

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
COMMERCIAL DIVISION  
MISC. APPLICATION NO. 503 OF 2021  
(Arising from EMA No. 010 of 2021  
(Arising from Misc. Application No. 910 of 2019  
(Arising from Civil Suit No. 422 of 2019)**

**AUGUSTINE KASOZI** ..... **APPLICANT**

**VERSUS**

**ARVIND PATEL** ..... **RESPONDENT**

**BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO**

**RULING**

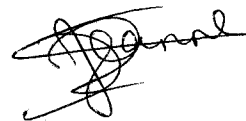
**Introduction:**

This application was brought by way of Notice of Motion under Section 98 of the Civil Procedure Act, Cap 71, and Section 33 of the Judicature Act, Cap 13 for the following orders:

- a) An order of stay of execution doth issue staying execution of the Ruling and orders in High Court Miscellaneous Application No. 910 of 2019 pending determination of the Applicant's appeal; and
- b) Costs of and incidental to this application be provided for.

**Background:**

The background of this application is that the Respondent filed a suit against the Applicant vide Civil Suit No. 422 of 2019 for recovery of Ugx. 947,000,000/= resulting from a loan facility. The Applicant then filed Misc. Application No. 910 of 2019 seeking dismissal of the main suit arguing that it is res-judicata, and that there was no effective service of summons. This court heard Misc. Application No. 910 of 2019 and ruled for the Respondent, and entered default judgment as well in the Respondent/Plaintiff's favour. Dissatisfied with the ruling, the Applicant then filed a Notice of Appeal in the Court of Appeal challenging the ruling.



The Applicant now seeks to stay execution of the ruling in Misc. Application No. 910 of 2019. He contends that he has lodged an appeal that raises triable issues. The Applicant states that he requested for a certified copy of the ruling and proceedings in Misc. Application No. 910 of 2019 in vain, and as such has not yet drafted the grounds of appeal. That the amounts involved are substantial and not allowing the appeal to first be heard will deny him a right of appeal and occasion substantial loss. The Applicant maintains that unless this application is granted, the appeal will be rendered nugatory, and that the Appeal has been brought without delay.

In reply, the Respondent's argument is that the appeal does not raise any serious triable issues. That the appeal is only intended to frustrate him and delay his enjoying the fruits of his judgment. That no memorandum of appeal has been filed or served upon his lawyers. The Respondent maintains that the application is incompetent and lacks merit and has not showed any sufficient grounds for warranting it. That however, should court grant the application, the Applicant should deposit security of costs.

**Representation:**

The Applicant was represented by Dr. James Akampumuza  
The Respondent was represented by Kagoro Roberts Friday

The Parties were directed to file written submissions, which the court considered, together with the pleadings, in deciding this matter.

**Issues:**

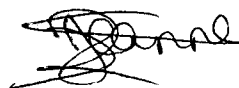
1. Whether the application discloses grounds for stay of execution.

**Resolution:**

**Issue: Whether the application discloses grounds for stay of execution.**

The court before granting an application for stay of execution has to put into consideration certain grounds. These were laid out by the Supreme Court in **Lawrence Musiitwa Kyazze -v- Eunice Busingye, Supreme Court Civil Application No. 18 of 1990** and the conditions are:

- a) that substantial loss may result to the party applying for stay of execution unless the order is made;
- b) that the application has been made without unreasonable delay; and
- c) that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.



This application clearly demonstrates that there is a threat of execution as shown through EMA 010 of 2021 wherein the Respondent seeks to execute Misc. Application No. 910 of 2019. The Respondent also does not contest the existence of an appeal. Therefore, the questions to determine is whether the conditions detailed in **Lawrence Musiitwa Kyazze -v- Eunice Busingye** above have been met.

On whether the Applicant may suffer substantial loss, he stated in paragraph 18 of his affidavit in support that:

“That the amounts involved are substantial and proceeding with the execution without allowing my appeal to first be heard will deny him [me] a right of appeal, occasion him [me] great substantial loss and occasion a miscarriage of justice if a stay of execution order is not made.”

It appears the substantial loss that the Applicant claims is loss of a large sum of money. Counsel for the Respondent submitted that loss of a substantial amount is not by itself conclusive proof for whether the loss would be substantial or not. For this he relied on **Transtrack Ltd -v- Damco Logistics (U) Ltd, Misc. Application No. 608 of 2012**. Counsel for the Applicant on the other hand prayed for this court to disregard the persuasive decision.

The question of what amounts to substantial loss was discussed by Justice James Ogoola in **Tropical Commodities Suppliers Ltd & 2 Others -v- International Credit Bank Ltd (In Liquidation), Misc. Application No. 379 of 2003**:

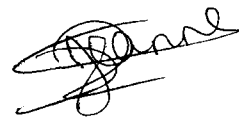
“Hence, the question needs to be asked as to what in law constitutes “substantial loss”. In my view, substantial loss need not be determined by a mathematical formula whose computation yields any particular amount. Indeed, *Jowitt’s Dictionary of English Law (2’ Edn.) Vol. 2, p.1713*, carefully defines the analogous concept of “substantial damages” as:

“damages which represent actual loss, whether great or small, as opposed to nominal damages.”

In similar vein, Black’s Law Dictionary (6th Edn.) at p.1428, defines the word “substantial” as, inter alia:

“of real worth and importance, not seeming or imaginary or illusive - *Seglem v Skelly Oil Co., 145 Kan. 216 P.2d 553, 554*. Something worthwhile as distinguished from something without value or merely nominal — *In Re Krause’s Estate, 173 Wash. 1, 21 P. 2d 268*.”

Substantial loss does not represent any particular amount or size. It cannot be quantified by any particular mathematical formula. Rather, it is



a qualitative concept. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal.” (Emphasis added.)

I agree that determination of whether a certain loss is substantial is qualitative and determined by the context of each case. As Justice Madrama put it in **Transtrack Ltd -v- Damco Logistics (U) Ltd (supra)**, “substantial loss in the context of the Applicant’s case must be loss that is not contemplated by the parties.”

The context of this case is that the Applicant’s application for dismissal of Civil Suit No. 422 of 2019 resulted in it being dismissed and default judgment entered. This means that his defense was never on the record. This, plus loss of money, is the loss that the Applicant stands to suffer. That is the loss of money in the absence of hearing of his defense. Contextually, that is a substantial loss and the justice of this case requires that it protects.

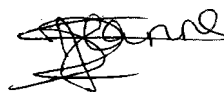
With regard to delay, the timelines of this case are as follows. The ruling in Misc. Application 910 of 2019 was delivered on 6/11/2020. The Applicant then filed a Notice of Appeal on 12/11/2020. A Notice to show cause why execution should not issue against the Applicant was served upon him on 18/03/2021. This application was filed on 8/04/2021. I find that there was no inordinate delay in lodging this application.

The next criteria is payment of security. It is settled through case law that the criteria for granting stay of execution is guided by the criteria laid out in Order 43 Rule 4(3) of the Civil Procedure Rules, SI 71-1. See **Lawrence Musiitwa Kyazze -v- Eunice Busingye**, and **Transtrack Ltd -v- Damco Logistics (U) Ltd (supra)**. Order 43 Rule 4(3) of the CPR states:

“(3) No order for stay of execution shall be made under subrule (1) or (2) of this rule unless the court making it is satisfied—

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
- (b) that the application has been made without unreasonable delay; and
- (c) that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.”

The nature of the security described in Order 43 Rule 4(3)(c) is not limited to security of costs and covers security for the entire decretal sum. See **Tropical Commodities Suppliers Ltd & 2 Others -v- International Credit Bank Ltd (In Liquidation) (supra)** at pages 7-8.



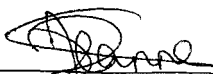
The Applicant has expressed a willingness to comply with whatever conditions this court may set for due performance of the order. See paragraph 21 of the Affidavit in support. The Respondent prayed in paragraph 14 of his affidavit in reply that should court grant the application, then the Applicant should be compelled to deposit security for the performance of the decree. This case has been the subject of numerous applications from both sides. To ensure commitment to the wholesome conclusion of the dispute, this court finds that there is need to pay security of some amount.

Accordingly, the court finds that there are grounds for grant of stay of execution and that therefore this application is allowed as herein below:

**Conclusion and Order:**

- a) The application for stay of execution is hereby granted on the conditions below.
- b) The Applicant is hereby ordered to pay security of Uganda Shillings Two Hundred Eighty-Four Million One Hundred Thousand Only (UGX. 284,100,000/=) (which represents 30% of the amount in issue) vide cash or a bank guarantee of the same amount from a reputable bank.
- c) This shall be deposited within a month from the date of delivery this Ruling.
- d) Costs shall abide the outcome of the appeal.

I so order.

  
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**Jeanne Rwakakooko**  
**JUDGE**  
**12/11/2021**

This Ruling was delivered on the 30th day of November, 2021