

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT – 01 – CV – CS M.A 036 OF 2021**

WANDERA MICHEAL ::: APPLICANT

5

VERSUS

BAGUMA SAMALIE ::: RESPONDENT

**BEFORE: HON. JUSTICE VINCENT WAGONA
RULING**

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Introduction:

The applicant brought this application under Order 43 rule 4 and Order 52 rules 1 and 3 of the Civil Procedure Rules seeking orders:

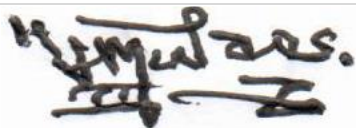
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- 1. That the execution of the judgment, decree and orders in HCT – 01 – CV – CS LD 0039 of 2013 be stayed HCT – 01 – CV – CS LD 0039 of 2013 be stayed the hearing of the intended appeal.**
- 2. That the costs of taking out the application be granted to the Applicant.**

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Grounds and evidence in support of the Application:

The grounds of the application are contained in the applicant’s affidavit and are:

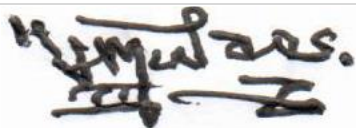
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1. That the applicant was a defendant in HCT-01 – CV – CS – LD 0029 of 2013 whose judgment was delivered on 7th December 2020 in favour of the plaintiff now the Respondent.
2. That the applicant being dissatisfied with the judgment and the orders therein lodged a notice of appeal in the Court of Appeal and asked for a typed record of proceedings.
3. That the Respondent extracted the decree and commenced taxation; the applicant was given up to 6 months to have complied thus posing a high threat of execution. That court has not availed him a copy of the record of proceedings yet he had paid for the same.
4. That the applicant has a good case on appeal which has a high likelihood of success.

Respondent’s Reply:

The Application was opposed by the Respondent through the affidavit in reply dated 15th September 2022 stating:

1. That the application does not meet the test for grant of stay of execution.
2. That the Respondent was the successful party in HCT – 01 – CV – CS – LD – 0029 of 2013 in which judgment was delivered on 10th December 2020.
3. That after judgment was delivered, the Applicant lodged a notice of appeal and a letter requesting for the record of proceedings but has

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never instituted the appeal and thus the applicant is deemed to have withdrawn the notice of appeal.

4. That the applicant is not interested in appealing the orders of this honorable court and is thus seeking a blanket stay of execution and the application was never served upon the Respondent.

5. That the Applicant shall not suffer any substantial loss if the application at hand is denied.

6. That the Applicant has not furnished security for costs and the application is designed to deny her the fruits of the judgment and thus should be dismissed with costs.

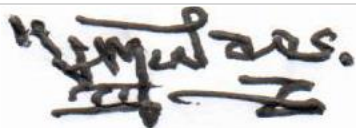
Representation:

The Applicant was represented by M/s Kaahwa, Kafuuzi, Bwiruka & Co. Advocates while the Respondent was represented by M/s Ahabwe James & Co. Advocates. The Applicant filed his written submissions while the Respondent did not.

Issues

1. Whether a stay of the decree in HCT – 01 – CV – LD – CS 0029 of 2013 should be granted.
2. Remedies available.

Submissions:

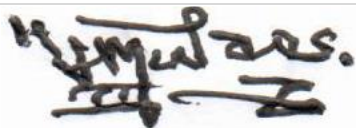
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Applicant's submissions

It was submitted for the applicant that the High Court has inherent jurisdiction to stay its orders and Counsel relied on the case of *Mugenyi & Co. Advocates Vs. National Insurance Corporation, SCC Appln No. 12 of 1984* to support his position. Counsel also invited court to the decision of *Francis Nansio Micah Vs. Nuwe Warakira SCCA Appn No. 9 of 1990* cited with approval in *The New Vision Publishing Corporation & 2 others Vs. Peter Kagwa (2007) KALR 391* where it was observed that in determining an application for stay of execution pending appeal, the high court should be guided by the conditions laid down in Order 43 rule 4(3) of the Civil Procedure Rules.

It was submitted that Order 43 rule 4(3) gives court the discretion to stay execution where sufficient cause has been shown. That sub-section 3 thereof requires that to exercise such discretion, court must be satisfied that (a) substantial loss may result to a party making the application if the stay is not granted, (b) that the application was made without inordinate delay and (c) that security for due performance of the decree was paid by the applicant.

It was contended that the Applicant has demonstrated through the affidavit in support of the application that he filed a notice of appeal against the decision of this court in Land Civil Suit No. 0029 of 2013 and asked for a typed and certified record of proceedings which have not been provided. That there is a threat of execution against the applicant since the Respondent extracted a

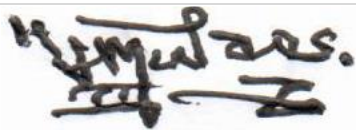
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decreed and carried out taxation of the bill. That the applicant has high chances on the appeal pending before the Court of Appeal and a notice to show cause was heard on 22nd March 2022 although execution was not issued against the Applicant. It was contended that if the Respondent is allowed to
5 continue with execution, the appeal by the applicant shall be rendered nugatory. Counsel also contended that the application was made without any inordinate delay.

On security for costs, Counsel cited the case of *Francis Nansio Micah Vs. Nuwe Warakira, SCC Appn No. 9 of 1990* where court observed that what is
10 required in an application for stay is security for due performance of the decree or order as may finally be binding upon the applicant in the event the appeal fails. That security need not be always the decretal sum.

It was submitted that the Applicant has children with the Respondent and the
15 dispute is over a house where the court decreed that the respondent has a share to the tune of UGX 45.000.000/=. It was contended that the house is sufficient security for due performance of the decree. Counsel submitted that the Applicant satisfied all the requirements for grant of a stay and the same
20 should be allowed.

CONSIDERATION BY COURT:

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Issue One: Whether a stay of the decree in HCT – 01 – CV – LD – CS 0029 of 2013 should be granted.

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

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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 execute on of a decree be stayed by reason only of an appeal having been preferred from the decree; but the High Court*

10 *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*

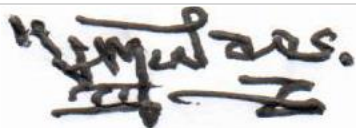
15 *being shown order the execution to be stayed.*

(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;*

20 (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.*



The above order is instructive to the effect that unless a party desirous of a stay of execution applies for the same, an appeal does not in itself operate as a stay of execution. The High Court may upon proof of sufficient cause stay of execution of the decree pending determination of the appeal to.

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It is also settled law that before a stay is granted, the applicant must satisfy the grounds established under Order 43 rule 3 of the Civil Procedure Rules.

In Lawrence *Musiitwa Kyazze - Vs - Eunice Busingye, Civil Application*
10 *No. 18of 1990*, the Supreme Court taking into account order 43 rule 3 observed 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
15 *or order as may ultimately be binding upon him.*

The Supreme Court further observed in *Dr. Ahmed Muhammed Kisule Vs. Greenland Bank (in Liquidation), Supreme Court Civil Application No. 7 of 2010*, that there must be proof of lodgment of an appeal in the appellate
20 court. In 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

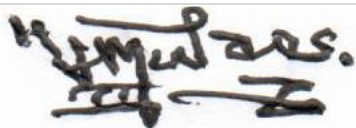
must prove in addition to other grounds: (a) *That there is a serious and imminent threat of execution of the decree or order and (b) That refusal to grant the stay would inflict greater hardship than it would avoid.*

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

(i) Proof of lodgment of an appeal:

10 The applicant herein attached a notice of appeal lodged in this court on the 11th of December 2020 as proof of lodgment of an appeal and the same was filed on 18th December 2020 and endorsed by the Assistant Registrar on 11th January 2021 and even requested for a typed record of proceedings.

15 Rule 76 (1) of the Court of Appeal Rules is to the effect that any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the High Court. Rule 76 (2) is to the effect that every notice under sub-rule (1) of this rule shall, subject to rules 83 and 95 of these Rules, be lodged within fourteen days after the date of the decision against which it is desired to appeal. In *Attorney General of the*
20 *Republic of Uganda versus The East African Law Society & Another EACA Application No.1 of 2013*, cited with approval in *Equity Bank Uganda Ltd versus Nicholas Were M.A No.604 of 2013* it was held that: ‘A notice of appeal is a sufficient expression of an intention to file an appeal and that

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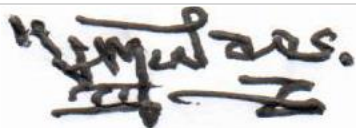
such an action is sufficient to found the basis for grant of orders of stay in appropriate cases’.

In this case there is a notice of an appeal lodged by the applicant in this court
5 on 18th December 2020 and endorsed by the Assistant Registrar on 11th
January 2021. The notice was lodged within the 14 days provided for under
rule 76 (1) of the Civil Procedure Rules. This is my view is sufficient proof
that there is an appeal competently lodged by the applicant against the
decision of this court in the Court of Appeal. Therefore, this ground is
10 satisfied by the applicant.

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

15 **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:

20 *“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*



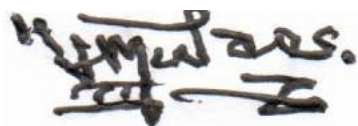
concept of “substantial damages” as: “damages which represent actual loss, whether great or small, as opposed to nominal damages.”

The applicant contended that the decree by court was self-executing in that the applicant had to comply within 6 months’ failure whereof execution had to commence. That there is a bill of costs which was taxed and a notice to show caused issued by the registrar on 25th May 2021. That if execution is allowed, the applicant appeal shall be rendered nugatory.

I have perused the judgment of His Lordship Elizabeth Jane Alividza dated 7th December 2020 where she entered judgment in favour of the Respondent for the sum of UGX 45,000,000/- being the Respondent’s share to be paid on a payment schedule of 6-8 months and that after the 8 months, the sum was to accrue a commercial interest rate and costs of the suit. The Respondent commenced execution and the same was temporarily put on hold by the Assistant Registrar by an order dated 22nd March 2022 pending the determination of this Application.

There is thus to the court’s satisfaction, an imminent threat of execution of the decree of court and unless stayed and the applicant is allowed to proceed with execution, the applicant’s appeal shall be rendered nugatory. I therefore find that this ground was proved.

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



It is not enough to merely allege that there is a threat of execution. The execution must be imminent, that is there must be a likelihood of having the order or decree executed. Where the orders sought to be stayed have little likelihood of being executed, it does not then constitute an imminent threat.

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The Respondent already commenced execution and the same was put on hold by the Assistant Registrar on 22nd March 2022. Unless execution is stayed, there is an imminent threat of execution since the same was on hold pending the determination of this application. This ground therefore succeeds.

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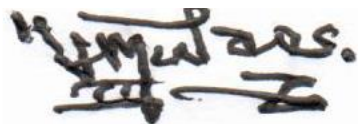
(iv) That the application has been made without unreasonable delay:

The Respondents filed the bill immediately execution was commenced and this fact was not disputed by the Respondent. Therefore this ground is proved.

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

20 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 of execution must be willing to deposit in court security for due performance of the decree. The main import of this requirement was stated by the Hon. Lady Justice Alexandra *Nkonge Rugadyain Shem Mpanga Mukasa & Anor Vs. Kizza Clessy Barya, Misc.*

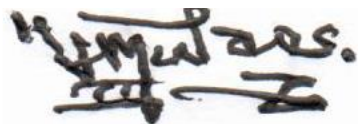


Application No. 479 of 2021 thus: “The payment of security for costs is intended to operate as a shield against the filing of frivolous and vexatious appeals which may never succeed yet have an effect in escalating trial costs.”

5 The Hon. Lady Justice Victoria Nakintu Nkwanga Katamba in Misc. Application No. 105 of 2020, *Kisaalu Joseph & 10 others Vs. Nakintu May & Anor* 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
10 decretal sum and it is intended to protect the judgment creditor in the event that the appeal is unsuccessful”

The Learned Lady Judge further stated that: “Courts though have been reluctant to order security for due performance of the decree. Rather Courts
15 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 NakateLussejere, 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
20 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



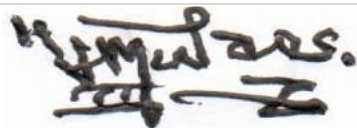
Amon Bazira Vs. Maurice Pater Kagimu, Land Division Misc. Application No. 1138 of 2016, the Hon. Justice Henry I. Kawesa stated as follows: “It has been trite that due performance of the decree can only be secured by the provision of security for costs.

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This position was not altered in anyway by the Supreme Court decision of *Lawrence Musiitwa Kyazze versus Eunice Busingye SCA No.18/1990*.

10 However, court may in deserving cases order a stay without payment of security for costs if it will frustrate the Applicant’s right to prosecute his or her appeal while at ease or where a party is indigent or a pauper as provided for in the Civil Procedure rules. 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
15 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*).

20 At the same time, I believe that a stay of execution should not be used to delay or deny a successful party the fruits of their judgment.

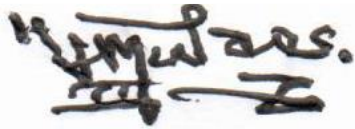


I have made regard to the history of this case and the judgment of this court and the order made therein. I find that this is a deserving case to order for security for due performance of the decree.

5 This application is granted with the following orders:

1. **That the execution of the decree in HCT – 01 – LD – CS – 0029 of 2013 is hereby stayed subject to the Applicant depositing in Court UGX 45,000,000/= as security for the due performance of the decree within 3 months from the date of delivery of this ruling, in**
10 **default of which, execution shall issue against him.**

It is so ordered.



15 Vincent Wagana
High Court Judge
FORT-PORTAL
27.03.2023

