**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**

**COMMERCIAL DIVISION**

Reportable
Miscellaneous Application No. 2855 of 2023

In the matter between

**VISARE UGANDA LIMITED** **APPLICANT**

**And**

**1. FESTUS KATEREGA T/a QUICKWAY AUCTIONEERS**

**2. GRANT THONTON MANAGEMENT LIMITED**

**3. YI HAI PROPERTY SERVICING COMPANY LTD**

**4. COMMISSIONER LAND REGISTRATION** **RESPONDENTS**

**Heard: 13 February, 2024.**
**Delivered: 19 February, 2024.**

***Civil Procedure -*** *service of Court process - electronic service - electronic service of court process has been accepted as effective - for electronic service of court documents to be effective, there must be confirmation of delivery to the opposite party - where the electronic mode used is designed or structured purposely with the intended result of notifying the opposite party of the existence of court proceedings, such as ECCMIS, the recipient will be deemed to have been duly served upon validation of the court process intended to be served - service of court process through the Court's electronic-filing system is effective for all those parties whose contact information of service is already uploaded into the system, upon filing of the main pleading and response thereto, and all subsequent applications arising therefrom which are thereto linked - Service on and by all parties who are not represented by an advocate and who do not designate an e-mail address, and on and by all advocates excused from ECCMIS e-service, must be made by delivering a copy of the document in accordance with Order 5 of The Civil Procedure Rules.*

***Civil Procedure*** *- leave to appeal - Order 44 rule 2 of The Civil Procedure Rules - An applicant seeking leave to appeal must show either that his or her intended appeal has a reasonable chance of success or that he or she has arguable grounds of appeal and has not been guilty of dilatory conduct - leave will be granted where the points intended to be raised on appeal are normative in nature and have weighty ramifications that go beyond the parties to the dispute -.*

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**RULING**

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**STEPHEN MUBIRU, J.**

Introduction:

[1] On or about 24th February, 2017 the applicant obtained a loan from KCB Bank Uganda Limited for facilitating the completion of the construction of a block of condominium residential apartments on its land comprised in LRV 2651 Folio 9 Plot 65A located along the Lugogo Bypass in Kampala. As security for the loan, the applicant executed a mortgage over the title to the same land in favour of the bank. The applicant constructed a total of forty-four (44) units of residential condominium apartments but defaulted on the loan. Upon default on the obligation to pay the US $ 1,930,813 as agreed, the Bank initiated a process of foreclosure. The applicant filed HCCS No. 898 of 2019 to challenge the foreclosure and sale of the property by KCB Bank Uganda Limited.

[2] In order to raise part of the funds outstanding due under the mortgage, the applicant had on 31st December, 2019 signed an agreement with the M/s Grant Thornton Management Limited, selling twelve (12) out of the forty-four (44) units to M/s Grant Thornton Management Limited at the price of US $ 2,400,000. M/s Grant Thornton Management Limited paid US $ 500,000 to the bank in satisfaction of the condition for stay of the sale as ordered by court. It was agreed that in the event the applicant was unable to raise the balance outstanding by 31st December, 2020 then M/s Grant Thornton Management Limited was to raise an additional US $ 1,900,000 in order to redeem the applicant's mortgage.

[3] Subsequently, a tripartite memorandum of understanding between the applicant, M/s Grant Thornton Management Limited and KCB Bank was executed on 28th February, 2020 by which it was agreed that the mortgage would be redeemed upon payment of US $ 1,930,813. It is on that basis that on 26th March, 2020 a consent judgment had two days before been entered in the suit between KCB Bank Limited, M/s Grant Thornton Management Limited and the applicant. Eventually the court signed and sealed the consent judgment/decree on 31st August, 2020 whereby part of the loan repayment was to be financed by the third-party M/s Grant Thornton Management Limited. While the applicant reserved the right of redeeming the 12 units by 31st December 2020, M/s Grant Thornton Management Limited reserved the right to cause transfer of the 12 units into its name or sell the security in the event of the applicant's default.

[4] The applicant having defaulted and there being no independent titles yet to the 12 condominium units, M/s Grant Thornton Management Limited subsequently on or about 30th April, 2021 applied for attachment and sale of the entire land comprised in LRV 2651 Folio 9 Plot 65A, on account of the applicant's default. The applicant challenged the attachment in execution vide Civil Appeal No. 722 of 2021. In a decision delivered on 11th January, 2022 the set aside that warrant of attachment on ground that by virtue of Order 22 rule 14 (4) of *The Civil Procedure Rules,* an order of attachment should affect only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree.

[5] Following that decision, the 1st respondent undertook a valuation of the entire property the result of which revealed, in a report dated 20th October, 2022 that the Market Value of this property is in the sum of US $ 12,250,000 while its Forced Sale value is in the sum of US $ 8,000,000. On that basis, the court issued a warrant of attachment and sale of the following; twelve (12) 3-bedroom units valued at US $ 182,000 each, hence a total of US $ 2,184,000 all comprised in Bock "B"; and ; fifteen (15) 3-bedroom units valued at US $ 182,000 each, hence a total of US $ 2,730,000 and one 2-bedroom unit valued at US $ 170,000 all

comprised in Bock “C”, rendering the total value of the property attached as US $ 5,084,000 for the recovery of the then decretal sum of US $ 5,501,540 exclusive of the costs of recovery.

[6] Attempts at securing a buyer of only two out of the three blocks having been unsuccessful and with potential buyers / bidders expressing interest only in the entire property inclusive of Block “A,” the 1st respondent sought a variation of the order of 11th January, 2022 that required the Registrar to attach only such portion of the property as may seem necessary to satisfy the decree. Consequently, upon a reference to this Court from the Deputy Registrar, the order was by a ruling delivered on 23rd January, 2023 varied and leave was granted for the sale of the entire property.

[7] Following that decision, the 1st respondent on 27th February 2023 caused publication of a notice of sale in “The New Vision” newspaper for a sale by public auction due on 30th March 2023. On 13th March, 2023 counsel for the judgment creditor lodged the duplicate certificate of title and original valuation report by M/s Byokusheka and Company dated 20th October, 2022 with the Court. The Acting Assistant Registrar upon examining the duplicate certificate of title directed counsel for the 2nd respondent to retain it in view of the terms of the consent judgment/decree. Following the sale of the suit property, the 1st respondent filed a return in court on 17th April, 2023 showing that the property was sold to the 3rd respondent at the price of US $ 9,000,000. The proceeds of the sale in excess of the decretal sum less my taxed costs are to be paid to the applicant within 14 days from the date of the ruling ascertaining the costs recoverable, which ruling is still pending the decision of Court.

[8] The applicant then filed an application seeking orders that; (i) the sale and transfer of Leasehold Volume 265 I Folio 9, Plot 65, 4 Lugogo Road Kampala by the 1st respondent to the 3rd respondent be cancelled and set aside; (ii) the Commissioner for Land Registration do reinstate the applicant as the registered proprietor of

Leasehold Volume 2651 Folio 9, plot 65A Lugogo Road Kampala; (iii) the respondents be restrained from alienating or dealing with Leasehold Volume 2651 Folio 9, plot 654 Lugogo Road Kampala; (iv) in the alternative to the foregoing, the 1", 2nd and 3rd respondents do jointly and severally pay to the applicant the market value of the property less the lawful decretal sum, interest and costs.

[9] The applicant contended that the sale was illegally conducted without the duplicate certificate of title being first deposited in court, the decree and warrant of attachment were not registered on the title before the purported sale and transfer, the sale was conducted without a valid valuation of the property, the 1st respondent did not notify the applicant of any valuation of the property prior to the purported sale, the 1st respondent failed to deposit the proceeds of the purported sale in court, and that the sale is a sham perpetuated by the 1st, 2nd and 3rd respondents. The applicant contends that the consent judgement created a mere security in favour of the 2nd respondent, but not a judgement debt capable of realization by execution.

[10] Execution commenced when the 1st respondent was issued a warrant of execution of sale on 23rd February, 2022 which was later renewed on 27th March, 2023, while the warrants had no foundation in the decree in absence of prior proof of default or liability being ascertained by any court. The sale ensued by an agreement dated 14th April, 2023. The 1st respondent in connivance with the 2nd respondent purported to illegally allow the 3rd respondent to withhold 6 % of the purchase price (US $ 540,000) as withholding tax and remit it to Uganda Revenue Authority.

[11] In a ruling delivered on 22nd November, 2023 this Court decided that the parties had executed a consent judgment attaching the entire property in which all that remained for the Court to do was to enforce it as it stands. Triggering the enforcement of this decree required no more than the 2nd respondent, as judgment creditor, stating that the applicant had breached the terms of the agreement, in which event a notice to show cause why execution should not issue, would be

served upon the applicant. The decree was capable of enforcement by execution and the warrants of attachment and sale were justifiably issued for that purpose. The sale was not conducted illegally since the duplicate certificate of title had been lodged with the court and was at all material time was in the physical custody of an officer of the court empowered by the Court to hold the title deed. The memorials entered onto the original title showed that at the time of sale on 14th April, 2023, the land comprised in LRV 2651 Folio 9 Plot 65A located along the Lugogo Bypass in Kampala was the subject of a lien securing the judgement debt and interest thereon, upon which the execution issued. The Court therefore found that the decree and warrant of attachment were duly registered on the title before the sale and transfer of the land to the 3rd respondent. The fact that those entries were not reflected on the duplicate certificate of title was a mere irregularity.

[12] This Court found further that no irregularity in the process leading up to the sale should vitiate the sale unless the applicant proves to the satisfaction of the Court that he or she has sustained substantial injury by reason of such irregularity. Although the two valuations of the property were seven months apart, both were pegged to the United States Dollar such that any changes in the exchange rate did not affect the valuation of the suit property. The sale was based on a proper valuation of the property. Mere inadequacy of price upon sale under a decree or failure to notify the applicant as judgment debtor of the value of the property, which too was in the circumstances of the case was a mere irregularity, was not sufficient ground for setting aside the sale and ordering a resale, in the absence of any showing of fraud, collusion, unfairness, or oppression, or unless the inadequacy is so gross as necessarily to raise the inherence of fraud or imposition; or in the absence of evidence tending to show bad faith, unfairness in the conduct of the sale, the deterring of bidders, an undue advantage taken of the ignorance or weakness of the persons whose property rights are affected by the sale, or other circumstances tainting the transaction with fraud, and entitling the parties injuriously affected to equitable relief. For practical reasons, the Court opted to authorise the 1st respondent to retain the funds and since in its view it can still

exercise its mandate to direct the distribution of the sale proceeds. That too is not a ground for vitiating the sale. The application was accordingly dismissed.

The application.

[13] The application by Notice of motion is made under the provisions of section 98 of *The Civil Procedure Act*, and Order 44 rule 1 (2), (3), (4), as well as Order 52 rules 1 and 2 of *The Civil Procedure Rules.* The applicant seeks leave to appeal the above decision. It is the applicant's case that the intended appeal raises serious questions of law and fact; there are serious and important points of law which require reconsideration by the Court of Appeal, to wit; (i) whether an Assistant Registrar of Court can make a finding that a party breached an agreement; (ii) whether section 48 of *The Civil Procedure Act* and Order 22 rule 51 (1) of *The Civil Procedure Rules* may be satisfied by constructive custody of the title deed through counsel for the judgment creditor; (iii) whether the non-registration of the attachment on the duplicate certificate of title as required by section 46 (3) of *The Registration of Titles Act*, is an immaterial irregularity that does not vitiate the sale; and (iv) whether the bailiff may be authorized by court to keep custody of the proceeds of sale. The applicant prays that the costs of this application abide the result of the appeal.

The 1st respondent's affidavit in reply;

[14] In the 1st respondent's affidavit in reply, it is contended that on 23rd January, 2023 the 2nd respondent obtained a ruling authorising the sale of the entire property comprised in Leasehold Register Volume 2651 Folio 9, Plot No. 65A, Lugogo Bypass Road, Kampala, measuring 0.351 hectares and all developments thereon. On 23rd February 2023, he was appointed by this Court to attach and sell the suit property to recover the judgment debt. On 13th March, 2023, Counsel for the 2nd respondent appeared before the Acting Assistant Registrar for the purpose of endorsement of the order of sale and explained to her that the duplicate certificate of title had been in the 2nd respondent's possession having been received pursuant to the consent judgment/decree in the suit and a memorandum of settlement of

debt which was executed between KCB Bank Uganda Limited, the applicant and the 2nd respondent. The Acting Assistant Registrar directed that Counsel retains the duplicate certificate of title. The Court endorsed the order of sale and directed the 1st respondent to deliver to the Judgment Debtor the proceeds of the sale in excess of the decretal sum less the Bailiff's taxed costs within 14 days from the date of the ruling.

[15] The 1st respondent's bill of costs was on 12th December 2023 taxed and allowed at US $ 277,000.08. On 13th December, 2023 the 1st respondent gave an accountability of the proceeds of sale of the property to the Court and also, requested the judgment debtor's advocates to avail him client's account details to enable him to deposit the balance of US $ 2,107,933.40. The applicant's advocates provided their bank account details, and later acknowledged receipt of the sum. On 30th January, 2024 the 1st respondent executed a compromise on my bill of costs with the applicant by which his fees and disbursements were agreed at US $ 94,400.

The 2nd respondent's affidavit in reply;

[16] In the 2nd respondent's affidavit in reply, it is contended that as part of the consent judgment, it was agreed that the 2nd respondent would keep the duplicate certificate of title to the suit property in its custody until 31st December 2020 when the applicant would exercise the option to refund the amounts as agreed between the 2nd respondent and the applicant or execute sale agreements with the 2nd respondent or its associates. In the event that the applicant did not exercise any of those options, then the 2nd respondent would be entitled to sell the suit property to recover the said agreed amounts. On 22nd April, 2021 the applicant appeared in Court to show cause why a warrant of attachment and sale of the suit property should not issue. The proof of default and/or liability were determined by the court. The court issued a warrant of attachment and sale of the suit property in that application. The 2nd respondent's advocates have since 10th January, 2024

demanded for the taxed costs but the applicant has failed and/or refused to pay the costs.

The 3rd respondent's affidavit in reply.

[17] In the 3rd respondent's affidavit in reply, it is contended that the Notice of Motion is invalid and not properly before the court since it was served out of the statutory timelines on 24th January 2024. The Notice of Appeal was filed on 27th November, 2023 and endorsed by the court on 28th November, 2023 and to date has never been served and as such an appeal cannot be maintained on the basis of this incurably defective Notice of Appeal. The applicant has not filed a letter requesting for a record of proceedings and as such no Memorandum of Appeal can be filed since the time for its filing has long expired. Following the dismissal of the application the 3rd respondent was under the impression that the matter had been finalized· and that there would be no appeal and thus instructed its advocates to recover costs awarded in the matter on basis of which they filed a bill of costs and served the applicant's lawyers with a letter requesting for a pre-taxation meeting.

[18] Surprisingly on 24th January, 2024, more than two months after the ruling, the applicant served this application. The applicant has not shown any reasonable plan on ever settling its indebtedness in the circumstances and therefore the application is not brought in good faith. In the meantime, the 3rd respondent has made significant improvements to various amenities and fixtures on the suit property, disposing of other properties owned and making arrangements to rent out and stay on the property, all of which actions were taken under the impression that the matter had been finally determined and there would be no appeal. The 3rd respondent company will therefore suffer extreme prejudice if the application is granted given that investments made into the suit property under the impression that the matter had been finalized will stand to be at risk. The applicant has not raised any reasonable grounds that merit serious judicial consideration to warrant grant of leave to appeal against the decision of the Court.

Submissions of counsel for the applicant;

[19] Counsel for the applicant submitted that once leave is granted, the applicant has a statutory right to file the notice of appeal and then time will begin to run. The High Court has no jurisdiction to declare a notice of appeal invalid; it can only be struck out by the Court of Appeal. Its validity cannot be inquired into by this Court. Rule 44 of *The Judicature (Court of Appeal) Rules*, applies to applications before the Court of Appeal. Compliance with the decree is not a bar to the right to appeal. The appellate Court can order restoration to the previous position. Legal Notice No. 6 of 2019 on electronic service guides that if a party is linked, they are deemed to have received notification upon validation of a document filed. Authority may be found in C*. A. Civil Appeal No. 09 of 2022 Equity Bank U ltd v Simbamanyo Estates*, and *H. C. (LD) Misc. Application No. 898 2023 Kensington v. Uganda Crop Industries Limited*.

Submissions of Counsel for the 1st and 2nd respondents;

[20] Counsel for the 1st and 2nd respondents submitted that under Rule 41 of *The Judicature (Court of Appeal) Rules* the application may be made before or after notice of appeal is lodged. Rule 78 (1) of the same rules makes it mandatory to serve a notice to appeal within 7 days which has not been done. Rule 83 (3) provides that a request for the record is to be made within 30 days of the decision. *Sgt. Oumo Joshua v. Wanyoto S.C. Civil Appeal 17 of 2022* interpreted it to be mandatory to serve the notice of appeal. Rule 44 (4) of *The Court of appeal Rules* requires formal application to be accompanied by the decision sought to be appealed, or order of the High Court refusing the application. The affidavit in reply of the 1st respondent paragraph 11 – 15 refers to the bills having been taxed; the balance was remitted to the applicant's account. The appeal is moot since the applicant has taken benefit of the proceeds of sale. Case 4 and 5 on the list of authorities state the test for the merits of the appeals; the applicant is guilty of dilatory conduct and cannot file a fresh notice of appeal.

Submissions of Counsel for the 3rd respondent;

[21] Counsel for the 3rd respondent submitted that the notice of appeal is defective. Rule 41 (1) of *The Court of Appeal Rules* permits making an application before or after the leave is granted. The notice of appeal was filed on 27th November, 2023 but has never been served to-date. It ought to have been served within 7 days as per Rule 78. It should have been served by 5th December, 2023. It is intended to put the party on notice and thus guide on how to deal with the judgment property. He thought that the matter had come to an end. The notice of appeal is incurably defective. Having chosen to file the notice before leave, they ought to have applied for the record of proceedings and hence the 60-day period has also lapsed. *Horizon Coaches S. C. Civil Appeal 20 2001*.

[22] The application is defective since the motion was served on 24th January, 2024 outside the 15 days prescribed. The application was filed on 24th November, 2023 endorsed on 2nd December, 2023. It was received under protest and without prejudice. Order 5 rule 1 (2) provides for 21 days for service of summons. *Bitaminsi v. Rwabuganda CA 16 of 2014* failure to apply for extension, the suit dismissed without notice. *Gatete and another v. William Kyobe S.C. CA 7 of 2005* is to the same effect. This also amounts to dilatory conduct. The application does not disclose sufficient grounds. *S. C. Civil Appeal No. 3 of 1992 Hannington Wasswa and another v. Maria Ochola*, Rules can be overridden by court Order. *Masud Amani Abdala v. Olam Uganda Limited, H.C. CS. 39 of 2022* posits that the rationale for the rule should be considered. For deposit of title, it is to guarantee good title.

The decision.

[23] As regards the timeliness of service of this application, it was argued by Counsel for the 3rd respondent that since this application was filed on 24th November, 2023 and endorsed by Court on 2nd December, 2023 it was served out of time on 24th

January, 2024 outside the time prescribed by Order 5 rule 1 (2) of *The Civil Procedure Rules* which specifies 21 days for service of summons. That notwithstanding, Courts are encouraged to take a proactive stand to adopt modern and new technology for communication and with time dispense with antiquated court processes and procedures in relation to service of court process (see *Abela and others v. Baadarani, Trinity Term (2013) UKSC 44* and *Gray v. Hurley [2019] EWHC 1636 (QB*) Rule 7 (2) (c) of *The Constitution (Integration of ICT into the Adjudication Processes for Courts of Judicature) (Practice) Directions, Legal Notice No. 6 of 20I9* requires parties at all stages of the court process and during trial, to use technology for purposes of information exchange and to serve documents electronically through email, instant messaging applications and any other widely used electronic communications service.

[24] On basis of that provision, electronic service of court process has been accepted as effective such as in *Male H. Mabirizi v. Attorney General, H. C. Misc. Application No. 918 of 2021* (service by e-mail); *Musumba Isaac Isanga v. Quid Financials Ltd, H. C. Misc. Application No. 139 of 2020*, (service by WhatsApp messenger); *Nyanzi Fred Sentamu v. The Electoral Commission and 2 others, C. A. Misc. Application No.10 of 2021 arising from Election Petition Appeal No.20 of 2021* (service by WhatsApp messenger).

[25] It has been held though that for electronic service of court documents to be effective, there must be confirmation of delivery to the opposite party; for example, where the addressee acknowledges receipt of the documents by sending a message to the sender or where there is an automated response confirming delivery. Where the addressee denies receipt of the court summons, the onus is on the sender to prove that the summons was indeed delivered (see *Peace Barigye v. Rosemary Kizza Omamteker, H.C. Misc. Application No. 2075 of 2022*). In cases of service of summons by e-mail, it must be proved that: the e-mail is undisputedly connected to the party being served; that the e-mail address is used for business purposes; and that the addressee regularly monitors its e-mail

addresses. Service of court summons through WhatsApp is effective where it is proved that the sender's smart phone or other electronic gadget displays double blue ticks.

[26] Exceptionally, where the electronic mode used is designed or structured purposely with the intended result of notifying the opposite party of the existence of court proceedings, such as ECCMIS, the recipient will be deemed to have been duly served upon validation of the court process intended to be served. This is because the system allows the entry of email addresses for people who wish to receive notifications of activity in the case. Although ECCMIS is a tool of convenience that was never intended to and indeed did not amend provisions of *The Civil procedure Rules* regarding the service of process, to the extent practicable its use is adaptable to the applicable rules governing the filing and service of documents, and to such other and further processes as the Court may require from time to time.

[27] Faced with ever expanding caseloads, the Judiciary of Uganda has looked at the concept of "electronic filing" as a way to reduce the considerable demands of handling physical case files and to reduce the long-term costs of storing official documents in Court records. It is then the duty of the Courts, in order to implement the "full service" model of electronic filing; including not only the transmission of electronic documents into the courts, but also the routine use of electronic documents and the electronic record for case processing, for service on other parties, and for access and use by everyone involved in, or interested in, the case, to adapt *The Civil procedure Rules* to the ECCMIS environment.

[28] It is thus the obligation of registered ECCMIS users to maintain proper delivery information in that system. Notices of electronic filing are only sent to persons who have associated themselves with a case, to whom such notifications continue to be sent until they have filed a proper withdrawal of appearance in a case and, if applicable, obtained an order allowing the withdrawal. Parties who register and

thus get linked to specific electronic files are deemed to consent to henceforth receive e-service of documents in relation to that specific electronic file.

[29] However, parties must serve a paper (hard) copy of any ECCMIS filed document in the manner required by Order 5 of *The Civil Procedure Rules* on a party or other person entitled to service who is not a registered and linked to the specific electronic file. It is the responsibility of the ECCMIS filer to review the list of parties who will receive electronic service as indicated by the e-filing system and determine which parties, if any, require conventional service. It is only if the party filing learns or has reason to know that the ECCMIS filed document was not transmitted successfully to a party, that electronic service will not be effective. In that case the filer must serve the electronically filed document by traditional methods pursuant to Order 5 of *The Civil Procedure Rules* immediately upon discovering that the notice was deficient or that transmission was otherwise unsuccessful. The return of service must be imaged in a PDF or PDF/A format and electronically filed by the party at whose request the court process was issued and served if proof of service is returned to that party. For similar reasons, service of summons with the plaint attached or other process initiating a new case, must be served in the manner provided for by the Rules and not by use of the e-filing system, though proof of service may thereafter be filed via the court's e-filing system.

[30] Service on and by all parties who are not represented by an advocate and who do not designate an e-mail address, and on and by all advocates excused from ECCMIS e-service, must be made by delivering a copy of the document in accordance with Order 5 of *The Civil Procedure Rules*. Otherwise ECCMIS provides an option of the Judicial Officer issuing the process of Court, to select all persons upon whom the service is to be effected, for example the parties, their advocates or Law Firms, provided they are linked to the main electronic file. By this functionality, ECCMIS casts upon judicial officers, the responsibility for a function of service of some court process for which advocates and parties have

traditionally been responsible. Upon clicking the validate/Admit/Sign icon, notification with a hyperlink is transmitted and thus service is deemed to be effective on all such persons so selected once the transmission is successfully completed at the date and time recorded electronically in the system, except where it is proved that there was a system failure, glitch or similar occurrence that occasioned a defect in the transmission.

[31] Although it is desirable during this transition period of the Judiciary's migration from a paper to an electronic courtroom by way of ECCMIS, to support the electronic court process service with physical service, such as counsel for the applicant did on 24th January, 2024, service of court process through the Court's electronic-filing system is effective for all those parties whose contact information of service is already uploaded into the system, upon filing of the main pleading and response thereto, and all subsequent applications arising therefrom which are thereto linked. Individuals whose email addresses are listed receive automated emails to all parties associated with that case, along with a hyperlink to the electronic document any time that someone submits a document in the case through the electronic filing system, and any time that the Court takes action in the case. Service of a document ECCMIS is made by notification sent to all addresses designated by the Court with either (a) a copy of the document in PDF format attached and/or (b) a link to the document on ECCMIS.

[32] Transmission of the court process with a hyperlink to the electronic document constitutes service of the filed document within the meaning of Order 5 rule 8 of *The Civil Procedure Rules* and no other service on those parties is required. The effective date of service for such parties is the date of validation/Admission/Signing of the duly completed court process in issue, specifying a date and time for a response or hearing. Save for proven system failure, glitch or similar occurrence, delivery of e-service documents through ECCMIS to other registered and linked users on the respective electronic file is considered valid and effective service and has the same legal effect as an original paper document. For the purpose of

computing time to respond to documents received via ECCMIS e-service, any document served on a day or at a time when the court is not open for business is deemed served at the time of next opening of the court for business. Some courts and advocates are sceptical about electronic filing processes because of uncertainties regarding delays in validation and due to the inconsistent reliability of computers and of internet-based networks. ECCMIS has this far not experienced these problems in high frequency or large numbers, making a case-by-case decision making process a reasonable remedy in terms of the needs of the courts as well as those of advocates and parties.

[33] In the instant case where the respondents had already e-filed pleadings in the prior linked or associated proceedings, and considering further that the contemporaneous system-generated hearing notice associated to the Notice of motion now in issue indicates that all respondents were listed in the ECCMIS drop-down window for notifications of process filed in respect of the electronic file for the proceedings from which this application springs, therefore each of the respondents is deemed to have consented to receive electronic service in the subsequent linked and associated electronic files. If a document is served by more than one method of service, the computation of time for any response to the served document is based on the method of service that provides the shortest response time. There being no evidence of a system failure, glitch or similar occurrence that occasioned a defect in the transmission, each of the respondents is deemed to have been served on the date and time of validation/Admission/Signing of the Notice of motion now in issue, i.e. 2nd December, 2023 at 02:58 am. Considering that the court was not open for business at the said time, the Notice of motion is deemed served at the time of next opening of the court for business, hence the effective date of service was 2nd December, 2023 at 08:00 am. Service was effected on the very day the notice of motion was validated by the Court. Counsel for the 3rd respondent's objection is overruled on that account.

[34] That aside, the right of appeal is a creature of statute and must be given expressly by statute (see *Hamam Singh Bhogal T/a Hamam Singh & Co. v. Jadva Karsan (1953) 20 EACA 17*; *Baku Raphael v. Attorney General S.C Civil Appeal No. 1 of 2005* and *Attorney General v. Shah (No. 4) [1971] EA 50*). By virtue of section 76 (1) (h) of *The Civil Procedure Act,* a right of appeal exists from orders made under rules from which an appeal is expressly allowed by rules. Order 44 of *The Civil Procedure Rules* specifies orders from which appeals arise as a matter of right. An order dismissing an application for review is not listed among them. The order sought to be appealed is not one of the listed orders, hence this application. Rule 2 thereof states that an appeal under the Rules shall not lie from any other order except with leave of the court making the order or of the court to which an appeal would lie if leave were given.

[35] Apart from determining whether or not *prima facie* there are grounds of appeal that merit serious consideration, the court to which an application of this nature is made should; (i) identify and assess the "seriousness and significance" of the points sought to be raised on appeal. If the points are neither serious nor significant, relief will usually be granted; (ii) the court must consider the points relate to a significant misdirection on law or fact; and (iii) the court must always have regard to all the circumstances of the case, including (a) the need for litigation to be conducted efficiently and at proportionate cost; and (b) the need to enforce compliance with rules, practice directions and orders. The relevant factors would vary from case to case but might include the promptness of an application for relief and other past or current delay.

[36] If the question is one of principle and a novel one, ordinarily leave to appeal should be granted. Substantial justice should not altogether be lost sight of in considering finality of decisions, in cases where the Legislature and the Rules Committee have cast the duty of deciding whether the litigation should be continued further, on the trial court or alternatively the appellate Court which considers an application for leave to appeal. It would be obviously absurd to allow an appeal against a decision

under a provision designed to limit the right of appeal. However, if the question raised be one in respect of which there is no authoritative decision that would be a guide to the parties, then the circumstances favour granting of leave. For this purpose, the material consideration is whether a particular decision is of a kind which would preclude the agitation of the same question before the same court in further stages of the same proceeding, or on appeal.

[37] Leave will normally be granted where *prima facie* it appears that there are grounds of appeal which merit serious judicial consideration (see *Sango Bay Estates Limited and others v. Dresdner Bank [1992] E. A. 17; G.M. Combined (U) Ltd v. A.K. Detergents (U) Ltd, S. C. Civil Appeal No. 23 of 1994; Degeya Trading Stores (U) Ltd. v. Uganda Revenue Authority, C. A. Civil Application No 16 of 1996;* and *Kayaga v. Waligo C. A. Misc. App. 80 of 2012*). An applicant seeking leave to appeal must show either that his or her intended appeal has a reasonable chance of success or that he or she has arguable grounds of appeal and has not been guilty of dilatory conduct. Leave to appeal will be given where: the court considers that the appeal would have prospect of success; or there is some compelling reason why the appeal should be heard, but where the order from which it is sought to appeal was made in exercise of a judicial discretion, a rather strong case will have to be made out (see *GM Combined v. AK Detergents SCCA No. 23 of 1994*). The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on appeal. A real prospect of success means that the prospect for the success must be realistic rather that fanciful (see *Swain v. Hillman [2001] 1 All ER 91*).

[38] In the instant case, the arguments intended to be raised on appeal are that this court misdirected itself when it held that; (i) an Assistant Registrar of Court can make a finding that a party breached an agreement; (ii) section 48 of *The Civil Procedure Act* and Order 22 rule 51 (1) of *The Civil Procedure Rules* may be satisfied by constructive custody of the title deed through counsel for the judgment creditor; (iii) he non-registration of the attachment on the duplicate certificate of title as

required by section 46 (3) of *The Registration of Titles Act*, is an immaterial irregularity that does not vitiate the sale; and (iv) that the bailiff may be authorized by court to keep custody of the proceeds of sale.

[39] The set of facts on which the intended appeal is founded cannot be dropped through a defined test; this Court was really in uncharted territory when it considered the application. These particular points intended to be raised on appeal have weighty ramifications that go beyond the parties to this dispute; as a binding decision thereon will guide the practice of this Court in matters of execution. They are not necessarily confined or limited to the case at hand but are rather normative in nature, given that they would apply generally or universally to other similar situations. They are not hypothetical or merely theoretical questions which are peripheral or irrelevant to the dispute. The procedural issues relating to the timeliness of service of the notice of appeal or the lack thereof, and the failure to serve a letter asking for a certified copy of the record relate to the propriety of the intended appeal, which issues are within the jurisdiction of the Court of Appeal.

[40] In conclusion, the facts of this case do not present a situation where the law is clearly against the case intended to be argued by the applicant, so that the applicant should reasonably expect to lose the intended appeal, or for this Court to conclude that the prospect for success of the intended appeal is unrealistic and fanciful. The applicant is capable of presenting plausible argument on appeal for that Court's consideration.

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Order:

[41] It is for that reason that the application is allowed and accordingly leave is hereby granted to the applicant to appeal the decision. The costs of this application shall aide the outcome of the appeal.

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Stephen Mubiru

Judge.

Appearances;

For the applicant : M/s Nambale, Nerima & Co, Advocates.

For the 1st and 2nd respondents : M/s J. B. Byamugisha Advocates.

For the 3rd respondent : M/s K & K Advocates, (formerly Kiwanuka & Karugire Advocates)