

**Kirunda v Narendra & Another
(HCT-03-CV-MA 52 of 2024) [2024]
UGHC 952 (5 September 2024)**
[2024] UGHC 952

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1. An order doth issue restraining the Respondents, their agents and anyone authorized by them from executing the Decree of this Honorable Court in **Civil Suit No.33 of 2019** until hearing and determination of **Court of Appeal Civil Appeal No.0100 of 2022/ECCMIS No.0211 of 2022**
2. The Costs of this Application be in the cause.

The grounds upon which this application is premised are as follows:-

1. In 2019, the Respondents instituted **Civil Suit No. 33 of 2019** against him in this honorable court, which was on 22nd March, 2022 was decided in their favor. **(A copy of the judgment on court record)**.
2. He was dissatisfied with the judgment of the court and immediately notified court that he intended to appeal against the whole judgment and Orders of this Honorable Court and through his then lawyers; filed **Court of Appeal Civil Appeal No. 0100 of 2022/ECCMIS No. 0211 of 2022** and the respondents were dully served. **(Attached is a copy of the Record and Memorandum of Appeal are attached hereto & collectively marked "B")**.
3. The Respondent stealthily tried to dislodge a caveat he had lodged on the suit property as well as applying for a special certificate of title for the suit property but upon discovering it, he lodged another caveat on the 12th March, 2024. **(A copy of the search report & the caveat is attached & collectively marked "C")**
4. To his surprise, the Respondents have equally commenced execution proceedings against me and they are praying for my eviction and arrest yet they are fully aware of the pendency of my appeal in the court of appeal. **(Copies of the application for execution and Notice to Show Cause are attached and marked as "D" and "E" respectively)**.
5. The Respondents intend to evict him from the suit property, which he purchased from the Government of Uganda before his appeal is heard and determined which will automatically render the same nugatory and with no effect.
6. His appeal is pending hearing in the court of Appeal and has high chances of success especially with arguable grounds of appeal that contain both questions of law and fact.
7. It is in the interest of justice that this Application is allowed and the execution be stayed until after the hearing and determination of my application for stay of execution and subsequently the appeal in the Court of Appeal.
8. Whatever I have stated hereinabove is true and correct to the best of my knowledge and belief save for the advice whose source has been disclosed herein.

The Applicant filed an additional Affidavit in Support of the Application wherein the deponent further averred that; -

1. On 12th March, 2024 his Lawyers of M/S. Tenax Advocates lodged a caveat with the land Office at Jinja MZ0 and he was surprised when they informed me on 15th March, 2024 that M/S. IBC Advocates & Solicitors acting on behalf of the Respondents had served them with an application for execution together with a Notice to Show Cause purportedly fixed for hearing on 27th March, 2024 at 11 am. **(Reference is made to the application for execution and Notice to Show Cause).**
2. His lawyers advised him to immediately file the instant application for stay of execution which was filed on 21st March, 2023 but the registry officials informed him that the said application for execution together with a notice to show cause were suspected to be forgeries as they doubted the judicial officer thereon and the file number indicated thereon was unknown to them.
3. He immediately informed his lawyers who advised him to wait until the 27th March, 2024 when they will appear to establish the truth and on the said day they approached the Assistant Registrar of this court who also confirmed that the file number of documents was unknown to the court and that the signature was not hers but advised his lawyer to follow up on my applications to have them fixed for hearing.
4. He went back to the registry, but the clerk (by names of Emmanuel) informed them that they needed to first trace for the physical file and have the same re-allocated to a Judge and then fixed for hearing for which he advised that he returns the following week to enable them trace for the file.
5. He returned to court the following week on Wednesday, but still the file had not been traced and the registry officials advised that he keeps on checking on them which he continuously did but- all they would tell him was that the file was still missing until the 17th April, 2024 when he officially complained to the Assistant Registrar of this Honorable Court. **(A copy of the complaint is attached hereto & marked "E")**
6. Upon lodging his complaint, he was surprised the following day on 18th April, 2024 when he and all his tenants were served with a copy of a Notice of Eviction from M/S. Wafula & Co. Advocates dated 30th January, 2024 requiring them vacate the premises not later than the 30th April, 2024. **(A copy of the notice is attached hereto & marked "G")**
7. He immediately approached my Lawyers M/S. Tenax Advocates who addressed the Assistant Registrar about the predicaments he was facing and was likely to suffer injustice to which they requested for a duplicate file to be opened which was done and my applications fixed. **(A copy of the letter is attached hereto & marked "H")**
8. His lawyers informed him that Save for M/S. Wafula & Co. Advocates, all the Respondents known lawyer to wit: M/S. Pathways Advocates and M/S. IBC Advocates & Solicitors declined receipt of the application citing different reasons, which appears to be a trick to frustrate the disposal of his applications.

9. It is in the interest of justice that this Application is allowed and the execution be stayed until after the hearing and determination of his Appeal in the court of Appeal.
10. Whatever he had stated hereinabove is true and correct to the best of his knowledge and belief save for the advice whose source has been disclosed herein.

In Reply, the 1st Respondent, **Narendra Dharamshia** filed an Affidavit opposing this Application and averred that: -

1. He had read and fully understood the contents of the Notice of Motion and its supporting Affidavits as filed by the Applicant but the same have no merit and ought to be dismissed.
2. The Applicant has no legitimate or protectable rights in the suit property since he surrendered occupation of the same to third parties who are not party to either the pending Appeal in the Court of Appeal or the instant Application.
3. He is informed by his lawyers' M/S. Okoth - Osillo Advocates which information he verily believes to be true that the Applicant's 2nd Affidavit filed in further support of this Application on 7th .05.2024 is not properly on record for want of leave of this Honourable Court and thus should be struck off the record.
4. That the Applicant has not deposited any security for due execution of judgment in High Court **Civil Suit No. 33 of 2019** which is mandatory for applications like this and therefore this Application cannot be properly entertained or allowed.
5. The Applicant has since lodging his said **Appeal No. 100 of 2022/ECCMIS No. 211** with the court of Appeal not made sufficient effort to have it fixed for hearing or disposal and is using the same to delay and/or frustrate execution and his enjoyment of the fruits of the judgment in the main suit.
6. It is in the interest of justice that this Application is declined and dismissed with costs.

In Rejoinder, the Applicant averred that in specific reply to paragraph 1 of the Affidavit in Reply, he stated that state that the contents therein are misconceived when the deponent states that he is the owner of the suit property for issues of ownership are still pending in the court of Appeal.

1. In reply to paragraph 3 of the affidavit in reply, I wish to state that I purchased the suit property from government and in full occupation thereof with my family residing on one part and he rented out the remaining part thus it is wrong for the respondent to state that he neither had any protectable right nor having occupation of the suit property.
2. In specific reply to paragraph 4 of the Affidavit in Reply, he stated that he have been advised by his Advocates of M/S. Tenax Advocates that the contents therein are devoid of any legal back up thus Ought to be treated with utmost contempt.

3. He was advised by his aforesaid Advocates that the law permits to file an affidavit in further support without leave of court and the same was filed before the service of the application on the respondent's lawyers thus they had all the opportunities to respond to its contents as permitted by law and as such it is properly on record.
4. Further, he had been advised by his Advocates of M/S. Tenax Advocates which advise he verily believes to be true that deposit of security in court is neither mandatory nor a condition precedent to filing, hearing and disposal of an application for stay of execution like the instant one.
5. In reply to paragraph 6 thereof, he stated that even if the judgment of this court was pronounced in the favor of the respondents, filing of an appeal against the decision is his legally acceptable right which he exercised and the appeal is yet to be fixed and heard by the court of appeal, thus the need to stay execution.
6. Further, he has been advised by his Advocates of M/S. Tenax Advocates which advise he verily believes to be true that if the respondents wished to enjoy the fruits of the judgment, the legally acceptable process of commencing execution had to be followed thus the execution need to be stayed to curtail the fraud and abuse of court process orchestrated by the respondents.
7. It is in the interest of justice that their application is granted to enable him exploit his legally permissible right of appeal in the court of appeal without risking them from being rendered nugatory if the execution is not stayed.

REPRESENTATION

When this Application came before me for hearing, the Applicant was represented by learned counsel Mr. Katende Stephan of M/S. Tanex Advocates, while the Respondent was represented by learned counsel Mr. Jacob Osillo of M/S. Okoth-Osillo Advocates. Both parties were directed to file Written Submissions and they have all complied. I have analyzed the same and relied on them in this Ruling.

BACKGROUND

The background according to learned counsel for the Applicant is that the Respondents instituted **Civil Suit No.33 of 2019** against the Applicant in this honorable court claiming ownership of one-thirds (1/3) of the property/building situate on land comprised under LRV 4477 Folio 18 (Plot 19)- Main Street in Jinja City. The said suit was decided in the respondents' favor on 22nd March, 2022 pursuant to which the applicant filed **Civil Appeal No.0100 of 2022/ECCMIS No.0211 of 2022** in the Court of Appeal against the whole judgment and orders arising there from which appeal is pending hearing and disposal.

The Applicant later learnt of the respondents' attempts of having the caveat that the (applicant) had lodged on the register vacated as well as applying for a special certificate of title for the suit property which prompted him to lodge another caveat on the 12th March, 2024. The respondents retaliated by initiating an execution process and served on them as applicant's lawyers (presumable that he got the address from the caveat that had since been lodged in the land office) with an application for execution by way of eviction & arrest against the applicant together with a notice to show cause why the execution should not issue which was fixed for hearing on 27th March, 2024 at 11:00am. This prompted the applicant to file the instant application to stay the said execution process because proceeding with the execution process would have the effect of rendering the pending civil appeal in the court of appeal nugatory.

THE LAW

S. 98 of Civil Procedure Act (CPA) Cap 282, which reads that:-

“Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

This section empowers the court to grant orders in all cases in which it appears to the court to be just and convenient to do so to restrain any person from doing certain acts. The main principle in this section is whether the dictates of justice so demand.

Order 22, rule 23(1) CPR provides for; -

*“When court may stay execution***

(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of the decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution of the decree, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued by the appellate court or if application for execution has been made to it”.

Order 22, rule 26 CPR provides for stay of execution pending suit between decree holder and judgment debtor and reads as follows: -

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

This order empowers court to stay execution where there is a pending suit against the decree holder but is not mandatory. This means that the court has to be satisfied that it is in the interest of justice that such a stay is granted.

Order 89(1) of the CPR SI-71 -1 provides for the procedure that an Application of this nature must take.

RESOLUTION OF THE APPLICATION

It was submitted by learned counsel for the Applicant that this application was brought under the laws cited on the chamber Summons and it is supported by the affidavits of the applicant Kirunda Jimmy and we at the onset, we wish to state that we adopt the entire grounds in both affidavits in support and in further support of the application to prove that it is just and fair to grant the order sought in the application.

That the issue to be determined is whether the applicant has made out a case for the grant of stay of execution.

Counsel for the Applicant submitted hereunder that, among the laws under which this application was preferred is **Order 22 rules 23(1) of the CPR** whose import is to empower the court to which a decree has been sent for execution and/or the court which passed the decree stay such execution upon sufficient cause being shown. It provides;

"*The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of the decree for a reasonable time to enable the judgment debtor to exists for this Court to issue a stay of execution. This is so because if the order is not issued, the respondents are likely to keep under the cover of being decree holders and conduct an illegal eviction, which would prejudice the applicant by rendering his appeal nugatory.*

In addition, that the above notwithstanding, the instant application was equally preferred under **Order 22 rules 26 of the CPR** which state provides;

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

They cited the case of Hon. Justice Oyuko Anthony Ojok in ***Rwashande Yosam & 9 others vs. Kayivwa Vincent, HCT-15-EXD-EMA-0013-2020 at pages 11 & 12*** while interpreting the above provision emphasized thus;-

"*The general principle is that where a party is exercising their unrestricted right to appeal, it is the duty of the court to make such order for staying execution of the judgment appealed against in order to prevent the appeal from being rendered nugatory".*

The same principle has been upheld/observed in a plethora of decisions including among others

Global Capital Save 2004 Ltd & Another vs Alice Okiror & Another, HCMA No.485/2012,

Lawrence Musiitwa Kyazze vs. Eunice Busingye, SCCA No.18 of 1990 (1992) IV KALR 55

wherein courts have emphasized that:-

"...that, an application for stay of execution pending appeal is designed to preserve the Subject matter in dispute so that the right of the appellant who is exercising his/her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory"

In the case of ***Rwashande (supra)**,* his Lordship indicated the conditions to be met in granting the application for stay of execution and these are;-

1. The Applicant must establish that his appeal has a likelihood of success, or a prima facie case of his right of appeal.
2. That the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay of execution is not granted.
3. If 1-2 above have not been established, court must consider where the balance of convenience lies.
4. That the application was filed without delay.

Learned counsel for the Applicant argued that the applicant exercised his right of appeal and dutifully filed **Civil Appeal No. 0100 of 2022/ECCMIS No. 0211 of 2022** in the Court of Appeal and the same was duly served on the respondents which appeal is only pending hearing and disposal by the court of appeal. The respondents did not dispute the existence of the said appeal but the 1st respondent simply averred that the applicant is using the appeal to deny him the of his judgement.

However, even if the respondents are decree holders, they are still bound to follow the law and if the fruits of the judgment are to be enjoyed, the same should be achieved upon conducting a proper execution process but not engaging in forgeries and so on. It is in that vein that the applicant seeks for unconditional order staying the execution in order to safeguard his appeal.

It is equally our submission that if the execution is not stayed, the applicant is likely to suffer irreparable injury/substantial loss especially if he is evicted from the property, which is both a home to his family and a source of living as he rents out part of the property.

That Justice Ogola J (as he then was) in ***Tropical Commodities Suppliers Ltd and O'rs vs International Credit Bank Ltd (In Liquidation) (2004) EA 331*** opined that **"substantial loss does not represent any particular amount or size for it cannot be quantified by any particular mathematical formula. It refers to any loss, great or small that is of real worth or value as distinguished from loss without a value or that, which is merely nominal. It is my considered view then that, the Court ought to consider substantial loss claimed by an applicant in light of the particular facts raised by each case"**.

They added that as earlier submitted, the respondents conduct of serving forged execution documents where no such execution has been rightly/legally commenced coupled with other actions like serving letters to the applicant and his tenants to vacate the premises presents a case that the respondents are capable of doing anything and may even take the applicant or the tenants on the suit property by surprise and conduct an illegal eviction which would greatly prejudice the applicant and even render his appeal nugatory.

Application is made without unreasonable delay.

It was submitted by learned counsel for the Applicant that this principal was correctly discussed by Justice Oyuko Anthony Ojok in ***Rwashande Yosam & O'rs vs Kayiwa Vicent, HCT -15-EXD-EMA-0013-2020*** that “*Where he stated that where a litigant proves to court that indeed his application was filed within reasonable time after threat was manifested to them then that shall be taken doing so without reasonable delay”.*

That in the instant case this application was also filled without any delay on 21st March, 2024 upon the respondents serving an application and notice to show cause why execution should not issue on 15th March, 2024 which was just within 6 days after the said application for execution was served. There is no doubt that this application was made within time and therefore there was no inordinate delay.

To this end, they submitted that the applicant has made out the case for the grant of this application since all elements for its grant exist as indicated above, it is therefore their humble prayer that this application be granted in the terms prayed for.

I have carefully analyzed this Application, the supporting Affidavit, Affidavit in Reply, Rejoinder and submissions of the Applicant. The principles under which an Application of stay of execution can succeed were well espoused in the case Supreme Court Case of ***Hon. Theodore Ssekikubo and Ors vs The Attorney General and Ors Constitutional Application No 03 of 2014*** clearly re-stated the principles as follows:

“In order for the Court to grant an application for a stay of execution;

1. ***“The application must establish that his appeal has a likelihood of success; or a prima facie case of his right to appeal***
2. ***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.***
3. ***If 1 and 2 above has not been established, Court must consider where the balance of convenience lies.***
4. ***That the applicant must also establish that the application was instituted without delay.”***

The purpose of the application for Stay of Execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his/her undoubted right of appeal are safe guarded and the appeal if successful, is not rendered nugatory. See ***Lawrence Musiitwa Kyazze vs. Eunice Busingye SCCA No. 18 of 1990 [1992] IV KALR 55****.

Further, in the case of ***Hansa Industries Ltd vs Tadjir Hussein & 2 Ors S. C. C. A. No. 19 of 2018***, the court of appeal stated that for an application for stay of execution to succeed there must be a pending appeal filed in court. I have also referred to the case of ***Nalwanga vs Eden Ltd & Ors MA 7/2017*** where court noted that once an appeal is pending, court intervenes by preserving the status quo pending disposal of the appeals.

The conditions for granting Stay of Execution pending appeal are mainly;

1. Whether there is an arguable appeal.
2. That substantial loss may result to the applicant unless the order of stay is made.
3. That the application has been made without unreasonable delay; (See ***Mugene v Akankwasa [2008] HCB 160)*** ; and
4. That security has been given by the applicant for due performance of the decree or orders as may ultimately be binding upon him or her. This is available where an application for stay of execution is made before the expiry of the time allowed for appealing from the decree to be executed.

The above conditions are also reiterated in the case of ***Membe v Mayoga [2009] HCB 82***.

Further, the Court of Appeal in ***Kyambogo University vs Prof. Isaiah Omolo Ndiege, CA No 341 of 2013*** expanded the list to include:

1. There is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory
2. That the Application is not frivolous and has a likelihood of success.
3. That refusal to grant the stay would inflict more hardship than it would avoid.

The above principles have been upheld in numerous cases. Having elaborately stated the position of the law, I will analyze each of the conditions to be met against the evidence adduced in this application.

1. **Whether there is an arguable Appeal?**

Regarding the first principle that there should be a pending appeal, the Applicant annexed a Memorandum of Appeal to this Application. The said Memorandum of Appeal was filed in the Court of Appeal on the 2nd day of June, 2022 as per the received stamp attached thereto. The Judgment of the High Court was read on the 22nd day of March 2022.

In the case of ***Stanbic Bank Uganda vs Atyaba Agencies SCCA N0.31 of 2004*** where Court noted that ***“where a Notice of Appeal or an Application or an Appeal is pending before a Superior Court, it is right and proper that an interim order for stay of execution be granted in the interests of justice and to prevent the proceedings and any order there from, of the Appellate Court being rendered nugatory”***

Further, in ***Attorney General of the Republic of Uganda vs East African Law Society & another, EACJ Application No. 1 of 2013***, it was held that a notice of appeal is sufficient expression of an intention to file an appeal and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases.

The Applicant in this matter has proved in paragraph 2 of his Affidavit in Support of the Application that through his then lawyers; filed Court of Appeal **Civil Appeal No. 0100 of 2022/ ECCMIS No. 0211 of 2022** and the respondents were dully served. (Attached is a copy of the **Record and Memorandum of Appeal** are attached hereto & collectively marked "B").

The Respondents do not rebut this. It is therefore my finding that this principle was complied with by the applicant.

1. Whether substantial loss may result to the applicant unless the order of stay is made?

The second principle that substantial loss may result. This was discussed in the case of ***Tropical Commodities Supplies Ltd and 2 others vs International Credit Bank Limited (in Liquidation) [2004]2 EA 331, *Ogoola J (as he then was) held that;**

"The phrase substantial loss does not represent any particular amount or size; it cannot be qualified by any particular mathematical formula.

It refers to any loss great or small of real worth or value as distinguished from a loss that is merely nominal."

It is the position of the law that once an appeal is pending and there is a serious threat of execution before hearing of the appeal, the court intervenes to serve the purpose of substantive justice. See ***Hwang Sung Industries Ltd vs Tadjaudin Hussein & Others SCCA No.79/2008.***

It is evident on record that the Respondent has applied for execution and that there is eminent threat for the same to pull through, however the same could cause serious loss to the Applicant as he is living in the suit premises with his family in one part and the other he rented it out as per paragraph 5 of the affidavit in rejoinder.

The Applicant has shown at this stage that he shall suffer the alleged substantial loss. From the Applicant's affidavit, there is material form, which this Honourable Court can infer that substantial loss shall result if the Application is not granted. In the case of ***Steel Rolling Mills Ltd & Anor vs Gestation Economique Des Mission Catholic & Anor*** where Mukasa L J cited the case of ***Pan African Insurance Company (U) Ltd v International Air Transport HCT MA No.86/2006*** where the Applicant merely stated that if the decree is not stayed the Applicant will suffer substantial loss and stated that:-

“the deponent should have gone a step further to lay the basis upon which court can make a finding that the applicant will suffer substantial loss as alleged. The applicant should go beyond the vague and general assertion of substantial loss in the event a stay is not granted”.

The learned Judge also cited the case of ***Bashidar v Pribku Dyal Air 41 1954*** where it was stated that:-

“It is not merely enough to repeat the words of the code and state that substantial loss will result, the kind of loss must be given and the conscience of court must be satisfied that such loss will really ensure”.

Further, it was observed in the same case that “*the words substantial’ cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case.... substantial loss must mean something in addition to all different from that”.*

The Applicant in the current Application stated that the likelihood of the applicant suffering substantial loss if the order of stay of execution is not granted. As stated in the decided cases, it must be substantiated by evidence and it is for that reason that before courts of law can grant an Application for Stay of Execution, there must be proved that there is a threat for execution which some decided cases refer to as ‘eminent threat of execution’.

I have carefully analyzed the submissions of both sides and case law cited. In paragraphs 4 & 5 of the Affidavit in Support of the Application, the Applicant avers that the 1st Respondent stealthily tried to dislodge a caveat he had lodged on the suit property as well as applying for a Special Certificate of Title of the suit property and upon discovering it; the Applicant lodged another which was attached to the Affidavit in Support of the Application and **marked ‘C’**.

The Applicant averred further that the 1st Respondent commenced execution proceedings vide **EMA No.325 of 2024** arising from **Civil Suit No.33 of 2019** in High Court Jinja as per **Annexure ‘D’**

I have found the above averments true and they have neither been rebutted by the 1st Respondent in his Affidavit in Reply. It is therefore clear from those two paragraphs that substantial loss will occur to the applicant if execution is not stayed. The Applicant stands to lose the subject matter of the Appeal if the Application is not granted. My decision is that the Applicant has also fulfilled this ground.

1. **Whether the Application has been brought without delay?**

The third principle that the application has been made without unreasonable delay, I have already indicated above that The Judgment of the High Court was read on the 22nd March 2022, there is a valid notice of appeal on record. The instant Application was filed in this court on 21st March 2024, a year after the Judgment. It is my considered view that this application was lodged late. In the case ***of Sewankambo Dickson vs Ziwa Abby HCMA No. 178 OF 2005***, Court cited ***Ujagar Singh vs Runda Coffee Estates Ltd.*** where Sir Clement De Lestang, Ag. V. P stated:

“... it is only fair that an intended appellant who has filed a notice of appeal *should be able to apply for a stay of execution to the Court which is going to hear the appeal as soon as possible and not have to wait until he has lodged his appeal to do so. Owing to the long delay in obtaining the proceedings of the High Court it may be months before he could lodge his appeal. In the meantime, the execution of the decision of the Court below could cause him irreparable loss,” at Page 266.*

From the foregoing, this principle has not satisfied by the applicant.

1. Whether there is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory?

As for the fourth Principle that there is serious or eminent threat of execution of the Decree or Order and if the Application is not granted, the appeal would be rendered nugatory, there is uncontested evidence from the Applicant that he was already in occupation.

My findings therefore are that it is clear that there is eminent danger of execution, since it is undeniable that execution proceedings have already commenced in this case. I therefore hold that the Applicant has also fulfilled these two principles; and as such, both grounds are satisfied.

The fifth principle that the application is not frivolous and has a likelihood of success, I have perused the Judgment, the Memorandum of Appeal, the application and proceedings. It raised pertinent appealable issues that would call for court of appeal to determine whether the trial Judge did not misdirect herself. It should be noted at this stage, I’ am not required to look at the Judgment substantively as I’m not a Court of Appeal, lest I be accused of revising my sisters Judgment. Even the Court of Appeal is not expected to look at the substance of the appeal. It is sufficient to establish whether there are grounds with a probability of success. This ground also succeeds.

1. Whether the application is not frivolous and has a likelihood of success?

I have examined the Judgment, the application and proceedings. It is already noted that the Applicant has furnished this Court with a copy of his Memorandum of Appeal in the Court of Appeal. At this stage, I’m not required to look at the Judgment substantively as I’m not a Court of Appeal, it is sufficient to establish whether there are grounds with a probability of success; and it cannot be ascertained from the affidavit in support of the application that there are appealable issues that require court’s attention.

This principle is also fulfilled.

1. Whether the applicant has given security for due performance of the decree or order as may ultimately be binding upon him?

I have carefully examined this Application and noted that the Applicant did not in any way state that they are willing to deposit security for costs. I have also read the authorities relied upon by both learned counsels. I have relied on the case of ***Tropical Commodities Supplies Ltd & Others v International Credit Bank Ltd (in liquidation) Civil Appeal No.24 of 2004*** where Justice Ogoola

held that the requirement is more of justice and insistence on policy or practice that mandates security for the entire decretal amount is likely to stifle appeals; however, I have found the decision of Justice Mukasa in ***New Vision Publishing Corporation & 2 Others v Peter Kagawa HCMA 127/2006 [KALR 391]**,* while emphasizing the rationale of furnishing security for due performance of the decree in an Application for Stay of Execution quoted with approval the Judgment of Justice Kato in the case of ***Ntege Mayambala v Christopher Mwanje (1993) KALR 97** * that:-

“I....there are several reasons why depositing of security by the applicant in this type of application is necessary. One of the reasons is to maintain the status quo among the parties; another reason is to ascertain that the purpose of the application is not merely intended to defeat the course of justice by delaying tactics whereby after the execution has been stayed the decree holder is made to wait indefinitely for the fruits of his success. By providing security the judgment debtor is also trying to prove how serious he is in his application for stay of execution”.

Relating the above to this Application, I have found that the Applicant has neither furnished security for due satisfaction of the decree nor intimated to court by way of affidavit evidence that he even intends to do so in accordance with **Order 43 rule 4(3) (c) of the CPR**; instead he is latching onto the inherent powers of Court, which in my view, should not be invoked unless there are valid reasons to do so.

Further, the provision of this security is mandatory before any order for stay of execution can be granted. See the Court of Appeal decision of ***International Credit Bank (In Liquidation) vs Tropical Commodities Ltd & 2 Others Civil Appeal No.24 of 2004**.*

My interpretation of the provisions of **Order 43 rule 4 (3) CPR** and in view of the above cited case is that all the conditions stated under **sub rule 3** must be considered by court before the application is granted; and that it is only the court which can dispense with depositing of security for costs if the justice of the case warrants.

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

There can never be cases with similar facts. As it was held in the case of ***Hon. Theodore Sekikubo*** cited above, the nature of decision depends on the facts of each case, as situations vary from case to case. I am persuaded by the decision Hon Lady Justice Wolayo in ***Amuanaun Sam vs Opolot David MA No 3 of 2014*** that the status of the applicant should be put into consideration in order to decide whether security should be ordered or not.

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