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**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(LAND DIVISION)**

**MISC APPLICATION NO. 3845 OF 2023**

**(ARISING FROM HCMA NO.3028 OF 2023)**

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**(ARISING OUT OF H.C.C.S NO. 597 OF 2021)**

**1. MASHATE FRANCIS**

**2. MASH INVESTMENTS LTD ::::::::::: APPLICANTS/ APPELLANTS**  
**VERSUS**

**DHALVAL DEVABG KUMAR BARROT ::::::::::: RESPONDENT**

15

**BEFORE HON. LADY JUSTICE IMMACULTE BUSINGYE**  
**BYARUHANGA**

**RULING**

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This application was brought by way of chamber summons under *Order 22 rules 23, 26 and 89 (1) of the Civil Procedure Rules, Section 33 of the Judicature Act Cap 13 and Section 98 Civil Procedure Act, Cap 71* seeking the following orders;

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1. An Order of stay of execution of the Orders and Ruling in Miscellaneous Application No. 3028 of 2023, ordering the respondents to pay a sum of Uganda shillings 400,000,000/= (Uganda Shillings Four Hundred Million only) within 60 days from 11/12/2023 doth issue restraining the respondents, their servants and / or agents from executing the orders arising from the Ruling of the High Court at Kampala (Land Division) pending the hearing and final disposal of Civil Appeal No. 617 of 2023.
2. The costs of and incidental to this application abide the result of the intended appeal.

5 This application is supported by an affidavit in support deposed by the 1<sup>st</sup> applicant **Francis Mashate**, the Managing Director of the 2<sup>nd</sup> applicant which was sworn on the 19<sup>th</sup> day of December 2023. The grounds of the application are laid out in the application and the affidavit in support of the application but briefly they are the following: -

10 a) The applicants have lodged a Notice of Appeal in the High Court of Uganda (Land Division) that was served on the respondent's lawyers against the Ruling and Orders arising from Miscellaneous Application No.3028 of 2023 intending to appeal against the said decision in the Court of Appeal of Uganda.

15 b) The applicants' lawyers have similarly written a letter dated 18<sup>th</sup> December 2023 to the High Court that was served on the respondent's lawyers requesting for a typed and certified true copy of the record of proceedings in Miscellaneous Application No. 3028 of 2023 in preparation of the Appeal to the Court of Appeal.

20 c) The applicants have further prepared a Memorandum of Appeal vide Civil Appeal No. 617 of 2023 ready to be filed in the Court of Appeal of Uganda in the Record of Appeal upon acquiring a true certified record of proceedings against the ruling and orders arising from Miscellaneous Application No. 3028 of 2023 intending to appeal against the said decision in the Court of Appeal.

25 d) The intended Appeal raises several legal issues mainly bordering on the legality of the nature of transactions between the applicants and Jiang Xiong the 1<sup>st</sup> defendant in the head suit (currently deceased) which transactions were loudly denounced in the applicants written submissions in court on 21<sup>st</sup> November 2023 which the trial judge overlooked and never considered or at  
30 all in arriving at her unfortunate decision that warrants serious judicial

5 consideration by court of Appeal which prima facie give the intended appeal high chances of success.

e) The applicants have also filed Civil Appeal No. 617 of 2023 pending in the Court of Appeal.

10 f) There is a serious threat of executing the High Court Ruling as the respondent is already attempting to take steps to evict the 1<sup>st</sup> applicant from his residential home comprised in LRV 3147 Folio 15 plot 2 Lugogo Channel Road before the determination of Civil Appeal No. 617 of 2023 in the Court of Appeal.

15 g) The applicants will suffer irreparable loss as the pending substantive application and appeal will be rendered nugatory if this application is not granted.

h) The balance of convenience in maintain the status quo tilts in favour of the applicants.

i) It is in the interests of justice that this Honourable Court grants this application for the ends of justice to me met.

20 According to paragraph 2 of the applicants' affidavit in support of the application, the ruling of 11<sup>th</sup> December 2023 was delivered against the second respondent who is nonexistent in this matter. There is only one respondent as per the Chamber Summons.

25 The respondent filed an affidavit in reply deposed by **Dhalval Devang Barot** wherein the contents of the application and the affidavit thereto were denied in total and subsequently the applicants filed an affidavit in rejoinder which I will consider in the process of resolving issues before this court.

### **Background to this application**

5 On 28<sup>th</sup> of June 2021 the applicants in this application filed Civil Suit No. 597 of 2021 in the High Court of Uganda Land Division through an ordinary plaint against four defendants who were; Jianxi Xiong (1<sup>st</sup> defendant), Lin Huefeng (2<sup>nd</sup> defendant), Dhaval Devang Kumar Barot (3<sup>rd</sup> defendant) and the Commissioner Land Registration (4<sup>th</sup> defendant). Paragraph six of the said plaint contained the  
10 cause of action and the plaintiffs who are the current applicants stated that their claim against the defendants jointly and severally was for a declaration that the transactions between the plaintiffs and 1<sup>st</sup> defendant was a mortgage disguised as a purchase, fraud, a declaration that the suit properties belong to the plaintiffs, a declaration that the 1<sup>st</sup> defendant's sale and transfer of the suit properties to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants  
15 was illegal and tainted with fraud or irregular and unlawful, cancellation of the purported transfers, a permanent injunction restraining the defendants from auctioning, selling or disposing off or in any way dealing with the suit properties, general damages, punitive damages and costs of the suit.

In the facts constituting the cause of action, the plaintiffs stated that in March 2019,  
20 they requested the 1<sup>st</sup> defendant to advance them a loan and they were to secure the loan using their property comprised in LRV 2882 Folio 3 plot 2 Saddler Lane Naguru, Kampala measuring approximately 0.098 hectares and the said land was valued at Uganda Shillings 2,000,000,000 (Uganda Shillings two billion). The plaintiffs further stated that the 1<sup>st</sup> defendant told them that since he was not a  
25 registered money lender the parties should enter into a sale agreement which was executed and the 1<sup>st</sup> defendant promised the plaintiffs to return their properties upon repayment of the loan which was supposed to be paid back in a period of six months after the execution of the sales agreement.

The plaintiffs further contended that on 23<sup>rd</sup> March the 1<sup>st</sup> defendant advance to the  
30 them a sum of Uganda Shillings 2,000,000,000 (Uganda shillings two billion) and a

5 sales agreement was executed in disguise for the loan and the plaintiffs signed transfer from in favour of the 1<sup>st</sup> defendant.

The plaintiffs further pleaded that on 29<sup>th</sup> May 2019, the 1<sup>st</sup> plaintiff paid the 1<sup>st</sup> defendant the 1<sup>st</sup> installment of Uganda Shillings 275,000,000 (Uganda Shillings Two Hundred Seventy-Five Million only) and the 1<sup>st</sup> defendant acknowledged receipt  
10 of the said sum through a deed of acknowledgment. That after that the plaintiffs tried to reach out to the 1<sup>st</sup> defendant for payment of the balance in vain and they were told by his wife that he had gone to China for medical treatment.

The plaintiffs further pleaded that they were later shocked to learn that the 1<sup>st</sup> defendant had on the 18<sup>th</sup> day of October 2019 transferred the suit property  
15 comprised in LRV 3147 Folio 2 Channel Road Lugogo into the names of the 2<sup>nd</sup> defendant who later sold the suit property to the 3<sup>rd</sup> defendant.

The 2<sup>nd</sup> defendant filed a written statement of defence pleading that the 1<sup>st</sup> plaintiff with the consent and participation of his spouse sold Land comprised in LRV 3147 Folio 15 plot 2 Lugogo Channel to the 1<sup>st</sup> defendant who later sold the same to the 2<sup>nd</sup>  
20 defendant. According to the 2<sup>nd</sup> defendant's written statement of defence the 2<sup>nd</sup> plaintiff had mortgaged the suit property to Equity and the 1<sup>st</sup> plaintiff needed money to clear the mortgage and that is how the suit property was purchased by the 1<sup>st</sup> defendant who later sold the same to the 2<sup>nd</sup> defendant and the 2<sup>nd</sup> defendant sold and transferred to the 3<sup>rd</sup> defendant.

25 In 2023, the 3<sup>rd</sup> defendant filed an application for security for costs in the main suit vide Miscellaneous Application No. 3028 of 2023 against the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/ respondents indicating that he was being put to defending a frivolous and vexatious suit since the properties in the main suit had been sold by the plaintiffs/ respondents through an agreement dated 23<sup>rd</sup> March 2019. The 3<sup>rd</sup> defendant/ applicant further

5 pleaded that it is the 1<sup>st</sup> plaintiff/respondent who convinced him to buy the suit property in order to offset his loans and counsel on both sides filed written submissions.

On 11<sup>th</sup> December 2023, I delivered a ruling and ordered the plaintiffs/ respondents to furnish security for costs to the tune of Uganda Shillings 400,000,000 (Uganda  
10 Shillings Four Hundred Million) and the same amount was to be deposited in court within a period of two months from the date of the ruling. The costs of the application were to abide the outcome of the main cause.

The plaintiffs/respondents being dissatisfied with my ruling filed Civil Appeal No. 617 of 2023 challenged my ruling in the Court of Appeal and equally filed  
15 Miscellaneous Application No. 3845 of 2023 seeking stay of execution pending determination of the appeal in the Court of Appeal.

### Representation

The applicants were represented by Counsel Wasani Sebil and Mubonde Nasser while the respondents were represented by Katende Serunjogi & Co Advocates.

20 It should be noted that it is only counsel for the applicants who filed written submissions and as such court shall consider the same. The main issue for resolution in the current application is *whether the applicants have met the conditions for grant of an order for stay of execution against the Ruling and Orders of this court vide M.A. 3028 of 2023?*

25 As a general principle of law, it is the duty of court to protect the interests of an unsuccessful litigant by making an order staying execution proceedings in a Judgment or Ruling being appealed against hence preventing the appeal from being rendered nugatory. In the case of ***Lawrence Musiitwa Kyazze v. Eunice Busingye S.C.C.A No. 18 of 1990***, it was held that, an application for stay of execution pending

5 appeal is designed to preserve the subject matter in dispute so that the rights of the appellant who is exercising his/ her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

According to the case of *Theodore Sekikubo and others v. Attorney General and Others SCMA 03 of 2014*, in an application for stay of execution pending appeal,  
10 the applicant must show that he has lodged a notice of appeal, the appeal may have a likelihood of success and the application has been made without unreasonable delay and if the say were not granted substantial loss may result to the applicant. (see *Lawrence Musiitwa Kyazze v. Eunice Businge, (supra)*).

Condition 1: A notice of appeal has been filed

15 The applicant has satisfied this requirement. According to annexure “B” to the applicants’ affidavit in support of the application, the applicants filed a Notice of Appeal in this court on the 18<sup>th</sup> day of December 2023. Therefore, this requirement has been satisfied.

Condition 2: The application has been made without unreasonable delay.

20 Applications of this nature ought to be made within a reasonable time. Whether delay is unreasonable depends on the peculiar facts of each case. In the instant case, the orders sought to be executed were made by this court on 11<sup>th</sup> December, 2023. The instant application for stay as well as the application for interim stay vide H.C.M.A No. 3846-2023 were filed on the 20<sup>th</sup> of December 2023.

25 Therefore, I find that the applicants filed this application without undue delay hence this requirement has equally been satisfied.

Condition 3: The appeal is not frivolous and has a likelihood of success.

5 In such an application, the court must be satisfied that the prospects of the appeal succeeding are not remote but there is a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. (*See: Formula Feeds Ltd & 3 others v. KCB Bank ltd HCMA No. 1647 of 2022*)

10 An appeal is considered frivolous if prima facie, the grounds intended to be raised are without any reasonable basis in law or equity and cannot be supported by a good faith argument. (*See: Formula Feeds Limited versus KCB Bank Ltd (supra)*). In the case of *Commissioner Customs Uganda Revenue Authority v. Kayimba Court of Appeal CA No.62 of 2014*, Justice Kakuru stated that on the likelihood of success, “the circumstances include like the subject matter of a case is in danger of being  
15 destroyed, sold or in any way disposed of”.

The respondent averred in the affidavit in reply that there is no eminent danger of evicting the applicants since the applicant has never owned or harbored any interest in Plot 2 Lugogo Channel Road. The respondent further averred that the applicants are misinterpreting the orders of court vide M.A. No. 3028 of 2023 because court  
20 merely ordered the applicants to pay security for costs to cover the respondent’s costs that he has incurred and or will incur in defending HCCS No. 597 of 2021 in the event judgment is issued in his favour, and as such, there is no threat of evicting the applicants from their residential home or attaching the same to release the said sum ordered as security for costs.

25 According to the memorandum of appeal attached to the affidavit in support of application (Annexure “D”), the grounds raised relate to legality of the nature of transaction between the applicants and the Jiang Xiong (the 1<sup>st</sup> defendant) in the main suit. It is important to note that the main suit has not been heard on its merits.



5 The legal issues relating to legality that the applicants claim were not considered in  
MA 3028 of 2023 are issues for determination in the main suit. MA 3028 of 2023  
dealt with security for costs under Order 26 of the Civil Procedure Rules. It had  
nothing to do with issues for determination in the main suit. These issues cannot be  
tried and determined by the Court of Appeal because the High Court has not had an  
10 opportunity to evaluate the evidence on record to determine the legality of the said  
land transactions. It is therefore not possible to determine where there is an arguable  
case on appeal. I find that the applicant has failed to prove this requirement. In  
addition, in MA 3028 of 2023 I never ordered the respondents to pay costs of the  
application in order to lead to taxation and execution. I stated that costs of the  
15 application shall be in the main cause. This condition has not been satisfied.

Condition 4: The appeal would be rendered nugatory

The Court of Appeal in *Kyambogo University v. Prof. Isaiah Omolo Ndiege Court  
of Appeal Miscellaneous Civil Application No. 341 of 2013* held that one of the  
conditions to consider in an application for stay of execution pending appeal is  
20 whether or not an appeal will be rendered nugatory and this depends on whether or  
not what is sought to be stayed if allowed to happen will be reversible, or if it is not  
reversible, whether damages will reasonably compensate the party aggrieved, or it  
is in the public interest to grant a stay. There must be proof that refusal to grant a  
stay would inflict more hardship than it would avoid.

25 The applicants have not shown that damages will not reasonably compensate the  
applicants in case they win the appeal or that it is in public interest to grant the stay.  
There is no proof to show that the appeal will be rendered nugatory. The applicants  
have failed to prove this requirement too.

5     Condition 5: There is serious or imminent threat of execution of the decree or order and if the application is not granted.

As earlier noted, this court did not make an order for eviction of the applicants but rather ordered for payment of security for costs. I agree with the respondent that the applicants misinterpreted the orders of this court in MA. 3028 of 2023.

10     In the instant case, the applicants seek for an order to stay execution on grounds that there is a serious threat of eviction from their residential home comprised in LRV 3147 Folio 15 plot 2 Lugogo Channel Road. The Order of this court in HCMA 3028 of 2023 relates to payment of security for costs to a tune of Uganda shillings 400,000,000 (Uganda Shillings four hundred million) in accordance with the  
15     provisions of Order 26 of the Civil Procedure Rules. At the end of the Ruling I ordered for security for costs to be paid and the costs of the application would abide the outcome of the main cause. At this stage, execution cannot arise since the taxation proceedings will be conducted at the end of the main suit. The effect of failure to furnish security for costs is clearly catered for under Order 26 rule 2 sub  
20     rules (1) & (2) of the Civil Procedure Rules which provides as follows:

*“If the security is not furnished within the time fixed, the court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw from the suit.*

25     *Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the court that he or she was prevented by any sufficient cause from furnishing security within the time allowed, the court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day  
30     for proceeding with the suit”.*

There was no mention of eviction of the applicants from their place of residence in my ruling. The order for security for costs is not a matter for execution before court

5 makes such a pronouncement. The effect of failure to furnish security for costs is a dismissal and not execution proceedings. The order made by this court is just an order for security for costs under Order 26 rule 1 of the Civil Procedure Rules.

Apart from claiming that the respondent is attempting to evict the 1<sup>st</sup> applicant from residential home, the applicants have not adduced any evidence to prove this claim.

10 Therefore, I find that this requirement has not been satisfied.

Ground 6: The applicant has given security for due performance of the decree or order.

In the **Formula Feeds Case**, Justice Mubiru held that in granting an order of stay of execution pending an appeal, the court has to balance the need to uphold the respondent's right to be protected from the risk that the appellant may not be able to satisfy the decree, with the appellant's right to access the courts. The current application is for stay of execution pending the outcome of the appeal. It should be noted that in applications of such a nature the provisions of Order 43 rule 4 (3) (c) have to be complied with where it is provided that: -

20 *“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 that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon home or her”.*

25 This is in respect of applications for stay of execution by the High Court pending appeal. Courts have held that an order for security for due performance must be made according to the circumstance of each particular case. (*See John Baptist Kawanga v. Namyalo Kevina & Anor HCMA No. 12 of 2017*)

5 According to the case of *John Baptist Kawanga v Namyalo .Kevina and Anor* (Supra), the objective of the legal provision on security was never intended to fetter the right of appeal rather it was intended to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals.

10 In the instant application, the applicants' affidavit in support of the application made no mention of the payment of security for the due performance of the order as may ultimately be binding upon them. This implies that the provisions of Order 43 rule 4 (3) (c) have not been complied with as a condition for stay of execution pending appeal.

15 In addition, the applicants' affidavit in support of the application refers to the amended plaint in paragraph 5 and the said amended plaint is attached to the affidavit in support of the application for stay as annexure "E". According to annexure "E" thereof, the amended plaint in paragraph 6 (1) states that the 1<sup>st</sup> applicant tried out to reach to the 1<sup>st</sup> defendant with intentions of making a payment of Uganda Shillings 500,000,000 (Uganda Shillings Five Hundred Million) in July 2019 but the 1<sup>st</sup> 20 defendant was nowhere to be seen.

The above paragraph indicates that the applicants are capable of paying security for costs ordered for by this court. The applicants have not proved to this court that they do not have sufficient means to cater for security for costs ordered for.

#### Condition: 6 Balance of Convenience

25 Since the main suit has not been heard on its merits, I am unable to dispose of the issues relating to the legality of land transactions on the suit land. Therefore, the balance of convenience tilts in favour of the respondent and not the applicants. This requirement has not been satisfied either.

5 Therefore, the applicants have failed to satisfy the essential requirements for the grant of an order for stay of execution pending app pending app pending app pending appeal and I order as follows;

- a. This application is dismissed.
- b. HCMA No. 3846 of 2023 for interim stay of execution is equally dismissed.
- 10 c. Costs shall be in the main cause.

I so order.

Ruling delivered at High Court, Land Division via ECCMIS this **15<sup>th</sup> day of February, 2024.**

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**Immaculate Busingye Byaruhanga**

**Judge**

**15-02-2024**

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