

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**MISCELLANEOUS APPLICATION NO. 1588 OF 2021**  
**(ARISING OUT OF CIVIL SUIT NO. 1053 OF 2001)**

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1. INTERNATIONAL PROJECTS LTD
2. EDWARD KIYENJE .....APPLICANTS

**VERSUS**

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**ZINUNULA COFFEE CO. LTD... ..RESPONDENT**

**Before: Lady Justice Alexandra Nkonge Rugadya**

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**RULING**

**Introduction:**

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The applicants seeks for stay of execution of its orders pending the decision of the Court of Appeal. This follows a ruling on preliminary objection raised by the applicant which ended up disposing of the main suit: High Court **Civil Suit No. 1053 of 2001**. The ruling was delivered on 28<sup>th</sup> August, 2021.

In the affidavit deposed by Mr. Edward Kiyenje, the 2<sup>nd</sup> applicant, it is averred that the applicants were dissatisfied with the decision of this court which they seek to challenge. By that decision, the applicants were ordered to make payment of the decretal sum in satisfaction of the decree of this court: **Civil Suit No. 1053 of 2001**, within 60 days from date of judgment.

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That the applicants will suffer irreparable damage; and the balance of convenience weighs in favour of the granting of the application since there was a threat of execution. Furthermore, that there was a likelihood of success and there has been no delay in filing this application.



It was also the applicants' argument that there were several legal issues that warrant judicial consideration by the appellate court and accordingly, the stay of execution ought to be granted pending the hearing and disposal of the appeal, and for costs to be provided for. That the appeal will be rendered nugatory if the order is denied.

5 **Reply by the respondent:**

The affidavit in reply was deposed by Mr. Sam Kizito, the Managing Director of the respondent company. He averred that the judgment was passed for **Ugx 181,677,000/=** on 1<sup>st</sup> February, 2001 for breach of contract but that no specific date of payment was ordered; and that the present application did not meet the criteria for the grant of the order for stay of execution.

10 That the applicant in the past participated in a process to deny liability to pay the claim by the respondent and that honoring court's directive will not render the applicant's intended appeal nugatory; and furthermore, no such evidence of substantial loss has been furnished to support his claim.

15 Counsel for the respondent therefore argued that the applicants can easily recover all monies paid to the respondent in the event of a successful appeal; and in any case they had not furnished any security for due performance of the decree or the awards in the judgment in **HCCS No. 1053 of 2001**.

**Representation:**

The applicants in this application were represented by **M/s Herutage Associated Advocates**.  
20 The respondent was represented by **M/s S & L Advocates**.

**Consideration of the issue:**

Under **order 43 r 4(3) of the CPR** the applicant must satisfy court that there is likelihood of substantial loss if order is not made; that the application was made without unreasonable delay; and that there is provision of security for due performance.

25 **a). Whether substantial loss will be incurred by the applicants if the application is denied:**

30 The applicants claimed that the decision has far reaching implications on the new directors of the 1<sup>st</sup> applicant of the 1<sup>st</sup> applicant who were neither party to the suit nor directors of the company by 1998. If the Court of Appeal were to reverse the decision when the respondent has already executed the decree, it will lead to an absurdity which ought to be avoided.

The applicants' argument was that they would suffer loss if execution is commenced in **Civil Suit No. 1053 of 2001** which had been dismissed in their favor. This court tried to remedy an





illegality by commencing execution of a judgment in **Civil Suit No. 193 of 1998** that was time barred and unenforceable. That since the respondent will not be prejudiced by the granting of the order for stay, it was only fair and equitable that it to be granted.

In reply, counsel for the respondent however cited the case of: **Asaba George vs Kasangaki Simon MA No. 2 of 2020**, where it was stated that the words *substantial loss* cannot mean the ordinary loss which every judgment debtor is subjected to when he loses his case and is deprived of property in consequence since that is an element which must occur in every case.

Such loss must mean something in addition to all different from that. That the applicants in this case are aware they owe the sum ordered albeit from a previous judgment they refused to respect or honor and conspired through illegalities to defeat.

**b). Whether brought without unreasonable delay:**

Regarding this requirement, the respondent argued that while a notice of appeal was lodged no appeal has yet been filed. That the respondent has its right to pursue proceedings relating to the realization of its judgment since no valid reason to stay the proceedings had been presented to court.

The applicants in rejoinder however noted that the respondent having admitted that the application was brought without delay, that alone was sufficient for the application for stay of execution to be granted.

**b) Whether security has been given by the applicants to such order:**

According to the respondent furnishing security for due performance of the decree was a mandatory requirement under **order 43 r 4 (3) of the CPR** before court can exercise its discretion to grant the application; and that noncompliance of a direction to deposit amount or part of it or furnish security therefor would result in the dismissal of the application for a stay.

In rejoinder however the argument was made that this was an order which can only be issued through discretion of court and that the respondent had not discharged the onus to prove that he was entitled to security for costs; that the court in **Civil Suit No. 1053 of 2001** did not award any costs to the parties and dismissed the said suit.

That the respondent seeks security for costs on decretal sum yet there are no taxed costs on the sums. That security is not a must where costs were not granted. They prayed court to therefore allow the application without the said condition.

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**c). Whether there was likelihood of success in the pending appeal..**

The applicants referred to the notice of appeal and the draft Memorandum of appeal which they intended to file, as soon as court availed them with a certified typed copy of record of proceedings and judgment.

- 5 That one of the grounds that demonstrate a likelihood of appeal is the fact that **Civil Suit No. 1053 of 2001** was dismissed in favour of the applicants and yet court directed the applicants to pay 50% of a decretal sum in **HCCS No. 193 of 1998**. That this court therefore erred in law and in fact when it upheld the PO and went ahead to enforce orders in **HCCS No. 193 of 1998** which were unenforceable in law and time barred.
- 10 In response, the respondent's argument however was that likelihood of success cannot be determined by the number of grounds in the appeal. In this case it was not contested that the applicants refused to honor a court award leading to the proceedings of the case. It cannot therefore be given the benefit since it has no respect for court order or rules.

**Decision of court:**

- 15 In the case of **Kawanga John B. vs Namyalo MA No. 12 of 2017** court in expounding on the conditions as laid out in **Order 43 rule 4 of the CPR** which an applicant is required to fulfil in an application of this nature, stated that a notice of appeal must be lodged by the applicant; that the appeal should not be frivolous or vexatious; there must be serious threat to execution which would make the appeal nugatory; and the application be brought without undue delay. The
- 20 applicants must be ready to provide security and it will normally grant the application where it is satisfied that a refusal to grant would occasion more hardship than it would avoid.

**Order 43 rule 4** also states clearly that an appeal does not operate as a stay, except as the hearing the application court may order. This court therefore has discretion to order the stay of execution, for sufficient cause.

- 25 In *subrule (2)*, the application is to be made before the expiration of the time allowed for appealing against the decree. **Section 79(1)(a) of the CPA** which governs appeals provides that an appeal shall be entered within 30 days of the date of the decree or order.

- The order in this case was passed on 24<sup>th</sup> August, 2021 and the notice of appeal filed on 31<sup>st</sup> August, 2021, well within the time allowed by law to lodge an appeal. On the same day of 31<sup>st</sup>
- 30 August the applicants also wrote to court requesting to be availed with a certified copy of the record of proceedings. The present application was filed on 8<sup>th</sup> September, 2021. There is no doubt therefore that it was filed without undue delay.





I have also carefully considered the other aspects of this application and have also had the benefit of perusing the ruling provided by counsel for the applicants. (***Court of Appeal Commissioner Customs URA vs Kayumba Emile Ogane T/A ETS OGANE Company, CACA No. 62 of 2014***).

Indeed as pointed out by counsel, this court has discretion to grant or deny the grant of stay of execution where it appears to be equitable to do so, with a view of temporarily preserving the *status quo*. Needless to add, each case must be considered and decided on its own facts and merits.

Generally, if court is satisfied that the notice of appeal had been lodged in time; the letter of proceedings was filed in court and a copy served on the respondent; and that the application was made without delay the order may be issued.

In my view, though the principles as illustrated in that case may be the same and binding to this court, the circumstances as presented therein are distinguishable from the present ones. In that case the application was made for an interim order of stay, pending the hearing of the substantive application for stay.

It involved the removal of property from the jurisdiction of the court. The present case however is a substantive application for stay and involves the order for payment of the decretal sum owed by the 1<sup>st</sup> applicant as the judgment debtor, money that had been due and owing for a period of two decades.

Court in the case as cited by learned counsel ruled that for an interim order to be granted, it suffices that a substantive application was pending and that there was some threat of execution pending the hearing of that application.

It was a matter concerning an immediate action of demolishing the subject matter of a suit and the concern was, as in the present application, to avoid rendering the appeal nugatory. The judgment debtor in this present application is the 1<sup>st</sup> applicant, the same judgment debtor who was ordered to pay the decretal sum in the earlier suit, an order which it had failed to honour.

In another case referred to in the judgment cited by counsel: ***NEC vs Mukisa Foods MA No. 7 of 1998***, court stated that as a general rule the only ground for stay is for applicant to show that once the decretal property is disposed of there is no likelihood of getting it back should the appeal succeed. The applicant must therefore demonstrate that there indeed was no likelihood of getting back the money from the respondent.

As it turns out in this case, the respondent's interest lies in the satisfaction of a decree granted to him in an earlier suit. The 1<sup>st</sup> applicant against whom the orders were made in the previous suit now finds itself in a similar but awkward position where it would not trust the respondent

to pay back any sum if paid out as security for costs, were the Court of Appeal to allow the appeal.

The applicants in this case did not demonstrate that there was no possibility of getting back the money paid as security, from the respondent. The respondent's evidence on record on the other hand demonstrates that the applicants have not met their obligation to pay the decretal sums due.

It is really not for this court to decide on the issue of the likelihood of success of the appeal at this stage. In most cases even in circumstances where a court were to believe that there was no real basis or merit in the case, declaring so in an application for stay would not serve any useful purpose, as the merits of the appeal is a preserve of the appellate court.

Given the situations as highlighted, suffice for court to state therefore that in the peculiar circumstances of this case, the *status quo* as declared by the court in the previous decision (which the applicants did not appeal against) was that **M/S Beverages and Spices Ltd and International Projects Ltd** (1<sup>st</sup> applicant) were to pay, jointly and severally a sum of **Ugx 181, 677,000/=**. That position has since not changed and the pending appeal does not seek to challenge that order but rather the mode of its enforcement as declared by this court in the subsequent decision.

The suggestion also made by the applicants that where no costs are granted, the respondent is required to discharge the onus to prove entitlement to security for costs is, with all due respect, quite misleading and is besides, not supported by any authority. It is against the spirit of **order 43 rule 4 of the CPR**, which gives discretion to this court, exercisable whether or not costs were awarded by court.

In my view therefore, the respondent will be prejudiced were this court to grant the application for stay of execution without committing the applicants to payment of security for costs, prior to the appeal.

For the reasons as highlighted therefore, this court would be justified to exercise its discretion to grant the application, but only subject to payment of 30% of the decretal sum; and upon payment of costs of this application.

  
**Alexandra Nkonge Rugadya**

**Judge**

**21<sup>st</sup> October, 2021**

DeBured via email  
A. Nkonge  
21/10/2021