THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO 40 OF 2022

[ARISING OUT OF CIVIL APPLICATION NO. 39 OF 2022]

[ARISING OUT OF HIGH COURT MISCELLANEOUS APPLICATION NO 843 OF 2021]

[ARISING OUT OF HIGH COURT MISCELLANEOUS CAUSE NO 287 OF 2021]

MALE H MABIRIZI K. KIWANUKA} ..... APPLLLICANT

VERSUS

ATTORNEY GENERAL} .....RESPONDENT

RULING OF CHRISTOPHER MADRAMA, JA

The Applicant filed this application as having been brought under Article 28 (1), 44 (c), 139 (1) & 134 (2) of the Constitution, section 33 of the Judicature Act, rules 6 (2) (b), 43 (1) and (2) of the Court of Appeal Rules for orders that an interim order issues staying all orders in High Court Miscellaneous Application No 843 of 2021 until final determination of the Applicant's substantive application for stay of execution and for costs of the application to be provided for.

The grounds of the application averred in the notice of motion are as follows:

1. The Applicant was dissatisfied with the decision of the High Court in Miscellaneous Application No 843 of 2021.
2. The Applicant filed a notice of appeal and requested for typed proceedings.
3. There are serious matters of law relating to fair hearing and scope of contempt of court in the appeal.
4. The intended appeal has arguable grounds of appeal.

5. The intended appeal has a higher and reasonable chance of success.
6. The application has been made without delay.
7. There is a serious threat of committing the Applicant to civil prison on account of orders in Miscellaneous Application No 843 of 2021.
8. The appeal will be rendered nugatory if this application is not granted.
9. The Applicant's right to be heard on appeal will be curtailed if the application is not granted.
10. The Applicant has filed a substantive stay of execution application.
11. There is an imminent danger of committing the Applicant to civil prison on account of orders in Miscellaneous Application No 843 of 2021 before determination of the substantive application.
12. The main application for stay of execution will be rendered nugatory if the application is not granted.
13. The Applicant's right to be heard on appeal will be curtailed if the application is not granted.
14. The Applicant shall suffer irreparable injury if the application is not granted.
15. It is in the interest of justice and preserving the rule of law that the application is allowed.

The application is further supported by the affidavit of Male H. Mabirizi K. Kiwanuka affirmed on 10th of February 2022 which contains the following facts. The Applicant is a Ugandan, a resident of Kampala and a lawyer by profession as well as a businessman by choice with sufficient interest in economic management of Uganda and East Africa as a whole including ownership of multinational companies which generate enormous incomes from selling goods and services to Ugandans and to the Applicant. He is the Respondent in Miscellaneous Application No 843 of 2021 who contested the ruling delivered on 27th of January 2022. Since then he filed a notice of appeal requesting for proceedings as attached to the affidavit. He came across a notice to show cause why he should not be committed to civil prison for violating a court order fixed for 11th February 2022 a copy of which is attached to the affidavit. He states that he is not aware which court order was violated, the application No of the Attorney General's application and it

is particulars. According to the notice of intention to show cause, his appeal will be rendered nugatory if he is committed to civil prison and the subject matter of the appeal will be disposed of and will be overtaken. He states that his appeal has arguable grounds of appeal with higher and reasonable chances of success. He repeats the other grounds in the notice of motion that I do not need to regurgitate. In addition, he states that there is an imminent danger of being committed to civil prison on account of orders in Miscellaneous Application No 843 of 2021 before determination of the substantive application. The other depositions repeat the contents of the notice of motion.

Notice of appeal was filed on 27th January 2022 and was received in the High Court registry on the same day. Secondly the Applicant wrote a letter dated 27th of January 2022 requesting for the typed record of proceedings. Last but not least the attached notice to show cause shows that the Attorney General made an application to the High Court to show cause why the Applicant should not be committed to civil prison for violation of a contempt of court order. He had been requested to appear before the High Court on 11th of February 2022 at 3 PM to show cause why he should not be committed to prison for contempt of court.

The Applicant further filed a supplementary affidavit in support of the notice of motion affirmed on 16th February 2022 and filed in the registry of the Court of Appeal on 17th February 2022 in which he states that on 10th February 2022 he filed High Court Civil Division Miscellaneous Application No 85 of 2022 and 86 of 2022 for stay of execution and interim stay of execution respectively which have not been fixed for hearing at the time of the affidavit. On 11th February 2022 he filed an application for recusal of Justice Musa Ssekaana which has not yet been determined. Copies of the application are attached to the affidavit. On the same day, he filed an opposition to the application to have him committed to civil prison on grounds that he has never been served with a court order for Miscellaneous Application No 843 of 2021 either by the Respondent or any person and he is not aware of which order was violated. He attached the opposition to have

him committed to civil prison. On 14th February 2022 he requested for the signed ruling of the trial judge in Miscellaneous Application No 843 of 2022 and states that the clerk of the judge informed him that she had none. On 14th February 2022, his lawyers were served with a written letter by the Attorney General to the Principal Judge requesting that he is summoned to substantiate allegations and to show cause why he should not be held in contempt. He was also served on 14th February 2022 with a letter to the Registrar of the High Court Civil Division requesting that he be summoned to show cause why he should not be held in contempt. He states that there was no way he could file affidavits in reply because the morning of 15th February 2022, he was scheduled to appear before the East African Court of Justice Appellate Division for hearing application No 02 of 2022 Male H. Mabirizi K. Kiwanuka versus Attorney General of Uganda.

The deponent further states that on 15th of February 2022 he was represented by his lawyers Ojok advocates who informed him that they were served with a court order in Miscellaneous Application No 843 of 2022. His lawyers also informed him that they asked for adjournment to enable the Applicant reply owing to the East African Court of Justice case, which request was rejected. Further, his lawyers informed him that they requested the judge to first determine the recusal application since the presiding judge was the one mentioned in Attorney General's letters but the judge remained silent. His lawyers also informed him that they objected to an application by letter, contrary to legally provided procedure but he overruled them. He was also informed by his lawyers that they referred the judge to the opposition to the notice to show cause why he should not be committed to civil prison which was ignored. Consequently, the trial judge made an order that the Applicant be arrested and imprisoned for 18 months on account that he was in contempt of court order of "strong warning". He attached the initial order and the letter of 15th February 2022. He states that a strong warning cannot be enforced because it does not require any positive action. That the trial judge having received his application earlier for stay went ahead to determine letters with imprisonment of 18 months' imprisonment which is a clear indication that the court refused to hear his

applications hence the need for this court to exercise its jurisdiction. Further that the Uganda Police is already hunting him down for arrest even without any warrant of arrest against him and they attempted to do so on the evening of 15th February 2022 when they raided the home of one of his friends at Makerere, Kawempe Division Kampala City only to find that he had just left.

He asserted that the threat of execution of the challenged orders has now materialised and there is a need to grant the application.

In reply, Oburu Jimmy Odoi Principal State Attorney from the Chambers of the Attorney General deposed to an affidavit in which he states that he read and understood the Applicant's application plus the supporting supplementary affidavit and his reply is as hereunder.

The Attorney General filed Miscellaneous Application No 843 of 2021 alleging that the Applicant had made various posts on his Twitter and Facebook accounts which were calculated to bring Justice Philip Odoki into contempt and to lower his judicial authority, and to scandalise and lower the authority of the High Court. On 27th January 2022, the High Court delivered a ruling in which it found that the Applicant is guilty of contempt of court and issued a stern warning to the Applicant against attacking judicial officers according to a copy of the ruling Annexure "A". Further, the deponent states that the Applicant made fresh contemptuous statements attacking the integrity and competence of Justice Musa Ssekaana contained in a letter dated 1st February 2022 and in various posts on his Twitter handle according to the address indicated. By letter dated 7th and 11th February 2022, the Respondent brought to the attention of the High Court the Applicants fresh attacks on the judge and the court subsequently summoned the Applicant to show cause why he should not be held in contempt of court for the statements. Mr. Oburu Jimmy deposed that the Applicant was served with the letters and the Respondent's accompanying affidavits on 14th of February 2022 at 12:58 PM. It is therefore not true that the Applicant was served in the evening of 14th February 2022 as this is contrary to the documents attached as Annexure "B" to the affidavit in reply.

Further, the Principal State Attorney deposed in reply to paragraphs 9, 10 and 12 of the Applicant's supplementary affidavit that he was informed by the Principal State Attorney Richard Adrole that on 15 February 2020 to the Applicant and the Respondent appeared before the East African court of justice using zoom videoconferencing and the parties made arguments in respect of the Applicant's request for the recusal of Justice Kiryabwire. The proceedings started at 9 AM and ended at approximately 11 AM on the said date. He states that he knows that the Applicant was able to attend the High Court hearing scheduled at 3 PM on 15th February 2022 but opted not to be present in court to show cause why he should not be held in contempt of court but instead opted to be represented by Counsel. After the High Court heard the parties, it delivered a ruling on the same date of 15th February 2022 in which it found the Applicant guilty of a further contempt of court and sentenced him to 18 months' imprisonment according to a copy of the court order attached as Annexure "C".

Mr Oburu Jimmy deposed that whereas the High Court issued a warrant of arrest and committal order against the Applicant in execution of its order, the Applicant is presently a fugitive who is hiding in order to evade arrest and imprisonment. He states that he knows that the Applicant's actions of knowingly evading arrest and imprisonment amounts to further contempt of court and that the Court of Appeal cannot entertain any matter on his behalf before he presents himself to prison. He states that it is not in the interest of the due administration of justice for this court to hear any application brought by a fugitive from the law who is acting in defiance and contempt of a court order. Further that the application is incompetent and bad in law and made in abuse of the courts process.

When the application came for hearing on 22nd February 2022, the Attorney General was represented by learned Counsel Ms Patricia Mutesi, Assistant Commissioner while the Respondent was represented by learned Counsel Mr Isaac Semakadde.

Learned Counsel Ms Patricia Mutesi sought an adjournment to file an affidavit in reply to present new developments in the Applicant's situation

that according to her were relevant to the application but I declined adjournment because the Applicants Counsel Mr Isaac Semakadde conceded to the facts relating to the new developments. Secondly, on the question of whether the Attorney General needed further time to address the court on the implications of the new developments to the Applicant's application, I declined an adjournment and requested both Counsel to address the court orally in addition to written submissions as directed by Court. Later on it transpired that the Attorney General had no written submissions on record and the written submissions that had been placed in the file belonged to a Respondent in another application. I summoned the Counsel to appear on 23rd of February to clarify on the matter. When the application was called learned Counsel Ms Patricia Mutesi, Assistant Commissioner appeared for the Attorney General while learned Counsel Mr. Ronald Idhumbi holding brief for Counsel Isaac Semakadde represented the Applicant. Ms Mutesi stated that the Respondent relied on the oral submissions of 22nd Feb 2022.

It is therefore on the basis of the written submissions of the applicant in person, the oral address of his Counsel Mr. Isaac Semakadde, the oral submissions of Ms Mutesi and the oral submissions in rejoinder of Mr. Semakadde that the application will be considered.

In the application is an agreed fact that that Mr Male H. Mabirizi K. Kiwanuka, the Applicant in this application, was arrested pursuant to a warrant of arrest in execution dated 15th of February 2022 which was executed and the Applicant was committed to Kitalya prison and is currently in the custody of the prison authorities pursuant to the warrant. It is a fact on record by warrant of committal attached to the affidavit of Mr Oburu Jimmy, Principal State Attorney dated 15th of February 2022 and issued and signed by the Assistant Registrar of the High Court Civil Division addressed to the officer in charge Kitalya Mini Max Prison commanding the prison authorities therein to receive the Applicant and to keep him for the period of 18 months' imprisonment stated in the orders of the court.

The Applicant had in person filed written submission as directed by court as follows:

The written Submissions of the Applicant.

The Applicant submitted in his written submissions pursuant to the direction of court and filed on record on 17th February 2022. In those submissions, the Applicant stated that the general principle regarding interim orders were stated in **Hon Theodore Ssekikubo and 3 others versus the Attorney General and 4 others, Supreme Court Constitutional Application No 06 of 2013** that it is the duty of the court to make such orders as will prevent the appeal, if successful, from being nugatory. Secondly, in **Lubega versus Attorney General and 2 others; Supreme Court Miscellaneous Application No 13 of 2015**, Arach Amoko, JSC held that;

> "for an application for an interim order of stay, it suffices to show that the substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application. It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the substantive application for stay."

Further that the only issue for consideration is whether the Applicant has satisfied the criteria for the grant of an interim order of stay of execution. These are that a notice of appeal had been lodged. Secondly a substantive pending application had been filed in court. Thirdly, there was in existence a serious threat of execution. She found that issues raised in the submissions were meant to be determined in the substantive application because they touch on the likelihood of success of the appeal. In the premises, she found that the criteria for the grant of an application of an interim order had been met and that the ends of justice could be achieved by maintaining the status quo until the substantive application for stay of execution is heard by the full court in accordance with the rules.

In the premises, the Applicant submitted that Annexure "A" to the affidavit in support of the notice of motion is a letter requesting for typed

proceedings and the requirement that there is a pending appeal has been met. Secondly, there is a substantive application No 39 of 2022 from which the instant application arises. Thirdly annexure "B" to the affidavit is a notice to show cause while annexure "G" to the first supplementary affidavit is an order for the arrest of the Applicant for imprisonment for 18 months. Further the Applicant asserts that his affidavit in support of the application shows that on 15th February 2022 the police attempted to arrest him. Lastly there was no delay in filing the application because it was filed on 11th February 2022, a few days after the notice to show cause was issued. Further the Applicant asserts that even though the above requirements were met, according to his supplementary affidavit it is clear that the High Court refused to hear his applications for stay of execution hence his application to the Court of Appeal. He prays that the application is granted according to the terms prayed for in the notice of motion.

Oral address of the Applicants Counsel

The Applicant's Counsel Mr. Semakadde adopted the Applicant's written submissions on record. He stated that the event of imprisonment of the Applicant happened the previous day (21st February 2022) and was inconsequential to the merits of the application. He submitted that the application and the status quo requested should be held as at the date of filing the application. Secondly, he urged that the court to condemn the acts of government which contravene article 128 (1) (2) and (3) of the Constitution read together with article 126 which requires Government to observe the rule of law to halt enforcement action till disposal of the application. The Applicant's Counsel submitted that the Government should have desisted from acts that pre-empt proceedings in the matter until after court has determined the application. Counsel contended that instead the Government took the law into its hands and threw to the wind the court's directions in the matter and invested its energy in a manhunt of a citizen who run to court for protection against judicial tyranny and political persecution.

Mr. Semakadde submitted that the Applicant intended to argue his application in person as directed but was instead made the subject of an

unjustified "cobra level" manhunt (which according to him means highest level of national alert). The Applicant filed a supplementary affidavit which is essential to this submission.

He further submitted that the sentence to which the Applicant was received in prison of 18 months is 540 days. He argued that the Applicant is exposed to quandary and on being probed about the nature of this order whether Civil or criminal, he submitted that the actions were foul and should be set aside. In the supplementary affidavit it is shown that lower court ignored the Applicant's application for stay of execution in that the judge refused to fix it. He submitted from the bar that the file is under lock and key and the presiding judge is the head of the court.

Further that since filing of the application, the judge has had time to apply further process and the court can look at the dates (to show that the Applicant's efforts were frustrated). He invited the court to invoke its concurrent jurisdiction and powers to achieve the ends of justice.

Regarding the 540 days, the Applicant's Counsel submitted that the application has not been rendered nugatory by the committal of the Applicant to prison. In that the court has power to freeze the illegality and the Applicant has not even served more than 8 hours in prison.

Mr. Semakadde submitted that the Applicant is entitled to the remedies sought in the application. Secondly, the remedies sought are broader and the imprisonment of the Applicant subsequent to his application should not become the sole determinant of the application. He prayed that the court should look beyond the imprisonment because the application raises several issues (touching on the right to fair hearing and liberty). The Applicant's Counsel however prayed that the ruling of court be confined to the thin parameters of an application for an interim order as sought in the application.

The Applicant relied on some authorities which were supplied to court. In **Constitutional Petition No. 06 of 2013; Davis Wesley Tuswingire v Attorney General of Uganda** at pages 25 – 28 Counsel submitted that two principles

were articulated. The first is that where there is an alleged infringement of right of fair hearing in proceedings, the court should jealously guard that right. He contended that failure to protect the right does cataclysmic damage which cannot be atoned for by an award of damages to the aggrieved party. Secondly, the court at pages 26 – 27 considered the balance of convenience and held that propriety in administration of justice should not only be done but should be seen to be done which is of greater value. If court at final disposal was to find that prosecution or sentence should continue, the same could resume without inconvenience to the state. Should the court find that the imprisonment was unconstitutional, the same would have been conclusively dealt with and those persons subjected to it would have been greatly inconvenienced. On the issue of people undermining the law because of that procedure, the court found that this was misconceived.

Mr. Semakadde further prayed that the court be persuaded by the High Court decision in **HCMA No 94 of 2014; Lukwago Erias Lord Mayor Kampala City Council Authority v Attorney General, the Electoral Commission, Kampala City Council Authority and Badru Kiggundu** by Lady Justice Lydia Mugambe starting at page 38 onwards on the heading Rule by law vs Rule of law. He invited court to peruses page 39 paragraph 159 for the quotation on the Supremacy of rule of law since medieval times as a principle of constitutional significance. Counsel further invited court to consider paragraph 168. Further Counsel referred to **HCMA No 116 of 2017 Mrs Geraldine Busuulwa Ssali v NSSF** where Justice Musota, judge of the High Court as he then was expressed the indignation of court in strong terms towards Respondents who are served with process for injunctive reliefs but go ahead to change the status quo. This is because such Respondents do not allow the court process to be completed. Counsel reiterated the prayers in the application and in addition prayed for release of his client.

Submissions of the Attorney General in reply

Ms Patricia Mutesi, Assistant Commissioner in reply submitted that the application before court was for an interim order to preserve the status quo at the time of the application. With particular reference to Ground 7 of the

Notice of Motion, it is averred that there is a threat of committing the Applicant to prison. Further, the supplementary affidavit stated that he was being hunted down whereupon the Applicant sought orders of court to protect him from imminent arrest. Ms Mutesi referred to **Lubega v Attorney General and two Others: S.C.C.A. No. 13 of 2015** which restated the principles applicable to applications for interim orders. Ms Mutesi contended that the Applicant's Counsel delved into the substance of the main application. Further, that the duty of the court is to preserve the status quo but the orders sought to be stayed have been executed. In the premises, she contended that the court should not (and cannot) go beyond the interim application to maintain the status quo.

Ms Mutesi further submitted that in handling the application, this court has no powers to deal with the matters raised by the Applicant. The written submissions did not address the matter because it had not arisen. Further Ms Mutesi submitted that there is a court order issued by the High Court on 15th February sentencing the Applicant to 18 months' imprisonment. Further there is a warrant of arrest and committal in obedience to that order which is lawful and regular. More so because there is no subsisting court order staying the High Court orders. The application was filed on 11th Feb 2022 to stay orders of the High Court which existed at that date. After the application was filed, the High Court made a separate order in respect of different contempts and issued a separate order in respect thereof. Thereafter the Applicant filed a supplementary affidavit by which he sought to extend the application to cover the second ruling and hence he attached subsequent orders and warrants etc.

The Respondent's Counsel further submitted that there is no pending appeal from the decisions sought to be impeached.

Further and without prejudice, Ms Mutesi submitted that Civil Application No s 39 and 40 are incompetent and misconceived in so far as they seek a civil remedy in respect of a sentence of imprisonment for the criminal offence of contempt of court. Further she invited the court to consider article 28 (12) of the Constitution which she submits does not require formal

criminal proceedings or a charge sheet before conviction of an offender for the offence of contempt. She proposed that the remedy of the Applicant lay in an application for bail pending appeal. In the premises she submitted that the application of the Applicant is strange in law and is barred.

Further, the Respondent's Counsel submitted that even if the application was of a civil nature, it does not satisfy conditions for stay of execution of the order dated 15th February 2022. This is because there is no pending appeal from that order. Secondly, the notice of appeal on record is in respect of an order made in January 2022. The Respondents Counsel submitted that the Attorney General concedes to the Applicant's quest for an order of stay of execution of a fine of Uganda shillings 300,000,000/- pending the hearing and determination of the main application. She further submitted that the order for the Applicant to pay a fine did not have a term for imprisonment in default of payment and it can only be executed as a civil debt. In the premises, the Respondent's Counsel submitted that the enforcement of the fine imposed can be stayed.

Further, Ms Mutesi reiterated submissions that the instant application before the court cannot be extended to cover the subsequent order of imprisonment which was based on an independent order. She submitted that the remedy of the Applicant was to apply for bail pending appeal.

With regard to the application for stay of the arrest and imprisonment of the Applicant, the Respondents Counsel reiterated submissions that this have been overtaken by events. In the premises, the court should decline to grant an order staying the orders of High Court dated 15th February 2022 and any other order save for the order imposing a fine.

Submissions of the Applicant in rejoinder

The Applicants Counsel Mr. Semakadde submitted in rejoinder that:

In respect to the first contention that the application is incompetent because it targets orders made on 15th February 2015, Mr. Semakadde submitted that the contentions of the Respondent are inconsistent with the affidavits of the

Attorney General filed the previous day. Further the there was an inescapable nexus between the proceedings and verdict in January and February. Counsel submitted that there is on record a letter of Attorney General of 11th February 2022 moving the court to enforce its decision of 28th January 2022 in the manner suggested in the letter. This was accompanied by a letter of 27th January 2022 as attached to the affidavit in reply of Principal State Attorney Oburu Odoi. The Applicant's Counsel submitted that the decision in January 2022 makes the nexus between the two orders plain. Further that the was a threat of enforcement of the warning but it was unconstitutionally brought. The supplementary affidavit of the Applicant shows the evidence of fear of the Applicant.

In response to the second point made by the Respondent's Counsel, Mr. Semakadde submitted that the submission on incompetence is premised on the Attorney General's characterisation of contempt of court proceedings as civil and not criminal. He submitted that this was a live issue in the appeal itself. As far as the interim order and jurisdiction of this court is concerned, Mr. Semakadde submitted *inter alia* that the court should desist from determining the definitional issues of whether the arrest and imprisonment of the Applicant was in civil or criminal proceeding and that this was a substantial question of law. Further, the Applicant was served with notice to show cause but was not issued with a charge sheet (or charged). He relied on **Re: Ivan Samuel Ssebaduka** which is the sentencing ruling of the court (arising from **Presidential Election Petition No. 01 of 2022 Ivan Samuel Ssebaduka v the Chairman Electoral Commission and 3 others**) where the Supreme Court of Uganda saw it fit to address the matter of contempt in a charge sheet of a criminal offence called contempt. He invited the court to peruse the record to confirm that there was no charge sheet in the Applicant's matter.

Mr. Semakadde submitted that in fairness, the court should decline to make a finding on the nature of the proceedings at this stage. Further that it is the constitutional duty of the court to establish, whether it is criminal or civil in nature, that there is an abridgment of liberty and the court should look

through constitutional lenses and not common law lenses. He contended that the Applicant is in court to say his liberty should not be fettered while he has legal proceedings challenging the infringement of his rights. Further that the Applicant should be allowed to address the court while at liberty in the main application and appeal.

Mr. Semakadde submitted that this is because the lower court may find lack of proportionality in the action of imprisonment but the Applicant would have served a year by the time he is heard. Further, Mr. Semakadde contends that the entire submission of the government whittles away the import of this court's jurisdiction in rule 2 (2) of the Rules of this court and in the alternative rule 6 (2) (b) which arises from civil proceedings and not criminal proceedings. Further Applicant's Counsel prays that the court should consider the articles of the Constitution he cited at the beginning and the General Comments 31 of Human Rights Committee on the nature of legal duties imposed on State Parties under the International Covenant on Civil and Political Rights and paragraph 13 thereof. To illustrate he again referred to **Theodore Sekikubo v Attorney General** (supra) where the MPs had been thrown out of Parliament but the Supreme Court held that they should continue to sit as members of Parliament.

Further, as far as the status quo is concerned, Mr. Semakadde submitted that it does not comprise in events of the previous day (of arrest and imprisonment) but the antecedent legal papers. Further that unless that action is set aside, the court is powerless to administer justice. He contended that such a submission is erroneous. Firstly, because the court can use constitutional lenses, the court has the power. Secondly, the alternative argument is that the Applicant understood the matter as a civil matter and this can be established by the papers. Imprisonment should not be made a fetish. That it is not a dungeon where unwanted lepers are thrown and removed from high society. He prayed that the idea that the imprisonment cannot be considered should be rejected. The order has not been fully served and can be stayed.

In conclusion, Mr. Semakadde submitted that it is unfair to tell a citizen who has come to court contesting alleged failures of lower which should not be implemented before he regains his liberty. He submitted that the court has power under section 33 of the Judicature Act and sections 37 and 38 thereof on the nature of injunctions the court can issue to grant a remedy. Lastly, he prayed that the cardinal principles of justice and fairness should be upheld.

Resolution of application.

I have carefully considered the Applicant's application, the submissions of Counsel which I have set out above and the law generally.

The Applicant filed this application by notice of motion under the provisions of article 28 (1), 44 (c), article 139 (1) and article 134 (2) of the Constitution as well as section 33 of the Judicature Act. Further the Applicants cited rule 6 (2) (b) and 42 (1) (b), 43 (1), (2) of the Rules of this court. He seeks an interim order to issue to stay all the orders of the High Court in Miscellaneous Application No 843 of 2021 until final determination of his substantive application for stay of execution. Secondly he prays that the costs of the application are provided to the Applicant. In Annexure "A", to the affidavit in support of the notice of motion the Applicant filed a notice of appeal in which he states that he was dissatisfied with the rulings and orders of Ssekaana J delivered on 27th of January 2022 in a matter between the Attorney General and the Applicant in High Court, Civil Division Miscellaneous Application No 843 of 2021. The notice of appeal was lodged in the High Court on 27th January 2022. Secondly, by letter dated 27th of January 2022, the Applicant wrote to the deputy Registrar High Court Civil Division informing the Registrar that he had filed a notice of appeal against the ruling and requested for the typed, transcribed and certified proceedings to enable him prepare for the intended appeal.

Annexure "B" attached to the affidavit in support of the application is a notice to show cause why the Applicant should not be committed to prison for violating a court order. The notice to show cause was issued by the trial

judge on 9th February 2022 indicating that the Attorney General had made an application to the High Court for the Applicant to show cause why he should not be committed to prison for violation of the contempt of court order. He was directed to appear before the High Court on 11th February 2022 at 3 PM to show cause why he should not be committed to prison for contempt of court. In paragraph 4 of the affidavit in support of the application he states that he had come across the notice to show cause set for the next day which was 11th of February 2022 suggesting that he had seen it on 10th February 2022. Most importantly the application indicates that there was a serious threat of execution as the notice to show cause had already been issued. This application was argued on 22nd February 2022 and therefore way after the period indicated in the notice to show cause had elapsed.

In a further supplementary affidavit the Applicant affirmed the on 16th of February 2022, the Applicant stated that in the evening of 10th of February 2022 at 3 PM he filed High Court Miscellaneous Application No 85 of 2022 and 86 of 2022 for stay of execution and interim stay of execution respectively but they had not been fixed for hearing. On 11th of February 2022 he filed an application for recusal of Hon Justice Musa Ssekaana which had not yet been determined at the time of the affirmation of his affidavit. On 14th of February 2022 he requested for the signed ruling of the trial judge in Miscellaneous Application No 843 of 2022 but the clerk of the trial judge said that she had none. On 14th February 2022, his lawyers were served with a letter written by the Attorney General to the Principal Judge requesting that he be summoned to substantiate allegations and to show cause why he should not have been held in contempt. He was served the notice to show cause on 14th February 2022.

Most importantly on 15 February 2022, he did not appear in court as he was scheduled to appear before the East African Court of Justice Appellate Division in Application No 02 of 2022 between the Applicant and the Attorney General of Uganda.

In the affidavit in reply deposed to by Mr Oburu Jimmy Odoi, Principal State Attorney of the Ministry of Justice and Constitutional Affairs, the deponent indicates that the Attorney General filed Miscellaneous Application No 843 of 2021 alleging that the Applicant had made various posts on his Twitter and Facebook accounts calculated to bring Justice Philip Odoki into contempt and to lower his judicial authority and to scandalised and lowered the authority of the High Court. On 27th of January 2022 the High Court delivered the ruling in which it found Applicant guilty of contempt of court and issued a strong warning to him against attacking judicial officers. A copy of the ruling Annexure "A" to the affidavit of Mr Oburu Jimmy Odoi hold that the Attorney General's application succeeded and the court granted the following orders:

1. A declaratory order that the Respondents statement & posts on his Twitter handle @MaleMabirixiHKK and Facebook page; Uganda People's Interests were in contempt of court.
2. An order that the Respondent pays a fine of Uganda shillings 300,000,000/= (three hundred million shillings only).
3. A strong warning to the Respondent to stop attacking judicial officers in future.
4. An order that the Male H. Mabirizi K. Kiwanuka pays the Attorney General's costs of the application.

The order is dated 27th of January 2022. Thereafter the Attorney General wrote a letter dated 11th of February 2022 addressed to the Registrar High Court (Civil Division) requesting for the summoning of the Applicant to this application in respect of their contempt of court violation of court order in Miscellaneous Application No 843 of 2021. This was in respect of various posts attributed to the Applicant on 28th of January 2022 up to that time which in the opinion of the Attorney General amounted to contempt of court. He requested the Applicant to be summoned to show cause why he should not be held in contempt of court for the said posts.

The notice to show cause was issued on 9th February for the Applicant to appear on 11th February 2022 at 3 PM was meant for the Applicant to show

cause why he should not be committed to prison for violation of the contempt of court order that I have set out above dated 27th January 2022. It is clear from the affidavit in reply of the Principal State Attorney that referred to above that subsequently the Applicant for the reasons he has given in this application did not appear to show cause and subsequently on 15th February 2022 Hon Mr Justice Ssekaana Musa in the presence of Mr Nuwe Noel for Mr Male H. Mabirizi K Kiwanuka and Ms Mutesi Patricia who represented the Attorney General issued an order that the Applicant is in contempt of court for the second time after the court had earlier issued a strong warning to him to desist from/or stop attacking judicial officers. That the Applicant should be arrested and imprisoned for a period of 18 months with costs to be in the cause. On the same day the assistant Registrar of the High Court Civil Division issued a warrant of arrest in execution to any police officer in the Uganda Police service commanding them to arrest the Applicant and deliver him to the prison mentioned in the committal warrant with immediate effect. The committal warrant is addressed to the officer in charge Kitalya Mini Max Prison and was also issued on 15th February 2022 indicating that the Respondent was found to be liable for contempt of court and was sentenced to serve 18 months in prison. The prison authorities were commanded to receive the Applicant and keeping him for the period indicated in the warrant of committal.

When the Applicant's application came for hearing, both Counsel of the parties agreed that the Applicant had been arrested on 21st February 2022 and committed to Kitalya prison pursuant to a warrant and the orders indicated above.

Following the above developments, Ms Patricia Mutesi, Assistant Commissioner conceded part of the application relating to the payment of a sum of Uganda shillings 300,000,000/= and agreed that an order of stay of execution issue pending the hearing of the Applicant's main application restraining any enforcement in execution for recovery of that sum from the Applicant.

Following that concession, an order issues restraining the Respondent or anybody acting on the instructions of the Respondent from enforcing the payment of the fine of Uganda shillings 300,000,000/= against the Applicant pending the hearing of the Applicant's application in this court in Miscellaneous Application No 39 of 2022.

On the other hand, the Respondents Counsel submitted that the Applicant's application in relation to the restraint orders sought in the application stopping the enforcement of the warrant of arrest and committal to prison had been overtaken by events. Ms Mutesi further strongly objected to the application on that aspect of the application on the ground that the application is incompetent because it seeks, by introducing in the supplementary affidavit issues of the committal and arrest warrant of the Applicant, an extraneous matter that is alien to civil application No 40 of 2022.

On the other hand, Mr. Semakadde who represented the Applicant submitted that this court has inherent powers which are constitutional to enforce the fundamental rights and freedoms of the Applicant because he has a grievance in that the warrant of arrest was enforced when he had a pending matter in this court in bad faith and the court should not tolerate this. He relied on the **Lukwago Erias Lord Mayor v Attorney General and others** (supra) and prayed that this court is persuaded by the decision of Mugambe J, where the trial judge emphasised the principle of the supremacy of the Constitution enshrined in article 2 of the Constitution. She held that "the supremacy of law has been, since the Middle Ages, a principle of the Constitution. It means that the exercise of powers of government shall be conditioned by law and that the subject shall not be exposed to the arbitrary will of his ruler." Particularly Mr Semakadde cited paragraph 159 at page 41 where the learned trial judge stated as follows:

> If I put all the events before me in one room, I see rule by law as the big elephant in the room. This is demonstrated through the reliance on sections in the KCCA Act to deny Lukwago his rights as ordered by court. By disobeying these orders (that is the 25th November order and the ruling of 28th November 2013) the

> Respondents are attacking the very independence of the judiciary enshrined in Article 128 of the Constitution. It is for this reason that they are suffocating rule of law with rule by law. This is outrageous."

I have carefully considered the above quotation and it clearly deals with a situation where there was a disobedience of court orders by the authorities and is clearly distinguishable except for the principle enshrined therein of the rule of law as opposed to rule by law. I will further carefully consider the decision cited in support of the Applicant's case of **Mrs Geraldine Bussulwa Ssali v NSSF** (supra), by Hon Mr Justice Musota, judge of the High Court as he then was. Particularly the Applicants Counsel relied on passage at page 8 where the learned trial judge stated that:

> In this case, the Respondents seem to have lost their conscience to the extent that they could not allow the court process to be completed. The thrust of the Respondents reply to this application is that since the board resolution to suspend the Applicant was passed before the ruling or hearing of the application for the interim injunction, then they were not under obligation to maintain the status quo.

I have again considered the above quotation in context because it deals with the situation where a resolution was passed before an injunctive order was issued and there was an attempt to enforce the resolution. The High Court disapproved of the Respondent's actions in that context.

I have weighed the submissions of the Applicant against the further objections of the Respondent's Counsel that the matters complained about are the subject of a separate order of the court which were neither appealed by any notice of appeal nor further proceedings. The Respondents Counsel relied on the authorities also relied on by the Applicant for the principles applied in applications for an interim order to maintain the status quo pending appeal or pending the substantive application.

These principles are well trodden and I will refer to them in the passing before considering the objection of the Attorney General on the ground that the Applicant's application cannot be granted because the orders being

challenged and being sought for setting aside, arise from a separate order which has not been appealed.

The practice of the Court of Appeal when resolving an application for an interim order by a single Justice pending consideration by the full bench is trite law. The jurisdiction to stay execution of a High Court order or decree is enabled by Rule 6 (2) (b) of **The Judicature (Court of Appeal) Rules** which provides that:

> 6. Suspension of sentence and stay of execution
>
> (2) Subject to sub rule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may-
>
> (a) ...
>
> (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these rules, order a stay of execution, an injunction, or a stay of the proceedings on such terms as the court may think just.

The Applicant indeed fulfilled the requirement to lodge a notice of appeal in accordance with Rule 6 (2) (b) and 76 of the Rules of this Court. Secondly, the Applicant filed a substantive application for stay of execution in Civil Application No 39 of 2021.

Thirdly, the rationale for granting an interim order is traditional and well – trodden. An interim order is granted to preserve the right of an intending appellant to have his or her appeal heard and so that it is not rendered nugatory ~~under~~. The rationale for stay of proceedings is stated in **Wilson v Church (1879) Vol 12 Ch. D 454** which rationale has been applied in Uganda time and time again that:

> As a matter of practice, where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings in the Judgment appealed from as will prevent the appeal if successful from being rendered nugatory.

This rationale is equally applicable to applications for stay of execution, stay of proceedings and injunction. All such applications intend to preserve the

status quo pending the hearing of the substantive matter be it the appeal or an application. It preserves the right of hearing and the word "status quo" has always been used to mean the prevailing situation at the time the application was filed. In **Uganda Revenue Authority versus Nsubuga Guster and another; Supreme Court Miscellaneous Application No 16 of 2018** the Supreme Court applied rule 2 (2) of the Judicature Supreme Court Rules and held that it gives the court very wide discretion to make such orders as may be necessary to achieve the ends of justice and that one of the ends of justice is to preserve the right of appeal and to help the parties to preserve the status quo before their dispute can be considered on the merits by the full court according to the rules.

Rule 2 (2) of the Judicature (Court of Appeal Rules) Directions is in *pari materia* with rule 2 (2) of the Judicature (Supreme Court Rules) directions. Rule 2 (2) of the Judicature (Court of Appeal Rules) Directions provides that:

> (2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extent to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay.

I agree with the law and have nothing useful to add. What is important is that inherent powers do not exist in isolation. There has to be a pending appeal from the orders sought to be stayed. The facts of this application are very clear that the High Court made a decision in Miscellaneous Application No 843 of 2021 dated 27th of January 2022. The Applicant was aggrieved by this decision and lodged an appeal on the same day. This notice of appeal was accompanied by a letter requesting for a copy of the record of proceedings. Thereafter, on 9th of February 2022 the High Court Civil Division issued a notice to show cause why the Applicant should not be committed to prison for contempt of court. The court made a ruling in an application by the Attorney General on 15th of February 2022. The subsequent ruling is not the subject of the notice of appeal in this application.

For this court to exercise its inherent powers, the Applicants Counsel further urged the court to enforce the fundamental rights and freedoms of the Applicant. I was referred to General Comment No 31 on the nature of the general legal obligations imposed on state parties by the International Covenant on Civil and Political Rights. The Applicants Counsel emphasised comments on article 2 which defines the scope of the legal obligations undertaken by state parties to the covenant and which imposes a general obligation on state parties to respect the covenant rights and ensure them to all individuals in their territory and subject to their jurisdiction. Further the obligations of the covenant are binding on every state as a whole. Secondly state parties are to give effect to the covenant rights in accordance with the domestic constitutional process.

I have carefully considered the plea of the Applicant's Counsel not to go beyond the application which was restricted to a previous order dated 27th of January 2022. Secondly, I was requested not to consider whether the sentence of the applicant to imprisonment was made pursuant to a civil or criminal conviction or liability for contempt. The Applicant's counsel emphasised the relationship or nexus between earlier proceedings culminating in the order of 27th January, 2022, the notice to show cause and the subsequent imprisonment of the applicant. Counsel further invited court to consider the alleged violation of the Applicant's rights by the Government.

I have considered the general comment on the International Covenant on Civil and Political Rights clearly respects the constitutional processes of each member states. The Court of Appeal can only exercise such appellate jurisdiction as is conferred on it by the Constitution and any other Act of Parliament. The appellate jurisdiction of the Court of Appeal is conferred by article 134 (2) of the Constitution of the Republic of Uganda which provides that:

> (2) An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law.

It is necessary to highlight the fact that the appellate jurisdiction can be invoked when there is a decision of the High Court. The facts of this application are that there was a decision of the High Court dated 27th January 2022. Subsequently, the Attorney General alleged that the Applicant had committed contempt of court order and further proceedings took place with regard to the alleged further contempt. This culminated in a ruling dated 15th of February 2022 the conclusion of which is as follows:

> Therefore, the Respondent is in contempt for the second time after the court had earlier issued a STRONG WARNING to him to desist and/or stop attacking judicial officers. The Respondent should be arrested and imprisoned for a period of Eighteen (18) months. The costs shall be in the cause. I so Order.

The doctrine that appellate jurisdiction only springs from statute was considered in the celebrated decision of the East African Court of Appeal in **Attorney General v Shah (No. 4) [1971] EA, 50**. The appeal arose from a decision of the High Court. The facts are that the High Court of Uganda issued an order of mandamus against officers of government and the Attorney General was aggrieved and appealed against the order of mandamus. The Respondent objected to the hearing of the appeal by the East African Court of Appeal on the ground that the East African Court of Appeal lacked jurisdiction to hear the appeal. Spry Ag P stated that:

> It has long been established and we think there is ample authority for saying that appellate jurisdiction springs only from statute. There is no such thing as inherent appellate jurisdiction.

Spry Ag P found that the appellate jurisdiction of the East African Court of Appeal sprung from Article 89 of the Constitution of the Republic of Uganda 1967 (since repealed) and the Judicature Act 1967 (since repealed) which provided that the East African Court of Appeal had only such jurisdiction as conferred on it by Parliament.

Consequently, in this matter, there has to, in the least, be a notice of appeal from the decision of 15th February 2022 to base the jurisdiction under article 134 (2) of the Constitution to suspend the sentence imposed on the applicant pending appeal as envisaged by Rule 6 (1) of the Rules of this court or to set

aside or stay the orders issued after the decision of the High Court dated 27th of January 2022.

Further the Applicant's Counsel urged me to look at the issue of the liberty and the right of the Applicant to a fair hearing through constitutional lenses. Further, I note that both Mutesi and Semakadde prayed that I restrict myself to the confines of the interim order application. This contradicts the request for me to go further. Nonetheless, I will consider the further arguments. The order issued by the High Court on 15th February is a valid order which is operative unless set aside or suspended in in the ordinary appeal processes. Secondly, a single justice of this court only exercises appellate jurisdiction and the inherent powers of the court are exercised when a decision of the High Court has been challenged in the minimum step by lodging a notice of appeal against it within 14 days of the decision. The court is therefore constrained on a fundamental point of jurisdiction from considering the submissions of the Applicant's Counsel. The Applicant was not and is not precluded from seeking a remedy on the basis of any allegation that his fundamental rights and freedoms have been infringed. In any case such a remedy can be considered by an appellate court after the impugned decision has been duly challenged ~~by~~ a competent court or tribunal exercising original jurisdiction for enforcement of fundamental rights and freedoms.

I have also considered the issue of the perceived delays in the handling of appeals and applications arising therefrom against the constitutional principle that fundamental rights and freedoms should be jealously guarded. The right of access to court for redress in respect of alleged breach or infringement of a fundament right and other human rights and freedoms was considered in **Attorney General v Ali & Others [1989] LRC** 474 at pages 525 – 526 by Harper J.A who held that:

> ... a citizen whose Constitutional rights are allegedly being trampled upon must not be turned away by procedural hiccups. Once his complaint is arguable, a way must be found to accommodate him so that other citizens become knowledgeable of their rights ...

In that matter the court considered an original application to the High Court which had been refused on the grounds of procedure. A similar matter was handled in **Juandoo v Attorney General of Guyana (1971) AC 972** at pages 982 – 983 where the court considered the equivalent of article 50 (4) that states that Parliament shall make laws for the enforcement of the rights and freedoms under the chapter. In article 50 (1) of the Constitution it is provided that any person who claims that a fundamental or other right or freedom granted under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation." In **Jaundoo v Attorney General** (supra), no rules of procedure had been prescribed by Parliament for enforcement of fundamental rights and freedoms though the Constitution commanded that Legislature to enact rules for enforcement of fundamental rights and freedoms. On application by the Appellant for enforcement of her right to compensation a preliminary objection was raised to her petition on the ground that there was no procedure available to approach the court. The objection was overruled when the court held that:

> ...the clear intention of the Constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by failure of parliament or the rule making authority to make specific provisions as to how that access should be gained.

From the above two decisions, the matter proceeded in a court with original jurisdiction such as the High Court or the Constitutional Court. The Court of Appeal is not a competent court envisaged under Article 50 except when handling an appeal. It is an appellate court envisaged under article 134 (2) of the Constitution. Secondly in Uganda the enforcement of fundamental rights and freedoms is further governed by a procedural law that was envisaged by article 50 (4) of the Constitution of the Republic of Uganda. The Act of Parliament is the Human Rights (Enforcement) Act, 2019. Particularly sections 3, 4 and 5 deal with enforcement of fundamental rights and freedoms by competent courts which include the High Court and subordinate courts. This courts are empowered with original jurisdiction.

In the premises, the Applicant's application only partially succeeds on the grounds conceded to by the Attorney General while the rest of the orders sought which affect orders of the High Court dated 15th of February 2022 is incompetent because this court lacks jurisdiction to handle the prayers in relation to those orders. In the premises the following orders shall issue:

1. A stay of execution order issues staying the order of the High Court dated 27th of January 2022 for the Applicant to pay a fine of Uganda shillings 300,000,000/= pending the disposal of Civil Application No 39 of 2022 in this court.

2. The prayer to stay execution with regard to the notice to show cause issued by the High Court on 9th February 2022 why the Applicant should not be committed to prison for violation of a court order has been overtaken by events as the Applicant was arrested on 21st of February 2022 and committed to Kitalya Prison.

3. The Court of Appeal at this point in time has no jurisdiction to entertain prayers to restrain or stay orders issued by the High Court on 15th February 2022 until and unless the Applicant challenges those orders by means envisaged under rules 6 (2) and 76 of the Rules of this court. In the premises, the prayer to suspend the Applicants imprisonment and set him free pending his application or appeal (which has not been commenced) cannot be granted for want of jurisdiction.

4. The costs of this application shall abide the outcome of the main application or the appeal as may be determined by the court comprising of an uneven number of Justices of Appeal not being less than three.

Dated at Kampala the 25th day of February, 2022

Christopher Madrama Izama

Justice of Appeal