

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT GULU**  
**MICELLANEOUS CIVIL APPLICATIONS No. 0081 and 0082 OF 2018(Consolidated)**  
**(Arising from Civil Suit No. 015 of 1998)**

5 **GEOFFREY OPIO** ..... **APPLICANT**

**VERSUS**

1. **FELIX OBOTE** }  
2. **OSUALD OLUMA** } ..... **RESPONDENTS**  
10 3. **MOLLY OSAKO** }

**Before: Hon Justice Stephen Mubiru.**

**RULING**

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This is a ruling in respect of two applications consolidated under Order 11 rule 1 of *The Civil Procedure Rules*, since both relate to the same subject matter in controversy between the same parties and seek more or less the same or similar relief. In Miscellaneous Application No. 081 of 2015, the applicant seeks an order setting aside the consent judgment that was entered on 22<sup>nd</sup> November, 2006 in the main suit, an order of stay of execution of a decree arising from that judgment, release of the applicant from civil imprisonment and costs, while in Miscellaneous Application No. 082 of 2015, the applicant sought only a temporary order of stay of execution of a decree arising from that judgment, and costs. The latter application is therefore for all practical purposes a sub-set of the former.

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The grounds supporting both applications are mainly that the consent judgment was entered in error, is illegal and unenforceable and the mode adopted for the execution of the decree arising from that judgment is erroneous. The respondents oppose both applications and prays that they should be dismissed on grounds that; the consent judgment is valid and enforceable, and the application seeking to set it aside is barred by laches.

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Submitting in support of the application, Mr. Geoffrey Anyoru appearing together with Mr. Brian Watmon argued that the arrest and detention of the applicant in civil detention is illegal and erroneous since there is no debt sought to be recovered. The applicant was not ordered to pay

any money. He is in prison for failure to fulfil a consent order. Section 38 of *The Civil Procedure Act* provides for all the modes. Arrest and detention is under section 40 *The Civil Procedure Act* and the circumstances require a judgment debt. The consent judgment had no sum recoverable. It has nothing like specific performance granted to the respondent. Order 22 rules 34 and 35 of *The Civil Procedure Rules* are all about a debts. Arrest and detention does not complete execution. In those circumstances, the execution should be stayed, the order of vacated and the applicant be released from civil prison.

They argued further that the consent should be set aside because it is illegal. It was entered into under mistake of fact and law. The applicant did not have the authority to be sued and even to enter into the consent. The applicant had never administered the estate of the late George William Omoro and Administration Cause No. 846 1998, that was caveated resulting in the underlying suit, was for the administration of the estate of his late father. The consent related to a different estate. The plaint in the suit seeking removal of the caveat related to the estate of his late father yet the application was in respect of the estate of the applicant's brother. Under section 180 of *The Succession Act*, he had no capacity to enforce the decree since he had no letters of Administration. Section 191 of *The succession Act* is mandatory.

On the other hand, none of the parties signed the consent although they were represented. Since section 191 of *The Succession Act* required an administrator, the court endorsed the consent but did so erroneously with the assumption that there was an administrator whereas there was none. With regard to the distribution of the estate, several beneficiaries were left out. Under pars 3, 4 and five of the affidavit in support, more than ten were left out, including children and two widows. Section 28 of *The Succession Act* requires equal distribution. They submitted therefore that the consent cannot stand. Much as the consent deals with a transfer of property, the applicant has no capacity to do so. He is not registered proprietor, he is not a bailiff or mortgagee of the land and he therefore cannot transfer the land. He could be authorised by court but only after grant of letters of administration but to date no grant has been made in respect of that estate. For the court to allow the consent to stand would be to sanction illegality.

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Citing *Active Automobiles v. Crane Bank S.C. CA. No. 21 of 2001*, at page 27 and 28, they submitted that it was held that it matters not whether the defendant has pleaded the illegality, once shown the court ought not to assist the person. Since several illegalities have been raised and they involved both parties, they prayed that the consent judgment and decree be vacated and set aside. They prayed for the costs of the consolidated application and alternatively, each party to bear their own costs since they are relatives and were under mutual mistake.

In response, Mr. Twontoo Oba Counsel for the respondents submitted that the mode of arrest and detention in execution is available for this type of decree as provided for in sections 30 - 50 of *The Civil Procedure Act*. Under section 35 of the Act, a decree can be executed within 12 years. Section 38 of the Act gives the basis for execution subject to limitation. The modes include delivery of property, and under (d) by arrest and detention in prison. This is the parent law and it has not been amended. The decree made specific orders in clause one that the land be transferred. The parties came to court for distribution of their father's estate. The applicant had contended that the father had a will. Odong obtained letters of administration with the will annexed whereas Omoro had no will in fact. Para 8 of the defence they said that Odong left 200 acres of land. It was therefore practically one and the same estate.

In paragraph 8 of the defence the applicant averred that Odongo left about 200 acres. The respondents contended Plot 10 Parra Lodge belonged to the late Omollo. When the matter came to court the parties agreed. The court invoked its inherent powers realised to avoid multiplicity of suits. The parties could override the legal requirement of an administrator of the estate. The court was persuaded and they were willing to bequeath to the applicant. They are agreed and the court should not set aside the agreement. They have the power to compromise and it is their father's estate. The parties are brothers and they should be helped to execute the compromise.

Under section 67 of *The Civil Procedure Act*, no appeal is allowed from such a decree. Even if there is an error, it is too late now. The consent was made on 22<sup>nd</sup> November, 2006 yet the application to set it side is made 11 years later. This is unexplained dilatory conduct. The application is not properly before court, is incompetent and ought to be dismissed. The first

application for execution was made on 18<sup>th</sup> November, 2013. The applicant failed to show cause. Once a decree is final and the court is *functus officio*. It cannot be set aside by the same court.

On the other hand, applications need affidavits. There are two affidavits one by Opio Geoffrey  
5 dated 6<sup>th</sup> June, 2018 by which time the execution process had commenced. The applicant was  
already before court on 3<sup>rd</sup> May 2018. He was committed to civil prison. It is commissioned by  
the Grade One Magistrate, Hon. Ndiwalana in the deponent's absence. This can be inferred from  
paragraphs 2, 9 and 12. This violates sections 2, 4 and 5 of *The Oaths Act*. The second deponent  
Peninah Omolo's affidavit too incompetent. In conclusion, these are matters within the mandate  
10 of the parties to compromise and they did so wilfully, willingly and voluntarily and the court  
exercised its powers and entered a consent decree. It has to be enforced. There is nothing that can  
be done. They cannot turn round and seek to set it aside. It is too late in the day.

In reply, counsel for the applicants submitted that the court has powers to set this decree aside. In  
15 *A.G v. James Mark Kamoga*, it was held that a court of law can never enforce an illegal consent  
as parties can never consent to an illegality and the same was held in *Singh Ltd. v. UBC S.C. C.A*  
*No. 3 of 2004*. The delay of filing is not fatal. It is not twelve years yet and it is not too late to set  
it aside. Execution began in 2013. The parties were not in court as indicated in the decree. He  
prayed that the court finds that there is no delay.

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The background to this application is that the applicant herein, during or about October, 1998  
under Administrative Cause No. 846 of 1998, he petitioned the Chief Magistrate's court of Lira  
for a grant of letters of administration (with the will annexed), to the estate of his late younger  
brother, Geoffrey Odongo, who passed away on 28<sup>th</sup> July, 1995. In that application, he averred  
25 that his late brother died testate and he attached a photocopy of the will to the petition. He  
averred further that at the time of his death, the deceased had immovable property comprising,  
among other property, Plot 10 Bala Road in Lira Municipality and "land in the village." He  
stated further that the deceased was survived by his a sole dependant mother, Peninah Omolo.

30 However, on or about 30<sup>th</sup> October, 1998 the first respondent herein, Obote Felix lodged a caveat  
preventing a grant from being made in the matter of that estate. His grounds as disclosed in the

affidavit supporting the caveat were that he is the younger brother of the deceased while the applicant is the older one. Sometime during the 1980s the applicant was granted letters of administration to the estate of their late father which he mismanaged to the detriment of the beneficiaries. Upon the demise of their late brother, Geoffrey Odongo it was him and not the applicant whom the family authorised to obtain letters of administration. The applicant is not fort to be appointed administrator of the estate of the late Geoffrey Odongo but rather himself, Obote Felix should be appointed.

Consequent upon that caveat, Mr. Obote Felix was joined by the other two respondents herein and on 27<sup>th</sup> April, 1999 filed a suit No. 0015 of 1999 jointly in the High Court, against the applicant seeking "letters of administration, a share of the estate and costs." They contended in that suit that they and the applicant (defendant) are children of the late George William Omollo who died in 1977. Upon his death, letters of administration were granted to the now late Geoffrey Odongo. The late George William Omollo was survived by two widows; Beatrice Omollo and Peninnah Omollo. He was also survived by children; Molly Osako (36 years old), Obote Felix (25 years old), Oluma Oswald (19 years old), Dolly Okullo (38 years old), Susan Obote (34 years old), and the applicant / defendant Opio Omollo Geoffrey (40 years old). The applicant / defendant had since then occupied four plots of land in Lira Town that belonged to the estate of the deceased, one of which he had sold off. Peninnah Omollo, one of the widows of the deceased, had since taken possession of plot 1 Balla Road and plot 24 Main Street in Lira Municipality together with her children. Beatrice Omollo, the other widow, had since taken possession of rural land at Aloa Ideba village together with her children. They contended that the status quo was unfair to some of the beneficiaries for which reason they opposed grant of letters of administration to the applicant / defendant. They prayed that the court instead grants them letters of administration and that the estate be distributed according to law.

In his written statement of defence, the applicant / defendant contended that compared to the plaintiffs / respondents, he was better qualified for a grant of letters of administration to the estate of his late brother Geoffrey Odongo. Upon the death of their late father, the late George William Omollo in 1977, his son the late Geoffrey Odongo obtained a grant of letters of administration to his estate on 5<sup>th</sup> May, 1982 from the Chief Magistrates Court at Lira,

consequent upon which he distributed all the property of the deceased among the beneficiaries to their satisfaction. No complaint was raised about that distribution until his death in 1995. The four plots in Lira Municipality were applied for and leased to the late Jimmy Ochen s/o Peninnah Omollo and did not form part of the estate of the late George William Omollo. Peninnah Omollo  
5 obtained letters of administration to the estate of the late Jimmy Ochen and took possession of the four plots one of which she disposed off. Before his death, the late George William Omollo had given Plot 10 Bala Road in Lira Municipality to his son now deceased, Geoffrey Odongo, who retained possession thereof until his death in 1995. In his last will, the late George William Omollo had demised the approximately 200 acres of land at Aloa Ideba village between his two  
10 wives; Peninnah Omollo (50 acres) and Beatrice Omollo (150 acres). He contended that the estate of George William Omollo existed no more since it had been fully distributed. His application was in respect of the estate of his late brother Geoffrey Odongo and not his father, George William Omollo. He thus counterclaimed seeking remedies for defamation, distress and inconvenience caused him by the wrongful caveat lodged against that process and other acts of  
15 the plaintiffs / respondents ancillary thereto.

That suit was never heard and decided on its merits because on or about 22<sup>nd</sup> November, 2006 the parties entered into a consent judgment, in the following terms;

1. The farmland at Akao Idebe Amach sub-county measuring about 200 acres be  
20 transferred to the plaintiff's names by the defendant.
2. The said transfer shall be less by 3 (three) acres, to be preserved as a burial ground for the defendant and the family. The land shall be surveyed before demarcating it.
3. The defendant secures for the plaintiff a plot in Lira Town in exchange for the  
25 burial ground within 3 months.
4. The plaintiff relinquishes all other claims in the suit against the defendant.
5. The caveat lodged by the plaintiff against the defendant's application for letters of administration to the estate of the late Odongo be lifted.
6. The defendant deposits the land title to the farmland at Akao Idebe Amach sub-  
30 county in Gulu High Court within 14 days.
7. The defendant removes all encumbrances on the land title to the said farmland before the land is transferred to the plaintiff.
8. All hostilities between the parties should cease and the parties shall leave (sic) in harmony as one family in memory of their late father the late Omollo.
- 35 9. The parties bear their own costs.

Pursuant to that consent judgment, the plaintiffs / respondents on or about 20<sup>th</sup> November, 2013 applied for execution of the resultant decree by way of arrest and imprisonment of the defendant / applicant. The applicant was committed to civil prison from where he was later produced and granted a two week's reprieve within which he was required to comply with  
5 decree. The applicant never complied but instead went into hiding. On or about 11<sup>th</sup> December, 2017 the plaintiffs/ respondents applied for execution of the decree afresh by way of arrest and imprisonment of the defendant / applicant. Having failed to show cause why he should not be committed to civil prison, he was on 3<sup>rd</sup> May, 2017 committed once again to civil prison, from where on his instructions, three applications were filed.

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In Miscellaneous Civil Application No. 83 of 2018, the applicant sought an interim order of stay of execution on grounds that he had a pending application No. 81 of 2018 by which he sought an order setting aside the consent judgment and No. 82 of 2018 constituting the substantive application by which he sought a stay of execution. On 2<sup>nd</sup> July, 2018 the Assistant Registrar of  
15 this court dismissed with costs to the respondents, the application that sought an interim order of stay of execution, leaving the other two applications for determination, hence their consolidation herein.

The nature of a consent judgment was stated by the Supreme Court in *British American Tobacco (U) Limited v. Sedrack Mwijakubi, S.C. Civil Appeal No. 1 of 2012*, to be a Judgment of the parties validated by Order 25 Rule 6 of *The Civil Procedure Rules*. For that reason, in *Nshimye and Company Advocates v Microcare Insurance Limited and Insurance Regulatory Authority, H.C. Misc. Application No. 231 of 2014*, it was decided that by consent judgments, the Court assists and facilitates parties to meet the ends of Justice and that it would therefore be unfair and  
25 cause injustice to nullify a consent judgment properly concluded.

It is a well settled principle that parties to a Civil Suit are free to consent to a judgment. They may do so orally before a judge who then records the consent or they may do so in writing and affix their signatures on the consent. In that case still the Court has to sign that judgment. Any  
30 judgment unless set aside is binding on the parties. A consent judgment has to be upheld unless it is vitiated by the fact that if it was entered into without sufficient material facts or in

misapprehension or in ignorance of material facts, or it was actuated by illegality, fraud, mistake, contravention of court policy or any reason which would enable the Court to set aside an agreement (see *Hirani v. Kassam* [1952] EA 131; *Attorney General and Uganda Land Commission v. James Mark Kamoga, S.C. Civil Appeal No. 8 of 2004*; *Brooke Bond Liebig (T) Ltd v. Mallya* [1975] 1 EA 266; *Edison Kanyabwera v. Pastori Tumwebaze* [2001 – 2005] HCB 98 and *Babigumira John and others v. Hoima District Council* [2001 – 2005] HCB 116).

I have found a number of anomalies in the proceedings leading up to and including the consent judgment in this matter. Firstly, in proceedings removal of the caveat, section 265 of *The Succession Act* requires that the applicant in the administration cause becomes the plaintiff while the caveator becomes the defendant (see *Namungo v. Kiryankusa* [1980] HCB 66 and *In the matter of the estate of late Justine David Kirunda, H.C Misc. Application No. 252 of 2014*). It was held in *Margaret Kabahunguli v. Eliazali Tibekinga and another, H.C. Administration Cause No. 08 of 1995*, that the notice in section 255 of *The Succession Act* that should precede the filing of such a suit is a mandatory statutory notice which must be effected on the caveator notifying him of an intended suit should he fail or refuse to remove the caveat failure of giving of which renders the suit incompetent.

A section 255 suit is meant to enable the court before which the application and caveat have been lodged, after hearing both parties, to determine whether or not orders that the caveat lodged by the defendant(s) be removed / vacated and Letters of Administration be granted to the plaintiff / applicant should be made. The issues in such a suit revolve around the determination of whether or not the plaintiff / applicant qualifies, is competent, or is a fit and proper person and therefore entitled to administer the estate in issue. Since the applicant for grant of letters of administration is required to make full disclosure of the nature of assets comprising the estate, their value, identity and particulars of the beneficiaries, these too may form part of the issues to be resolved. When successful, the suit results in an order vacating the caveat and issuance of the grant applied for, to the plaintiff, or another person or persons found to be suitable. The suit is dismissed where the court finds the plaintiff unsuitable to administer the estate and none of the other person(s) party to the suit, qualifies in which case the grant will be made to the Administrator General.



Contrary to that procedure, the suit for removal of the caveat was filed in the High Court where there was no pending application for a grant of letters of administration in respect of the estate of the late Geoffrey Odongo. The jurisdiction to order that caveat to be vacated rested in the Chief Magistrate's Court at Lira where both the application and the caveat had been lodged. The High Court has no powers to intervene in a matter pending before the Chief Magistrate's court save by way of revision, reference, case-stated or appeal. The proceedings before the High Court that resulted in the consent decree therefore had no legal basis and when a court purports to exercise a jurisdiction that is not vested in it by law, the resultant judgment and decree are a nullity (see *Kasibante Moses v. Katongole Singh Marwana and another, H.C. Election Petition No. 23 of 2011; Karoli Mubiru and 21 Others v. Edmond Kayiwa [1979] HCB 212; and Peter Mugoya v. James Gidudu and another [1991] HCB 63*).

Secondly, the court before which the application for a grant of letters of administration is pending will through a section 255 suit consider whether or not the caveator has a caveatable interest in the estate comprising the subject matter of the application. A caveatable interest will exist in favour of;- a customary heir; an executor of a valid will of the deceased; a creditor; a beneficiary under that particular estate; or where assets of the estate the subject matter of the application are mixed with those of another estate, a beneficiary or creditor under that other estate; and the Attorney General by virtue of the statutory role of that office. It was not shown in the suit that any of the plaintiffs / respondents was a beneficiary under the estate of the late Geoffrey Odongo the subject of the application for a grant, but rather that of their father, George William Omollo, which was not the subject of the grant.

Thirdly, the plaintiffs / respondents claim was based on an allegation that part of the estate of their late father, George William Omollo, had merged with that of Geoffrey Odongo yet the defendant / applicant contended that distribution of the estate of the late George William Omollo had been concluded by the late Geoffrey Odongo sometime after the grant of 5<sup>th</sup> May, 1982 to him by the Chief Magistrates Court at Lira. According to section 19 (2) of *The Limitation Act*, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of the Act, is not brought after the expiration of six years from the date on which the right of action accrued. The

period ordinarily begins to run from the date of the grant of administration, unless the breach of trust complained of occurred later. Whereas the grant was made on 5<sup>th</sup> May, 1982, the plaintiffs / respondents only filed a suit alleging unfair distribution on 27<sup>th</sup> April, 1999, seventeen years following the grant and nearly four years after the death of the administrator of that estate, 5 Geoffrey Odongo on 28<sup>th</sup> July, 1995. The action was not only time barred but was also misconceived in so far as the defendant / applicant had not made an application for "effects un-administered" of the estate of the late George William Omollo under section 229 of The Succession Act but rather to the estate of the late Geoffrey Odongo.

10 Lastly, the consent judgment / decree in clauses 1, 6 and 7 imposed upon the defendant / applicant obligations that would otherwise be legally those of a holder of letters of administration of effects un-administered (*De bonis non administratis*) of the estate of the late George William Omollo, yet none had been granted to him. Clearly in clause 5 of that consent decree the application that was caveated related only to the estate of the late Geoffrey Odongo. The power 15 to distribute, dispose or otherwise deal with the property comprised in the estate of a deceased person vests in the personal representative (s) of the deceased intestate. It is the reason why under section 191 of *The Succession Act*, no right to any part of the property of a person who died intestate can be established in any court of justice, unless Letters of administration have first been granted by a court of competent jurisdiction. A personal representative is defined in Section 20 2 (r) of *The Succession Act* as the person appointed by law to administer the estate of a deceased person. In the decree, the defendant / applicant was never appointed personal representative of the late George William Omollo. He had no legal capacity to distribute, dispose or otherwise deal with the property considered to belong to that estate.

25 Moreover, under sections 92 and 94 of *The Registration of Titles Act*, the authority to transfer land is limited to proprietors of land, or of a lease, or mortgage, or of any estate, right or interest in the land. It is also extended to a holder of powers of attorney of such proprietors or mortgagees under section 146 (1) of the Act. The other category includes purchasers under any decree, judgment or order of any court (see sections 73 of the Act) and holders of decrees of 30 execution (see section 135 of the Act). In the latter case, the prescribed form comprised in the Fourteenth Schedule to the Act envisages that such a transfer is to be executed by a "person

appointed to execute the decree." It follows therefore that anyone who is not registered as proprietor, a mortgagee, purchaser under a decree, or a person appointed to execute a decree or attorney of a registered proprietor, has no capacity to transfer registered land.

5 In the law of contract, a common mistake can void a contract if that mistake of fact was sufficiently fundamental to render the identity of the subject matter different from what was contracted, making the performance of the contract impossible (see *Bell v. Lever Brothers Ltd* [1932] AC161 and section 17 of *The Contracts Act, 2010*). Where both parties to an agreement are under a mistake as to a matter of fact which is essential to the agreement, consent is obtained  
10 by mistake of fact and the agreement is void.

In the instant case, the multiplicity of errors highlighted above shows that the consent judgment was entered into with insufficient material facts or in misapprehension or in ignorance of material facts. Either way, it was based on common mistake that vitiates it. It was argued  
15 nevertheless that it cannot be set aside because of the inordinate delay in seeking to have it set aside. According to section 3 (3) of *The Limitation Act*, no action may be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable. The decree sought to be set aside is dated 22<sup>nd</sup> November, 2006 and thus it will become unenforceable after 22<sup>nd</sup> November, 2018. Moreover, the first attempt by the plaintiffs /  
20 applicants to enforce it was on 18<sup>th</sup> November, 2013, seven years after its execution. This application is thus not affected by the law of limitation.

Inordinate delay may in the alternative be considered from the perspective of laches, the essence of the doctrine is that an equitable relief will not be given if the applicant has unduly delayed in  
25 bringing the action. That both justice and equity abhor a claimant's indolence. That stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. therefore, it is trite law that the time taken to lodge an application for review is an important factor to consider when determining an application for review (see *Combined Services Ltd. v. Attorney General, H.C.C.S. No. 200 of 2009*; and *Muyodi v. Industrial and Commercial*  
30 *Development & Anor [2006] EA 243*). Nevertheless, the equitable defence of laches is resorted to only when *The Limitation Act* cannot be relied on. The doctrine of laches is available to

dispatch of a claim after its deadline has passed. The equitable doctrine of laches has a legal equivalent in *The Limitation Act*. To allow a laches defence in a legal action would be to override a time limit mandated by the Legislature.

5 Courts have routinely referred to laches as an equitable defence, that is, a defence to equitable remedies but not a defence available to bar a claim of legal relief (see 1 D. Dobbs, *Law of Remedies* (2d Ed.1993) § 2.4(4), p. 105). A proceeding will be treated as equitable if an equitable, coercive remedy is invoked such as injunction, otherwise not. An application for setting aside a decree is not essentially equitable in character, and therefore not subject to laches.

10 Whether a consent judgement is valid is a question of law and not equity. While the defence of laches is utilized to prevent prejudicial delay in suits in equity, it is apparently available only when discretionary relief is sought. Illegality may be brought to the attention of court at any time for as long as the subject matter is still enforceable.

15 To rely on the defence of laches, the defendant / respondent must show not only that the plaintiff / applicant unreasonably and inexcusably delayed filing, but that the delay caused “material prejudice” to the defendant. The court need only consider, as it does in any laches defence, whether the harm to the defendant outweighs the causes of the plaintiff’s delay. Laches does not result from the mere passage of time, but because during the lapse of time, circumstances

20 changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another. The mere lapse of time does not constitute laches unless it results in prejudice to the opposing party as where, for example, the opposing party is led to change his position with respect to the matter in question. Additionally, material prejudice can be evidentiary prejudice-including loss of records and lack of memory.

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In determining whether laches is applicable, the court must consider factors such as (1) the length of the delay, (2) the seriousness of the prejudice, (3) the reasonableness of the excuse, and (4) the conduct of the defendant. Dismissal under the doctrine of laches must come from a finding that the delay caused prejudice to the party that could have otherwise been avoided had

30 the plaintiff / applicant made a timely filing. Hence, even if the defendant is successful in establishing the elements of laches, the court may still deny the application of the doctrine based

on the defendant's conduct. I conclude therefore I find that the applicant has made out a case justifying an order setting aside the consent judgment and decree, and it is hereby set aside.

5 The other order sought is one setting aside the process of execution. Having set aside the decree orders made in its execution would consequentially have to be set aside. I nevertheless consider it necessary to examine this aspect as well in a little bit more detail. Section 38 of *The Civil Procedure Act* lays down various modes of executing a decree. One of such modes is arrest and detention of the judgment-debtor in a civil prison. The decree-holder has an option to choose a mode for executing his decree and normally, a court of law in the absence of any special  
10 circumstances, cannot compel him to invoke a particular mode of execution.

Under section 40 *The Civil Procedure Act* and Order 37 rule 2 (d) of *The Civil Procedure Rules*, the judgment debtor has the option of execution by way of arrest and commitment to civil prison, of the judgment-debtor. The object of detention of judgment-debtor in a civil prison is twofold.  
15 On one hand, it enables the decree-holder to realise the fruits of the decree passed in his favour; while on the other hand, it protects the judgment-debtor who is not in a position to pay the dues for reasons beyond his control or is unable to pay (see C.K. Takwani, *Civil Procedure*, 5<sup>th</sup> edition (2006), p. 438-439. If the judgment-debtor has means to pay and still he refuses or neglects to honour his obligations, he can be sent to civil prison.

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As a mode of execution, detention in civil prison is competent for failure to pay monetary awards, fines for contempt of court and for wilful failure to perform a decree that orders specific performance (a *decree ad factum praestandum*) where court is satisfied that the non-performance is wilful. Perusal of the decree at hand reveals that it does not contain any monetary award. It has  
25 been demonstrated as well that the would-be orders akin to specific performance contained in clauses 1, 6 and 7 thereof are unenforceable in law. Therefore the arrest and commitment to civil prison of the applicant was erroneous.

Be that as it may, Courts are increasingly expressing displeasure with this mode of execution in  
30 so far as it contravenes the "inhuman standards" expressed in Article 11 and 21 of *The International Covenant on Civil and Political Rights* (ICCPR). Article 11 of the ICCPR provides

that no one shall be imprisoned merely on grounds of inability to fulfil contractual obligations. Article 21 that prohibits deprivation of his life or personal liberty except according to procedure established by law, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence. Although not domesticated, by virtue of the law of state responsibility for international treaties to which Uganda is a signatory, the ICCPR is arguably part of the Ugandan law, or alternatively, until the Municipal Law is changed to accommodate the Covenant, because of its binding provisions at the very least it serves as a source of persuasive standards that ought to influence the interpretation and application of legislation. Moreover, the foreign policy objective under state policy No. xviii and Article 287 of *The Constitution of the Republic of Uganda, 1995* promotes the respect for international law and treaty obligations.

It is difficult to discern a modern trend worldwide in respect of imprisonment for civil debt. Some countries have abolished the remedy entirely while other countries, like Zimbabwe, have prohibited it only with respect to the indigent debtor. The Kenyan High Court case, *R.P.M v. P.K.M, Nairobi Divorce Cause No. 154 of 2008 (unreported)* is an example of decisions influenced by international treaty based standards. In that case, Justice G.B.M Kariuki held that;

No one should be sent to civil jail for inability to pay a debt. It would be morally wrong to do so. It would arguably also amount to discrimination against the have-nots. And it would also make no sense to send to civil jail a person who is unable to pay. That would be malicious. In any case, it would amount to throwing away good money after bad for the creditor. Civil jail is for those who refuse to part with their money to pay debts.

In *Chinamora v. Angina Furnishers (Private) Ltd [1997] 1 LRC 149 (Supreme Court of Zimbabwe)* it was held that a court it should not order civil imprisonment if the debtor proved inability to pay. The court should order imprisonment only if it is established positively that the debtor could but would not pay. In the *First National Bank v. Julia Moseneke and Bank Gaborone v. Thabang Mosiny (consolidated)* Justice Dr. Zein Kebonang, of the Botswana High Court at Gaborone went as far as proposing that this method of execution should be abolished altogether because it serves no practical purpose. These decisions illustrate that the high value of human dignity and the worth of the human must always be kept in mind. Degrading treatment connotes treatment of individuals that grossly humiliates them before others or drives them to act

against their will or conscience. Such treatment is not limited only to physical acts but to any act of a certain level of severity which lowers a person in rank, position, reputation or character. To commit a debtor to prison who through poverty is unable to satisfy the judgment debt is contrary to the purpose of civil imprisonment which is to coerce payment. Its only real effect on an impoverished debtor is that of punishment. It is a punishment that can be avoided by a debtor who is able but unwilling to pay, for satisfaction of the judgment remains within his power. But it becomes mandatory against one without the means to pay. It discriminates between the one and the other. Poverty-stricken judgment debtors should not be consigned to jail.

10 When applied to honest debtors incapable of paying dues for reasons beyond their control, this mode has the undesirable effect of subverting justice by being turned into a tool of harassment of a person just because of his or her poverty. It leaves both the debtor deprived of his or her liberty and creditor still destitute. To avoid this outcome, the creditor must therefore satisfy the Court that the debtor is guilty of wilful refusal or culpable neglect to pay the debt. Mere omission to pay should not result in arrest or detention of the judgment-debtor. Before ordering detention, the court must be satisfied that there was an element of bad faith, not mere omission to pay but an attitude of refusal on demand verging on demand verging on disowning of the obligation under the decree. I am persuaded by the dicta of by Krishna Iyer, J. in *Jolly George Verghese v. Bank of Cochin*, (1980) 2 SCC 360; 1980 AIR 470, 1980 SCR (2) 913 where he stated that;

20 The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or reculant disposition in the past or alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here, a consideration of the debtor's other pressing needs and straitened circumstances will play prominently.

The court opined that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability was appalling. "To be poor ..... is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of [the Constitution] unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness." By that construction, the court further opined that it would have sauced law

with justice, harmonised the law permitting arrest and detention in civil imprisonment as a mode of execution with the covenant and the Indian Constitution.

By virtue of Order 22 rule 37 (1) of *The Civil Procedure Rules*, court has the discretion to make  
5 an order disallowing an application for the arrest and detention of a judgment debtor and directing his or her release where it is satisfied that the judgment debtor is unable, from poverty or other sufficient cause, to pay the amount of the decree. The executing Court therefore should necessarily go into the question of means of the judgment-debtor to pay the decree amount after the latter is arrested and brought to Court and before deciding whether the judgment-debtor has  
10 to be committed to prison or not. The court should adjudicate on the present means of the debtor *vis-a-vis* the present pressures of his or her indebtedness, or alternatively whether he or she has the ability to pay but has improperly evaded or postponed doing so or otherwise dishonestly committed acts of bad faith respecting their assets. The court should in that process take note of other honest and urgent pressures on the debtor's assets. The aspect of deliberate refusal or  
15 negligence has to be necessarily established by the decree-holder to the satisfaction of the executing Court. The direction for arrest is an extreme consequence that can be resorted to if there is adequate proof of refusal to comply with a decree in spite of the fact that the judgment-debtor is possessed of sufficient means to satisfy the same. Civil imprisonment should be a remedy of last resort when all other methods of debt collection have failed. In any event, a  
20 judgment debtor was once discharged from jail, cannot be arrested a second time in execution of the same decree (see s. 42 (2) of *The Civil Procedure Act*). He was once arrested on or about 20<sup>th</sup> November, 2013, he could not be arrested again in execution of the same decree in 2017.

In the final result, the consent judgment of 22<sup>nd</sup> November, 2006, the resultant decree and the  
25 warrant of arrest and imprisonment of the applicant in execution of that decree, are hereby set aside. The applicant should be set free forthwith. The costs of the application are awarded to the applicant.

Dated at Gulu this 24<sup>th</sup> day of August, 2018

.....  
Stephen Mubiru  
Judge,  
24<sup>th</sup> August, 2018.

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