

UGANDA / JUDGMENT

Ham Enterprises Limited and 2 Others v Diamond Trust Bank Uganda Limited and Another (Miscellaneous Application 143 of 2021) [2021] UGCA 206 (18 November 2021) [2021] UGCA 206

COURT

Court of Appeal of Uganda

BEFORE

Buteera, DCJ, Madrama Izama, JA, Monica K.
Mugenyi, JA

CASE / FILE NUMBER

Miscellaneous Application 143 of 2021

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THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: BUTEERA, DCJ; MADRAMA AND MUGENYI, JJA

MISCELLANEOUS APPLICATION NO. 143 OF 2021

(Arising from Civil Appeal No. 242 of 2020)

- 1. HAM ENTERPRISES (U) LTD
- 2. KIGGS INTERNATIONAL (U) LTD
- 3. HAMIS KIGGUNDU

VERSUS

1. DIAMOND TRUST BANK (U) LTD 2. DIAMOND TRUST BANK (K) LTD

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Application No. 143 of 2021

RULING OF THE COURT

A. Introduction

- 1. Ham Enterprises (U) Ltd, Kiggs International (U) Ltd and Hamis Kiggundu ('the Applicants') lodged this Application for stay of execution pending appeal under Rules 2(2), 6(2)(b), 43 and 44 of the Judicature (Court of Appeal Rules) Directions, SI 13-10 ('the Court's Rules of Procedure'). The Application seeks to preserve the Applicants' right of appeal in respect of this Court's decision in **Civil Appeal No. 242 of 2020** and seeks the following reliefs:
- I. An order restraining Diamond Trust Bank (U) Ltd and Diamond Trust Bank (K) Ltd ('the Respondents'), their agents, servants and or employees from executing or enforcing the judgment decree and orders of the Court pending the determination of **Civil Appeal No. 13 of 2021** by the Supreme Court.
- II. Costs.
- 2. It is the Applicants' contention, supported by Mr. Kiggundu's affidavits of 11th May 2021 and 1st September 2021, that the appeal now pending before the Supreme Court has a likelihood of success and, the Respondents having since taken steps to enforce this Court's judgment in Civil Appeal No. 242 of 2020, there is imminent threat of the pending appeal being rendered nugatory.
- 3. The Application is opposed by the Respondents, who jointly filed an affidavit in reply to that effect deposed by Mr. Emejeit K. Mbabazi, the Executive Director of the First Respondent Company. That affidavit deposes to the following steps having been taken by the parties or their legal representatives on their behalf:
 - I. Correspondence between the Respondents' advocates and the High Court on the one hand and the Applicants' advocates on the other hand, directed at the extraction of a decree in respect of Civil Appeal No. 242 of 2020.
 - II. Contestation by the Applicants' advocates as to some of the proposed contents of the decree on account of their not having been in the lead judgment that was unanimously adopted by the Court.
- 4. The affidavit further attests to the Applicants' right of appeal not being inhibited as alleged given that 'the continuation of the hearing at the High Court would not stop the Supreme Court appeal.' In a nutshell, it is averred that on the balance of convenience the Respondents stand to lose more than the Applicants in the event that this Application is allowed given that they would be denied the speedy determination of the retrial ordered by this Court in Civil Suit No. 43 of 2020, rendering the securities provided in respect of the loan in issue therein insufficient to cater for the increasingly outstanding amounts due.

- 5. At the hearing of the Application, the Applicants were represented by Mssrs. Arnold Kimara and Matthew Kirunda while Mssrs. Peter Kawuma, Sam Sebuwufu and Richard Bibangamba appeared for the Respondents.

B. Applicant's Submissions

- 6. Learned Counsel for the Applicants commenced their submissions with a preliminary objection to the affidavit of reply for purportedly offending section 84(c) of the Evidence Act, Cap 6 in so far as it was premised on authorization that was not duly authenticated. Learned Counsel for the Respondent did not address the Court on the matter. I revert to this objection later in this Ruling. On the merits of the Application, learned Counsel relied on the decision in Lawrence Musiitwa Kyazze v Eunice Businge, Civil Application No. 18 of 1990 (Supreme Court) to highlight the considerations governing the grant of stay of execution pending appeal as follows:
 - i. The applicant shows that he or she lodged a notice of appeal.
 - ii. The applicant shows that substantial loss may result to the applicant unless stay of execution is granted.
 - iii. The application was made without unreasonable delay.
 - iv. The applicant has given security for due performance of the decree or order as may be ultimately binding upon him.
- 7. In addition, the following additional considerations espoused by this Court in Kyambogo University v Prof. Isiah Omolo Ndiege, Civil Application No. 341 of 2013 were cited for the Applicants:
 - i. 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.
 - ii. The appeal is not frivolous and has a likelihood of success.
 - iii. The refusal to grant a stay would inflict more hardship than it would avoid.
- 8. It is argued that a case has been made for the grant of stay of execution given that there is indeed an Appeal pending determination by the Supreme Court; there is imminent threat of execution of this Court's orders in so far as the Respondents had sought the fixture of Civil Suit No. 43 of 2020 for retrial, and to the extent that the appeal pending before the Supreme Court raised questions of law, it does have a likelihood of success. It is further opined that the Application was brought without unreasonable delay having been filed on 11th May 2021, only six days after this Court handed down its judgment in Civil Appeal No. 242 of 2020.

C. <u>Respondents' Submissions</u>

- 9. Conversely, it is the contention of learned Counsel for the Respondents that the Applicants have not satisfied the grounds for the grant of the Application. The principles governing the grant of such applications were urged to be as outlined by this Court in Theodore Ssekikubo & Others v The Attorney General & Another, Constitutional Application No. 6 of 2013 as follows:
- i. The application must establish that the appeal has a likelihood of success or a prima facie case of the applicant's right to appeal.
- ii. It must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.

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- iii. If (i) and (ii) above have not been established, court may consider where the balance of convenience lies.
- iv. The applicant must also establish that the application was instituted without delay.
- 10. Justifying the substance of this Court's decision on appeal, it is opined that the second appeal to the Supreme Court has no chance of success. Learned Counsel further opines that in so far as no decree has been extracted in respect of this Court's judgment, there is no imminent threat of execution as would warrant the grant of a stay thereof. In any event, the precedence of the Supreme Court over the High Court is such that its orders would be enforceable regardless of any proceedings before the High Court. On the balance of convenience, Counsel argues that the existence of an order for the auditing of the Applicants' accounts to establish the legality of the deductions made thereon would enable a quick and fair determination of their (Applicants') claims rather than prejudice them. In any case, the Applicants being disinclined to furnish security for costs in the matter, the Application should not be allowed.

D. Determination

11. The preliminary objection raised by the Applicants shall be addressed forthwith. Section 84(c) of the Evidence Act as invoked is reproduced below for ease of reference.

> The court shall presume that private documents purporting to be executed out of Uganda were so executed and were duly authenticated if—

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- b.

- c. in the case of such a document executed in any country of the Commonwealth in Africa, it purports to be authenticated by the signature and seal of office of any notary public, resident magistrate, permanent head of a government department, or resident commissioner or assistant commissioner in or of any such country; and, in addition, in the case of a document executed in Kenya, it

purports to be authenticated under the hand of any magistrate or head of a government department.

- 12. We are constrained to observe that the supposed preliminary objection is improperly before the Court. The true nature of a preliminary objection was articulated in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as 'a point of law which has been pleaded, or which arises in the course of the pleadings and which, if argued as a preliminary point, may dispose of the suit.'¹
- 13. In the instant case, the Applicants object to a letter of authorization that was extended to Mr. Emejeit Mbabazi to depose an affidavit on the Second Respondent's behalf. That objection is misguided because it does not dispose of the present Application; the impeachment of the impugned letter would in no way negate the same deponent's authority to depose an affidavit on behalf of the First Respondent. As quite aptly observed in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (supra) (per Newbold, P):

The improper raising of points by way of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuses the issues. The Court considers that this improper practice should stop.

- 14. We would therefore over-rule the Applicants' objection.
- 15. Turning to the matter before the Court, we deem it necessary to address the nature of stay of execution sought in this Application prior to a determination thereof. The term execution in its literal sense is defined in *Black's Law Dictionary*, 1999 (8th Edition), p. 609 as 'the act of carrying out or putting into effect (as a court order).' This definition would in broad terms denote the enforcement or effecting of a court judgment and, more specifically, the execution or implementation of the specific orders issued thereunder. Indeed, the enforcement of judgments in civil proceedings is defined in the *Oxford Dictionary of Law*, 2009 (7th Edition), p. 199 as 'the processes by which the judgments and orders of a court may be

¹ See also *Attorney General of the Republic of Uganda v Media Legal Defence Initiative & 19 Others*, EACI Appeal No. 3 of 2016 and *Attorney General of the Republic of Kenya v Independent Medical Legal Unit*, EACI Appeal No. 1 of 2011 (Also reported at (2005 - 2011) EACJ LR 377).

enforced.' Thus, as was held in *Re Overseas Aviation Engineering (GB) Ltd* (1962) 3 All ER 12 at 16 (per Lord Denning MR), 'the word 'execution' means, quite simply, the process for enforcing or giving effect to the judgment of the court.' In that case, it was held to be 'completed' when the

judgment creditor gets the money or other thing awarded to him by the judgment.' Completion of execution by the receipt of money would obviously accrue to a monetary award but does not necessarily negate any other form of execution that would ensue where a successful party otherwise obtains whatever has been awarded to it by the judgment.

16. In Uganda, the processes by which judgments are enforced are delineated in section 38 of the Civil Procedure Act (CPA), Cap. 71 in the following terms:

> Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree holder, order execution of the decree —

- a. by delivery of any property specifically decreed;
- b. by attachment and sale, or by sale without attachment, of any property;
- c. by attachment of debts;
- d. by arrest and detention in prison of any person;
- e. by appointing a receiver; or
- *f.* in such other manner as the nature of the relief granted may require. (our emphasis)

- 17. The specific processes in sub-sections (a) to (e) above are undoubtedly inexhaustive hence the provision in section 38 for any other processes on caseby-case basis.

- 18. In the instant case, this Court rendered itself as follows in Civil Appeal No. 242 of 2020:

In conclusion, the learned judge erred in law to strike out the written statement of defence and I would accordingly allow grounds 9 and 11 of the Appeal and set aside the order striking out the written statement of defence. I find that because the defendants were not heard, the rest of the orders issued by the learned trial judge cannot stand and there is no need consider grounds 1, 2, 3, 4, 5, 6, 7, 8, 10 and 12 of the appeal. I would hold that the appellant's (sic) appeal substantially succeeds with

an order setting aside the judgment and orders of the learned trial judge with costs. I would issue an order remitting the suit to the High Court to be fixed before another trial judge for determination after hearing both parties.

- 19. Two orders emanate from the Court's decision above: first, the judgment and orders of the trial court in **Civil Suit No. 43 of 2020** were set aside with costs and, secondly, that suit was remitted back to the High Court for retrial on its merits. The order to set aside the trial court's judgment did indeed nullify the lower court's decision and it ceased to exist. However, the same cannot be said of the order for retrial on its merits. That order is to be distinguished from the orders of dismissal cited in *Exclusive Estate Limited v Kenya Posts & Telecommunications Corporation & Another* (2005) 1 EA 53 (Court of Appeal of Kenya) and *Mugenyi & Co. Advocates v National Insurance Corporation* (1992 – 1993) HCB 82 (Court of Appeal of Uganda). Such orders would be final, leave no further remedy for execution and

are, to that extent, incapable of execution. Not so, with an order of retrial.

- 20. The Respondents as the successful party in Civil Appeal No. 242 of 2020 would be entitled to enforce the order of retrial. That is the import of section 45(2) of the Judicature Act, Cap 13, which provides for the enforcement of a judgment of this Court. Whereas (as the defendants before the trial court) the Respondents may not have the prerogative to kick-start the proceedings therein, there is nothing to stop them from initiating court processes to have the matter dismissed should the present Applicants not take practical steps to have the matter re-heard by the High Court. It is such enforcement of this Court's orders that the Applicants seek to halt pending the determination of the appeal before the Supreme Court. To that extent, in principle there is parity between the stay of execution sought in this Application and the suspension of the enforcement of this Court's judgment. A stay of execution in this matter would in effect and in any event result in the stay of the proceedings due to (re)commence in the High Court. Black's Law Dictionary alludes to such parity in its definition of stay of execution as 'the postponement or halting of a proceeding, judgment or the like.'

8th Edition at p. 1453.

- 21. The grant of the relief of stay of execution by this Court pending appeal is governed by Rule 6(2)(b) of the Court's Rules of Procedure. It reads:

> Subject to subrule (1) of this rule, the institution of an appeal shall not operate to ... stay execution, but the court may—

- a.
- b. 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 a stay of proceedings on such terms as the court may think just.
- 22. Rule 6(2)(b) is grounded in Rule 76 of the same Rules, which in turn hinges on Rule 75 thereof that clearly restricts its application to appeals from the High Court to the Court of Appeal. Meanwhile, Rule 41(1) of the Supreme Court Rules of Procedure limits applications to be lodged in this Court prior to their filing in the Supreme Court to applications for certificates of importance or leave to appeal. Nonetheless, although applications for stay of execution pending appeal are not explicitly designated under Rule 39 of the Supreme Court Rules among the category of applications that may be lodged in this Court prior to the Supreme Court, the requirement that they too be initially lodged in this Court is markedly implicit in Rule 41(2) of the Supreme Court Rules. It reads:

Notwithstanding subrule (1) of this rule, in any civil or criminal matter, the court may, in its discretion, on application or of its own motion, entertain an application under rule 6(2)(b) of these Rules to safeguard the right of appeal, notwithstanding the fact that no application has first been made to the Court of Appeal.

23. Given the inapplicability of Rule 6(2) above to applications for stay of execution pending appeal from the Court of Appeal to the Supreme Court, it follows that such applications would be considered under Rule 2(2) of this Court's Rules of Procedure, which preserves the Court's inherent power to 'make such orders as may be necessary for attaining the ends of justice (such power to be) exercised to prevent abuse of the process of any court caused by delay.'

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³ See also <u>Attorney General v Eddie Kwizera, Constitutional Application No. 1 of 2020</u>.

That legal provision was duly invoked by the Applicants in the present Application. In so far as an application for stay of execution pending appeal hinges on the existence of an appeal, such an application should of necessity demonstrate the existence of an impending appeal by furnishing a Notice of Appeal. In the same vein, given that Rule 2(2) seeks to avert the abuse of court process occasioned by undue delays, an applicant for stay of execution pending appeal would be required to demonstrate that the application has been instituted without delay. In addition, as deduced from the plethora of cases on the subject, such an application should demonstrate that:

- I. The impending appeal is not frivolous but rather has a likelihood of success.
- II. There is imminent threat of execution of the decree or order that would render the impending appeal nugatory. This denotes irreparable harm to the applicant.
- III. Where (I) and (II) above have not been aptly demonstrated, the court may consider the balance of convenience.
- 24. In the instant case, a Notice of Appeal was duly lodged by the Applicants and the present Application was lodged without delay. In terms of the impending appeal's likelihood of success, we find fortitude in the renown case of **American Cyanamid v Ethicon Limited** (1975) AC 396, where it was proposed that a court faced with questions as to the veracity of a case for purposes of temporary reliefs should consider whether there is a serious question to be tried rather than delve into the merits of the case or appeal. It was observed that 'the court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.' In **Blackstone's Civil Practice 2005, para. 37.19 - 37.20**, pp. 392, 393, the post-American Cyanamid case approach was expounded as follows:

Before **American Cyanamid Company v Ethicon Limited** (1975) AC 396, the courts would only grant an interim injunction if the applicant could establish a prima facie case on the merits. Consequently, the courts needed to consider the respective merits of the parties' cases in some detail ... (After the American Cyanamid case), the court only needs to be satisfied that there is a serious

question to be tried on the merits. The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality.

- 25. Although the subject matter in that case was interlocutory injunctions, to the extent that the frivolity of an appeal is a matter for consideration in applications for stay of execution pending appeal, the emphasis on presence of a serious question to be tried as espoused in *American Cyanamid v Ethicon Limited* (supra) would, in our view, be similarly applicable to that category of temporary reliefs. We would thus abide the decision in *Gashumba Maniraguha v Sam Nkudiye*, Civil Application No. 24 of 2015 where the Supreme Court observed that an appeal that raises questions of law 'ought to be preserved by way of the grant of stay of execution.' Such an appeal was held not to be frivolous and 'ought to be given the benefit to be heard.' That decision indeed resonates with an earlier decision by the same court in *Theodore Ssekikubo & 2 Others v The Attorney General & 4 Others*, Constitutional Application No. 4 of 2014 where the preservation of parties' right to appeal was adjudged to speak to the ends of justice. In the application before the Court presently, the Memorandum of Appeal enclosed as Annexure 'F' raises matters of fundamental importance to commercial banking practice within Uganda and the greater East African region for final determination by the Supreme Court. Consequently, without delving into the merits thereof, we are satisfied that the impending appeal does raise serious questions of law and is thus not frivolous.
- 26. The alleged imminent threat of execution, on the other hand, begs the question as to whether the orders sought to be stayed are in fact executable. Quite clearly, this court's order setting aside the trial court's decision in Civil Suit No. 43 of 2020 is not capable of execution because it took immediate effect and the trial court's judgment was thereby vacated. To decide otherwise would be to revive the judgment and orders of the trial court (albeit temporarily), and entitle the Applicants to execute them as against the Respondents. Such an eventuality would obviate the Respondents' appeal and the judicial result thereof, as well as perpetuate a derogation from due process and established tenets of the rule of law. Court orders granted pursuant to applications for stay of execution pending appeal should not

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have the effect of undoing the judgment on appeal; rather they should preserve it and only seek to stay its execution until the appellate court has pronounced itself on the matters under consideration on appeal. We are persuaded by the reasoning in *Exclusive Case Limited v Kenya Posts and Telecommunications Corporation & Another* (supra), where the dismissal of a suit was held to be a negative order; incapable of execution; could only be set aside where an appeal therefrom succeeds but could not be stayed. In our considered view, the same parameters would apply to this court's order that set aside the trial court's judgment and orders. They can only be reinstated should the appeal before the Supreme Court succeed. Consequently, the blanket stay of all the orders of this Court as sought by the Applicants in the matter before this Court would be untenable and misconceived. We decline to grant a stay of execution in respect of the order of

this Court setting aside the judgment and orders of the trial court in this matter.

27. However, as espoused earlier in this Ruling, the specific order for retrial does not fall within the nature of a 'negative' order as espoused in **Exclusive Case Limited v Kenya Posts and Telecommunications Corporation & Another** (supra). It is capable of enforcement or execution under the general provisions of section 38(f) of the CPA as highlighted above. It is common ground herein that the Respondents had indeed sought to extract a decree in respect of this Court's judgment in Civil Appeal No. 242 of 2020 but were halted by the Applicants' contestations in respect of some of the contents thereof. Although the decree had not been extracted as at the date of hearing this Application, the process had commenced albeit, following the Applicants' intervention, subject to the direction of a Registrar of the High Court. Undoubtedly, the extraction of a decree is one of the pre-requisites to the execution of a judgment. It is thus indicative of threat of imminent execution. With respect, we are unable to abide the proposition by learned Counsel for the Respondents that there is no need for a stay of execution given that any decision finally handed down by the Supreme Court would bind the High Court. That may very well be so but it does not address the dictates of due process and the prudent management of judicial resources. The Supreme Court having been seized of the matter on appeal, due process and the right to a fair hearing guaranteed in Article

28 of the Constitution would require that the Applicants' private rights be preserved pending the determination of the Appeal.

- 28. Perhaps more fundamentally, however, is the impropriety of two parallel judicial proceedings in respect of the same subject matter. This brings to bear the notion of judicial economy, which is defined in Black's Law Dictionary, 10th Edition, p. 975 as 'efficiency in the operation of courts and the judicial system, especially the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources.' As was most compellingly observed in *Hassan Basajjabalaba & Another v The Attorney General of Uganda*, EACJ Reference No. 8 of 2018, 'it is abundantly clear that deference to judicial economy would be the direct antithesis to parallel judicial proceedings, and the connotations of duplicity and the inefficient utilization of scarce judicial resources that pertain thereto.' We would agree.
- 29. We find the circumstances of this case befitting of the need for judicial economy in the management of judicial resources so as to obviate the absurdity of a contrary judgment from the apex court quashing a lower court's judicial proceedings and the inevitable confusion that could ensue. More so, on a matter of such undisputed vitality to the national and regional banking sectors. In that regard, we have in mind a situation where the High Court proceeds to hear and determine the suit de novo (pursuant to the orders of this Court), then the Supreme Court subsequently reverses the decision of this Court and orders that the case should not have been remitted back to the High Court. That would certainly cause the mischief that we wish to avert.

- 30. Having so held, we find no reason to consider the balance of convenience. It will suffice to note, nonetheless, that the notion of judicial economy does speak to the balance of convenience in this matter. That balance lies with the prudent management of scarce judicial resources while in the same vein preserving the legal rights of all parties pending the determination of the appeal.
- 31. It is trite law that costs would ordinarily follow the event unless a court for good reason decides otherwise. See section 27 of the Civil Procedure Act, Cap. 71. In the instant case where, despite the colossal sums of monies involved the \$13\$

successful party is admittedly disinclined to furnish security for costs in the substantive appeal, it would be unjust to condemn opposite party to costs in this interlocutory application.

E. Conclusion

32. In the result, this Application is partially allowed with the following orders:

- I. The Respondents, their agents, servants and or employees are forestalled from executing or enforcing this Court's order for the retrial of **Civil Suit No. 43 of 2020** by the High Court pending the determination of Civil Appeal No. 13 of 2021 by the Supreme Court.
- II. Costs shall abide the cause.

It is so ordered.

Dated at Kampala this $\frac{1}{\sqrt{2}}$ day of $\frac{1}{\sqrt{2}}$ day.

Ion, Justice Richard Buteera DEPUTY CHIEF JUSTICE

pudngenj',

Hon. Lady Justice Monica K. Mugenyi JUSTICE OF APPEAL

S THE REPUBLIC OF UGANDA, IN THE COURT OF APPEAL OF UGANDA AT KAMPALA (BUTEERA, DCJ, MADRAMA AND MUGENYI, JJA) MISCELLANEOUS APPLICATION NO 143 OF 2021 (ARISING FROM CIVIL APPEAL NO 242 OF 2020) (ARISING FROM HIGH COURT MISC. APPLICATION NO 654 OF 2020) 10 (ARISING FROM HIGH COURT CIVIL SUIT NO 43 OF 2020) 1. HAM ENTERPRISES LTD} 2. KIGGS INTERNATIONAL (U) LTD} 3. HAMIS KIGGUNDU}

VERSUS

- 1. DIAMOND TRUST BANK (U) LTD}
- 2. DIAMOND TRUST BANK (K) LTD} RESPONDENTS

RULING OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the ruling of court and I respectfully disagree with the order granting the application for stay of execution 20 pending appeal to the Supreme Court. I would strike out the application for incompetence on matters of procedure and jurisdiction. I dissent from the majority decision granting the application for the reasons given below.

The brief background of the application is contained in the lead judgment and for purposes of this ruling I will set out some of those material facts. 25

The applicant's application is for an order to issue restraining the respondents, their servants/agents and/or employees from executing and/or enforcing the judgment, decree and orders of the Court of Appeal issued on 5th May 2021 in Civil Appeal No 242 of 2020 pending the hearing and the final determination of the applicant's intended appeal to the

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Supreme Court from that decision. Secondly, it is for costs of the application S to be provided for.

In ground 4 of the Notice of Motion the applicants aver that the respondents have, since the Court of Appeal decision, commenced execution of the judgment and orders issued by writing to the Registrar of the High Court requesting that HCCS No 43 of 2020 be allocated to a new Judge and be 10 fixed for hearing expeditiously. It is contended inter alia that the applicants will suffer irreparable harm and damage if the respondents are not restrained from enforcing the judgment and orders issued in Civil Appeal No 242 of 2020. It is further contended that there is a serious threat and likelihood that the appeal against the decision of the Court of Appeal would 15 be rendered nugatory if the respondents are not restrained from enforcing the judgment and orders that were issued.

The other grounds are on the likelihood of success of the appeal need not be emphasised here.

- The applicants aver that the judgment of the Court of Appeal was that the 20 applicant's appeal substantially succeeds with an order setting aside the judgment and orders of the learned trial judge with costs. Secondly, an order was issued remitting the suit to the High Court to be fixed before another trial judge for determination after hearing both parties.
- Further the Court ordered the parties to revert to the position in the 25 proceedings of the High Court as was on 31st of August 2020 immediately after conclusion of the scheduling conference. The court also saved the order of the learned trial judge appointing auditors and ordered that the suit to be set down for hearing on the basis of the original pleadings prior to the amendment of the plaint and for the hearing to be fixed before another judge 30 of the Commercial Division of the High Court without any further delay. Lastly, that the costs of the appeal would be borne by the respondents.

The applicants filed a notice of appeal intending to appeal the Court of Appeal decision to the Supreme Court on 10th of May 2021. Secondly they applied for a certified copy of the record of proceedings on 10th May, 2021. In

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a letter dated 6th of May 2021, Messrs K & K advocates wrote to the Registrar $\mathbb{S}$ of the High Court of Uganda, Commercial Division to set Civil Suit No 43 of 2020 before another judge and fix it for hearing expeditiously.

The Application was filed in the Wrong Court

The applicants' application is made under rule 6 (2) (b) of the Judicature (Court of Appeal Rules) Directions. These rules allow the court in any civil 10 proceedings, where a notice of appeal has been lodged in accordance with rule 76 of the rules, to order a stay of execution, injunction or a stay of proceedings on such terms as the court may think just. The applicant's application is for stay of execution directed against the respondents to restrain them from enforcing the judgment, decrees and orders of this 15 court.

On a matter of procedure, applications which may be made in the Court of Appeal or the Supreme Court are considered under rules 38, 39, 40 and 41 of the Judicature (Supreme Court Rules) directions. Applications which may be made at the Court of Appeal after determination of an appeal, include application for a certificate of importance for leave to appeal under rule 38 (2) of the Supreme Court rules. This applies to criminal matters. In civil matters, application for a certificate of importance or leave to appeal in civil matters is catered for by rule 39 of the Judicature (Supreme Court Rules) directions. Thirdly, under rule 39 (2), of the Judicature (Court of Appeal) 25 Rules where formally an appeal lay from the High Court to the Court of Appeal with the leave of either the High Court or the Court of Appeal, the same rules apply. The rules are that; the application shall be made informally at the time the decision of the Court of Appeal is delivered failure for which it may be made by notice of motion within 14 days after the 30 decision. If the Court of Appeal refuses to grant leave, the aggrieved person may apply to the Supreme Court within 14 days after the decision of the Court of Appeal refusing to grant leave or a certificate of importance as the

case may be.

Rule 40 of the Supreme Court rules provides that the application may be $\mathbb{S}$ made before or after a notice of appeal has been lodged. Finally rule 41 of the rules of the Supreme Court provides for the order of applications. Rule 41 (1) provides that where an application may be made either to the Supreme Court or to the Court of Appeal, it shall be made to the Court of Appeal first. This does not however preclude someone from applying direct to the $\mathbb{S}$ Supreme Court in terms of rule 41 (2) of the Supreme Court rules to safeguard the right of appeal without first having made an application to the Court of Appeal.

An application for stay of proceedings, or for stay of execution or injunction after the Court of Appeal has determined the appeal, are not the 15 applications envisaged in the aforementioned rules which may be made firstly in the Court of Appeal. The only applications envisaged are (a) an application for a certificate of importance and (b) an application for leave to appeal.

In circumstances, where the Court of Appeal has not exercised its 20 jurisdiction in an interlocutory application pending the determination of the appeal, upon determination of the appeal, the applicant's remedy should be to file an application in the Supreme Court for stay of proceedings pending appeal and it should not even be an application for stay of execution. Strangely, the High Court also has jurisdiction to stay its proceedings 25 pending any appeal which has been preferred so as to not to render nugatory its own decision which may be affected by the appeal.

In the premises the express rules do not allow this application to firstly be made to the Court of Appeal. They are to be made direct to the Supreme Court as the Court of appeal determined the appeal and is functus officio. I 30 would for that reason not exercise the inherent powers of this court under rule 2 (2) which powers may be exercised in the context of the rules and does not apply to the applicant's circumstances. Rule 2 (2) of the Rules of this court provides that:

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- (2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent S power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and the power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay.

The inherent powers of the court to make such orders as may be necessary for attaining the ends of justice are not limited by the rules which expressly provide for stay of execution, proceeding or injunction under rule 6 (2) of the Rules of this court and therefore the inherent powers of court cannot be invoked. Inherent powers are invoked where the rules limit the court from making the appropriate orders. The rules do not limit this court as such but apply to a different situation. The applicant's remedy lies in the Supreme Court. I would nevertheless consider those powers expressly provided for by the rules to demonstrate whether they apply to the applicants' application.

Even if the application is not struck out for incompetence, two points may 20 be set out for dismissal of the application. The first point is the nature of an application under rule 6 of the rules of this court. Rule 6 (2) (b) provides that:

6. Suspension of sentence and stay of execution.

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- (2) 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—

(a) ...

(1) ...

- (b) 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 a stay of proceedings on such terms as the court may think just.

The rule is quite clear that a notice of appeal has to be lodged pursuant to an order or decree in any civil proceedings in accordance with rule 76 of the Judicature (Court of Appeal) Rules. That is when the Court of Appeal may stay execution, grant an injunction or stay proceedings. The expression

"civil proceedings" obviously means proceedings in the High Court and orders sought are made pending hearing and determination of the intended appeal to the Court of Appeal. Rule 76 of the rules demonstrates that it concerns notice of appeal from decisions of the High Court. For emphasis the notice of appeal referred to in rule 76 is a notice of appeal from a decision of the High Court. This is demonstrated by rules 75 and 76 of the rules of this court which provide that:

75. Application of Part IV.

This Part of these Rules shall apply to appeals from the High Court acting in its original and appellate jurisdiction in civil cases.

76. Notice of appeal in civil appeals.

- (1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the High Court.

(2) ...

In this matter, the notice of appeal referred to in the applicant's application is not the one envisaged under rule 76 of the rules of this court but one envisaged under rule 72 of the rules of the Supreme Court. Paragraph 8 of the affidavit in support of the notice of motion in this application of Mr.

- Hamis Kiggundu attaches Annexure "H" and "I" respectively which clearly indicate that a notice of appeal from the decision of the Court of Appeal was lodged in the Court of Appeal on 10th of May 2021 appealing or intending to appeal from the decision of the Court of Appeal in Civil Appeal No 242 of 2020. Secondly Annexure "I" is a letter applying for the record of proceedings and is also dated 10th May, 2021 intending to appeal to the Supreme Court.

- If rule 6 (2) (b) of the rules of this court is to be read in context, it can only 30 be invoked where a person gives a notice of appeal from a decision of the High Court. It is therefore inapplicable to applications for stay of execution, injunction or stay of proceedings when someone intends to appeal from the decision of the Court of Appeal to the Supreme Court. More so, the expression "civil proceedings" refers to proceedings in the High Court. A 35

stay of execution, stay of proceedings or injunction would operate to stay S execution of the High Court decision or to stay proceedings of the High Court pending hearing and determination of an appeal to the Court of Appeal.

Clearly, the applicant, moved the court under the wrong rule. For appeals from the decision of the Court of Appeal, the applicable rule is rule 72 of Judicature (Supreme Court Rules) directions. Secondly, rule 71 of the S Judicature (Supreme Court Rules) directions provides that; that part of the rule applies to appeals from the Court of Appeal. Rules 71 and 72 provide that:

71. Application of Part IV.

This Part of these Rules shall only apply to appeals from the Court of Appeal in civil and constitutional matters.

72. Notice of appeal.

- (1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the Court of Appeal.

The Judicature (Supreme Court Rules) directions and rule 72 have to be S read in conjunction with rule 6 of the same Rules which deal with applications for stay of execution, injunction or stay of proceedings. Rule 6 (2) (b) of the **Judicature** (Supreme Court Rules) directions provides that:

6. Suspension of sentence, stay of execution, etc.

$\mathsf{(1)}$...

- (2) 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-

$\mathsf{(a)}$...

- (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 72 of these Rules, order a stay of execution, an injunction or stay of proceedings as the court may consider just.

The application of the applicants and the submission of counsel are on the S basis of a motion filed under rule 6 (2) (b) of the rules of this court. They are misconceived and ought to be struck out.

The other problem of the application is that; had it been an application pending appeal to the Court of Appeal, the Court of Appeal would only stay proceedings which are ongoing in the High Court. Where the appeal has been determined, and the Court of Appeal has set aside the decision of the High Court and ordered a retrial, there is no pending appeal except from the decision of the Court of Appeal. There is no decision of the High Court. The suit has to be tried De Novo by the High Court.

There is no Order Capable of Execution to be Stayed 15

An application for stay of execution presupposes that there is an order capable of execution which may be stayed. In this application, it is erroneous because there is no order that is capable of being executed as the order setting aside the decision of the High Court was a self-executing order that operated upon its pronouncement and there was no need to use any mode or modes of execution provided for under section 38 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules to give effect to the order. The main decision of the Court of Appeal nullified and set aside the decision of the High Court and that decision can only be restored if the applicants' intended appeal to the Supreme Court succeeds.

The applicant's application seeks an order of stay of execution of the decision of this court in Civil Appeal No 242 of 2021. In that appeal the Court of Appeal allowed the appeal and the judgment and decree of the High Court was set aside. This Court held that the suit in the High Court shall be heard before another judge.

Having set aside the judgment of the High Court, the High Court suit became a pending suit before the High Court and the High Court is under obligation to try all pending suits before it within the time it has according to its own schedules. The High Court does not hear or try suits on the basis of orders of the Appeal Court but exercises its inherent and statutory jurisdiction to

- do so. There is no direction of the Court of Appeal for the High Court to hear $\$S\%$ the suit within a specified time frame. The matter would be fixed before another judge who will schedule it like any other suit for hearing in due course. The decision for the matter to be tried afresh before another judge is just a decision to say that it should not be tried by the same judge who
- made the decision which was set aside by the Court of Appeal upon $\$10\%$ determination of the appeal. It is not an order for the court to try the matter as such because this is what the High Court is supposed to do. Such an order would be unnecessary. Once the judgment of the High Court was set aside, the suit revived and became a pending suit for trial. In the premises, there is no order capable of execution that may be stayed. 15

On that basis, the application was erroneously lodged as an application for stay of execution and argued as such. In reality what the applicants seek is an order of stay of proceedings when this court has already determined the appeal and cannot invoke its rule 6 (2) of the Judicature (Court of Appeal) Rules to stay proceedings of the High Court. There are no proceedings before the Court of Appeal which we may stay pending appeal to the Supreme Court.

When considered as stay of execution, there is no order capable of execution involved because a stay order is to stay the use of court processes under section 38 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules to give effect to the judgment and execution is ordinarily supervised by Registrars of the court executing the decree or order capable of execution.

An example of an order capable of execution was considered by the Court of Appeal of Kenya in *Exclusive Estate Limited vs. Kenya Posts and Telecommunications Corporation and Another* [2005] 1 EA 53 (CA) where they held that stay of execution envisaged under rule 5 (2) (b) of the Court of Appeal Rules of Kenya (equivalent to the Ugandan Rule 6 (2) (b) of the Judicature (Court of Appeal Rules) Directions) is the execution of a decree capable of execution in any of the modes provided for under the equivalent 35 of the Ugandan section 38 of the Civil Procedure Act. That a decree holder

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as defined under the Civil Procedure Act means: "a person in whose favour S a decree capable of execution has been passed". They held that a negative order can only be set aside when the appeal succeeds but cannot be stayed.

In that case the order which had been issued dismissed the suit and was a negative order because it was not capable of execution. In other words there was nothing further to do to implement the court decision which dismissed the suit. It was an order which was not capable of engaging the modes for execution of the decrees and orders of the court.

Analogously, there is no order issued by the Court of Appeal in this matter which requires use of the process of court under section 38 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules to enforce the decree of the Court of Appeal. I note that the applicant does not seek stay of an order of costs which is capable of execution. No. Further, the decision of the Court of Appeal can only be set aside as they became operational immediately save for the order to pay costs. The applicant's application is not to stay the order for payment of costs but to stay potential hearing of the suit in the High Court.

The question of whether an order is capable of execution can be illustrated from different perspectives. In *Mugenyi and Co. Advocates vs. National Insurance Corporation* Civil Appeal No. 13 of 1984 [1992 - 1993] HCB 82, the Court of Appeal held inter alia that under Section 2 of the Civil Procedure Act an order of dismissal of a suit for default is not a decree and accordingly the Respondent who was the Applicant in the High Court was not a decree holder and thus there was a valid objection to an order for stay of execution pending hearing a suit.

Section 2 (c) of the Civil Procedure Act defines a "decree" to mean 30

> "the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint or writ and the determination of any question within section 34 or 92, but shall not include —

"(i) any adjudication from which an appeal lies as an appeal from an order; or

(ii) any order of dismissal for default;"

Section 2 of the Civil Procedure Act also defines a "decree holder" to mean "any person in whose favour a decree has been passed or an order capable of execution has been made, and includes the assignee of such decree or order" (Emphasis added). Has a decree has been passed or an order capable of execution been made? The expression "an order capable of execution" means an order capable of execution in the modes provided for under section 38 of the Civil Procedure Act. These modes under section 38 of the Civil Procedure Act are:

\$10\$

$\$S\$$

- "(a) by delivery of any property specifically decreed,
- (b) by attachment and sale, or by sale without attachment, of any property,
- (c) by attachment of debts,
- (d) by arrest and detention in prison of any person,
- (e) by appointing a receiver,
- (f) in such manner as the nature of the relief granted may require."

Section 38 (f) of the CPA provides for any other mode of execution as the nature of the relief may require. These are elaborately provided for in the rules. No mode of execution is necessary or required where the judgment nullified a proceeding or order or decree and no positive order capable of execution is made thereafter. For instance, in this application, the \$25\$ judgement of the Court of Appeal nullified and set aside the judgment of the High Court sought to be stayed. That status quo cannot be restored unless and until the Supreme Court reverses the decision of the High Court. There is no other decision of the High Court in existence in this matter. Further by saying that the suit would be tried afresh, no mode of execution is necessary for this to happen. The Judicial officer who is to hear the suit afresh would not be in disobedience of the Court of Appeal judgment and for the matter, they exercise their judicial independence in scheduling the suit for hearing in the ordinary course of their duties. It follows that the decision to hear the suit De Novo is not capable of execution in the modes

provided for under section 38 of the Civil Procedure Act and Order 22 of the $\mathcal{S}$

The methods for execution of the court orders and decrees are provided for under Order 22 of the Civil Procedure Rules. Order 22 rules 1 – 26 deals with the procedure for execution of decrees and orders through court process. Order 22 rule 27 of the Civil Procedure Rules specifically deals with the 10 decree for payment of money. Order 22 rule 28 of the Civil Procedure Rules deals with the decree for specific movable property. Order 22 rule 29 of the Civil Procedure Rules deals with the decree for specific performance, for

- restitution of conjugal rights and for an injunction. Order 22 rule 30 of the Civil Procedure Rules deals with the execution of decrees for restitution of 15 conjugal rights. Order 22 rule 31 deals with execution of a document or endorsement of negotiable instruments. Order 22 rule 33 of the Civil Procedure Rules deals with the decree for delivery of immovable property under occupancy of a tenant. Order 22 rule 34, 35, 36, 37, 38 deal with arrest
- and detention and the procedures. Order 22 rule 39 of the Civil Procedure 20 Rules deals with the attachment in case of a decree for rent or mesne profits. Order 22 rule 40 deals with attachment of immovable property other than agricultural produce in possession of the judgment debtor. Generally, Order 22 rules 41 – 46 deals with attachment. Order 22 rule 47 of the Civil Procedure Rules deals with execution against a firm. Again Order 22 rules 25
- 48 54 deal with attachment. Order 22 rules 55 60 deal with objections to attachment. All these rules are inapplicable to an order which has set aside a judgment of the High Court. Only the Supreme Court can reverse that

Nature of Orders Not Capable of Execution 30

The nature of the decision of the Court of Appeal does not require enforcement through court process but only service of the order on the affected persons. Execution process by its nature would require further action to be taken to realise the fruits of the decree or order capable of execution. Denning MR considered the nature of execution and the meaning

of the word "execution" in *Re Overseas Aviation Engineering (GB) Ltd* [1962] $\mathcal{S}$ 3 All ER 12 at page 16 when he held that:

> "when a judgment creditor obtains a judgment charge on specific land of a company, he thereby issues "execution" against the land of the company".

Further:

"The word "execution" is not defined in the Act. It is, of course, a word familiar to lawyers. "Execution" means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is "completed" when the judgment creditor gets the money or other thing awarded to him by the judgment.

- Simply put, execution means the process, using the modes available in law and procedure, of giving effect to the judgment of the court. Further the 15 nature of the order of setting aside and ordering retrial is self-executory because it takes effect upon pronouncement by court and service of the order or decree. This can be illustrated by self-executing orders which carry in themselves the remedy upon service or pronouncement such as
- declaratory orders of illegality of a decision or proceedings. Such orders 20 take effect from the time they were pronounced by the court and served. Breach of the order would be disobedience of court order or contempt of court order. According to Administrative Court: Practice and Procedure by Blackstone Chambers General Editor: Beverley Lang Q. C. Sweet and Maxwell 2006 (first edition) page 188, the potential uses of declarations in 25 public law cases are 'legion' and are not susceptible to exhaustive listing but inter alia include declaratory orders that the decision, policy, practice, or act of the public body is unlawful:
- "A declaration may also be used where a decision is held invalid. In *Cox vs. Thanet DC* [1983] AC 286 the House of Lords did indicate that for questions or validity of 30 the decision the quashing order remains the primary and most appropriate remedy in most cases. However, such an order (which has the effect that the decision is void ab initio) may not always be appropriate. Where a more tailored solution, such as a prospective overruling, is called for it is questionable whether quashing is appropriate".

In a nutshell, the remedy and its execution is embedded in the S pronouncement of court i.e. in a declaratory order or an order quashing or setting aside a decision or proceeding. A quashing order or setting aside order have exactly the same effect. The court may make a declaration

where a statutory instrument or standing order has been unlawfully adopted or is invalid (See *R vs Secretary of State for Home Department Ex 10 Parte Anderson* [1984] 1 QB 778). A declaration may also be used to set out the particular consequences of invalidity (see *R ν Port Talbot BC ex parte Jones* [1988] 2 All ER 277 in (Blackstone Chambers Supra)). It was held that the effect of the quashing order upon the decision to grant a tenancy was to 15

render void the agreement concluded as a result of that decision. A declaration may be used instead of a quashing order (*Chief Constable of North Wales Police versus Evans* [1982] 1 W. L. R.)

On the effect of the quashing order Blackstone Chambers (supra) which as we noted sets aside or nullifies a decision, the learned authors note at page 185 that:

"by granting a quashing order, the court is declaring the decision or measure to be invalid from the outset or void ab initio. Typically, the grant of a quashing order is a largely destructive remedy, since in those circumstances the decision maker would be free to retake the decision at issue, based upon the evidence available at the time of the fresh decision."

The Court of Appeal nullified the decision of the High Court and made an order setting it aside. The judgment of the High Court no longer exists from the time of the decision which operated to set aside the decision of the High Court and the Court of Appeal decision cannot be stayed and only the Supreme Court may set it aside. For that reason, the application is incompetent and ought to be dismissed. The parties are free to apply to the Supreme Court for any order that they may wish.

As noted earlier on, the jurisdiction of the Court of Appeal was exhausted after the appeal was determined. What is envisaged in rule 6 of the rules of this court is an interlocutory application pursuant to an appeal in the Court of Appeal which is still pending.

\$20\$

- The Court of Appeal does not exercise the jurisdiction of the Supreme Court S in rule 6 of the rules of the Supreme Court which is couched in the same words as rule 6 of the rules of this court. The word "court" under rule 6 (2) (b) is further defined by section 3 (g) of the Judicature (Supreme Court) Rules to mean the Supreme Court of Uganda.
- This court could have on its own motion and not on the basis of the 10 applicants' application moved under its inherent powers. As I have held above, in the circumstances where there are specific rules for stay of execution or proceedings which envisage an application for stay of execution of a decree of the High Court under rule 6 of the Judicature (Court of Appeal) Rules, pending appeal to the Court of Appeal, upon the 15 determination of the appeal, that jurisdiction is exhausted. The proper remedy of the applicants is to apply to the Supreme Court under rule 6 (2) (b) of the Judicature (Supreme Court) Rules for stay of proceedings of the High Court pending an appeal in the Supreme Court.
- In the premises, this application inappropriately filed for stay of execution 20 and inappropriately filed before this court. The applicants are at liberty to seek the remedy they desire from the Supreme Court as envisaged by the rules.

I would make an order that the application be struck out with no order as to costs. 25

Dated at Kampala the 18th day of μ 2021

Christopher Madrama Izama

Justice of Appeal

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