

UGANDA / JUDGMENT

MP Electronics Limited & Another v
Kamani & 2 Others (Civil Application 614
of 2024) [2025] UGCA 87 (21 March 2025)
[2025] UGCA 87

COURT

Court of Appeal of Uganda

BEFORE

Cheborion-Barishaki, JA

CASE / FILE NUMBER

Civil Application 614 of 2024

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 0614 OF 2024

(Arising from Civil Reference No. 0036 of 2024 and

Civil Appeal No. 0465 of 2024)

RULING

This Application was brought by Notice of Motion under Article 28(1) , 126(2)(e) of the Constitution of Uganda, Section 33 Judicature Act, Rules 2(2), 6(2) (b) of the Judicature (Court of Appeal Rules) Directions SI 13-10 seeking for orders that;

- a) An order doth issue staying execution of the ruling/orders issued by the High Court in HCCMA No.124 of 2024 on the 8th of April 2024 granting to

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- ⁵ the respondents' proprietary possessory right of enjoyment of the economic benefits of the Applicants' properties comprised in;
- t LRV 330 Folio 11 plot 56 Seuenth street Industrial Area,

- o LRV 301 Folio 21 Plot 58 Seventh street Industrial Area
- o LRV 4009 Folio 11 Plot 88 South Street,

pending the hearing and determination of Civil Reference No. 0036 of 2024 and Civil Appeal No. 0465 of 2024. L0

- b) Costs of this application be provided for.

Representation

At the hearing of the Application, Mr. Charles Nsubuga appeared for the applicants while the respondents were represented by Mr. Ernest Sembatya together with Mr. Timothy Lugayizi. 15 Counsel for both parties filed written submissions which were adopted at the hearing.

Background

- The Applicants filed Civil Appeal No.0465 of 2024 against the ruling I and orders in HCCMAOI24I2024 of the High Court by which the Respondents were granted proprietary possessory rights of the enjoyment of the economic benefits of the Applicant's properties comprised in LRV 330 Folio 11 Plot 56 seventh street Industrial area, LRV 301 Folio 21 Plot 58 seventh street Industrial area and LRV 4009 Folio 11 Plot 88 South Street which is pending hearing and determination 20
- in this Honorable Court. 25

s The Applicants subsequently filed Civil Application No.1266 of 2023 seeking a temporary injunction restraining the respondents from enforcing any possessory rights or taking possession of their properties as a result of the aforesaid order. This Court dismissed the application for a temporary injunction pursuant to which the applicants filed Civil Reference No.0036 of 2024 against the said ruling 10 which reference is pending hearing in this Court.

Applicants' submissions

Counsel for the Applicants submitted that the grounds for issuance of an order for stay of execution were that the applicant must establish that his appeal has a likelihood of success; or a prima facie case of his right to appeal, it must also 15 be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if the stay is not granted, if 1 and 2 above have not been established, then Court must consider where the balance of convenience lies and lastly that the Applicant must also establish that the Application was instituted without delay. He relied on Theodore Sselcikubo &

20 3 others V Attorney General and Others, Civil Application No.6 of 2073 for the grounds to be considered by Court before an Application for stay of execution can be granted.

As to whether the Appeal has a likelihood of success; or a prima facie case of his right to appeal, counsel highlighted the grounds of the appeal and the reference

25 and emphasized that the said grounds were meritorious and had a high likelihood of success as they raised serious and pertinent points of law and fact which would call for this Court to determine for example that the learned trial 3lPage

⁵ Juilge erred in law and fact when he granted a proprietary possessory rights to the Respondents in complete disregard of a subsisting Court of appeal interim order vide Civil Appeal No. 1267 of 2023 which restrained the same Respondents from taking possession of the suit properties. He relied on Gashumba Manlraguha Vs. Sam Nkundige SCCA No. 24/2015 for the proposition that where an appeal raises questions of law, such an appeal possesses a likelihood of success and ought to be preserved by way of a grant of stay of execution. 10

As to whether the Applicants will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted, it was submitted for the applicants that in paragraph 7 of the affidavit in support of the application, the Applicants had never been heard on the merits and they shall suffer substantial/irreparable loss and damage if the order for stay is not granted. Counsel further submitted that in a further affidavit in support of the Application 15

sworn by Timothy Awaza, the Applicants'Property Manager, he stated that two

policemen went to one of the suit properties, Plot 88 South Street, Master Plaza Building with a Court order while demanding that the tenants should either pay rent to the 3rd Respondent or vacate. He relied on Tvopical Commodities Supplies Ltd & 2 others V International Credit Bank Ltd (tn Ltd) (2004) 2 DA 331 for the proposition that substantial loss refers to any loss great or small; of real worth or value as distinguished from a loss that is merely nominal. 20 25

Counsel further submitted that there was imminent threat of execution and loss was likely to be suffered by the Applicants as they are bound to completely lose

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⁵ their properties over the alleged loan which they never received if an order for stay of execution is not granted. That there will be failure to be heard on merit of the dispute as stated under paragraph 7 of the affidavit in support of the Application. Counsel added that the right to be heard was provided for under the 1995 Constitution and it is a non-derogable right In counsel's view, the right to access to justice which includes the right to be heard on appeal should not be fettered by anybody. 10

Regarding the Balance of convenience, counsel for the Applicants submitted that in paragraph 9 of the Affidavit in support of the Application, the Applicants stated that they were in possession of the suit properties and that there was no doubt that the balance of convenience weighed heavily in their favor. That the Respondents do not stand to lose anything if the application for stay is granted.

As to whether the application had been made without unreasonable delay, Counsel for the Applicants stated that in paragraph 4 of their affidavit in support of the Application that this court dismissed the application for a temporary injunction on the 11th of October, 2024 and that this had the effect of revitalizing the ruling in HCMA No. 124 of 2024. He added that the ruling on the Application for a temporary injunction was delivered on 11th of October 2024, the Applicants filed the reference on the 17th of October 2024 and the present Application was filed on ECCMIS on the 22nd of October 2024. This is barely two weeks after the ruling was delivered.

Counsel submitted that the Applicants had satisfied all the grounds required for grant of an order for stay of execution and prayed that Court grants the orders as sought and stays the execution of the orders in HCMA No. 124 of 2024. He also prayed that costs of this application be awarded to the Applicants.

Respondents' Submissions.

- 10 Counsel for Respondents raised 4 preliminary objections and submitted that the instant Application seeks to stay execution of the orders in HCMA No. 0124 of 2024 without first seeking the said remedy before the trial Court and without pleading special circumstances for applying to this Court first. Further that the Applicants in this case were dissatisfied with the Ruling of Court in H. C. M. A No.
- 124 of 2024 delivered on 8th April 2024. However, since delivery of the said Ruling the Applicants neither sought stay of execution or any injunctive relief in the High Court nor have they demonstrated any exceptional circumstances that justify making of this application straight to this Court. He relied on Rule 42(1)

of the Court of Appeal Rules and. Lautrence Muslluu, a Kgazze as Eunice

20 Busingge Supreme Court Civil Application No. 78 of 1990, for the proposition that wherever an application may be made either in the court or in the High Court it shall be made first in the High Court.

The second preliminary objection was the failure to seek leave to appeal the orders in H. C. M. A No. 0124 of 2024. Counsel contended that the Applicants sought to stay execution of the orders in H. C. M. A No. 0124 of 2024, which was an application for vacant possession of the Suit Properties and referred to

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- annexure "D1" and "D2" attached to the Respondent's Supplementary Affidavit). That the Order in the underlying matter that the Applicants sought to appeal against arose from a Ruling dated 8th April 2024 and the Applicants had 14 days from the date of the Ruling to seek the said leave, first from the lower Court and if so denied, then from this Court which they did not do. However, the Applicants on 7th June 2024, went ahead and filed Civil Appeal No. 465 of 2024 against the orders in H. C. M. A No. 0124 of 2024. He relied on Lukutago Elias V Attorney General and KCCA S. C. C. A No. 06 of 2014 for

the proposition that the right of appeal is a creature of Statute and that there is nothing known in law as an inherent right of appeal. 10

- Corrnseel further submitted that the Applicants interestingly tried to circumvent this requirement by purporting that this Application for stay of execution is also founded on Court of Appeal Civil Reference No. 0036 of 2024. However, Court of Appeal Civil Reference No. 0036 of 2024 against orders in Court of Appeal Civil Application No. 1266 of 2023 which arose from H. C. M. A 510 of 2023. H. C. M. A 510 of 2023 had nothing to do with H. C. M. A No. 0124 of 2024 in which the orclers sought to be stayed were granted. The Applicants were essentially trying to ,seek stay of execution of orders H. C. M. A No. 0124 of 2024 pending a civil reference which relates to a completely different application. Further that Court of Appeal Civil Application No. L266 of 2023 was dismissed for failure by the Applicant to obtain leave to appeal H. C. M. A 510 of 2023, thus Civil Reference No.0036 of 2024. 15 20 25

⁵ The third preliminary objection was that the instant Application purports to arise froln two unrelated appeals/ references, Court of Appeal Civil Appeal No. 0465 of 2024 and Court of Appeal Civil Reference No. 0036 of 2024. Counsel submitted that the applicant is seeking stay of execution of orders in H. C. M. A No. 0I24 of 2024 but purporting that the Application arises from two (2) separate and unrelated appeals/ references being Court of Appeal Civil Appeal No. 0465 of 2024 and Court of Appeal Civil Reference No. 0036 of 2024 which have never been consolidated. Further that between the 2 Appeals/ References, only Court of r',ppeal Civil Appeal No. 0465 of 2024, arises from H. C. M. A No. 0124 of 2024. However, the said appeal is invalid for failure to seek leave to appeal and Court of Appeal Civil Reference No. 0036 of 2024 has no correlation with the current application whatsoever. 10 15

Lastly that the instant Application goes against the principle that one cannot aporobate and reprobate. Counsel submitted that without prejudice to the preliminary objection in (ii) above, Court of Appeal Civil Reference No. 0036 of 2024 from which this Application purports to arise seeks to challenge the decision of Justice Oscar Kihika sitting as a Single Justice in Court of Appeal Civil Application No. 1266 of 2023 dated 11ft October 2024 in which he ruled that the Applicants needed leave to appeal the decision in H. C. M. A 510 of 2023 before appealing.

The Applicants sought leave to appeal the decision in H . C. M . A 5 1 O of 2023 before the High Court in H. C. M. A No. 0581 of 2024 which application was dismissed 25

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⁵ with costs on Sth June 2024. That following Justice Oscar Kihika's Ruling of 11th October 2024, the Applicants on 28th October 2024 filed Court of Appeal Civil Application No. 0347 of 2024 seeking leave to appeal the decision in H. C. M. A 510 of 2023 which is yet to be heard.

The Applicants' actions in seeking leave to appeal directly contradict the grounds in their Civil Reference No. 0036 of 2024 which is tantamount to approbating and reprobating and thus prohibited in law. Further that the Applicants cannot purport to challenge the merits of Justice Oscar Kihika's decision in a civil reference while also complying with his findings. They cannot approbate and reprobate. 10

Reilarding the merits of the Application, counsel for the respondents submitted that the Applicants by filing of the same applications repeatedly in the same courts seeking interim relief in respect of the same suit properties which all result in dismissals amounts to a blatant abuse of court process. Further that the Applicants still have a pending Counterclaim before the trial Court which seeks the same remedies sought in this Court. L5 20

Regarding irreparable loss and balance of convenience, Counsel submitted that the Respondents having lawfully obtained title had been unfairly denied their right to benefit from the suit Properties. The trial Judge's order granting them the right to collect rent did not in any way prejudice the Applicants. That if their Appeals succeed or their Counterclaim in the trial Court succeeds, the collected

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- ⁵ rent for the said period could be refunded to them together with the price of the properties. Further that the Suit Properties are commercial and in mortgaging the m, the Applicants were aware of the likelihood of losing them if they failed to service their loan and therefore, will not suffer any irreparable loss arising from the registered proprietors lawfully collecting rent. Counsel relied on P. K Sengendo Vs Busulutq. qnd Mq.le Abdu, Cidl Application No.207 of 2074, 10
- for the proposition that an execution would not render the appeal nugatory neither would it cause the applicant substantial loss. '

Regarding Possession/Change in proprietorship, Counsel submitted that this Court could not permit the Applicants to injunct every stage of change of ownership at their whim. That the Applicants had tried in vain severally in this Court and in the Court below to do so. Further that the Applicants tried to injunct sale by the mortgagee and failed, he also tried to stop change of proprietorship and failed. The Applicants' right to redeem the Suit Properties lapsed once they were sold to the Respondents. However, they can pursue their counterclaim to have the said sales reversed and the rent lost during the intervening period refunded. Counsel relied on Geoffreg Nangunga us Grtlf Stream Inaestment (U) Ltd and 5 Others Court of Appeal Ciuil Appllcatton ^1\Io. 847 of 2022 where Court held that although the l't respondent's proprietorship may be one of the matters in issue in the pending Appeal, at this ma.terial time, the Applicant who lost ownership to it, cannot claim any serrtimental attachment. Should he be the eventual victor in the Appeal, the suit 15 20 25

5 property will revert to him, or that failing, its value which can be quantified in damages

Whether the Application was brought without undue delay and provision of security for due performance, Counsel submitted that the Ruling which granted the orders that the Applicants sought to stay was delivered on 8th April 2024. This Application was filed on 28th October 2024, over 7 months later. The Applicants cannot be said to have filed this Application without undue delay. Further that the Applicants had not provided security for due performance of the orders and therefore the Application could not be granted.

Submissions in Rejoinder

15 20 Th,: Applicants reiterated their earlier submissions and added that on the 16th day of December 2024, the Respondents purportedly filed an affidavit in reply together with a supplementary affidavit in reply in the instant matter. The said affidavit was deposed by a one Muhammad Senoga, the legal manager-litigation, DFCU Bank Ltd. That it was imperative to note that DFCU Bank Limited was not a party to the instant Application and therefore had no locus to file any pleadings in this Honorable Court except with leave of Court. Further that the Respondents as parties to the instant Application had never filed any response despite having been sued in their own private capacities. That the Respondents' affidavit in reply dated 16th December, 2024 was deposed by the said 5 Muhammad Senoga who is an officer of DFCU Bank and who was a nonparty to the instant proceedings.

Counsel further submitted that in deposing the respective affidavits in reply on behalf of the Respondents, the said Muhammad Senoga did not present any authorization to depone the said affidavits on behalf of the said Respondents. It is settled law that a person cannot swear an affidavit on behalf of another unless he is an advocate or holder of powers of attorney or duly authorized See.' Kaingana as. Dabo Boubou (1986) HCB 59/. Counsel added that in the instant case, there is no semblance of any such authorization seen on the record and the deponent makes no mention in which capacity he deposes the affidavit on behalf of the Respondents.

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On the failure to seek stay of execution in the High Court, Counsel for the Applicants submitted that the Respondents' Counsel contended that this Application should have been made to the High Court before being made to this Honorable Court and referred to Rule 42(1) of the Rules of this Court, Laurence Musiituta Kgazze vs. Eunice Busingge, SCCA .l\Io. 18 of 7990 and. P. K Sengendo vs. Eusuluta & Male Abdu CACA No.207 of 2074 to support this proposition however in Counsel for the Applicants'view, the above objection was based on a misconstruction and improper application of Rule 42(L) which

obviates any merit. The High Court already heard HCMA No.510 of 2023 which was an application for a temporary injunction and dismissed it on the 10th day of November 2023. The Applicants filed an Appeal against the said dismissal 12 IPA61e 25

⁵ vide Civil Appeal No.0234 of 2024 and sought a temporary injunction to preserve the status quo pending the hearing of the said appeal. The Applicants could not therefore file a second application before the High Court because the High Court had already heard and disposed of the same application. He added that the High Court's jurisdiction to entertain the instant Application was fully and finally exercised and its authority in the matter ceased. In that case, the High Court cannot be recalled to review, alter or supplement its decision under Rule 42 (1) of the Judicature Court of Appeal Rules. L0

Further that since the Applicants were appealing against the dismissal order to this Honorable Court, they were entitled to apply for stay of execution pending an appeal to preserve their right of appeal which is envisaged under Rule 42 (21) (b) of the Court of Appeal Rules. That this Court seized with the jurisdiction under Rule 2(2), 6 (2) (b) read together with 42 (21) (b) of the Rules of Court to entertain the instant Application for a temporary injunction.

On failure to seek leave to appeal the orders in HCMA No. I2412024, Counsel for the Applicants submitted that the Respondents in a flagrant abuse of Court processes filed HCMA No.124 of 2024 seeking for vacant possession of the suit properties and that the mentioned application was filed during the pendency of Civil Application No.1266 of 2023 filed by the Applicants in this Court. Counsel added that the Trial Judge in complete disregard of the interim order that had been issued by this Court in Civil Application No. I266 of 2023 proceeded to hear and grant the orders as sought in HCMA No.124 of 2024. That it is under 20 25

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those premises that the Applicants filed Civil Appeal 465 of 2024 challenging the impugned orders of vacant possession that had been granted by the lower Court during the pendency of Civil Application No. I266 of 2023. The said Appeal is pending hearing and determination in this Court. 5

As to whether the instant Application arises from two unrelated Appeals/ References, Counsel for the Applicant submitted that it was an insincere submission that the instant Application arises from two unrelated Appeals and References. That first and foremost, the instant Application was in respect of the same subject matter that is in dispute in both Civil Appeal No.0465 of 2024 and Civil Reference No.0036 of 2024, secondly, the orders sought are the same as those in the above mentioned Appeal and Reference. He added that the Applicant filed Civil Application No. 1266 of 2023 in this Court seeking for orders of a temporary injunction to restrain the Respondents from alienating and/or evicting the Applicants from the suit property pending the hearing and determination of Civil Appeal No. 0234 of 2023. However, during the pendency of the said Application the Respondents proceeded to file HCMA No. 124 of 2024 seeking for orders of vacant possession against the Applicants. L0 L5 20

Further that the High Court proceeded to grant the orders sought in the above mentioned Application and being aggrieved by the said decision, the Applicants filed Civil Appeal No.0465 of 2024. When this Honorable Court dismissed Civil

Application No. 1266 of 2023, the Respondents threatened to execute the orders granted by the lower Court in HCMA No.124 of 2024 of obtaining vacant 14 IFag,e 25

⁵ possession of the suit properties hence this Application. In Counsel's view, it was an insincere submission by the Respondents that the above-mentioned matters are totally unrelated.

Counsel for the Applicants submitted that the Respondents attempted to give a background to this dispute which was not factual and in setting the record straight, the Applicants wished to state that they (the applicants) were former customers of the defunct Crane Bank Ltd who were duped to sign credit facility agreements in the amounts of USD3,800,000 and Ushs.3,000,000,000/ by the former Managing Director of the said defunct Crane Bank Ltd who subsequently disappeared before disbursing the above mentioned loan amount to the Applicants. That despite the absence of any evidence or records of disbursement, receipt, withdrawal andf or utilization of the alleged credit facility, DFCU Bank had persistently demanded repayment of the credit facility and on numerous occasions rode on technicalities rather than form to prove the alleged debt. The Applicants have on numerous occasions requested the lower Court to accord it a hearing on the merits of their complaint but have never had a day in court. 10 15 20

Court's consideration

I have carefully studied the Notice of Motion and the supporting affidavit and the affidavit opposing the Application. I have also considered the submissions of 25 both Counsel and the authorities availed to this Court.

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⁵ The jurisdiction of this court to grant a stay of execution is set out in Rule 6 (2) (b) of the Rules of this Court which provides that;

6. Suspension of sentence and stag of exeantion.
- (2) Subject to sub rule (1) of this rule, the institntion of an appeal shall not operate to suspend ang sentence or to stag execution, but the court maA--
- (b) in ang ciuil proceedings, where a notice of appeal has been lodged in accordance uith rule 76 of these Rules, order a stag of exeantion, an injunction, or a stag of proceedings on such terms as tlrc court mag think just. 10

The Rule gives this Court the discretion, to grant a stay of execution, however the discretion must be exercised on well-established principles. L5

Counsel for the Respondent raised 4 preliminary objections which I wish to dispose of before delving into the merits of the Application. First, the failure by the Applicants to seek stay in the High Court before seeking the same from this ho,rorable Court.

20 Rule 42 of the Court of Appeal Rules provides;

"42. Order of hearing applications

1) Whenever an application may be made either in the Court or in the High Court it shall be made first in the High Court.

2) Notwithstanding sub rule (1) of this rule, in civil or criminal matter, the Court may, on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing so as the justice of the case requires, or entertain an application under rule 6(2) (b) of these Rules, in order to safeguard the right of appeal notwithstanding the fact that no application for that purpose has first been made to the High Court."

It is now settled law that this Court and the High Court have concurrent jurisdiction in applications of this nature. The applications should first be filed in the High Court but where exceptional circumstances exist, they can be filed straight in this Court. See *Kgambogo Unlversitg v Prof. Isaiah Omolo Ndetge*

CACA No. 347 of 2073. 15

It was Counsel for the Respondents' submission that the applicants were dissatisfied with the Ruling of Court in H. C. M. A No. 124 of 2024 delivered on 8th April, 2024 and since the delivery of the said ruling, the Applicants neither sought stay of execution or any injunctive relief in the High Court nor have they demonstrated any exceptional circumstance that justify making this Application straight to this Court.

The Applicants stated that the High Court already heard HCMA No. 510 of 2023 which was an application for a temporary injunction and dismissed it on the 10th day of November 2023. The Applicants filed an Appeal against the said dismissal vide Civil Appeal No. 0234 of 2024 and sought a temporary injunction to preserve the status quo pending the hearing of the said appeal. The Applicants

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could not therefore, file a second application before the High Court because the High Court had already heard and disposed of the same application. He added that the High Court's jurisdiction to entertain the instant Application was fully and finally exercised and its authority in the matter ceased. In that case, the High Court cannot be recalled to review, alter or supplement its decision under Rule 42 (II) of the Judicature Court of Appeal Rules. The Applicant therefore complied with Rule 42 of the Rules of this Court. 10

Secondly, that the Applicants failed to seek leave to appeal the orders in H. C. M. A No. 0124 of 2024. Counsel for the Respondent submitted that the Applicants sought to stay execution of the orders in H. C. M. A No. 0124 of 2024, which was an application for vacant possession of the suit properties and that Order 44 Rule 1 (1) of the CPR provides for orders that are appealable as of right and does not include applications for vacant possession.

Counsel for the Applicants submitted that the Respondents in a flagrant abuse of Court processes filed HCMA No.124 of 2024 seeking for vacant possession of the suit properties and that the mentioned Application was filed during the pendency of Civil Application No.1266 of 2023 filed by the Applicants in this Honorable Court. Counsel added that the trial judge in complete disregard of the interim order that had been issued by this Court in Civil Application No.1266 of 2023 proceeded to hear and grant the orders as sought in HCMA No.124 of 2024 and It was under those circumstances that the Applicants filed Civil Appeal 465 of 2024 challenging the impugned orders of vacant possession that had been 20 25

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5 granted by the lower court during the pendency of Civil Application No.1266 of 2023. The said Appeal is pending hearing and determination in this Court

The evidence on record shows that the Applicant filed Civil Application No.1266 of 2023 as seen in annextrlrre "B" Seeking a temporary injunction to restrain the Respondents from enforcing any possessory rights or taking possession of the properties pending the hearing and determination of their intended Appeal on 30rr, November, 2023.

The Respondents filed H. C. M. A No.124 of 2024 on 25n January, 2024 seeking for orders that the 1't and 2nd Respondents be granted vacant and quiet possession of LRV 330 Folio 11 Plot 56 Seventh Street, industrial area over which they are joint registered proprietors and the 3.d Respondent be granted vacant and quiet possession of LRV 4009 Folio 11 Plot 88 South Street over which he is the registered proprietor. The orders sought were granted by the learned Trial Judge. This was irregular because the interim order that had been granted to the Applicants by this Court was still running.

20 Thirdly, that the instant Application purports to arise from two unrelated appeals/ references, Court of appeal Civil Appeal No. O465 of 2024 and Court of Appeal Civil Reference No. 0036 of 2024. Counsel for the Respondents submitted that the Applicants are seeking stay of execution of orders in H. C. M. A No. Ol24 of 2024 but purporting that the application arises from two (2) separate and unrelated Appeals/ References being Court of Appeal Civil Appeal No. 0465 of 25

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⁵ 2024 and Court of Appeal Civil Reference No. 0036 of 2024 which have never been consolidated. Further that between t};,e 2 Appeals/ References, only Court of Appeal Civil Appeal No. 0465 of 2024, arises from H. C. M. A No. Ol24 of 2024. However, the said appeal is invalid for failure to seek leave to appeal and Court of ,ppeal Civil Reference No. 0036 of 2024 has no correlation with the current Application whatsoever. 10

In reply, counsel for the Applicant submitted that it was an insincere submission that the instant Application arises from two unrelated Appeals and References. That the instant Application was in respect of the same subject matter that is in dispute in both Civil Appeal No.0465 of 2024 and Civil Reference No.0036 of 20:t,4.

I have looked at the Memorandum of Appeal in Civil Appeal No.0465 of 2024 attached to the Applicant's Application marked as annex Lrre "A" and Civil Reference No.0036 of 2024 marked as annex rre "D" and find that although the said two matters were not consolidated, they are in respect of the same subject matter. For that reason, the objection is overruled.

Lastly, counsel for the Respondent submitted that the instant Application goes against the principle of approbation and reprobation. That the applicant's actions in seeking leave to appeal directly contradict the grounds in their Civil Reference which is tantamount to approbating and reprobating thus prohibited in law.

5 On the issue of approbation and reprobation raised by the Respondents, this court not be determined without delving into the merits of the pending Appeal. It will best be determined at the hearing of the Appeal.

Merits of the application

The Supreme Court in Hon. Theodore Ssekikubo & Others as. The Attorney General and Another, Constitutional Application No 06 of 2013 re-stated the principles to consider before granting an order of stay of execution pending Appeal 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 have not been established, Court must consider where the balance of convenience lies.

20 (4) That the Applicant must also establish that the application was instituted without delay. "

The issue for determination by the Court is whether the Applicant has adduced sufficient evidence to justify the grant of a stay of execution.

1. Prima facie case with likelihood of success of the appeal

⁵ The record shows that this matter has a checkered history. Following the decision of *Gashumba Maniraguha V Sam Nkudlge*, Supreme Court Civil Application No.24 of 2015 where the Supreme Court held that even though the Court is not at this stage deciding the Appeal, it must be satisfied that the Appeal raises issues which merit the consideration of the Court. I will give a brief background without going into the merits of the pending Appeal. The Applicants contested their indebtedness to M/S Crane Bank Limited and the enforceability of the impugned mortgage securities. 10

They filed various suits including;

- i. HCCS No.229 of 20 19, New Master Electronics Ltd V Crane Bank Ltd
- ii. HCCS No.896 of 2020, MP Electronics Limited V DFCU Bank Limited. 15
- iii. HCCS No.57 of 2022, New Master Electronics, MP Electronics Limited and 2 Others V DFCU Bank Limited, Commissioner Land Registration and 2 Others.
- iv. Court of Appeal, Civil Application No.503 of 2022 arising from Civil Appeal No.117 of 2022

All of them were decided in favor of the 1st Applicant. Later DFCU Bank challenged the actions of the Commissioner Land Registration in respect of Crane Bank Mortgages in Court. According to the Applicants, before the suit could be heard inter parties, DFCU Bank and Commissioner Land Registration entered into a consent judgment on 12th April, 2023 to compromise the suit without the involvement of the Applicants as interested parties. This raises an

⁵ issue of the right to fair hearing which is enshrined in the Constitution. The Applicants attached a Memorandum of Appeal marked as annexure "A". The said Memorandum of Appeal presents sound and arguable issues which merit serious consideration by a panel of Justices. In *Salome Njiru Keen and 7*

Others V Alice Wanjiku Wanjohi Administratrix of the estate of Francis

Wanjohi Ndirangu (Deceased) (2019) e KLR Ct App 10.326 of 2013 FfR 240/2013) the Court held that an arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the Court's consideration. 10

The Applicants stated under paragraph 4 of the grounds of the Application that their Reference and Appeal are meritorious and have a high likelihood of success as they raise serious and pertinent points of law and fact to which I agree. 15

It is therefore, my considered view that the Applicants have established that they have a prima facie case which merits determination of the Appeal pending before this Court.

2. Irreparable damage 20

> The second consideration is whether the Applicant will suffer irreparable damage or that the Appeal will be rendered nugatory if a stay is not granted. In *American Cyanamid v Ethicon* [1975] 1 All E. R. 504 it was held that;

"Before granting an injunction, the Court must consider the adequacy of damages. This involves two steps; 25

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⁵ 1. The Court must consider whether, if the plaintiff were to succeed at trial, damages would be an adequate remedy. If damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted; and

> 2. The Court must consider whether if the defendant were to succeed at trial, he would be adequately compensated by the plaintiffs undertaking in damages for the loss caused by being prevented from carrying out the work between the time of the application for the interim injunction and the trial. If the defendant would be adequately compensated, then an interim injunction should be granted."

The Applicant stated in paragraph 2(L1 of the affidavit in rejoinder to the Respondents' affidavit in reply that whereas it was not true that the orders issued in HCMA No.124 of 2024 have taken effect as alleged by the Respondents since they have never effected any change of guards at the premises or taken possession thereof despite several attempts to do so to the extent that the Applicants remain in possession of the suit properties to date. Under paragraph 5 c'f the grounds of the Application, the Applicants' stated that the Respondents are now threatening to enforce and enjoy the possessory rights granted by the High Court by taking over the Applicants tenants and changing the guards at the premises. In a further affidavit in support of the Application sworn by Timothy Awaza, the Applicants state that two policemen went to one of the suit properties, Plot 88 South Street, Master Plaza Building and produced a court

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⁵ order while demanding that the tenants should either pay rent to the 3rd Respondent or vacate.

The above shows that there is imminent threat of execution and loss is likely to be suffered by the Applicants. In *Tedd Sseezi Cheege and Another V Enos Tttmusllme*, Court of Appeal Civil Application No.21 of 1996, this Court while considering circumstances which Court should take into account before granting a stay of execution held that, they include where the subject of a case is in danger of being destroyed, sold or in any way disposed of. This is so in this C SC.

The applicants having established grounds 1 and 2, I find no reason to consider

the issue of balance of convenience for reasons that court should only consider the balance of convenience where it is in doubt. 15

I find that the Applicants have satisfied the conditions required for the grant of a stay of execution and I accordingly allow the Application and make the following orders: -

1. The execution of the ruling/orders issued in High Court Miscellaneous Application No. 0124 of 2024 granting the respondents proprietary possessory rights of enjoyment of the economic benefits of the Applicants' properties comprised in LRV 330 Folio 11 Plot 56 Seventh Street Industrial Area, LV 301 Folio 21 Plot 58 Seventh Street Industrial Area and LRV 4009 Folio 11 Plot 88 South Street is hereby stayed pending the hearing and 20 25
- ,
- disposal of Civil Reference No.0036 of 2024 and Civil Appeal No.0465 of 2024 pending hearing and disposal before this Court.

- 2. Costs of this application will follow the outcome of the Appeal.
- I so order

Dated at Kampala this..... \$10\$

Cheborion Barishaki

JUSTICE OF APPEAL

$\$S\%$

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Prepared on 14 October 2026 · Esheria