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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 43 OF 2023

(ARISING OUT OF HGH COURT CIVIL APPEAL NO.29 OF 2020)

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UGANDA REVENUE AUTHORITYAPPLICANT

VERSUS

NATIONAL SOCIAL SECURITY FUNDRESPONDENT

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

(SINGLE JUSTICE)

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RULING

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This application is brought under Article 126(2) of the Constitution of the Republic of Uganda, Rule 2 (2), Rule 6(2) and Rule 76 of the Judicature (Court of Appeal Rules) Directions, for an order of stay of execution of the judgment and orders issued by the High Court in Civil Appeal No.29 of 2020 pending the final disposal of the Applicant’s application for leave to appeal in COA-00-CV-CL-0656-2022 and the appeal.

JURISDICTION

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The jurisdiction of this Court to grant a stay of execution is set out in **Rule 6(2) (b) and Rule 2(2) of the Rules of this Court** which mandates the Court to grant a stay of execution, an injunction or order a stay of proceedings on such terms as the Court may deem fit. This Court has inherent powers to make such orders as may be necessary for attaining the ends of justice.

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There is, however, one matter that ought to be addressed. This is a substantive application for the grant of an order of stay of execution, that is being entertained by a single judge of this Honourable Court.

The hearing of applications in this Court is provided for by Rule 53 of the rules of this Court which provides as follows;

“(1) Every application, other than an application included in subrule (2) of this rule, shall be heard by a single judge of the court; except that any

5 ***such application may be adjourned by the judge for determination by the court.***

(2) This rule shall not apply to—

(a) an application for leave to appeal, or for a certificate that a question or questions of great public or general importance arise;

10 ***(b) an application for a stay of execution, injunction or stay of proceedings;***

(c) an application to strike out a notice of appeal or an appeal; or

(d) an application made as ancillary to an application under paragraph (a) or (b) of this subrule or made informally in the course of the hearing, including an application for leave or to extend time if the proceedings are found to be deficient in the matters in the course of the hearing.”

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The practice of this Court has hitherto been that a single judge of the Court has jurisdiction to hear interlocutory applications, save those that are mentioned in sub-rule 2 of Rule 53 of the Rules of this Court. Thus, applications for a stay of execution, injunction or stay of proceedings; applications to strike out a notice of appeal or an appeal; or applications made as ancillary to an application under paragraph (a) or (b) of this subrule or made informally in the course of the hearing, including an application for leave or to extend time if the proceedings are found to be deficient in the matters in the course of the hearing, are to be heard by a panel of three judges of the Court of Appeal.

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25 It would appear therefore, that as a single judge, I do not have jurisdiction to entertain the current application before me.

However, Rule 53 of the rules of this Court is at odds with Section 12 of the Judicature Act which provides as follows;

“Powers of a single justice of the Court of Appeal

30 ***(1) A single justice of the Court of Appeal may exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal.***

(2) Any person dissatisfied with the decision of a single justice of the Court of Appeal in the exercise of any power under subsection (1) shall be

5 ***entitled to have the matter determined by a bench of three justices of the Court of Appeal which may confirm, vary or reverse the decision.***”

From the reading of Section 12 of the Judicature Act, it is evidently clear that a single justice of the Court of Appeal, may exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal.
10 Therefore, sitting as a single justice of this Court, I have the jurisdiction to hear and determine the application presently before me.

The question then would be, what becomes of Rule 53(2) of the Rules of this Court?

15 It should be recalled that Section 41(1) of the Judicature Act provides for the passing of Statutory Instruments which provide for the regulation of practice and procedure in this Court. It stipulates as follows;

“Functions of the Rules Committee

20 ***(1) The Rules Committee may, by statutory instrument, make rules for regulating the practice and procedure of the Supreme Court, the Court of Appeal and the High Court of Uganda and for all other courts in Uganda subordinate to the High Court.***”

The rules of this Court are therefore a Statutory Instrument made under the Judicature Court by the Rules Committee. There is, however, a historical context to this.

25 The current Judicature Act which came into force on the 17th of May 1996, was preceded by the Judicature Act of 1967. Under the Judicature Act of 1967 and the 1967 Constitution of Uganda, the apex court in the land was initially the East African Court of Appeal and later, the Supreme Court of Uganda. The rules in force governing the practice and procedure of the Supreme Court at the time,
30 were the Supreme Court Rules made under the Judicature Act of 1967.

The promulgation of the 1995 Constitution, came with it, the introduction of this court, The Court of Appeal/Constitutional Court of Uganda. It therefore became necessary to enact the Judicature Act Cap 13 which, as stated before, came into force on the 17th of May 1996.

35 The long title to the current Judicature Act Cap 13, reads as follows;

5 ***“An Act to consolidate and revise the Judicature Act to take account of the provisions of the Constitution relating to the judiciary.”***

The Act that was being revised by the Judicature Act Cap 13, was the Judicature Act 1967. In effect, the Judicature Act Cap 13 repealed the Judicature Act, 1967, with a view to taking into account the introduction of the Court of Appeal/Constitutional Court and other related matters.

The Judicature Act Cap 13 however contained saving provisions which related to Statutory Instruments that had been made under the Judicature Act of 1967. The saving provisions are to be found in Section 48 of the Judicature Act Cap 13, which in part provides as follows;

15 ***“Without prejudice to the general application of section 12 of the Interpretation Act, notwithstanding the repeal of the Judicature Act, 1967***

(a) until rules of court are made by the Rules Committee to regulate the practice and procedure of the Supreme Court, any rules of court applicable to the former Supreme Court immediately before the coming into force of the Constitution shall apply to the Supreme Court subject to such modifications as the Chief Justice may direct in writing;

20 ***(b) subject to rules of court made under this Act, any rules of court applicable to the former Supreme Court immediately before the coming into force of the Constitution shall apply to the Court of Appeal with such modifications as the Chief Justice may direct in writing;”***

25 Thus, the current rules that govern practice and procedure in the Court of Appeal/Constitutional Court of Uganda were the rules that were in force which were applicable to the former Supreme Court. Indeed section 2 of The Judicature Act Statutory Instrument No.13-10 which brought into force The Judicature (Court of Appeal Rules) Directions reflects this. It provides as follows;

“2. Application

The Supreme Court Rules¹ are modified in their application to the Court of Appeal so as to read as set out in the Schedule to these Directions”

5 The footnote contained in Section 2 of The Judicature Act Statutory Instrument No.13-10 reads as follows;

“The rules referred to are the Court of Appeal for the East Africa Rules S.I.179/1972 as retitled the Supreme Court Rules by S.I. 19/1991.”

10 The footnote above quoted, gives further historical insight and context to the current rules in force governing the practice and procedure pertaining to the Court of Appeal of Uganda. Without going into too much detail, Section 40 of the repealed Judicature Act 1967, provided for the Court of Appeal. The Court of Appeal referred to in Section 40 of the Judicature Act 1967 was the East African Court of Appeal, which could exercise its jurisdiction by sitting in Uganda or
15 elsewhere.

Under Section 43 (2) of the Judicature Act 1967, the East African Court of Appeal Rules continued to apply, with modification, to appeals from the High Court of Uganda to the Court of Appeal. It is these rules that are referred to in the footnote
20 aforementioned as ***“the Court of Appeal for the East Africa Rules S.I.179/1972”*** which in turn eventually came to be ***“the Supreme Court Rules S.I. 19/1991”***, that governed the procedure and practice of the former Supreme Court of Uganda.

It would appear therefore, that the modification of the rules that governed the former Supreme Court came with it Rule 53 of the rules of this Court which, as
25 stated earlier is at odds with section 12 of the Judicature Act Cap 13. Adding to that, the Judicature Act 1967, did not contain provisions similar to section 12 of the Judicature Act Cap 13. Given the brief historical origin of the current rules herein provided, it is perhaps easy to see, with the benefit of hindsight, how this inconsistency may have arisen.

30 In circumstances such as these, one has to look to the Interpretation Act Cap 3 so as to resolve this apparent contradiction. Section 18 (4) of the Interpretation Act Cap 3, which provides for general provisions relating to statutory instruments reads as follows;

35 ***“Any provision of a statutory instrument which is inconsistent with any provision of the Act under which the instrument was made shall be void to the extent of the inconsistency.”***

It appears to me that Rule 53 (2) of the rules of this Court falls into the category of provisions that are mentioned in the aforementioned Section 18 of the

5 Interpretation Act Cap 3. Rule 53(2) of the rules of this Court, is in my view clearly inconsistent with Section 12 of the Judicature Act Cap 13. I find therefore, Rule 53 (2) (a), (b), (c), and (d) of the rules of this Court to be void, to the extent of their inconsistency, with Section 12 of the Judicature Act Cap 13.

10 For the reasons given above I, sitting as a Single Justice of Appeal, does therefore, have jurisdiction to hear and determine this substantive application for stay of execution.

I now turn to the application.

Background

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

The Respondent, sometime in 2014, filed a suit in the High Court of Uganda Commercial Division vide HCCS NO 366 of 2014, challenging a tax assessment that had been raised by the Applicant. It would appear that the matter was referred to mediation wherein a number of issues were agreed upon save the issue of deductibility of interest paid to the members' account by the Respondent. The matter was then transferred to the Tax Appeals Tribunal vide TAT Application No.3 of 2019 for determination.

20 On the 27th of March 2020, the Tax Appeals Tribunal delivered a ruling in which it found that interest payable to the Respondent's members was not a deductible allowance under the provisions of the Income Tax Act and ordered the Respondent to pay the principal tax of Shs.30,521,703,065/= and penal interest amounting to Shs.12,196,879,941/= plus costs.

25 Being dissatisfied with the decision of the Tax Appeals Tribunal, the Respondent filed an Appeal to the High Court Commercial Court Division vide Civil Appeal No. 29 of 2020. On the 2nd November 2020, Hon. Justice Boniface Wamala delivered a Judgement in which he set aside the decision of the Tax Appeals Tribunal.

30 The Applicant on the 6th of November 2020 filed a Notice of Appeal in the High Court Commercial Division and served it on Respondent's Counsel of record on the 10th of November 2020. The Applicant, on the 9th of April 2021, then filed Miscellaneous Application No. 509 of 2021 seeking orders for stay of execution of the Judgment of the High Court. The Applicant also filed Misc. Application No. 117 of 2021 seeking an order for leave to appeal the decision in Civil Appeal No. 29 of 2020.

5 On the 9th of August 2022, the High Court Commercial Division delivered a ruling
in Miscellaneous Application No. 509 of 2021 wherein it granted orders staying
the execution of its orders pending the hearing of the application of leave to
appeal. The High Court Commercial Division subsequently delivered a ruling in
10 Misc. Application No. 117 of 2021, wherein it denied the grant of leave to appeal
against the orders of Hon. Justice Mr. Boniface Wamala in High Court Civil
Appeal No. 29 of 2020. The application for leave to appeal having been denied,
resulted in the dismissal of the application for stay of execution seeing as it
hinged on the success of the application for leave to appeal.

The Applicants now seek an order for stay of execution of the judgment and
15 orders issued by the High Court in Civil Appeal No.29 of 2020 pending the final
disposal of the Applicant's application for leave to appeal in COA-00-CV-CL-
0656-2022 and the appeal.

The grounds of the application for stay of execution, as stated in the Notice of
Motion and affidavit in support of the application sworn by Ms. Charlotte
20 Katuutu on behalf of the Applicant on 15th February 2023, are as follows;

1. *That the Applicant being dissatisfied with the whole of the decision of the
High Court in Civil Appeal No. 29 of 2020; National Social Security fund
Vs. Uganda Revenue Authority, delivered on 2nd November, 2020, filed a
Notice of Appeal on the 6th November, 2020.*
- 25 2. *That the Applicant filed a Notice of Appeal and an application for leave to
appeal to the Court of Appeal.*
3. *That the Respondent shall execute the orders of the High Court unless
stayed.*
4. *That the Applicant's application for leave to appeal and appeal would be
30 otherwise rendered nugatory if stay of execution is not granted.*
5. *The Respondent will not suffer any prejudice of (sic) the application is
granted.*
6. *The Application has been made without undue delay.*
7. *It is just and equitable and in the interest of natural and substantive
35 justice that the application be granted.*

The Respondent filed an affidavit in reply deponed by Isaac Ogwang on the 3rd of
March 2023, opposing the application. The grounds for opposition, as set out in
the affidavit in reply, can be surmised as follows;

- 40 1. *That there is neither a pending Appeal nor an application for leave to appeal
before this Honourable Court, upon which the main application would be*

- 5 *premised. Consequently, this application for an order of stay of execution is incompetent.*
2. *That if the application is granted, the members of the Respondent will be prejudiced by the Applicant's continuous unlawful deprivation of the Respondent's access to a substantial amount which it could have utilized to*
- 10 *invest, grow and pay back members.*
3. *That the Applicant has not demonstrated that it will suffer irreparable loss if the application is not granted and has therefore not provided sufficient grounds to warrant that grant of a stay of execution and the application should be dismissed with costs.*

15 At the hearing of this application, Ms. Barbara Ajamo Nahone and Mr. Donald Baluka Masenga appeared for the Applicant, while the Respondent was represented by Mr. Oscar Kambona appearing together with Bruce Musinguzi and Martin Mbanza.

Both counsel, filed written submissions which they adopted at the hearing.

20 However, counsel applied for an adjournment to file submissions in rejoinder. This application was denied by the Court. It instead allowed counsel for the Applicant to make oral submissions in rejoinder.

Applicant's submissions

Counsel for the Applicant submitted that Rule 2(2) **of the Judicature (Court of**

25 **Appeal Rules) Directions** provides that this court has powers to make such orders as may be necessary to attain the ends of justice and under Rule 6(2) (b), this court has powers to grant an order of stay of execution on the terms the court thinks fit where a Notice of Appeal has been lodged in accordance with Rule 76. Counsel relied on the decision in **Gashumba Vs Nkudiye Civil Appeal**

30 **No. 24 of 2015** in which the Supreme Court held that if a court was to grant an application for stay of execution, the Applicant must establish that the appeal has a likelihood of success, or that a prima facie case of his right to appeal exists; an Applicant will suffer irreparable damage or the appeal will be rendered nugatory if a stay is not granted and that the application was instituted without

35 delay.

Counsel submitted that for an order of stay of execution to be granted, an Applicant has to prove that; there is a substantive appeal pending before this court; the appeal has a likelihood of success or established a prima facie case that warrants judicial consideration; the Applicant will suffer irreparable

40 damages and the application was made without inordinate delay. Counsel

5 argued that the Applicant has fulfilled all the above requirements for grant of an order staying the orders of the High Court in HCCA No. 29 of 2020.

Counsel contended that the Applicant lodged a substantive Notice of Appeal in line with Rule 76 of the Rules of this Court on the 6th of November 2020. Further, that the appeal has a likelihood of success and the issues for determination are
10 whether interest payments made to members of the fund are allowed as deductions under Section 25 of the Income Tax Act. He further contended that the issue for this court to determine is whether the learned High Court Judge misinterpreted Section 25 of the Income Tax Act to conclude that the relationship created between NSSF and its members created a debt obligation under Section
15 2(ss) of the Income Tax Act. Further

Additionally, counsel contended that his Lordship misconstrued the NSSF Act to conclude that the relationship between NSSF and its members was not a fiduciary relationship but rather a lender-borrower relationship.

Counsel submitted that the issue in dispute relates to a total of UGX
20 30.521.703.063 as principal tax and UGX 12.196.875.941 as penal interest. The Respondent seeks to execute a UGX 25.321.214.423 that was paid as 30% of the dispute tax at the Tax Appeals Tribunal. Counsel argued that this is a lot of money and that the Applicant is likely to lose if the Respondent proceeds with execution and will suffer irreparable damage.

25 Counsel also submitted, that there is a serious threat of execution as evidenced by the demand letter demanding payment of the claimed refund, in which the Respondent threatens to use legal means to recover the money. Counsel relied on Hon. **Theodore Sekikubo & others Vs Attorney General Constitutional Application No. 06 of 2013** for the proposition that where a party discloses that
30 there shall be irreparable damage that cannot be atoned for in damages, an order of stay of execution should be granted.

Counsel submitted that this application was made without inordinate delay and executing the amounts in question would inconvenience the Applicant who has a statutory duty to collect taxes on behalf of government.

35 **Respondent's submissions**

In reply, counsel for the Respondent submitted that the Respondent opposes the application in its entirety on the grounds that the Applicant had not satisfied the conditions for grant of a stay of execution. That the principles that govern courts in such applications for stay of execution were summed up in the case of

5 **Lawrence Musiitwa Kyazze Vs Eunice Busingye C.A No. 18 of 1990 (S.C)** to be; that substantial loss may result to the Applicant unless the order is made; the application has been made without unreasonable delay and security for costs has been given by the Applicants.

10 Counsel submitted that the principles were further stated in **Kyambogo University Vs Prof Isaiah Omolo Ndiege Civil Application 341 of 2013** where it was held that the Applicant ought to satisfy the following conditions before an order for stay of execution is granted; the Applicant has lodged a notice of appeal in accordance with Rule 76 of the Rules of this Court; a substantive application for stay of execution has been filed in this court and is pending hearing; the said
15 substantive application and the appeal are not frivolous and they have a likelihood of success; there is a serious and imminent threat of execution of the decree or order and that if the application is not granted the main application and the appeal will be rendered nugatory; the application was made without unreasonable delay; the Applicant is prepared to grant security for due
20 performance of the decree; that refusal to grant the stay would inflict greater hardship than it would avoid.

Counsel submitted that the Applicant's affidavit in support bares falsehoods to the extent that an application for leave to appeal has not been filed in this court, having had its application for leave to appeal in the High Court dismissed. That
25 the Applicant was mandated to file an application for leave to appeal within 14 days under Rule 40 (2) (b) of the Judicature Court of Appeal Rules Directions. Counsel relied on the decision in **Dr. Ahmed Muhammad Kisuule Vs Greenland Bank (in liquidation) Civil Application No. 10 of 2010 [2011] UGSC 5** for the proposition that failure to seek leave to appeal against the decision dismissing
30 the application for review casts a shadow on the likelihood of success of the Applicant's appeal. Counsel therefore submitted that there is no appeal from which this application arises and ought to be dismissed.

Counsel relied on the decision in **Uganda Revenue Authority Vs Golden Leaves Hotels & Resorts Ltd & Apollo Hotel Corporation Ltd MA No. 0783 of 2007**
35 and argued that the Applicant's appeal has no likelihood of success as no material has been put before this court to show that the Applicant has a likelihood of success. The Applicant has not demonstrated that its intended appeal has a like hood of success. Further, that the Applicant has not attached a certificate from the High Court showing that the intended appeal involves novel
40 points of law or matters of great public importance. That the Applicant's right of appeal is restricted as the tax laws of Uganda at the time of filing Civil Appeal

5 No. 29 of 2020 did not provide for appeals to the Court of Appeal from the High Court emanating from the Tax Appeals Tribunal.

With regard to irreparable loss, counsel submitted that the Applicant does not state what kind of loss it is likely to suffer if this application is not granted. The Applicant merely states that the appeal will be rendered nugatory but does not
10 state how. On the contrary, the Respondent stands to suffer substantial loss since they have been in court since 2014 and since obtaining judgment in its favour, the Applicant has without sufficient cause, held the 30% that was paid in 2014. Further, that the application was not made without reasonable delay, having been filed 5 months after the ruling was delivered.

15 Counsel prayed that this application be dismissed with costs to the Respondent, the Respondent having proved that the Applicant has failed to fulfill any conditions for the grant of stay of execution.

Counsel for the Respondents contended that the application was improperly before this Court because the Applicants ought to have first filed the application
20 in the High Court as provided under **Rule 42(1) of the Rules of this Court**. The said Rule states that whenever an application may be made either in the Court or in the High Court, it shall be made first in the High Court.

Consideration of the Application

As stated before, the law governing grant of a stay of proceedings, an injunction
25 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
30 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.

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
35 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.

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

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

10 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. Counsel for the Applicant framed it as follows; ***“Whether the application for stay of execution should be granted? ”***

15 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.

20 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.

25 The grounds, as stated by the Applicant in the Notice of Motion and the supporting affidavit, do not contain this very important consideration. The grounds are stated to be as follows;

- 30 ***1. “That the Applicant being dissatisfied with the whole of the decision of the High Court in Civil Appeal No. 29 of 2020; National Social Security fund Vs. Uganda Revenue Authority, delivered on 2nd November, 2020, filed a Notice of Appeal on the 6th November, 2020.***
- 2. That the Applicant filed a Notice of Appeal and an application for leave to appeal to the Court of Appeal.***
- 3. That the Respondent shall execute the orders of the High Court unless stayed.***
- 35 ***4. That the Applicant’s application for leave to appeal and appeal would be otherwise rendered nugatory if stay of execution is not granted.***
- 5. The Respondent will not suffer any prejudice of (sic) the application is granted.***
- 40 ***6. The Application has been made without undue delay.***
- 7. It is just and equitable and in the interest of natural and substantive justice that the application be granted.”***

5 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.

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
10 chance of success. This in my view is a very grave omission.

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
15 material to the court in order for it to establish whether or not the Applicant has a prima facie case on appeal.

Indeed, in the case of **Osman Kassim Vs Century Bottling Company Ltd Civil Appeal 34 of 2019**, which was cited by Counsel for the Respondent, the Supreme Court of Uganda stated thus;

20 ***" 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***
25 ***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"***

The circumstances of the **Osman Kassim** case (*supra*) are very similar to the
30 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. This in my view makes matters even more complicated for the Applicant.

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.

I have carefully read the Notice of Motion and the affidavit in support of thereof.
40 Yet again, there is surprisingly no material before the Court by way of evidence,

5 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.

10 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.

15 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.

Paragrapahs 9 and 10 of the affidavit in support of the Applicant's application state as follows;

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"9. That the Respondent has commenced and threatened to execute the orders of the High Court of Uganda unless the same are stayed (A copy of the letter demanding payment of the refund is hereto attached and marked as annexure D)

25

10. That the Applicant's leave to appeal and the substantive appeal would be rendered nugatory if stay is not granted"

30

I have read the letter attached as annexure D to the affidavit in support of the application. It is indeed a demand letter dated 23rd January 2023 addressed to the Applicant from the Respondent for the refund of UGX 25, 321, 214, 423 (Twenty five billion, Three Hundred Twenty One Million, Two Hundred Fourteen Thousand Four Hundred Twenty Three Shillings Only).

35

That is all that is contained in the affidavit in support of the application. There is no decree or order attached to the application which would be the subject of execution. In other words, there is no evidence provided to the court that execution proceedings have been commenced. A letter of demand alone, in my view, does not constitute a threat of execution.

40

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:

"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

5 ***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.***”

10 In the instant case, there is no evidence whatsoever that there is an impending or imminent threat of execution. No warrant of execution has been issued, let alone, even applied for. I have found no evidence of any threat of execution on record. There is no evidence that if the order is not stayed the application for leave to appeal and the appeal would be rendered nugatory.

3. Balance of Convenience

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

20 ***“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”***

25 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 pertained in the **Osman Kassim** case (supra).

30 The Applicant is in the process of obtaining leave to appeal, having filed a Notice of Appeal. However, having failed to establish whether or not the intended appeal has a likelihood of success, this Court is of the view that the balance of convenience does favour the Respondent which has a judgement in its hands.

35 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.

40 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;

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1. The application is dismissed.

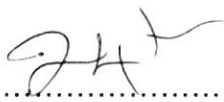

2. The interim order that was entered by consent of both parties on the 7th of March 2023 in Misc. Application No. 44 of 2023 is hereby vacated.

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3. The costs of this application shall abide the outcome of the appeal.

I so order

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Dated this..... day of..... 2023.

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OSCAR JOHN KHIKA
JUSTICE OF APPEAL