THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL REFERENCE NO. 03 OF 2023

KASOLO ROBINS ELLIS::APPLICANT

VERSUS

JULIUS JOSEPH DELAHAIJE GEERTRUDA:::::::::RESPONDENT

CORAM: HON. MR. JUSTICE MIKE J. CHIBITA, JSC
HON. LADY JUSTICE ELIZABETH MUSOKE, JSC
HON. MR. JUSTICE STEPHEN MUSOTA, JSC

RULING OF THE COURT

This is a reference from the decision of Hon. Lady Justice Faith Mwondha, JSC, sitting as a Single Justice of this Court, in Civil Application No. 04 of 2023, by which the applicant's application for an interim order staying part of the decision of the Court of Appeal in Civil Appeal No. 120 of 2019 was dismissed with costs.

Background

The respondent lodged an application in the High Court of Uganda seeking an order for re-sealing a grant of probate of the estate of the late Edmond Van Tongeren given to him by the High Court of Kenya. It appears that the respondent's motive for resealing the grant of probate was to obtain permission to deal with assets belonging to the late Tongeren, including shares in three local companies, namely; Security (U) Ltd, Security Group Cash-in-Transit Ltd and Security Group Alarms Ltd. The applicant and another person John Kisembo also had interests in these companies, alongside the late Tongeren, either as shareholders or directors or both, and objected to the respondent's application for resealing of his grant of probate. In due course, after hearing, the application was dismissed by Mukwaya, J.

The respondent was dissatisfied and lodged an appeal to the Court of Appeal against Mukwaya, J's decision dismissing the application. The Court of Appeal (Madrama, Mulyagonja and Mugenyi, JJA) in a decision dated 23rd January, 2023, allowed the appeal and granted an order for the resealing of the grant of probate made to the respondent. The applicant was dissatisfied with the decision of the Court of Appeal and filed a Notice of Appeal dated 23rd January, 2023 intimating his decision to appeal to this Court.

The applicant, on 27th January, 2023, filed an application in this Court for an interim order to restrain the respondent from executing part of the order of the Court of Appeal which permitted the resealing of his grant of probate. The respondent opposed the application. The application was heard by Hon. Lady Justice Faith Mwondha, JSC who dismissed it in her ruling dated 14th March, 2023. She gave two major reasons for her decision; first, that the applicant had not filed a competent substantive application for stay of execution; and secondly, that execution had been completed by resealing of the respondent's grant of probate rendering the applicant's application as having been overtaken by events.

The applicant was dissatisfied with the decision of Hon. Lady Justice Faith Mwondha, JSC and filed the present reference based on the following grounds:

"1) **The learned Single Justice erred in law and fact when she failed to evaluate the evidence and held that the applicant had not filed a main application for stay of execution in the Supreme Court yet the same i.e Civil Application No. 004/2023 was duly filed in Court signed by the applicant's counsel and sealed and signed by the Registrar H/W Mary Babirye on 13th February, 2023 thereby coming to a wrong conclusion. A copy of which is attached hereto and marked "A".**

2) **The learned Single Justice erred in law when she departed from earlier decisions of the Supreme Court which held that proof of existence of the main application having been filed in Court is one of the three requirements for an interim order of stay of execution to be granted thereby coming to a wrong decision.**

3) **The learned Single Justice erred in law when she completely ignored the affidavit in rejoinder of the applicant filed in the Supreme Court thus occasioning a miscarriage of justice. A copy of which is attached hereto and marked annexure "B"**

4) **The learned Single Justice erred in law and fact when she held that illegalities raised were not the subject of the application before her and therefore could not be investigated since they were not one of the grounds for considerations thereby departing from known precedents on illegality.**

5) **The learned Single Justice erred in law and fact when she held that the application had been overtaken by events and therefore moot and academic with no practical value when the purported execution was partial and effected contrary to Rules 34 and 35 of the Judicature (Court of Appeal) Rules.**

6) **The learned Single Justice erred in law and fact when she held that the Supreme Court could not investigate illegalities raised by counsel for the applicant thereby occasioning a miscarriage of justice.**

7) **The learned Single Justice erred in law and fact when she failed to evaluate the evidence of illegalities which were evident in the affidavit in rejoinder of the applicant thereby coming to the wrong conclusion that the illegalities and irregularities raised therein were arguments not supported by evidence."**

The applicant prayed that this Court allows the reference, reverses the decision of the Hon. Lady Justice Faith Mwondha, JSC and makes an order granting the interim order and also awards him costs.

The respondent opposed the reference.

Representation

At the hearing, Mr. Michael Mayambala appeared for the applicant. Mr. Esau Isingoma appeared for the respondent.

The respective counsel filed written submissions in accordance with a schedule communicated by this Court at the date of the hearing.

Applicant's submissions

Counsel for the applicant argued grounds 1 and 2 jointly; grounds 3, 5 and 7 jointly and lastly grounds 4 and 6 jointly.

Grounds 1 and 2

In support of grounds 1 and 2, counsel submitted that the learned Single Justice erred in finding that the applicant had not filed a substantive application for stay of execution and that what he attached to his affidavit was an unsigned draft application with no number. Counsel referred to the applicant's substantive application for stay of execution at page 227 of the record which was filed via ECCMIS on 27th January, 2023, and electronically signed by the Registrar on 13th February, 2023 and given a draft number DRFT-SUP-00-CV-CL-001/2023. Counsel further contended that although the substantive application was not given a number as correctly found by the learned Single Justice, any default in that regard was on the part of the Court which carries out the role of admitting documents filed on ECCMIS and should not have been visited on the applicant.

Counsel further submitted that the learned Single Justice's insistence on the applicant presenting a numbered substantive application was a departure from the decisions of this Court which hold that it is sufficient if an applicant for an interim order of stay of execution proves by an averment in his/her affidavit that he/she filed a substantive application for stay of execution. Counsel referred to the cases of **Zubeda Mohammed and Another vs. Laila Kaka Wallia and Another, Supreme Court Civil Reference No. 07 of 2016 (unreported);** and **Kitende Appolonaries Kalibogha and 2 Others vs. Eleonora Wismer, Civil Application No. 6 of 2010 (unreported)** in support of this submission.

Counsel contended that the applicant, in the present case, stated in his two affidavits that he had filed a substantive application for stay of execution, and also attached a copy of the application with a received stamp of the Supreme Court Registry. The applicant therefore satisfied the requirement of having filed a substantive application for stay of execution as a condition

for grant of an interim order of execution. Counsel therefore concluded that the learned Single Justice erred when she found that otherwise and submitted that this Court be pleased to reverse her findings on this point.

Grounds 3, 5 and 7

In support of ground 3, counsel submitted that the learned Single Justice erred by ignoring to consider the applicant's affidavit in rejoinder and that doing so had occasioned the applicant a miscarriage of justice because the affidavit in rejoinder highlighted several illegalities that the Court was obligated to consider but instead overlooked.

Counsel submitted that the illegalities set out in the affidavit in rejoinder, and which are the subject of grounds 5 and 7 are as follows: first, that the document that was resealed by the Registrar, Court of Appeal was different in the format of certification from the grant presented by the respondent in the lower Courts and also did not appear genuine; secondly, that the decree of the Court of Appeal, which formed the basis for resealing the respondent's grant of probate was extracted contrary to **Rules 34 and 35** of the **Court of Appeal Rules** in that it only partially covered the orders of the Court of Appeal and omitted the part refusing to grant an order in respect of administration of the late Tongeren's estate, thereby rendering it illegal.

Counsel submitted that there was further illegality in that although the Registrar Court of Appeal was notified of the above highlighted omission in the Court of Appeal decree, she refused to entertain an application to rectify the decree or to refer the same to a Judge on the panel which rendered the decree, which was also contrary to the Rules of the Court of Appeal.

Counsel reiterated the principle set out in **Makula International vs. His Eminence Cardinal Nsubuga [1982] HCB 11** that a court cannot sanction that which is illegal and that illegality once brought to the attention of the Court overrides all questions of pleadings including any admissions made therein. He then submitted that this Court should, in light of all the above highlighted illegalities, be inclined to nullify and set aside the

execution of the Court of Appeal's decree for having been done contrary to **Rules 34 and 35 (2) (c)** and **(d)** of the **Rules of the Court of Appeal**.

Grounds 4 and 6

In support of grounds 4 and 6, counsel submitted that the learned Single Justice erred in finding that the illegalities raised in the applicant's affidavits could not be entertained in an application for an interim order of stay of execution. Counsel submitted that this Court in the case of **Philemon Wandera and 2 Others vs. Yesero Mugenyi and Another, Civil Appeal No. 11 of 2018 (unreported)** handled illegalities at the stage of execution and relied upon them to reverse the entire execution process. He contended that this Court ought to follow its own decision and hold that matters on illegalities can be raised and addressed at any time, including in an application for stay of execution, and to set aside the illegal execution of the Court of Appeal's decree in the present case.

Respondent's submissions

Counsel for the respondent argued the grounds in the same manner adopted by counsel for the applicant.

Grounds 1 and 2

In reply, counsel supported the learned Single Justice's finding that the applicant failed to adduce evidence that he had filed a substantive application for stay of execution and that he had only adduced evidence of an unsigned and unnumbered draft substantive application. In counsel's view, the applicant's failure to present a numbered application supported the learned Single Justice's finding that he never filed a substantive application.

In relation to the applicant's submission, allegedly based on the **Zubeda Mohammed case (supra)**, that proof of filing a substantive application is achieved by a mere averment in the applicant's affidavit to that effect, counsel submitted that no such principle was articulated in that case, and any such principle would be impractical. In counsel's view, an applicant needs to adduce positive evidence to support his/her averment of having

filed a substantive application, something the applicant in the present case failed to do.

Further, counsel contended that the applicant should have attached the proper substantive application to his affidavit in support of the application for an interim order, but having failed to do so, cannot be allowed to blame court officers for lapses that he was in a position to cure.

Counsel submitted that the Court ought to find that grounds 1 and 2 both fail.

Grounds 3, 5 and 7

With respect to the applicant's argument under ground 3 that the learned Single Justice ignored the illegalities pointed out in his affidavit in reply, counsel submitted that this was not the case. He referred to a passage at page 7 of the learned Single Justice's ruling where she considered the illegalities but took the view that they were not matters that were appropriate for consideration in an application for an interim order of stay of execution. Counsel submitted that the learned Single Justice reached the correct conclusion on this point.

As regards the applicant's contentions on illegalities relating to the authenticity of the respondent's resealed grant, counsel submitted that these had no merit and were rightly overlooked by the learned Single Justice as they fall outside the scope of an application for an interim order of stay and should instead be pursued on appeal. In counsel's view, pursuing them in the present application is an abuse of Court process.

Counsel further submitted, relying on this Court's decision in **Matthew Rukikaire vs. Incafex, Civil Application No. 11 of 2015 (unreported)**, that the granting of interim orders is meant to help the parties to preserve the status quo and then have the main issues between them determined by the full Court. He pointed out that while in the present case, the applicant sought an interim order to stay the execution of part of the decision of the Court of Appeal permitting the resealing of the respondent's grant of probate, the execution was completed by the resealing

of the grant, before the interim order could be granted. In those circumstances, according to counsel, reversing the learned Single Justice's decision would result in reversing the status-quo as opposed to preserving it which militates against the purpose of an interim order.

On ground 5 challenging the learned Single Justice's finding that the applicant's application for an interim order of stay of execution had been overtaken by events and was academic, counsel submitted that the learned Single Justice's finding was correct in law and was supported by evidence. He referred to this Court's decision in **Kwesiga and 2 Others vs. Ssennyonga and 2 Others [2021] UGSC 58;** and the East Africa Court of Justice decision in **Legal Brains Trust Ltd vs. Attorney General of Uganda [2012] e KLR** for the guiding principles on when a matter may be said to be moot. He contended that in the present case, according to the respondent's affidavit, the Court of Appeal resealed his grant of probate on 9th February, 2023 and thus the applicant's application for an interim order of stay of execution which was decided thereafter was accordingly overtaken by events and was rendered moot and academic.

As for the applicant's contentions alleging certain irregularities in the process of extraction of the decree of the Court of Appeal, counsel submitted that the orders of the Court of Appeal were self-executing, and thus any irregularity in the Court of Appeal decree pertaining to omission of some orders therefrom were mere formalities that did not occasion a miscarriage of justice.

Counsel also submitted that, in any case, the applicant did not in his application demonstrate what prejudice he would suffer from execution of the Court of Appeal's decision which permitted the resealing of the respondent's grant of probate to the estate of the late Tongeren. In counsel's view, the applicant was not a beneficiary of that estate and as such he could not suffer any prejudice from the execution which affected the late Tongeren's estate.

Counsel concluded by submitting that this Court ought to find that grounds 3, 5 and 7 also fail.

Grounds 4 and 6

In response to the applicant's submissions on grounds 4 and 6, counsel submitted that the learned Single Justice correctly found that it was not appropriate to handle the applicant's averments on illegalities and irregularities in an application for an interim order of stay of execution since the application only calls for a decision on whether to grant or to decline to grant an interim order of stay of execution.

Furthermore, counsel submitted that the applicant did not suffer any prejudice due to the learned Single Justice's refusal to consider the averments on illegalities and irregularities since he can still raise the same arguments during the hearing of his appeal in this Court.

Counsel submitted that grounds 4 and 6 also ought to fail.

Applicant's submissions in rejoinder

Counsel for the applicant filed submissions in rejoinder to the respondent's submissions, which we shall not set out, because they merely repeat his main submissions which we set out earlier.

Consideration of the Reference

We have carefully studied the record of this reference, and considered the submissions of the respective counsel as well as the law and authorities cited.

We shall begin by noting that **Section 8 (2)** of the **Judicature Act, Cap. 13** and **Rule 52** of the **Judicature (Supreme Court Rules) Directions S.I 13-11** provide for the filing of a reference from a decision of a Single Justice of the Supreme Court. Section 8 (2) provides as follows:

> **"8. Powers of a single justice of the Supreme Court.**
>
> **(1) A single justice of the Supreme Court may exercise any power vested in the Supreme Court in any interlocutory cause or matter before the Supreme Court.**

(2) Any person dissatisfied with the decision of a single justice in the exercise of a power under subsection (1) is entitled to have the matter determined by a bench of three justices of the Supreme Court which may confirm, vary or reverse the decision."

Rule 52 of the Rules of this Court provides as follows:

"52. Reference from decision of a single judge.

(1) Where under section 8(2) of the Act, any person who is dissatisfied with the decision of a single judge of the court—

(a) in any criminal matter wishes to have his or her application determined by the court; or

(b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the court, the applicant may apply for it informally to the judge at the time when the decision is given or by writing to the registrar within seven days after that date.

(2) At the hearing by three judges of the court of an application previously decided by a single judge, no additional evidence shall be adduced except with the leave of the court."

From the above provisions, and with particular reference to a civil matter, a person may bring a reference for purposes of having the decision of the Single Justice varied, discharged or reversed. It is our view, that for one to succeed in a reference, he/she must demonstrate that the decision of the learned Single Justice contains errors, whether of law or fact, or in case of a discretionary decision, that the learned Single Justice failed to exercise her discretion judiciously or exercised it unreasonably.

The decision of the learned Single Justice in this case was refusal to grant the applicant's application for an order of interim stay of execution. It is well-established that a decision regarding the granting of an order of interim stay of execution is discretionary, although it is also established that the discretion is exercised taking into account certain conditions, namely: first, whether the applicant has filed a competent notice of appeal; secondly, whether the applicant has also filed a substantive application for stay of execution pending the hearing of his/her appeal and thirdly, whether there

is an imminent or serious threat of execution before the hearing of the substantive application for stay of execution pending the hearing of the appeal. **See: Hwan Sung Industries Ltd vs. Tajdin Hussein and 2 Others, Supreme Court Civil Application No. 19 of 2009 (unreported)**.

The learned Single Justice was alive to the above applicable principles and mentioned them in her ruling. She also carefully discussed all the considerations before giving her reasons for refusing to grant the interim order, which were firstly, that the applicant did not file a competent substantive application for stay of execution; and secondly, that the execution of the relevant Court of Appeal decree had been completed thereby rendering the application to have been overtaken by events and therefore moot and academic.

We have carefully read and understood the grounds of reference and find that grounds 1 and 2 challenge the learned Single Justice's finding that the applicant did not file a competent substantive application for stay of execution; ground 5 challenges the finding that the execution of the Court of Appeal's decree had been completed thereby rendering the applicant's application as having been overtaken by events, and therefore moot and academic; while grounds 3, 4, 6 and 7 raise complaints about the learned Single Justice's failure to handle certain irregularities and/or illegalities that counsel for the applicant is convinced ought to have influenced her into granting the application before her. In our analysis, we shall consider the grounds of reference in the following order; ground 5 independently; grounds 1 and 2, jointly and lastly grounds 3, 4, 6 and 7, jointly.

Ground 5

The applicant's complaint in ground 5 is that the learned Single Justice erred in law and fact when she held that the application had been overtaken by events and was therefore moot, academic with no practical value when the purported execution was partial and effected contrary to Rules 34 and 35 of the Judicature (Court of Appeal) Rules.

The learned Single Justice made her impugned finding while discussing the consideration of whether there was an imminent or serious threat of execution of the Court of Appeal's orders which the applicant sought to stay. She stated as follows:

> **"Whether there is an eminent (sic) or serious threat of execution before the substantive application is determined. It is apparent that there cannot be an eminent (sic) or serious threat on a non-existent application.**
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> **Counsel for the respondent was so clear that the probate had been resealed, however, the applicant did not adduce any evidence to the contrary. The averments about illegalities and irregularities were merely arguments not supported by any evidence. In any case, this was not the subject of this application as it is limited to either granting or not granting depending on the already known considerations for grant.**
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> **I am inclined to accept counsel for the respondent's submission that the application had been overtaken by events and, therefore, moot and academic with no practical value. (See Kwesiga and 2 Others vs. Senyonga and 2 Others, supra)**
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> **From the above foregoing, it's clear that the applicant has failed to adduce sufficient evidence to entitle him to be granted the interim order he sought for."**

In our view, the effect of the above passage, is that the learned Single Justice found that the execution of the relevant Court of Appeal decree had been completed, by the resealing of the respondent's grant of probate, prior to her decision. This finding was correct as a copy of the grant that was re-sealed on 23rd February, 2023 by the Deputy Registrar, Court of Appeal was attached as an annexture "B" to the respondent's affidavit in reply and is at page 257 of the record.

However, the applicant alleges that execution had only been partially done, and in substantiating this allegation, counsel for the applicant stated in his submissions that the Court of Appeal had, in its judgment, declined to grant an order in respect of administration and distribution of the deceased Tongeren's estate because the issue had not been canvassed in the

application for resealing probate before the High Court. In counsel's view, execution of the relevant decree could have been completed upon the High Court concluding the application for letters of administration of the deceased Tongeren's estate. We find counsel's submissions misconceived and we cannot accept them. The only order made by the Court of Appeal and the one which the applicant sought to stay in his application for an interim order was an order for resealing of the respondent's grant of probate. The Court of Appeal made no order regarding administration of the late Tongeren's estate and one cannot read matters of that estate into the Court of Appeal decree.

We therefore find that execution of the Court of Appeal decree was completed upon resealing of the respondent's grant of probate. Since the purpose of an order of stay of execution is to stop the implementation of a court's orders, it follows that where the Court's orders have been implemented, it would not only be illogical to grant stay of execution but doing so would serve no practical purpose. We are instead of the view that if a person is aggrieved with the manner in which execution was conducted, he/she may explore the appropriate avenues to set it aside.

We therefore find that ground 5 must fail.

Given the manner of our resolution of ground 5, we would have found it unnecessary for the purposes of our decision in this reference to discuss the rest of the grounds. However, for completeness' sake, we shall make very brief comments on them.

Grounds 1 and 2

These grounds relate to the learned Single Justice's conclusion that the applicant did not satisfy the condition to file a competent substantive application for stay of execution pending the hearing of his appeal. The learned Single Justice found that what the applicant had filed was an unnumbered draft that did not qualify as a competent substantive application for stay of execution.

The relevant background is that the applicant filed his substantive application for stay of execution via the Electronic Court Case Management System (ECCMIS), an automated system used by the judiciary for case filing, among other things. At its roll-out, ECCMIS had been programmed in such a manner that upon filing, a case was allocated a draft number pending certain actions by the Registrar, where after, the case would be confirmed and allocated a final ECCMIS number. In case of any issues in confirming the filing, the case would remain with a draft number although the party would have duly filed the case in the traditional sense.

There appears to have been some issues in the present case because the applicant's substantive application for stay of execution which the applicant alleges was filed on 25th January, 2023 still only had a draft number by 14th February, 2023 when the ruling of the learned Single Justice was given representing a delay of about 21 days between filing and approval of the filing on ECCMIS.

However, we agree with counsel for the applicant's submission that the confirmation and approval of case filing on ECCMIS is the role of the Registrar. Therefore, any issues pertaining to allocation of a final ECCMIS number should not be visited on the party who duly filed his or her case and was given an ECCMIS draft number. We therefore consider that a party successfully files his/her case once he/she submits a case on ECCMIS and is given a draft ECCMIS number. This is what happened in the present case, and we therefore find, in departure from the learned Single Justice, that the applicant duly filed his substantive application for stay of execution. We find that ground 1 succeeds.

However, we find that ground 2 fails. We do not find from reading the learned Single Justice's ruling that she departed from any earlier decision on the nature of proof of existence of an application for substantive stay of execution, as the applicant alleges in ground 2.

Grounds 3, 4, 6 and 7

The thrust of the applicant's arguments in relation to grounds 3, 4, 6 and 7 is that the learned Single Justice erred in ignoring certain illegalities or irregularities that tainted the execution of the Court of Appeal decree in this case. These illegalities and irregularities, which counsel for the applicant contended, were highlighted in the applicant's affidavit in rejoinder can be set out in the following broad categories; first, illegality in the Court of Appeal certifying a document purporting to be the grant of probate made by the Kenya High Court to the respondent, yet the document appeared different from the document tendered in the lower Courts as the relevant grant; secondly, illegality because the executed Court of Appeal decree omitted certain orders made by the Court which was contrary to Rules 34 and 35 of the Rules of the Court of Appeal.

We noted that the learned Single Justice was alive to these illegalities and irregularities but stated that they were merely arguments not supported by any evidence. She also found to the effect that the illegalities and irregularities could not be appropriately handled in an application for stay of execution. We agree with the latter finding. We reiterate that an order for stay of execution is aimed at staying the implementation of a court decree. However, where the relevant court decree has been implemented, the recourse to a party who is aggrieved by the manner of execution is to seek to have the execution set aside. It is illogical to seek to stay an already executed decree.

Therefore, whatever the merit in the illegalities and irregularities raised by the applicant, the application before the learned Single Justice was simply the wrong forum to raise them. Interestingly, counsel for the applicant alluded to avenues provided by the Court of Appeal Rules for addressing issues pertaining to the framing of decrees, or arising from execution of decrees in that Court, which left us wondering why he did not raise the applicant's complaints in the Court of Appeal.

We therefore conclude that the learned Single Justice was alive to the illegalities and irregularities raised by the applicant but rightly found that

they should have been raised in a more appropriate forum and not in an application for an interim order of stay of execution.

We find that grounds 3, 4, 6 and 7 also fail.

In conclusion, for all the reasons given above, the reference substantially fails on grounds 2, 3, 4, 5, 6 and 7 and only succeeds on ground 5, and we therefore dismiss it and uphold the decision of the learned Single Justice. However, since the reference partially succeeds, we order that the costs of the reference be in the cause.

We so order.

Dated at Kampala this ..... 1st ..... day of..... July .....2024.

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Mike J. Chibita

Justice of the Supreme Court

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Elizabeth Musoke

Justice of the Supreme Court

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Stephen Musota

Justice of the Supreme Court

Delivered by the Registrar