

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CIVIL REFERENCE NO. 63 OF 2013

(ARISING FROM COURT OF APPEAL CIVIL APPLICATION NO. 357 AND 356 OF 2012)

*(ALSO ARISING FROM HIGH COURT MISCELLANEOUS APPLICATION NO 631 OF
2012 AND HIGH COURT CIVIL SUIT NO 1183 OF 1997)*

- 1. MUGABO PETER BAGONZA
- 2. JOHN SSIMBWA
- 3. ELISA TUSUGIRE
- 4. PATRICK OKILANGO
- 5. J K SSEWANYANA
- 6. LEMA NORAH KATABARWA
- 7. M NAKASAJJA
- 8. EDITH BAINOMUGISHA
- 9. S OJAKOL
- 10. BETTY KEMIREMBE

.....APPELLANTS

VERSUS

- 1. JAMES KIMALA
- 2. NAMUKASA DEBORAH}
- 3. MUSISI ROBINSON}
- Administrators of the estate of C J M Kamoga*
- 4. ATTORNEY GENERAL
- 5. UGANDA LAND COMMISSION

.....RESPONDENTS

BEFORE: THE HONORABLE JUSTICE SOLOMY BALUNGI BOSSA

RULING

This is a reference to a single Justice of Appeal from the Ruling and orders of the Registrar of the Court of Appeal at Kampala (His Worship Mr. E O Kisawuzi) dated April 25, 2013 in Civil Application No. 357 of 2012. The appellant in his reference stated that he was aggrieved and dissatisfied with the ruling on the following grounds;

1. That the learned Registrar of the Court of Appeal erred in law and fact when he held that no imminent threat of execution existed and that the applicants' fears of any pending execution of the Consent Decree against them were merely speculative.
2. That the learned Registrar of the Court of Appeal erred in law and fact when he misled himself on the point that the present applicants were parties to previous appeals to the Court of Appeal and Supreme Court which were in favor of the 1st, 2nd, and 3rd respondents and or their predecessor in title.

He prayed that the reference be allowed, the order of the Registrar of the Court of Appeal dismissing Civil Application No. 357 of 2012 be reversed and an interim order be granted. He also prayed for costs and any further relief as the Court deems fit.

The background to this reference is as follows. One Kamoga (now deceased) and his son one Kimala sued the Attorney General, the Uganda Land Commission and all the applicants in High Court Civil Suit No. 1183 of 1997 over a piece of land in Mbuya. The Government sold to the applicants pool houses in Mbuya and the Uganda Land Commission subsequently granted them lease titles in respect of those houses. At the same time, one James Kamoga (deceased) holds a freehold title over the same piece of land. Kamoga gave his freehold interest to his son Kimala, one of the Respondents. Kamoga and his son Kimala sued the Attorney General and the applicants in the High Court for recovery of his land vide High Court Civil Suit No. 1183 of 1997. Kamoga later passed on and his administrators were joined as parties. The Attorney General entered into a consent judgment with Kamoga and Kimala in the High Court. In the consent judgment, the Attorney General acknowledged that the plaintiffs were entitled to terminate the lease to the Government and to re-enter the same as it had failed to pay rent and had committed other breaches of the lease. The Attorney General also declared that the Uganda Land Commission had unlawfully granted leases on the Plaintiff's freehold to all the applicants.

The consent judgment was signed between Counsel for Kamoga and Kimala on the one hand and the Attorney General on the other hand and was entered by a Registrar. It was reviewed and set aside by a High Court Judge. Kamoga and Kimala appealed to the Court of Appeal, which allowed the appeal and restored the consent judgment. The applicants appealed to the Supreme Court. The Supreme Court dismissed the appeal and upheld the consent judgment. The estate of the late Kamoga and Kimala thereupon sought to enforce the consent judgment. The Applicants then sought to have the consent judgment reviewed and /or set aside by the High Court. The High Court (Tuhaise J) refused to set aside the Judgment on the grounds that the matter was finally decided by the Supreme Court. The respondents then sought to enforce the consent judgment, hence this application for stay of execution.

The Applicants filed in this Court Civil Application No. 356 of 2012 for a stay of execution. They also filed Civil Application No. 357 of 2012 for an interim order which was heard by the Registrar. He granted an ex parte Order granting the application, pending hearing inter partes. After hearing both parties, he dismissed the application.

At the hearing of this application, learned Counsel for the applicants argued that a reference could be made from a decision of the Registrar refusing a stay of execution to a single judge under the **Court of Appeal (Judicial Powers of Registrars) Practice Direction, Practice Direction No. 1 of 2004**. He cited **Rule 5** thereof, which granted specific powers to the Registrar to entertain applications for interim orders. He also cited the decision of Kasule JA in **Butera Edward versus Mutalemwa Godfrey Civil Reference No. 70 of 2013**, in support of the proposition that a single Justice of Appeal has jurisdiction to entertain a reference from a decision of the Registrar in matters of stay of execution.

Learned Counsel for the Respondents argued, among other things that an application of this nature was supposed to be before a full bench of three Justices of Appeal.

To appreciate the arguments and how they have been resolved below, it is necessary to set out the decision made by Justice Kasule in the case of **Butera Edward versus Mutalemwa Godfrey Civil Reference No. 70 of 2013** (supra) It was couched in the following terms;

“Pursuant to Practice Direction No. 1 of 2004 issued b His Lordship the Chief Justice on July 2, 2004 pursuant to Section 41(1)(v) of the Judicature Act 2000, Registrars were vested with powers to extend time under Rule 4

and to entertain applications for Interim Orders under Rule 5 of the Rules of this Court, amongst other powers. The issuance of the Practice Direction was in order to ensure expeditious disposal of cases.

Like is the case in Rules 15(4) and 110(3) of this Court Reference against the Registrar's decision in respect of documents being filed in Court and in taxation of cost has to be made to a single Justice and not to a Bench of three Justices. The Bench of three justices only entertains References from a single Justice under section 12(2) of the Judicature Act and Rule 55(2) of the Rules of this Court.

It logically follows therefore that Reference to a single Justice has to be that case is that reference to a single Justice has to be made in respect of a decision of a Registrar made in exercise of the Registrar's enhanced powers. This reference is therefore properly before this Court in as much as it is in the nature of an appeal against the decision of the Assistant Registrar in dismissing Application No. 112 of 2013 for an interim order of stay of execution."

The learned Judge rightly noted that a reference from a decision of a registrar to a single judge is in the nature of an appeal. However, and with the greatest respect to the learned Judge, I do not agree with his statement that because Rules 15(4) and 110(3) provide for reference to a bench of three Justices from a decision of the Registrar under those specific rules that it therefore follows logically that references can also be made to a single Justice of Appeal from the Registrar's decisions on stay of execution. Under Practice Direction No.1 of 2004 (the Court of Appeal (Judicial Powers of Registrars) Practice Direction) there are no specific provisions in this regard. What is provided for is that the Registrar is empowered to entertain matters relating to applications for interim orders, among others. The Directions provide:

"Pursuant to the Court of Appeal Rules Directions 1996 made under Section 41(1) (v) of the Judicature Act 2000, and in order to ensure expeditious disposal of cases, the powers of the Registrars shall include, but not limited to entertaining matters under the following rules.

- 1. Rule 4- Extension of time*
- 2. Rule 5- Applications for interim orders*
- 3. Rule 34(2)©- Approval of such contested orders/decrees*
- 4. Rule 93-Orders on withdrawal of an appeal/application*
- 5. Rule 112-Orders on relief from fees and security in civil appeals..."*

This same power is vested in a single Justice of Appeal under s.12 of the Judicature Act which provides:

“12 (1) A single Justice of Appeal may exercise any powers vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal.

(2) Any person dissatisfied with the decision of a single Justice of Appeal in execution of any power under subsection (1) shall be entitled to have the matter determined by a bench of three Justices of Appeal which may confirm vary or reverse the decision.”

I agree with the Ruling of Honorable Justice Kakuru in *Constitutional Reference No. 116 of 2013 Herman Kaliisa versus Gladys Nyangire and Others* that Practice Direction No. 1 of 2004 grants the Registrar powers similar to those of a single Justice of Appeal under s. 12 of the Judicature Act to handle specified interim applications. I also agree with him that while it is clear that a decision of a single Justice of Appeal is appealable to a bench of three Justices under s. 12 (2) of the Judicature Act, there is no specific provision that establishes a reference/right of appeal from a decision of a Registrar to a single Justice of Appeal in respect of the enhanced powers of the Registrar discussed above.

Appeal is a creature of statute and it cannot be presumed to exist, unless it is specifically provided for (see *Attorney General versus Shah No. 4 [1971] EA p. 50*). I have certainly found no specific provision granting a single Justice of Appeal such jurisdiction. I therefore consider that such jurisdiction does not legally exist and I decline to exercise it.

The lacuna has to be filled by the enactment of a specific rule, and this is a matter that should be addressed by the Rules Committee.

I now turn to the provisions of Rule 53 of the Court of Appeal Rule. I have reproduced its provisions below for ease of reference. It provides:

“53(1) Every application, other than an application included in sub rule (2) shall be heard by a single Judge of the Court: except that any such application may be adjourned by the Judge for determination by the Court.

(2) This rule shall not apply

(a) To an application for leave to appeal, or for a certificate that a question or questions for great public or general importance arise; or

(b) To an application for a stay of execution, injunction or stay of proceedings; or

© To an application to strike out a notice of appeal or an appeal; or

(d) To an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of hearing, including an application for leave or to extend time if the proceedings are found to be deficient in the matters in the course of hearing”.

In *Civil Reference No. 116 of 2013 Herman Kalisa v. Gladys Nyangire* (supra) Justice Kakuru analyzed this provision vis-à-vis the Judicature Act s. 12. He concluded that;

“With the coming into force of Practice Direction No. 1 of 2004, a Registrar could grant an interim order of stay of execution, injunction or stay of proceedings while a single Justice of Appeal would be precluded from doing so by Rule 53. This contradiction however is cured by the provisions of section 12 of the Judicature Act that grants power to a single Justice of Appeal to exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal.”

To the extent that sub rule (2)(b) specifies an application for stay of execution, injunction or stay of proceedings as one of the applications that cannot be heard by a single judge, I agree that it contradicts s. 12 of the Judicature Act. To my mind, a rule cannot override a statutory provision. Moreover, the Rule was enacted after the statutory provision. In any event, the Rule should be read subject to s. 12 of the Judicature Act. There is clear and urgent need to reconcile the Rules with the parent Act, as the contradiction remains.

In conclusion, I have found no statutory support for the reference made by the applicant from the decision of the Registrar denying stay of execution to a single Justice of Appeal. I consider that it would have been a better option for the applicant to fix for hearing Civil Application No. 356 Of 2012 for stay of execution before a bench of three Justices. That application is yet to be heard and determined. In the result, I dismiss this application with costs.

Dated and signed September 2, 2013

S B Bossa

Justice of Appeal

Ruling read September ..., 2013 by

Her Worship Mary Babirye

In the presence of:
