

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA
CIVIL APPLICATION NO. 1021 OF 2023
(ARISING FROM CIVIL APPEAL NO. 182 OF 2023)

- 5 1. NAHURIRA HAAM AKA KASHABA
 2. MAJ. KANDUHO GORGEIOUS :::::::::::::::::::: APPLICANTS
 3. KEMPAKA JAMES

VERSUS

10 LWANGA MIKE :::::::::::::::::::: RESPONDENT

RULING OF CATHERINE BAMUGEMEREIRE, JA
(SITTING AS A SINGLE JUSTICE)

Introduction

15 The applicants brought this application by way of notice of motion
under *section 34(1), 98 of the Civil Procedure Act, rule 6(1) (b) of*
the Judicature (Court of Appeal Rules) Directions, seeking orders
that;

- 20 1. Execution of the ruling and orders in High Court Misc.
Application *No.1874 of 2021* be stayed pending determination of
the applicants' appeal lodged before this court.
2. Costs of this application be provided for.

This application is based on the the affidavit deponded by **Nahurira Haam** , who's main grounds are that:

- 25 1. The applicants filed an application stay of execution in Misc.
Application No. 1874 of 2021 before the High Court it was
denied and as result may render his intended appeal before
this court nugatory.
2. That there is *prima facie* merit in the appeal as it raises serious
questions of law that need to be determined and as such, has

a high likelihood of success and that the applicants are not guilty of dilatory conduct in pursuing this application and that the balance of convenience lies with the applicants.

5 In reply the respondent contends that

1. The application is incompetent and an abuse of court process.
2. That Civil Appeal No. 182 of 2023 is improperly before this court.
3. The applicants are guilty of dilatory conduct since they could have filed this application about the time the respondent extracted an order in Misc. Application No. 1874 of 2021, filed the bill of costs and had the same taxed on 10th November 2022. or 10th November 2022.

Brief Background

The respondent (then applicant) filed Civil Application No. 1874 of 2021 seeking orders that the applicants (then respondents) are in breach of a court order in Civil Suit No. 578 of 2021. The ruling was delivered in favour of the respondent and court ordered the applicants to pay a fine of UGX 10,000,000/= for being in contempt of a court order, punitive damages of UGX 3,000,000/= and costs of the suit. The applicants being dissatisfied with the said ruling filed Civil Appeal No. 182 of 2023. The applicants also brought this application staying execution of the orders in Misc. Application No. 1874 of 2021.

Representation

At the hearing of this application, Mr Julius Muhumuza represented the applicants while Mssrs Kitimbo Associated Advocates represented the respondent.

- 5 The parties had filed written submissions and the court adopted the same in writing this ruling.

Submissions for the Applicants

Counsel cited **Hon. Theodore Ssekikubo & Ors v the Attorney General & Ors Constitutional Application No. 03 of 2014** and other
10 authorities for the established principles for grant of stay of execution.

On whether a notice of appeal was filed, counsel submitted that it is not in dispute that there is an appeal pending before this honourable court. Counsel submitted that Civil Appeal No. 182 of 2023 is the appeal pending in court thus the applicants have a valid appeal.

- 15 **Regarding the likelihood of success of the appeal**, counsel cited **American Cynamid Co. Ltd v Ethicon (1975) ALLER 504** which defined likelihood of success as the existence of serious questions to be tried and that the action is not frivolous and vexatious.

Counsel submitted that the applicants raise serious questions to be
20 determined in the appeal warranting the stay of execution. Counsel contended that the applicants' appeal is founded on a plea that they (the applicants) had no knowledge of the contempt of court order thus they are appealing against the trial Judge's evaluation of evidence

arriving at the decision that they are guilty of contempt of an order that they were never party to or aware of in the first place.

Regarding the principle of irreparable damage/ the appeal being rendered nugatory counsel submitted that the consent judgment and
5 decree being the subject of the contempt proceedings against the applicants was subsequently reviewed and set aside by the trial court giving rise to the respondent's subsequent suit against the registered proprietors of the suit land in civil suit No. 115 of 2023 before the High Court of Luweero. Counsel contended that the circumstances under
10 which a consent may be vitiated are very limited and include where such consent is procured by fraud. He argued that the setting aside of the consent judgement from which the contempt proceedings arose, ought to be a red flag to court in determining whether it would be just to allow execution against the applicants without considering their
15 appeal.

On the balance of convenience, counsel submitted that the risk to which the applicants are exposed is the tedious task and uncertainty of ever recovering monies from the respondent who is a complete stranger to them in the event that the applicants are successful with
20 the appeal.

Counsel submitted that this application has been brought without undue delay.

Submissions for the Respondent

Counsel argued that Civil Appeal No. 182 of 2023 is not properly before this court and is invalid within the meaning of **Order 44 rule 2 & 3** of the **Civil Procedure Rules** which enjoin whoever is desirous of
5 appealing an order of contempt of court to seek leave either from the High Court or Court of Appeal. Without prejudice to the preliminary objection, counsel submitted on the merits of the application.

On the principle of likelihood of success, counsel submitted that the grounds of appeal are frivolous and vexatious. He submitted that
10 there is no evidence furnished by the applicants indicating a serious question before the court. Counsel prayed that this court finds that the appeal lodged by the applicants has no likelihood of success.

On the principle of the applicant suffering substantial loss, counsel submitted that the applicants have not proved to this court by
15 any form of evidence in their affidavits that they will suffer substantial loss. Counsel contended that substantial loss is not ordinary loss to which every judgment debtor is necessarily subjected to when he or she loses a case. He cited **Cotton Marketing Board v Cogecot Cotton SA (1995-1999) 1 EA 312** to that effect.

20 Counsel submitted that the stay of execution envisaged in this case involves payment of monies thus no hardship or substantial loss is envisaged in executing the demand for money. Counsel implored this court to find that this ground has not been sufficiently proved.

On the principle that the application has been made without undue delay, counsel submitted this application is an afterthought and it ought to have been brought as early as the time of filing a Notice of appeal on 21st June 2022 or on 10th November 2023 when the decree and taxation of the respondent's bill was taxed. Counsel submitted that
5 the application was brought as an afterthought.

On the principle of security for due performance, counsel submitted that should the court be inclined to grant this application, it should order that a substantial sum of the decretal amount be
10 deposited by the applicants as security for due performance of the order in Misc. Application No. 1874 of 2021.

Rejoinder by the applicants

In response to the preliminary objection, counsel submitted that the provisions of **o. 44 rules 2 & 3 of the Civil Procedure Rules** cited by
15 the respondent are merely complimentary to **section 76 of the Civil Procedure Act**, which lists orders from which an appeal shall lie as of right. Counsel referred to **section 76 (1) (g)** which provides that an appeal shall lie from, "*an order under this act imposing a fine or directing the arrest or detention in prison of any person, except where*
20 *the arrest or detention is in execution of a decree.*"

Counsel contended that the order appealed from is an order arising from a contempt of court proceedings in which the applicants were condemned to fines and in the alternative, arrest and detention, thus the appeal is as of right.

Consideration of the application

I have carefully considered the application and attendant affidavits together with the submissions and authorities cited by both counsel and those not cited but are relevant to this application.

- 5 The jurisdiction of this Court to grant a stay of execution is set out in rule 6(2) (b) of the Rules of this court which provides that; "Subject to sub-rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may in any civil proceedings where a notice of
10 appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction or stay of proceedings as the court considers just.

In Dr. Ahmmed Muhammed Kisuule v Greenland Bank (in liquidation) S.C.C.A No. 7 of 2020, the Supreme Court articulated
15 the conditions for the grant of the order of stay of execution:

*"For an application in this court for stay of execution to succeed the applicant must first show subject to other facts in a given case that he/she has lodged a notice of appeal... the other facts which lodgment of the notice of appeal is subject vary from case
20 to case but include the fact that the applicant will suffer irreparable loss if a stay is not granted, that the appellants appeal has a high likelihood of success."*

I will summarize the principles that have been followed by courts in the grant of stay of execution.

1. The applicant must show that he/she lodged a notice of appeal.
2. That the appeal has a high likelihood of success.
3. That substantial loss may result to the applicant unless the stay is granted.
4. That the application has been brought without unreasonable delay.

I shall start by addressing the preliminary objection raised by counsel for the respondent that the appeal has no merit because the applicants didn't seek leave of court to appeal against the contempt of court order as required by the law.

Counsel for the applicant argued that the orders given by court were fines, which are appealable as of right under **section 76 (1) (g)**.

I have read the orders of court in Misc. Application No. 1874 of 2021. The applicants were condemned to pay a fine of 10,000,000/= for being in contempt of court and punitive damages of 3,000,000/=. In my view, the order given by court was a fine, which falls under **section 76 (1) (g) of the Civil Procedure Act**. The appeal lies as of right thus no need to seek leave of court. The preliminary objection is overruled.

I shall continue with the merits of the application.

As to whether a notice of appeal was lodged, the applicants deponed that the ruling in Misc. Application No. 1874 of 2021 was passed on 13th June 2022 and the Notice of appeal was filed on 21st June

2022. I find that there is a valid notice of appeal on record. This condition has been satisfied.

As to whether the applicant will suffer substantial loss if a stay is not granted.

5 In **Tropical Commodities Suppliers Ltd & Ors v International Credit Bank Ltd (in liquidation)** [2004] 2 EA 331 court held that:-

“Substantial loss refers to that loss that cannot be quantified by any particular monetary compensation, or that there is no exact mathematical formula to compute substantial loss.”

10 The onus is on the applicants to satisfy this Court that a refusal of stay would be unjust and inequitable.

It is not enough for any applicant for a stay of execution to just aver that they will suffer substantial loss if the application is not granted.

The applicant is expected to adduce cogent evidence to that effect. In

15 the absence of such evidence, court cannot stop the respondent from enjoying the fruits of their judgment or award.

It was submitted for the applicants that a party should not be permitted to execute on the basis that there would be no irreparable

20 damage where there is prima facie evidence that the foundation of such execution is tainted with fraud.

I have assessed the entire application and the affidavits and my concern is that there was a consent judgment entered into by the respondent and another party to which the applicants were not

25 parties. The same consent judgment affects the rights of applicants.

Counsel for the applicants submitted that the consent judgment and decree being the subject of the contempt proceedings against the applicants was subsequently reviewed and set aside by the trial court giving rise to the respondent's subsequent suit against the registered proprietors of the suit land in civil suit No. 115 of 2023 before the High Court of Luweero.

In my view, basing on the above evaluation, it would be unfair to condemn the applicants to contempt of court orders and execute against them. I find that the applicants would suffer substantial loss if the stay is not granted. This principle has also been satisfied by the applicants.

As to whether the substantive appeal has a likelihood of success, at this stage I would not pre-empt the consideration of matters necessary in deciding whether or not the appeal would succeed, neither is it incumbent on the applicants to demonstrate the possibility of success of the appeal but they have to prove that the appeal is not frivolous and vexatious. They have to show that their appeal raises serious questions of law and fact.

In **Stanley Kang'ethe Kinyanjui v Tonny Ketter and 5 Ors (2013) e KLR**, cited with approval in **Beeline Travel Care (u) Ltd & anor v Finance Trust Bank CACA No. 67 of 2023** the Court of Appeal of Kenya stated that;

5 *"An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. In considering an application brought under Rule 5(2) (b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal."*

10 In the present application, the applicants are challenging the consent order claiming it was procured by fraud and they were not party to the proceedings yet it affects their rights. The respondent on the other hand claimed that judgment in the consent is entered in rem thus the applicants had to oblige with the orders of court.

It is my humble view that such issues merit consideration of the appeal thus I find that the appeal has serious issues to be tried.

15 The applicants have therefore satisfied this condition.

As to whether the application was brought without unreasonable delay, counsel for the respondent submitted that this application is an afterthought and it ought to have been brought as early as the time of filing a Notice of appeal on 21st June 2022 or when the decree and
20 taxation of the respondent's bill was taxed.

I agree that the application was brought quite late, however, having found that the applicants have satisfied the rest of the conditions pertinent for the grant of stay of execution, I securely conclude that a compelling case has been presented for this court to exercise its

discretion and grant a stay of execution. Consequently, the following orders are hereby declared:

1. Execution of the ruling and orders in High Court Misc. Application *No.1874 of 2021* are stayed pending determination of Civil Appeal No. 182 of 2023.
2. Costs of this application shall abide the outcome of the appeal.

Dated at Kampala this *12th* day of *March* 2024

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CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL