

That there is an imminent threat of execution as the respondent has filed for execution and that based on the advice of his lawyers, it is the deponent's belief that there is prima facie merit in the intended appeal because the decision of this court in **Miscellaneous Application No.1874 of 2021** was founded on unauthenticated video evidence which was never availed to the applicants who had no opportunity to respond.

That the 2nd & 3rd applicants shall suffer substantial loss yet the respondent is not in the financial position to atone for the same even if damages were awarded and that if this application is not granted, the appeal shall be rendered nugatory

That this application ought to be granted as the applicants have demonstrated sufficient cause, and that the application has been brought without inordinate delay.

The respondent on his part filed an affidavit in reply opposing the application wherein he stated *inter alia* that the imminent threat of execution alleged by the applicants is not a ground for stay of execution, but for an interim order of stay pending the substantive application and that while it is true that there is an appeal pending in the Court of Appeal vide **Civil Appeal No.182 of 2023**, the same has no likelihood of success.

That the applicants lodged the appeal to the Court of Appeal without first seeking leave to do so and the same therefore is not properly before the Court of Appeal.

Furthermore, that the video evidence relied on in **Miscellaneous Application No.1874 of 2021** was filed in this court and duly served on the applicants alongside the submissions in rejoinder of the application but that court did not rely on the said video evidence to find that the applicants were in contempt of the orders of this court as there were other corroborative pieces of evidence that were presented to court.

That the applicants herein also failed to deposit the decretal sums as well as damages and costs and that the applicants' allegations that the respondent is not in the financial position to atone for any loss suffered by the applicants

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are not only false, but also speculative and are not backed by any evidence because the applicant is a business man and is able to pay **Ugx. 14,835,600/= (fourteen million eight hundred thirty-five thousand six hundred shillings).**

5 In addition, that they have not in any way demonstrated the substantial loss to be suffered in the event that execution is done and that this application is only meant to waste both court, and the respondent's time, and is an abuse of court process. Further, that since the appeal mentioned herein is properly before the Court of Appeal, there will be no effect if this application is denied.

10 The applicants also filed an affidavit in rejoinder to the averments set out in the respondent's affidavit in reply. It was deponed by Mr. Nahurira Haam, the 1st applicant herein.

In rejoinder to *paragraph 3 of the affidavit in reply*, the 1st applicant stated that the contents thereof are inconsequential in opposing the application
15 since the respondent acknowledges that there is a threat of execution which is the basis of the application.

That the contents of *paragraph 4* are an admission that the applicants have a pending appeal, while the contents of *paragraphs 8 & 9* confirm the grounds of appeal, which are the basis for execution to be stayed pending its disposal
20 by the court of appeal.

That the respondent has made no legitimate rebuttal to the applicant's averments and that his affidavit on a whole demonstrates merit in this application which is intended that the appeal is not rendered nugatory.

Representation:

25 The applicants are represented by **M/s Muhumuza Kateeba & Co. Advocates** while the respondent was represented by **M/s Kodili & Co. Advocates**. Both counsel filed submissions in support of their respective clients' cases as directed by this court.



Consideration by court:

This application was instituted under the provisions of **Order 22 Rule 23(1)** which provides that;

5 ***“The court to which a decree has been sent for execution shall, upon sufficient cause being shown stay the execution of the decree for a reasonable time to enable the judgment debtor to apply to court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution of the decree, for an order to stay the execution, or for***
10 ***any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued by the appellate court or if application for execution has been made to it.”***

15 The above provision seems to imply that the aforementioned order can only be relied on in instances where a decree has been transferred from one court to another, and the court to which the decree has been sent for execution is required to stay execution. ***(See: Miscellaneous Application No.836 of 2021, Nansubuga Aida Nalule & Another vs Sebuliba David.)***

20 This does not apply as the application is before the same court that passed the order/decreed being appealed against and sought to be stayed.

An applicant seeking stay of execution must meet the conditions set out ***in O. 43 r.4 (3) of the Civil Procedure Rules*** and those espoused in the case of ***Lawrence Musitwa Kyazze Vs Eunice Businge, Supreme Court Civil Application No 18 of 1990.***

25 They 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; that 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.* ***(See also; Hon Theodore Ssekikubo and***
30 ***Others Vs Attorney General and Ors Constitutional Application No 03 of 2014).***



Existence of a pending appeal:

The first requirement the applicants should prove to this court is that there is a pending appeal.

In the present case, it is not in dispute that the applicant has an appeal pending to wit; **Civil Appeal No.182 of 2023**, having filed a notice of appeal as well as a memorandum of appeal before the Court of Appeal, and that the same is yet to be fixed for hearing. **(Refer to Annexure D' of the affidavit in rejoinder, & Annexure A of the Affidavit in support of the application).**

Likelihood of substantial loss:

In regards to the 2nd requirement of the occurrence of substantial loss, counsel for the applicants in his submissions argued that the because the applicants were condemned to fines and costs totalling up to **Ug.x 14,835,000/- (Uganda shillings fourteen million eight hundred thirty-five thousand only)**, they would suffer substantial loss if execution ensued against the applicants.

Court in the case of **Tropical Commodities Supplies Ltd & 2 others vs International Credit Bank Ltd (In Liquidation) [2004] 2 EA 331** as cited by counsel for the applicant stated that substantial loss refers to any loss great or small, of real worth or value as distinguished from a loss that is merely nominal.

The **Court of Appeal in the case of P.K Sengendo vs. Busulwa Lawrence & Another CACA 207 of 2014** noted as follows:

"if what was sought to be executed was payment of a sum of money, generally courts will deny stay. Reason being that money can always be returned.

A deponent must go a step further to lay the basis upon which court can make a finding that the applicant will suffer substantial loss. It should go beyond the vague and general assertions of substantial loss in case the order of stay is refused. **(See Andrew Kisawuzi vs Dan Oundo, Misc. Application No. 467 of 2013).**



The applicants in this case merely stated that the respondent lacked the capacity to refund the monies if the appeal was successful which contention was not substantiated.

5 In the circumstances, it is the opinion of this court that the applicants did not meet the requirement that substantial loss would be occasioned.

Application made without unreasonable delay:

The applicants are also required to prove that the application was made without unreasonable delay. The ruling of this court against which the applicants seek to appeal was delivered on 13th June 2022.

10 The applicants then lodged a notice of appeal in this court on 21st June 2022, and the memorandum of appeal was lodged in the Court of Appeal on 10th May 2023.

The record also indicates that the respondent had initially filed **Taxation Application No.176 of 2022** on 21st June 2022 but the same was validated
15 18th August 2022.

There is no explanation as to why the application was not instituted immediately after the applicant had lodged the notice of appeal in this court on 22nd June 2022.

The applicants only filed the application a year later, and after the respondent
20 had filed **Miscellaneous Execution Miscellaneous Application No.0064 of 2023** for execution.

It is the opinion of this court that the applicants only filed this application merely as an afterthought, whose sole objective was to frustrate the respondent's execution proceedings.

25 **Security for costs:**

The applicants are also required to furnish security for due performance of the decree. Courts have however held that each case must be looked at according to its merits.



The requirement for payment of security for costs is to ensure that a losing party does not intentionally delay execution while hiding under unnecessary applications.

5 The Supreme Court *in Musiitwa vs. Eunice Busingye CA 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)**.

In the instant case, there is nothing in the pleadings, evidence or submissions indicating that the applicants are committed to furnish security for due performance or costs.

10 Accordingly, since not all the requirements have not been satisfied, I decline to grant the application.

Costs awarded to the respondent.

I so order.


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Alexandra Nkonge Rugadya

Judge

4th August, 2023.

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Delivered by e-mail

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