THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT KAMPALA

MISCELLANEOUS APPLICATION NO. 846 OF 2020

(Arising from Civil Suit No. 43 of 2020)

1. DIAMOND TRUST BANK UGANDA LIMITED

2. DIAMOND TRUST BANK KENYA LIMITED.....APPLICANT

VERSUS

1. HAM ENTERPRISES LIMITED

2. KIGGS INTERNATIONAL (U) LIMITED

3. HAMIS KIGGUNDU.....RESPONDENTS

BEFORE: THE HON. JUSTICE DR. FLAVIAN ZEIJA

RULING

REPRESENTATION: For the Applicants-**Kiwanuka Kiryowa and Usaama Sebuufu of K&K Advocates**

For the Respondents- **Fred Muwema of Muwema and Co. Advocates**

This is an application for stay of execution. It is brought under S. 98 of CPA, S.33 of the Judicature Act, Or 43 R 4(2) and (3) and Or 52 R 1 of CPR. It is seeking for orders that:

1. The execution of the Decree in High Court Civil suit No 43 of 2020 be stayed pending the hearing and determination of the Applicants' appeal in the Court of Appeal
2. Costs of the application be provided for

The application is supported by the affidavit of Mbabazi K. Emejeit, the Head Legal and Company Secretary of the 1st Applicant in which the grounds of the

application were more buttressed. The ground upon which this application is anchored are that:

(a) The Applicants are not satisfied with the decision of Court in the High Court Civil Suit No. 43 of 2020 delivered on the 7th of October 2020.

(b) The Applicants have filed a Notice of Appeal against the decision in High Court Civil Suit No. 43 of 2020.

(c) The intended appeal raises serious questions of law and fact and the appeal has a high likelihood of succeeding.

(d) The Applicant's appeal in the Court of Appeal shall be rendered nugatory in the event of execution prior to disposal of the appeal.

(e) The Applicant and the entire Banking Sector shall suffer substantial and irreparable loss if this application is not granted.

(f) This application has been made without unreasonable delay.

(g) It is in the interest of Justice that this application is granted.

The respondents filed an affidavit in reply deponed by Hamis Kiggundu opposing the application. Among other grounds, they stated the following:

(i) The application for stay of execution of the decree in HCCS No. 43 of 2020 pending the applicants' appeal is misconceived and incompetent in law

(ii) The court ruling and judgement pursuant to the hearing of M.A. No 654/2020 was well grounded in law and the applicant' intended appeal has no likelihood of success in fact or in law

(iii) The applicants have not demonstrated that they will suffer any substantial loss or irreparable damage or prejudice if the application for stay of execution is not granted

(iv) the alleged loss or damage for the banking sector as a result of the ruling and judgement in this honourable court is speculative at best and extraneous to the legal limits of his application.

(v) The respondents shall suffer substantial loss, irreparable damage and prejudice if the applicants continue to benefit from their illegalities by

holding on the respondents' properties that were adjudged to be returned to them by this honourable court

(vi) The applicants have not furnished any security for due performance of the decree against which they seek stay orders, as is required by law.

The background to this application can be summarized thus:

On the 17th of January 2020, the respondents filed a suit against the Applicants for among other things for breach of the terms of the Bank-Customer contractual relationship. The details of the breach were outlined in paragraph 5 of the plaint to wit:

(i) Breach of terms of the contract.

(ii) Brach of contractual, fiduciary and statutory duties.

(iii) Misrepresentation and Negligence.

(iv) Undue influence and economic duress

(v) Unfair and or Unconscionable contractual terms

(vi) Unjust enrichment from monies unlawfully debited/recovered from the 1st and 2nd plaintiffs.

(vii) Recovery of all sums unjustly, unlawfully and or unfairly charged upon and obtained from the plaintiffs.

On 23rd of January 2020, the Applicants/Defendants filed a joint written statement of defence. On 10th of August 2020, the Plaintiffs/Respondents filed an amended plaint in which they abandoned the above claims and introduced the claim of illegality against the second Defendant/Applicant for conducting illegal business in Uganda and the 1st Applicant/Defendant for facilitating an illegality. The Applicant/Defendant filled an amended Written Statement of Defence. On the 27th of August 2020, the case came up for scheduling but it was adjourned at the instance of the Respondents/Plaintiffs' counsel to 31st of August 2020. On this adjourned date, the Parties filed a joint scheduling memorandum. Under Paragraph 6 thereof, the parties agreed that a court appointed Auditor carries out an Audit and reconciliation of the plaintiff's loan

amounts to determine the indebtedness of either party. Counsel for the Respondents/Plaintiffs informed court that he had filed an application on matters of law (Miscellaneous Application No 654 of 2020) seeking to strike out the aforementioned joint Written Statement of Defence. The trial Judge ordered the parties to file written submissions in respect of the application and a schedule was given. On the same day, the trial Judge ordered the appointment of ICPAU as an Accountant to reconcile the accounts between the Plaintiffs and the Defendants as part of the agreed upon pre-trial issues. Having filed submissions on 15th of September 2020, the Respondents/Plaintiffs filed an application by way of Notice of Motion seeking for orders for stay of execution of the order of court appointing auditors (ICPAU). By letter dated 16th September 2020 counsel for the plaintiffs sought leave to have the application for stay of appointment of auditors withdrawn. On 30th of September 2020, the trial Judge granted the stay of the audit pending the determination of Miscellaneous Application No. 654 of 2020. Ruling in the said application had been reserved for 5th October 2020. On 7th October 2020, the trial Judge delivered a ruling in Miscellaneous Application No. 654 of 2020 and made the following orders, consequential and other supplementary orders:

> ***"(i) This application is allowed with costs to the applicants.***
> ***(ii) The joint written statement of the Respondents filed in HCCS No. 43 of 2020 which is a perpetuation of the illegalities is hereby struck out***
> ***(iii) Judgement is hereby entered for the plaintiffs as prayed for in their joint plaint by virtue of order 9 rules 6,8,10 and 30 and Orders 52 rules 1, 2, and 3 of the CPR SI 71-1 and S 98 of CPA as follows:***
>
> ***(a) I declare that by their illegal actions, the respondents/defendants breached the different loan agreements terms entered into with the applicants/plaintiffs***

in the period between 16th February 2011 to the 16th November 2019.

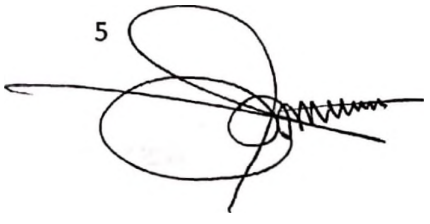
(b) I declare that credit facilities between the 1st and 2nd plaintiffs and defendants have since been settled at law.

(c) I do order for the recovery by the applicants from the respondents/defendants jointly of the UGx 34, 295,951,553/= (Uganda Shillings Thirty-Four Billion, two hundred and Ninety-Five Million Nine hundred and Fifty-One Thousand Five Hundred and Fifty-three only) and USD 23, 467,670.61 (United States Dollars Twenty-Three Million, Four Hundred and Sixty-Seven Thousand Six Hundred and Seventy only) being monies that were unlawfully taken by them from the applicant/plaintiffs loan accounts.

(d) I do declare that since the 2nd defendant did not produce and or attached a licence allowing it to conduct financial institutions business in Uganda from Bank of Uganda in respect of the business alluded hereto, then the alleged credit facilities that were stated to have been offered by it to the plaintiff were illegal and thus void ab initio and consequently unenforceable.

(e) I do declare that the appointment of the 1st defendant by the 2nd defendant as agent bank and security agent in respect of the 2nd defendant's loan was illegal, unethical, unlawful, in breach of trust, in breach of fiduciary duty and in breach of the financial institutions act 2004 (as amended) as well as the Bank of Uganda Consumer Protection guidelines 2011 and the Kenya Banking Act

(f) I do hereby issue an order for the unconditional release/Discharge of Mortgages allegedly created over the plaintiffs' properties comprised in Kyadondo Block 248 Plot



328 Land at Kawuku, FRV 1533 Folio 3 Plot 36-38 Victoria Crescent II Kyadiondo and LRV 3176 Folio 10 Plot 923 Block 9 Land at Makerere Hill Road and all corporate and personal guarantees issued by the plaintiff.

(g) I do hereby vacate the orders previously issued by this court for taking an Audit and account of all the 1st and 2nd plaintiffs loan accounts for the period between 16th February 2011 to date as it is now overtaken by events

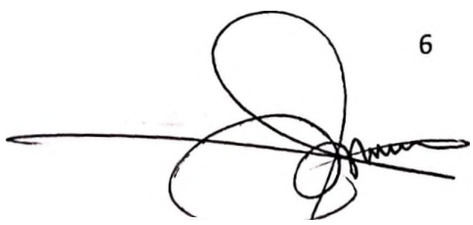
(h) I do issue a permanent injunction restraining the defendants from enforcing the mortgages over the plaintiffs' properties comprised in Kyadondo Block 248 Plot 328 Land at Kawuku, FRV 1533 Folio 3 Plot 36-38 Victoria Crescent II, Kyadondo and LRV 3176 Folio 10 Plot 923 Block 9 Land at Makerere Hill Road.

(i) I do not offer any General and punitive damages as against the respondents for I have found nothing to warrant such

(j) I do declare interest on (c) above from the date of filling this suit at the prevailing court rate of 8% per annum till payment in full.

(k) I award costs of this application and the head suit to the applicant/plaintiffs.

(iv) I do issue directives to Bank of Uganda which is the implementing authority under the Financial Authorities Act 2 of 2004 (as amended) to take such necessary actions and measures to ensure that the provisions of the law is implemented in accordance with the intention of the law such as to protect the Ugandan Economy from illegal hemorrhage and uncontrolled flow of financial resources and to ensure that financial institutions business in Uganda



is operated within the letter of the law to protect the nascent banking business industry in Uganda".

The principles under which an application for stay of execution can succeed were well espoused in the case of ***Lawrence Musiitwa Kyazze Vs. Eunice Businge, Supreme Court Civil Application No 18 of 199***0, but more pronounced in the Supreme Court Case of ***Hon Theodore Ssekikubo and Ors Vs. The Attorney General and Ors Constitutional Application No 03 of 2014***. Another case where the principles were well pronounced is the Court of ***Appeal decision in Kyambogo University Vs. Prof. Isaiah Omolo Ndiege, CA No 341 of 2013.*** Quoting The **Supreme Court in Miscellaneous Application No. 7 of 2010; Dr. Ahmed Muhammed Kisuule vs. Greenland Bank (In liquidation)** had this to say;

"For an application in this Court for a stay of execution to succeed the applicant must first show subject to order 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".

From the above cited cases, the principles that can be derived include:

(1) The Applicant must show that he lodged a notice of appeal and the appeal is not frivolous and has a likelihood of success.

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

(3) That the application has been made without unreasonable delay.

(4) That the Applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

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

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

Order 43 Rule 4 (3) of the Civil Procedure Rules provides that;

> *"(3) No order for stay of execution shall be made under sub rule (1) or (2) of this rule unless the court making it is satisfied—*
> *(a) That substantial loss may result to the party applying for stay of execution unless the order is made;*
> *(b) That the application has been made without unreasonable delay; and*
> *(c) That security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him or her."*

Principle 1: The applicant must show that he lodged a notice of appeal and the appeal is not frivolous and has a likelihood of success

Perhaps, this is one of the controversial principles that makes no sense to me. While it is important to have an appeal filed before an application for stay of execution is preferred, it makes no sense to expect that a Judicial Officer who has decided a matter should be expected to find fault in the same matter which he/she decided with conviction. That is why in my view it is not practical to have an application for stay of execution before the same Judge who made the decision. In my view, it should be sufficient that there is an appeal lodged and

consideration should be made for other grounds. Nevertheless, these principles were set by the superior Courts and I am bound by the rule of precedent.

That said, there are two approaches to this principle. One school of thought suggests that to prove that the appeal has a high probability of success, one should delve into some skeletal arguments on the success of the appeal while another school of thought suggests that it is enough to raise questions for appeal only. This second school of thought however presupposes that there is a memorandum of appeal. Otherwise raising questions entails delving into areas of possible grounds of appeal with supporting skeletal arguments. Counsel for the Applicants and Respondents preferred the former and that is the approach I shall take.

Counsel for the Applicants in order to show that the appeal has high probability of success submitted that the determination of illegality was based on a wrong application of the law. The law the trial Judge relied upon had been amended in 2016. He submitted that the trial Judge relied on the Financial Institutions Act of 2004, yet it was amended in 2016. Further that although the judge awarded amounts to the Plaintiffs/Respondents, the amounts were not liquidated sums and court could not make that finding without calling evidence.

Counsel for the Respondents in reply submitted that the sums were liquidated and he defined a liquidated sum as a specified amount prayed by the plaintiffs at the time of filling the plaint. He averred that the sums awarded were specified in the plaint. Counsel stated that court does not have to set down the suit for hearing if it can dismiss it under Order 6 Rule 30 of the Civil Procedure Rules. The court can dismiss the suit and strike out the pleadings. That the court found that the pleadings of the defendants were founded on illegalities and the court did the right thing to strike out the pleadings.

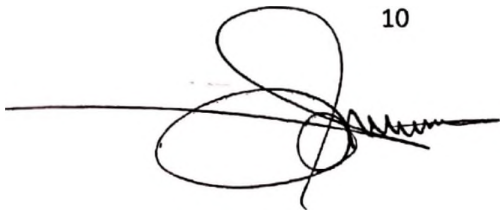
In rejoinder, counsel for the Applicants submitted that liquidated sum must be an amount specified and agreed upon by the parties. The amount in the plaint was not agreed upon by the parties.

As to whether there is an appeal filed, the Applicants annexed to their affidavit in support and rejoinder a Notice of Appeal dated 7th October 2020 and filed in the Court of Appeal on 7th October 2020. The Court of Appeal has already issued conferencing notices as evidenced by the affidavit in rejoinder.

As regards the likelihood of success of the appeal, both counsel argued on two aspects, i.e. Procedural aspects and the illegality aspects. As a judge hearing this application, I do not need to go into the depth of who of the two has a compelling argument. I need to point out arguable grounds that will be determined on appeal that could show the likelihood of success and I will confine myself to those that both counsel raised, but maybe raise one more question likely to be critical for the Court of Appeal.

(a) Procedural Aspects.

Under Order 9 Rule 10, where there is no defence filed, the suit proceeds as if a defence had been filed. It follows therefore, that even when a defence is struck out, the suit must proceed for formal proof as if a defence exists; save where the sum claimed is a liquidated sum. Counsel for the Applicants submitted that this was not a liquidated sum while counsel for the Respondents argued that this was a liquidated sum. In view of the fact that there is this contention is proof enough that there is an arguable ground of appeal. In view of the fact that the parties had agreed in the Joint Scheduling Memorandum to have an Audit to ascertain the amount deducted from the plaintiff's' account vis-à-vis what they received and the trial Judge had appointed ICPAU to conduct the Audit, which order he vacated, it remains to be determined by the Court of Appeal as to whether this was actually a liquidated sum that would be awarded without



formal proof. The question for the court of appeal to determine will be: why agree on an Audit if the sum was liquidated?

The trial Judge entered judgement under Order 9 Rules 6,8,10 and 30. Under rule 8, it is a requirement that where judgement is entered under this rule, the suit is set down for assessment of damages which the judge did not do. He denied the respondents damages without proof or failure to prove thereof. It is therefore not clear whether the judge entered an interlocutory judgement under Order 9 Rule 6 or Order 9 Rule 8 or both. This coupled with the fact that Order 9 Rule 30 which he referred to does not exit, are questions for the court of appeal to determine.

(b) Illegality

Both counsel strongly submitted on this aspect of illegality as shown above. At common law, the principle of public policy is enshrined in a latin Maxim *"ex dolo mala non oritur action"* literally meaning, no court will lend its aid to a man who found his cause of action upon an immoral or an illegal act. In such a case, where a contract is illegal, the court leaves the parties where it finds them. The court will help neither party. The only exception is where a statute is couched in a way that it protects a particular party to the contract as explained in the case of ***Kulubya Vs Sigh (1964) AC 142.***

The Contract Act 2010 has modified the position of common law. Section 19 of the contract Act 2010 provides:

> ***19 (2) An agreement whose object or consideration is unlawful is void and a suit shall not be brought for the recovery of any money paid or thing delivered or for compensation for anything done under the agreement, unless—***
>
> ***(a) the court is satisfied that the plaintiff was ignorant of the illegality of the consideration or object of the***

agreement at the time the plaintiff paid the money or delivered the things ought to be recovered or did the thing in respect of which compensation is sought;

(b) the court is satisfied that the illegal consideration or object had not been effected at the time the plaintiff became aware of the illegality and repudiated the agreement;

(c) the court is satisfied that the consent of the plaintiff to the agreement was induced by fraud, misrepresentation, coercion or undue influence; or

(d) the agreement is declared illegal by any written law, with the object of protecting a particular class of persons of which the plaintiff is one.

In view of the fact that the trial Judge issued orders in favour of one party in a transaction he found illegal and he made no mention of the sums the Plaintiffs borrowed, it will be an important question of law for the court of appeal to determine as to whether the illegality did not apply to the Respondents as well or whether the Respondents are one of those protected by the law the parties were found to have violated. The court will have to determine whether the transaction was illegal in the first place since this remains a contention in the submissions of the parties above. The court will have to determine whether the respondents fall under the category of the exceptions under S19 (2) (a) of the Contract Act 2010 since the Loan agreement shows that the Respondents received independent advice by counsel before signing the agreements.

(iii) Agency banking

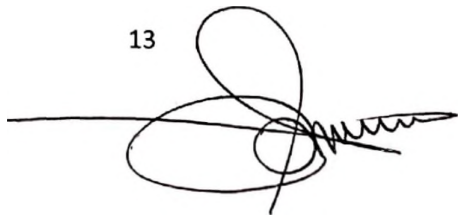
The other questions that will be of interest to the Court of Appeal is the question of agency. As to whether foreign banks that are not trading in Uganda are required to obtain a licence from Bank of Uganda to execute a contract is a good question for the court of appeal to determine. In a statement issued which was

annexed to the applicant's affidavit in rejoinder, the Bank of Uganda suggests that the licence was not required in the transaction under dispute and the Court of Appeal will have to determine whether Bank of Uganda is right or not.

***Principle 2*: That substantial loss may result to the applicant unless the stay of execution is granted.**

Counsel for the applicant submitted that the applicant will suffer substantial loss and damage if this application is not granted. Substantial loss does not refer to a particular amount not even the size of the amount. It may be loss that cannot be properly quantified by any particular mathematical formula. Therefore, it is a qualitative concept. The nature of the orders granted in this case by their quality and purpose are far reaching. For example, for the court to find that a person who indeed borrowed money can come to the court and say I will not pay it because it was obtained from a foreign country. That is a qualitative question that the court of appeal will need to look at. The loss in this case is both financial as submitted and qualitative. Looking at the qualitative test in this case or taking into consideration the nature of this case, the circumstances of the case, the way it was handled by the trial Judge, it is just proper that an application for stay be granted. Taking also into consideration the nature of the industry we are dealing with being the banking industry, the effect of the ruling does not affect the individual Applicants. The appeal needs to be addressed and the status quo needs to be stayed and maintained in order for the industry to remain balanced and settled.

Counsel for the Respondents submitted that 23 million dollars and 34 billion Uganda shillings represents a substantial loss to the respondents. That it is the respondents who are suffering prejudice and substantial loss because they have lost a colossal sum of money at the hands of their bank. That the argument that the decision will have impact on the industry is farfetched. That this claim of far



reaching consequences is speculative and it is extraneous to the legal limits of this application. That this is a case between a customer of the bank and the licensed banks. That the banks are sued here in their individual capacity as banks like any other litigant and indeed banks get sued every day. Banks are in this court every day they are suing and they are being sued.

My take is that this decision has far reaching implications on the Banking industry in as far as it declares syndicated loans illegal. At page 22 of the ruling, the trial judge stated:

> ***"The fact of this matter shows syndicated financial institution business by the 1st and 2nd respondents aimed at dodging the seeking of a licence from the relevant authority which actions are clearly illegal ..."***

In essence, the trial Judge declared syndicated loans illegal. That has a significant effect on the industry if there are other banks that have syndicated loans. This calls for maintenance of the status quo to enable the court of appeal to inquire into this illegality and either uphold the finding or reverse it. The effect is not *in personam*. It is in *rem*.

Principle 3: That the application has been made without unreasonable delay.

This was not contested. On 7th October 2020, the trial Judge delivered a ruling in Miscellaneous Application No 654 of 2020. The notice of appeal dated 7th October 2020 was filed in the Court of Appeal on 7th October 2020. It is my considered view that this application was lodged without unreasonable delay.

Principle 4: There is serious or eminent threat of execution of the decree or order and if the application is not granted, the appeal would be rendered nugatory.

Counsel for the Applicants submitted that the argument by counsel for the respondents that, there was no execution pending and therefore, this court cannot stay execution, is a wrong premise of law. That the court can stay execution at a point after the judgment has been issued. He referred to paragraph 11, 12 and 13 of the affidavit in rejoinder; and submitted that as long as there is a decree that is executable the Applicants have the right to apply. That it is also important to note that the nature of the opposition of this application should be good evidence that there is serious threat for execution if indeed the Respondents did not intend to execute this order why oppose it. A person comes to the court opposes application for stay and say but I don't intend to do anything?

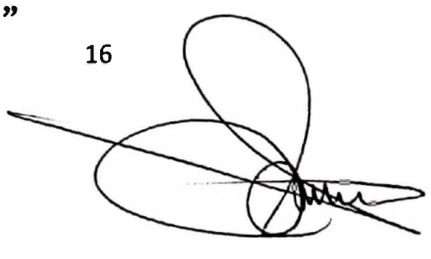
On the other hand, Counsel for the Respondents submitted that the only executable element of the court's decision is the one for payment of sums of money and the one for discharge of mortgages. That even for those executable orders, for a stay to be issued the Applicants needed to show that the Respondents were executing those orders or they were threatening to execute those orders. The application does not allude to any execution being threatened or taking place. This is an application for stay of execution, meaning there must be execution or threatened execution. Such applications fail where the Applicant does not show in one way or the other any form of execution. That there is no basis therefore, for staying something which is not there or which has not been shown in the application.

My take is that the nature of these orders made by the trial Judge are self-executing. The following order should be of interest to satisfy this assertion:

(l) I do hereby issue an order for the unconditional release/Discharge of Mortgages allegedly created over the plaintiffs' properties comprised in Kyadondo Block 248 Plot 328 Land at Kawuku, FRV 1533 Folio 3 Plot 36-38 Victoria Crescent II Kyadiondo and LRV 3176 Folio 10 Plot 923 Block 9 Land AT Makerere Hill Road and all corporate and personal guarantees issued by the plaintiff.

What the respondents needed was to extract an order and serve it on the Registrar of Titles and the mortgages are released. This presents a very great risk as these titles can be transferred upon release of the Mortgages and defeat the only security the Applicants have against the respondents. Indeed, counsel for the respondents had secretly extracted an order on the day I issued an interim order, which was filed and signed by an Acting Registrar Lilian Bucyana on the 12th October 2020, without input from counsel for the applicants and without court files because the files were already in my custody. I only leant of the order from the pleadings filed by the Applicant in this application, particularly in the affidavit in rejoinder. It should be noted that the law governing extraction of decrees and orders is set out in Order 21 Rule 7(2) and 4 which provides:

> ***"(2) It shall be the duty of the party who is successful in a suit in the High Court to prepare without delay a draft decree and submit it for approval of the other parties to the suit, who shall approve it with or without amendments, or reject it without undue delay. If the draft is approved by the parties, it shall be submitted to the Registrar who, if he or she is satisfied that it is drawn up in accordance with the judgement, shall sign and seal the decree accordingly. If all the parties and the Registrar do not agree upon the terms of the decree within such time as the registrar shall fix, it shall be settled by the judge who pronounced the judgement, and the parties shall be entitled to be heard on the terms of the decree if they so desire."***



(4) Any Order whether in the High Court or Magistrate Court which is required to be drawn up shall be prepared and signed in a like manner.

Execution therefore, was a big possibility hence a risk. The rest of the orders would require an application for execution as a condition precedent.

Principal 5: That the applicant has given security for due performance of the decree or order as may ultimately be binding upon him.

Counsel for the Applicants submitted that security for due performance is not a condition precedent for granting of stay of execution. He relied on the ***case of John Baptist Kawanga Vs Namyalo Miscellaneous Application No 12 of 2017 and the case of Margrette Kato VS Nalwo, Civil Miscellaneous Application No. 11 of 2011*** and argued that in both of these cases the court discussed the power of the court to grant stay and the discretion to grant it in the circumstances of each case. He further submitted that there is no requirement under the Rules or the Law to make deposit for security for due performance of the decree before the court can exercise its discretion. That does not exist in the law. That the Supreme Court in the decision of ***Margaret Kato*** above, discussed that this is a rule of practice. That the rational in both of these cases is that, security for due performance should not be a fetter on the right of the Applicants to pursue the appeal. The principle in both of those cases is the same and the objective of the provisions of the law is clear.

On the other hand, Counsel for the Respondents submitted that if court was inclined to entertain and grant the orders sought, this would be a proper case for the grant of an order of stay conditionally upon the deposit of the decretal sums. This would be a proper case for an order to deposit 23 million dollars and

34 billion shillings to be made if the stay was to be granted. The reason for that is, it would at least help to balance the rights of the successful party in this court by having the deposit of cash since the applicants will still be remaining with the Respondents' securities which are of a far higher value. If the court was to consider the balance of convenience, the balance of convenience will favour the Respondents. Not only have they been robbed of cash but they have also been denied access to their properties, so it would be unjust to deny them both.

I have held before that every application should be handled on its merits and a decision whether or not to order for security for due performance be made according to the circumstances of each particular case. The objective of the legal provisions on security was never intended to fetter the right of appeal. It was intended to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In essence, the decision whether or not to order for security for due performance must be made in consonance with the probability of the success of the appeal. As it was held in the case of ***Hon Theodore Sekikubo*** cited above, that the nature of the decision depends on the facts of each case, as situations vary from case to case. The applicants are banks with an international presence and given the amounts that they lent to the respondents, they are liquid enough to meet the obligations under the decree should the appellate courts confirm the judgement entered against the respondents by this court. In effect, I shall not order for security for due performance.

Principle 6: That refusal to grant the stay would inflict more hardship than it would avoid.

While both counsel did not submit on this principle, if this stay is not granted it would inflict more hardships on both parties. I have noted that the case involves

a substantial sum of money and if the stay is not granted, the possibility of vacating the mortgages is very high hence this would create more hardships should the court of appeal set aside the decision of the High Court.

Consequently, I allow this application in terms of the orders sought. Costs shall abide by the results of the appeal.

Before I take leave of this matter, I was flabbergasted by one of the parties sending emissaries to me with financial proposals in order to influence my decision. This is disgusting to say the least.

Dated at Kampala, this ..... 2nd ..... day of ..... November 2020

Flavian Zeija (PhD)
PRINCIPAL JUDGE