

UGANDA / JUDGMENT

Kampala International University Limited v Housing Finance Company Limited (Civil Application 153 of 2025) [2025] UGCA 119 (5 May 2025) [2025] UGCA 119

COURT

Court of Appeal of Uganda

BEFORE

John Mike Musisi, JJA/JCC

CASE / FILE NUMBER

Civil Application 153 of 2025

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA CIVIL APPLICATION NO. I53 OF 2025
ARISING FROM CIVIL APPEAL NO. I67 OF 2025 (ARISING FROM CONSILDATED
ARBITRATION CAUSES NO.0038 AND 46 OF 2024)

BETWEEN

KAMPALA INTERNATIONAL UNIVERSITY LIMITED:.....: APPLICANT . VERSUS.

HOUSING FINANCE COMPANY LIMITED:: : :: : : : : : : RESPONDENT 10

BEFORE HON. JUSTICE JOHN MIKE MUSISI, JA (SITTING AS A SINGLE JUSTICE)

RULING OF THE COURT

Introduction

This an application brought by notice of motion, under Rules 2(1) A @, 6 (2) (b), 42(2), 43(l) and 41 (l) of the Judicature (Courr of Appeal) Rules SI l3- 10. In the application, the applicant seeks for orders thatl

- a) The enforcement or execution of orders of the High Court in consolidated Arbitration Causes No. 38 of 2024 and 46 of 2024 including the enforcement and execution in Uganda, of the Final Arbitral Award handed down in Nairobi Kenya between the parties by Mr. Collins Namachanja on 19th September 2019 as a judgement, order and decree of the High Court of Uganda and recovery of the decretal sums therein and costs, be stayed pending the determination of the applicant's appeal to the Court of Appeal
- b) Costs of this application be provided for.

The application is premised on eight grounds set out in the motion and is supported by an affidavit deposed by Dr. Mundu Mustafa, the Deputy Vice Chancellor in Charge of Finance and Administration. The application is opposed by the respondent through an affidavit in reply deposed by Ms. Regino Kajuju Anyika, the Company Secretary and Director Legal of the respondent. The applicant filed an affidavit in rejoinder also deposed by the said Dr. Mundu Mustafa.

The brief Background.

- 5 The applicant, a private university providing higher education in Uganda, was desirous of extending similar services in Nairobi Kenya. It acquired land comprised in Title Numbers KJD/Kaputiei North/1209, KJD/Kaputiei North/1210 and KJD/Kaputiei North/1211, situate at Kajjado, Kitengela Nairobi for construction of a University campus. In order to partly finance the completion of construction of the university premises, the applicant approached the then Housing Finance Company Kenya Limited for a construction loan facility in the sum of USD 15,000,000. However, Housing Finance Company Kenya Limited only extended two facilities; one under agreement dated 8th January 2014 in the sum of USD 10,000,000 and another agreement dated 4th November 2014 in the sum of USD 1,300,000. The said facilities were all secured by the applicant's aforesaid land and development.
- 10 In the year 2017, a dispute arose between the parties, each contending that the other had breached the terms of agreements. The respondent herein, claiming as a successor in title to Housing Finance Company Kenya Limited, demanded for repayment of the loan. The dispute was referred to arbitration before Mr. Collins Namachanja, an arbitrator in Nairobi, Kenya. The seat of the arbitration was Nairobi, Kenya and the adjudication of the dispute was pursuant to the provisions of the Arbitration Act of Kenya Cap 19, and other applicable laws of Kenya.

15 20 Upon hearing the matter, the Arbitrator rendered a final arbitral award dated 17th September 2019, in which he found that the respondent was partly in breach of contract. He thus allowed the applicant's claim in part and made some monetary awards to the applicant. He also allowed the counterclaim filed by the Respondent. Upon setting off the sums awarded to the applicant from the sum awarded to the respondent, the arbitrator ordered that the applicant pay to the Respondent a sum of USD 12,767,508.33 within a period of 30 days, together with interest at the rate of 9.5 %

per annum compounded from 16th January 2018 until payment in full.

Aggrieved with the arbitral award, the applicant filed Miscellaneous Application No. 564/2019 in the High Court of Kenya holden at Nairobi, seeking to set aside the final arbitral award on several grounds. The respondent opposed the said application. It also filed an application for recognition and enforcement of the final arbitral award as a judgement and decree of the High Court of Kenya. In a ruling rendered on the 16th day of September, 2021, the High Court partially allowed the

applicant's application. The court found that the part of the final arbitral award that includes an order that the amount outstanding of the loan facility shall be paid within 30 days could not be enforced, as in its view, the manner and timelines for repayment of the loan were governed by the terms of the facility letters and could not be legally varied by the Arbitral Tribunal. The said court

further found that with regard to the redemption of the facility or default and enforcement of any of the securities, the parties had contracted that the choice of law is Kenyan Law and choice of forum is the High Court of Kenya. Consequently, the court held that the respondent's counterclaim on the repayment of the outstanding loan by the applicant would be recognized but that enforcement therefore was to be subject to the parties' contracts and the applicant's securities. The court held that in case of any dispute arising, it would be heard and determined in the High

Court.

It appears from the final orders, that, in effect, the High Court of Kenya, set aside the original orders of the Arbitral Tribunal to the effect that, the applicant pays to the respondent, a sum of USD 12,767,508.33 within a period of 30 days, together with interest at the rate of 9.5 % per annum compounded from 16th January 2018 until payment in full. The court substituted the same with an order that the counterclaim be recognized, save that it is to be executed in the terms of the letters of offer of 8th January 2014 and 4th November 2014 and executed securities and guarantees by the parties. The court made a further order that any issue or dispute arising shall be heard and determined by the said High Court.

- Further attempts by the applicant to contest the ruling of the High Court on appeal to the Court of Appeal of Kenya and subsequently to the Supreme Court of Kenya were unsuccessful. The respondent did not challenge any part of the decision of the High Court, notwithstanding the fact that the orders of the High Court had the effect of setting aside and substituting the original orders of the Arbitrator. In July 2024, the respondent advertised the applicant's property comprising the university campus premises at Kajiado Kitengela Nairobi for sale to recover the mortgage sums. This appears to have been in execution of the orders of the High Court of Kenya that recovery be in accordance with the terms of the letters of offer of 8th January 2014 and 4th November 2014 and executed securities and guarantees by the parties. However, the status of that recovery process remains unclear as no information was provided to the lower court and in this application. 20

- Nevertheless, in addition to the recovery process in Nairobi, the respondent filed Arbitration Cause No. 38 of 2024 in the High Court of Uganda seeking an order for recognition and enforcement of the final arbitral award in Uganda. The applicant herein opposed the application 30

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and further filed Arbitration Cause No. 46 of 2025 objecting to the recognition and enforcement of the final arbitral award by the High Court of Uganda on grounds inter alia, that in view of the Orders of the High Court of Kenya, which in essence, had the effect of setting aside or varying the final arbitral award, the original final arbitral award could not be recognized and enforced in 5 Uganda as a decree of the High Court of Uganda.

Upon hearing the consolidated applications, the High Court, in a ruling delivered on 10th March 2025 dismissed the applicant's objections and duly recognized the final arbitral award. The court held that the arbitral award handed down in Nairobi Kenya between the parties by Mr. Collins Namachanja on 19th September 2019 is recognized and is to be enforced in the same manner as ^a judgment, order and decree of the High Court of Uganda and that the respondent herein is entitled to recover the sums awarded in the final arbitral award from the applicant.

Aggrieved by the ruling and orders of the High Court, the applicant filed a notice of appeal in the High Court and caused it to be transmitted to this Court and it was registered as Civil Appeal No. 167 of 2025. The applicant further filed a letter requesting for certified typed proceedings in

the High Court. In the meantime, the respondent's advocates served the applicant with a formal demand to comply with the orders of the High Court of Uganda or else execution proceedings would issue against it. The said letter requested that the orders of the High Court be satisfied not later than the 21st day of March 2025. The applicant filed Miscellaneous Application No. 559 of 2025 in the High Court seeking an order for stay of execution, which application was heard and 15 dismissed on 4th April 2025. The applicant filed the instant application in this court and has since filed the appeal in this Court.

Representation

- 25 At the hearing, the applicant was represented by learned Counsels, Mr. Nelson Nerima and Mn Joseph Kyaue, Dr. Mundu Mustafa, the applicant's Deputy Vice Chancellor in charge of Finance and Administration was in attendance. The respondent was represented by learned Counsel s, Mr. Mukiibi Dovid and Mn Muwonge Kassim.
- 30 Counsels for the respective parties sought and were granted leave by this Court to adopt their written submissions. I commend both counsel for their extensive and authoritatively supported legal arguments, which have been very helpful in the determination of the application.

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I note that, in their submissions, counsel for both parties were in agreement that there are two issues for determination in this application, namely;

- i. Whether the application is competently before this Honourable Court.
- ii. Whether the Applicant has met the conditions precedent for the grant of an order of stay of execution by this Court.

Submissions by Counsel for the applicant on issue 1

As to whether the application is competently before this Honourable Court, applicant's counsel relied on Rule 42 (1) (2) of the Judicature (Court of Appeal Rules) Directions and submitted that all that is required is for the applicant to prove that it first filed the application for stay of execution in the High Court, which declined to grant the order, hence the application before this Court. Counsel cited the decisions in *Falcon Estates Limited versus Bismillah Trading Limited* Court of Appeal Miscellaneous Application No. 104 of 2015 and CACA No. 304 of 2017, the Registered 10

Trustees of the Hindu Union versus Kagoro Epimac & Ors. Counsel submitted that the applicant first filed a similar application in the High Court commercial division vide; Miscellaneous Application No. 559 of 2025 which was dismissed on 4th April 2025, hence this application. 15

Secondly, it was contended that, this Court derives its discretionary power to grant an order of stay of execution from Rules 2(2), 6(2) (b) of the Judicature (Court of Appeal Rules) Directions and that in determining the application, this court is required to consider the application on its own merits, without being bound by the reasoning and ruling of the High Court in HCMA No. 559 of 2025. Counsel relied on Civil Application No. 006E of 2025 *Gasasiro Augustine versus Bataringaya David*, 20

Lastly, citing the decision in Counsel further submitted that, this being an interlocutory application pending determination of an appeal before this court, and in the context of section 12 of the Judicature Act, this court, presided over by a single Justice has jurisdiction to hear and determine the application. Counsel prayed that court finds that the application is competently before the

Court. Counsel relied on the ruling of this court in Civil Application No. I 13 of 2023 UGCA 2052. *Haruna Senlongo V I & M Bank Ltd*,

Respondent's submissions on issue one.

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For the respondent, it was submitted that the application is incompetent as there is no valid notice of appeal as the applicant has no right of appeal. Respondent's counsel further contended that a right of appeal is a creature of statute and that in the instant case, the applicant has no such right of appeal.

5 Counsel cited and relied on the authorities of *Lukwago Efias v. The Attorney General and KCCA*, Supreme Court Civil Application No. 6 of 2014, where it was held that;

Where a Notice of appeal has been filed but the right of appeal does not exist, the Notice of appeal is incompetent and cannot form the basis for an application for stay of execution pending appeal as there is no pending appeal

- ¹⁰ He further relied on the case of *Uganda National Examinations Board v. Mparo General Contractors*, Supreme Court Civil Application No. 19 of 2004, *Mukanyondo v. Ssekamwa Sonde*, Court of Appeal Civil Application No. I 139 of 2023, it was similarly held that where the applicant has no right of appeal, there is no valid Notice of appeal and consequently, no stay of execution could be granted.
- Counsel invited court to find that the applicant has no right of appeal, hence there is no valid notice of appeal to support an application for an order of stay of execution.

Summary of the Applicant's submissions on issue two

Learned counsel submitted that according to the decision in *Hon Theodore Ssekikubo & Ahers v. Attorney General & Anor* Constitutional Application No. 06 of 2013, an applicant seeking an order for stay of execution will succeed on satisfaction of the following conditions precedent;

- i. There is a Notice of Appeal duly filed in accordance with Rule ⁷⁶
- ii. The Applicant must establish that his appeal has a likelihood of success: or a prima facie case of his right to appeal.
- iii. Proof that the applicant will suffer irreparable loss if the stay is not granted or that the appeal will be rendered nugatory if a stay is not granted.
- iv. The Applicant must also establish that the application was instituted without delay.

As to whether there is on record, a valid and competent notice of appeal, applicant's counsel contended that, according to the decision in *Gashumba Muniraguha Vs. Sam Nkutu* Civil Application No. 24/2015, all that is required of the applicant is to prove that a valid notice of appeal had been filed in accordance with Rule 76 of the Court of Appeal Rules. That, upon delivery of the ruling of the High Court on 10s March 2025, a notice of appeal was filed on 12th March and served on the respondent on 13u March 2025. It was also transmitted to this court and registered under COA-00-CY -CA-0167 -2025. The notice of appeal was thus filed and served within the timelines prescribed by Rule 76 of the Rules of the Court. Citing the decision in *Horuna Sentongo V I & M Bank Ltd* CACA No. 1069 of 2023, counsel invited court to find that a notice of appeal is sufficient to found the legal and factual basis for grant of an order of stay of execution.

Regarding the second condition, of existence of a bona fide appeal with a likelihood of success, counsel contended that all that is required is proof that there is an arguable appeal, one that is not frivolous or a sham. Citing the decision in *Haruna Senlongo Vs I&M Bank Ltd* supra, counsel contended that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court. Further, at this level, Court should not express ^a definitive opinion on merits of the appeal. That, in applications of this nature, court is not called upon to pre-empt consideration of matters suitable and reserved for the full bench in determining the appeal. The court's focus should be towards preventing the appeal from being rendered moot and or nugatory. Counsel relied on *China Henan International Cooperation Group Co. Ltd vs. Juslus Kyaboh*, a Civil Application No.100 of 2021, counsel submitted 15 20

Applicant's counsel invited Court to find that the applicant's appeal raises substantial triable issues or questions of law and fact, of great public importance, touching recognition and enforcement of foreign arbitral awards in Uganda, which merit consideration by the Court. Court was referred to the grounds of appeal in the draft memorandum of appeal, reproduced in the affidavit in support of the application, which according to counsel included unique questions pertaining to the law and legal principles applicable to recognition and enforcement of New York 25

Convention Arbitral awards in Uganda; the role of the Court at the Seat of the arbitration and the pertinent question of whether a foreign arbitral award, set aside or varied by a competent Court at the seat of arbitration, is capable of being recognized and enforced as such in Uganda in total disregard of the decision and orders of the High Court at the Seat. Relying on *Gasasira Augustine versus Bataringuya David*, Civil Application No. 0068 of 2025 Counsel contended that those 30

are serious questions that show that the appeal is arguable and is not a sham. That the full bench of this court will be invited to interrogate and settle the parameters that must be considered by the High Court of Uganda before it makes orders for recognition and enforcement of a New York Convention award. Court was reminded that the available jurisprudence of this Court and the Supreme Court focused on recognition and enforcement or setting aside and variation of domestic arbitral awards.

As to whether there is an imminent threat of execution and is so, whether applicant will suffer substantial loss or irreparable damage in the sense that the appeal will be rendered nugatory, if an order of stay is not granted, it was contended that the existence of a threat is a question of fact. Court was referred to the decision in Civil Application No. i of 2019 *Patrick Kaumba Willshire V Ismsil Dabule*. It was contended that the evidence on record shows that, immediately upon the delivery of the ruling by the High Court, the respondent extracted an order and made a formal demand to the applicant to comply with the orders of the Court by paying the decretal sums by 21st March 2025 or else execution proceedings would issue. That those are steps towards execution. Counsel argued that the threat is more plausible and imminent given the fact that the Respondent's target are the operational accounts of the applicant, especially where garnishee

proceedings are primarily conducted ex parte, without any need for an application for execution or a notice to show cause and the applicant will at the time have no way of objecting to or forestalling the same.

Further, that according to the decision in Hon. Theodore Ssekikubo & 3 Others vs. AG & Ahers CA No. 06/ 2013, the likelihood of suffering substantial loss if the order of stay is not granted, requires proof that there is a high possibility that in the event that the appeal succeeds, the reliefs sought on appeal will be rendered nugatory. Counsel invited court to find that the determination of the grounds of appeal has a direct and substantial effect on the orders sought to be executed by the respondent. That the applicant seeks to set aside the orders rendered by the High Court and to have them substituted with an order dismissing the respondent's application for recognition and enforcement of the award and allowing the applicant's application objecting to the recognition and enforcement. That if the appeal succeeds at the time when execution has been concluded, and the enormous sums are recovered, any remedies granted by the Court will have been rendered moot.

Counsel submitted that under grounds 6 & 7 of the notice of motion and Paragraphs I I, 12, 13, 14, 16 and 17 of the affidavit in support, the applicant had demonstrated the nature of substantial loss that it is likely to suffer as a result of execution, if the order of stay is not granted. It was further argued that the ripple effect execution on the operations of the applicant, a private University offering higher education, would be to paralyze the operations and cause potential sudden closure given the enormous sums ordered to be recovered and that any form of execution whether by garnishee or attachment and sale of University premises in Uganda has the ripple effect of causing the closure of the University. That the extent that the damage that will have been caused to the applicant is irreversible, in the event the applicant succeeds on appeal.

Counsel reiterated that the grant of an order for stay of execution is meant to protect the appellants'/applicants' unrestricted right of appeal such that when a party successfully pursues their appeal, the appeal and reliefs sought therein should not be rendered nugatory. An order for stay of execution will have preserved the status quo pending the disposal of the appeal especially where the respondent too, has no assets in Uganda capable of being reverted to upon determination of the appeal. Counsel cited the decision in *Kisembo Emmanuel & Ors* ^{>V} [>]</sup>

Tibendeza Moses [>]supro,

On the question of where the balance of convenience lies, counsel submitted that all that applicant needs to demonstrate is that the denial of the order will cause it more hardship than the respondent, which is the judgment creditor. That, in the instant case, the balance of convenience lies in maintaining the status quo by granting an order of stay of execution. Counsel cited *I/arana Sentongo* ^{>V} [>]I & M Bank Ltd Civil Application No. 113 of 2023 UGCA 2052. That the respondent will not be inconvenienced, as it had already taken recovery processes in Nairobi through advertising the applicant's valuable property worth over USD 20 Million situate in Nairobi for sale to recover the same sums sought to be recovered from the applicant through</sup>

execution in Uganda. That the Respondent is therefore able to recover the entire claimed sums or a substantial part thereof through sale of the security in Nairobi and cannot claim that it will be inconvenienced by the grant of an order of stay of execution by this court, as the order sought herein would not stay the recovery process in Kenya, yet simultaneous execution in Kenya and Uganda, will adversely expose the applicant to substantial double loss, and the ripple effect of such execution to students, staff and other stakeholder's in Uganda not be underscored. The risk of injustice to the applicant is gravely high. 20 25

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Lastly, as to whether the application was commenced without unreasonable delay, counsel contended that the applicant proved that the application has been made without unreasonable delay. They relied on *Kyambogo University v. Prol. Isaiah Omolo Ndiege*, C. A. Misc. Civil Application No 341 of 2013 for the proposition that court must take into account the time at which the application was filed in the High court and the time at which the application was filed

in this court after the High Court declining the grant of an order of stay of execution and that court will find that the application was promptly filed. Counsel re-iterated the prayer that the application be granted.

10 Summary of the respondent's submissions on issue two;

Learned counsel for the respondent re-iterated their arguments under issue one that the applicant has no right of appeal and therefore no likelihood of success in the appeal. That no right of appeal lies against the impugned order under the provisions of the Arbitration and Conciliation Act, Cap. 5 (the "ACA"), which domesticates the New York Convention. The right of appeal under the said Act is available in limited circumstances prescribed in section 31 and 38 of the ACA, which were not complied with by the applicant and that there is no statutory right of appeal from the order recognizing and enforcing an arbitral award. That appeals are barred by Section 9 of the ACA which bars courts from intervening in matters governed by the Act.

20 25 30 Counsel cited *Babcon Uganda Limited v. Mbale Resoa Hokl Ltd*, Supreme Court Civil Appeal No. 6 of 2016, *Industrial Development Corporation of South Africa Ltd v. Aya Investments (U) Limited*, Court of Appeal Civil Application No. 1104 of 2023 and *Lakeside Dairy Limited v. Midland Emporium Limited and 3 others*, Court of Appeal Civil Application No. 858 of 2022, for the proposition that there is no right of appeal against the decision of the High Court under Section 31 of the ACA and that accordingly, there is no valid notice of appeal upon which any stay of execution can be requested or granted by this Honorable Court. Counsel further relied upon the decision of this court in *Aya Investment (U) Limited vs Industrial Development Corporation of South Africa Ltd* Civil Application No 410 of 2023 where an order for stay of execution was denied for the reason that this court's intervention in arbitral matters was limited to S 9 ACA and that cast doubt on the likelihood of success of the appeal.

As to whether the application meets the conditions precedent for the grant of an order of stay of execution, counsel contended that there is no pending execution application, rendering the application premature. Citing the decision in *Uganda Revenue Authority v. East Africa Property Holdings Ltd*, Court of Appeal Civil Appeal No. 144 of 2014, counsel submitted that

a mere letter demanding for payment was not proof of a serious and imminent threat of execution especially where no application for execution has been filed or warrant of execution extracted.

Regarding whether there is an appeal with a likelihood of success, it was contended that in the absence of a right of appeal, there is no valid notice of appeal, and thus, no valid appeal with any likelihood of success exists to warrant the grant of an order of stay of execution. Counsel reiterated the principle in *Lakeside Dairy Limited v. Midland Emporium Limited and 3 others*, and *Aya Investments (U) Limited v. Industrial Development Corporation of South Africa Ltd*, and prayed that court finds that there is no prima facie case of a right of appeal or an appeal with a likelihood of success. Further that the grounds of appeal raised by the applicant equally have no likelihood of success and are unarguable because they deliberately mischaracterize the High Court's Ruling.

On the issue of irreparable loss, it was contended that the applicant cannot claim that it will suffer irreparable loss as its liability is clearly quantified in the Arbitral Award and the High Court's Ruling as US\$ 12,767,508.33 with interest thereon at 9.50% per annum from 16th

- January 2018 until payment in full. The amount of liability arises from a loan and is therefore clear and already bindingly quantified and capable of atonement in damages. Citing *Kiluuma-Magala and Co Advocates v. J. W. Inter Semice Limited and Another* of Appeal Civil Application No. 14 of 2024, counsel contended that the onus is on the applicant to satisfy this Court that a refusal to grant an order for a stay of execution would result in substantial loss that cannot be quantified by any particular monetary compensation or computed by exact mathematical formula. That, it is not enough for an applicant seeking for a stay of execution to merely assert that he/she will suffer substantial loss but it must be demonstrated how and the kind of loss that would result so as to justify denying the respondent enjoyment of the proceeds of his success at the court below. n 25
- Secondly, that the respondent is a highly reputable financial institution regulated by the Central Bank of Kenya with the capacity to make any consequent payment of damages to the Applicant should that unlikely eventuality arise. That education institutions are not immune from the risks 30

of execution or deserving of any special treatment when it comes to execution of awards and decrees. Counsel also contested the valuation report relied on by the applicant as a unilateral valuation that is exaggerated, unreliable and not approved by court and therefore of no relevance.

- 5 Thirdly, counsel contended that the applicant has not furnished security for due performance of the decree of US\$ 2,767,508.33 (with interest thereon at 9.50% per annum from 16th January 2018), yet this is a mandatory requirement under Order 43 Rule 4 of the Civil Procedure Rules. Counsel relied on *Lawrence Musiitwa Kyazze v. Eunice Busingye*, Supreme Court Civil Application No. 1E of 1990,
- Lastly, regarding the balance of convenience, it was submitted that the balance of convenience clearly favours the Respondent who has been kept out of the use of its monies and has, despite succeeding on the award in 2019, not been paid to-date, despite the fact of lending and disbursement being undisputed. All in all, it was prayed that the application be dismissed with costs to the Respondent. 10

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Applicant's submissions in rejoinder

In their submissions in rejoinder, and oral highlights, applicant's reiterated that there is a valid notice of appeal filed and served within the timelines prescribed by law. They relied on *Yokramu Kasinde & Anor versus Kihonde Samuel & Anor* Civil Application No, 259 of 2018.

- Further that the applicant derives the right of appeal from article 134 (2) of the Constitution, section 10 of the Judicature Act and section 66 of the Civil Procedure Act, by virtue of the fact that upon recognition of the impugned arbitral award, as it is, under section 43 of the ACA deemed to be a decree of the High Court, and that appeals lie as of right from decrees of the High Court to this Court. The applicant also invoked the general right of appeal to the Court of Appeal, to correct an illegality, drawn to the attention of the Court, and which the appellate court must necessarily correct in its duty to ensure that justice is done to the parties. That the illegality lies in the High Court purporting to sit in appeal from the ruling of the High Court of Kenya, and recognizing and enforcing a foreign arbitral award, which had been set aside at the 20
- seat of arbitration in Kenya. Counsel cited, *Makula International Limited v Carulinal*
- *Nsubuga Llamala* (19E2) HCB 1, 1. 30

Further, that, sections 9, 34 & 38 of the Arbitration and Conciliation Act alluded to by the respondent are applicable to orders of the High Court under section 34 and 38, from domestic awards, which do not include the order. the subject of the appeal, as it emanates from proceedings for recognition and enforcement of a New York Convention Award. That the order the subject of the appeal emanated from an application for recognition and enforcement of ^a foreign arbitral award under Part III of the ACA, sections 42 and 43, which fall outside the restrictions on appeals in section 38 of ACA.

Counsel submitted that, the decisions in Lakeside Diary Limited versus Midland Emporium Limited and 3 Others Civil Application No. 858 of 2022, Bohcon Uganda Limited versus

Mbale Resort Hotel Limited SCCA No. 6/2016 and Industrial Development Co-operation of South Africa Limited versus Aya Investments (U) Limited Civil Application No. 1101/2023 relied upon by respondent's counsel related to appeals from applications under section 31 and 38 of the ACA which relate to orders issued in respect of domestic awards and not those in respect of recognition and enforcement of New York Convention awards. That the Court(s) in the said cases were not addressed and indeed, did not consider nor pronounce themselves on 10/15

the right of appeal emanating from an order of the High Court recognizing and ordering for enforcement of a foreign arbitral award, which has been wholly or partly set aside at the seat of arbitration contrary to Article 5 (1) (e) of the New York Convention.

Counsel contended that the jurisdiction to determine whether the applicant has a right of appeal or whether the notice of appeal is incompetent lies not with the court presided over by a single justice but with the full bench in appropriate proceedings for striking out a notice of appeal under Rule 82 of the Rules of the Court, otherwise the Single Justice would be assuming the jurisdiction of the full bench and pre-empting consideration of matters for the full bench in determining the appeal, yet at this stage the court is not required to pre-judge the appeal or delve into its merits. They cited Industrial Development Co-operation of South Africa Limited versus Aya Investments (U) Limited Civil Application No. 1104/2023 and China Henan International Cooperation Group Co. Ltd vs. Justus Kyabahwa Civil Application No. 100 of 2021. 20/10

In rejoinder to the question of whether the application meets the conditions precedent for grant of a stay, counsel for the applicant contended that, the grounds for the grant of an order of stay of execution do not expressly include the existence of a pending application for execution as a ground for consideration. What matters is that steps towards execution are initiated' See;

at [11]/

Goshumba Maniraguha -vs.- Sam Nkudiye SCCA No. 24 of 2015. Garnishee proceedings can issue ex parte without any notice to show cause being issued and in circumstances where a garnishee order nisi is made absolute, the decreed monies will be paid consequently rendering the entire appeal obsolete. They cited, China Henan International Corporation Group Limited -versus- Justus Kyabahwa CACA No. 101 of 2021. Kyabahwa CACA No. 101 of 2021 .

In rejoinder to the respondent's contention that there is no prima facie case of right of Appeal with a likelihood of success, appellants counsel re-iterated their earlier submissions that an arguable appeal is not one which must succeed but one which ought to be argued before a bench and is not frivolous and that the respondent had not demonstrated that the grounds of appeal are a sham. They relied on Kiiza Sanyu -versus- Emojong John CACA No. 130 of 2021,

Counsel further re-iterated the earlier submissions on substantial loss contending that execution has the potential and effect of paralyzing the Applicant's operations and consequently resulting into liquidation and further rendering the appeal nugatory. That the balance of convenience tilts

- in its favour. Citing the decision in *Gasasira Augustine versus Balaringaya David*, Civil Application No, 006E of 2025. counsel further contended that under Rule 6 (2) (b) there is no requirement for depositing security for due performance of the decree and in this case, the issue should not arise where the respondent has already undertaken the sale of the applicant's property in Nairobi and has not attached a current valuation of the property, has concealed from 15

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court, the reserve price for the property, has not disclosed if it has been sold and the fate of the proceeds and if not yet sold, the amounts so far offered to purchase it.

Consideration and decision

for the grant of an order for stay of execution.

I have carefully considered the pleadings and affidavit evidence in support of and in opposition to the application, together with the annexures thereto and the submissions of counsel as summarized herein above. The Respondent's counsel in their submissions raised a preliminary point of law as to the competence of the notice of appeal, contending that there is no valid notice of appeal capable of forming the basis for any stay of execution, because the applicant has no right of appeal. The same argument has been re-iterated under issue number two on the conditions for the grant of an order for stay of execution. I will address that the objection in the consideration of the second issue, on whether the applicant has met the conditions precedent

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This court is alive to the pertinent principles guiding the determination of applications of this nature. There is need to strike a balance between the rights of the judgement creditor which is entitled to enforce and recover the fruits of its judgement and the duty of this court in appropriate cases and in the interest of justice to make such orders for a stay of execution restraining the respondent from executing the judgement appealed from, as will prevent the appeal, if successful, from being rendered nugatory. See; *Consilulionol Application No. 07 of 2011 and 09 of 2011 Akankwasa Damian versus Uganda and Civil Application No. 0068 of 2025 Gasasira Augustine versus Balaringaya David*. The rationale is to preserve the suit property or avert execution, so that the parties can have their rights determined by the appellate

court. See, *National Housing and Construction Corporation vs. Kampala District Land Board and Anor*. Civil Application No, 6/2002. 10

Whether the application is competently before this Honourable Court.

The discretionary power of this Court to grant an application for stay of execution is enshrined in Rules 2(2) and 6(2) (b) of the Judicature (Court of Appeal Rules) Directions. This position has been re-iterated in *Haruna Sentongo V I & M Bank Ltd* Civil Application No. 113 of 2023, Civil Application No. 157/2022; and quite recently in Civil Application No. 0068 of 2025 *Gasasira Augustine versus Balaringuya David* 15

The procedure of commencing an application for stay of execution, pending determination of an appeal to this Court is guided by Rule 42 (1) & (2) of the Rules of this Court, which require that preferably an application for an order of stay of execution should first be made in the High Court, and where it is declined, a fresh application can be filed in this court. See Supreme Court Civil Application No. 4712020 *Editor in Chief, the Red Pepper Publications Limited versus Rt. Hon. Chief Justice Samuel Lloko Yombuzi and the Registered Trustees of the Hindu Union V Kagoro Epimac & Ors* CACA No. 304 of 2017. 20 25

In the instant application, it is evident from the notice of motion that the application was brought under Rules 2(2) and 6(2) (b) and 42 of the Rules of this Court, which confer jurisdiction and discretion upon this court to grant an order of stay of execution pending an appeal to this Court. There is also uncontroverted evidence that the applicant filed Miscellaneous Application No. 559 of 2025 for an order of stay of execution in the High Court, which application was dismissed by on 4th March 2025. It is upon the dismissal of the said application that the applicant filed the instant application in this Court. I find that, in the context of Rule 42 of the Rules of this Court,

the application is competently before this Court. I also find that, it being an application for stay of execution pending an appeal before this court, it can be heard and determined by a single Justice of this Court under section 12 of the Judicature Act. That position has since been settled by several decisions of this Court. See: *Jomayi Property Consultants Ltd v Maviiri* (Civil Reference No. 171 of 2015) [2020] UGCA 2052.

I must note however, that, where the application for an order of stay of execution pending an appeal to this court is declined by the High Court, and a fresh application is preferred before this Court, this Court in the exercise of its discretionary powers under Rules 2(2) and 6 (2) (b) to grant or decline the grant of an order of stay of execution is not bound by the decision and, or reasoning of the High Court, upon which that Court declined the application. I am therefore not persuaded by the prayer from Respondent's counsel that this Court should consider and adopt the reasons of the High Court in the determination of this application. In my view, such an approach would amount to fettering the discretion of this court embedded in Rule 2(2) and Rule 6 (2) (b) of the Rules of this Court, which empower this court to consider, and where the circumstances permit, grant an order for stay of execution in any civil proceeding "as the court may consider just". I am fortified in this finding by the decisions in Civil Miscellaneous Application 11 of 2011 *Joel Kato v Nulu Nalwoga* (SC) cited with approval in Civil Application No. 0068 of 2025 *Gasasira*

A ugust i ne vers us Bal a ringaya David

I take the view that the court's focus in considering an application of this nature should be towards preservation of the status quo in respect of the subject matter of the appeal, so that upon determination of the appeal, the appeal and reliefs sought therein are not rendered nugatory. This position is supported by the Supreme Court decision in Hon. Theodore Ssekikubo & Ors V Attorney General & Anor Constitutional Application No.06 of 2013. I therefore find that the application is properly and competently before this Court. 25

Whether the Applicant has met the conditions precedent and threshold adduced for the grant of an order of stay of execution by this Court,

- The conditions precedent for the grant of an application for stay of execution before this Court were re-iterated by the Supreme Court in Hon Theodore Ssekikubo & Others Versus Attorney General & Anor Constitutional Application No.06 of 2013 to wit: 30
- i. There is a Notice of Appeal duly filed in accordance with Rule 76 of the Court of Appeal Rules
- ii. The Applicant must establish that his appeal has a likelihood of success; or a prima facie case of his right to appeal.
- iii. Proof that the applicant will suffer irreparable loss if the stay is not granted or that the appeal will be rendered nugatory if a stay is not granted.
- iv. The Applicant must also establish that the application was made without delay. I will hereunder, consider each of the said requirements to determine if the applicant has met the

threshold, warranting the grant of the order of stay of execution.

10 15 20 The first condition is proof of filing of a valid notice of appeal. It is not in dispute that, for court to grant an order of stay of execution, the applicant must prove that a notice of appeal was filed in accordance with Rule 76 of the Court of Appeal Rules. I find useful guidance in the decision in Gashumba Muniraguhu Vs. Sam Nkutu Civil Application No. 24/2015. I must add that the notice of appeal must be proved to have been filed within 14 days after the decision being appealed and served on the respondent within 7 days from the date of lodgment in the High Court. The uncontroverted evidence on record is that the impugned ruling, the subject of the appeal was delivered on 10th March 2025. On 13th March 2025, the applicant filed a notice of appeal in the High of Uganda, caused it to be transmitted to this court and had it registered under Case No COA-00-CV-CA -0167-2025. It is also evident that the notice of appeal was served on the respondent on 13th March 2025. I am therefore satisfied that the notice of appeal was filed within the confines of Rule 76 of the Rules of this Court.

However, it has been strongly and extensively submitted that the applicant has no right of appeal from the impugned order of the High Court and that an appeal is barred by section 9, 31 and 38 of the Arbitration and Conciliation Act. It has also been contended that in the absence of a right of appeal, no application for stay can be sustained. Several authorities were cited as summarized in the submissions of respondent's counsel herein above.

In response to the objection that there is no right of appeal contended that the question of whether there is right of appeal is one that can only be determined by the full bench in appropriate proceedings as is prescribed by the rules and not by a single justice of the Court determining an application for stay of execution. They have also contended that the High Court held that the arbitral award was recognized and rendered enforceable as a decree of the High Court of Uganda pursuant to section 43 of the ACA. That in that context, the applicant has a right of appeal from the said decree pursuant to Article I 31 of the Constitution, section 10 of the Judicature Act and 30

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section 66 of the Civil Procedure Act. Finally, that sections 9, 34 and 38 of the ACA' the foundation of the respondent's objection is only invoked in appeals arising from domestic arbitration in the circumstances set out in section 34 and 38 and are not applicable to orders emanating from recognition and enforcement of a foreign arbitral award, alleged to have been set aside by a competent court at the seat of the arbitration.

- I have carefully considered the plethora of authorities cited on this issue by both counsel. I must state that, it is quite apparent that the question of a right of appeal from the orders of the High Court under sections 31 and 38 of the ICI was considered by the Supreme Court and this Court in the context of domestic arbitral awards. The question of the applicability of section 9, 31 and
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38 of the ACA to the right of appeal from an order of the High Court arising from an application for recognition and enforcement of a foreign or New York Convention arbitral award has not been interrogated by the Courts. I note that section 38 is titled "questions of law arising in domestic awards" and would prima facie appear to relate to appeals from orders of the High Court in the circumstances set out in the section, arising from proceedings challenging domestic arbitral awards. I further note that section 34 of the ACA equally appears to be in respect of applications to set aside or vary an arbitral award.

However, I am alive to the position of the law that the jurisdiction to review, set aside or suspend such a New York Arbitral award is a preserve of a competent court at the seat of arbitration. This

- is apparent from the wording of Article 5 (1) (e) of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") and is supported by the persuasive decision in Arbitration Causes No, 0002 and 0005 OF 2023 Greal Lakes Energt Company NV Versus MSS XSABO Power Lld and Others. It would appear that the provisions of section 34 and 38 of the ACA that relate to setting aside of domestic arbitral awards or determination of questions of law arising from domestic arbitral proceedings may not be applicable to a New York convention Award and by extension may not extend to any appeals from an order recognizing a New York Convention award as a judgement and decree of the High Court of Uganda. 20
- At this stage, I can only make such observations, as a court presided over by a single Justice has no jurisdiction to make definitive determination on the question of the right of appeal. Counsel for the respondent in their submissions contend that the Decree sought to be stayed is now ^a decree of the High Court of Uganda having been recognized as such by the High Court. I can only observe that the said contention appears to support the argument by counsel for the applicant 30

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that, if the award was recognized and held by the High Court in its ruling to be enforceable as a judgement, order and decree of the High Court of Uganda it is a plausible argument that the judgement and decree is appealable to this Court under Article 131 (2) of the Constitution, section 10 of the Judicature Act and section 66 of the Civil Procedure Act, which will ultimately be determined by the full bench of this Court.

It is quite apparent from the decisions of the Supreme Court and this Court summarized in the submissions of counsels above that the courts were considering orders of the High Court emanating from proceedings under the ACA relating to domestic awards and that the question of right of appeal from an order challenging the recognition and enforcement of a New York Convention award in Uganda was not interrogated. The applicant's appeal presents that opportunity. In my humble view, the question of the right of appeal in the context of orders of the High Court arising from applications for recognition and enforcement of a foreign arbitral award, alleged to have been set aside by a competent court at the seat of arbitration has not been settled and remains arguable.

S.42 ACA states that; a New York Convention award shall be recognized and enforced pursuant to s 35.

^t J.' ACA states that;

- (1) An arbitral award shall be recognized as binding and upon application in writing to the court shall be enforced subject to this section,
- (2) Unless the court otherwise orders, the party relying on an arbitral award or applying for its enforcement shall furnish

- o, The duly authenticated original arbitral award or a duly certified copy of it; and
- b. The original arbitration agreement or a duly certified copy of it.
- Q) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.

S.35(2)(b) ACA specifically requires the party who is desirous of enforcing a foreign award to furnish a duly authenticated original arbitral award. This part of the law is silent on enforcement of awards which have been varied and/or set aside in part by the Court clothed with jurisdiction at the seat. S 35(2) (b) seems to restrict itself to the enforcement of the original arbitral award.

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I am persuaded by the submission by applicant's counsel that, such a question can only be determined by the full bench of this court in appropriate proceedings. This appears clear from the decision in Industrial Development Co-operation of South Africa Limited versus Aya Investments (U) Limited Civil Application No. I 10412023. The full bench of this court will have

an opportunity to pronounce itself fully and in more succinct terms on the scope of sections 9, 31, 35, 38 and 42 ACA, as they relate to each other and their applicability to a right of appeal from an order of the High Court emanating from applications for enforcement and recognition of ^a foreign New York Convention award, which is alleged to offend provisions of Article 5 of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York

Convention"). 10

> I also agree that in applications of this nature, court is not called upon to pre-empt consideration of matters suitable and reserved for the full bench in determining the appeal. The court is not at this stage required to pre-judge the appeal or delve into its merits. I find the case of *China Henan*

International Cooperation Group Co. Ltd vs, Julius Kyabahwa Civil Application No. 100 of 2021 cited with approval in *Gasasira Augustine versus Balarigoya David* Civil Application No. 0068 O F 2025 to be of useful guidance on that point. 15

It is therefore the view of this court that, at this stage, the paramount duty of court to which an application for stay of execution pending appeal is made is to see to it that the appeal, if successful, is rendered nugatory. This is the approach taken by the Supreme Court in *Gashumba Maniraguha -vs. - Sam Nkudiye* Civil Application No. 24 of 2015, where court was of the view that the objection to competence of the appeal could be raised in appropriate proceedings, if no remedial action was subsequently taken by the applicant, otherwise the court could not abdicate from its duty to reserve the status quo pending determination of the parties' rights on appeal. In the circumstances, I am unable to make a definitive finding that there is no valid notice of appeal, on account of alleged want of a right of appeal. That is a preserve of the full bench in appropriate

proceedings. With the finding that a notice of appeal was filed in accordance with Rule 76, that in my view, suffices to found the basis for grant of an order of stay of execution in this Court. 20 25

Haruna Sentongo V I & M Bank Ltd CACA No. 1069 of 2023.

As regards the requirement to prove that the appeal has a likelihood of success; or a prima facie case of his right to appeal, I have already found that, in applications for stay of execution, court is not called upon to pre-empt consideration of matters for the full bench in determining the

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appeal. The court is not at this stage required to prejudge the appeal or delve into its merits. See; China Henon International Cooperation Group Co. Ltd vs. Juslus Kyabahwa Civil Application No.100 of 2021. It suffices for the applicant to demonstrate that they have an arguable appeal, which ought to be argued fully before the court and one that is not frivolous. The decision in Stanely Kang'ethe Kinlanjui V Ketter & Ors [2013] e KLR is of good guidance.

In the instant case, the applicant has not only attached the draft memorandum of appeal containing the grounds of appeal but has in the affidavit in support stated the grounds and elucidated on what they contend to be material errors of law in the decision of the High Court. I note that the grounds relate to critical questions relating to; the jurisdiction and limitations of the High Court in applications for recognition and enforcement of foreign arbitral awards in Uganda whether the High Court in Uganda can lawfully recognize and enforce a foreign award, stated to have been set aside and/or varied by a Court of competent jurisdiction at the seat of arbitration, or can make a finding that the Court at the seat of arbitration acted in error in interfering with or varying the arbitral award. I also note from the ruling of the High Court that, the learned Judge alluded to the varying schools of thought on enforcement of foreign arbitral awards, including foreign arbitral awards set aside or varied by courts at the seat of arbitration, and took a position based on one school of thought. The varying schools of thought on the subject will mostly likely be interrogated by the full bench, to determine whether the conclusion drawn by the learned judge is supported in law or fact. It has not been suggested by the respondent that there is no possibility that the full bench of this Court could reasonably arrive at a conclusion different from that of the High Court or that it will for lack of jurisdiction decline to entertain such an important grey area

In essence, the full bench of this Court is being invited to provide a definitive interpretation of provisions of the Arbitration and Conciliation Act and The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") and guide on the parameters for recognition and enforcement of foreign awards in Uganda, where such awards are the subject of further orders of a competent court at the seat of arbitration setting aside or varying the award. I do not find such questions to be a sham or to be unarguable. In my view, the appeal presents some novel questions worth reconsideration by the full bench not only for the benefit of the parties to the appeal but also for purposes of streamlining the law on recognition and 25 30 enforcement of foreign arbitral awards or New York Convention awards in Uganda. I find that

of the law.

the applicant has satisfied this condition.

On the requirement to prove that the applicant will suffer irreparable loss if the stay is not granted or that the appeal will be rendered nugatory if a stay is not granted, I agree with the submission by learned counsel for the respondent that the onus is on the applicant to satisfy this Court that a refusal to grant an order for a stay of execution would result in substantial loss and that it is not

- enough for the applicant to merely allege that it will suffer irreparable injury without more. See *Kituuma-Magala and Co Advocates v. J. W. Inler Senice Limited and Anor*, Court of Appeal Civil Application No. 11 of 2021,
- 10 In the determination of this condition, the court must consider the peculiar circumstances of each case to guide the exercise of its discretion. The court must be alive to the need to ensure that the right of appeal and reliefs sought on appeal are not rendered nugatory. See: Civil Application No. 0068 of 2025 *Gasasira Augustine versus Balarigaya David*. The court has been invited by the respondent to take into account the fact that in a monetary decree, there is no likelihood that the applicant can suffer substantial loss, incapable of being atoned for by an award of damages. Citing *Kituuma-Magala and Co Advocates v. J. W. Inter Service Limited and Anor*, Court of Appeal Civil Application No. 14 of 2021, counsel contended that the onus is on the applicant to satisfy this Court that a refusal to grant an order for a stay of execution would result in substantial loss that cannot be quantified by any particular monetary compensation or computed by exact mathematical formula.

I note that there is nothing in the said decision to suggest that an order of stay of execution cannot be granted in a money decree. The matter remains one of exercise discretion of the Court in the manner that the Court considers just. See: Civil Application No. 0068 of 2025

- *Gasasira Augustine versus Balarigaya David*. The court should be guided by the peculiar facts before it. I am of the view that, whether an appeal will be rendered nugatory or not, if a stay is not granted is dependent on a number of considerations. These may include but not be limited to; whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible, whether damages will reasonably compensate the party aggrieved, or
- whether it is in the public interest to grant a stay, whether it is necessary to preserve the status quo pending appeal in order to protect the reliefs sought on appeal, so that the rights of the parties involved in the appeal may not be lost or reduced by reason of an intervening execution of the judgment. A stay of execution will be granted where failure to grant it will destroy the

subject matter of the proceedings or will most likely render nugatory any order or orders of the Court of Appeal nugatory.

In the peculiar circumstances of this case, the evidence on record shows that the applicant has challenged the orders of the High Court recognizing and granting the respondent the right to enforce and recover enormous sums of money by way of execution in Uganda. The applicant contends that the arbitral award sought to be forced was set aside or varied by the Kenyan High Court, which also guided that recovery of the loans sums claimed by the respondent be through enforcement of the terms of facility agreement, a matter that the applicant contends was ignored by the High Court of Uganda, when arriving at its decision, the subject of the pending appeal.

It is evident from the grounds and reliefs sought in the memorandum of appeal that the applicant seeks to set aside the decision of the High Court and all orders rendered therein. The possibility that the full bench of this Court may take a different position from the High Court, cannot be wholly ruled out. In that case, if execution proceeds, then the reliefs sought in the appeal if granted will have been rendered moot. This court will have failed in its duty to preserve the status quo in order to protect the right of appeal and reliefs sought therein, as the parties have their rights determined by the full bench of this Court. See; *National Housing and Construction Corporation vs. Kampala District Land Board and Anor.* Civil Application No.6/2002.

Further, it is the applicant's contention that, in light of the substantial or colossal amount in the sum of USD 12,767,508.33 with interest thereon, for which the High Court has cleared the Respondent to recover from the applicant by way of execution, recovery of that sum will adversely affect and stifle its operations as a University and adversely impact on its capacity to continue in business and also to sustain the appeal. The applicant has adduced evidence to show that, it is a private university with the principal source of income to run its activities being tuition paid by students through accounts with commercial banks. The sum sought to be recovered is obviously a significant amount and there is no doubt it has the potential of affecting the normal operations of the applicant if execution were to issue, affect the students, pursuing their studies and staff who all survive on the existence of the applicant. As was held in *i/o/z Sugar Limited & Another v Kiryondongo Sugar Limited & Anor* (Civil Application 607 of 202a) [2025], where a garnishee order for colossal sums of money had the potential to cripple the operations of an applicant and would put it out of business, which would be

detrimental to the economy and the wider society depending on the applicant's existence for survival. It would be in the interest of justice and public interest that an order of stay of execution is issued pending determination of the rights of the parties on appeal.

- 5 Further, where there is a real prospect that execution of the decree will, to a crippling extent deprive the appellant of the resources, financial or otherwise, necessary to sustain the appeal or rendering the reliefs sought nugatory, the court may be inclined to grant an order for stay of execution. See HCMA No, 0236 OF 2025 DFCU Bank Limited versus Crane Management Services Limited. In the affidavit in support and affidavit in rejoinder, Dr.

Mundu Mustafa has elucidated on the likely impact of execution whether by garnishee or attachment of university property on the operations of the University, including potential closure to the staff and the students and presumably the applicant's ability to sustain the appeal. That, in my view is not the type of damage to an academic institution capable of being undone, if the appeal succeeded. 10

- The applicant has also raised a critical factor, that already, the respondent has advertised the applicant's university premises in Nairobi for sale. I have perused the notice of sale attached to the affidavit in support marked annexure "D" and found that indeed, in July 2024, the respondent put on sale, the applicant's property comprising university premises at Kajiado, Kitengela in Nairobi for sale. The respondent does not dispute that fact. The applicant has also adduced a valuation report of the said property dated 16th December 2024, indicating that the open market value of the property was at the time K. Shs. 3,127,620,000 and forced sale value of K. Shs. 2,502,096,000 and contended that the proceeds of the sale will most likely wipe out the sums sought to be recovered through execution in Uganda or a substantial part thereof. 15 20
- The respondent has strongly contested the competence of the valuation report as being ^a unilateral valuation, which is quite exaggerated and contrary to the principle of reliability in international Valuation standards. On its own part, the respondent has adduced a valuation report dated 24th January 2023, wherein it contends that the said valuation returned an open market value of K. Shs. 1,195,000,000 and a forced sale value of K. Shs. 895,250,000/=, which appears to be less than half of the market value. I note that the respondent's valuation report too, was rendered over 1 1/2 years before the notice of sale, which was advertised in July 2024. It appears to be inconceivable that the respondent would lend a sum of USD 11.3 million for a property whose forced sale value is of a lesser sum at K. Shs. 895,250,000/=. 25 30

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It is not the duty of this Court at this stage to engage in a scientific determination of the value of the property. What is apparent is that there is a recovery process in Nairobi undertaken by the respondent to recover the same sums, the subject of the orders of the High Court. The respondent has not disclosed the status of the progress of the recovery in Nairobi, the reserve price for the sale of the property, the valuation of the property that was caused immediately before advertising the property for sale, which should ordinarily be about 6 months before the notice of sale, any offers for the purchase of the property and the sums offered or likely to be recovered.

- In *Kafu Sugar Limited & Another v Kiryandongo Sugar Limited & Another* (Civil Application 607 of 2024) 120251, the court noted that one of the relevant considerations in granting an order for stay of execution is whether the respondent has already recovered part of the decretal sum or has taken recovery process to recover the decretal sum including attachment of some of the assets. In that case, if there is any balance left un-cleared, the

respondent, would still be entitled to recover the said balance from the applicant, if it is the successful party in the appeal. In the instant case, it has not been suggested by the respondent that the applicant will have ceased to exist at the conclusion of the appeal, to the extent that the decretal sums or any 10 15

- The respondent's counsels have in their submissions claimed, albeit without evidence, that the applicant has frustrated the recovery process in Nairobi. The respondent has not adduced evidence of any court order if at all, obtained by the applicant in Nairobi staying or injunctioning the recovery process in Nairobi. At the hearing, court inquired from respondent's counsel about the exact status of the recovery process in Nairobi and counsel were unable to confirm the exact status of that process in Nairobi. 20 25

unrecovered part thereof shall be rendered irrecoverable.

It is therefore apparent that the respondent wants to have an open door to do simultaneous execution against the applicant's valuable assets in Nairobi and at the same time undertake execution in Uganda oblivious to the possibility of double and or over execution. It has been held that simultaneous execution proceedings in more than one State, although possible in exceptional circumstances, is ideally a power that should be used in a very restricted manner and, applied only in exceptional cases where it is demonstrated that it will not cause undue hardship to the judgment debtors because of several executions being allowed to contemporaneously be effected. See; *M/s Semuyabo, Iga & Co. Advocates & Anor -Versus-*

Attorney General of the Republic of South Sudan & 2 Ors HCMA No. 004/2022. In the instant case, the applicant does not seek to stay the recovery process in Nairobi and in any case, the order of stay of execution sought herein is not enforceable in respect of any assets in Kenya and cannot therefore extend to staying the recovery process in Kenya, if at all it has not yet been concluded.

In view of the recovery process in Nairobi undertaken by the respondent to recover the same sums sought to be recovered in execution in Uganda, and substantial value of the applicant's property at the seat, the subject of the sale, I find that the applicant will be subjected to adverse hardship as a result of simultaneous execution and is likely to suffer substantial loss. In the meantime, pending determination of the applicant's appeal, the respondent has a remedy in Nairobi of selling the collateral security to mitigate any potential losses that would arise, on account of the pending appeal, if the order of stay is granted by this court pending determination of the applicant's appeal. The balance of convenience therefore tilts in favour of the applicant, which will adversely be affected by the simultaneous recovery processes.

The respondent has also invited court to dismiss the application on ground that the applicant has not deposited security for due performance of the decree as is required under Order 43 Rule 4 of the Civil Procedure Rules. The question of whether in applications for an order of stay of execution, under Rule 6 (2) A) and 2(2) of the Rules of this Court, it is a mandatory requirement for the applicant to deposit security for due performance of the decree was considered in *Civil*

Miscellaneous Application 11 of 2011 Joel Kalo v Nulu Nalwoga (SC) cited with approval in Civil Application No.0068 of 2025 Gusosira Augustusline versus Balaringaya David, where it was held that there is no such mandatory requirement and that it is merely a rule of practice and a matter of exercise of discretion by the Court. That Rule 6 (2) (b) confers upon the court unfettered discretion to grant an order for stay of execution in any civil proceeding "as the court may consider just". In light of the earlier finding that the respondent is already enforcing recovery of the claimed sums by way of sale of the applicant's property in Nairobi, I find that it would not be in the interest of justice to order the applicant to deposit security for due performance of the 25 decree.

As to whether the instant application was instituted without delay, it is incumbent on the applicant to prove that the application has been made without unreasonable delay. See; Kyambogo University v. Prof. Isaiah Omolo Ndiege, C. A. Misc. Civil Application No 141 of 2013 (1__page_25_Picture_6.jpeg)

2013. I am equally alive to the legal position that, a party dissatisfied with a decision of any court is required to take essential steps within the prescribed time to file an appeal against the decision and not to spring in action when a successful party sets in motion, the process of realizing the fruits of his judgement See; Civil Reference No. 15/2016 Kananura Andrew

Kansiime versus Richard Henry Kaijuka 5

In the instant case, I am satisfied that the applicant brought the instant application without unreasonable delay. It is not in dispute that the ruling of the High Court, from which the order sought to be stayed emanates, was issued on the 10th day of March 2025. The applicant duly filed a notice of appeal on 12th March 2025 and further requested for the certified copy of the 10 record of proceedings to enable it prepare and file the memorandum and record of appeal. In the meantime, the applicant applied for an order of stay in the High Court, vide HCMA No. 0559 of 2025, which application was declined by the High Court on 4th day of April 2025. Thereafter, the applicant filed the instant application and equally filed submissions in support of the application. As stated in the affidavit in rejoinder, the applicant has since filed in this 15 Court, the Memorandum and Record of Appeal in Civil Appeal No. 167 of 2025, and served the same on the respondent's counsel. The conduct of the applicant in expeditiously taking steps to file and prosecute the appeal does not reflect an appellant whose intention is merely to delay execution but one desirous of having its rights determined promptly by the full bench of this court. I therefore find that the applicant has satisfied the condition.

Conclusively, it is the finding of the court that the applicant has satisfied the conditions precedent and threshold for the grant of an order of stay of the execution of the orders of the High Court in consolidated arbitration Causes No. 38 & 46 of 2024. The application therefore succeeds with the following orders;

- a) The enforcement or execution of orders of the High Court in consolidated Arbitration Causes No. 38 of 2024 and 46 of 2024 including the enforcement and execution in Uganda, of the Final Arbitral Award handed down in Nairobi Kenya between the parties by Mr. Collins Namachanja on 19 September 2019 as a judgement, order and decree of the High Court of Uganda and recovery of the decretal sums therein and costs, be and is hereby stayed pending the determination of the applicant's appeal to this Court vide Civil Appeal No. 1671 of 2025.
- b) Costs of this Application shall abide by the outcome of the appeal.

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It is so ordered.

Alcy \$ \ldots 2025. \$ Dated at Kampala this. \$ \$ \circ John Mike Musisi

Justice of the Court of Appeal

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