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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPLICATION NO. 47 OF 2023**

**(ARISING OUT OF HGH COURT CIVIL SUIT NO.41 OF 2014 & HIGH COURT  
EXECUTION MISCELLANEOUS APPLICATION NO 145 OF 2018)**

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**SPRINGS INTERNATIONAL HOTEL LTD.....APPLICANT**

**VERSUS**

**TUHAISE ENID.....RESPONDENT**

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**CORAM: HON. MR. JUSTICE OSCAR JOHN KIHKA, JA**

**(SINGLE JUSTICE)**

**RULING**

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The Notice of Motion filed by the Applicant does not state under what provisions of the law it is being brought. It is an application for orders that a temporary injunction doth issue to stay the orders of Her Lordship Hon. Justice Margaret Oumo Oguli pending the determination of the intended appeal at the Court of Appeal.

**Background**

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The background to the application, as can be determined from the pleadings, is as follows;

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The Respondent, sometime in 2011, filed a suit in the Chief Magistrate's Court of Mengo vide Civil Suit No. 2631 of 2011 in which she sued the Applicant and another, for the recovery of UGX 2,400,000/= being money had and received, recovery of tools of trade worth UGX 1,500,000/= and UGX 46,040,000/= being special damages, plus general damages and punitive damages.

The learned trial magistrate Her Worship Atukwasa Justine delivered judgement on the 13<sup>th</sup> of October 2014 wherein she awarded the Respondent the following;

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1. Cash had and received UGX 2,400,000/=
2. Value of property lost UGX 1,500,000/=
3. General damages UGX 9,000,000/=

5        4. Property not received UGX 27,000,000/=.

The Applicant being dissatisfied with the judgment of the Her Worship Atukwasa Justine, filed Civil Appeal No. 41 of 2014 in the High Court of Uganda. The said appeal was heard and determined by Hon. Lady Justice Margaret Oguli Oumo, who in a Judgement delivered on the 15<sup>th</sup> of December 2016, dismissed the appeal and confirmed the Judgement of the Learned Trial Magistrate with adjustments. The Respondent was awarded special damages of UGX 2,400,000/= and general damages of UGX 30,000,000/=.

15        The Applicant, being dissatisfied with Judgement of Hon. Lady Justice Margaret Oguli Oumo, filed a Notice of Appeal in the High Court of Uganda on the 18<sup>th</sup> of January 2017 and on the same day by letter requested for the record of proceedings. Both documents were duly served on the Respondent.

20        It would appear that having filed the Notice of Appeal and the letter requesting for the proceedings, the Applicant did not do much else until the Respondent applied for execution of the decree in Civil Appeal No. 41 of 2014 on the 30<sup>th</sup> of November 2017. The Applicant, in apparent response to the initiation of execution proceedings, filed Miscellaneous Application No. 468 of 2017 on the 8<sup>th</sup> of December 2017 seeking for an order of stay of execution of the decree issued in Civil Appeal No. 41 of 2014. For reasons not provided, the said application was endorsed by the Assistant Registrar of the High Court on the 20<sup>th</sup> of March 2018, a period of three months after it was filed.

30        The pleadings do not indicate when Miscellaneous Application No. 468 of 2017 came up for hearing. However, it is worth noting that in a ruling delivered by Hon. Justice Duncan Gaswaga on the 20<sup>th</sup> of February 2020, the Judge observed that the Applicant did not bother to file written submissions as directed and proceeded under the provisions of Order 17 rule 4 of the Civil Procedure Rules to consider the application and had it dismissed.

35        The Applicant now seeks an order for a temporary injunction staying execution of the judgment and orders issued by the High Court in Civil Appeal No. 41 of 2014 pending the determination of the intended appeal at the Court of Appeal of Uganda.



5 The grounds of the temporary injunction application staying the orders of Her Lordship Hon. Justice Margaret Oumo Oguli, as stated in the Notice of Motion and affidavit in support of the application sworn by Mukesh Shukla on behalf of the Applicant on 15<sup>th</sup> February 2020, are as follows;

10 a. *The Applicant was the Appellant in the High Court Civil Appeal No. 41 of 2014 at the High Court of Uganda.*

b. *The said appeal was against the judgement of the chief magistrate of Mengo at the Chief Magistrates Court of Mengo at Mengo.*

15 c. *The said appeal was dismissed by the Hon. Justice Margaret Oumo Oguli who went further to even drastically increase the decretal amount being appealed against by the appellant herein the applicant.*

20 d. *The Applicant is dissatisfied with the decision of Her Lordship Hon. Justice Margaret Oumo Oguli and intends to appeal against the whole of the said decision to the Court of Appeal of Uganda.*

25 e. *The Applicant has to that end filed a notice of appeal of the said decision at the Court of Appeal of Uganda.*

30 f. *The Applicant has further applied for a typed copy of the proceedings and decision from the High Court of Uganda.*

35 g. *The Respondent has taken steps to execute the decision of the Hon. Justice Margaret Oumo Oguli through an application to the Executions Division of the High Court of Uganda.*

40 h. *The execution of the decision being appealed against by the Applicant shall render the appeal to the court of appeal nugatory.*

i. *It is imperative to preserve the applicant's right of appeal against the decision of Hon. Justice Margaret Oumo Oguli before it is executed by the Respondent.*

j. *The Respondent is not a person known to be of means to compensate the Applicant in the event that the Applicant's appeal to the court of appeal is successful.*

5 k. *The Applicant shall suffer as a result of execution of a decree being appealed against by it if an order for stay of the said decision is not issued by this court.*

10 l. *It is just and equitable that the honourable court of appeal issue a stay of the orders of the Hon. Justice Margaret Oumo Oguli pending the determination of the appeal to be filed by the Applicant.*

The Respondent filed an affidavit in reply deponed by Tuhaise Enid sworn on the 23<sup>rd</sup> of June 2020, opposing the application. The grounds for opposition, as set out in the affidavit in reply, can be surmised as follows;

15 1. *The Applicants Notice of Motion is incompetent, barred and untenable in law, is frivolous and vexatious constituting a gross and blatant abuse of the Court Process and is grossly incompetent.*

20 2. *Since filing a Notice of Appeal in the High Court on the 18<sup>th</sup> of January 2017 and request for proceedings by letter dated 17<sup>th</sup> January 2017, the Applicant and its Advocates have never taken any steps in seriously prosecuting the intended Appeal to-date or at all.*

25 3. *Instead of prosecuting the intended appeal, the Applicant's Lawyers wrote another letter dated 14<sup>th</sup> December 2017 to the Registrar of High Court (Execution Division) again requesting to the have the case file be forwarded to that said Division to enable them lodge an application for stay of execution.*

30 4. *Consequently, on the 7<sup>th</sup> of March 2019, the Applicant filed Misc. Application No. 468 of 2017 for stay of execution of the High Court Judgement and the resultant decree arising therefrom which application was vehemently opposed and the same was dismissed with costs.*

35 5. *Judgement in Civil Appeal No. 41 of 2014 was given on the 15<sup>th</sup> of December 2016 and the Notice of Appeal as well as the letter requesting for proceedings (were filed) on the 18<sup>th</sup> of January 2017 and 17<sup>th</sup> of January 2017 effectively making the intended Appeal a nullity*

40 6. *The instant application is also not only erroneous but also untenable in law and a waste of court's time.*



- 5 7. *The intended appeal is also grossly incompetent and a waste of Court's time for lack of merit.*
8. *Garnishee proceedings against the Applicant were commenced against the Applicant, which were not satisfied were it not for the COVID -19 lock down to have the judgement debt satisfied.*
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9. *The Applicant commenced this instant application on the 27<sup>th</sup> of February 2020 as an afterthought to circumvent payment of the decretal sum as well as taxed costs in the applications it lost in the High Court.*
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10. *The instant application was therefore overtaken by events as there is nothing to be stayed with no pending competent appeal.*

At the hearing of this application, Mr. Badru Bwango appeared for the Applicant, while the Respondent was represented by Mr. Arthur Kirrumira.

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The advocates for both the parties filed written submissions which they adopted at the hearing. Counsel for the Applicant sought leave to file and serve submissions in rejoinder by the 29<sup>th</sup> of March 2023 but did not do so. I take it therefore that counsel for the Applicant opted not to file his submissions in rejoinder.

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### **Applicant's submissions**

In the introductory part of his submissions, Counsel for the Applicant stated that the present application was brought under the provisions of S.98 of the Civil Procedure Act, S.33 of the Judicature Act Order 22 Rule 23 and Rule 26 and Order 52 Rules 1 and 3 of the Civil Procedure Rules for an order for stay of execution pending an intended appeal.

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He then proceeded to argue that the principles under which an application for stay of execution can proceed were espoused in the case of **Lawrence Musiitwa Kyazze Vs Eunice Busingye SCCA No. 18 of 1990** and **Hon. Theodore Sekikubo Vs Attorney General Constitutional Appeal No.3 of 2013**. He stated that both cases held that the conditions for the grant of a stay of execution are:

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- A) The Applicant must show that he lodged a notice of appeal.

5 B) That substantial loss may result to the Applicant unless the stay of execution is granted.

C) The application has been made without unreasonable delay.

10 Counsel for the Applicant further argued that the aforementioned conditions were further expounded upon in the case of **Kyambogo University vs Professor Isaiah Omolo Ndiege CA. No 341 of 2013** and the conditions were expanded to include:

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

20 b) That the application is not frivolous and has a likelihood of success

c) That the refusal to grant the stay would inflict more hardship than it would avoid.

25 Counsel then proceeded to argue that in the present application, the Applicant had already filed a notice of appeal in the Court of Appeal and asked for typed copy of proceedings and the decision. He added that Respondent had been duly served with the said notice of appeal and application for typed proceedings.

30 With regard to the existence of serious threat of execution, Counsel argued that the Applicant is faced with the application for execution before the Execution and Bailiff division of the High Court of Uganda in EMA No. 145 of 2018 in which the Respondent is the Applicant and the Applicant is the Respondent.

35 Turning to the Applicant's appeal, Counsel argued that the appeal has a high likelihood of success on account of the fact that the judgement of Hon. Justice Oumo Oguli was not only erroneous but also littered with a lot of inconsistencies and failure to evaluate the evidence on record. A vivid example, Counsel contended, is where the Hon. Justice Oumo Oguli awarded damages to the Respondent in the sum of UGX 30,000,000/= for non-use of space paid for yet the receipt adduced by the Respondent clearly showed that the amount of UGX 2,4000,000/= was a deposit and not rental.

40 Counsel further contended that the Applicant's application was neither frivolous nor vexatious and clothed with a lot of merit.

Counsel also argued that the Applicant was likely to suffer substantial loss if the order being sought is not granted by this honorable court, and that the refusal



5 to grant the stay would inflict more hardship on the Applicant than it would avoid.

Counsel contended that if the Applicant's appeal were to be successful, the Respondent would not have any means to compensate the Applicant for any monies paid under the judgement at the High Court since she is said to be a salon operator based in Fort Portal and that everyone in Uganda knows that salons are closed by operation of the law due to the present Covid-19 pandemic in Uganda.

Counsel was of the view that the Applicant had met all the requisite conditions for the grant of an order for stay of execution pending its appeal to the Court of Appeal and prayed that this Court be pleased to issue an order for stay of execution pending the applicants appeal in the Court of Appeal of Uganda.

Counsel then addressed court on the requisite conditions for the grant of a temporary injunction. He cited the case of **Kiyimba Kaggwa vs Abdu Nasser Katende (1985) HCB 43** in which it was held that three conditions must be satisfied for the grant of a temporary injunction, namely;

- a) The applicant must show a prima facie case with a probability of success
- b) The applicant is likely to suffer irreparable harm which cannot be adequately atoned by an award of damages.
- 25 c) If the court is in doubt, it will decide the application on the balance of convenience.

Counsel argued that the status quo that the Applicant seeks to maintain is that it is in possession of the suit property and should continue to do so until the determination of the main suit by this honorable court.

30 With regard to prima facie case, Counsel relied on the case of **Uganda Development Bank vs ABA International & Others Misc. Application No. 568 of 2010** where it was held that a temporary injunction could be granted to protect the legal right of an applicant for as long as the applicant can show that there are serious issues to be tried and that the action is not frivolous or vexatious. He further argued that the purpose of an order for a temporary injunction is to preserve matter in status quo until questions to be investigated in the suit can be finally disposed of and that at this stage, there is no need to delve into the merits of the main appeal.

40 With regard to irreparable damage, Counsel argued that the applicant would suffer irreparable damage.

5 On the issue of balance of convenience, counsel contended that the Applicant would be inconvenienced if the injunction is not granted unlike the Respondent who will not suffer any loss as she doesn't have the capacity to compensate the Applicant.

10 Counsel concluded his submissions by asserting that the Applicant had satisfied all the three conditions for the grant of a temporary injunction.

### **Respondent's submissions**

In reply, counsel for the Respondent seemed to raise a preliminary point of law. He contended that the application was grossly incompetent on account of the fact that the Notice of Appeal lodged by the Applicant was filed out time.

15 He pointed out that the judgement in the High Court was delivered on the 15<sup>th</sup> of December 2016. The Notice of Appeal, he argued, should have been filed by 2<sup>nd</sup> or 3<sup>rd</sup> of January 2017. However, the Applicant filed the Notice of Appeal on the 18<sup>th</sup> of January 2017.

20 Counsel argued that Rule 76(2) of the Judicature (Court of Appeal) Rules provides that a Notice of Appeal should be lodged in the High Court within 14 days from the date of the decision, which was not the case in the instant case.

25 He relied on the case of **The Administrator General (Through the Lawful Attorney Kyomuhendo Jolly Christine) vs National Social Security fund & 2 others** where Mr. Justice Tsekoko (as he then was) held that *"the application in this court is automatic provided a proper Notice of Appeal is in existence. There is no proper Notice of Appeal upon which this application for stay of execution could be based"*

30 Additionally, Counsel argued that the Respondent had simply sat back and never taken any further steps to prosecute the Appeal after filing the Notice of Appeal and requesting for the typed proceedings in January of 2017. Counsel argued that the Applicant did not intend to appeal but was using the application to frustrate the Respondent.

35 In the alternative, Counsel argued that if the court is inclined to grant the application, the Applicant should furnish security for costs in the combined sum of UGX 42,180,000/=. He then asserted that judgement on admission pursuant to Order 13 rule 6 of the Civil Procedure Rules should be entered against the Applicant to furnish the stated sum of money before embarking on its frivolous and vexatious appeal.



5 **Consideration of the Application**

Before delving into the merits of the application I will first deal with the preliminary point of law that was raised by Counsel for the Respondent.

Counsel raised the point that the Notice of Appeal lodged by the Applicant was filed out time, and that being the case, the present application was incompetent.

10 It is not in dispute that the judgement in High Court Civil Appeal No. 41 of 2014 was given on the 15<sup>th</sup> of December 2016. The judgment itself was attached as annexure "A" to the Respondent's affidavit in reply. According to paragraph 4 of the Respondent's affidavit in reply, it is deponed that the Notice of Appeal was filed on the 18<sup>th</sup> of January 2017, while the letter requesting for the typed  
15 proceedings was filed on the 17<sup>th</sup> of January 2017. Copies of both documents were attached to the affidavit as annexures "E" and "F" respectively.

Pausing for a moment, I find it remarkable, if not dumb founding, that whereas the Applicant in its affidavit in support of the application, does make mention of the fact that it indeed filed the Notice of Appeal and letter requesting for the typed  
20 proceedings, it did not bother to attach these important documents to the affidavit!! One wonders how the Applicant would have proved this set of facts if it were not for the Respondent's kind assistance.

Be that as it may, Counsel for the Respondent was of the view that the Notice of Appeal and the letter requesting for typed proceedings were not filed in  
25 accordance with the provisions of Rule 76(2) of the Judicature (Court of Appeal) Rules which provides that a Notice of Appeal should be lodged in the High Court within 14 days from the date of the decision of the High Court. It is his contention that the Notice of Appeal should have been filed either on the 2<sup>nd</sup> or 3<sup>rd</sup> of January 2017.

30 Rule 76 (1) and (2) of the Judicature (Court of Appeal) Rules Directions provides as follows;

***"76. Notice of appeal in civil appeals.***

***(1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the High Court.***  
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5 ***(2) Every notice under subrule (1) of this rule shall, subject to rules 83 and 95 of these Rules, be lodged within fourteen days after the date of the decision against which it is desired to appeal.***

The computation of any period of time fixed by the Judicature (Court of Appeal) Rules Directions must be done in accordance with the provisions of rule 4 of the  
10 said rules. It provides as follows;

***“4. Computation of time.***

***Any period of time fixed by these Rules or by any decision of the court for doing any act shall be reckoned in accordance with the following provisions—***

15 ***(a) a period of days from the happening of an event or the doing of any act or thing shall be taken to be exclusive of the day on which the event happens or that act or thing is done;***

***(b) if the last day of the period is a Sunday or a public holiday, which days are in this rule referred to as “excluded days”, the period shall include***  
20 ***the next following day, not being an excluded day;***

***(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***

25 ***(d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time; and***

***(e) unless the court otherwise directs, the period of the Christmas vacation shall not be reckoned in the computation of time.”***

30 Counsel for the Respondent, appears not to have taken into consideration, the provisions of Rule 4 (e) of the Judicature (Court of Appeal) Rules Directions which take into account the period of the Christmas vacation while computing the time within which the Notice of Appeal should have been lodged.

35 The judgement was delivered on the 15<sup>th</sup> of December 2016, and as is well known, the Christmas vacation was round the corner. In order to determine the



5 period of the Christmas vacation, during the period in question, one has to look to Rule 21(1) of the Judicature (Court of Appeal) Rules Directions which provides as follows:

**“Vacations.**

10 ***(1) Vacations of the court shall be determined by the Chief Justice but the arrangement of business during a vacation shall be determined by the Deputy Chief Justice; and those arrangements shall be advertised or notified in a manner directed by the Deputy Chief Justice.”***

15 The duration of the Christmas vacation, with regard to the Court of Appeal, is determined by the Chief Justice. This is in contrast to the High Court where under Rule 51(4) of the Civil Procedure Rules, the Christmas vacation is stated, to begin on the 24<sup>th</sup> of December in any year and end on the 15<sup>th</sup> of January of the following year.

20 Given that it is the Respondent making the claim that the Notice of Appeal was filed out of time, it was incumbent upon her to provide evidence of the duration of the Christmas vacation as determined by the Chief Justice at the time. This was not done.

25 Unfortunately, I have been unable to establish what the Chief Justice determined to be the period of Christmas Vacation in the year 2016. The excluded days, in computing the time within which the Notice of Appeal should have been filed, cannot therefore be determined with certainty.

30 Even if, for arguments sake, the Notice of Appeal was determined to have been filed out of time, that would not, in my view be a ground to dismiss the application at this stage. Such a short coming, as it is, would impact on whether or not a compelling argument would be made during the hearing of the substantive application, for a prima facie case in the substantive appeal.

I would therefore dismiss the preliminary objection.

35 Turning to the merits of the application, as stated before, the Applicant did not, in the Notice of Motion, state under what provisions of the law this application was being brought. However, in his written submissions, Counsel for the Applicant stated that the application was brought under the provisions of S.98

5 of the Civil Procedure Act, S.33 of the Judicature Act Order 22 Rule 23 and Rule 26 and Order 52 Rules 1 and 3 of the Civil Procedure Rules for an order for stay of execution pending an intended appeal.

10 There are two matters of concern that arise from Counsel's submissions. The first is that whereas Counsel in his submissions states that the application is for an order of stay of execution, the Notice of Motion states that the application is in fact for a temporary injunction. The two are entirely different.

15 Secondly, the provisions of the law that Counsel for the Applicant is invoking so as this court may exercise its discretion, relate to the Civil Procedure Rules that govern procedure and practice in the High Court. The rules of procedure applicable are the Judicature (Court of Appeal) Rules Directions.

20 Counsel for the Applicant has obviously mixed up the law and procedure regarding the remedies that are required of this court, to the extent that I am tempted to rule that the proceeding before me is incompetent. However, I will adopt a more liberal view and take it that this is an application for a stay of execution.

25 The law governing grant of a stay of proceedings, an injunction or stay of execution is basically rule 6 (2) (b) of the Rules of this Court. This rule empowers this court, in civil proceedings, where notice of appeal has been lodged in accordance with rule 72 of the Rules of this Court, to order a stay of proceedings, stay of execution or grant an injunction. The power granted to this court by rule 6 (2) (b) is discretionary and, as has been decided severally, this discretion must be exercised judiciously and on well-established principles.

The principles governing the exercise of the discretion conferred by rule 6 (2) (b) have been laid down by a number of cases.

30 The Supreme Court of Uganda in the case of Hon. **Theodore Ssekikubo & Others vs Attorney General & Others Constitutional Application No. 6 of 2013**, re-stated the principles to be as follows;

***“(1) Applicant must establish that his appeal has likelihood of success; or a prima facie case of his right of appeal.***

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***(1) That the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.***



5           ***(2) If 1-2 above have not been established, Court must consider where the balance of convenience lies.”***

The main issue for determination by this Court is whether the applicant has adduced sufficient reasons to justify the grant of a stay of execution.

10           In determining this main issue, I have found it necessary to frame sub-issues which are aligned to the aforementioned principles.

**1. Whether the Applicant has established a prima facie case of its right of appeal or likelihood of success.**

15           I have carefully read the submissions by counsel for the Applicant and the Respondent, the affidavits on record and the law, regarding this sub-issue and indeed the rest of the sub-issues.

20           The grounds, as stated by the Applicant in the Notice of Motion and the supporting affidavit which were fully set out earlier in this ruling, do not contain this very important consideration.

The affidavit in support of the application does not contain any statement therein averring that the Applicant’s appeal has a high likelihood of success. Reference is only made to this in Counsel’s written submissions on behalf of the Applicant.

25           There is no material before this court, by way of proof, to back Counsel’s submissions on the issue as to whether or not the Applicant’s appeal has a high chance of success. This in my view is a very grave omission.

30           The Supreme Court in the case of **Gashumba Maniraguha vs Sam Nkudiye Civil Application No. 24 of 2015, Maniraguha** in effect held that the likelihood of success, is the most important consideration in an application for stay of execution. Therefore, it is incumbent upon the Applicant to avail evidence, or material to the court in order for it to establish whether or not the Applicant has a prima facie case on appeal.

35           Indeed, in the case of **Osman Kassim Vs Century Bottling Company Ltd Civil Appeal 34 of 2019**, the Supreme Court of Uganda stated thus;

40           ***“ It is trite that in order to succeed on this ground, the Applicant must, apart from filing the Notice of Appeal, place before Court Material that goes beyond a mere statement that the appeal has a likelihood of success.....the Applicant did not find it necessary to attach to his affidavit in support of the application a draft Memorandum of Appeal to***

5 ***indicate the proposed grounds of appeal...the important questions are not even mentioned in his affidavits so as to give court an idea about the possible ground of his intended appeal. We are in the circumstances unable to establish the likelihood of success in the absence of evidence”***

10 The circumstances of the **Osman Kassim** case (*supra*) are very similar to the application now before this court. The only difference, is that in the instant case there is no mention whatsoever of the likelihood of success of the Applicant’s appeal.

I therefore find that the Applicant has failed to establish a prima facie case of its right of appeal or likelihood of success.

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**2. Whether Applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.**

20 I have carefully read the Notice of Motion and the affidavit in support of thereof. Yet again, there is surprisingly no material before the Court by way of evidence, demonstrating irreparable damage that could be visited upon the Applicant in the event that a stay of execution is not granted. What the Court has, are written submissions of Counsel for the Applicant arguing this point.

25 It has to be said that submissions of Counsel are not evidence. The Court cannot go by Counsel’s submissions alone, in determining whether or not irreparable damage will be suffered by the Applicant.

I am therefore unable to find that the Applicant will suffer irreparable damage.

30

With regard to whether or not the appeal will be rendered nugatory if the stay of execution is not stayed, there is no cogent evidence on record to support this.

35 The Applicant has stated in paragraph 6 the affidavit Mukesh Shukla that a Notice of Appeal was filed in this court. No Notice of Appeal was attached to the affidavit. As stated earlier it was the Respondent who attached the Notice of Appeal to her affidavit. The Notice of Appeal having been filed way back in 2017, no substantive appeal has been filed six years later. This surely must be taken to be dilatory conduct on the part of the Applicant.

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That notwithstanding, the applicant has not attached any evidence of any imminent threat of execution. Whereas the Notice of Motion does make mention



5 of an application for execution in the Execution Division of the High Court, the affidavit in support does not make any mention or reference to it at all.

Justice Kenneth Kakuru (RIP) in the case of **Kyambogo University Vs Prof. Isaisah Omolo Ndiege Civil Application No.341 of 2013**, had this to say about execution proceedings:

10 ***“It appears that 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.”***

15 The Applicant has not attached any decree to be executed or evidence of commencement of execution proceedings to its affidavit in support of the application. I am therefore not satisfied that the Applicant has shown this court that its Appeal (if any) is going to be rendered nugatory.

### 20 **3. Balance of Convenience**

In the **Osman Kassim** case (supra), the Supreme Court had this to say when it was considering the issue of balance of convenience;

25 ***“The status quo is that the Court of Appeal has dismissed the applicant’s appeal with costs to the respondent. He is in the process of filing an appeal to this Court against that decision. However, in the absence of any document indicating the grounds of the intended appeal on record, we are of the view that the balance of convenience favours the respondent which has a judgment in its hands”***

30 I take guidance from and are indeed bound by the approach adopted by the Supreme Court as it considered the issue of balance of convenience in the circumstances of the facts that were before it. I say so, because the circumstances pertaining to this application are not too dissimilar to those that  
35 pertained in the **Osman Kassim** case (supra).

The Applicant has filed a Notice of Appeal. However, the said Notice of Appeal has been on record for six years without any substantive appeal ever having been filed. Secondly, the Applicant has failed to establish whether or not the intended  
40 appeal has a likelihood of success. In circumstances such as these, this Court

5 is of the view that the balance of convenience does favour the Respondent who has a judgement in her hands.

I find, therefore, that the Applicant has failed to establish that the Appeal will be rendered nugatory if an order for stay of execution is not issued.

10 Having said that, I am mindful of the fact that in applications such as these, the duty of court is to protect the applicants right of appeal where he or she has complied with Rule 76 of the rules of this court. Whereas I am satisfied that the applicant in this case has indeed complied with Rule 76, the applicant has sadly not provided material to this court necessary for it to exercise its discretion in protecting its right of appeal.

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**Conclusion and Orders**

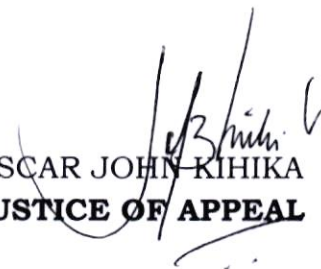
Given the findings above, I find no merit in the application and order as follows;

- 20 1. The application is dismissed.
2. The interim order that was entered by consent of both parties on the 24<sup>th</sup> of March 2023 in Misc. Application No. 44 of 2023 is hereby vacated.
- 25 3. The costs of this application are awarded to the Respondent.

I so order

30 Dated this 25<sup>th</sup> day of April 2023.

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OSCAR JOHN KIHKA  
JUSTICE OF APPEAL