THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 113 OF 2023

(Arising from Civil Appeal No.0001/2023)

(Arising from Consolidated High Court Civil Suits no.464 of 2018 & 038 of 2019)

HARUNA SENTONGO :: APPLICANT

VERSUS

I&M BANK LTD *(formerly)* ORIENT

BANK (U) LTD :: RESPONDENT

BEFORE: HON JUSTICE OSCAR KIHIKA, JA

(Sitting as a single Justice)

RULING OF COURT

This application was brought under Rules 2(2), 6(2)(b), 42(2) and Rule 43 of the Judicature (Court of Appeal Rules) Directions SI 13-10 and Section 98 of the Civil Procedure Act seeking for orders that;

1. An order of stay of Enforcement and or Execution doth issue, staying enforcement, and execution of the Judgment, Decree and or Orders of the High Court, made in *Civil Suits HCCS No. 464/2018 and HCCS No. 036/2019: Haruna Sentongo Vs Orient Bank (U) Ltd*, and or restraining the Respondent from taking any steps or carrying out any actions of any nature, capable of interfering with, or affecting Civil Appeal No. 0001 of 2023, until the hearing and determination Appeal.
2. Costs of this application be in cause.

Background

The background of this application as can be discerned from the pleadings and the affidavits on record is as follows;

In December of 2015, or thereabout, the Applicant embarked on a project of constructing a commercial property known as Segawa Market, on land situated on Kibuga Block 12 Plots 250 & 251, Kisenyi. The Applicant approached the Respondent for a financial facility for completion of the commercial blocks for Segawa Market, which was to be rented out to tenants to derive rental income. Both parties executed a facility letter dated 22nd February, 2016, for a Loan of UGx 5,000,000,000 (Five Billion) and it was agreed, that the facility would only be serviced through rent collections from Segawa Market if the Respondent Bank funded the development. It was the Applicant's case that the Respondent Bank breached the facility contract by failing to disburse the agreed sums of monies.

According to the Applicant, the Respondent Bank would purport to credit his account, and synonymously liquidate the loan, paying itself back immediately with the sums credited, and the sums it would repay itself were always reflected as "Loan amounts recovered".

The Respondent Bank on the other hand, claimed that between February to October 2016, the Applicant was granted several loan facilities. These loan facilities were, at the request of the Applicant, consolidated into one term loan with a single monthly instalment amortized for a period of five years. The Applicant, however, failed to meet his loan repayment obligations consequent upon which the Respondent Bank issued with two notices of default; one on the 22nd of December 2016 and the other on 15th June 2017.

The Applicant then instituted Civil Suit No. 464 of 2018 in the High Court of Uganda the credit facilities granted to him by the Respondent. The Respondent, in turn instituted High Court Civil Suit No. 036 of 2019 against the Applicant seeking to recover the sum of UGX 10,384,308,959/= on account of the credit facilities advanced to the Applicant.

Both suits were consolidated and judgment was on the 23rd of December 2022 entered in favor of the Respondent wherein the Applicant was ordered to pay the sum of UGX 10,384,308,959 being the decretal sums owing to the Respondent and UGX 150,000,000/= as general damages.

The Applicant then filed in the High Court Miscellaneous Application No. 009 of 2023 seeking for orders of stay of enforcement and execution of the orders of the court. On the 10th of February 2023, the Court granted the Applicant's application for stay of execution on condition that the Applicant deposits a Bank Guarantee for the sum of UGX 7,227,479,035.464 within one month form the date of the ruling. The Applicant, it appears, failed to comply with the conditions as stipulated by the Court order.

The Applicant then filed Civil Appeal 001 of 2023, appealing the decree and orders in consolidated Civil Suits No.464/2018 and No.036/2019. The Applicant also filed the instant application in which he seeks an order of stay of enforcement and or execution, staying enforcement, and execution of the Judgment, Decree and or Orders of the High Court, made in **Civil Suits HCCS No. 464/2018 and HCCS No. 036/2019: Haruna Sentongo Vs Orient Bank (U) Ltd**, and or restraining the Respondent from taking any steps or carrying out any actions of any nature, capable of interfering with, or affecting Civil Appeal No. 0001 of 2003, until the hearing and determination of Civil Appeal No. 1 of 2023.

The grounds upon which the application is premised are set out in the Notice of Motion and the affidavit of the Applicant MR. HARUNA SENTONGO and are briefly that;

1. *Judgment was delivered in Consolidated Suits HCCS No. 464/2018 and HCCS No. 036/2019: Haruna Sentongo Vs. Orient Bank (U) Ltd. Therein, the trial Court failed to take into consideration key material evidence of a failure of disbursement of loan amounts, and it erred and held that the Applicant is indebted to the Respondent in a sum of Ugx. 10,294,334,391/;*

2. *The Applicant filed a Notice of Appeal against the Judgment, Decree and Orders of the trial Court, both in the trial Court and this Court, and served a copy thereof upon the Respondents, within the time prescribed under the law;*
3. *The Applicant has since also filed in this Court an appeal against the Judgment, Decree and Orders made in Consolidated Suits HCCS No. 464/2018 and HCCS No. 036/2019: Haruna Sentongo Vs. Orient Bank (U) Ltd, vide Civil Appeal No.001 of 2023 and the appeal is pending hearing and determination;*
4. *The appeal has a likelihood and probability of success as the appeal raises a Prima facie case, and arguable grounds, which will merit judicial consideration by the Justices of Appeal, as are contained in the Memorandum of Appeal;*
5. *At trial, the Applicant adduced unrebutted evidence which will be considered on appeal demonstrating that earlier obtained loan facilities for the development of Nakayiza Mall on Kibuga Block 12 Plots 250, 251 and 252, were settled;*
6. *The Applicant also adduced evidence meriting consideration on appeal demonstrating that the specific Credit Facility under dispute, which the Applicant had applied to obtain, for the development of Segawa Market on Kibuga Block 12 Plots 250, 251 and 252, lapsed after 30 (thirty) days without being disbursed;*
7. *The Applicant demonstrated that loan amounts for the development of Segawa Market were never made available for this use as disbursements were reversed back on the same date of disbursement as loan amounts recovered.*
8. *The above evidences were unchallenged, however, the trial court totally missed this evidence, and failed to properly evaluate it, when determining Civil Suits HCCS No. 464/2018 and HCCS No. 036 of 2019;*
9. *There is a serious and imminent threat of execution of the Judgment and Decree before the appeal is heard and determined, which will render the*

pending appeal nugatory and occasion a serious injustice upon the Applicant;

10. *The Respondent has extracted a decree from the Judgment, which is a known preliminary step in execution, and has advertised for sale by public auction, the Applicant's property comprised in Kibuga Block 12 Plots 250, 251 and 252;*
11. *Further, the Respondent is already in possession of the certificates of title for the Applicant's properties comprised in Kibuga Block 12 Plots 250, 251 and 252 which are of substantial value, from which it is able to recover any sums should the appeal return unsuccessful;*

The respondent filed an affidavit in reply deponed by MUSHEMEZA CHEGUEVARA, opposing the application and briefly states as follows;

1. *On the 22nd day of February, 2016, the Applicant obtained a facility worth UGX. 5,000,000,000(Uganda Shillings Five Billion only). This facility was in addition to other facilities already obtained by the Applicant. The aforementioned facility was secured by property comprised in Block 12 Plots 251 and 825 Mengo and Block 12 Plot 250.*
2. *The facility was for construction of a mall on Kibuga Block 12 Plots 250 and 251 Mengo, however, it was misapplied by the Applicant to construct on an adjoining plot Kibuga Block 12 Plots 252, land at Kisenyi.*
3. *On the 16th may, 2016, the Applicant obtained a further overdraft facility for UGX. 100,000,000 for the completion of a shopping mall on Block 12 Plots 250 and 251 Mengo, Kisenyi.*
4. *The Applicant through a letter dated 26th May 2016 requested for financing of UGX. 1,500,000,000. On the 5th July, 2016, he obtained a further facility worth UGX. 1,500,000,000(One billion, Five Hundred Million Shillings) and it was secured by properties comprised in Block 12 Plots 250, 251, and 252 Mengo Kisenyi.*

5. *As a condition of facility dated 5th July,2016, the Applicant through this letter dated 14th July,2016, undertook to route rental proceeds from Segawa Mall (Plots 250, 251 and 252 Kibuga Block 12) through the Respondent.*
6. *Upon failing to meet his loan repayment obligations, the Applicant through a letter dated 14th October 2016 requested for consolidation of his existing loans with the Respondent into one term loan with a single monthly instalment amortized for a period of 5 years.*
7. *That the Respondent through its letter dated 18th October 2016 referred to the Applicant's request for amalgamation and informed him its acceptance of the amalgamation and that his account was in excess of UGX, 184,903,184/= (Uganda Shillings One Hundred Eighty-Four Million Nine Hundred Three Thousand One Hundred Eighty-Four only). The Respondent demanded the payment of the outstanding within 30 days.*
8. *That the Respondent amalgamated the Applicant's loans and offered him a loan facility in its letter dated 12th October consolidating the Applicant's loan facilities as per offer letters OBL/ADV-3952/112/112 dated 5th July, 2016 for term loans UGX. 2,805,883,000/- (Uganda Shillings Two Billion Eight Hundred Five Million Eight Hundred Eighty-Three Thousand only) and UGX. 6,439,629,000 (Uganda Shillings Six Billion Four Hundred Thirty-Nine Million Six Hundred Twenty-Nine Thousand); and overdraft of UGX. 450,000,000 (Uganda Shillings Four Hundred Fifty Million only).*
9. *That the Applicant continued to unsatisfactorily met his monthly repayment obligations and the Respondent issued a notice of default dated 22nd December, 2016.*
10. *That after persistent default and failure by the Applicant to meet his monthly repayment obligations for close to a year, the Respondent issued the Applicant with a notice of default through its former lawyers dated 15th June, 2017 demanding for the repayment of the entire outstanding of UGX. 10,294,334,391/- Uganda Shillings Ten Billion Two Hundred Ninety-Four*

Million Three Hundred Thirty-Four Thousand Three Hundred Ninety-One only).

11. *On the 23rd day of December 2022, the High court delivered its judgment in consolidated Civil Suits No. 464 of 2018 and Civil Suit No. 36 of 2019 wherein it decreed and ordered that the Applicant, Mr. Haruna Sentongo, is indebted to the Respondent, I&M Bank (Uganda) Limited formerly Orient Bank Limited in the sum of UGX. 10,384,308,959 (Ten Billion Three Hundred Eighty-Four Million Three Hundred Eight Thousand Nine Hundred and Fifty-One).*

Representation

At the hearing of this application, counsel Arnold Norgan Kimara appeared for the Applicant, with the Applicant in attendance, while Counsel Bruce Musinguzi and Counsel Joachim Kunta Kinte appeared for the respondent. Both parties filed written submissions which they adopted.

Consideration of the application

I have carefully considered the affidavits and submissions of both parties and the wealth of authorities cited by both parties.

I must note however that this application is essentially for two orders. The first order is stated to be that of *".....an order of stay of enforcement and or execution of the Judgment, Decree and orders of the High Court..."* and the second order is that of *".....restraining the respondent from taking any steps or carrying out any actions of any nature capable of interfering with or affecting Civil Appeal No. 001 of 2023..."* in essence, the first order is for a substantive stay of execution while the second order is for a temporary injunction against the respondent. I shall handle the two orders as sought separately.

ORDER FOR STAY OF EXECUTION

The authorities of **Lawrence Musiitwa Kyazze Vs Eunice Busingye SCCA No. 18 of 1990; Dr. Ahmed Muhammed Kisuule Vs Greenland Bank (In Liquidation) SCCA No. 7 of 2020** and **Gashumba Maniraguha vs Samuel**

Nkundiye SCCA No. 24 of 2015 re-state the principles for the grant of a substantive order for stay of execution such as one before me.

Recently, the Supreme Court in the application by **Hon. Theodore Ssekikubo & Others vs. The Attorney General and Another, Constitutional Application No 06 of 2013** 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 issue for determination by the Court is whether the applicant has adduced sufficient reasons to justify the grant of a stay of execution.

1. ***Prima facie* case with likelihood of success**

On the issue of likelihood of success, the applicant's counsel attached the Memorandum of Appeal filed in this court in Civil Appeal No. 1 of 2023 marked annexure 'I' to the affidavit in support of the application.

The applicant's counsel relied on the decision in the case of **Lawrence Musitwa Kyazze vs Eunice Busigye SCCA No. 18/1990** in which the Supreme Court instructively guided as follows; *"It is the appellate Courts interest to see that the status quo is preserved, so that Courts decisions are not rendered nugatory."* Counsel argued that where a party is exercising its unrestricted right of appeal, and the appeal has likelihood of success, it is the duly of the Court to make such

orders as will prevent the appeal from being nugatory if successful. Counsel further submitted that, the execution of a decree, ultimately renders an appeal against that decree moot, and nugatory. He argued that, in the instant application, the execution of the Judgement subject of Civil Appeal No. 0001/2023 would ultimately render the appeal nugatory. He further submitted that in Civil Appeal No. 001/2023, the Applicant is seeking an order reversing the findings of the trial court as to liability or the decretal sum and execution of the decree in this case will bring to finality the proceedings in the pending litigation.

For the respondent, counsel argued that whereas the applicant made reference to the Memorandum of Appeal filed in this court, he did not provide material evidence in support of his grounds of appeal. Counsel argued that the applicant lacks evidence to support his appeal and is thus unlikely to succeed.

From my perusal of the applicant's affidavit in support of his application, paragraph 4, the applicant states that he adduced unrebutted evidence which will be considered on appeal demonstrating that earlier obtained loan facilities for the development of Nakayiza Mall on Kibuga Block 12 Plots 250, 251 and 252, were settled and also adduced evidence meriting consideration on appeal demonstrating that the specific Credit Facility under dispute, which the Applicant had applied to obtain, for the development of Segawa Market on Kibuga Block 12 Plots 250, 251 and 252, lapsed after 30 (thirty) days without being disbursed. The applicant has attached the Memorandum of Appeal filed in this court and stated the grounds in paragraph 6 of the affidavit in reply and stated;

"6. THAT the appeal has merit and a likelihood of success, and it raises serious arguable grounds meriting judicial consideration which are contained in the Memorandum of Appeal, as follows, THAT;

i. *The learned trial Judge erred in law and fact, when he did not take into account the evidence of loan amounts purported to have been disbursed,*

clawed back, reversed and or recovered by the respondent, and he arrived at the incorrect holding that the appellant is indebted to the respondent;

ii. *The learned trial Judge erred in law and fact, when he failed to find that the credit transaction between the parties initiated under the contract dated 22nd February, 2016 failed and repudiated, and arrived at an incorrect decision in Consolidated Civil Suits HCCS No. 464/2018 and HCCS No. 36 of 2019;*

iii. *The learned trial Judge erred in law and fact when he misapplied the law on pleadings and fraud, and or applied the law with material inconsistencies which occasioned a miscarriage of justice, and he arrived at an incorrect decision in Consolidated Civil Suits No. HCCS No. 464/2018 and HCCS No. 36/2019;*

iv. *The learned trial Judge erred in law and fact when he misapplied the law on illegalities, and failed to make a finding on uncontroverted illegalities of "insider dealing" and "champertous connivance" by the respondent in its dealings with the appellant, and arrived at an incorrect decision which occasioned a miscarriage of justice;*

v. *The learned trial Judge erred in law and fact, when he failed to find the respondent liable in breach of contract, breach of statutory and fiduciary duties to the appellant, and was fraudulent in its dealings and transactions with the appellant;*

vi. *The learned trial Judge erred in law and fact when he declined to award the appellant an order for recovery of sums taken in unjust enrichment, general and special damages for loss of rental business income;*

vii. *The learned trial Judge erred in law and fact, when he failed to properly evaluate evidence on record as a whole, and he arrived at an incorrect decision dismissing Civil Suit HCCS No. 464/2018, and an order granting HCCS No. 36/2019;*

viii. *The learned trial Judge erred in law and fact, by awarding the respondent un-proven and excessive general damages, excessive interest and costs;"*

In **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] e KLR** the Court of Appeal of Kenya described an arguable appeal in the following terms: ***"vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. viii). In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal."***

I find that the decision in **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (supra)** is of persuasive value and would adopt the same reasoning. It is thus not necessary to pre-empt considerations of matters for the full bench in determining the appeal. In the instant case, the applicant not only attached the Memorandum of Appeal but also laid out the questions for this court to determine in the appeal. It is therefore my considered view that the applicant has established that he has a prima facie case pending determination before this court.

2. Irreparable damage

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 this regard, the applicant's counsel argued that the execution of the Judgement subject of Civil Appeal No. 0001/2023 would ultimately render the appeal nugatory. Counsel submitted that in Civil Appeal No.0001/2023, the Applicant is seeking an order reversing the findings of the trial court as to liability of the decretal sum and argues that execution of the decree brings to finality, any proceedings in litigation. Counsel relied on the decision of Ruby Opio-Aweri.

JSC (RIP) in **Osman Kassim Ramathan vs. Century Bollling Company Ltd (Supra),** in which it was held that execution in itself is a final process of completing the proceedings of Court, and giving effect to decisions. The applicant's counsel submitted that in the instant matter, should the decretal sum under dispute on appeal be recovered before the determination of the appeal, the Appellate Court would be faced with a situation where the judgment of the trial court has been given effect, and its final determination, has been put into final action. That the appellate court wouldn't be called upon to deliberate and re-appraise itself on matters that have been rendered moot, or even consider reversing a judgment which has been completed by execution.

For the respondent, counsel submitted that it is not enough to just merely plead substantial loss, the applicant must adduce evidence that he will suffer substantial loss should the application not be granted. Counsel submitted that the applicant must state the details of the loss and the court must be satisfied that the applicant will suffer irreparable loss as is argued in the affidavit in support of the application. Counsel submitted further that the mere fact that the applicant took out a mortgage with the respondent bank is enough for the applicant to have foreseen that the property could be sold in case of default.

The applicant stated in paragraphs 5.4 and 6 of his affidavit in support of the application that the Respondent never gave consideration for the mortgage and by its failing to disburse sums sought under the facility, it is a triable question on appeal whether the Respondent bears a valid mortgage interest in the suit property. If a stay is denied, substantial loss will result upon the applicant as the property will stand at the verge of being sold by the respondent. The term "irreparable damage" is defined in **Black's Law Dictionary, 9th Edition at page 447** to mean;

"damages that cannot be easily ascertained because there is no fixed pecuniary standard measurement"

In my understanding, the applicant has to show that the damage bound to be suffered is such that it cannot be undone or compensated for in damages.

In **Giella v. Cassman Brown & Co. [1973] E.A 358**, it was held that by irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage must be substantial or material one that is; one that cannot be adequately atoned for in damages. Likewise, In the case of **American Cynamide vs Ethicon [1975] 1 ALL E.R. 504** it was held;

"The governing principle is that the court should first consider whether if the Plaintiff were to succeed at the trial in establishing his right to a Permanent Injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant's continuing to do what was sought to be enjoined between the time of the Application and the time of the trial.

In the instant case, the evidence of irreparable loss/ damage is in paragraph 9 of the applicant's affidavit in support of the application, which I have reproduced below;

> ***"9. THAT if a stay is denied, substantial loss will result upon me, as follows;***
>
> ***9.1. THAT my appeal will be affected and even possibly rendered totally nugatory, which would effectively deprive me an opportunity to be heard on my appeal;***
>
> ***9.2. THAT I reasonable believe, that a deprivation of a right to be heard on appeal or an opportunity to be heard, would be a denial of fait access to justice, which is a loss not easily compensable in damages.***
>
> ***9.3. THAT I have been advised by my lawyer M/s Kimara Advocates & Consultants whose advice I verily believe to be true, that a denial***

by any circumstances of a right to be heard before a court of law, is non-quantifiable in damages;

9.4. THAT further, I reasonably believe, that a loss arising by the above deprivation, coupled with the colossal sums subject of appeal, aggregate to a substantial loss not easily reparable in law;"

Applying the above to the principals of irreparable damage, I find that the property subject of the appeal before this court is a commercial building whose rent proceeds can be ascertained. In addition, there was a valuation done on the property when the applicant applied for the loan facilities and as such, the value if the property in question can be ascertained and the same can be compensated in monetary terms, should the applicant's appeal succeed. I am therefore unable to find that the Applicant will suffer irreparable damage.

3. Balance of Convenience

The concept of balance of convenience was expounded in **Jayndrakumar Devechand Devani Vs. Haridas Vallabhdas Bhadresa & Anor, Civil Appeal No. 21 of 1971** where the Court of East Africa observed *inter alia* that:

"Where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff."

In essence, balance of convenience lies more on the one who will suffer more if the respondent is not restrained in the activities complained of in the suit. Therefore, in arriving at the proper decision whether the balance of convenience favors the applicant or not, court must weigh the loss or risk at exposure for the applicant in the event the order is denied and the damage which could be suffered if it is not granted. In my view, court should equally examine the prejudice and the injury both parties are likely to suffer if the stay is granted or denied.

In this case the applicant is in possession of the suit property, a commercial building with various tenants carrying out business and the sale of the property will be to the detriment of the applicant. The applicant thus prayed that the stay of execution is granted maintaining the status quo until the determination of the appeal pending before this court. I believe the balance of convenience favors the applicant who is in possession and stands to be prejudiced if the suit property is sold.

4. Regulation 13 of the Mortgage Regulations

The respondent raised an important issue which this court must address in a grant of a substantive order for stay of execution such as the one before me. The respondent argues that the applicant has not fulfilled the provisions of Regulation 13 (1) of the Mortgage Regulations. The applicant's counsel submitted that the circumstances of this matter are peculiar and exceptional in nature and do not warrant imposition of a condition to furnish any other security for costs or due performance of the decree, in considering a grant of stay of execution. The applicant stated in paragraphs 12, 12.1 - 12.6 of the affidavit in support of the application that at the lodging of the appeal, the Applicant already paid in this Court Security for Costs in compliance with Rule 105 of the Rules of this Court. That the Applicant has also demonstrated further, that the Respondent is already in possession of the certificates of title for the Applicant's properties comprised in Kibuga Block 12 Plots 250,251 & 251 which are of substantial

value, even where there is a dispute whether the Respondent provided consideration for remaining in possession of the Applicants titles

Regulation 13 (1) of the Mortgage Regulations 2012 provides;

> **13. Adjournment or stoppage of sale.**
>
> ***1. The court may on the application of the mortgagor, spouse, agent of the mortgagor or any other interested party and for reasonable cause, adjourn a sale by public auction to a specified date and time upon payment of a security deposit of 30% of the forced sale value of the mortgaged property or outstanding amount.***

With regard to Regulation 13, I would rely on the decision of this court in **Woodmore Energy Consultancy Ltd & others Vs Guaranty Trust Bank (U) Ltd Civil Application No. 270 of 2016** in which this court interpreted the context in which Regulation 13 should be applied. In that case, even though it was an application for an interim injunction, court held that;

> ***"this courts understanding of the above regulation is that it applies where the mortgagor is seeking to adjourn a sale by public auction to another date. I believe this is why the provision is very explicit that the court may adjourn the sale to a specific date and time upon payment of a security deposit of 30% of the forced sale value of the mortgage property or outstanding amount."***

I would agree with the above position. Where there is an impedning sale by public auction and an applicant seeks to stop the sale, the regulation would not apply. In the instant case, the applicant seeks to stop rather than adjourn the sale. I am therefore of the considered view that Regulation 13 of the Mortgage Regulations would not apply in this case. Regulation 13 applies to a mortgagor who is seeking adjournment to another date to enable them redeem the property.

5. Security for due performance of the decree

The decision in **Lawrence Musitwa Kyazze vs Eunice Busigye SCCA No. 18/1990** held as follows;

> ***"The practice that this Court should adopt is that in general, an application for a stay should be made informally to the judge who decided the case when judgment is delivered. The Judge may direct that a formal motion be presented on notice (Order XLVIII rule 1.), after notice of appeal has been filed. He may in the meantime grant a temporary stay for this to be done. The parties asking for a stay should be prepared to meet the conditions set out in Order XXXIX Rule 4(3) of the Civil Procedure Rules. The temporary application may be ex parte."***

The order relied on above in the current Order 43 (4) of the Civil Procedure Rules No. 71-1 of 2014 and it states;

> ***"4. Stay by High Court.***
>
> ***(3) No order for stay of execution shall be made under sub rule (1) or (2) of this rule unless the court making it is satisfied—***
>
> ***(a) that substantial loss may result to the party applying for stay of execution unless the order is made;***
>
> ***(b) that the application has been made without unreasonable delay; and***
>
> ***(c) 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."***

From the evidence on record, the applicant has not provided any security for due performance of the decree. I agree with the respondent's counsel that the

circumstances of this case warrant the deposit of security for due performance of the decree.

That being the case, it is my considered view that an order for stay of execution is not available to the applicant for failure to fulfill the mandatory requirement for deposit of security for due performance.

ORDER FOR TEMPORARY INJUNCTION

For a temporary injunction to be granted, court is guided by certain principles which were laid out in the case of **Shiv Construction V Endesha Enterprises Ltd S.C. Civil Appeal No. 34 of 1992** where it was held that;

"The applicant must show a prima facie case with a probability of success. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which could not be compensated in damages. When the court is in doubt it will decide the application on the balance of convenience."

Thus, the rules governing the grant of a temporary Injunction are;

1. *The granting of a temporary injunction is an exercise of judicial discretion and the purpose of granting it is to preserve the matters in the status quo until the question to be investigated in the main suit is finally disposed of.*

2. *The conditions for the grant of the interlocutory injunction are;*

i. *Firstly that, the applicant must show a prima facie case with a probability of success.*

ii. *Secondly, such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.*

iii. *Thirdly if the Court is in doubt, it would decide an application on the balance of convenience.*

An order for a Temporary Injunction is granted so as to prevent the ends of justice from being defeated. The most important purpose of the grant of temporary injunctions is to preserve the matters in status quo until the question to be investigated in the main suit is finally disposed of. I have already found, while determining the first part of the application seeking an order of stay of execution, that the applicant has established a prima facie case and that the balance of convenience lies with the applicant who is in possession of the suit property.

It is trite that such interlocutory orders for a temporary injunction are granted at the discretion of court to maintain the status quo pending the determination of the main issues in the appeal before court. I hasten to add that Rule 2(2) of the Rules of this Court grants this court wide discretionary powers, and the inherent power, to make such orders as may be necessary for attaining the ends of justice.

The Supreme Court in **Attorney General vs. Nakibuule Gladys Kisekka [2018] UGSC 30 (11 July 2018)** defined Judicial Discretion in the following terms; ***"Discretion refers to the power or right given to an individual to make decisions or act according to her/his own judgment. Judicial discretion is therefore the power of a judicial officer to make legal decisions based on her opinion - but I hasten to add - but within general legal guidelines. In Black's Law Dictionary 5nd Edition, "judicial and legal discretion" is defined as "discretion bounded by the rules and principles of law, ..."***

It is therefore my considered view that the applicant in this case has made out a case for the issuance of a temporary injunction restraining the respondent from the sale or interference with the suit property until the applicant's appeal vide Civil Appeal No. 001 of 2023 is disposed of by this court; an order to preserve the status quo of the suit property, which the respondent had previously

advertised in the newspaper, until the determination of the appeal before this court. In the result, I allow this application in part and make the following orders;

1. An order of a temporary injunction is hereby issued restraining the respondent from carrying out any steps or interference with the suit property comprised in Block 12 Plots 251 and 825 Mengo and Block 12 Plot 250 Mengo, the suit property in Civil Suits HCCS No. 464/2018 and HCCS No. 036/2019: Haruna Sentongo Vs Orient Bank (U) Ltd until the hearing and determination of Civil Appeal No. 0001 of 2023.
2. The application for a stay of execution is denied.

3. Costs shall abide the outcome of the appeal.

Dated this 19th day of May 2023

.....
OSCAR JOHN KIHIKA
JUSTICE OF APPEAL