THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL No. 0722 of 2021

(Arising from Civil Suit No. 0898 of 2019)

VISARE UGANDA LIMITED …… APPELLANT

VERSUS

GRANT THONTON MANAGEMENT LIMITED …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The procedural history;

On or about 24th February, 2017 the appellant obtained a loan from KCB Bank Uganda Limited for facilitating the completion of the construction of a block of condominium residential apartments on land comprised in LRV 2651 Folio 9 Plot 65A located along the Lugogo Bypass in Kampala. As security for the loan, the appellant executed a mortgage over the title to the same land in favour of the bank. The appellant constructed a total of forty-four (44) units of residential condominium apartments but defaulted on the loan. Upon default of the obligation to pay the US $ 1,930,813 as agreed, the Bank initiated a process of foreclosure. In order to raise part of the funds outstanding due under the mortgage, the appellant on 31st December, 2019 signed an agreement with the respondent, selling twelve (12) out of the forty-four (44) units to the respondent at the price of US $ 2,400,000. The respondent paid US $ 500,000 to the bank in satisfaction of the condition for stay of the sale as ordered by court. It was agreed that in the event the appellant was unable to raise he balance outstanding by 31st December, 2020 the respondent was to raise an additional US $ 1,900,000 in order to redeem the appellant's mortgage.

Subsequently, a tripartite memorandum of understanding between the appellant, the respondent and KCB Bank was executed on 28th February, 2020 by which it was agreed that the mortgage would be redeemed upon payment of US $ 1,930,813. It is on that basis that a consent judgment was entered in the suit between the bank and the appellant on 26th March, 2020. While the appellant

reserved the right of redeeming the 12 units by 31st December 2020, the respondent reserved the right to cause transfer of the 12 units into its name or sell the security in the event of the appellant's default.

The applicant having defaulted and there being no independent titles yet to the 12 condominium units, the respondent subsequently on or about 30th April, 2021 applied for attachment and sale of the entire land comprised in LRV 2651 Folio 9 Plot 65A located along the Lugogo Bypass in Kampala, on account of the appellant's default. The appellant sought relief from that process contending that it had performed its part of the bargain. On the other hand the respondent contended that the sale could not be finalised since the appellant was yet to secure condominium titles to the twelve units. In a ruling delivered on 6th May, 2021 the learned Registrar observed that in the consent judgment, it was agreed that upon the appellant's default, the respondent would have recourse against the security by way of attachment and sale. The learned Registrar therefore issued an order of execution by way of attachment and sale of the land.

b) <u>The grounds of appeal;</u>

The appellant was dissatisfied with the decision and appealed to this court on the following grounds as cane be discerned from the pleadings, namely;

1. The learned Registrar erred in law and in fact when he issued a warrant of attachment and sale of the land when the decree sought to be executed did not specify the amount recoverable.
2. The learned Registrar erred in law and in fact when he issued a warrant of attachment and sale of the land whose implication was recovery of an unconscionable rate of interest of 4% per month.

c) <u>The submissions of counsel for the appellant;</u>

Counsel for the appellant M/s Muwema & Co Advocates and Solicitors submitted that the Registrar erred in allowing the execution of the decree against the appellant when neither was the decree executable, nor breach of contract proved, and yet it contained an illegality in respect of

interest payable. A copy of the consent judgment was attached as Annexure "C" to the application and there is no particular amount of money decreed to the appellant. The appellant had to pay US $ 2,400,000 paid on its behalf by the respondent to the KCB. The obligation was pegged to a breach by the appellant. The agreement agreed to sell 12 units to the respondent. That satisfied the debt owed to the third party at US $ 200,000 per unit and this makes the US $ 2,400,000. This was full satisfaction. What was left was the exchange of titles. The title of the entire property is with the respondent. Breach of contract required evidence. The registrar did not have that evidence. The supplementary affidavit in support of the application shows that the Registrar found that there was a breach. There was an illegality in the fact that 4% was unconscionable. The affidavit in reply para 7 avers that the respondent rescinded the contract. They cannot rescind and seek to benefit from it. Had the Registrar called evidence, he would not have come to the conclusion that there was a breach of contract. They prayed that the court allows the appeal.

d) <u>The submissions of counsel for the respondent;</u>

Counsel for the respondent M/s J. B. Byamugisha Advocates, submitted that the appeal is incompetent. Order 50 rule 4 of *The Civil Procedure Rules* provides for formal orders of attachment may be made byte Registrar, Order 50 rule 6 the Registrar is a civil court. Rule 8 is the right of appeal. The appeal was filed out of time. Section 79 of *The Civil Procedure Act* requires seven days. The ruling was delivered on 6th May, 2021 and the appeal was filed on 14th May, 2021 two days out of time. There is no application for enlargement of time.

As regard the argument that the decree is not executable, paragraphs 17 and 18 of the affidavit in rejoinder attests to argument and ends with the prayer that the appeal should be struck off. The two agreements; 31st December, 2019 and 28th February, 2020. Clause 1.1.9 defined the sale agreement as the one to be executed between the parties of the sale of the condominium upon completion of transactions contained therein. It had to be signed but it was never signed. There are no certificates of title and thus the agreement could not be executed. The appellant was supposed to cause the creation of the titles. Clause 5.1 of the agreement of 28th February, 2020 required the appellant to submit proof of submission of application of titles before payment. Clause 1.1 of the Addendum of 26th March, 2020 attached as R1 to the affidavit in reply required proof of submission within 30

days. Clause 5.4 created option to refund the amount or execute sale agreement for the 12 units. The respondent was then entitled to sell the whole property to recover the amounts. That was the basis of the recession of the agreements which are collateral to the consent.

At the appearance before the registrar, the appellant did not oppose the execution. They wanted to limit it to 12 units. There was no objection to the attachment. It was not necessary for the Register to hold a hearing under section 34 of *The Civil Procedure Act*. We rely of the *Simba v. Uganda Corporation*. That issue is not arise so there was no need to hold a hearing. *Stanbic bank case* is to the effect that interest cannot be reviewed at execution. Their claim was over attachment. They submitted that the appeal should be dismissed.

e) <u>The decision;</u>

There is no inherent, inferred or assumed right of appeal (see *Mohamed Kalisa v. Gladys Nyangire Karumu and two others, S. C. Civil Reference No. 139 of 2013*). According to section 79 (1) (b) of *The Civil Procedure Act,* except as otherwise specifically provided in any other law, any person affected by an order or decision of a Registrar may appeal within seven (7) days of the date of the order, but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed. According to Order 50 Rule 8 of *The Civil Procedure Rules* the appeal is by summons in chambers.

The appeal in the instant case is from an order of the Registrar delivered on 6th May, 2021 issuing a warrant of attachment and sale of property comprised in LRV 2651 Folio 9 Plot 65A located along the Lugogo Bypass in Kampala. The appeal was filed on 14th May, 2021 one day out of time. Although there was no application made for enlargement of time, 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 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 it does not result in abridging, enlarging or modifying any substantive right. 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 appellant 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 appellant's belated appeal.

The power to issue warrants of attachment is discretionary. The general rules governing appeals from such orders seem well settled. Courts in Uganda have, as a matter of judicial policy, exercised considerable restraint in intervening in decisions characterised as involving the exercise of a discretion (see *Banco Arabe Espanol v. Bank of Uganda, S. C. Civil Appeal No. 8 of 1998*). Where the decision challenged involves the exercise of a discretion, broadly described to include states of satisfaction and value judgments, the appellant must identify either specific error of fact or law

or inferred error (e.g. where the decision is unreasonable or clearly unjust). The appellate court will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle. It should not interfere with the exercise of discretion unless it is satisfied that the Registrar in exercising his or her discretion misdirected himself or herself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Registrar has been clearly wrong in the exercise of his discretion and that as a result there has been injustice (see *Mbogo and another v. Shah [1968] 1 EA 93*).

It is trite that an appellate court is not to interfere with the exercise of discretion by a court below unless satisfied that in exercising that discretion, the court below misdirected itself in some matter and as a result came to wrong decision, or unless manifest from case as whole, the court below was clearly wrong in exercise of discretion and injustice resulted (see *National Insurance Corporation v. Mugenyi and Company Advocates [1987] HCB 28; Wasswa J. Hannington and another v. Ochola Maria Onyango and three Others [1992-93] HCB 103; Devji v. Jinabhai (1934) 1 EACA 89; Mbogo and another v. Shah [1968' E.A. 93; H.K. Shah and another v. Osman Allu (1974) 14 EACA 45; Patel v. R. Gottifried (1963) 20 EACA, 81;* and *Haji Nadin Matovu v. Ben Kiwanuka, S. C. Civil Application No. 12 of 1991*). A Court on appeal should not interfere with the exercise of the discretion of a court below merely because of a difference of opinion between it and the court below as to the proper order to make. There must be shown to be an unjudicial exercise of discretion at which no court could reasonably arrive whereby injustice has been done to the party complaining.

The appellate court will intervene where the court below acted un-judicially or on wrong principles; where there has been an error in principle (see *Sheikh Jama v. Dubat Farah [1959] 1 EA 789; Hussein Janmohamed and Sons v. Twentsche Overseas Trading Co Ltd [1967] 1 EA 287; Banco Arabe Espanol v. Bank of Uganda, S. C. Civil Appeal No. 8 of 1998* and *Thomas James Arthur v. Nyeri Electricity Undertaking [1961] 1 EA 492*). As such, the Registrar is entitled to deference in the absence of an error in law or principle, a palpable and overriding error of fact, or unless the decision is so clearly wrong as to amount to an injustice. Generally, appellate courts will only interfere with exercise of discretion by a court below where the court has incorrectly

applied a legal principle or the decision is so clearly wrong that it amounts to an injustice. Although there is a presumption in favour of judicial discretion being rightly exercised, an appellate court may look at the facts to ascertain if discretion has been rightly exercised.

The formulation and application of the above rule reflects an inherent tension where legislation both confers a power on a judicial officer to make a subjective choice and also provides a right of appeal from that choice. An appeal of this nature requires the appellate court to exercise judgment as to the appropriateness of its intervention, while deferring to the exercise of discretion by the Registrar, in light of the nature of the appeal, the issues of fact and law involved, the primary facts and inferences presented to the Registrar, the level of satisfaction, the value judgments involved, rule-application, reasonableness of the decision, proportionality and rationality of the decision, in particular as to whether its decision will provide a more just outcome.

Discretion is the faculty of determining in accordance with the circumstances what seems just, fair, right, equitable and reasonable. "Discretion" cases involve either the management of the trial and the pre-trial process; or where the principle of law governing the case makes many factors relevant, and requires the decision-maker to weigh and balance them. Just as the factors for consideration could never be absolute, there could never be a gauge to measure the accuracy of such decisions. Unless the exercise of discretion is obviously perverse, an appellate court should be slow to set aside discretionary orders of courts below.

Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, identification of error in the Registrar's exercise of discretion is the basis upon which the court will uphold the appeal. It would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the Registrar at first instance, in the absence of error on his or her part. If the Registrar acted upon a wrong principle, or allowed extraneous or irrelevant matters to guide or affect him or her, if he or she mistook the facts, if he or she did not take into account some material consideration, or where it not evident how he or she reached the result embodied in his or her order, or where upon the facts the order is unreasonable or plainly unjust,

the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the Registrar thus his or her determination should be reviewed.

Therefore, allowing an appeal from a discretionary order is predicated on proof of: (i) "specific error," i.e. an error of law (including acting upon a wrong principle), a mistake as to the facts, relying upon an irrelevant consideration or ignoring a relevant consideration, or (exceptionally) giving inappropriate weight to such considerations (relevancy grounds); and (ii) "inferred error," i.e. where, in the absence of identification of specific error, the decision is regarded as unreasonable or clearly unjust. Where inferred error is found, this will have been brought about by some unidentifiable specific error.

According to Order 22 rule 14 (4) of *The Civil Procedure Rules*, in the case of a decree for the payment of money when an application for execution of a decree is filed in court, the court is under an obligation to satisfy itself that the value of the property attached, as nearly as may be, corresponds with the amount due under the decree. A reading of this provision leads to the conclusion that at the time of attachment it has to be considered whether the value of the property sought to be attached is more than the amount due and care should be taken to attach only such property whose value as nearly as may be, equal to the amount due under the decree.

In the instant case, although the amount recoverable is not specified in the decree sought to be executed, it is however ascertainable from the agreements and addendums thereto signed between the parties that preceded and were referenced by the consent decree. It was therefore incumbent upon the Registrar to ascertain the value of the property to be attached and to ensure that as nearly as may be, it corresponds with the amount due under the decree. During the hearing, the Registrar ought to have called upon the respondent as decree-holder to specify the approximate value of the property sought to be attached in order to ensure that the value of the property to be attached corresponded as nearly as may be with the amount due under the decree. This was a fatal omission.

Although attachment or property will not be invalid either partially or wholly merely because the value of the property attached is more than the sum due under the decree, it is nevertheless incumbent upon the court to ensure that the warrant authorises the sale of only such a portion of

the property as may be necessary to satisfy the decree. A court executing a decree may order attachment and sale of property, or a portion thereof, only to such extent as may seem necessary to realise the sum in the decree and costs. The Court has a duty to ensure that the property in excess of what is required to release the amount necessary to satisfy the decree is not put to sale. It is immaterial in this case that the 12 units sought to be sold off had no titles yet. The attachment and sale of 44 units of prime real property for purposes of recovery of a decretal value approximated at that of 12 units is evidently excessive attachment.

By virtue of Order 22 rule 14 (4) of *The Civil Procedure Rules,* in all execution proceedings the Court has to first decide whether it is necessary to order an attachment and sale of the entire property or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the court must order the attachment of only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law, only such portion of the property should be sold. This is not just a discretion, but an obligation imposed on the court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The warrant issued without examining this aspect and not in conformity therewith would be illegal and is accordingly set aside. Each party is to bear their own costs of the appeal and the costs of the proceedings in the court below.

Delivered electronically this 11th day of January, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
11th January, 2022.