

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(EXECUTIONS AND BAILIFFS DIVISION)**

**MISCELLANEOUS APPLICATION NO 11 OF 2017  
(Arising from EMA 1381 of 2016)  
(Arising from High Court Civil Appeal No: 16 of 2009)**

**ADMINISTRATOR GENERAL}.....APPLICANT/JUDGMENT  
DEBTOR**

**VERSUS**

**KAKOOZA UMARO}.....RESPONDENT/JUDGMENT CREDITOR  
AND**

**STANBIC BANK}.....GARNISHEE**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant applied for a temporary stay of execution pending review of Civil Appeal No. 16 of 2017. The Applicant is represented by Robert Bogere (State Attorney) and Assistant Administrator while the Respondent was represented by Counsel Henry Rwaganika appearing jointly with Counsel Raphael Baku.

The Counsel of the parties addressed the court in written submissions and the material facts and issues for resolution as sufficiently set out in the written submissions of the Counsel.

The Applicant's Counsel submitted that the Applicant lost CA. NO: 16 of 2009, culminating into a decree absolute for payment of a sum of Shillings 95,771,665/= (the principal sum being Uganda Shillings 4,203,500/=). That the Applicant held for the estate of the late Katongole Rajab with the bulk being costs, interest and damages). The Applicant has filed MA. No. 697 of 2016 at the Civil Division seeking for the Honourable Court to review its judgment; hence the present application for temporary stay.

**ISSUES**

- 1. Whether Court has jurisdiction to stay execution under the circumstances of this case?**
- 2. Whether there is a judgment/order to be stayed?**

The Applicant's Counsel submitted that there is essentially one issue as noted by the court and he prayed that he addresses the application accordingly. The decision of this court in **Unique**

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**Holdings vs. Business Skills Trust Ltd MA-402-2012** needed to be put in context. The Applicant's Counsel urged the court to depart from the cited decision and issue a temporary order of stay of execution under the inherent powers of Court under section 98 of the Civil Procedure Act pending the determination of the application for review.

The Applicant's Counsel submitted that the judgment of the Hon. Justice Nyanzi Yasin was irregular in so far as it disregarded clear, unequivocal legal provisions that have never been repealed and its effect is illegal. The judgment precipitated the attachment of the Administrator general's bank accounts for payment of costs, damages and interest. It is that judgment that the Applicant applied to have reviewed and the Applicant is not submitting on the merits of the review.

Nonetheless with the holding in **Makula International vs. Cardinal Nsubuga (1982) HCB 11** an illegality once brought to the attention of court by whatever means enjoins the court to address it to meet the ends of justice. The Applicant's Counsel submitted that the judgment of Hon. Justice Nyanzi contravenes certain legal provisions, authorities and judgments that are binding on the present court. This includes section 35 of the **Administrator General's Act, Cap. 157**, which provide that, the revenues of Government shall be liable to discharge any liability which the Administrator General would be personally liable to discharge. In the case of **Administrator General vs. The Uganda Commercial Bank & Mildred Sengooba Salongo (E.A.C.A) No. 12/1977**, court held that the Government is responsible for paying costs owed by the Administrator General and that the accounts of the Administrator General are not liable to attachment to pay costs.

In summary the Administrator General is a government directorate and attachment proceedings are prohibited against him or her under the Government Proceedings Act and rules. Under the Administrator General's Act, the government meets the Administrator General's liabilities and only the principal sum awarded is available with the Applicant.

The Applicant's Counsel contended that the bulk of the money sought to be attached does not belong to the Applicant contrary to section 44 (1) of the Civil Procedure Act because the money belongs to orphans. The test here is whether the Administrator General can enforce payment from the account if he desires to do so for his own benefit (See Halsbury's laws of England (4<sup>th</sup> Edition) Vol. 17 Para 529 where it is stated "The debt must be one which the judgment Debtor could himself enforce within the jurisdiction of his own benefit, for the Creditor acquires no greater rights than those of the Debtor ( restated in Holtby vs. Hodgson Bateson (1889) 24 QBD, 103 at page 108, judgment of Lopes, CJ).

The Applicant's Counsel submitted that in view of the foregoing, the only funds that may be attached is the principal sum of Uganda Shillings 4,203,500/- because it belongs to the Respondent's alleged father. The rest of the amount in the Garnishee Order absolute being the

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costs, interest and damages cannot be obtained from the trust accounts because the amounts thereon belong to estates of deceased persons.

Furthermore, the Applicant's Counsel submitted that the Respondents will not give any authority to show that they are allowed to apply garnishee proceedings to recover costs, damages, and interest against the Applicant. They will cite the decision of this court in **Unique Holdings vs. Business Skills Development Trust Ltd (supra)** to argue that a degree absolute cannot be stopped but can only be set aside under Order 23 of the CPR.

According to the Applicant's Counsel, the Applicant being a government Directorate cannot make use of Order 23 of the CPR because in terms of rule 15 of the Government Proceedings Rules, S.1 77-1 where an order of the kind mentioned in section 19 of the Government proceedings Act has been made, inter alia Order 23 of the Civil Procedure Rules which deals with attachment of debts does not apply. The Applicant's Counsel submitted that the Respondent will fail to produce any decided cases which hold that one can withdraw funds from the accounts of the Applicant by garnishee proceedings. He cited Mildred Lwanga vs. Administrator General & Uganda Commercial Bank (H.C.C.S. 0086/2002) which he contended was flawed because Hon. Justice Katutsi did not order for money to be withdrawn. He simply ordered that the sums on that account should not be depleted below what was demanded by the judgment debtor. Finally he submitted that the case of **Unique Holdings vs. Business Skills Development Trust Ltd (supra)** is distinguishable from the present matter. In that case funds had been deposited onto the judgment creditor's account where in this case money has not yet been deposited pursuant to the garnishee order absolute.

The Applicant's Counsel concluded that in light of the reference to various laws, the judgment of Hon. Justice Nyanzi Yasin was irregular and contrary to clear legal provisions. Its effect is a nullity and incurably bad in terms of **Mac Foy vs. United Africa Co. Limited (1961) 3 All ER 1169**. Counsel urged the court to invoke section 98 of the Civil Procedure Act, to prevent a miscarriage of justice and abuse of the court process. He contended that it was wrong to pay out "orphan's money" to a person the Applicant has never seen whose residence is unknown and when the law and authorities are in favour of the Applicant. The Respondent can proceed under section 19 (1) of the Government Proceedings Act to enforce his claim against the government without disadvantaging orphans.

In reply, the Respondents Counsel submitted that in **HCCS No. 806 of 2008**, the Respondent sued the Applicant for recovery of the benefits of his deceased father from the defunct East African Community which was passed over to the Applicant for payment to the Respondent by the Ministry of Public Service. Judgment was delivered in favour of the Respondent. The Respondent instituted garnishee proceedings and obtained the garnishee order absolute in Miscellaneous Application No. 27 of 2009 on 2<sup>nd</sup> April 2009. Before payment was effected under the garnishee order absolute, the Applicant appealed to the High Court in Civil Appeal No 16 of

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2009 and the Respondent cross-appealed some parts of the decision. The appeal and cross appeal were decided in favour of the Respondent. The decision in the appeal upheld the garnishee order absolute issued by the trial court.

The Respondent then undertook another execution process for garnishee proceedings which culminated into granting another garnishee order absolute on 9<sup>th</sup> January, 2017, which was served on the garnishee on the same date. However, to the Respondent's surprise, the garnishee did not pay the judgment debt in violation of the garnishee order absolute and on 10<sup>th</sup> January, 2017 an ex parte interim order of stay of execution was issued by the deputy registrar of this court staying execution until 16<sup>th</sup> January, 2017, although he had already become *functus officio* in the matter. On 16<sup>th</sup> January, 2017 the interim order expired and there has been no extension but the garnishee has refused to pay.

### **Whether the court has jurisdiction to stay execution and in the circumstances of this suit?**

The Respondent's Counsel submitted that they strongly object to application for temporary stay of execution of the garnishee order absolute. This is because the law governing garnishee proceedings under Order 23 of the Civil Procedure Rules, clearly sets out the process of garnishee proceedings and does not envisage any stay after issuance of the garnishee order absolute.

Garnishee proceedings are conducted through two stages. The first garnishee order nisi which is an order of attachment of the debts of the judgment debtor in the hands of the garnishee operates as an injunction to restrain the garnishee from paying money out of the attached funds until the judgment debtor is discharged or the garnishee order nisi is set aside. At this point if the court is satisfied that there is a legitimate reason for not paying the judgment debt out of the attached debt, the court would halt the execution process by not issuing the garnishee order absolute.

The second stage is the garnishee order absolute, which is an order to pay the judgment debt from the judgment debtor's debt under the garnishee. This ends the execution.

The Respondent's Counsel relied on the case of **Unique Holdings Ltd versus Business Skills Trust Limited High Court (Commercial Division) Miscellaneous Application Number 402 of 2012** where the court held that the garnishee proceedings terminated with the garnishee order absolute and a subsequent interim order issued after issuance of the garnishee order absolute was issued in vain. The law envisages termination of garnishee proceedings by issuance of the garnishee order absolute which marks completion of the garnishee proceedings. Thereafter, the only option an aggrieved party has is to apply to set aside the garnishee proceedings.

Furthermore, the Respondent's Counsel submitted on the Applicant Counsel's prayer that the court should depart from the decision in Unique Holdings Ltd (supra) that there was no convincing reason to depart thereof because the decision was not per incuriam but based on the

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said case law. He urged the court to reaffirm the decision. In light of the interim order issued by the deputy registrar a day after the garnishee order absolute, Counsel submitted that it had no effect and the present application filed days after was filed in vain.

With reference to the case of **Makula International Ltd versus Cardinal Nsubuga [1982] HCB 11**; the Respondent's Counsel contended that the submission that the judgment of Hon. Justice Yasin NYANZI was an illegality was contemptuous of the court. The Applicant opted not to appeal against the decision and simply filed the application for review to waste time and to frustrate execution. Secondly, it is an abuse of court process because the judge clearly articulated that the protection accorded to the Administrator General before the promulgation of the 1995 Constitution is no longer valid. In arriving at his decision, the honourable judge was guided by the Constitutional Court and Court of Appeal decisions according to copies of the decision attached to the submissions for consideration of the court.

Regarding the Applicant's submissions on the application for review, the Respondent is not aware of the existence of such an application because it has not been served.

The Respondent's Counsel further contended that if the application existed, the grounds indicated in the Notice of Motion did not constitute grounds for review as laid out in section 82 of the Civil Procedure Act and Order 46 of the Civil Procedure Rules. For such an application to succeed, the Applicant must be a person aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred by decree or order from which no appeal is allowed and who for the discovery of new and important matter of evidence which, after exercise of due diligence was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or on account of some mistake or error apparent on the face of the record or for some other sufficient reason (see *Byamugisha Baby Coach & Sons Transport Company versus Paulino Chukwu Ejiofor*, HCMA 341 of 2014.) Counsel further submitted that to make matters worse, the application is not supported by any affidavit evidence which would probably have shown that the application for review has merit.

In the premises he prayed that the application should be found to have no merit and should be dismissed with costs to the Respondent.

In reply, the Applicants Counsel submitted that the Respondents produced no authority to support the withdrawal of funds from the Applicant's account by attachment.

The matter before the court is not an appeal from the decision of Hon. Justice NYANZI. It is Hon. Justice NYANZI who will have come to review the judgment he made and there is a high likelihood of success. This is because there is an error apparent on the face of the record.

In Edison **Kanyabwera vs. Pastore Tumwebaze Supreme Court Civil Appeal No. 6 of 2004**, Odoki JSC held that the error apparent on the face of the record entitles a party to apply for

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review. The error may be of fact or of law. In that context, the judgment of honourable Mr Justice Nyanzi Yasin was not backed up by any legal provision or case law and was contrary to the legal provisions. The case of Dr James Rwanyarare and others vs. Attorney General Constitutional Appeal No. 6 of 2002 and Civil Appeal No. 32 of 2002 did not discuss garnishee proceedings or the Administrator General and no court has since attached funds under the control of the Attorney General because of that decision.

The crux of the issue is that the money belongs to orphans and not the Applicant/judgment debtor. A huge sum of Orphans money is being paid out in favour of a person whom the Applicant has never seen; whose identity or place of residence is not known. It is not known whether he is alive. The person was recommended to the office of the Administrator General by persons who have been recently convicted of creating ghosts on the public service payroll. If the money is paid out, the Applicant would not have where to begin to recover it from, if it wins the review.

Furthermore, the Applicants Counsel submitted that the case of Unique Holdings limited (supra) is distinguishable on the ground that in that case, money had already been wired to the account of the judgment creditor.

Furthermore, Counsel emphasised that money is not yet in the hands of the Respondent and the court still has time and opportunity to use its inherent powers under section 98 of the Civil Procedure Act to prevent a terrible injustice of paying out money to the Respondent against clear legal provisions when the beneficiaries of the money are not parties to the suit. The law provides a clear remedy to the Respondent as to how to realise the fruits of his litigation.

The Respondents Counsel had submitted that the only remedy open to the Applicant was to set aside the garnishee proceedings. However, in the case of **Rawal vs. Mombasa Hardware Ltd [1968] EA 392 cited with approval in Adonia vs. Mutekanga [1970] 1 EA 429 Spry VP** held that there is no rule of law that inherent powers cannot be invoked where another remedy is available. The fact that a specific procedure is provided by rule cannot operate to restrict the court's inherent jurisdiction.

Counsel invited the court to exercise its powers under the unlimited original jurisdiction of the court using section 98 of the Civil Procedure Act to prevent a catastrophe that would result if trust money is taken under an illegal process by an unknown person.

Furthermore the Applicant filed Miscellaneous Application Number 697 of 2016. He contended that pleadings can only be served on the opposite party before the matter is fixed for hearing.

In conclusion, Counsel cited the case of **Sunnet Systems Ltd versus Nigeria Electricity Regulatory Commission (NERC) judgment debtor and first bank of Nigeria plc FC 30/HC/CV/979/11 (Motion No M/9372/13)**. In that case his Lordship Justice Valentine B. Ashi

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granted a stay of execution of the decree under the Nigerian equivalent of Section 98 of the Civil Procedure Act because he received information that the judgment creditor who had obtained the decree absolute may be a fictitious legal entity. In the premises the Court ought to depart from the decision in **Unique Holdings** (supra) as it would set a dangerous precedent.

### **Ruling**

I have carefully considered the Applicant's submission as well as the Respondent's submissions on the issue of whether a temporary stay of execution can or cannot be issued staying the execution of the garnishee order absolute against the garnishee bank in respect of monies on an account managed by the judgment debtor/Applicant.

The question before the court addresses a matter of public importance and is also primarily based on points of law which could be easily resolved on the basis of legal doctrine. I will in due course consider the submissions of the Applicant's Counsel that the money attached in the garnishee proceedings is trust money and not liable to attachment under section 35 of the Administrator General's Act. I will also consider the submissions of the Respondent's Counsel that execution proceedings were completed and therefore there is nothing more to stay. Finally I have considered the fact that the application is made by the Administrator General's Department and not the garnishee that is bound by the garnishee order nisi and garnishee order absolute which have already been issued.

Both Counsel of the parties submitted on the parallel points of law in that the garnishee proceedings and attachments of debt are governed by section 38 of the Civil Procedure Act as well as Order 23 of the Civil Procedure Rules. The essence of the procedure for attachment of debts under section 38 (c) of the Civil Procedure Act is that the court moved to attach a debt which is payable to the judgment creditor before it is paid to the judgment debtor. Order 23 of the CPR provides the procedure for doing this. The proceedings are ordinarily between the judgment creditor and the garnishee who owes money to the judgment debtor.

On the other hand, the Applicant relies on section 35 of the Administrator General's Act which makes the revenues of government liable to discharge the liability of the Administrator General if he is made liable as if he were a private Administrator/Trustee. The question of whether the revenue of government is liable addresses the issue of whether the trust account under the management of the Administrator General can be attached at all to offset the liability to a particular beneficiary or where damages are awarded. The arguments address a fundamental point of law and not only the process of execution under Order 23 of the Civil Procedure Rules.

I would deal with the process of execution and also address the fundamental point as to whether the garnishee order absolute amount, the subject matter of the application for a temporary stay order can be executed by attachment of the account of the Applicant and whether the court has jurisdiction where execution has been completed to make any orders staying execution or

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granting a temporary stay of execution as stipulated in the Applicants application pending the hearing of an application for review.

I will start with the decision of this court in **Unique Holdings Limited vs. Business Skills Trust Limited High Court (Commercial Division) Miscellaneous Application No. 402 of 2012**. This is my decision which dealt with the process of execution by attachment of debts. In that ruling I referred to 2 authorities that address the completion of execution as well as the process of execution. The decision does not deal with the substantial rights of the parties as such but the procedure for addressing the rights of the parties in garnishee proceedings.

In **Unique Holdings vs Business Skills Trust Ltd** (supra) the issue for determination was whether the transfer of money from the Applicant's account to the Respondent's account pursuant to the garnishee order absolute completed the process of execution and whether as a consequence there was nothing left for the court to consider in terms of maintaining the status quo by an order of stay of execution. I cited **Words and Phrases Legally Defined** volume 2 and 3<sup>rd</sup> edition London and Butterworth's 1989 at page 195-196 for definition of the word "execution" where it is written that: "in its widest sense signifies the enforcement of or giving effect to the judgments or orders of courts of justice". Furthermore reference was made to the holding of Denning MR on the meaning of "execution" and completion of execution in the case of **Re Overseas Aviation Engineering (GB) Ltd [1962] 3 All ER 12 at page 16** under 325:

"The word "execution" is not defined in the Act. It is, of course, a word familiar to lawyers. "Execution" means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is "completed" when the judgment creditor gets the money or other thing awarded to him by the judgment. That this is the meaning is seen by reference to that valuable old book "Termes de la Ley", where it is said:

"Execution is, where judgment is given in any action, that the Plaintiff shall recover the land, debt, or damages, as the case is; and when any writ is awarded to put him in possession, or to do any other thing whereby the Plaintiff should the better be satisfied his debt or damages, that is called a writ of execution; and when he hath the possession of the land, or is paid the debt or damages, or hath the body of the Defendant awarded to prison, then he hath execution."

The same meaning is to be found in *Blackman v Fysh* ([1892] 3 Ch at p 217), when Kekewich J said that execution means the "process of law for the enforcement of a judgment creditor's right and in order to give effect to that right". In cases when execution was had by means of a common law writ, such as *fieri facias* or *elegit*, it was legal execution: when it was had by means of an equitable remedy, such as the appointment of a receiver, then it was equitable execution. In either case it was "execution" because it was the process for enforcing or giving effect to the judgment of



the court. Applying this meaning of the word “execution”, I should have thought it plain that when a judgment creditor gets a charge on the debtor’s property, it is a form of “execution”, for it is a means of enforcing the judgment.”

The question of whether execution had been completed depended on the wording of the statutory provision and the action taken by the judgment creditor. The following points can be highlighted from the ruling of this court in **Unique Holdings Ltd vs. Business Skills Development Trust Ltd** (Supra).

- A garnishee order nisi binds the debt in the hands of the garnishee. The rule operates as soon as the garnishee order nisi is served on the garnishee.
- By the same order or the subsequent order the court may order the garnishee to appear before the court to show cause why he or she shall not pay to the decree holder the debt due from him or her to the judgment debtor or so much of the debt as may be sufficient to satisfy the decree with costs.
- The garnishee order nisi is also served on the judgment debtor.
- Where the garnishee does not dispute the debt due or claimed to be due from him or her to the judgment debtor or if he or she does not appear upon the day of hearing named in the garnishee order nisi, the court may order execution against the goods of the garnishee together with the costs of the garnishee proceedings.
- Where the garnishee disputes his or her liability, the court, instead of making an order that execution be levied, may order that the issue or question necessary for determining his or her indebtedness should be tried and determined.
- Under rule 5, the garnishee may suggest or advance the argument that the debt sought to be attached belongs to a third party. Subsequent to that, the court may order the third-party to appear and be heard.
- Lastly payment by the garnishee upon execution being levied is a valid discharge of him or her against the judgment debtor to the amount paid or levied. The proceedings or order may be set aside or the decree reversed.

Rules 3 and 7 of Order 23 of the Civil Procedure Rules were considered. Rule 3 provides that where the garnishee does not appear the court may levy execution against the person or goods of the garnishee to levy the amount due from him or her or so much of the amount due as may be sufficient to satisfy the decree together with the costs of the garnishee proceedings. Rule 7 provides as follows:

“Payment made by or execution levied upon the garnishee under any such proceedings as aforesaid shall be a valid discharge to him or her as against the judgment debtor to the amount paid or levied, although such proceedings or order may be set aside or the decree reversed.”

In the case of **Unique Holdings vs. Business Skills Development Trust Ltd** (supra) execution had been levied and the garnishee order nisi had been made absolute and the money had been transferred to the judgment creditor.

As far as case law is concerned, Denning M.R. considered the procedure for attachment of debts in the case of **Choice Investments Ltd vs. Jeromnimon (Midland Bank Ltd, Garnishee)** [1981] 1 All ER 225 at page 227 where he said:

“The word ‘garnishee’ is derived from the Norman-French. It denotes one who is required to ‘garnish’, that is, to furnish, a creditor with the money to pay off a debt. A simple instance will suffice. A creditor is owed £100 by a debtor. The debtor does not pay. The creditor gets judgment against him for the £100. Still the debtor does not pay. The creditor then discovers that the debtor is a customer of a bank and has £150 at his bank. The creditor can get a ‘garnishee’ order against the bank by which the bank is required to pay into court or direct to the creditor, out of its customer’s £150, the £100 which he owes to the creditor.

There are two steps in the process. The first is a garnishee order nisi. Nisi is Norman-French. It means ‘unless’. It is an order on the bank to pay the £100 to the judgment creditor or into court within a stated time unless there is some sufficient reason why the bank should not do so. Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors: see *Pritchard v Westminster Bank Ltd* [1969] 1 All ER 999, [1969] 1 WLR 547 and *Rainbow v Moorgate Properties Ltd* [1975] 2 All ER 821, [1975] 1 WLR 788. If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate. *On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if he himself directed the bank to pay it.* If it is a deposit on seven days’ notice, the order nisi operates as the notice.

As soon as the garnishee order nisi is served on the bank, it operates as an injunction. It prevents the bank from paying the money to its customer until the garnishee order is made absolute, or is discharged, as the case may be. It binds the debt in the hands of the garnishee, that is, creates a charge in favour of the judgment creditor: see *Joachimson v Swiss Bank Corp*n [1921] 3 KB 110 at 131, [1921] All ER Rep 92 at 102, per Atkin LJ. The money at the bank is then said to be ‘attached’, again derived from Norman-French. But the ‘attachment’ is not an order to pay. It only freezes the sum in the hands of the bank until the order is made absolute or is discharged. It is only when the order is made absolute that the bank is liable to pay.” (Emphasis added)

I have carefully considered the ruling in the case of **Unique Holdings vs. Business Skills Development Trust Ltd** (supra) and I have not found any ground or basis for departing from it. It is very clear that the court considered two elements as having culminated in completion of execution in the garnishee proceedings. The first element is that the Garnishee Order Nisi was made absolute thereby operating as an order to pay the debt to the judgment creditor. Secondly, the payment of the debt to the judgment creditor operated as a full discharge of the garnishee from any liability in respect of the payment. The garnishee order absolute is enforceable as an order to pay money and I referred to **Halsbury's Laws of England Volume 17 (1) 4<sup>th</sup> Edition (Reissue) Para 265** where it is written that:

“A final third party debt order is enforceable as an order to pay money.”

Where the bank pays the money as ordered, it operates as a complete discharge of the garnishee and the order of execution is completed.

I agree with the Applicant's Counsel that the decision is distinguishable from the Applicant's application on the ground that in the case of **Unique Holdings vs. Business Skills Development Trust Ltd** (supra) money had been paid to the judgment creditor's account. In this case, the garnishee order absolute has not been complied with by the garnishee and the judgment creditor has not been satisfied.

The question still remains as to whether this court has any residual powers to prevent the garnishee from complying with the garnishee order absolute. The Respondent has not applied for any remedy on account of the non-compliance with the garnishee order absolute because it is an admitted fact that the garnishee bank Messrs Stanbic Bank Ltd has not yet paid the attached debt. That is the practical issue to be resolved in this application.

The facts in support of the application are not in dispute. The Applicant lost Civil Appeal No 16 of 2009 and submitted that it culminated into a decree absolute for the payment of a sum of Uganda shillings 95,771,665/= and that the principal sum was Uganda shillings 4,203,500/= that the Applicant held for the estate of the late Katongole Rajab. Subsequent to the judgment of Hon. Justice Yasin Nyanzi, the Applicant filed Miscellaneous Application No 697 of 2016 at the Civil Division of the High Court seeking for review of the judgment hence the application for a temporary stay of execution.

The wording of the application is troubling because the Applicant applies for a temporary order staying execution of the garnishee order absolute issued against the garnishee bank in respect of the monies held in the bank. In the case of **Unique Holdings Ltd vs. Business Skills Development Trust Ltd** (supra), I held that the correct procedure for the party aggrieved by the garnishee order absolute was to apply, if there were any grounds to do so, to set aside the execution proceedings.

“7. Payment by or execution on the garnishee is a valid discharge.

Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him or her as against the judgment debtor to the amount paid or levied, although such proceeding or order may be set aside or the decree reversed.”

So the remedy for setting aside or reversal of the decree recognises the completeness of the garnishee order absolute. In an application for a temporary stay of execution brought by the judgment debtor, the question is what capacity the judgment debtor has to file this application. The question of capacity is very important because the Administrator General acts on behalf of other people and particularly handles the property of other people. The Administrator General can be sued for breach of trust or any other cause of action which is not directly related to the estate or property he is handling. In this case, the Administrator General was sued by the beneficiary of money paid by the East African Community. He was sued for breach of duty for not having remitted the money to the lawful beneficiary or administrator of the estate. There are situations where the estate administered by the Administrator General may be liable for any liabilities of the Administrator General and there are situations where the government coffers are liable where the Administrator General would have been personally liable i.e. for breach of duty or breach of trust which has nothing to do with the estate administered by the Administrator General. Can another person's property be attached to settle the liability of the Administrator General for breach of trust or breach of duty? It is therefore necessary to set out the various aspects of liability of the Administrator General as provided for in the Administrator General's Act and the Public Trustees Act.

I have accordingly considered section 35 of the Administrator General's Act which provides as follows:

“35. Liability of Government.

The revenues of the Government shall be liable to make good all sums required to discharge any liability which the Administrator General, if he or she were a private administrator, would be personally liable to discharge except when the liability is one which neither the Administrator General nor any of his or her agents could, by the exercise of reasonable diligence, have averted; and in either of those cases the Administrator General shall not, nor shall the revenues of the Government, be subject to any liability.”

The provision clearly provides that the revenues of government shall be liable to make good all sums required to discharge any liability which the Administrator General, if he or she were a private administrator, would be personally liable to discharge. In other words, where the Administrator General is held personally liable, it is the government to meet the liability and not

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any particular estate or trust funds under the administration or management of the Administrator General. The question of which property should meet the liability ordered against the Administrator General/Applicant to this application, does not contest liability in terms of entitlement of the Respondent to the sums awarded by the court. I have accordingly considered the judgment of Hon. Justice Nyanzi Yasin delivered on 18<sup>th</sup> of March 2016 not to reopen the question of liability, but to consider whether the issue of property executed against was tackled and, if so, how. The foundation of the appeal was a suit and judgment in the **Chief Magistrates Court at Mengo in Civil Suit Number 506 of 2008 Kakooza Umaru vs. Administrator General**. The Plaintiff sought for payment of money due to his father as benefits accruing from the defunct East African Community. The amount claimed was **Uganda shillings 4,203,500/=** with interest at 23% per annum. The Plaintiff executed the decree by garnishee procedure against one of the Administrator General's Accounts, namely Stanbic bank account number 0140001087001 at IPS branch for the decretal amount together with the taxed costs amounting to Uganda shillings 7,522,960/=. The Administrator General raised several objections which failed and the garnishee order nisi was made absolute. The Administrator General appealed to the High Court. The garnishee order absolute was upheld and the remedy of interest at 23% per annum from the date of filing the suit on 17<sup>th</sup> April, 2008 till payment in full was allowed.

In this application, the Applicant's grievance is that the money on the account quoted above is not liable to attachment. The issue raised in the cross appeal is against the Chief Magistrate's order that the Respondent has to apply and obtain a certificate of non-satisfaction and serve it on the Attorney General for payment of the Respondent's costs. However the Applicant/Administrator General only appealed on the question of whether Order 23 of the Civil Procedure Rules applies to the Applicant. The issue of whether the learned trial magistrate erred in law and fact when he issued the second garnishee order absolute is corollary to the complaint about whether Order 23 of the CPR which deals with attachment of debts applies to the Administrator General. Among other things it was held that the Administrator General had not filed a defence and the question was whether the Administrator General could raise the question of jurisdiction where he did not file a defence. Honourable Nyanzi Yasin held that all grounds which relate to the suit that the Administrator General did not defend could not be raised at execution level. In other words the suit proceeded in default of a defence. In relation to the issue of whether garnishee proceedings were lawful under the provisions of rule 15 of the Government Proceedings (Civil Procedure) Rules; Statutory Instrument 77—1, the learned Judge held that the rule did not apply and had been overtaken by the enactment of the 1995 Constitution of the Republic of Uganda.

Rule 15 (supra) provides as follows:

“15. Certain provisions of the principal Rules not to apply.

Where an order of the kind mentioned in section 19 of the Government Proceedings Act has been made, the following provisions of the principal Rules shall not apply—

- (a) Order XXII (Execution of decrees and orders);
- (b) Order XXIII (Attachment of debts);
- (c) Order XLII (Appointment of receivers).”

It is quite clear that where a matter proceeded in default, the questions raised by the Applicant in the appeal could not be determined on the merits of the suit but arise from execution proceedings. It follows that the question of whether execution could be levied in the manner it was levied could not be the subject of the appeal on the issue of liability primarily because of the standing of the Applicant in an appeal from a decision where he has filed no defence. In **Sengendo vs. Attorney-General [1972] 1 EA 140** Phadke J at page 141 followed an East African Court of Appeal decision that a Defendant who fails to file a defence puts himself out of court and no longer has any locus standi and cannot be heard in the following words:

“I drew his attention to the decision of the Court of Appeal in Kanji Devji v. Damodar Jinabhai & Co. (1934) 1 E.A.C.A. 87 where it was held that a Defendant who fails to file a defence puts himself out of court and no longer has any locus standi and cannot be heard.”

In conclusion, the submissions and decisions of the court in the appeal giving rise to execution proceedings cannot bar the court executing the decree from considering any grounds of objection to execution of the decree. The liability of the Administrator General is not contested. What is in dispute is whether the bank account, the subject matter of the application, can be attached. This issue was never addressed by the trial judge and is open to consideration in this suit. The issue of whether Order 23 of the Civil Procedure Rules applies is an issue on the merits of the Applicants application for review and will not be considered in this application. I proceed from the premises that Order 23 of the Civil Procedure Rules and section 38 of the Civil Procedure Act on attachment of debts applies.

The Administrator General is a public trustee who receives funds on the behalf of various people and is obliged to deal with the funds in the interest of the beneficiaries thereof. The Administrator General has in his control trust funds for various estates. Trust funds cannot be attached because they belong to other people and are not liable to attachment to answer the liabilities of the Administrator General. The High Court on appeal dealt with the issue of liability of the Administrator General as a party to the suit and whether garnishee proceedings apply. The matter before me has nothing to do with the whether the Administrator General is liable or not. It has nothing to do with whether Order 23 of the Civil Procedure Act applies to the Administrator

General. It proceeds from the assumption that there is an order against the Administrator General which is enforceable and which order is not in dispute.

On the question of procedure the issue is whether execution was completed and there is nothing to stay thereby making this application incompetent.

Furthermore, the Administrator General is a corporation capable of suing and being sued. In any case such as this one, a beneficiary on whose behalf the money was paid to the Administrator General sued for payment of the money under the control of the Administrator General. In addition the court awarded other monies other than the money under the control of the Administrator General and which was held on behalf of the Plaintiff/Respondent to this application. The question is who is to pay for that liability? To what extent is the garnishee order absolute enforceable? Can the order be enforced against money of other estates managed by the Administrator General or monies held on behalf of other beneficiaries? The Administrator General wears the hat of a trustee and the capacity in which he controls the account subject to the garnishee order absolute should be interrogated.

Section 1 (r) of the Trustees Act Cap 164 Laws of Uganda 2000 defines a trust in the following words:

“(r) “trust” does not include the duties incident to an estate conveyed by way of mortgage, but with this exception, “trust” and “trustee” extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and “trustee” where the context admits, includes a personal representative, and “new trustee” includes an additional trustee;”

Anybody holding property for the benefit of another person may be an implied, constructive, express, or resulting trustee. According to **Philip H. Pettit in: Equity and the Law of Trusts, 4<sup>th</sup> Edition London Butterworth’s 1979**, a trust as a right of property held by one person called the trustee for the benefit of another person, the *cestui que trust* or beneficiary. A trust creates an obligation under which a person to whom property is conveyed or transferred is bound in equity to deal with the beneficial interest in such property in a particular manner in favour of a specified object or class of objects or the beneficiary. According to **Osborn's Concise Law Dictionary 11th Edition (Sweet & Maxwell)**, the word “trustee” means:

"A trustee is a person who has the duty (either alone or with others) to administer property for the benefit of other(s), or for the purpose recognised as creating a valid trust.”

The money under the control of the Administrator General does not belong to the Administrator General but to the various beneficiaries on whose behalf the money is held. The Respondent

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indeed sued for that which belonged to his father's estate and he is entitled to it if it is still in possession of the Administrator General. How much money was in the actual possession of the Administrator General for the benefit of the estate administered by the Respondent?

With the above perspective in mind, section 35 of the Administrator General's Act deals with the question or the issue of where the Administrator General will find the money to pay for any liability other than the liability of the estate or trust fund where the Administrator General it is found to be liable personally or where a trustee or private Administrator would have been held liable personally under similar circumstances. In such cases and in relation to the Administrator General, it is from government coffers that the money would be paid.

Similarly the Administrator General is also the Public Trustee appointed under section 1 of the Public Trustees Act cap 161 and The Public Trustee (Appointment of Public Trustee and Deputy Public Trustee) Notice SI 161 – 1, acts as a trustee holding funds for another person. The government is liable to pay out of public funds any liability the Public Trustee incurs if he would have been held personally liable as a private trustee. This is provided for by section 10 of the Public trustees Act Cap 161 which provides as follows:

“10. Government liability for Acts of public trustee.

The Government shall be liable to make good out of the public funds of Uganda all sums required to discharge any liability which the public trustee, if he or she were a private trustee, would be personally liable to discharge, except when the liability is one to which neither the public trustee nor any of his or her officers or agents has in any way contributed, and which neither he or she nor any of his or her officers or agents could by the exercise of reasonable diligence have averted, and in that case the public trustee, his or her officers or agents shall not, nor shall the Government, be subject to any liability.”

Liability is no enforced against trust funds but against public funds of Uganda.

Proceedings against the Administrator General are expressly catered for by the Administrator General's Act in relation to who would meet the liability which arises and where money ordered to be paid to the Administrator General is paid. The Administrator General may under specified circumstances charge fees for his or her expenses from the estate funds (the estate or trust fund he or she is administering). This is made clear by section 20 of the Administrator General's Act which provides as follows:

“20. Fees and expenses.

(1) There shall be payable to the Administrator General out of every estate administered by him or her or his or her agents fees at such rates as the Minister may by rule prescribe.



(2) The Administrator General shall be entitled to reimburse himself or herself for any payments lawfully or reasonably made by him or her or his or her agents in respect of any estate in his or her or their charge.

(3) Where the Administrator General considers it necessary, in the interests of an estate which he or she is administering, to employ outside clerical or other assistance, he or she may do so and the costs of the assistance shall be a charge upon the estate.

(4) The fees, charges and reimbursements authorised by this section and section 21 shall be a first charge on the estate, after payment of funeral expenses, and may be deducted from any monies received by the Administrator General in the course of the administration.

(5) All such fees shall be paid by the Administrator General into the Consolidated Fund."

The fees, charges and reimbursements are payable from the estate. What will be the case where it is the beneficiary or administrator of the estate who sues the Administrator General for keeping property of the estate, as is the case in this situation? The Administrator General is charged with the duty of care and may only incur expenditure on such acts as may be necessary for the proper care and management of any property belonging to any estate in his or her charge. This is provided by section 21 of the Administrator General's Act which stipulates as follows:

"21. Power to incur expenditure.

The Administrator General may, in addition to and not in derogation of any other powers of expenditure lawfully exercisable by him or her, incur expenditure—

(a) on such acts as may be necessary for the proper care and management of any property belonging to any estate in his or her charge; and

(b) with the sanction of the court, on such religious, charitable and other objects and on such improvements as may be reasonable and proper in the case of such property."

In the case such as the present one where the Administrator General was held liable, his obligation, in relation to the funds for which he was sued, ends with handing over the property of the Plaintiff or paying back the Plaintiff, if the funds are still available. I am mindful of the law that in this case the Administrator General did not act as an administrator of the estate but as a Public Trustee holding funds paid by the Public Service for the benefits of the lawful beneficiaries thereof. If the funds have been misappropriated, the coffers of government will be liable. Any damages and costs together with interest awarded against the said Administrator General is payable by the government. It is not payable out of any estate or trust money which belongs to third party beneficiaries. To do so in a manner not authorized by the trust or the law would have amounted to a fraudulent conversion of trust property had the Administrator

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General/Public Trustee acted as a private person. Fraudulent conversion of trust property is an offence under section 322 of the Penal Code Act cap 120 Laws of Uganda. The payment of money of another beneficiary to another purpose not authorized by law would amount in law to fraudulent conversion of trust property. For emphasis I will quote from section 322 of the PC which provides as follows:

“322. Fraudulent disposal of trust property.

(1) Any person who, being a trustee of any property, destroys the property with intent to defraud, or, with intent to defraud, converts the property to any use not authorised by the trust, commits a felony and is liable to imprisonment for seven years.

(2) For the purposes of this section, the term trustee means the following persons and no others—

(a) trustees upon express trusts created by a deed, will or instrument in writing, whether for a public or private or charitable purpose;

(b) trustees appointed by or under the authority of a written law for any such purpose;

(c) persons upon whom the duties of any such trust as aforesaid devolve;

(d) executors and administrators.”

Conversion of property not authorised by the trust or the law applicable to the trustee is a criminal offence. It follows that the money itself under the charge of the Administrator General/Public Trustee cannot be attached because it belongs to beneficiaries on whose behalf they are held. One may argue that the Respondent is a beneficiary. Yes. The Respondent as a claimant is entitled to the trust fund under the control of the Administrator General/Public Trustee but not more than the monies held on his behalf together with the interest thereon if any which accrues and is applied by the Trustee.

This brings me to the last arm of the analysis. Because trust funds belong to the beneficiaries thereof, the Administrator General/Public Trustee is only a trustee of those funds and the accounts are not liable to attachment to answer liabilities which are not authorized or lawful to be incurred. To do so would be illegal and contrary to the express provisions not only of the Administrator General's Act, the Public Trustees Act or any express or implied principles for management of trust property. It would also violate the spirit of section 322 of the Penal Code Act. The Administrator General/Public Trustee as a party objecting to attachment does not do so in his personal capacity in which he is held liable in the original suit but acts in the capacity of a trustee managing the account which was attached. The Administrator General ought to have brought objector proceedings and perhaps in the name of the Public Trustee rather than apply for a temporary stay of execution pending review. Objector proceedings are part and parcel of

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execution proceedings. All legal representatives when sued or when they sue need to be properly described under the rules of the court. The capacity in which a person is sued or in which he or she sues has always to be pleaded. This enables the litigant and the court to make the necessary orders. Where a Plaintiff sues in a representative character, Order 7 rule 4 applies and provides that the Plaintiff is not only to show that he or she has an actual existing interest in the subject matter but that he or she has taken the steps, if any, necessary to enable him or her to institute a suit concerning it. Order 7 rule 5 of the Civil Procedure Rules provides that the plaintiff shall show that the Defendant is or claims to be interested in the subject matter, and that he or she is liable to be called upon to answer the Plaintiff's demand. Finally Order 7 rule 9 (2) of the CPR provides that:

"where the Plaintiff sues, or the Defendant or any of the Defendants is sued, in a representative capacity, the statement shall show in what capacity the Plaintiff or Defendant sues or is sued."

Such a pleading would go a long way to ensure that the judicial officer can make the appropriate order in terms of whether the estate administered by the legal representative is liable or whether the administrator or executor is personally liable. This is recognised by section 39 of the Civil Procedure Act which makes it clear that execution can be levied against the estate or against the personal legal representative personally. Section 39 of the Civil Procedure Act provides as follows:

“39. Enforcement of decree against legal representative.

(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment debtor, and he or she fails to satisfy the court that he or she has duly applied such property of the deceased as is proved to have come into his or her possession, the decree may be executed against the judgment debtor to the extent of the property in respect of which he or she has failed so to satisfy the court in the same manner as if the decree had been against him or her personally.”

Even if the Administrator General is not a legal representative of the deceased in the sense that he or she has no grant of letters of administration, as I noted the Administrator General/Public Trustee would act as a trustee until he or she pays the money to the proper legal representative appointed by court.

It is also apparent from the provisions of the Administrator General's Act and the Public Trustees Act that the Administrator General only acts as a trustee. It would therefore be illegal

and contrary to the laws of Trusts to attach the property of other beneficiaries or *cestui que trust* under the charge of the Administrator General/Public Trustee except what he or she holds for that particular beneficiary for which he or she is accountable. Last but not least specific provisions provide for actions against the Administrator General. The actions envisaged are those actions brought by creditors or claimants against the estate administered by the Administrator General. It is also apparent from the provisions that in case the creditor or claimant succeeds in the suit, it is the estate administered by the Administrator General which is liable to pay the claimant or creditor. This is clearly distinguishable from the liability of the Administrator General in a personal capacity had he or she been a personal trustee or administrator of an estate. Such liabilities can arise from breach of trust. Section 22 of the Administrator General's Act provides as follows:

“22. Actions against Administrator General.

(1) If any suit be brought by a creditor or any other claimant against the Administrator General, the creditor or claimant shall be liable to pay the costs of the suit unless he or she proves that not less than one month previous to the institution of the suit he or she had applied in writing to the Administrator General, stating the amount and other particulars of his or her claim, and had given such evidence in support of the claim as, in the circumstances of the case, the Administrator General was reasonably entitled to require.

(2) If any such suit is decreed in favour of the creditor or claimant, he or she shall, nevertheless, unless he or she is a creditor within the provisions of section 280 or 282 of the Succession Act, be only entitled to payment out of the assets of the deceased equally and rateably with the other creditors.”

Furthermore where the Administrator General is awarded costs, the costs are payable to the government coffers and not to the estate administered. Section 23 of the Act provides as follows:

“23. Right of Administrator General to costs.

When the court orders the cost of the proceedings, to which the Administrator General is a party, to be paid otherwise than out of the estate of a deceased person which is being administered by the Administrator General, the Administrator General shall be entitled to charge ordinary profit costs, whether he or she has appeared in person or not, based on any written law relating to the remuneration of advocates and taxation of costs for the time being in force, and those costs shall be credited to the Consolidated Fund.”

In the final analysis the conclusion is that the account of the Administrator General/Public should not be attached unless there is evidence that it has money due to someone whose money kept by the Administrator General/Public Trustee which sum can be attached. In a unique case where it is

the beneficiary suing for what is due the Administrator General/Public Trustee can only pay what he has for that estate and for which he or she is accountable with accounts to be kept and subject to a right of inspection. Any other payment for which, if he were a private administrator, he would be liable is payable by the Government. This may be damages, interests awarded by court and costs. Interest accruing on a trust fund i.e. arising out of investment of trust funds is part of the trust fund.

Finally a stay of execution cannot be issued in this application because there is nothing to stay. The garnishee order absolute completes execution proceedings and it can only be set aside. However as I have noted above, the money has not yet been paid and it is illegal to attach a trust account which belongs to beneficiaries whose funds are under the control of the Administrator General/Public Trustee. Following the decision in **Makula International vs. His Eminence Cardinal Nsubuga and another reported in [1982] HCB 11**, an illegality once brought to the attention of court overrides all questions of pleadings including any admissions made therein. In other words even the wrong procedure can be overlooked. The Administrator General ought to have moved by way of objector proceedings on behalf of the beneficiaries of the trust account to object to attachment and to have the account released from attachment.

The proposition of law that an illegality once brought to the attention of court overrides all questions of pleadings including any admissions made therein is found in the Ugandan case of **Makula International vs. His Eminence Cardinal Nsubuga and another reported in [1982] HCB 11** and holding No. 16 of the digest of the case, that the court could interfere with a taxing officer's order even where the appeal from the order was incompetent. They held that "a court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon. The Court of Appeal cited with approval **Belvoir Finance Co. Ltd vs. Harold and G Cole & Co. Ltd [1969] 2 ALL ER 904** and judgment of Donaldson J at page 908 as well as the case of **Mercantile Credit Co. Ltd vs. Hamblin [1964] 1 ALL ER 680**. In **Mercantile Credit Co. Ltd vs. Hamblin** (Supra), it was asserted for the Plaintiff that for illegality to be argued in defence, it had to be pleaded. The Defendant sought leave to amend the defence. John Stephenson J held that Counsel was not acting improperly to draw courts attention to an illegality of the transaction. On the contrary it was Counsel's duty, however embarrassing to prevent the court from enforcing an illegal contract.

Since the account in question is a trust account and it is unlawful to attach it in the sense that the attachment would amount to conversion of trust funds in a manner not authorised by the trust or the law, the Administrator General's Account No. 9030005842084 formerly Account No 0140001087001 with Stanbic Bank IPS branch is hereby released from execution proceedings. Save for money held on behalf of the Respondent by the Administrator General, the rest of the Respondent's money under decree of court shall be paid by the Government of Uganda. The costs of this application shall be paid by the Applicant.

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Ruling delivered on the 3<sup>rd</sup> of October 2017

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Baku Raphael for the Respondent and also holding brief for Rwaganika Henry who has personal conduct of the application

Robert Bogere for the Administrator General

Rose Obote: Court Clerk

**Christopher Madrama Izama**

**Judge**

**3<sup>rd</sup> October 2017**