

5 **THE REPUBLIC OF UGANDA**

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CIVIL REFERENCE NO.50 OF 2013

(ARISING FROM MISCELLANEOUS APPLICATION NO. 84 OF 2013)

10 *(ARISING FROM MISCELLANEOUS APPLICATION NO. 83 OF 2013)*

(ARISING FROM NAKAWA HIGH COURT CIVIL REVISION NO. 05 OF 2012)

*(ARISING FROM NAKAWA CHIEF MAGISTRATES COURT CIVIL SUIT NO. 23
OF 2008)*

BENSON ONGOM :::::::::::::::::::::::::::::::::::::::APPELLANT

15 **VERSUS**

SEBUNYA ROBERT :::::::::::::::::::::::::::::::::::::::RESPONDENT

**Coram: Before Hon. Justice A.S Nshimye, JA (Single
Judge)**

20 **RULING OF COURT.**

Background of the Appeal.

25 This reference is in a way an appeal challenging the ruling of the learned Registrar of 8.4.2013 in which he dismissed the appellant's application for an order of interim stay of execution pending the hearing of Misc Appl.83/2013 a substantive application for stay pending appeal.

30 The appellant was sued by the respondent at Nakawa for vacant possession, a permanent injunction, general damages, mesne profits and for a declaration that he was

the rightful owner of the suit property. In his written statement of defence, the appellant denied the claim and included a counter claim of shs. 31,000,000/- The counter claim was dismissed and the prayers of the respondent
35 were granted including an eviction order.

Being dissatisfied with the outcome of the suit, the appellant filed an application for revision in the High Court at Nakawa. His grounds were that the learned magistrate
40 had no jurisdiction to handle a suit where the value of the subject matter was above Twenty Millions shillings. The application for revision was dismissed.

The appellant being further dissatisfied with the ruling,
45 filed a notice of appeal in the High Court on 20.3.2013. He filed two applications in this court, one for stay of execution and another for an interim stay of execution, vide Miscellaneous Applications NOs. 83 and 84 of 2013 respectively.

50 **Miscellaneous Application NO. 84 of 2013** for an interim order of stay was heard and dismissed by the Registrar of this court as earlier stated hence this reference.

This reference is premised on four grounds namely;

- 55 **1. That the Registrar erred in fact and law in refusing to grant the orders of stay of execution of the decree in High Court Civil Suit NO. 5 of 2012.**



60 **2. That the Registrar erred when he failed to hold that this was a proper case for the grant of an interim order.**

3. That the Registrar erred when he exercised his discretion wrongly before reaching his decision.

65 **4. That the learned Registrar erred in law and fact in awarding costs.**

Representation.

70 Mr. Alfred Okello Oryem represented the appellant while Mr. Mafabi Godfrey represented the respondent.

Submissions for the appellant.

75 **On the first and second grounds**, counsel submitted that in the affidavit in support of the application for an interim stay of execution, the appellant stated that after losing his application for revision in Nakawa High Court, the respondent has consistently threatened to execute the decree of the Grade one Magistrate through eviction. He referred court to annexure “C” which was a notice to the appellant to vacate the suit property or face eviction.

80 The appellant stated in paragraphs 8, 9 and 12 of his affidavit that he was confronted by the respondent who assured him that he would evict his tenants and continues to do so.



Counsel faulted the learned Registrar for failure to apply the law to the facts, otherwise he should have found that there was actual threat by the respondent which is a
90 condition precedent for granting an interim order for stay of execution.

That execution had already been granted by the Executions Division of the High Court but was stayed by Justice Arach
95 Amoko, JA in Civil Application No. 140 of 2013.

On the third ground on exercise of discretion by the Registrar, counsel contended that the Registrar failed to judiciously exercise his discretion and reached a wrong
100 conclusion.

He submitted that this Court can interfere with the decision of the Registrar if it is found that he misdirected himself in some matter and as a result arrived at a wrong
105 decision or if it is manifest from the case as a whole that the Registrar was wrong in the exercise of his discretion and as a result there had been miscarriage of justice, as was held by Newbold, P. in the case of **Mbogo and Another Vs Shah (1968) EA 93**.

110

He invited Court to interfere with the exercise of discretion by the Registrar in order to meet the ends of justice and grant an order of an interim stay of execution.



115 **On the fourth ground on the award of costs**, counsel submitted that, they should abide the outcome of the substantive application for stay of execution.

In conclusion, counsel prayed that the reference be allowed
120 and the orders sought in **Civil Application NO. 84 of 2013** be granted.

Submissions for the respondent.

Counsel briefly highlighted the background of the
125 application and stated that the applicant applied for an interim order of stay which application, was dismissed on the ground that there was no threat of execution. In support, counsel cited Rule 55 of this court's rules which provides that the court has only got to look at the record
130 and nothing else.

He argued that the applicant had made no application to adduce additional evidence which meant that he would rely only on the evidence on record. In support of his
135 submission, referred to the case of **Goodman Agencies Ltd. Vs Hasa Agencies (K) Ltd, Supreme Court Civil Reference No. 1 of 2011** where it was held that the court is mandated only to look at materials on the file hence this court ought to restrict itself to the application and the reply
140 in order to determine whether the reference has merit or not.

On the first ground on whether the Registrar erred in fact and law in refusing to grant the orders of stay of execution of the decree,

145

Counsel argued that in Civil Suit No. 05 of 2012 the applicant and the respondent were not parties to it and the matter was not before the Registrar. That the parties were bound by their pleadings.

150

He prayed that ground one be rejected because it was not before the Registrar to determine.

Regarding the second ground whether or not the Registrar erred when he failed to hold that this was a proper case for the grant of an interim order of stay,

155

Counsel invited court to look at the application and note that there was no evidence to show any threat save for a statement that the person in the house was a tenant which was denied by the respondent. That there was no affidavit in rejoinder to prove that the respondent made any threats.

160

Counsel submitted that the applicant relies on the letter by a lawyer issued before Civil Division. He stated that the execution was concluded in accordance with annexure 'L' a "consent" on the affidavit in reply. That the respondent asked the applicant to give him time to remove his tenant and vacate on 24th October 2012.

165

170 Counsel submitted further that the applicant did not
demonstrate any threats at the time of the hearing and that
there was no application or warrant of execution. That this
court has inherent powers to prevent abuse of court
process and the Registrar was alive to the facts and law
175 and was right to dismiss the application. He referred to the
case of **Hwang Sung Industries Ltd. Vs Tajdin Hussein &
2 others, Supreme Court Civil Application NO. 19 of
2008** which laid down the conditions for the grant of such
interim orders.

180 Counsel also referred to the case of **Orient Bank Ltd. Vs F.
J. Zaabwe and five others, Supreme Court Civil
Application NO. 19 of 2012** where it was held that it was
not proper to institute an application for stay when there is
185 no evidence of an order and that a Registrar of the
Supreme Court could not issue a warrant without an order.

That the failure to file an affidavit in rejoinder was evidence
of admission of the contents in the respondent's affidavit.
190 He relied on section 14 of the Evidence Act.

**On the third ground on whether the Registrar exercised
his discretion in correctly reaching his discretion,**
counsel argued that the Registrar's exercise of his
discretion was within the law. He adopted his submission
195 in ground two. He also referred to the case of **Mbogo and
Another Vs Shah (supra).**

200 **On costs**, counsel stated that they follow the event and the Registrar was right to award costs. In support, he cited section 27 of the Civil Procedure Act.

In conclusion, counsel prayed for the dismissal of the reference with costs to the respondent.

205 **Submissions in rejoinder.**

Counsel stated that the appellant's case was that there was threat of execution of the decree in Civil Suit No. 23 of 2008 and referred to annexure 'L' to the affidavit in reply dated 10th October 2012 and annexure 'C' a letter dated 5th 210 October 2012 directing vacant possession to the occupant of the house in days yet according to his learned friend, this issue was concluded.

215 That the appellant filed an affidavit in support and the threats were included therein as directed to his tenant. That the respondent's denial had no effect in respect of threats from court bailiffs and the Registrar should have found this letter a threat, worth granting of the application.

220 That although all matter relating to whether a threat existed had been overtaken by subsequent events, under section 38 of the Evidence Act, it is a principle that court takes judicial notice of judgments and that **Civil Application NO. 140 of 2013** between the same parties, 225 Justice Arach found as a fact that execution had been issued by the Execution Division of the High Court.

230 That execution should have been carried out if it were not
for the application for its stay the consequence of which
would have been, to render Miscellaneous Application N0.3
as well as the appeal nugatory. That this Court under **Rule
1 (2) of its rules**; does not have to ignore the facts. Doing
so would cause a miscarriage of justice.

235 In reply to the submission of counsel for the respondent,
counsel admitted that the matters were not part of the
pleadings, but they were in the judgment although they
were not brought in the evidence.

240 **On ground one**, counsel stated that the record before
Court clearly demonstrates that the dispute arises from
Civil Reference N0. 5 of 2012 and the ruling of Justice
Arach gave a detailed reference and a mere technicality
245 should not based on to deny substantial justice. He cited
Article 126 (2) (e) of the Constitution of the Republic of
Uganda.

250 He further argued that they did not dispute the fact that
the Registrar was alive to the law but instead, he failed to
apply it to the facts while evaluating the evidence.

That although the threat was directed to his tenant, it also
affected the appellant.

255



Counsel submitted that since there was warrant of execution and had lapsed by the time the matter came before the Registrar, it was consistent with the threat. The appellant was threatened by that warrant hence
260 subsequent actions. In support he referred to the case of **Hwan Sung Industries Ltd. v. Tajdin Hussein & 2 others, Supreme Court Civil Application NO. 19 of 2008.**

265 Counsel prayed that Court exercises its inherent power, overrule the Registrar's orders and grant the interim order because there was evidence before the Registrar which he failed to evaluate.

270 On existence of a decree, counsel agreed with the authority of **Freidrick Zaabwe** and that indeed there were Civil Suit No.23 of 2008 and Civil Revision No. 5 of 2012. There was a decree for execution.

275 The Court should ensure that no miscarriage of justice takes place since the arguments as advanced by counsel for the respondent were for the main appeal and not for an interim order. it should be shown that:-

1. A Notice of appeal was filed.
2. A Substantive application for stay is pending hearing.
- 280 3. There is a serious threat of execution.

These were not considered by the Registrar hence he improperly exercised his discretion.



285 **On costs**, counsel faulted the Registrar and cited **Section 27 of the Civil Procedure Act** to support his submission that costs follow the event of the dispute between the parties. Counsel reiterated his earlier prayers.

Findings of court.

290 **Ground one, two and three.**

295 **Whether the learned Registrar erred in fact and law in refusing to grant the interim order of stay of execution of the decree in HCCS No. 05 of 2012 when he ruled that there was no serious threat of execution, whether or not the Registrar erred when he failed to hold that this was a proper case for the grant of an interim order and whether the Registrar exercised his discretion in reaching his discretion.**

300 The appellant's application is as a result of the Registrar's ruling of declining to grant an interim stay of execution because he found no threat of execution.

305 On the propriety of the application, the appellant relied on the threat of execution by the respondent and in his affidavit in support of his application for an interim order; he stated that ever since he lost **Civil Suit NO. 23 of 2008**, he has been threatened with execution.

310 On 10th October 2012, there was a letter between the appellant and respondent where it was agreed that the



appellant would vacate the suit property on 24th October 2012. This letter was attached as annexure “L”.

315 On 17th May, counsel for the appellant was issued with a copy of a warrant of vacant possession of the suit property by His Worship Muwata. The warrants of execution were annexed as “B” and “C”.

320 Basing on those threats, the learned Justice Arach Amoko, JA (as she then was) granted stay of execution.

At the time of hearing of this application, nothing was highlighted on the current status of the suit property which
325 I would like to imagine is as it was.

This Court is alive to the fact that a successful litigant should not be deprived of the fruits of his litigation. Equally an appellant should not be deprived of his right of appeal
330 otherwise the appeal would be rendered a nugatory.

Although the respondent relies on annexure “L” to defend his interest in as much as he considers it as an agreement, this was however followed by various events as highlighted
335 above.

The Registrar in his ruling found no threat of execution basing on **Civil Revision NO. 5 of 2012** yet this was arising out of **Civil Suit NO. 23 of 2008**. The revision was
340 in relation to jurisdiction of the trial Magistrate which in

the end was dismissed and various orders were made. They included the enforcement of the orders made by the Magistrates Court in **Civil Suit NO. 23 of 2008**. This was a re-affirmation of the first trial court's orders hence execution of which would mean execution of **Civil Suit NO. 23 of 2008** and the respondent cannot claim that there was no application for execution since it was clearly on the file as annexures "B" and "C".

There are wealth of authorities to be followed by courts before stay is granted. Some of these authorities were rightly quoted by both counsel for example in the case of **Hwang Sung Industries Ltd vs Tajdin Hussein and others, Supreme Court Civil Application NO. 19 of 2008**, it was held by G.M Okello JSC (as he then was) that for an application for interim order it suffices that a substantive application is pending and that there is some threat of execution before the hearing of the pending substantive application. It is not necessary to pre-empt consideration of the matters necessary in deciding whether or not to grant the substantive application for stay"

In the case of **Akright Project v. Executive Property Holding and 12 others Supreme Court Civil 5 Application No. 3 of 2011** Justice Kitumba (JSC) held that the Court in addition to considering that a notice of appeal has been filed and that there is a substantive application has to consider whether there are special circumstances to warranty such an interim order. An

370 example of that would be the immediate destruction of the
suit property”

In National Enterprise Corporation versus Mukisa Foods Miscellaneous Application No. 7 of 1998 this Court held that;- “The Court has power in its discretion to
375 grant stay of execution where it appears to be equitable to do so with view of temporarily preserving the status quo. As a general rule the only ground for stay of execution is for the applicant to show that once the decretal property is disposed of there is no likelihood of getting it back should
380 the appeal succeed.

The Registrar in exercising his discretion should have considered the law and the circumstances of the case as a whole with the evidence available. I find that there was
385 actual threat of execution evidenced by extracted decrees, warrants of execution and written eviction letters.

I therefore find that the learned registrar erred in finding that there was no evidence of threat of execution then.

390

On the fourth ground on whether the learned Registrar erred in law and fact in awarding costs.

I would like to associate myself with finding of the learned Judge in Civil Application No. 140 of 2013 where she
395 ordered that the costs do abide the outcome of the substantive application, that ground also succeeds.

The application succeeds; the order of the Registrar dismissing the application for an interim order of stay is set aside.

400 I grant an interim order of stay which will be valid for 60 days from the date hereof. I direct the Registrar to fix the main application before a full panel in the current Constitutional Civil Session before the said before 60 days expire.

405 I so order.

Before I take leave of this matter, let me state that in the course of writing the ruling, I called for the court file containing the substantive application from the registry and I was disappointed to discover that the applicant has
410 not taken any step since 18.3.2013 when the application came for conferencing. Neither himself nor his counsel appeared to have the main application fixed. The respondent appeared. The dilatory conduct of the appellant has greatly contributed to the clogging of our court system.
415 I also found out that apart from the Notice of Appeal that was filed on 20th March 2013, our Court Registry does not have an appeal file containing a court record from the High Court upon which the appeal is premised.

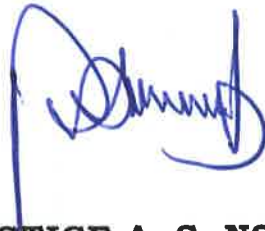
420 This again shows that after writing a letter requesting for the record, he has not bothered to persue the matter and have the record filed in the court.

425 Though the reference has succeeded, I have no doubt that the applicant is using delaying tactics to frustrate the respondent's victory in the lower court. That is more the

reason that the main application should be fixed and disposed of as soon as possible.

DATE AT KAMPALA THIS...^{12th}.....DAY OF JUNE 2015.

430



**HON. JUSTICE A. S. NSHIMYE,
JUSTICE OF APPEAL**

12.06.15

Mafabi Godfrey for respondents

Karwani Ronald for applicants

Resp. per

App. abs

Amun Mbuluya court clerk

Mr. Mafabi The matter is for filing and we are ready to receive it

CB Auling delivered in chambers

By ~~Handwritten signature~~

12/06/15