

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 challenging 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 from the date of the ruling. The Applicant, it appears, failed to comply with the conditions as stipulated by the Court order.

The Applicant subsequently 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 interim 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 the substantive application.

The grounds of the application, as stated in the Notice of Motion and affidavit in support of the application sworn by Haruna Sentongo on the 24th of March 2023, are as follows;

1. *The Applicant had a Bank-Customer relationship with the Respondent. He approached the Bank for a facility to complete development of his property, and offered properties comprised in Kibuga Block 12 Plots 250, 251 and 252 land at Mengo Kisenyi, to the Respondent, as security for credit facilities he was expecting from the Respondent Bank;*
2. *He was the Plaintiff/ Respondent of Consolidated Civil Suits HCCS No. 036/2019, however, on 23rd December, 2012, Court rendered Judgment in the matter dismissing HCCS No. 464/2018 and granting HCCS No. 36/2019 against him.*
3. *At all material times, it was as condition, and it was agreed that the Bank should perform the contract within 30 (Thirty) days of signing the agreement and failure of which, the contract would lapse.*
4. *That the Respondent breached the contract and failed to disburse the sums agreed for Segawa Market completion. What the Bank would do, it would post monies on my account purporting to disburse monies, however, it was never made available for my use towards the contracted purpose;*
5. *The Respondent breached the contract and failed to disburse the sums agreed for Segawa Market completion. What the Bank would do, it would post monies on my account purporting to disburse monies, however, it was never made available for my use towards the contracted purpose;*
6. *That the Applicant filed HCCS No. 464/2018 for breach of contract, for recovery of sums of money unlawfully drawn from my account and for an order for recovery of any properties from the Plaintiff and Judgment was made;*
7. *Dissatisfied with the above decision, the Applicant filed a valid Notice of Appeal against the Judgment, Decree and Orders of the Trial Court, and this Court, and served a copy thereof upon the Respondents, with the time prescribed under the law*
8. *There is main substantive application of Stay of Execution pending before this Court, and the application has a real likelihood of success;*

9. *The Applicant has since lodged an appeal against the Judgment, Decree and Orders in the said suits and the appeal is pending determination before the Court of Appeal.*
10. *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;*
11. *The Respondent extracted a decree from the judgment, which is a known preliminary step in execution, and it has advertised for sale by public auction, my property comprised in Kibuga Block 12 Plots 250, 251, and 252.*

The Respondent filed an affidavit in reply deposed by **Mushemeza Cheguevara** of Kampala Associated Advocates sworn on the 30th March 2023, and briefly stated that;

1. *The Respondent has not taken any steps to execute the Judgment of Court in Consolidated Civil Suits No. 464 of 2018 and 36 of 2019 and such the above application is premature.*
2. *The Applicant was always in default on his loan repayment obligations. On the 8th July 2017, the Applicant admitted that it was in default on its loan repayment obligations.*
3. *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) and the Applicant is directed to repay the entire sum in (a) above;*
4. *The Applicant lodged a Civil Appeal (Civil Appeal No. 001/2013) against the Judgment and Decree of the learned trial judge on consolidated suits HCC 464 of 2018 and HCCS 036 of 2019.*
5. *THAT I know the Applicant's appeal is frivolous and has no likelihood of success from reason that the Applicant does not deny borrowing the sums from the respondent, does not deny mortgaging the subject properties, has no proof that he ever paid the sums borrowed and accrued interest, a fact confirmed by the court.*

6. *The Applicant subsequently filed HCMA 009 of 2023 (arising from consolidated Civil Suits No. 464 of 2018 and 036 of 2019 pending the hearing and determination of the appeal pending before this Honorable Court.*
7. *That the decretal sum arises from a debt secured by mortgaged property which property continues to waste away.*

Representation

At the hearing of the 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 were adopted.

Consideration of the application

I have carefully considered the Notice Motion, affidavits in support and in opposition, and submissions of both counsel and the authorities cited therein.

It has to be stated that the bulk of the submissions filed by counsel for both parties, dwelt on matters that are best dealt with in the substantive application. I will therefore not dwell on them, given that in an application such as this, the only consideration that court takes into account is whether or not the status quo should be maintained pending the determination of the substantive application.

Rule 2(2) of the **Judicature Court of Appeal Rules Directions** gives this court powers to make orders to meet the ends of justice. It provides that;

(2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay.

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:

"2. Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or stay execution but the Court may:

a)....

b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of the Rules of this Court, order a stay of execution, an injunction, or a stay of proceedings on such terms as the Court may think just”.

This Rule gives the Court, the discretion, in civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of the Rules of this Court, to order stay of execution and injunctions in appropriate cases and on terms that it thinks fit.

This application is essentially for two orders. The first order sought is stated to be that of “.....an interim stay of enforcement and or execution of the Judgement, Decree and or orders of the High Court.” In effect, really, the first order, simply put, is for an interim order of stay of execution.

The second order sought is stated to be “...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.001 of 2023....”. The Applicant in many words is actually applying for an order of a temporary injunction.

With regard to the grant of an interim order of stay of execution, the case of **Zubeda Mohamed & Sadru Mohamed V Laila Kaka Wallia & Anor, Supreme Court Civil Reference No.07 of 2016** which cited with approval **Hwan Sung Industries Ltd vs. Tajdin Hussien and 2 others SCMA No. 19 of 2008**, the Supreme Court stated as follows;

*“Considerations for the grant of an interim order of stay of execution or interim injunction are whether there is a substantive application pending and whether there is a serious threat of execution before hearing of the substantive application. Needless to say, there must be a Notice of Appeal. See **Hwan Sung Industries Ltd vs. Tajdin Hussien and 2 others SCMA No. 19 of 2008.***

In summary, there are three conditions that an Applicant must satisfy to justify the grant of an interim order:

- 1. A competent Notice of Appeal;*
- 2. A substantive application; and*
- 3. A serious threat of execution.”*

The first condition for an Applicant to fulfill before grant of an interim order of stay of execution is having filed a Notice of Appeal. The Supreme Court in

Miscellaneous Application no. 7 of 2010; Dr. Ahmed Muhammed Kisuule vs. Greenland Bank (In liquidation) held that;

“For an application in this Court for a stay of execution to succeed the Applicant must first show, subject to facts in a given case, that he/she has lodged a notice of appeal in accordance with Rule 72 of Rules of this Court. The other facts which lodgment of the notice of appeal is subject, vary from case to case but include the fact that the Applicant will suffer irreparable loss if a stay is not granted, that the appellant’s appeal has a high likelihood of success”.

In the instant application, I am satisfied that Applicant filed a Notice of Appeal. The same is attached to the Applicant’s affidavit in support of the application marked annexure ‘H’. A substantive application for Stay of Execution has also been filed and it is referenced as Civil Application No. 113 of 2023.

With regard to an eminent threat of execution, the Applicant stated in paragraph 8.1 of his affidavit in support of the application that the Respondent has from the judgement extracted a decree, which is a known preliminary step in execution of a decree. He attached the decree as annexure J to his affidavit.

Katureebe JSC (As he then was) in **G V C SCCA No.02 of 2003 (unreported)** stated as follows:

“The granting of interim orders is meant to help the parties to preserve the status quo and then have the main issues between them determined by the full Court. They are granted by a single Judge of the Court invoking its inherent powers under Rule 2(2) of the Rules of this Court.

I am also satisfied that the respondent has extracted a decree and has a certificate of taxation. He could, if he wished, proceed to execute, and this would render the applications nugatory.”

As was held in the case of **Kyambogo University Vs Prof. Isaisah Omolo Ndiege Civil Application No.341 of 2013,**

“..... execution refers to a process by which a successful party in a civil matter enforces the decree or order. This usually entails attachment of property to recover judgment debt, order of eviction, order requiring vacant possession of land, cancellation of certificate of title, return of moveable property and so on.”

Although the Respondent has argued that mere extraction of a decree doesn’t amount to a threat of execution, it cannot be denied the extraction of the decree is the first step in the process of execution. As it stands, the Respondent is

certainly entitled to take the next step and proceed to obtain a certificate of taxation. I am inclined to err on the side of caution and agree with the Applicant that there is a threat of execution looming.

I therefore find that the grant of an interim order to restrain the Respondent from proceeding with execution, until the disposal of the substantive application for stay of execution would be in the interest of justice.

The Supreme Court held in the case of **China Henan International Cooperation Group Co. Ltd Vs Justus Kyabahwa Civil Application No. 30 of 2021** that;

"In cases of urgency, this Court is empowered to issue interim orders as a stop gap measure to ensure that the substantive application is not rendered nugatory. This power is granted to Court by Rule 2(2) of the Rules of the Court in "order to achieve the ends of justice" In Hon. Ssekikuubo & Ors vs AG & Ors, SC Constitutional Application No. 04 of 2014, this Court said:

"Rule 2(2) of the Judicature Court Rules gives this Court very wide discretion to make such orders as may be necessary to achieve the ends of Justice. One of the ends of Justice is to preserve the right of appeal"

Therefore, in granting the interim order of stay I have done so bearing in mind the principles enunciated in the **China Henan International** (Supra) case.

As stated before, the Applicant has also prayed for an interim order of an injunction. This is premised on the averment in paragraph 8.1 of the affidavit in support wherein it is stated that Respondent has advertised the Applicant's property comprised in Kibuga Block 12 Plots 250, 251 and 252 for sale by public auction. The advert was attached as annexure K to the Applicant's affidavit.

Counsel for the Applicant submitted that there was an imminent threat of alienation of one of the suit properties which are the subject of the substantive application. The imminent threat, according to Counsel for the Applicant, is evidenced by the advert threatening the sale of the suit properties by public auction. He cited the case of **Yakobo Senkungu & Others vs Cerencio Mukasa SCCA No. 5 of 2013** where the Supreme Court of Uganda held;

".....the granting of interim orders is meant to help parties preserve the status quo and then have the main issues between the parties determined by the full court as per the Rules"

Counsel for the Respondent on the other hand argued that the Applicant seeks to injunct/stay the Judgement, Decree and orders in High Court, Civil Suits **HCCS No. 464/2018 and HCCS No. 036/2019: Haruna Sentongo Vs Orient**

Bank (U) Ltd. Counsel for the Respondent argues that the Decree no way relates to the mortgaged property that has been advertised by the Respondent and that the Respondent is simply exercising its right as a mortgagee under the Mortgage Act.

Counsel for the Respondent further argues that the Applicant has not complied with the statutory requirements of Regulation 13(1) of the Mortgage Regulations 2012, which require a person to first pay a security deposit of 30% of the forced sale value of the mortgaged property. Counsel prayed that the application must therefore be dismissed.

I have perused the advert attached as annexure K. The advert, which was published in the Daily Monitor newspaper on the 14th of March 2023, sets the date of sale of the mortgaged property as 30 days from the date of advertisement. This means that the mortgaged property is to be sold on the 15th of April 2023.

Whereas the Respondent is enforcing its rights as a mortgagee, it is difficult to divorce the threatened sale from the proceedings in **High Court Civil Suits No. 464/2018 and No. 036/2019: Haruna Sentongo Vs Orient Bank (U) Ltd.** Indeed, paragraph No. 32 of the affidavit of Mushemeza Cheguevara sworn on behalf of the Respondent states as follows;

"...The decretal sum arises from a debt secured by the mortgaged property which property continues to waste away"

The threatened sale of the property by public auction most certainly relates to the suit property which is the subject of the substantive application for stay of execution and an injunction.

This Court, as seen in the case of **Yakobo Senkungu & Others vs Cerencio Mukasa** (*supra*) is required to assist the parties maintain the status quo. Therefore, I would be hard pressed not to grant the interim order injunctioning the sale by auction so as not to render the substantive application and indeed the appeal nugatory.

However, I must consider the arguments by Counsel for the Respondent regarding the matter of Regulation 13(1) of the Mortgage Regulations 2012, which require a person to first pay a security deposit of 30% of the forced sale value of the mortgaged property before a court can grant a stay.

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

"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”

The issue here is whether the instant application is for the postponement of the auction or an interim injunction stopping the sale pending the determination of a substantive application.

This issue was considered by the Court of Appeal in the case of **Wood More Energy Consultancy Ltd & 2 Others vs Guaranty Trust Bank (U) Ltd (GT Bank)** where Justice Hellen Obura held as follows;

“This Court’s 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 that 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 mortgaged property or outstanding amount.

.....in the instant case the applicants are not seeking for an order of adjournment of the sale by public auction but rather an interim order restraining the sale pending the hearing of the substantive application.”

I would adopt the same position. The application before me is one for an interim injunction restraining the sale pending the hearing of the substantive application. I find therefore that the provisions of Regulation 31(1) of the Mortgage Regulations 2012 do not apply. I would grant the order for an interim stay of the sale by public auction pending the hearing of the substantive application.

Before I take leave of this matter, I note that Counsel for the Respondent argued that this application is res judicata, having been heard and determined by the High Court first.

The law, under rule 42(1) of the rules of this Court, allows for such applications to be made to the High Court first. It 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.

This means such an application may be made to the High Court first and then to this court. This issue was well discussed by the Supreme Court in **Lawrence Musiitwa Kyazze vs Eunice Busingye, Supreme Court Civil Application No. 018 of 1990**, in which the Supreme Court observed and held as follows:-

"The practice that this court should adopt is that general applications 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 XL VIII rule 1.), after a 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 maybe ex parte if the application is refused, the parties may then apply to the Supreme court under Rule 5(2)(b) of the Court of Appeal Rules where again they should be prepared to meet similar condition similar to those set out in XXXIX Rule 4(3). However, there may be circumstances when this court will intervene to preserve the status quo. In cases where the High Court has doubted its jurisdiction or has made some error of law or fact apparent on the face of the record which is probably wrong, or has been unable to deal with the application in good time to the prejudice of the parties in the suit property, the application maybe made direct to this court. It may however be that this court will direct that the High Court would hear the application first, or that an appeal be taken against the decision of the High Court, bearing in mind that the interest of the parties and the costs involved. The aim is to have the application for stay speedily heard, and delays avoided." Emphasis added


From the above excerpt, such an application should be made to the High Court first as it was in this case. This application is therefore not res judicata since both this court and the High Court are vested with concurrent jurisdiction to hear such applications for stay, as per the decision in **Lawrence Musiitwa Kyazze vs Eunice Busingye (supra)**

In the result I do hereby order that;

1. An interim of stay of execution is hereby granted, 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*, until the hearing and determination of the substantive application for stay of execution.
2. An interim order for an injunction restraining the Respondent from selling Block 12 Plots 250,251 and 252 Mengo Kisenyi Kampala until final disposal of the substantive application for stay if execution.
3. Costs of this application shall abide the main cause.

I so order

Dated this...^{6th}.....day of ...^{April}..... 2023


OSCAR JOHN KIHKA
JUSTICE OF APPEAL