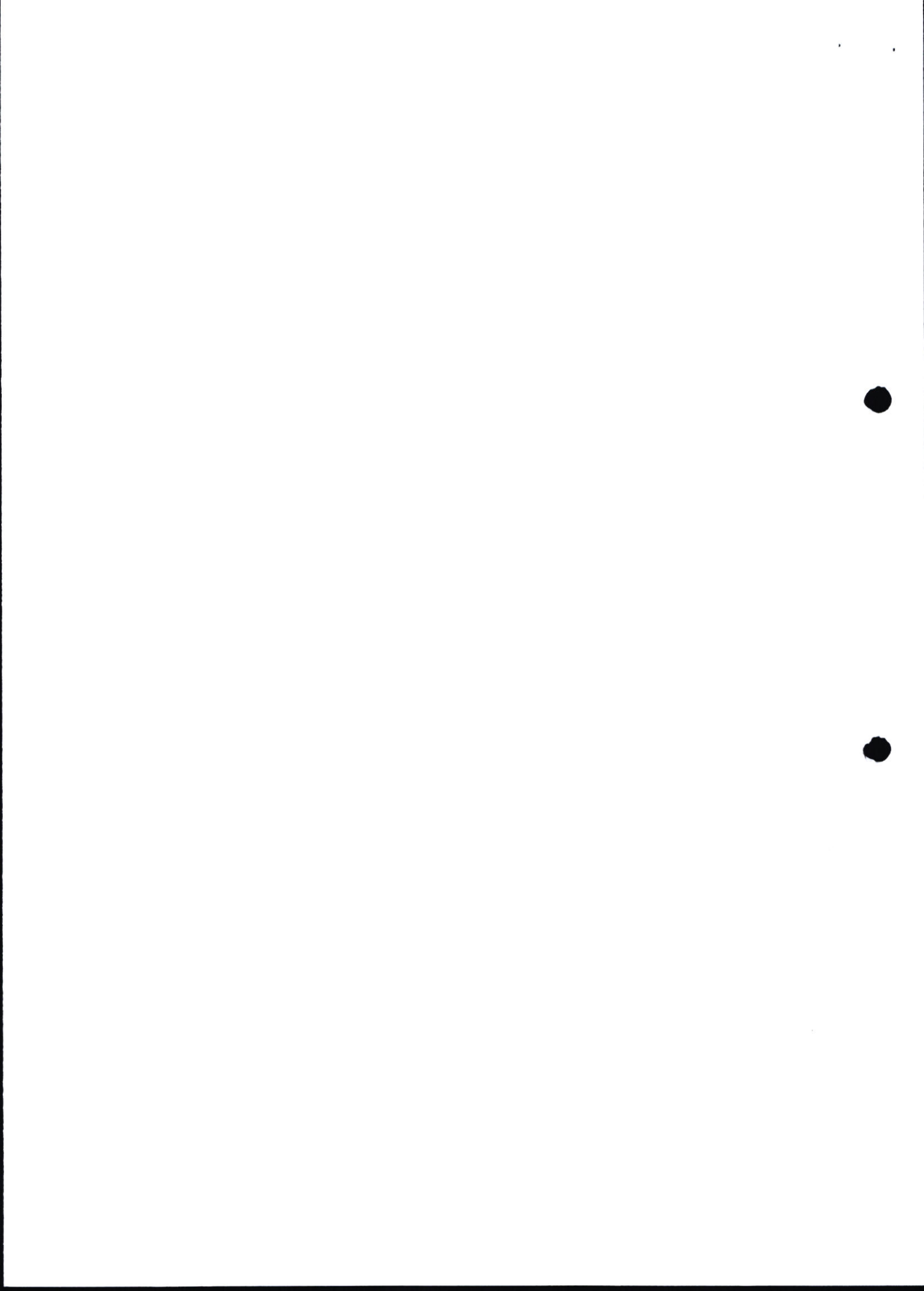
In response, counsel for the respondent submitted that this application was brought in bad faith and intends to frustrate the respondent from realizing the fruits of his judgements in this case. That the intended appeal has no likelihood of success as the applicant has not taken any steps to prosecute the same for 18 months now. That there is no eminent threat of execution as there is no application for execution. Further that the applicant has not shown to court how he will suffer any loss whether substantial or irreparable. He finally submitted that the application lacks merits, is vexatious and a waste of court's time and should be dismissed with costs.

RESSOLUTION

I have considered the grounds of this application, the supporting affidavit and its attachments. I have also considered the arguments for counsel for the applicant in support of the application

For court to grant applications of this nature, the applicant must meet conditions set under Order 43 r 4 (3) of the CPR which has been interpreted in a number of decisions to include the following principles;

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.
5. That there is a serious or eminent threat of a decree or order and that if the application is not granted the appeal will be rendered nugatory.



6. That the application and appeal are not frivolous and has a likely hood of success.

7. That refusal would inflict more hardship than it would avoid.

I shall therefore go ahead and assess whether the application meets the conditions as set down in the law.

From the pleadings on record, this court is satisfied that there is a notice of appeal pending filing the memorandum of appeal in the court of appeal which in my view does not constitute an appeal. However, the said notice commences the appeal process as evidenced by the request for proceedings. Therefore the first and 3rd conditions are satisfied since this application has been filed with out unreasonable delay.

I shall now proceed to deal **with whether substantial loss may result to the applicant unless the stay of execution is granted.**

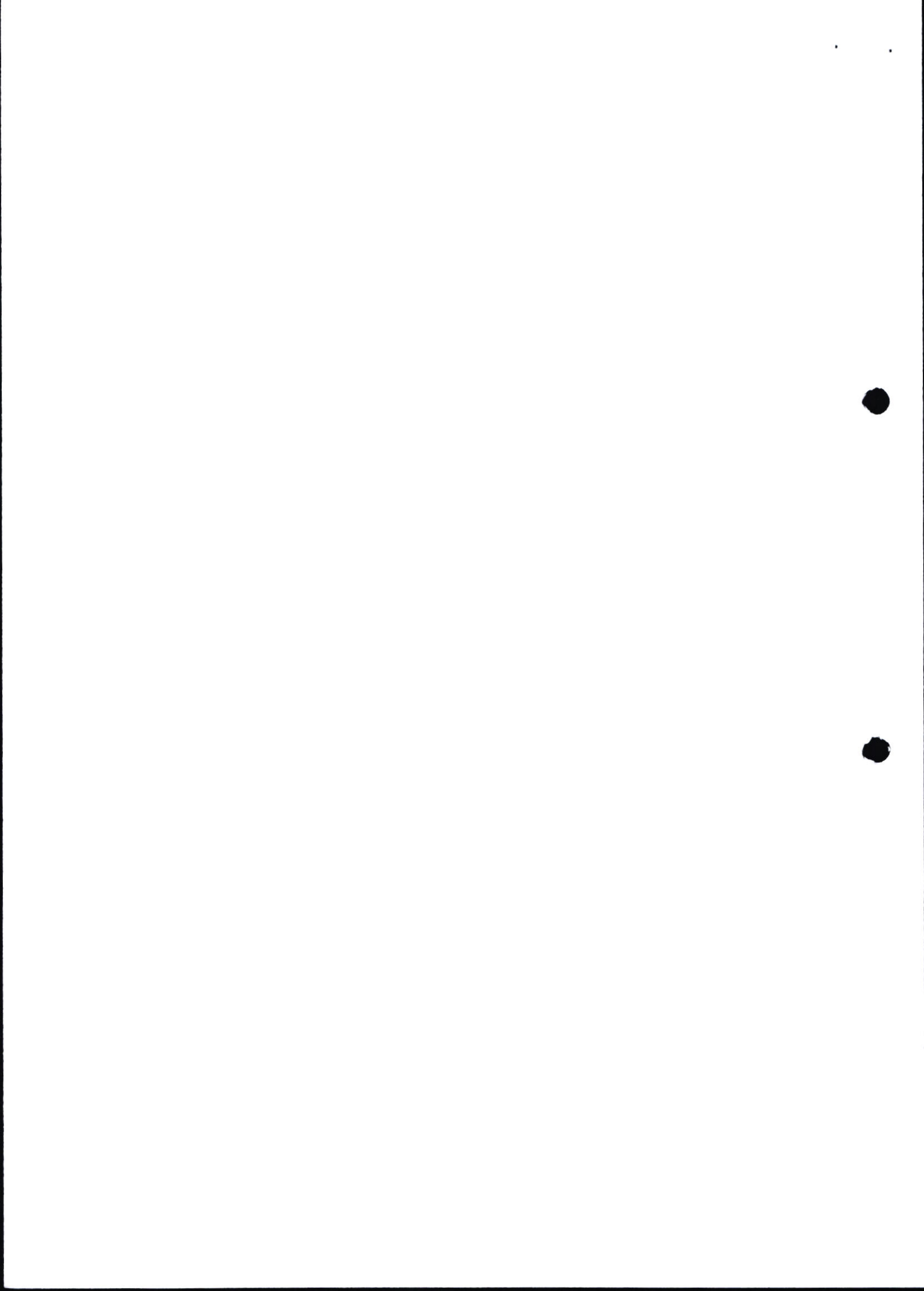
The applicant submitted that the subject matter of the appeal being registered land, if this court does not grant the orders sought any transfer that may subsequently be made by the respondent will extinguish the applicant's interest since any third party would take the land bonafide without notice of the applicant's appeal and that that the appeal will be rendered nugatory. It is not enough to just state that the appeal will be rendered nugatory without laying a basis for such statements.

Court in the **case of Pan African Insurance Company (U) Ltd vs International Air Transport Association High Court Misc. Application No. 86 of 2006** where the applicant merely stated that if the decree is not stayed the applicant will suffer *substantial loss and stated:*

"The deponent should have gone a step further to lay the basis upon which court can make a finding that the applicant will suffer substantial loss as alleged. The applicant should go beyond the vague and general assertion of substantial loss in the event a stay order is not granted."

The Learned Judge also cited the case of **Banshidar vs Pribku Dayal Air 41 1954** **where it was stated:**

"It is not merely enough to repeat the words of the code and state that substantial loss will result, the kind of loss must be given and the conscience of court must be satisfied that such loss will really ensure"



In the same case it was further observed:

"The words 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case...substantial loss must mean something in addition to all different from that."

I am fully persuaded by that observation and I do find that in the present case the applicant has not demonstrated any loss that he will suffer. The applicant only argued that if this application is not granted since transfers on the title can be possible without a stay. This definitely in my view would not amount to substantial loss. Deprivation of property is a natural consequence of determined matters. The applicant has not demonstrated anything additional to show possible irreparable loss that would not be atoned to by damages. In the circumstances, the applicant has not satisfied the 2nd condition for grant of application of this nature.

2. Whether the appeal is not frivolous and has a likely hood of success.

The applicant submitted that he has filed a notice of appeal and an intended memorandum of appeal. That in effect the appeal has high chances of success of success.

I am aware that pendency of an appeal. However its high chance of success cannot be ascertained in the absence of a memorandum of appeal even if found to exist cannot be used to bar a successful party from exercising his or her right to enforce a decree in his favor. **See: National Pharmacy Ltd vs Kampala City Council (1979) HCB 132 and Uganda Revenue Authority vs Tembo Steels Ltd HCT Miscellaneous Application No. 521 of 2007.**

The above decisions are premised on possibility of loss capable of being atoned to by damages as found in this case.

Besides this being an application arising from a second appeal, this court cannot ascertain its likelihood of success.

Further I have noted that the notice of appeal and letter requesting for a typed record of proceedings were filed in May 2020. 18 months down the road, there are no correspondences on record to show that the appellant took on any other steps to prosecute the appeal. Besides the earlier appeal proceeded by written submissions



which I deem sufficient for the appellant to proceed with the appeal. Be that as it may, court's finding is that the applicant did not satisfy this condition as well.

Whether there is a serious or eminent threat of a decree or order and that if the application is not granted the appeal will be rendered nugatory.

The applicant in his affidavit in support of the notice of motion, that the respondent extracted a decree which is the only document required to free the suit land from any encumbrance and allow the respondent to transfer the suit land to any third party and make it out of reach for the applicant.

I am aware and agree that a decree is one of the documents used in the execution process. However execution in its self is commenced by an application for execution which is none existent in this matter.

Court would have expected to see evidence of an application for execution as proof of eminent threat of execution. However, none exists as already stated above and this court has no basis to believe that there is existence of an eminent threat. In effect, this requirement is not met by the applicant. Therefore, this application was filed prematurely. This application was not necessary at this stage and is speculative.

On the whole, the applicant has not satisfied this court on conditions for grant of an application for stay of execution. Therefore this application lacks merit and the same is hereby dismissed with costs against the applicant.

I so order.



TADEO ASIIMWE

JUDGE

18/10/2022

