THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0871 OF 2020

5 **(Arising from Civil Suit No. 0319 of 2009)**

MAVID PHARMACEUTICALS LTD ……………………………………… APPLICANT

VERSUS

1. ROYAL GROUP OF PAKISTAN } …………………………… RESPONDENT

10 **2. REGISTRAR, HIGH COURT } ……………………………… GARNISHEE**

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

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Judgment was on 24th July, 2015 entered in favour of the applicant against the respondent. By that decision, the applicant was awarded US $ 32,093 being the value of the raw materials, US $ 5,075 being the shipping charges for those materials, US $ 600,169 as clearing charges, US $ 30,000 as general damages, (hence a total of US $ 667,337) interest on the special damages at the rate of 20 20% per annum from 24th July, 2015 until the date of judgment, and further interest on aggregated awards at the rate of 20% per annum from the date of judgment until payment in full. The applicant was further awarded the costs of the suit. The respondent on 27th July, 2015 filed a notice of appeal challenging the decision, and later a memorandum of appeal on 23rd June, 2016.

25 When the applicant sought to enforce the decree, the respondent applied for, and on 28th November, 2015 secured an order of stay of execution, conditional on the respondent depositing in court within forty five (45) days (expiring 12th January, 2016) as security for due performance of the decree, 50% of the decretal amount (hence a sum of US $ 333,669). The applicant provided court with bank drafts on 22nd December, 2015 worth US $ 56,281 which for some reason were 30 never banked as a result of which they became stale. It is nearly four years later on 24th October, 2019 that this was established as a fact. The Registrar then issued a fresh warrant of execution of the decree, for the recovery of US $ 111,771 and shs. 1,320,000/= The respondent reapplied for and on 18th June, 2020 secured another order of stay of execution, conditional on the respondent

depositing in court on the day of the order, 50% of the decretal amount (hence US $ 55,885 and 660,000/=) as security for due performance of the decree. The respondent was only able to remit US $ 62,819 two months later on 19th August, 2020. The applicant then on 15th October, 2020 filed garnishee proceedings seeking to attach that fund and on 22nd February, 2021 obtained a garnishee order nisi attaching the money so deposited by the respondent in court.

b. <u>The case stated;</u>

When the matter came up before the Registrar for consideration of whether or not the garnishee order nisi should be made absolute, he decided to refer that question to this court for its opinion in light of the unusual complexity of the facts in whose context it arose. At common law a consultative case stated is a procedure by which a court can ask another court for its opinion on a point of law. A consultative case stated is made at the discretion of a presiding judicial officer before he or she determines the case before the court. The higher court to which the case is stated will refer the case back to the referring court with directions to correct its decision. The decision of the higher court is transmitted to the lower court which can then resume its hearing of the case, with the benefit of the legal advice of the higher court. Where a case is stated after aspects of the decision have been made, the higher may reverse, affirm or amend the determination in respect of which the case has been stated.

The court may reserve a question of law if it is satisfied that it is in the interests of justice to do so. A consultative case stated can be made at any time during proceedings before a final determination has been made. Before stating a case, the court below must consider: the extent of any disruption or delay to the trial process that may arise if the question of law is reserved; whether the determination of the question of law may; - (i) render the trial or hearing unnecessary; (ii) substantially reduce the time required for the trial or hearing; (iii) resolve a novel question of law that is necessary for the proper conduct of the trial or hearing; or (iv) in the case of questions reserved in relation to a trial, reduce the likelihood of a successful appeal. It is essential that the court below has made the necessary findings of fact on which the question(s) of law to be stated will be based (see *DPP (Travers) v. Brennan [1998] 4 IR 67 at 70*). In the meantime the final decision in the case is suspended until the case stated has been determined.

The factors which should weigh in the lower court's decision to require a case stated to a higher court are: (a) there has to be a real and substantial point of law open to serious argument and appropriate for decision by a higher court, (b) the point should be clear cut and capable of being accurately stated as a point of law and not a matter of fact dressed up, (c) the point should be of such importance that the resolution of it is necessary for the proper determination of the case. If those factors are satisfied the lower should state a case (see *Halfdan Greig & Co. A/S v. Sterling Coal and Navigation Corporation and A. C. Neleman's Handel-En Transportonderneming (The "Lysland") [1973] 1 Lloyd's Rep. 296*).

This consultative case stated was made in a manner akin to that envisaged by section 61 of *The Civil Procedure Act* providing that persons may agree in writing to state a case for the opinion of the court, which then has to try and determine the case in the manner prescribed. In resolving the controversy, this court has as well adopted a procedure akin to that specified in Order 35 of *The Civil Procedure Rules* which requires the parties to state the question(s) in the form of a case for the opinion of the court, and to concisely state such facts and specify such documents as may be necessary to enable the court to decide the question raised thereby. On a stated case, this Court cannot receive additional evidence. It can only examine the record from which it may make additional findings of fact or draw inferences. It must determine the matter based on the facts included in the stated case. It is for that reason the additional affidavits filed have been disregarded.

c. <u>Submissions of counsel for the applicant;</u>

Counsel for the applicant, M/s Sewankambo and Co. Advocates together with M/s Semuyaba, Iga and Co. Advocates, submitted that an appeal does not operate as a stay of execution. The decree, although passed on 24th July, 2015 remains unsatisfied to-date. The respondent is a foreign company with no assets within jurisdiction save for trademarks and product licenses. The respondent was twice granted conditional orders of stay of execution of the decree and twice the respondent failed to comply with the conditions. The orders were never appealed, varied or set aside. Upon the respondent's failure to comply with the conditions, the orders lapsed. The belated partial compliance with the latter order was ineffective. The respondent was contemptuous of the court order, never complied with it and yet did not apply for extension of time for compliance. The

court is now *functus officio*. It cannot revive the order since there is already a decree nisi in place. The respondent is now only required to show cause why the garnishee order should not be made absolute. The respondent's *locus standi* in the matter too is doubtful since these are primarily proceedings between the applicant and the garnishee.

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From the time the respondent deposited the bank drafts that became stale, they never took any initiative to confirm they had been cashed and never demanded for a receipt. In any event those bank drafts were deposited in court out of time on 22nd June, 2020.The second attempt was two months late on 21st August, 2020 when the deadline was on 18th June, 2020 and this too was part

10 payment. The respondent never made any attempt to apply for extension of time. To the extent that the um deposited in court by the respondent was in partial fulfilment of the conditions attached to the grant of the orders of stay, it is attachable since the Registrar holds it in trust for the respondent. It is irrelevant that the sum is deposited on a general collection account managed by the Registrar. The respondent cannot seek to question the conduct of the Registrar in light of their own failure to

15 comply with court orders. In any event the Registrar did not have the capacity to vary any of the orders made by Judges of the Court. The garnishee order ought to be made absolute since no justifiable cause has been advanced to prevent that. The amount outstanding now is US $ 223,554 and 6,600,000/=

20d. Submissions of counsel for the respondent.

Counsel for the applicant, M/s Nangwala, Rezida and Co. Advocates submitted that the order of stay of execution was made on 28th November, 2015 conditional on the respondent depositing in court within forty five (45) days (expiring 12th January, 2016) as security for due performance of

25 the decree, 50% of the decretal amount. The applicant provided court with bank drafts on 22nd December, 2015 worth US $ 56,281. A bank draft is as good as cash. The respondent thus complied with the conditional order. The drafts were never cashed, apparently because the title of the payee was inadvertently wrongly worded, but this was never brought to the attention of the respondent until four years later. Upon the applicant's fresh application to execute the decree, the respondent

30 applied for a renewal of the order of stay but the court imposed stringent conditions requiring the respondent to deposit 50% of the decretal sum in court that very day of 18th June, 2020. The

respondent made frantic efforts to comply but was only able to remit US $ 62,819 two months later on 19th August, 2020. The security for due performance of the decree is not a debt due to the respondent and therefore is not attachable. It is not money deposited pursuant to any agreement or contract. Its release is contingent upon the outcome of the appeal.

The Registrar is faulted on grounds that although he received a timely deposit of the bank drafts, he neither banked them nor notified the respondent of irregularities found therein which prevented them from being cashed. Consequent thereto, the respondent not only lost their value in cash as the issuing bank, Crane Bank Limited, became defunct two years later in 2017, but the respondent was also deprived of the benefit of the order of stay, despite its timely and good faith effort to comply with the condition attached to it. As a result the respondent has by now deposited in court the full amount in contention, half of which was lost when Crane Bank Limited closed. Instead, six months after receipt of the drafts, the Registrar issued a notice to show cause why the decree should not be executed, and subsequently a decree nisi. The respondent is aggrieved, yet the judicial officer responsible for all this is protected by absolute immunity. It is a violation of article 128 (4) of *The Constitution* for the Registrar to have been made a party to these proceedings. The court should therefore invoke its inherent jurisdiction to furnish a remedy for the respondent by finding the order of stay still valid and the amount deposited in court as not being attachable.

e. The decision.

According to section 34 (1) of *The Civil Procedure Act*, all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, have to be determined by the court executing the decree and not by a separate suit. The scope of this provision is very wide as exclusive jurisdiction is conferred on the executing court in respect of all matters relating to execution. For the provision to apply; (i) the questions must have arisen between the parties to the suit or their representatives; (ii) they must arise in the suit in which the decree was passed; (iii) they must relate to the execution, discharge or satisfaction of the decree; and (iv) they must be determined by the execution court. It is trite that questions relating to execution must be determined by court executing decree and not

by separate suit *(see Kabwengure* v. *Charles Kanjabi [1977] HCB 89* and *Semakula Fenekansi v. Musoke J., F. Musoke & East African General Insurance Co. Ltd [1981] HCB 46*).

This section is intended to provide an inexpensive and expeditious remedy for determination of certain questions that arise in the course of execution, so as to avoid a multiplicity of suits. Such questions usually include; whether a decree is executable? Whether the property attached is liable to be sold in execution of the decree? Whether a decree is fully satisfied? Whether a particular property is included or not in a decree? Generally all questions regarding attachment, sale or delivery of property. Since in the instant case they arise within the context of a case stated, the questions must be sufficiently clear and precise to enable the Court to decide the controversy without any additional evidence. The following questions have arisen in the course of execution;

1. Whether or not there is a valid order of stay of execution.
2. Whether there are justifiable reasons for the delayed and partial compliance with the court orders issued previously.
3. Whether the money deposited in court as security for costs is attachable to satisfy the decree.
4. Whether the conduct of the Registrar, High Court, in the circumstances occasioned a miscarriage of justice.
5. Whether the decree nisi should be made absolute.
6. What remedies are available to the parties?

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The first and second issues will be considered concurrently just as the fifth and sixth issues. The rest of the issues will de determined independently.

i. <u>Whether or not there is a valid order of stay of execution.</u>
ii. <u>Whether there are justifiable reasons for the delayed and partial compliance with the court orders issued previously.</u>

In the context of civil litigation, the general rule is that absent an appeal, an order of court remains good and valid according to its terms, including a term which extends it, until further order.

However, a conditional court order of stay of execution is one which is conditional on one or more of the parties doing something attached to the order, requiring performance of a specified act by a particular date or within a particular period. A conditional order of this nature cannot be said to be an order passed in adjudication on merits and therefore is regarded as an interlocutory order. It operates in favour of the applicant if he or she complies with the conditions by the appointed date, whereas if the applicant fails to do so, the order works itself out automatically as one of dismissal or in the alternative, is vacated automatically. Where the order requires the applicant to deposit money in court by a specified date, in the event of the applicant failing to make the deposit, the order stands vacated automatically.

Orders of this nature, although made conditional, they are none the less "interlocutory decisions" pending an appeal not having the force of *res judicata* which precludes re-litigation of the same subject-matter, between the same parties, within the same or subsequent proceeding. Needless to point out that interlocutory orders are of various kinds; some like orders of stay or injunction are designed to preserve the status quo pending the litigation on appeal and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit.

A decision of court is considered "final" so as to trigger the *functus officio* doctrine if it ends the litigation on the merits and leaves nothing for the court to do but execute the decision. A ruling that leaves any pending claim or central relief is non-final but interlocutory. For that reason conditional orders for stay of execution pending appeal are interlocutory in the sense that they do not decide any matter in issue arising in the appeal, nor put an end to the litigation. They do not, in that sense, decide in any manner the merits of the controversy in issue in the appeal and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of *res judicata* does not apply to the findings on which these orders are

based, though if applications were made for relief on the same basis after the same has once been disposed of the court would be justified in rejecting the same as an abuse of the process of court.

Even if the rule of *res judicata* does not apply, it would not follow that on every subsequent day
5 on which the suit stands adjourned for further hearing the application could be repeated and fresh orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the court does not however necessarily rest on the principle of *res judicata*. Thus if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same facts, is
10 not barred on the application of any rule of *res judicata*, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of *res judicata* and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of *res judicata* is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to
15 operate and preclude a fresh investigation of the issue, whereas in the other case, on proof of fresh facts, the court would be competent, and would be bound to take those into account and make an order conformably to the facts freshly brought before the court.

The court considering afresh the question raised in an interlocutory application is both entitled and
20 bound to take account not only of the change in circumstances which has occurred since the last occasion but also all circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the applicant. The question is a little wider than "has there been a change?" it is "are there new considerations which were not before the court when the application was last
25 considered?" On a second or subsequent application, the court need only ask first whether there had been a material change in circumstances since the original order. If there had been no change, there is no need to look at the facts underlying the previous refusals of the application. It seems to me that it follows that on an application or further application for the same relief, the applicant must show that something has changed so that the continuance of the order is no longer necessary
30 or appropriate. Unless that is so, the applicant would have the merits of an earlier decision or decisions re-determined anew without having appealed them.

In the instant case it is argued by counsel for the respondent that the objections by the respondent against making the garnishee order absolute lack merit because twice before the respondent has inexplicably failed to comply with the order of stay of execution as a result of which it expired. They further argues that the applicant has waited for too long for the fruits of a judgment delivered on 24th July, 2015 in their favour, yet the respondent has no other known assets within jurisdiction save intellectual property rights. Counsel for the respondent as retorted that the initial order was complied with, but for the negligence of a court official which prevented its perfection, while the respondent made its best effort to comply with the second order, despite being unusually stringent.

The court will take a flexible and robust view of failure to comply with conditional orders, particularly where the defaulting party has a good reason for failing to comply. Technical breaches alone though will not necessarily save the defaulting party especially where there is a history of disregard for the court rules and orders. To be relieved of the adverse impact of failure to comply with a conditional order, the party seeking relief is required to demonstrate a reasonable excuse for its failure to comply with the order. The drastic outcome of denial of a remedy for failure to comply with a conditional court ordered is justifiable only where the conduct of party seeking relief is shown to be wilful, contumacious, or in bad faith. Wilful and contumacious conduct of the party seeking relief may be inferred from the repeated failure to comply with conditional court orders previously entered, over an extended period of time or where the party is able to comply without manifest hardship and has not made good faith effort to comply. In some cases though the failure could be inexcusable but not wilful and deserving of sanctions. What constitutes a reasonable excuse is left to the sound discretion of the court on the facts of each case.

On the one hand, the court ought to be mindful of the fact that our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. Chronic noncompliance with deadlines breeds disrespect for the dictates of *The Civil Procedure Rules* and a culture in which cases can linger for years without resolution. It also places courts unnecessarily in the position of having to order enforcement remedies to respond to the delinquent parties and their advocates. If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.

However on the other hand, court will not ignore an unsuccessful good faith effort to comply, in which case it may, on application, extend the time for compliance or modify the condition. In determining whether "reasonable effort" was undertaken, the courts will consider such factors as whether the party used the level of effort that a reasonable litigant would have used, in light of the party's own capabilities. This will be achieved by showing that the party used all reasonable methods for satisfying the condition.

As regards the order of stay made on 28th November, 2015 conditional on the respondent depositing in court within forty five (45) days (expiring 12th January, 2016) as security for due performance of the decree, 50% of the decretal amount (hence a sum of US $ 333,669). The applicant provided court with six bank drafts on 22nd December, 2015 worth US $ 56,281. According to rule 13 of *The Judicature (Court Fees, Fines and Deposits) Rules*, a receipt in the prescribed form has to be given for all monies deposited or paid into court. On this occasion though, the then counsel for the respondent in the letter forwarding the drafts wrote "kindly acknowledge receipt of the said drafts by stamping and returning a copy of this letter to the bearer." Indeed the letter was duly stamped by the court. For some reason, the drafts were never banked as a result of which they became stale. Hence the security was never perfected, out of a fault that could have been corrected, had the respondent insisted on demanding for a general receipt (which presumably would have been issued only after the drafts were cashed) instead of a note of acknowledgement. Comparatively though, the respondent's shortcomings on this incident pale in light of the court's default. I therefore find that the imperfection of the security occurred despite the respondent's best efforts to comply.

As regards the order of stay made on 18th June, 2020 conditional on the respondent depositing in court on the day of the order, 50% of the decretal amount (hence US $ 55,885 and 660,000/=) as security for due performance of the decree, the respondent was only able to remit US $ 62,819 two months later on 19th August, 2020. It is clearly not open to an applicant after such a conditional order is passed against it to do nothing at all by way of compliance or even by moving the Court before the date fixed for compliance, to extend the time, and then to claim that the order is still in force. However, this court takes cognisance of the fact that in imposing that time limit, the court entirely disregarded the fact that the court was largely to blame for the failure to perfect the

previous order. This rendered the terms imposed on this occasion unreasonably onerous. Despite this, the respondent used all reasonable methods for satisfying the condition but could only succeed after two months. Notwithstanding the existence of some evidence of conduct demonstrating noncompliance with the order of 28th November, 2015, on this occasion this Court finds that respondent's conduct still fails to rise to the level of wilful, contumacious, and bad faith failure.

Unfortunately, the law is silent as to what the court should do upon making such a determination. Where no express law or rule is applicable to any matter in issue before this Court, Section 14 (2) (c) of *The Judicature Act* allows for resort to a decision that is in conformity with the principles of justice, equity and good conscience. Equity is invoked to do justice. The very difference between law and equity is that law looks into the actions of a person while equity gives credence to the conscience. Equity construes the undertaking given by someone as his act. Equity will treat the subject matter of performance with relation to its consequences and incidents in the same manner as if the acts, contemplated, agreed or undertaken had been done or performed.

The maxim that "equity regards as done what should have been done" means that when individuals are required, by their agreements, court orders or by law, to perform some act of legal significance, equity will, based on notional performance, regard that act as having been done as it ought to have been done, even before it has actually happened (see *Walsh v. Lonsdale [1882] 21 Ch. D 9*). The doctrine of performance in equity is connected with notional performance rather than actual performance. The doctrine proceeds upon the ground that a person is presumed to do that which he is bound to do, if he has done anything, that he has done it in pursuance of his obligation. In the peculiar circumstances of this case, the maxim is perfectly suited to prevent the exploitative attempt to take advantage of lapses in the administrative processes of the court regarding deposits in court.

Partial Compliance means that the applicant has achieved less than substantial compliance but has made progress toward satisfying the requirements of the order. It is attained by proof of a good-faith attempt to comply with the conditions attached to the order. Substantial compliance means performance of all that is necessary on the part of the applicant, to accomplish the purpose of the order, pending administrative acknowledgement. An important factor in assessing substantial

compliance would be whether the respondent has actually received the benefits of applicant's partial compliance. Substantial, and not exact performance, accompanied by entire good faith, is all that is required to enable the applicant secure an extension of time. In this context, a court's willingness to allow "substantial" as opposed to "strict" compliance with the condition may be seen as consistent with the law's traditional reluctance to enforce contract provisions that result in forfeitures.

Equity imputes an intention to fulfil an obligation such that "wherever a thing is to be done either upon a condition, or within a time certain, yet if a recompence can be made which agrees in substance, though perhaps not in every formal circumstance, such a recompence shall be good, and shall go in satisfaction of the thing covenanted to be done" (see *Lechmere v. Lady Lechmere (1735) Cas. temp. Talb. 80*). This maxim means that if a person is obligated to do one act and does another, the act done by him will be taken as a close enough approximation to the fulfilment of the required obligation. This principle will be invoked to address a situation where it is unconscionable for one litigant to be disadvantaged and another obtain advantage or a benefit from a breach of duty by an officer of the court. In circumstances of this nature equity will regard as done that which ought to be have been done (see *Attorney General for Hong Kong v. Reid and others [1994] 1 AC 324; [1994] 1 All ER 1*). In such cases where individuals are required by law or court order, to perform any act of legal significance, equity will regard that act as having been done as it ought to have been done even though it actually did not happen as required or ordered.

Furthermore, according to Order 51 rule 6 of *The Civil Procedure Rules*, where a limited time has been fixed for doing any act by order of the court, the court has power to enlarge the time upon such terms, if any, as the justice of the case may require, and the enlargement may be ordered although the application for it is not made until after the expiration of the time appointed or allowed. The rule envisages four scenarios in which extension of time for the doing of an act so authorised or required, may he granted, namely; (a) before expiration of the limited time; (b) after expiration of the limited time; (c) before the act is done; (d) after the act is done. Proportionality is key to a proper application of these powers. While the court may properly allow extra time for compliance, there will come in the end a stage where the only order which is fair and which does not infringe the purpose of the original order is that of dismissal of the application. Irrespective of

the timing, extension of time will be granted where it is found that the mistake was that of the court (see *Mansukhalal Ramji Karia and Crane Finance Co. Ltd. v. Attorney General and two others, S.C. Civil Application No. 1 of 2003*).

Where the Court has the power to fix time and the power is not regulated by any statutory limits, it has in appropriate cases the power to extend the time fixed by it. It is well settled principles that the Court has power to extend the time beyond the stipulated period, when sufficient cause exists or events pointed out to the Court for non-compliance of the order are beyond the control of the party. The power to fix the time for doing of an act must carry with it the power to extend such period, depending upon whether the party in default makes out a case to the satisfaction of the Court which fixed the time. Where extension of time is granted on account of part payment of the security deposit, the court will require payment of the balance by the date specified in the order and if the applicant does not make the deposit by the date specified, the order will be vacated automatically.

While a step taken out of time is voidable, it may be validated by extension of time. An extension of time may be granted even where the step has been taken out of time and before the application (see *Shanti v. Hindocha and others [1973] 1 EA 207; Mansukhalal Ramji Karia and Crane Finance Co. Ltd. v. Attorney General and two others, S.C. Civil Application No. 1 of 2003; Godfrey Magezi and another v. Sudhir Rupaleria (2), S.C. Civil Application No. 10 of 2002* and *Crane Finance Co. Ltd v. Makerere Properties Ltd, S. C. Civil Appeal No. 1 of 2001*). Time may be enlarged by validation of a belated step taken in the proceedings, where its effect is only the reversal of a tactical advantage but does not result in abridging, enlarging, restricting, impairing or modifying any substantive right arising in the litigation. It will not have such an effect where it only facilitates the fair and accurate performance of the truth-finding function of the court rather than providing a substantive basis on which to resolve the pending litigation.

Enlargement of time in the instant case by way of validation has no discernable substantive impact on the merits of the appeal. The legal effect of extending time to perform an act out of time when the act has already been duly performed, albeit out of time, is to validate that act or to excuse the late performance of the act. In other words the legal effect of extending time is to validate or excuse

the late step taken in the proceedings. The applicant need not take a further step of compliance if that already taken is complete and in proper form (see *The Executrix of the Estate of Christine Mary N. Tebajjukira and another v. Noel Grace Shalita, S. C. Civil Application No.8 of 1988*). This is a proper case in which the court ought to, and does hereby, validate the respondent's belated compliance with the conditional order of stay of execution.

For all the forgoing reasons I find that there are justifiable reasons for the delayed and partial compliance with the court orders issued previously and therefore there is still in force, a valid order of stay of execution pending appeal to the Court of appeal.

iii. Whether the money deposited in court as security for costs is attachable to satisfy the decree.

Whenever, on an application for the execution of a decree, or whenever in the course of execution proceedings, it is necessary to ascertain the amount of money which is or which remains due under the decree, the judicial officer should form his or her own conclusion on the matter therefrom.

In the process of attachment, the court at the request of the decree-holder designates specific property owned by the debtor to be transferred to the creditor or sold for the benefit of the creditor. Section 44 of *The Civil Procedure Act* prescribes the property which can and cannot be attached in execution. Several types of property are liable for attachment and sale in execution of a decree like lands, houses or other buildings, goods, money, banknotes, checks, bills of exchange, government securities, bonds or other securities etc., "and ….. all other saleable property, movable or immovable, belonging to the judgment debtor, or over which or the profits of which he or she has a disposing power which he or she may exercise for his or her own benefit, whether the property be held in the name of the judgment debtor or by another person in trust for him or her or on his or her behalf."

In short property liable to attachment and sale in execution of a decree is the "property belonging to the judgment debtor" or the property over which, or the profits of which, he or she "has disposing power which he or she may exercise for his or her own benefit." The question then is whether or

not money deposited in court as security for costs on grant of an order pending appeal, is "property belonging to the judgment debtor" or property over which he or she "has disposing power which he or she may exercise for his or her own benefit." The question precisely is whether a Judgment-debtor can be said to have disposing power over property in "*in custodia legis.*"

An order which requires a party to pay money into court, or provide a bond or guarantee, as security for their opponent's costs of litigation renders the sum deposited available for specific situations set out in the order, subject to the court's discretion. An order for security for costs pending appeal protects the judgment creditor against the risk that the appellant will lose the appeal and be condemned in costs, but then the respondent will not be able to enforce the costs order against the appellant. An order for security to be given, if complied with, will provide a fund available within Uganda, against which the party who has obtained the security order can enforce any costs order they may obtain.

Money deposited into court as security is held subject to the order of a court of competent jurisdiction. Until such order of a court of competent jurisdiction is duly made and entered, the money in question, being held subject to the making of such order, is "*in custodia legis*." It is held to be disposed of in some particular manner prescribed by law or according to orders of the Court. The party depositing it may not maintain a claim for its return to him or her until an order of court discharging it is made.

For example in *Ex parte Banner; In re Keyworth, (1874) 9 Ch A 379 (A)*, the plaintiff filed a suit upon an overdue bill of exchange for £ 1200 against the acceptors. The defendants obtained leave to appear and defend the suit upon paying into Court £ 880 to abide the event. Shortly thereafter the defendants filed a liquidation petition. The Liquidator claimed the £ 880 for distribution among the creditors generally but Bacon C. J. disallowed the claim observing:

> According to all the cases cited, the £ 880 paid into Court ceased, upon its being paid into Court, to be the property of the debtors; it was no longer part of their estate. If the action had gone on to judgment, and the Judgment had been for the plaintiff for £ 880, the matter would have been quite clear and plain; the money would have belonged to the plaintiff.

This decision was affirmed on appeal and as the sum in question was paid into Court to abide the event of the suit, it belonged to the party who would eventually be found entitled thereto. In that case depositing the money in court placed it in *custodia legis* which automatically prohibited its transfer in the absence of approval of the court. Therefore, although it can technically be described as "property belonging to the judgment debtor," once money is deposited in court and until an order of its discharge is made, it is not property over which the judgment debtor "has disposing power which he or she may exercise for his or her own benefit." Upon depositing the property in court, the depositor loses any enforceable interest in, or lien on the property until an order of discharge is made, declaring him or her the party entitled thereto. The property becomes inalienable without the knowledge and consent of the court. Any attachment, sale or transfer of such property in violation of this rule is void as a matter of law.

The answer then is that a person can have no disposing power over property which is in the custody of the Court. The judgment debtor has neither the "custody" nor the "control" of monies standing in his credit in an account with the Court. It is also a general proposition of law that in the absence of a specific provision to the contrary, property which is "*in custodia legis*" cannot be attached in the execution of a decree unless the specific purpose for which property is held has been fulfilled, and the court has made an order disposing of it in some particular manner prescribed by law. In the absence of express statutory authority, in general, property or funds *in custodia legis* are not subject to either attachment or garnishment (see *Clarkson Co. Ltd., Shaheen, 716 F.2d 126 at 129* and *The Lottawanna, 87 U.S. 201 (1873*). Property held *in custodia legis* is "in the custody of the law" (see *Black's Law Dictionary* 783 (8th ed. 2004). It is liable to attachment only with the leave of court. The court has complete control or the ability to distribute funds from the account, in other words, custody of the funds. Property *in custodia legis* is in possession of the Court and the judgment debtor had no right to disposes such a custodian of the Court. If the judgment debtor did so he would be guilty of theft (see *Teeka and others v. The State of Uttar Pradesh, AIR 1961 S. C. 803* and *Autolite Financiers Ltd. and another v. Swastika Financial Corporation Ltd. and another, AIR 1964 All 383*).

The reason why property "*in custodia legis*" cannot be attached is that to permit attachment would be to interfere with the possession before the office of law had been performed as to the process

under which it was taken. Any interference with property so held is considered an infringement of the prerogative of the court and a contempt thereof (see *Powell v. Bradlee, 9 Gill & J. (Md.) 220*). The rule is enforced by the courts to preserve the jurisdiction of the court administering the particular property. A court in custody of property may distribute it free from interference by other courts. The property is *custodia legis* until the distribution occurs. *Custodia legis* terminates once the court in possession of the property determines and orders the appropriate distribution of that property.

Therefore, once deposited in court, the personal property of the judgment debtor comes within the jurisdiction of the court and is subject to the creditor's claim. Money paid into Court in a suit cannot be taken out of Court by a creditor of the party who pays it in so long as the suit is pending, or unless the result is that the person who paid it in is held entitled to withdraw the money or some part of it, and then the creditor of the party who paid it in can only have execution against so much of that money as his judgment-debtor would be entitled to take out of Court. It is in custody of the Court until the result of the litigation is known. It is well settled that property in *custodia legis* is not subject to attachment or garnishment without the leave of court. It follows therefore that when money is deposited in court in full satisfaction of an order for stay of execution pending appeal, the decree-holder is not entitled to attach it, and it is not competent to the Court to pay out to anyone but the person entitled to it under the decree on appeal, any portion of the sum. The judgment creditor is only entitled to it so long as the decree is not modified or reversed in appeal.

Before full compliance with the condition, the notion of *in custodia legis*, which states that, once a court has jurisdiction over property, the court may dispose of it in the litigation before it, in spite of subsequent litigation in a different, perhaps higher, court will apply with full force (see *Metcalf v. Barker, 187 U.S. 165, 175 (1902)* and *Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922)*. A court cannot interfere with property which is in the control of another court. It is well settled that where property is in the actual possession of the court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control (see *Peck v. Jenness, 48 U.S. (7 How.) 612, 624 (1849)*. However where there is a conditional order of stay of execution pending an appeal, the jurisdiction of the appellate court attaches upon full compliance with the condition

attached to the stay. The trial court in then precluded from exercising its jurisdiction over the same *res* to defeat or impair the appellate court's jurisdiction.

There is an essential distinction between possession and custody. Possession consists both of fact and law, that is to say, of actual control and the legal right to it. On the other hand, custody is a mere fact: without a legal right. The Court holds the property deposited with it, actually without claiming any legal interest in it for the benefit of the successful party. As the Court does not claim any right in itself and as the only object of the *in custodia legis* is to await the success of either party in the litigation, the plaintiff is not able to seek further relief against the Court. Property *in custodia legis* is accorded immunity from attachment or execution, for, as the rationale goes, to allow such actions would require a public official to appear and defend a multitude of actions regarding the right to possession and would cause confusion and delay in the execution of legal process. The court cannot be required to join as a defendant for, as soon as the Court is satisfied that a litigation between the parties has ended in favour of the plaintiff, the Court would terminate its custody and hand over the possession of the property to the plaintiff.

Consent of Court is necessary if attachment is to be effected of money held by the Court. Where money liable to be attached by garnishee proceedings is in the custody or under the control of a public officer in his or her official capacity or in *custodia legis*, no order nisi should be made In such situation, Order 22 rule 49 of *The Civil Procedure Rules* requires instead that notice must be served on the registrar of the Court, requesting that the money on becoming payable, may be held subject to the further orders of the court from which the notice is issued. Such notice should not issue unless consent to such attachment is first obtained from the Court.

The *in custodia legis* principle is one of custody rather than possession, it does not entail a split between legal and equitable title and therefore it is not a constructive trust. It instead gives rise to a lien on the property before the court, on behalf of the creditor who claims it. The property is a fund in court, intended to abide the event of the litigation on appeal, and to be applied to the payment of the judgment creditor on appeal. Therefore in those cases where the money is "*in custodia legis*" as a result of a failed attempt to secure an order of stay of execution pending appeal, there would be no justification for the court retaining custody of such money when there has been

a total failure of the specific purpose for which it was deposited in court, which purpose can no longer be fulfilled.

Upon failure of fulfilment of the specific purpose for which the money *in custodia legis,* reverts to its character as property of the judgment debtor available for attachment in the execution of a decree. In that case, the court would be justified in declaring that the money is the property of the judgment debtor over which the respondent would then have disposing power which he or she may exercise for his or her own benefit. Leave would then accordingly be granted rendering that sum liable to attachment by the judgment creditor.

However in the instant case, the money is "*in custodia legis*" as a result of a validated belated deposit secure an order of stay of execution pending appeal. The court has found justification for its retention of custody of such to abide the event of the litigation on appeal, and to be applied to the payment of the judgment creditor on appeal.

iv. Whether the conduct of the Registrar, High Court, in the circumstances occasioned a miscarriage of justice.

According to Order 50 rule 9 of *The Civil procedure Rules*, it is the duty of a Registrar to;

> register all orders and judgments and shall keep a record of all proceedings of the court, and shall have custody and keep an account of all fees and fines payable or paid into court, and of all monies paid into or out of court, and shall enter an account of all such fees, fines and monies as and when received in a book belonging to the court, to be kept by him or her for that purpose, and shall from time to time, as required by the Auditor General or as may be directed by the court, submit his or her accounts to be audited and settled by the Auditor General, and shall pay to the Secretary to the Treasury the amount of fines, fees and other monies in his or her custody at such intervals as the Secretary to the Treasury may direct.

Rule 13 of *The Judicature (Court Fees, Fines and Deposits) Rules*, requires the Registrar to issue a receipt in the prescribed form for all monies deposited or paid into court. In the instant case, there is evidence on record to show that the Registrar received six bank drafts on 22nd December, 2015

worth a total of US $ 56,281. There is no evidence to show that the Registrar cashed the drafts, and issued a general receipt thereof, or that the money was paid to the Secretary to the Treasury. There is unfortunately no explanation on record advanced to explain this failure. It is not in doubt though that as result of this failure, loss was occasioned to the respondent since the drafts became stale and the drawing bank became defunct in due course. Recovery is now doubtful.

This court is mindful of the fact that not every judicial inaction constitutes a misconduct. A judicial act or omission constitutes a violation "if a reasonably prudent and competent [judicial officer] would consider that conduct obviously and seriously wrong in all the circumstances" (see *In re Benoit 487 A.2d 1158 (Me. 1985*). The reasonable judicial officer must be reasonable both in prudently exercising his or her judicial and administrative powers and in maintaining his or her professional competence. But the standard must be further restricted to recognise that every error of law, even one that such a reasonable judicial officer might avoid making, is not necessarily deserving of disciplinary sanction. An erroneous decision is not misconduct if it was not obviously wrong or there was confusion or a question about its legality.

It was rightly argued by counsel for the respondent that joining the Registrar as a party to the proceedings was not the proper remedy for this fault, or for any other related purpose. According to article 128 (4) of *The Constitution of the Republic of Uganda, 1995* a person exercising judicial power is not liable to any action or suit for any act or omission by that person in the exercise of judicial power. This is re-iterated in section 46 (1) of *The Judicature Act* by which a judge or other person acting judicially is not be liable to be sued in any civil court for any act done or ordered to be done by that person in the discharge of his or her judicial functions whether or not within the limits of his or her jurisdiction. This means that they may not be sued for their wrongful judicial behaviour, even when they act for purely corrupt or malicious reasons (see *Pierson v. Ray, 386 US 547 at 554* and *Stump v. Sparkman, 435 US 349 (1978) at 356*). As a general matter, judicial immunity protects all judicial officers, from the lowest to the highest court, so long as they are performing a judicial act that is not clearly beyond their jurisdiction. This immunity, however, does not apply to disciplinary actions against judicial officers for violations of the professional and ethical standards that pertain to their conduct (see *Attorney General v. Nakibuule Gladys Kisekka S. C. Constitutional Appeal No. 2 of 2016*).

Part of the justification for the absolute immunity doctrine is that making mistakes is part of being human and is inevitable in the context in which most judicial decision-making takes place. It is not unethical to be imperfect, and it would be unfair to sanction a judicial officer for not being infallible while making hundreds of decisions often under pressure. All judicial officers make legal errors. Sometimes this is because the applicable legal principles are unclear. Other times the principles are clear, but whether they apply to a particular situation may not be. Whether a judicial officer has made a legal error is frequently a question on which disinterested, legally trained people can reasonably disagree. And whether legal error has been committed is always a question that is determined after the fact, free from the exigencies present when the particular decision in question was made. Absent any explanation for the failure on this occasion though, it is my considered view that the failure by the Registrar is not a mere error of law but is obviously and seriously wrong in all the circumstances and raises a *prima facie* case for disciplinary action.

v. <u>Whether the decree nisi should be made absolute.</u>

vi. <u>What remedies are available to the parties?</u>

Garnishee proceeding are a procedure by which a judgment creditor may obtain a Court order against a third party who owes money to, or holds money for, the judgment debtor. Garnishment may be served upon persons who hold earnings of a judgment debtor and upon persons or entities who are in the possession and control of a judgment debtor's credits, debts, money, choses in action, or personal property of any kind. Such orders are "usually obtained against a bank requiring the bank to pay money held in the account of the debtor to the creditor" (see *Osborn's Concise Law Dictionary*, 9th edition, page 181 and *Choice Investments Ltd. v. Jeromnimon [1981] 1 All E.R. 225*). Personal property capable of manual delivery owed to, or owned by, the judgment debtor, and in the possession or control of the garnishee at the time of service of such writ upon the garnishee, is subject to the process of garnishment. In the instant case, the proceedings were undertaken in respect of money deposited with the Registrar of this court by the respondent, in a failed attempt to secure an order of stay of execution pending appeal.

A *decree nisi* is an interim or provisional order which states in essence that the court does not see any reason why the funds should not be attached in satisfaction of the judgment debt. It specifies

the date on which the final order will be made unless a good reason for not to granting such an order is produced. A "garnishee" is a person who has been warned not to pay a debt to anyone other than the third party who has obtained judgment against the debtor's own creditor. Once served, the garnishee holds the property of the debtor in *custodia legis* and the debtor's property comes within the jurisdiction and control of the court. Attachment creates no charge or lien upon the attached property. It only confers a right on the decree-holder to have the attached property kept *in custodia legis* for being dealt with by the court in accordance with law.

As soon as the garnishee order nisi is served on the garnishee, it operates as an injunction. It prevents the garnishee from paying the money to the judgment debtor until the garnishee order is made absolute, or is discharged, as the case may be. It prevents and avoids private alienations; it does not confer any title on the attaching creditors. Any private alienation without leave of the Court of the property attached, whether by sale, gift or otherwise and any payment of any debt or debts or dividends or shares to the judgment debtor during the continuance of the attachment, is null and void as against all claims enforceable under the attachment (see section 47 of *The Civil Procedure Act*).

A garnishee on whom an order nisi has been served has to appear and show cause why an order absolute should not be made. The order is made absolute, directing the garnishee to pay to the judgment creditor or into Court, whichever is the more appropriate, unless there is some sufficient reason why the garnishee should not honour it, or if payment to this creditor might be unfair to prefer him to other creditors. The general principle, when there is no insolvency, is that the person who gets in first gets the fruits of his or her diligence but the court will not allow one creditor, however diligent he or she may be, to get an advantage over the others by getting in first with a garnishee order (see *Pritchard v. Westminster Bank Ltd [1969] 1 All ER 999* and *Rainbow v. Moorgate Properties Ltd [1975] 1 W.L.R. 788*). If no sufficient reason appears, the garnishee order is made absolute. On making the payment, the garnishee gets a good discharge from its indebtedness to the judgment debtor, just as if he himself directed the garnishee to pay it (see Order 23 rule 7 of *The Civil Procedure Rules*).

According to Order 23 rule 4 of *The Civil Procedure Rules*, if the garnishee disputes his or her liability, the court, instead of making an order that execution be levied, may order that any issue or question necessary for determining his or her indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined. The garnishee may file an affidavit to deny that it is not in the custody of the moneys of the judgment debtor, or that the judgment debtor is not a customer, etc. and that becomes a triable issue, determined in any manner in which any issue or question in any proceedings may be tried or determined.

The garnishee has not appeared to challenge the order nisi. There is no evidence to suggest that the garnishee does not have in his custody the money sought to be attached, nor that it was not deposited by the judgment debtor, nor that the judgment debtor has no money deposited with the garnishee. There is no evidence to suggest that there are ongoing insolvency proceedings against the judgment debtor which would render recovery by the applicant conferment of an advantage over the other creditors. However, the mode of attachment of property in custody of court is not by garnishee but by notice to the court. Order 22 rule 49 of *The Civil Procedure Rules* provides as follows;

> **49. Attachment of property in custody of court or public officer.**
> Where the property to be attached is in the custody of any court or public officer, the attachment shall be made by a notice to the court or officer requesting that the property, and any interest or dividend becoming payable on the property, may be held subject to the further orders of the court from which the notice is issued; except that where the property is in the custody of a court, any question of title or priority arising between the decree holder and any other person, not being the judgment debtor, claiming to be interested in the property by virtue of any assignment or otherwise shall be determined by the court.

The provision applies to the attachment of money or property in the custody of any Court whether, that Court be the same Court as the attaching Court or a different Court. When the attaching Court and the custody Court are the same, it seems to me that an order should be made by the Court as attaching Court for transferring the money from the suit in which it came into Court to the suit in which the attachment took place. It is only when this is done that the Court as attaching Court can properly be said to have received the assets and to hold it.

According to rules 8 and 9 (2) of *The Judicature (Court Fees, Fines and Deposits) Rules*, no money or valuables deposited in court on an order of the court may be paid out of court except in pursuance of a decree or other order of the court, or under the direction of the judge of the court without formal order. Having found that there is still in force, a valid order of stay of execution pending appeal to the Court of Appeal providing a justification for this court's retention of custody of the sum deposited by the respondent as security for du performance of the decree to abide the event of the litigation on appeal, and to be applied to the payment of the judgment creditor on appeal; having found further that property in *custodia legis* is not subject to attachment or garnishment without the leave of court, and that the mode of attachment of property in custody of court is not by garnishee but by notice to the court, the decree nisi issued in this case cannot be made absolute. Instead the decree nisi should be set aside. The file is accordingly remitted back to the Registrar to make the appropriate orders and to decide the issue of costs.

Delivered electronically this 5th day of October, 2021

……Stephen Mubiru…………..
Stephen Mubiru
Judge,
5th October, 2021