THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL APPLICATION NO. 0016 OF 2022

ATTORNEY GENERAL :: APPLICANT

VERSUS

DR. BUSINGYE KABUMBA & ANOTHER::::::::::::::::::::::::::::RESPONDENTS

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ
HON. JUSTICE CATHERINE BAMUGEMEREIRE, JCC
HON. JUSTICE MUZAMIRU KIBEEDI MUTANGULA, JCC
HON. JUSTICE IRENE MULYAGONJA, JCC
HON. JUSTICE OSCAR JOHN KIHIKA, JCC

RULING OF THE COURT

Introduction

The Applicants brought this application under the provisions of Rule 2(2), 6(2)(b), 42 and 43 of the Judicature (Court of Appeal Rules) Directions S.I. 13-11 for orders that this Honorable Court issues a stay of execution of the orders of the Constitutional Court at Kampala (Egonda-Ntende, Musoke, Mugenyi, and Gashirabake, JJCC; Madrama, JCC, dissenting) dated 7th December 2022 in Constitutional Petition No. 0015 of 2022 until determination and final disposal of the Appeal, with costs to be provided for.

Background

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

The Respondents, sometime in 2022, filed Constitutional Petition No. 0015 of 2022 in the Constitutional Court in which they challenged the constitutionality of the appointment of new Judges of the High Court in acting capacity for a period of two (2) years.

On the 7th of December 2022, the Constitutional Court delivered judgement wherein the following declarations and orders were issued;

i. A declaration that the appointment of sixteen (16) judges of the High Court subject to an acting term of two (2) years is inconsistent with Articles 2, 128, 138,142 and 144 of the Constitution and is to that extent unconstitutional.
ii. An order that the Judicial Service Commission is directed to take necessary steps to regularize the appointment of the affected sixteen 16) judges into substantive appointments within six (6) months.
iii. A declaration that this judgement does not render void the judicial services rendered to date. It simply illuminates the need by the JSC to regularize their appointments as a matter of urgency to bring them in conformity with the Constitution and forestalls appointments in acting capacity for freshly recruited judges.
iv. Each party shall bear its own costs.

Being dissatisfied with the declarations and orders of the Constitutional Court the Applicants, on the 8th of December 2022, lodged a Notice of Appeal in the Constitutional Court, making known their intention to appeal against the whole decision to the Supreme Court of Uganda. The Applicants on the same day, by letter, also requested for the typed proceedings.

The Applicant now seeks an order staying execution of the orders issued by the Constitutional Court in Constitutional Petition No.0015 of 2022 pending the determination of the intended appeal to the Supreme of Uganda.

The grounds of the application, as stated in the Notice of Motion and affidavit in support of the application sworn by **Mwebembezi Julius** on the 8th of December 2022, can be summarized as follows;

1. The Applicant filed a Notice of Appeal, pursuant to an intended appeal, which raises several constitutional and legal issues that warrant serious judicial consideration by the Supreme Court and have a likelihood/chance of success.

2. Unless a stay of execution is granted by this Honorable Court the Appeal will be rendered nugatory.

3. *The balance of convenience in maintaining the status quo is in favour of the Applicant until the substantive intended appeal is heard and determined by the Supreme Court.*

4. *This application has been brought without undue delay.*

The Respondents filed an affidavit in reply deponed by **Busingye Kabumba** sworn on the 2nd February 2023, opposing the application. The grounds for opposition, as set out in the affidavit in reply, can be summarized as follows;

1. *The Applicants application is devoid of merit, misconceived, frivolous and vexatious, premature, incompetent and blatant abuse of court process.*

2. *The application is meant to defeat the consequential orders of the court issued in Constitutional Petition No. 15 of 2022.*

3. *The declarations and orders issued in Constitutional Petition No. 15 of 2022 are self-executing and hence the same cannot be stayed.*

4. *The Applicant's appeal has no chances of success as the Constitutional Court ably and correctly interpreted the constitutional provisions in issue.*

5. *The decision of the Constitutional Court did not create any uncertainty as the Judicial Service Commission was ordered to treat the matter with urgency to regularize the appointment of the acting judges as substantive within 6 months from the date of the decision.*

6. *If this Court were to grant the application, this would be tantamount to a disguised and unconstitutional review of the decision being appealed against.*

7. *The Applicant's appeal will not be rendered nugatory as the Supreme Court can overturn or uphold the decision of this Honorable Court.*

8. *A much greater inconvenience would flow from permitting the continuation of actions deemed patently unconstitutional by the Constitutional Court and would in fact create a constitutional crisis.*

9. *The Applicant did not indicate that he would suffer irreparable injury of this application is not granted.*

At the hearing of this application, **Mr. Geoffrey Atwine** appearing with **Mr. Franklin Uwizera** appeared for the Applicant, while the Respondents were represented by **Mr. Bwowe Ivan**.

The advocates for both the parties filed written submissions which were adopted at the hearing.

Applicant's submissions

Counsel for the Applicant framed one issue. Whether an order for stay of execution can issue.

They submitted that an order for stay of execution can issue against the Respondents, and that the considerations for the grant of such an order are:

1. The lodgment of a Notice of Appeal and request for certified copies of the record of proceedings to file the appeal;
2. That the appeal has a high likelihood of success
3. That the Applicant's appeal will be rendered nugatory if the stay of execution is not granted
4. If 2 and 3 above have not been established, the Court must establish where the balance of convenience lies; and
5. That the application was lodged without undue delay.

Counsel referred the Court to Rule 6(2)(b) of the rules of this Court and the court's decisions in **National Housing Corporation vs Kampala District Land Board, S.C.C.A No. 06 of 2002, Akankwasa Damian Vs Uganda S.C.C.A No. 7 & 9 of 2011**, **Theodore Sekikuubo & Others vs Attorney General & Others, S.C.C.A No.6 of 2013** and **Dr. Ahmed Muhammed Kisuule vs Greenland Bank Civil Application No. 7 of 2010**

Counsel then proceeded to argue the application under the five considerations that he had set out which are in line with the criteria set out in the Supreme Court case of **Theodore Sekikuubo & Others vs Attorney General & Others, S.C.C.A No.6 of 2013.**

With regard to the first consideration, Counsel submitted that the Applicant had filed a Notice of Appeal and lodged a letter requesting for the certified copies of the record of proceedings and the judgment. They referred to the case of **Attorney General vs Eddie Kwizera SCCA 1 of 2020** in which the Supreme Court held that Rule 6(2)(b) gives discretion to this court where a Notice of Appeal has been lodged in accordance with Rule 72 of the rules of this court, to

order stay of execution in circumstances where it deems fit. Counsel averred that the Applicant had thus satisfied this ground.

With regard to the second consideration, , Counsel argued that the intended appeal raises serious points of law that warrant consideration by the Supreme Court. They further submitted that in the intended appeal the Applicant will demonstrate that;

1. The learned Justices of the Constitutional Court erred in law and fact when they held that the appointment of sixteen (16) judges of the High Court subject to an acting term of two (2) years is inconsistent with Article 2, 128, 138, 142 and 144 of the Constitution.

2. That the learned Justices of the Constitutional Court erred in law and fact when they held that the provisions for acting judges under article 142(2) and 147(1) of the Constitution is only available to serving and retired judges and not freshly recruited judges and that their appointment does not conform to the tenure of the office of High Court as prescribed under article 144(1) of the Constitution.

3. The learned Justices of the Constitutional Court erred in law and in fact when they directed the Judicial Service Commission to take necessary steps to regularize the appointment of the affected sixteen judges into substantive appointments within six (6) months from the date of the judgement.

4. That the effect of the decision of the Constitutional Court curtails the mandate of the President to appoint acting judges in accordance with Article 128,138, 142 and 144 of the Constitution.

5. That the effect of the decision of the Constitutional Court is that the status of the sixteen (16) acting High Court Judges appointed by the President remains uncertain and their decisions stand to be challenged.

Counsel argued that in determining the likelihood of success of the appeal the court need not determine the constitutionality of the violations complained of at this stage, as these are to be determined at the appeal. Counsel referred to the cases of **J.W.R Kazoora vs M.L.S Rukuba** (supra) and **Davis Wesly Tusingwire vs Attorney General S.C.C.A No. 1 of 2014.** Counsel then contended that the Applicant's intended appeal raises serious points of law that warrant consideration by the Supreme Court.

The third consideration was that the Applicant's appeal will be rendered nugatory if the stay of execution is not granted.

Counsel submitted that the Constitutional Court ordered the Judicial Service Commission to regularize the appointment of the affected sixteen judges into substantive appointments within six (6) months from the date of judgement. Counsel argued that regularization of the sixteen judges' appointment had the effect of usurping the mandate of the President and that in so doing it would also render the intended appeal nugatory.

Counsel further submitted that the purpose of this application was to preserve the status quo so that the Applicant's right of appeal is safe guarded. They referred to **Hon. Theodore Ssekikuubo** and **Eddie Kwizera** cases (supra). which held that it is the duty of the court to ensure that intended appeals, if successful, are not rendered nugatory.

With regard to the fourth consideration,, the balance of convenience,

Counsel submitted that the term balance of convenience means that if the risk of doing injustice is going to make the applicants suffer, then the balance of convenience will favour him/her and the court will most likely be inclined to grant the application.

Counsel argued that it's the Applicant who faces an injustice and therefore the balance of convenience is in favour of the Applicant.

With regard to the issue whether the application was filed without undue delay,

Counsel submitted that this application was brought without any delay. He argued that the judgement was delivered on the 7th of December 2022, the Notice of Appeal filed on the 8th of December 2022 and this application was filed on the 8th of December 2022. Counsel referred to Eddie Kwizera (supra) to support his submission.

Counsel concluded that the application had merit and meets the threshold and the bench mark for the issuance of the remedies sought.

Respondents' submissions

Counsel for the Respondents in his submissions raised a preliminary point of law that

whereas this honorable court has the jurisdiction to hear matters pertaining to stay of execution, the rules are silent about stay of declarations particularly those of the Constitutional Court. He argued that declarations cannot be stayed.

Counsel went on to point out that the declarations made by the Constitutional Court which have already been set out verbatim hereinabove.

Counsel argued that the order that JSC takes steps to regularize the appointment of the affected judges within six months amounted to a consequential order.

Further, that staying the said consequential order would by default be tantamount to setting aside the decision in Constitutional Petition No. 15 of 2022 and would usher in a constitutional crisis, disrupt the security of tenure of the 16 affected judges, introduce uncertainty on the status of the tenure of the said judges but also impact on the legality and the binding nature of the decisions they render. Counsel asserted that a stay has the effect of reversing the court's orders and declarations.

By way of analogy, Counsel referred to **Civil Application No.220 of 2019 Finasi/Roko Construction SPV Ltd. & Anor vs Roko Construction Ltd** in which it was held that once an order of injunction has been issued by the trial court, such order cannot be stayed but rather may be set aside suspended or lifted.

Counsel concluded by submitting that the jurisdiction to stay a declaration does not exist. Counsel then addressed the issue framed by Counsel for the Applicant whether an order for stay of execution should issue? He submitted that this application does not meet the requirements set out in **Theodore Sskikuubo & 3 Others**

With regard to the issue whether the appeal has a likelihood of success, he submitted that no appeal has been filed yet so it cannot be determined whether it has a likelihood of success, especially because the applicant did not attach a memorandum of appeal to his application. He asserted that the appeal has a limited likelihood of success.

With regard to proof of irreparable damage, counsel argued that the applicant did not indicate what damage would be caused by implementing the decision of the CC. Neither did the applicant show that the appeal would be rendered nugatory. He asserted that instead, irreparable damage would be caused if the

16 judges affected if this application is granted. He referred to **Davis Wesley Tusingwire** (supra) where the Supreme Court denied injunctive orders sought in a constitutional appeal on the basis that the applicant would not suffer irreparable damages if the orders sought were not granted.

With regard to the balance of convenience, Counsel argued that it lies with ensuring that the Judiciary is not saddled with a substantial number of judges who are unsure and uncertain of their tenure and hence affect their independent decision making. Counsel further contended that the 16 affected judges and their decisions would continue to be rendered questionable and of uncertain legal standing with persons seeking justice before them being left uncertain as to whether their decisions are legally binding.

As to whether the application was instituted without delay, Counsel argued that the application has no merit and fails all the major tests hence this consideration is not relevant. Counsel concluded by submitting that this application has not met the test for grant of stay and ought to be dismissed.

Applicant's Submissions in Rejoinder

With regard to the preliminary objection, Counsel sought to correct the inadvertent error in the Notice of Motion which states that the application was brought under the provisions of Rule2(2), 6(2)(b). 42 and 43 of the Judicature (Supreme Court Rules) Directions S.I. 13-11. Counsel clarified that the application was premised on the Judicature (Court of Appeal Rules) Directions S.I. 13-10, and therefore reference to the Supreme Court Rules was a typing error. Counsel argued that it was a long-established principle that the citing of wrong law, or even failure to cite any law under which a case is brought is not fatal, for as long as the substance of the case is clear on the pleadings and the opposite party is not prejudiced thereby.

On the jurisdiction of this court to hear this application, Counsel argued that the court was therefore competent to entertain this application under Rules 2(2),6(2)(b) and 43 of the Rules of this court, which give the court the discretion to entertain applications of this nature.

On status quo, Counsel submitted that the main purpose of this application is to preserve the status quo so that the Applicant's right of appeal is safeguarded pending the disposal of the appeals.

In response to the Respondents' argument that granting the stay of execution would usher a constitutional crisis and disrupt the security of tenure of the 16 affected judges, Counsel argued that in fact failure to grant the stay would usher the constitutional crisis.

In response to the Respondents' submission that the Applicant has not yet filed the appeal, Counsel argued that an appeal under Rule 76 of the Rules of this Court is commenced by filing a notice of appeal. It suffices that a notice of appeal has been filed.

Counsel concluded by submitting that the application has merit and meets the threshold for issuance of the remedies sought.

Resolution of the Preliminary Objection

Before delving into the merits of the application we will first deal with the preliminary point of law that was raised by Counsel for the Respondent to the effect that whereas this court has the jurisdiction to hear matters pertaining to stay of execution, the rules are silent about stay of declarations particularly those of the Constitutional Court. As such, argued Counsel, declarations cannot be stayed; they can only be set aside.

The Applicant disagreed.

Black's Law Dictionary 9th Edition at page 918, defines a declaratory judgment as follows:

> ***"A binding adjudication that establishes the rights and other legal relations of the parties without providing for ordering enforcement"***

On the other hand, ***Osborn's Concise Law Dictionary Eleventh Edition*** defines a declaratory judgment as follows:

> ***"A judgment which conclusively declares the legal relationship of the parties without the appendage of any coercive decree. Such a declaration may be made whether or not a consequential relief is***

or could be claimed. So, a declaratory judgment may be made along with other relief, e.g. damages or injunctions."

Whether a declaratory judgment is amenable to being stayed pending appeal depends on the circumstances of each case. In the Jamaican Supreme Court case of ***Norman Washington Manley Bowen Vs. Shahine Robinson and Neville Williams [2010] JMCA App 27***, the applicant sought a stay of execution of the judgment of the court by which the 2007 election for the constituency of Saint Ann North East was declared null and void, and the seat declared vacant. The judgment was required to be served on the Speaker of House of Representatives and the Clerk to the Houses of Parliament. Morrison JA, in refusing the application for stay of the judgment, stated at paragraph [10]:

"[10] It will immediately be seen that the judgment is in substance declaratory, rather than executory, by which I mean that although it does make a pronouncement with regard to the 1st defendant's status as a member of the House of Representatives, it does not purport to order the 1st defendant to act in a particular way, such as to pay damages or to refrain from interfering with the claimant's rights, either of which would be enforceable by execution if disobeyed."

In the Nigerian Supreme Court case of ***Chief RA Okoya & ors v Santilli & ors, SC 200/1989***, one of the issues for consideration by the Court was *'whether a defendant who has filed an appeal purely against declaratory orders made against him is entitled to apply for a stay of execution of those orders pending the hearing and determination of the appeal.'* Agbaje J. who wrote the Lead Judgment, after reviewing several scholarly works on the subject, concluded the following as being a 'consensus' among academic writers:

"First: [An] Executory judgment declares the respective rights of the parties and then proceeds to order the defendant to act in a particular way, eg. To pay damages or refrain from interfering with the plaintiff's rights, such order being enforceable by execution if disobeyed

Second: A declaratory judgment may be the ground of subsequent proceedings in which the right having been violated, receives enforcement but in the mean-time there is no enforcement nor any claim to it."

Agabje J then went ahead and stated thus:

"It appears to me that the starting point .... is the consensus that a declaratory judgment may be the ground of subsequent proceedings in which the right ...violated receives enforcement but in the mean-time there is no enforcement nor any claim to it. So, until subsequent proceedings have been taken on a declaratory judgment following its violation or threatened violation there cannot on the clear authorities, I have referred to above, be a stay of execution of the declaratory judgment because prior to the subsequent proceedings, it merely proclaims the existence of a legal relationship and does not contain any order which may be enforced against the defendant."

In the matter before us, the declarations in the impugned judgment were not stand-alone declarations of rights. They were accompanied by consequential orders which the Judicial Service Commission and the Attorney General had to comply with in a space of six months.

In that context, the declarations and consequential orders are so intertwined that in a deserving case, a stay of only the consequential orders in isolation of the declarations would defeat the main purpose of a stay of execution pending appeal namely, the protection of the appellant's right of appeal.

Further, we do not accept the Respondent's submission that the only recourse available to a party aggrieved by a declaratory judgment is an action to set it aside. In our view, declaratory judgments are final and conclusive of the rights of parties only where there is no appeal. But where the right of appeal has been exercised by any of the parties, like in the instant matter, there is always implied that that the declarations of the court of first instance are not final and conclusive unless and until the appellate court makes a final pronouncement on them. To that extent, stay of execution in an appropriate case, postpones the binding and conclusive effect of the declaration in order to safeguard the right of appeal being exercised by a party.

We accordingly overrule the preliminary objection and proceed to consider the application on its merits.

Turning to the merits of the application, whereas the Applicant brought this application under the provisions of Rule 2(2), 6(2)(b), 42 and 43 of the Judicature (Court of Appeal Rules) Directions, it ought to be recalled that the power of the Constitutional Court to stay its own decision which was made in exercise of its original jurisdiction in constitutional matters is pursuant to the inherent jurisdiction the of the Constitutional Court which, like any other court of first instance, has power to stay its own judgment and orders. (See **Lawrence Musiitwa Vs Eunice Busingye, Civil Application No. 18 of 1990**)

The inherent jurisdiction of this court as a first instance court (Constitutional Court) is set out in S.98 of the Civil Procedure Act and Rule 2 of the Court of Appeal Rules which are applicable in respect of Constitutional Petitions, with the necessary modifications, by virtue of Rule 23 of the Constitutional Court (Petitions and References) Rules, 2015. Those are the provisions under which applications such as this should be brought.

Rule 6 of the Court of Appeal Rules is applicable, with the necessary modifications, only to applications for injunctions and stay made pending the hearing and disposal of the judgment of the Constitutional court (otherwise termed as "interlocutory applications"). But after the Constitutional Court has made the judgment, the application for stay of execution is not an interlocutory application and, accordingly, the jurisdiction of the Constitutional Court to stay its own orders and decisions in such a situation shifts to Rule 2 of the Court of Appeal Rules and S.98 of the CPA which grant a court of the 1st instance the inherent power to stay its own decision and orders.

The powers granted to the Constitutional Court under Rule 2 are 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 2 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 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.***
>
> ***(1) That the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted.***
>
> ***(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, as framed by the parties is whether an order for stay of execution can issue.

In determining this main issue, we have found it expedient 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.**

We have carefully read the submissions by counsel for the Applicant and the Respondent, the affidavits on record and the law, regarding this sub-issue.

In the instant case, ground 2 of the Notice of Motion is couched in the following terms;

"2. The Applicant's appeal to the Supreme Court challenging the decision and orders of the Constitutional Court in Constitutional Petition No.0015 of 2022 raises several constitutional and legal issues which warrant serious judicial consideration by the Supreme Court and have a likelihood/chance of success."

In support of this ground, paragraphs 5 and 6 of the Applicant's affidavit sworn by **Mwebembezi Julius** depone as follows;

" 5. THAT I know that the Applicant's intended Appeal raises several Constitutional and legal questions of a serious nature regarding the President's mandate to appoint acting judges in accordance with Articles 128, 138, 142 and 144 of the Constitution of the Republic of Uganda which warrants judicial consideration by the Supreme Court.

6. THAT I know that the Appeal has a likelihood of success as the Learned Justices of the Constitutional Court erred in law and fact when they held that the provision of acting judges under Article 142(2) and 147(1) of the constitution of the Republic of Uganda is only available to serving and retired judges and not to freshly recruited judges and that their appointment does not conform to the tenure of the office of the High court as prescribed under Article 144(1) of the Constitution"

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.

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

" 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 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"

Counsel for the Respondent argued that the Applicant had not attached a memorandum of appeal to identify the grounds of appeal, thus it was not possible for the Applicant to advance any argument that the intended appeal has likelihood of success.

We are inclined to reject the submissions of the Respondents' Counsel.

Whereas in the instant case the Applicant did not attach to the affidavit, a draft Memorandum of Appeal for the consideration of this court, the questions to be determined on appeal were in our view sufficiently articulated in paragraphs 5 and 6 of the said affidavit in support.

In our opinion, and as has indeed been decided in several authorities, an arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the court. It is not necessary to pre-empt considerations of matters for the full bench in determining the appeal.

We are satisfied that there are indeed arguable points that have been put forward by the Applicant in the application that would warrant due consideration by a court sitting to consider the intended appeal.

We therefore find that the Applicant has indeed established a prima facie case of its right of appeal or likelihood of success.

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

The Applicant did not, in the supporting affidavit, lead evidence in connection to the suffering of irreparable damage. We will therefore not labor to discuss this point.

However, paragraph 9 of the supporting affidavit of Mwebembezi Julius is to the effect that if the stay is not granted it will render the appeal nugatory.

Counsel for the Applicant submitted that the Constitutional Court ordered the Judicial Service Commission to regularize the appointment of the affected sixteen judges into substantive appointments within six (6) months from the date of judgement. Counsel argued that regularization of the sixteen judges' appointment had the effect of usurping the mandate of the President and that in so doing it would also render the intended appeal nugatory.

Counsel for the Respondent on the other hand did not, in their submissions, address the court on this point.

In the Supreme Court Case of **Theodore Sekikuubo** (*supra*) the court had this to say;

"It is trite that where a party is exercising its unrestricted right of appeal, and the appeal has likelihood of success, it is the duty of the court to make such orders as will prevent the appeal, if successful, from being nugatory.

In the instant case, the applicants are clearly exercising their unrestricted right of appeal, and the appeal meets the conditions precedent; it is thus the duty of this court to ensure that their appeal, if successful, is not rendered nugatory"

The above quoted remarks by the Supreme Court, in our view, equally apply to the circumstances in the present application. The Applicants, having established that their intended appeal has a prima facie case, this court is duty bound to ensure that the said intended appeal is not rendered nugatory in the event that it is successful.

We are of the view that this is one instance where the Applicant's right of appeal ought to be protected.

3. Balance of Convenience

In the present case, the Applicant has not only established that it has a prima facie case on appeal but has satisfied the court that if a stay is not granted the appeal will be rendered nugatory. In circumstances such as these, it would follow that the balance of convenience does tilt heavily in favour of the Applicant.

Counsel for the Respondents had argued that the balance of convenience lies with ensuring that the Judiciary is not saddled with a substantial number of judges who are unsure and uncertain of their security of tenure and hence affect their independent decision making.

That may well be so. However, this court has the duty of ensuring that there is no risk of doing an injustice to the Applicant who has a right of appeal which ought to be protected.

The learned author Musa Ssekaana in his book **Civil Procedure and Practice in Uganda 2nd Edition** at page 263 noted:

"The Court must be satisfied that the comparative mischief, hardship or inconvenience which is likely to be caused to the applicant by refusing the injunction will be greater than that which is likely to be caused to the opposite party by granting it."

We agree with the learned author's statement of the law and would apply it to the circumstances of this application in resolving the balance of convenience in favour of the Applicant.

Additionally, although not necessarily connected, we are satisfied that this application was filed without, undue delay.

Conclusion and Orders

Given the findings above, we find merit in the application and order as follows;

1. The application is granted.

2. A stay of execution of the orders of the Constitutional Court at Kampala until determination and final disposal of the intended appeal, is hereby issued.

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

We so order

Dated this ....06.....day of .....June.....2023

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HON. JUSTICE RICHARD BUTEERA, DCJ,

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HON. JUSTICE CATHERINE BAMUGEMEREIRE, JCC

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HON. JUSTICE MUZAMIRU KIBEEDI MUTANGULA, JCC

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HON. JUSTICE IRENE MULYAGONJA, JCC

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HON. JUSTICE OSCAR JOHN KIHIKA, JCC