

ii) Costs of the application be provided for.

**Background:**

2. That the late Nakitto Sarah being one of the administrators of the Estate of the late Erenesti Kawesa filed Civil Suit No.105 of 2006 against the applicants for trespass on the land comprised in Kyadondo Block 215 Plot 939 at Kulambiro and the suit was determined in her favor. The applicants being dissatisfied with the decision filed a notice of appeal and memorandum of appeal against the decree and orders vide Civil Appeal No.279/2023. The applicants bring this application against the respondents being the surviving administrators of the estate of the late Erenesti Kawesi. The applicants are in possession of the suit land but the agents of the late Nakitto Sarah are trying to evict them from the suit land.

**Applicant's evidence:**

3. The application is supported by an affidavit sworn by **Nakiwala Safina** the first applicant which sets out the grounds of the application including the following;
  - i) That the applicants were defendants in Civil Suit No.105 of 2006 being sued by the late Nakiito Sarah for trespass on land comprised in Kyadondo Block 215 Plot 939 at Kulambiro.
  - ii) That the said suit was determined on the 7<sup>th</sup> of June 2023 and the late Nakitto Sarah passed on the 25<sup>th</sup> of July 2023.
  - iii) That the applicants being dissatisfied with the decision, filed a notice of appeal and a memorandum of appeal against the decree and orders made in Civil Suit No.105 of 2006 vide Civil appeal No.279 of 2023.
  - iv) That the applicants appeal has high chances of success since the appeal raises substantive grounds and that the applicants are in possession of the suit land.

- v) That the appeal will be rendered nugatory and of no consequence if the execution is not stayed.
- vi) That the application has been made without unreasonable delay.
- vii) That the applicants will suffer substantial loss if the application is not granted which loss will not be atoned by way of damages since there is threat of execution of the decree.

**Respondents evidence.**

4. The application is responded to by affidavits in reply sworn by ***Kawesa Sam*** and ***Ernest Kawesa*** the respondents in which they stated the following among others;

- i) That the respondents do not intend to object to the application and the affidavit in support.
- ii) That the respondents and the late Nakitto Sarah are the administrators of the Estate of the Late Kawesa Erinesti.
- iii) That the respondents learnt that the Late Nakitto Sarah sued the applicants under fraudulent transactions on the certificate of title to the suit land.
- iv) That the respondents well know that the suit land was sold to the late Alima Nakiwala.
- v) That the suit land belongs to the late Alima Nakiwala who is related to the applicants.
- vi) That its true there is an imminent threat of execution of the decree and orders from ***Civil Suit No.105/2006*** since the agents of the late Nakitto Sarah (the plaintiff in civil suit No.105/2006)) are doing all efforts to evict the applicants.
- vii) That the applicants are in possession of part of the suit land.
- viii) That its just and equitable that this application be granted.

**Representation.**

5. At the hearing held on the 18<sup>th</sup> of September 2023, the applicants were represented by Mrs.Nantongo Rehemah of M/s Kazungu-Kakooza Alinaitwe & Co. Advocates while the respondents appeared in person. The parties filed their affidavits and the applicants filed their submissions which I have considered in the determination of this application.

**Issue to be determined by the court**

6. The main issue for determination is whether or not the execution of the decree in *Civil Suit No.105/2006* against the applicants should be stayed till the determination of the applicant's appeal.

**Resolution of the issue.**

7. An application for stay of execution pending an appeal is designed to preserve the subject matter in dispute so that the right of the appellant who is exercising his or her undoubted rights of appeal are safeguarded and the appeal if successful is not rendered nugatory.
8. The fact that there is no specific provision regarding stay of execution of a decree from the high court where the appeal lies to the court of appeal, this is an area where court exercises its inherent powers as stipulated under Section 98 of the Civil Procedure Act Cap 71.
9. The same position is espoused in the decision of *Singh vs Runda Coffee Estates Limited (1966) EA*, where it was stated that the high court has inherent powers to take decisions which are pertinent to the ends of justice and order of execution is such one.
10. The conditions for court to consider in an application for stay of execution pending an appeal were pronounced in the celebrated decision of *Lawrence Musitwa Kyazze vs Eunice Busingye*

**S.C.C.A No.18 of 1990** and have been re-echoed in ***Theodore Sekikubo and Others vs The Attorney General and others Constitutional Application No.03 of 2014*** and these include;

- i) The applicant must show that he lodged a notice of appeal*
- ii) Substantial loss may result to the applicant unless the application for stay is granted*
- iii) That the application has been made without unreasonable delay*
- iv) That the applicant has given security for the due performance of the decree or order as may ultimately be binding upon them*

**11.** The court of appeal in ***Kyambogo University vs Prof.Isaiah Omolo Ndiege,CA No. 341of 2013*** furthered on the above conditions to include; ***that there is serious or eminent threat of execution of the decree or order, that the appeal is not frivolous and has a likelihood of success and that refusal to grant the stay would inflict more hardship than it would avoid.***

**Determination of court.**

**12.** This honorable court will now proceed to qualify the above conditions in the instant case as follows;

**13.** The Applicant must show that he lodged a notice of appeal; Under Paragraph 4 of the affidavit in support the applicant indicates how he filed a notice of appeal and its pending hearing, the same is attached on the application. The respondents do not dispute the existence of the appeal, this condition has been met.

**14.** As to whether the Applicant will suffer substantial loss if the application is not granted; the applicant stated under paragraph 14 of the affidavit in support that she and the other applicants will suffer substantial loss which will not be atoned by way of damages if the application is not granted and further in the submissions of the applicant, counsel indicated how the

applicants are in possession of part the suit land have developments on the same land which include crops where they derive their sustenance which are on the verge of being destroyed due to the execution of the decree leading to substantial loss.

15. The phrase substantial loss has been interpreted by courts of law drawing reference to the *Tropical Commodities Supplies Limited & 2 others vs International Credit Bank Limited (in liquidation) (2004)EA* where Justice Ogoola as he then was held that “*the phrase substantial loss doesn’t represent any particular amount or size, it cannot be qualified by any particular mathematical formula*”. It refers to any loss great or small of a real worth or value as distinguished from the loss that is merely nominal
16. In the instant case the applicants base their claim for substantial loss on the intended destruction of the crops by the agents of the Late Sarah Nakito (photographs of the crops are attached) in executing the decree where the applicants derive their sustenance and the applicants are in possession of the suit land. This honorable court did not receive any evidence to the contrary from the respondents and I find that the applicants have met the condition.
17. That the application has been made without unreasonable delay; Under paragraph 13 of the affidavit in support of the notice of motion its depicted how the application was made without unreasonable delay and in the submissions counsel for the applicants indicates that the judgement was delivered on the 7<sup>th</sup> of June 2023, the notice of appeal was filed on the 8<sup>th</sup> of June 2023 in this court and on the 12<sup>th</sup> of June in the court of appeal five days after losing the case in this court. The applicants filed their present application for stay of execution on the 30<sup>th</sup> of August 2023, two months and 23 days from the date of judgement. All these steps taken by the applicants to appeal and contest the execution of the decree testify to the great speed that they have brought this application. Since the respondents did not adduce any evidence contrary

to the same, I'm satisfied that the application for stay of execution was lodged without unreasonable delay.

18. As to whether the applicant has given security for due performance of the decree; security should be given for due performance of the decree however each case should be looked at according to its own merits, the requirement for payment of security for due performance of the decree is to ensure that the losing party does not intentionally delay execution while hiding under unnecessary applications.
19. The applicants did not mention of paying security for due performance of the decree in the affidavit in support of this application, this honorable court will rely on the decision of ***John Baptista Kawanga vs Namyalo Kevina & Anor M.A No.12 of 2017*** where it was held that the decision as to order for payment of security for the due performance of the decree must be made in consonance with the probability of success. In the instant case the applicant's counsel indicated in the submissions how the appeal stands high chances of success since it raises questions of law and fact that were not considered by the high court and the fact that the applicants are in possession of the contested land, the respondents did not adduce any evidence against the same. It's to the findings of this honorable court that the applicants need not furnish security for due performance of the decree.
20. As to whether the applicants appeal holds likelihood of success; In ***Gapco Uganda limited vs Kaweesa & Anor (MA No.259 of 2013) UGHCLD 47*** defined likely hood of success of a case to be one that, ***"the court is satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried"***
21. Under paragraph 6 of the affidavit in support of the application its stated that the appeal raises triable grounds which merit high chances of success as the trial judge failed to resolve critical


issues which were framed by court and ignored the expert evidence at trial. Counsel further submitted how the Late Nakito Sara's (Who was the Plaintiff in Civil Suit No.105 of 2006) counsel fraudulently transferred the title of the suit land to a third party and besides the agents of the Late Sarah Nakito are threatening to evict the applicants from the suit land. The respondents made no submissions on this ground, this honorable court finds that from the above the applicant has made a case that his appeal has a likelihood of success.

**22.** Having regard to the law and the evidence before me, I'm satisfied that the staying of execution of the decree from Civil Suit No.105/2006 pending the determination of Civil Appeal No.279/2023 is pertinent to the ends of justice.

**23.** Accordingly, it's my finding that this application has merit and its allowed with the following orders:

- i) The Execution of the decree from Civil suit No.105 of 2006 against the applicants be stayed pending the determination of the applicants appeal civil appeal No.279 of 2023.
- ii) The costs of the application will abide the outcome of the appeal in the court of appeal.

**I SO ORDER.**



**NALUZZE AISHA BATALA**

**JUDGE**

**25<sup>th</sup> /09/2023**