

UGANDA / JUDGMENT

Kituzi Farm Co. Ltd v Bestpack UG Ltd (Miscellaneous Application No. 1070 of 2025) [2025] UGCommC 125 (12 June 2025)

[2025] UGCommC 125

COURT

Commercial Court of Uganda

BEFORE

Dr. Ginamia Melody Ngwatu, J

CASE / FILE NUMBER

Miscellaneous Application No. 1070 of 2025

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**5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION) MISCELLANEOUS APPLICATION NO.1070 OF
2025 (ARISING OUT OF CIVIL SUIT NO. 0826 OF 2022)**

KITUZI FARM CO. LTD:..... APPLICANT

VERSUS

BESTPACK UG LTD:..... RESPONDENT

15 Before: Hon. Lady Justice Dr. Ginamia Melody Ngwatu

RULING

The applicant filed this application by notice of motion under section 98 of the Civil Procedure Act cap 282, Order 43 Rule 4 and 5 of the Civil Procedure Rules S. I. 71-1, as amended. The 20 application seeks orders that: a stay of execution and enforcement of the decree and orders in *Civil Suit No. 826/2022 Bestpack UG Ltd vs Kituzi Farm Co. Ltd* be unconditionally granted pending the hearing and final disposal of the applicant's appeal to the Court of Appeal and the attendant *Civil Application No. 0154/2025*; and that costs of the application be provided for.

25 The background to this application is that Bestpack UG Ltd instituted a claim vide *Civil Suit No. 826/2022* against the applicants herein for recovery of the sum of Ugx 335,411,200= as the outstanding sum due to the respondents herein from the sale and supply of packaging materials to the applicant, plus costs of the suit. The respondent herein had supplied the applicant with packaging materials worth Ugx 893,411,200= and the applicant had only paid Ugx 558,000,000= 30 and did not settle the balance of Ugx 335,411,200=. Court found in favour of the respondent and

ordered that the applicant pays to the respondent the contractual amount of Ugx 335,411,200=; interest of 18% per annum from the date of filing the suit till payment in full; general damages of Ugx 20,000,000 and costs of the suit. The respondent, through its counsel issued a demand notice for the decretal sum; hence this application by the applicant to stay execution.

The grounds of the application were stated in the affidavit of Aruho Moses, the applicant's director, and are briefly that:

- 1) This court delivered judgment in *Civil Suit No. 0826/2022 Bestpack UG Limited vs Kituzi Farm Co. Limited* on 14th November 2024.
- 5 2) The judgment was brought to the attention of the applicant by the respondent's lawyers on 27th February 2025 when they served her with a Notice of demand.
- 3) The applicant's Director instructed her new lawyers to commence the process of appealing against the findings and orders of the court and validate the notice of appeal.
- 4) The applicant filed a notice of appeal on the Electronic Court Case Management System 10 and the same was made available to the respondent on the same system in real time. The applicant also requested for a certified copy of the proceedings.
- 5) The applicant also filed a civil application in the Court of Appeal to validate the notice of appeal which had been lodged in court on 5th March 2025. The application is pending hearing and determination in the Court of Appeal.
- 15 6) The civil application is meritorious and has a high chance of success.
- 7) The appeal raises plausible triable questions of law and fact with a high likelihood of success whose effect would be to set aside the orders in the decree sought to be executed by the respondent.
- 8) The respondent has taken advanced steps leading to execution by issuing a notice of demand and filing a bill of costs on the 27th 20 of February 2025.
- 9) If this substantive application for stay of execution is not granted, the appeal shall be rendered nugatory and moot.
- 10) The applicant will suffer substantial loss if the order of stay is not unconditionally granted.
- 25 11) The application was made without undue delay.
- 12) It is in the interest of justice that execution of the judgment in *Civil Suit No. 0826/2022* is stayed pending determination of the appeal in the Court of Appeal.
- 30 The respondent opposed the application on the grounds contained in the affidavit in reply of Timonthy Lugayizi, a practicing advocate with MMAKS Advocates, wherein he briefly stated that:

- 1) The respondent and applicant had a longstanding business relationship during which the respondent supplied the applicant with packaging material on credit on various occasions.
- 35 The applicant failed to pay in full leaving an outstanding sum of Ugx 335,411,200=
- 2) The respondent instituted *Civil Suit No. 826 of 2022* seeking the recovery of the outstanding sums.
- 3) Court entered judgment in favour of the respondent on 14th November 2024.
- 4) Despite having been notified of the judgment of the court, the applicant did not take steps 40 to challenge the judgment and decree of the court for over five months and belatedly lodged a notice of appeal out of time when the applicant demanded for the payment of the outstanding sums due.
- 5 5) The grounds of appeal raised by the applicant are sham grounds and cannot impeach the trial court's finding of indebtedness on the basis of the evidence before it. The appeal, therefore, does not raise arguable issues and has no prospect of success.
- 6) The applicant shall not suffer any irreparable harm from the execution of the decree as it is a decree for the payment of a monetary sum which can always be atoned for in 10 damages or refunded if the appeal is successful.
- 7) The applicant has not demonstrated any exceptional circumstances in this case to justify the stay of a monetary decree.
- 8) The debt due to the respondent has been outstanding for over four years and the respondent has been unfairly and unjustly denied payment for goods it duly supplied. The 15 respondent has, therefore, lost a colossal amount of cashflow which could have been used to enhance its operations and the balance of convenience, therefore is in its favour.
- 9) In paragraph 14 of the affidavit in support of the application, the applicant averred that execution of the decretal sums would render its business insolvent which demonstrates that there is a likelihood that it shall not satisfy the judgment debt.
- 20 10) The applicant has not deposited security for due performance of the decree and therefore the application is incompetent.
- 11) It is in the interest of justice that this application is dismissed with costs to the respondent as it is frivolous attempt to deny the respondent payment for money that is validly due to it.
- 25

Representation at the hearing

The applicants were represented by Mr. Edgar Ayebazibwe and Mr. Philbert Kansiime Nuwagaba of M/s Mwesigwa Rukutana & Co. Advocates; while the respondent was represented 30 by Mr. Kenneth Kiapi of MMAKS Advocates. The parties were granted leave to file written submissions which are on the court record.

Issue for determination

The main issue for determination is whether this application raises sufficient grounds for an 35 order of stay of execution? If it does, whether the applicants should deposit security for the due performance of the decree; and whether the parties have remedies available to them?

Submissions

At the hearing of this application, counsel for were granted leave to file their respective written 40 submissions. This directive was complied with and the written submissions are on court record. This court shall consider the submissions alongside the respective pleadings and authorities cited in the determination of this application.

5 Decision of Court

The submissions of the parties have been taken into consideration; as well as the relevant legal authorities cited. The submissions will, however, not be replicated. This application is resolved as follows:

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

The applicant herein relied on provisions of Order 43 rule 4 and 5of the Civil Procedure Rules SI 71-1, as amended to apply for stay of execution. Order 43 rule 4 (3) of the Civil Procedure Rules, in particular provides for the conditions that ought to be satisfied before a stay of execution is granted and they include that:

- 15 1. substantial loss may result to the party applying for stay of execution unless the order is made;
- 2. the application has been made without unreasonable delay;
- 3. that security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her.

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

- 25 1. there is serious or imminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory;

- 2. the appeal is not frivolous and has a likelihood of success;
- 3. refusal to grant the stay would inflict more hardship than it would avoid.
- 30 In consideration of the grounds raised by the applicants for a grant of stay of execution, it is found as follows:

The filing of a notice of appeal

Order 43 rule 4 (3) of *The Civil Procedure Rules*, assumes that an application of this nature must be made after notice of appeal has been filed. In this application, no proof of a filed notice of appeal was annexed to the affidavit in support of the application. Counsel for the applicant submitted that due to mistake of the applicant's former lawyers, the applicant only got to know of the judgment entered against her on 27th February 2025 when a demand notice was served on her; and the applicant subsequently filed a notice of appeal out of time. That as new lawyers for the applicant, they filed a notice of appeal on 40 th March 2025 without delay and there is a pending application, *Civil Application No. 0154/2025,* before the Court of Appeal seeking to validate the notice of appeal. That the said application is pending determination.

5 Counsel for the respondent submitted that the applicant sought a remedy of having execution stayed pending its application to have its appeal validated; and not pending appeal. counsel for the respondent relied on the cases of *Heywood Group Ltd and Another vs Kaffika Animal Feeds Ltd Miscellaneous Application 972 of 2025* and *Busia Produce Dealers Multipurpose Cooperative Society vs Stanbic Bank (U) Ltd Miscellaneous Application No. 185/2021* to argue 10 that there is no competent notice of appeal and that the application ought to be dismissed.

In line with the considerations for a grant of an application for stay of execution under Order 43 of the Civil Procedure Rules, the existence of a competent notice of appeal is the basic foundation upon which other considerations for a grant of an order of stay of execution can be 15 considered. In this instance, there is no proof of the existence of competent notice of appeal. Much as it is argued that there is a notice of appeal that is pending consideration of an application to have it validated since it was filed out of time, at the very least, proof of that pending application and the received copy of the notice of appeal should have been annexed to this application. In the circumstances, in the absence of validation of the applicant's notice of 20 appeal, there is no appeal. This consideration has not been satisfied.

The appeal is not frivolous and has a likelihood of success

It is also a requirement that the said appeal should have a likelihood of success. The appeal should raise triable issues with a likelihood of success and this can be deduced from the grounds 25 of appeal as raised in the memorandum of appeal. Justice Stephen Mubiru in the case of *Formula Feeds Limited & 3 Others vs KCB Bank Limited Miscellaneous Application No. 1647 of 2022* page 7, stated that:

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

In *Formula Feeds Limited & 3 Others vs KCB Bank Limited* case, Justice Mubiru found that the applicants had not provided court with the memorandum of appeal of the pending appeal to the 35 Supreme Court; and it was, therefore, not possible for an assessment to be conducted as to whether the applicants had an arguable case on appeal.

Counsel for the applicant submitted that per paragraph 6, 8 and 9 of the affidavit in support of the application, there is a pending appeal in the Court of appeal and it raises plausible trial 40 questions of both law and fact with high chances of success. That the memorandum of appeal sets down the grounds upon which the pending appeal is premised. Counsel for the respondent submitted that the applicant's proposed appeal has prospects of success on any ground. That the respondent abused a longstanding relationship they had that allowed them to take large amounts of products on credit and failed to pay for the goods.

- 5 In this application, there is no pending appeal since there is no valid notice of appeal or memorandum of appeal. The applicant furnished court with what can be presumed to be a draft memorandum of appeal since it is yet to be filed at the Court of Appeal. Further, as submitted by Counsel for the applicant, the applicant's notice of appeal has not yet been validated by the Court of Appeal pending the determination of *Civil Application No. 0154/2025*. In the premises there is
- 10 no memorandum of appeal from which court can determine whether the applicant has an arguable case on appeal.

The absence of a copy of an admitted memorandum of appeal renders this court unable to confirm the grounds of appeal or establish whether the Court of Appeal would reasonably come 15 to a different conclusion from the trial court. In the premises, this requirement has not been satisfied.

Substantial loss may result to the party applying for stay of execution unless the order is made
This consideration requires that an applicant ought to demonstrate to court that substantial loss 20 would be rendered to them if the stay of execution is not granted and execution occurs before the appeal is heard.

In *Tropical Commodities Suppliers Ltd and Ors vs International Credit Bank Ltd (In Liquidation)* (2004) 2 EA 331, court stated that substantial loss does not represent any particular 25 amount or size for it cannot be quantified by any particular mathematical formulae. It refers to any loss, great or small that is of real worth or value as distinguished from loss without a value or that which is merely nominal.

In this instance, it is not sufficient to only show that there is a possibility of a loss being 30 occasioned on the applicant. It must be demonstrated that the harm caused to the applicant would be substantial, and also irreparable. In this particular application, the applicant did not demonstrate that there is an eminent threat of execution. Rather, counsel for the applicant submitted that refusal to grant an order for stay of execution would lead to execution of the orders of the trial court by the respondent; which will render the appeal pending before the Court

35 of Appeal nugatory and moot.

Considering that execution of the orders of the court would amount to satisfaction of the debt owed by the applicant to the respondent, payment of a money decree would not amount to loss *per se*. This is money actually owed to the decree-holder, the respondent herein. This ground, ⁴⁰ therefore, fails.

5 *The application has been made without unreasonable delay*

application by the applicant. This requirement has been satisfied.

An application for stay of execution ought to be made within a reasonable time. The reasonableness or unreasonableness of the delay in filing such an application would be dependent on the circumstances pertaining to each case.

- 10 In *Kabarema Adonia vs Natukunda Marion Miscellaneous Application No. 0264/2021*, at page 7 Hon. Justice Joyce Kavuma, having examined the record of *HCT-05-CV-CA-0043-2016*, found that the application had been brought without reasonable delay. The basis of this finding was that the decision of the court was made on 16th August 2021 and the application was lodged before the same court on 8th October 2021.
- 15

In the instant case, judgment was rendered in *Civil Suit No. 826/2022* on 14th November 2024 and the applicant only learnt of the said judgment upon being served with a Notice of Demand on 27th February 2025. The applicant instructed her new lawyers to commence the process of appealing against the said judgment to the Court of Appeal. An application for validation of the notice of appeal which had been lodged in court on 5 20 th March 2025 was filed in the Court of Appeal on 8 th April 2025. This application was lodged on 26th May 2025. This particular application was filed in this court within three months after the applicant learnt of the judgment that was delivered. I do not find that there was any unreasonable delay in the filing of this

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

There must be a direct and immediate danger of execution of the decree. The determination of whether or not an appeal will be rendered nugatory if a stay of execution is not granted is 30 dependent on whether, if a stay is not granted and execution is permitted to proceed, the effect will be reversible. If the effect is irreversible, whether the award of damages can reasonably compensate the aggrieved party; or it is in public interest to grant a stay of execution. Here, it may be necessary for the **status quo** to be preserved pending appeal in a bid to ensure that the rights involved in the appeal may not be lost or reduced by reason of an intervening execution of 35 the judgment.

The term nugatory was defined by Hon. Justice Stephen Mubiru in the case of **Formula Feeds Limited & 3 Others vs KCB Bank Limited Miscellaneous Application No. 1647 of 2022** as meaning "of no force or effect; useless; invalid." In consideration of this application, therefore, 40 whether or not an Appeal would be rendered nugatory if a stay of execution is not granted depends on 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 it is in the public interest to grant a stay.

5 The applicant herein has not demonstrated that if an order of stay of execution is not granted and execution proceeded, the effect would be irreversible; or that the respondent is impecunious. The assumption here then is that any payment made to the respondent in execution of the decree would be reversible in the event that the applicant succeeded in the appeal.

10 Security for due performance of the decree

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

- 15 Hon. Justice Dr. Flavian Zeija, cited the case of **Hon. Theodore Ssekikubo and Ors vs the Attorney General and Ors Constitutional Application No 03 of 2014**, in **John Baptist Kawanga versus Namyalo Kevina & another Miscellaneous Application No. 12/2017**, while considering the issue of security for due performance stated that:
- **"... every application should be handled on its merits and a decision whether or not* 20 *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 filling vexatious and frivolous appeals. In essence, the decision whether to order for security for due performance* 25 *must be made in consonance with the probability of the success of the appeal."**

The applicant herein relied on the case of *John Baptist Kawanga vs Namyalo Miscellaneous Application No. 12/2017* to argue that each application should be handled on its merits. Counsel for the applicant submitted that the appeal has a high probability of success and, therefore this 30 application does not necessitate the order of security for due performance. The respondent relied on Order 22 rule 26 of the civil Procedure Rules which requires the payment of security as a precondition for stay of execution. Counsel for the respondent emphasized that security is given by the appealing party and that the applicant should be ordered to deposit 70% of the outstanding decretal sum due to its assertion that it is on the verge of insolvency and may therefore be unable 35 to satisfy the decretal sum.

In granting an order of stay of execution pending an appeal, the court has to balance the need to uphold the respondent's right to be protected from the risk that the appellant may not be able to satisfy the decree, with the appellant's right to access the courts. The applicant in this application 40 sought unconditional stay of execution. It is observed that the applicant, did not undertake to pay security for due performance of the decree in paragraph 5 of the applicant's written submissions; but rather, stated that it is not necessary for the order of security for due performance to be made since the applicant believes that its prospective appeal has a high probability of success.

- 5 Considering that security for due performance of a decree is intended to ensure that courts do not assist litigants to delay execution, it would have been proper for the applicant to undertake to pay security for due performance of the decree given that the respondent equally has rights as a judgment creditor that ought to be respected.
- 10 In consideration of the applicant's failure to satisfy most of the considerations required for a grant of an order of stay of execution, this application fails. I find that the applicant has failed to demonstrate sufficient cause to warrant this court to stay execution and enforcement of the orders in *Civil Suit No. 826/2022 Bestpack UG Ltd vs Kituzi Farm Co. Ltd.* This application is dismissed with costs to the Respondent.

I so order.

20 *Dr. Ginamia Melody Ngwatu Ag. Judge 12th June 2025*

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