

Preliminary Objection

At the hearing of the appeal, Pamba for the respondent raised a preliminary objection that the appeal from which this application arises is from a decision of a judicial review application in the High Court at Masindi, which was dismissed with costs to the respondent. Counsel contended that the applicant appealed but he did not lodge a stay of execution in Masindi but he instead chose to come straight to this court to lodge the stay.

It was counsel's contention that **order 22 rule 26 of the Civil Procedure Rules** states that applications for stay ought to be filed in the High Court first. Further, that rule 42 (1) of the Court of Appeal Rules stipulates that, "**whenever an application maybe made either in the court or in the High Court it shall be made first in the High Court.**" Counsel relied on **Adonia v Mutekanga 1970 EALR 429 at 432** where court held that; "court cannot evoke (read invoke) its inherent powers where a specific position of law exists that addresses a particular situation." He prayed that this application should be dismissed on that basis.

In reply to the preliminary objection, counsel for the applicant submitted that the general powers of this court under rule 32 are to the effect that this court has inherent powers to determine such cases. She further referred to **rule 2 (2) of the** Court of appeal rules to the effect that this court has inherent powers to grant applications of this kind. She prayed that this court exercises its power to allow this application to be heard on merit.

Submissions

Counsel cited **Dr. Ahmmed Muhammed Kisuule v Greenland Bank (in liquidation) S.C.C.A No. 7 of 2020**: which laid down the conditions for grant of stay of execution to include:

- 5 I. That the applicant must show that he lodged an appeal in accordance with the rules of this court.
- II. That substantial loss may occur unless the order is made.
- III. The application has been made without undue delay.

Counsel submitted that in paragraph 2 of the applicant's affidavit in support of the application, the applicant affirmed that he filed **Civil Appeal No. 0265 of 2022** which is pending before this court. Counsel added that the appeal has a likelihood of success because the trial Judge misapplied and/or misconstrued the facts when he ignored evidence showing that the applicant was being investigated under GEF
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15 001/2021 whereas not thereby arriving at a wrong decision. Counsel submitted that the appeal would be rendered nugatory if this application is not granted.

As to whether substantial loss may result, counsel submitted that in
20 paragraph 5 of the applicant's affidavit, the applicant asserted that his income is pegged to his job which is his only source of livelihood.

As to whether the application was made without undue delay, counsel submitted that notwithstanding the fact that the respondent has
25 already commenced the execution process, execution is a process and

not an event. Counsel implored this court to grant the order during the process of execution. Counsel added that no attachment has been made yet but the respondent has initiated the process of attachment. Counsel submitted that '*annexure C*' to the applicant's affidavit is
5 clear evidence that execution will commence on 23rd August 2023. Counsel urged that this court should stop the execution process pending the disposal of the appeal. Counsel submitted that the application was made without undue delay because the applicant learnt of the impending execution on the 27th June 2023 and he filed
10 this application immediately. Counsel invited this court to allow the application and grant an order for stay of execution.

Counsel for the respondent submitted that the conditions upon which a stay of execution can be granted were laid down in **John Baptist Kawanga v Namyalo Kevina & Anor Misc Application No. 12 of 2017** to include;

- a) That the applicant must show that he has lodged a notice of appeal.
- b) That substantial loss may result to the applicant unless the stay
20 of execution is granted.
- c) That the application has been brought without delay.
- d) That the applicant has given security for due performance of the decree.

Counsel submitted that it is not enough to state that substantial loss
25 will result but the kind of loss must be specified, details given and the

conscience of the court must be satisfied that such a loss will really
ensue. He referenced **Cotton Marketing Board v Cogecot Cotton
Co. SA (1995-1998) EA 312** to that effect. Counsel submitted that the
applicant has not demonstrated that he is likely to suffer substantial
5 loss. He added that the order for execution relates only to costs, which
is ordinary loss resulting from litigation. Counsel contended that the
applicant has not satisfied the condition that he is likely to suffer
substantial loss if the instant application is not granted.

10 Counsel contended that the applicant did not pay security for costs nor
did he express willingness to pay security for costs, which rendered
this application incompetent. Counsel further submitted that
pendency of an appeal is not a bar to a successful party's right to
enforce a decree obtained even by execution. Counsel contended that
15 an appeal is not sufficient ground for stay of execution.

It was counsel's submission that the applicant has failed to fulfill any of
the conditions for grant of stay thus the application ought to fail as it is
devoid of merit.

Consideration of court

20 I have carefully considered the Notice of Motion, the affidavits
together with the submissions and authorities cited by both counsel
and those not cited but are relevant to this application. I shall
commence by dispensing with the preliminary objection raised by
counsel for the respondent that the applicant didn't lodge a stay of
25 execution in Masindi High Court but he instead chose to come straight

to this court contrary to **order 22 rule 26 of the Civil Procedure Rules** and rule 42 (1) of the Court Of Appeal Rules stipulates that:-
whenever an application maybe made either in the court or in the High Court it shall be made first in the High Court.”

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I appreciate the import of **Rule 42 (1)** of the Rules of this court referenced above. **Rule 42 (2)** however provides that:

(2)**Notwithstanding sub-rule (1) of this rule, in any civil or criminal matter, the court may, on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any act as the justice of the case requires, or entertain an application under rule 6(2) (b) of these Rules, in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court.”**

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In **Olok Francis v Reverend William Pasha, CACA Application No. 059 of 2015** court propounded as follows:

“this court may entertain an application brought under Rule 6(2) of the Rules of this Court in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose had first been made to the High Court.”

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I subscribe to the above reasoning, notwithstanding the fact that the applicant did not file the application in the High Court; this court can still entertain an application for stay of execution.

5 On that note, I dismiss the preliminary objection raised by the respondent.

I now proceed to the merits of the application. A stay of execution is a discretionary order and as with all exercise of discretion, it must be done judiciously and judicially. By virtue of **rule 6 (2) (b)** of the Court of Appeal rules, this court has jurisdiction to grant or deny an order for
10 stay of execution, and such grant may be made unconditionally or upon conditions imposed with the judicial discretion of the Court. **Rule 6 (2) (b)** 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
15 execution, but the court may in any civil proceedings where a notice of 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.**

Appellate Courts have laid down the principles to serve as beacons to
20 guide the courts in considering applications for stay of execution. In **Kyambogo University v Prof. Isaiah Omolo Ndiege CACA No. 341 of 2013**, this court laid down the conditions for the grant of the order of stay of execution to the effect that:

***"There is a serious or eminent threat of execution of
25 the decree or order and if the application is not***

granted, the appeal would be rendered nugatory, that refusal to grant the stay would inflict more hardship than it would avoid. That the application was made without unreasonable delay.”

5 Further, in **Hon. Ssekikubo & ors v Attorney General & ors Constitutional Application No. 03 of 2014**. The court stated these principles to include the following:-

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

On whether the applicant has lodged a notice of appeal, I note that an application for a stay of execution naturally underscores the presence
15 of a valid notice of appeal. In this application, the applicant in paragraph 2 of his affidavit in support of the application, stated that he filed Civil Appeal No. 0265 OF 2022 which is pending before this honorable court. The applicant attached his memorandum of appeal marked annexure A that I have looked at. The respondent did not
20 dispute this fact. I find that the first condition of lodgment of a notice of appeal has been satisfied.

Regarding the second consideration as to whether the applicant will suffer substantial loss if a stay is not granted:

In **Tropical Commodities Suppliers Ltd & Ors v International Credit Bank Ltd (in liquidation)** [2004] 2 EA 331 court the court pronounced itself on the question of what amounts to substantial loss as follows:

5 ***“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 applicant to satisfy this court that a refusal of a stay would be unjust and inequitable. He/she must show cogent reasons to deny the respondent enjoyment of his success at the Court below.

It is not enough for any applicant for a stay of execution to assert that they will suffer substantial loss if the application is not granted. The
15 applicant is expected to adduce cogent evidence to that effect. In the absence of such evidence, court cannot stop the respondent from enjoying the fruits of their judgment or award.

In the instant application, the applicant deponed in paragraph 5 of his affidavit that his livelihood hinges on his job, which is his only source
20 of income. In his submissions in rejoinder, counsel for the applicant submitted that the applicant has no other property that can be subjected to execution. Counsel added that the respondent is aiming for the applicant’s salary, which he uses for school dues and basic needs for a family of 20 people.

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In the present application, the applicant bases his claim of substantial loss on the notice to show cause why execution should not be issued. It is indicated therein that the parties should appear on 23rd August 2023 to show cause why the attachment and sale of immovable property should not issue in execution of the court decree.

Notice to show cause against execution is provided for under **order 22 rule 19 of the Civil Procedure Rules** which briefly states that where an application for execution is made more than one year after the date of the decree, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring that person to show cause on the date fixed, why the decree should not be executed against him or her.

Order 22 rule 20 provides for the procedure after the issuance of the notice to the effect that where the person to whom notice is issued under rule 19 does not appear or does not show cause to the satisfaction of the court why the decree should not be executed, the court shall order the decree to be executed.

Sub rule 2 provides that where a person offers any objection to the execution of the decree, the court shall consider the objection and make such order as it thinks fit.

In the instant case, the application and counsel's submissions were filed in this court on 4th August 2023 before 23rd August 2023, the date given in the Notice to show cause why execution should not issue. In my view, the applicant should have first attended the High Court on 23rd August 2023 to give reasons why execution should not issue as was

stated in the notice to show cause why. The applicant had a chance to show reasons why execution should not issue at the High Court but he however chose to come to this court prematurely seeking a stay of execution. If the applicant had an objection it would have been considered and at that point, the applicant would apply for stay of execution if his objections were not considered. Nonetheless, this application was heard on 13th October 2023, after the stated date in the Notice to show cause why but the applicant never indicated whether the High Court actually issued the execution or not. This would help this court to determine whether the applicant's objections were considered or not. Further, it would also inform this court whether the execution took place. To this point, there is no evidence of whether the attachment is still in process or not. No evidence was adduced to this effect. I therefore find that this condition has not been met.

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As to whether the applicants' appeal has a prima facie case with a likelihood of success, the applicant attached a memorandum of appeal to his affidavit in support. I note that it is not incumbent on the applicant to demonstrate the possibility of success of the appeal at this stage but he has to prove that the appeal is not frivolous and vexatious. 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 decided that:

"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
5 that stage as doing so may embarrass the ultimate hearing of the main appeal.

As noted earlier above, the applicants attached their memorandum containing the grounds of appeal and having studied the same, I find
10 that the appeal raises some serious questions that need to be determined for instance; that due process was not followed when interdicting the applicant and that the trial judge erred when he held that the respondent could not be sued in his individual capacity while acting as a chief Administrative officer.

15 It is therefore my considered view that the applicant has established that he has a prima facie case pending determination before this Court. The third condition has also been fulfilled.

On the principle of security for due performance, the respondent
20 contended that the applicant has not pleaded to deposit security for due performance and have not indicated willingness to pay the security as required by law. The applicant indicated in his submissions in rejoinder that he furnished security of costs to this honorable court. There is, however, no evidence to support this allegation.

In *Margaret Kato and Anor v Nuulu Nalwoga*, SC Civil Misc. Application No. 11 of 2011, Court held that:

5 *“There is no requirement under our rules, for an applicant to make a deposit of security for due performance of a decree, before the Court can exercise its powers under rule 6(2) (b). The court is only required to exercise its discretion as it may consider just. The practice in the past of this Court to impose this condition in some cases is only a rule of practice based on case law.”*

10 The concept of security for due performance is intended to protect the judgment creditor in the event that the appeal is unsuccessful. Basing on the submissions of both counsel, I find it just that the applicant should deposit security for due performance. The applicant has indicated that he has furnished security of costs to this honorable
15 court; it is not known how much the applicant has deposited. The applicant should thus deposit 20% of the costs allowed for the respondent, as security for costs.

In the final result, although one condition on substantial loss was not
20 satisfied, I find that the applicant has satisfied the other conditions for the grant of stay of execution. The application is granted with the following orders:

1. An order for stay of execution of the decree and orders arising from HCMC No. 07 of 2022 is hereby granted pending the
25 hearing and final determination of Civil Appeal No.265 of 2022.

2. The costs of this application shall abide the outcome of the appeal.

3. The applicant is hereby ordered to take all steps necessary to ensure that his appeal is ready for hearing at the earliest time possible.

4. The applicant shall deposit 10% of the costs allowed for the respondent, as security for due performance of the decree.

I so order

Dated at Kampala this 2nd day of February 2024.



CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL