

Andrew Byakutaga and Another v M/S Kabega, Bogezi & Bukenya Advocates (Miscellaneous Application No. 0356 of 2025) [2025] UGCommC 92 (15 May 2025)

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**5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION) MISCELLANEOUS APPLICATION NO. 0356 OF
2025 (ARISING OUT OF CIVIL SUIT NO. 0965 OF 2020)**

1. ANDREW BYAKUTAGA

2. BUNYORO KITARA KINGDOM:..... APPLICANTS VERSUS

M/S KABEGA, BOGEZI & BUKENYA ADVOCATES:::::::::::::::::::::::::::::::: RESPONDENT

Before: Hon. Lady Justice Dr. Ginamia Melody Ngwatu

RULING

The applicant filed this application by chamber summons under section 33 of the Judicature Act 20 cap 16, section 98 of the Civil Procedure Act cap 282, Order 22 Rule 26 and 89 of the Civil Procedure Rules S. I. 71-1, as amended. The application seeks orders that: a stay of execution of the orders in *Civil Suit No. 965/2020 M/s Kabega, Bogezi & Bukenya Advocates vs Bunyoro Kingdom & Anor* be granted pending determination of the applicant's appeal to the Court of Appeal; and that costs of the application be provided.

The background to this application is that M/s Kabega, Bogezi & Bukenya Advocates, the respondents herein entered into a Fee Agreement with the applicants/defendants in *Civil Suit No. 965/2020* in which the respondent undertook to negotiate and assist the second applicant in securing payment from Government of Uganda for the second applicant's equity in Kinyara 30

Sugar Works Limited. Under the agreement, the second applicant was to pay the respondent an amount equivalent to 20% of the sums received by the second applicant from Government of Uganda. Government of Uganda subsequently partly paid the second applicant Ugx 6,250,000,000. The second applicant in turn paid the respondent 20% on Ugx 5,000,000,000; leaving a balance of Ugx 250,000,000 from the Ugx 1,250,000,000 that had been received. There 35 was also an outstanding balance of Ugx 26,750,000,000 that was yet to be paid by Government of Uganda to the second applicant; out of which the respondent was entitled to Ugx 5,350,000,000. The said outstanding balance was payable as and when Government paid funds to the second applicant. Court found for the respondent and ordered that the respondent was entitled 5 to the Ugx 5,749,000,000 as claimed. The respondents commenced execution proceedings to recover the said sum, hence this application by the applicants to stay execution.

The grounds of the application were stated in the affidavit of the 1st applicant and Prime Minister of the 2nd applicant, Andrew Byakutaga Ateenyi, and are briefly that:

- 10 1) The applicants were defendants in *Civil Suit No. 965 of 2020* in which judgment was delivered on 28th January 2025 in favour of the respondent;
- 2) The applicants were dissatisfied that the trial Judge, while entering judgment in *Civil Suit No. 965/2020*, misdirected himself on a crucial matter of law and fact;
- 3) Due to the dissatisfaction with the judgment, the applicants appealed to the Court of Appeal against the same and filed a notice of appeal dated 6th 15 February 2025, which appeal has a high probability of success;
- 4) The applicants brought this application in a timely manner and without unreasonable delay on their part;
- 5) The applicants stand to suffer irreparable loss in the event that this application is denied and the execution of the judgment entered on 28th 20 January 2025 is allowed to proceed;
- 6) The appeal has been lodged before the Court of Appeal may be rendered nugatory in the event that this application is denied and execution proceedings are allowed to continue;
- 7) The applicants are ready and willing to satisfy the requirement of security for costs for the due performance of the decree as they await the hearing and determination of the 25 appeal that has been lodged;
- 8) The balance of convenience favours the applicants who are still in possession of the amount sought to be executed upon the respondent.

The respondent opposed the application on the grounds contained in the affidavit in reply of 30 Majda Atulinda, a Legal Associate at the respondent law firm, wherein she briefly stated that:

- 1) She is aware of the test for grant of orders staying execution and that the applicant only meets the first two tests which are to the effect that: a notice of appeal has been filed and that the application has been made without delay. The other requirements were not met.

- 2) The likelihood of the appeal against the judgment having success was not demonstrated 35 as a draft memorandum of appeal was not attached to the application.
- 3) The execution of the decree of court against the applicant does not delay or impair the character of the appeal as it is a money decree and the remedy of restitution is available to the applicants in case the appeal is successful.
- 4) There is no threat of execution as the applicants had drawn down all their accounts and 40 the same accounts have no money.
- 5) The respondent's firm has not been shown to be impecunious and the execution of the decree in issue shall not have any irreversible effects against the applicants
- 6) The applicants have not undertaken to deposit security for due performance of the decree which shall occasion hardship on the decree-holder in the event that the appeal fails.

5 7) The execution of the decree by the respondent against the applicant shall not occasion any hardship against the applicants beyond that which a judgment debtor shall ordinarily be subjected to if they lose a case and they are deprived of their property as a consequence.

10 Representation at the hearing

The applicants were represented by Mr. Naboth Muhairwe of M/s Agaba Muhairwe & Co. Advocates; while the respondent was represented by Mr. Isaac Walukagga of MMAKS Advocates. The parties were granted leave to file written submissions which are on the Court record.

Issue for determination

The main issue for determination is whether this application raises sufficient grounds for an order of stay of execution? If it does, whether the applicants should deposit security for the due performance of the decree; and whether the parties have remedies available to them?

Submissions

Both counsel were granted leave to file written submissions, which are on court record.

Submissions of Counsel for the Applicant

25 In his submission, Counsel for the applicant based on Order 22 rule 26 of the Civil Procedure Rules as amended to submit that court may order a stay of execution until the determination of a pending suit where there is a pending suit in any court between a decree holder and judgment debtor. Counsel relied on the case of *Dr. Ahmed Kisule vs Greenland Bank (in Liquidation)* Supreme Court Civil Application no. 7 of 2010* as cited by Hon. Justice Catherine

- 30 Bamugemereirwe in the case of *Nahurira Haam & 2 Ors vs Lwanga Mike Court of Appeal Civil Application No. 1021 of 2023* to lay out the considerations that courts should follow when determining applications for stay of execution and these include: a notice of appeal has been lodged; the appeal has a high likelihood of success; substantial loss may result to the applicant unless the stay is granted; and the application has been brought without unreasonable delay.
- 35 Counsel for the applicant submitted on each of these grounds and these are contained in the written submissions on court record.

Counsel for the applicant also submitted that the balance of convenience lies in favour of the applicant and that it is more unlikely for the respondent to refund the applicant the decretal sum 40 if execution proceeds that it is for the applicant to pay up the decretal amounts to the respondent once the appeal is determined.

As to whether there are any remedies available to the parties, counsel for the applicants relied on section 33 of the Judicature Act, cap 16 to submit that the High Court has jurisdiction to grant

5 remedies to any party in a matter so that matters in controversy between the parties may be determined; hence this application for stay of execution of the judgment and decree in *Civil Suit No. 965/2020*. The applicants, therefore, seeks that this application is granted.

Submissions of Counsel for the respondent

- 10 Counsel for the respondent also laid out the conditions that the applicants in this matter ought to meet for a stay of execution to be granted. Counsel cited various authorities including *Junaco (T) Limited & Others vs DFCU Bank Limited Miscellaneous Application No. 0027/2023* and *Karuhanga Geoffrey v Tulihamu Budongo Sacco Miscellaneous Application No. 0108 of 2022 (unreported*) to reflect similar conditions highlighted by the applicant. However, it was pointed
- 15 out that in the case of *Karuhanga Geoffrey vs Tulihamu Budongo Sacco* the application was dismissed on grounds that the applicant had not deposited security for due performance of the decree.
- The counsel for the respondent admitted that the applicant did lodge a notice of appeal. 20 However, in regard to the likelihood of success and the propriety of the appeal, counsel for the respondent argued that the applicants had not attached their draft memorandum of appeal. the applicants executed a fee agreement that they partly paid and did not pay the rest after Government of Uganda had made further payments to the 2 nd applicant. That the purported appeal is devoid of merit and state should not be granted. With regard to the appeal being 25 rendered nugatory, this ground was not set out in the application or affidavit in support thereof.

On the argument that substantial loss would result to the applicants if stay is not granted, counsel for the respondent submitted that satisfaction of a monetary decree does not amount to substantial loss or irreparable injury unless if the respondent is demonstrated as being 30 impecunious. Counsel for the respondent further submitted that the remedy of restitution is available to the applicants in the appeal is successful.

Counsel for the respondent also submitted that the applicants did not deposit security for due performance of the decree. Counsel for the respondent stated that court is enjoined to balance the

- 35 rights of the parties; and that in the event that the applicants are granted an order staying execution, the respondent's right should be protected. That this protection of the respondent's rights would require the deposit of the disputed amount of money in court (*see Junaco (T) Limited*). Counsel for the respondent further submitted that the execution of the decree against the applicants shall not occasion any hardship against the applicants; and that Court is enjoined
- 40 to balance the scales of justice by ensuring that the intended appeal is not rendered nugatory but also that the judgment creditor is not denied the fruits of its judgment, save for good cause (*see Junaco (T) Limited*).

5 Counsel for respondent concluded by submitting that the applicants do not meet the conditions for stay of execution of the judgment but in the alternative, if court is inclined to stay execution of the decree, the applicants should be ordered to deposit the decretal sums into court or a bank guarantee in the value of the decretal sums.

10 RESOLUTION

Having considered the application, the reply by the respondent and the submissions of both parties as well as the relevant legal authorities cited, this application is resolved as follows:

Issue 1: Whether this application raises sufficient grounds for an order of stay of execution?

15 Stay of execution is provided for under Order 22 rule 26 of the Civil Procedure Rules SI 71-1 which provides thus:

"Where a suit is pending in any court against the holder of a decree of the court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree 20 *until the pending suit has been decided."*

Court, therefore, has the discretion to grant or deny a stay of execution.

Order 43 rule 4 (3) of the Civil Procedure Rules SI.71 provides for the conditions that ought to be satisfied before a stay of execution is granted and they include that:

- 25 1. substantial loss may result to the party applying for stay of execution unless the order is made;
- 2. the application has been made without unreasonable delay;
- 3. 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.
- 30

These considerations were cited in the *case of Hon Theodore Ssekikubo and Ors vs the Attorney General and Ors Constitutional Application No. 03 of 2014* and expanded on by the Court of Appeal in *Kyambogo University vs Prof. Isaiah Omolo Ndiege, Civil Application No. 341 of 2013* to include the following grounds:

- 35 1. there is serious or imminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory;
- 2. the appeal is not frivolous and has a likelihood of success;
- 3. refusal to grant the stay would inflict more hardship than it would avoid.
- 40 In consideration of the grounds raised by the applicants for a grant of stay of execution, it is found as follows:

5 *The filing of a notice of appeal*

Order 43 rule 4 (3) of *The Civil Procedure Rules*, presupposes that an application of this nature must be made after notice of appeal has been filed. In this particular instance, there is no dispute as to whether a notice of appeal was filed as proof of such filing was annexed to the affidavit in support of the application and marked as annexure "A".

The appeal is not frivolous and has a likelihood of success

In addition to the requirement that the applicant demonstrates that a notice of appeal was filed, it is also required that the said appeal should have a likelihood of success. The appeal should raise triable issues with a likelihood of success and this can be deduced from grounds of appeal as 15 raised in the memorandum of appeal. Justice Stephen Mubiru in the case of *Formula Feeds Limited & 3 Others vs KCB Bank Limited Miscellaneous Application No. 1647 of 2022* Page 7, stated that:

"The court must be satisfied that the prospects of the appeal succeeding are not remote but that there is a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless..."

In the *Formula Feeds Limited & 3 Others vs KCB Bank Limited* case, Justice Mubiru found that the applicants had not provided court with the memorandum of appeal of the pending appeal to the Supreme Court; and it was, therefore, not possible for an assessment to be conducted as to whether the applicants had an arguable case on appeal.

Similarly, in this application, the applicants did not furnish court with a copy of their memorandum of appeal to enable court gauge whether their appeal had a likelihood of success or it is one that is frivolous. Much as counsel for the applicant submitted in their written submissions in rejoinder that they wrote to the Registrar of the Court requesting for the record of proceedings to enable them draft the memorandum of appeal, which had not been honoured; no proof of such request to the Registrar of the Court was presented. Counsel further argued that the appeal hinges on the corporate capacity of the 2nd applicant to bind the applicants on the fee agreement.

Counsel for the applicant relied on the case *of Nahurira Haam & 2 Others vs Lwanga Mike CACA No. 1021/2023* to argue that it is not necessary for the court to consider proving whether the appeal will succeed or not; but that it is sufficient to show that the appeal is not frivolous or vexatious and that it raises serious questions of law and fact. But still, these can only be determined upon perusal of the memorandum of appeal, which has not been availed. In the absence of a copy of the memorandum of appeal indicating the grounds of appeal, this court is unable to confirm the grounds of appeal or establish whether the Court of Appeal would

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5 reasonably come to a different conclusion from the trial court. In the premises, this requirement has not been satisfied.

Substantial loss may result to the party applying for stay of execution unless the order is made
The applicants are required to demonstrate to court that substantial loss would be rendered to

- 10 them if the stay of execution is not granted and execution occurs before the appeal is heard. In *Tropical Commodities Suppliers Ltd and Ors vs International Credit Bank Ltd (In Liquidation)* (2004) 2 EA 331,* court stated that substantial loss does not represent any particular amount or size for it cannot be quantified by any particular mathematical formulae. It refers to any loss, great or small that is of real worth or value as distinguished from loss without a value or
- 15 that which is merely nominal.

In this instance, it is not sufficient to only show that there is a possibility of a loss being occasioned on the applicant; but rather it must be demonstrated that the harm caused to the applicant would not only be substantial, but also irreparable. In this particular application, the 20 applicants submitted that there is an eminent threat of execution as the respondent had already commenced execution proceedings against the applicant; which was not disputed. It must be noted, however, that payment of a money decree is not a loss *per se*.

The application has been made without unreasonable delay

- 25 An application for stay of execution ought to be made within a reasonable time. The reasonableness or unreasonableness of the delay in filing such an application would be dependent on the circumstances pertaining to each case. **Kabarema Adonia vs Natukunda Marion Miscellaneous Application No. 0264/2021**, page 7 Hon. Justice Joyce Kavuma, having examined the record of **HCT-05-CV-CA-0043-2016**, found that
- 30 the application had been brought without reasonable delay. The basis of this finding was that the decision of the court was made on 16th August 2021 and the application was lodged before the same court on 8th October 2021.

In the instant case, judgment was rendered by Hon. Justice Richard Wejuli Wabwire in **Civil Suit No. 965/2020** on 28th 35 January 2025 through ECCMIS. The applicants subsequently appealed to the Court of Appeal and filed a Notice of Appeal on 6th February 2025. Thereafter, the respondent commenced execution proceedings as a result of which the applicants filed this application for stay of execution on 24th February 2025. This application was filed within 28days after judgment. I, therefore, do not find any unreasonable delay in the filing this application by

40 the applicants. The applicants have satisfied this requirement.

There is a serious or imminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory

- 5 There must be a direct and immediate danger of execution of the decree. The determination of whether or not an appeal will be rendered nugatory if a stay of execution is not granted is dependent on whether, if a stay is not granted and execution is permitted to proceed, the effect will be reversible. If the effect is irreversible, whether the award of damages can reasonably compensate the aggrieved party; or it is in public interest to grant a stay of execution. Here, it
- 10 may be necessary for the **status quo** to be preserved pending appeal in a bid to ensure that the rights involved in the appeal may not be lost or reduced by reason of an intervening execution of the judgment. It must be pointed out that the it was not demonstrated that the respondent is impecunious. The assumption here would then be that any payment made to the respondent in execution of the decree would be reversible in the event that the applicant succeeded in the

- 15 appeal.

In consideration of the submissions made by both counsel for the applicants and the respondent; and the law pertaining to applications for stay of execution pending an appeal, I find that the applicants have largely proved the grounds that entitle them to a stay of executions. In the case of

20 **DFCU Bank Ltd vs Dr. Ann Persis Nakate Lussegere, C. A Civil Appeal No. 29 of 2003,** the Court of Appeal recognized that an applicant seeking stay of execution of a decree of the High Court **may** be required to satisfy the conditions as set out in Order 43 rule 4(3) of the Civil Procedure Rules. This, therefore, connotes that it is not mandatory that all the conditions set out in Order 43 rule 4(3) must be met before an application for stay of execution is granted.

The issue that arises in this instance is whether the applicants should be required to deposit security for due performance of the decree.

Issue 2: Whether the applicants should deposit security for the due performance of the decree

30 An applicant for stay of execution may be required to provide security for the due performance of the decree to ensure that in the event the appeal fails, the losing party will be in a position to fulfill the decree. Security in this instance includes a deposit of funds, bond or bank guarantee.

Hon. Justice Dr. Flavian Zeija, cited the case of **Hon. Theodore Ssekikubo and Ors vs the* 35* **Attorney General and Ors Constitutional Application No 03 of 2014**, in **John Baptist Kawanga versus Namyalo Kevina & another Miscellaneous Application No. 12/2017**, while considering the issue of security for due performance stated that:

"... every application should be handled on its merits and a decision whether or not to order for security for due performance be made according to the circumstances* 40 *of each particular case. The objective of the legal provisions on security was never intended to fetter the right of appeal. It was intended to ensure that courts do not assist litigants to delay execution of decrees through filling vexatious and frivolous appeals. In essence, the decision whether to order for security for due performance must be made in consonance with the probability of the success of the appeal."

The court, in this instance, has discretion to determine a just and fair amount of security, considering all the circumstances of the case. The requirement for security for due performance of a decree should not, however, stifle an appeal.

10 In **DFCU Bank Ltd vs Dr. Ann Persis Nakate Lussegere, C. A Civil Appeal No. 29 of 2003,** the Court of Appeal recognized that an applicant seeking stay of execution of a decree of the High Court may be required to satisfy the conditions as set out in Order 43 rule 4(3) of the Civil Procedure Rules, which includes the fulfilment of the condition that security has been given by the applicant.

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. It is observed that the applicants, undertook to pay security for due performance of the decree in paragraph 8 of the 20 affidavit in support of the application. The applicant's written submissions were, however, silent on this.

The respondents, in paragraph 23 of their written submissions pointed out that the applicants had not deposited any security for due performance of the decree. Further, in paragraph 2.8.5 of the 25 respondent's reply to the application, it was stated that the applicants did not have funds as they had drawn down their accounts and the said accounts had no money. This assertion was not rebutted by the applicants and, therefore, raises an issue as to whether the applicants would indeed be able to satisfy the decree in the event that they lose the appeal.

30 ***Issue 3: Whether there are any remedies available to the parties?***

The duty of court in applications such as this is to balance between the need of the applicants to pursue an appeal, but at the same time, it should not be seen to stifle the respondent's right to enjoy the fruits of its litigation. Court must balance between the interests of the respondents who were successful litigants in **Civil Suit No. 965/2020** and would wish to execute the judgment; and

- 35 the interests of the applicants who were the unsuccessful litigants and wish to pursue an appeal. It should be observed that court has the discretionary power to determine whether a stay of execution should be granted or not. The discretionary power of court was discussed in the case of **But*t *vs Rent Restriction Tribunal (1982) KLR 417** where the Court of Appeal held that:
- **"1. The power of the court to grant or refuse an application for a stay of execution is a* 40 *discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.**
- **2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**

- 5 **3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
- **4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The* 10 *special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**

5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to 15 *lapse."*

Court is clothed with inherent powers as provided under section 98 of the Civil Procedure Act to make orders that are necessary for the ends of justice; which includes a grant of an order of stay of execution. The court has a duty in the exercise its discretion to grant stay of execution of this 20 decree, to balance the equities between the parties and ensure that no undue hardship is caused to a decree holder due to the stay of execution of such decree.

In the final result, this application is granted with the following orders:

- 1. A stay of execution of the decree vide *Civil Suit No. 965/2020 M/s Kabega, Bogezi &* 25 *Bukenya Advocates vs Bunyoro Kingdom & Anor* pending disposal of the appeal in the Court of Appeal.
- 2. As a pre-condition for the stay of execution, the applicants shall deposit before this court 40% of the decretal sum as security for due performance of the decree; or a bank guarantee of the same sum, within 30 days from the date of delivery of this ruling.
- 30 3. Costs will abide the outcome of the appeal.

I so order.

Dr. Ginamia Melody Ngwatu Ag. Judge 15th May 2025

40 *Ruling delivered via ECCMIS*

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