

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(EXECUTION AND BAILIFFS DIVISION)

MISCELLANEOUS APPLICATION NO. 002 OF 2016

5 **(ARISING FROM ARBITRATION SERIAL NO. 006 OF 2015)**

**MUHAMMED BUWULE KASASA APPELLANT/ JUDGMENT
CREDITOR DECREE HOLDER**

VS

10 **NATIONAL WATER AND SEWAGE CORPORATIONRESPONDENT/
JUDGMENT DEBTOR**

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT / RULING

This appeal was brought under S.98 CPA 0.50 r 8, and rr1, 2 and 3 seeking orders that the
15 decision of the Registrar delivered on 28.11.15 setting aside the Appellant's order nisi be
reversed and or set aside.

Costs of the application were also applied for together with consequential orders making
order nisi absolute.

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The appeal was supported by the affidavit of Patrick Ainamani.

When the appeal was first called for hearing on 17.03.16, the Counsel for the Respondent
sought adjournment on the ground that they had only been served with the application and
25 hearing notice on 11.03.16 and they needed time to consult their clients in order to file
affidavit in reply.

The adjournment was vehemently opposed by Counsel for the Applicant. However, court advised the parties to endeavor to settle out of court and matter was adjourned to 29.03.16. It was also directed that the affidavit in reply be filed by 23.03.16 and the rejoinder if any, by 24.03.16.

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On 29.03.16, Counsel for the Applicant went through the provisions of the law under which the appeal was made and relying on the supporting affidavit submitted that the Registrar clearly and blatantly misapplied and misdirected himself on the laws relating to the powers of Registrars.

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That order 0.50 r20 C.PR, the Registrar can only enter judgment in uncontested cases.

RR 3 and 4 of 0.50 C.P.R the powers are limited to formal steps preliminary to trial, interlocutory orders and formal orders for execution of decrees.

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In this case, the Registrar issued an order NISI attaching the Bank accounts of the Respondent and then proceeded to set aside his own orders on 27.11.15.

Counsel contends that the Registrar acted ultravires the law and assumed powers of a judge.

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And that the actions of the Registrar prejudiced the Appellant who was frustrated from realizing the fruits of his judgment.

Court was referred to the case of **Reconciling Gospel World Wide and 3 Others vs. Douglas Ataryeba and Another Miscellenous Application 264 of 2015 from Civil Suit 163 of 2015**. Where a similar situation was dealt with by Justice Adonyo.

25

In that case a default judgment was entered against the Applicants and later set aside.

The judge explained the limitation of Registrars' powers under 0.50 C.P.R and held that ***“the powers do not extend to setting aside their own judgments and matter should have been appealed to the trial judge”***.

30

It was argued that the Registrar in the present case therefore took matters in his own hands and acted as a judge and jury and set aside his own orders without jurisdiction.

Court was urged to reverse the orders of the Registrar, restore the order nisi and make it absolute as all the garnishee banks confirmed that there were sufficient funds to satisfy the arbitral award of Shs. 171,000,000/-.

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Counsel pointed out that, the Registrar set aside the order nisi mainly because he said that there was an application filed at the Commercial Court seeking to set aside the Arbitral award.

10 Referring to S.34 (3) of the Arbitration Act, the Registrar stated that even though the application had been filed out of time, the wording of the section “**May**” presupposed that court has discretion to enlarge time within which to file an application to set aside an arbitral award.

15

Further that r 11 Arbitral rules provides that applications for execution shall not be made before the expiry of 90 days from the date of receipt of the Arbitral award.

20 Also that the accounts to be attached were not specific and that this would have created an ambiguity.

However, Counsel argued that it had been held in a number of cases that ***“Though the language used under S.34 (3) of the Arbitration Act appears discretionary, to the contrary, this provision of the law does not expressly give jurisdiction to the High Court to enlarge time within which to file application to set aside a arbitral award”***. – See **Soroti Joint Medical Services Ltd. vs. Five Africa Medicines Heather Ltd Ar. Cause 452/11** – where the case of **Katamba Phillip and 3 Others vs. Magala Ronald Arb. 03/07**.

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30 It was stated in the above case that ***“the period of 30 days is prescribed by statute under S.34 of the Arbitration Act. Once limitation has set in, there is no room for enlargement of time as it is not provided for by statute”***.

Counsel asserted that the ratio decided is that under S.9 Arbitration Act – no court shall intervene in matters governed by the Act. The court’s influence only relates to the C.P.R but not to the Arbitration Act in view of SS. 9 and 34 of the Act.

5 The only influence of court is provided for under SS. 5 and 6 of the Act which provide for stay of proceedings. But that courts have established that **“a court has no residual or inherent jurisdiction to enlarge a period of time fixed by statute and any extension of time by a High Court judge is always a nullity”**. - **Makula International vs. Cardinal Nsubuga [1982] HCB** Case.

10 Accordingly, Counsel submitted, it was wrong for the Registrar to hold that power to enlarge time was within the discretion of court.

And that the application was brought in bad faith on the eve of the application for order absolute. And the Registrar erred in law to agree with Counsel for the Respondent that
15 execution of matters under the Arbitration Act should wait for ninety days in light of r 11 of the Arbitration Rules.

In any case, Counsel submitted, the ninety days have since expired. And S. 36 Arbitration Act provides that enforcement of an arbitral award shall be executed in a manner like a decree of
20 court.

He added that rule 11 Arbitration Rules appears to contradict S.36 of the Arbitration Act. And where there is a contradiction, the rules cannot prevail over the Act. – the case of **Roko Construction Ltd. vs. Mohammed Mohammed Humid C.A 51/2011** was cited in support.

25 It was asserted that it was glaringly wrong and irregular for the Registrar to rely upon the rules over the Act. And that his orders should be set aside and the order nisi made absolute with costs to the Appellant.

30 The application was opposed by Counsel for the Respondent relying on the affidavit in reply.

He complained of the prayer to make the order absolute contending it was not contained in the motion.

Counsel argued that the matter before court is not a default judgment and yet the case relied upon by the Appellant to argue that court had no jurisdiction deals with setting aside default judgments.

5

The matter before court concerns execution under rule 0.23 C.P.R- where garnishee order nisi is equivalent to notice to show cause under 0.22 C.P.R. And that it is a transitional and not a final order.

10 He referred court to the definition of the word “**nisi**” – in **Black’s Law Dictionary 8th Edition** and the case of **Unique Holdings Ltd vs. Business Skills Trust Ltd Miscellaneous Application 402/2012** to argue that an order nisi operates as an injunction that prevents the bank from paying out the money until the order is made absolute or discharged.

15 Counsel argued that since the Registrar has jurisdiction to entertain and determine execution proceedings then he had jurisdiction to discharge the proceedings in accordance with the law.

Further that the argument that the Registrar was not in order to discharge the order nisi was based on rules which contradict the Act cannot be sustained.

20

The affidavit in support of the application shows that the award was registered at the Commercial Division on 21.10.15.

25 Under the arbitral rules 2 and 3 – the award may be registered in court by a party. Counsel argued that the use of the word “**may**” does not make it mandatory. But by registering the same, the Appellant put the award within the ambit of the rules and therefore cannot trivialize their importance.

30 The rule relied upon by the Registrar provides that “***an application to enforce award of the decree of court under S.35 of the Act shall not be made until after the expiration of ninety days after notice of filing or registering the award has been served upon the party against whom the award is to be enforced. And if objections are lodged, until the objections have been dealt with by the court.***”

The notice of registration of the award was served on the Respondent's lawyer on 22.10.15. The application to set aside the award was filed on 26.11.15, that is, within a month and four days and not within ninety days.

5 The application is still pending disposal before the Commercial Court and therefore the Registrar was right to hold that the execution proceedings could not be commenced in accordance with rule 11 of the Arbitration rules.

10 It was asserted that the rules do not contradict the Act in any way but compliment it and had to be enforced.

The Act does not provide for Registration of the Award and the limitation provided for under S.34 (3) is discretionally and is for the date of receiving the award and not for registration of the award.

15

And whether the application to set aside the award was within or out of time is a matter to be determined during the proceedings of the application to set aside the awards otherwise it will be rendered nugatory, and deny the Respondent a right to be heard on the application as provided for by the Arbitration Act. The right is derived from a right to a fair hearing under Article 28 of the Constitution.

20

Commenting about the authorities cited on the issue of enlarging time, Counsel contended that the High Court derives jurisdiction from the Constitution which is the supreme law of the land and also the Judicature Act which under S. 33 empowers court to grant any orders it deems fit for the ends of justice. That therefore, the authorities are not binding on this.

25

Further that, the Registrar did not extend time but only noted that there was an application before the Commercial Division and the time to commence the execution proceedings under r11 of the Arbitration Act.

30

Counsel then submitted that the appeal has no merit as the Registrar did not err in law. He urged court to uphold the decision of the Registrar, dismiss this appeal and give the Respondent a chance to exercise its right to be heard on the matter pending before the Commercial Division.

Referring to paragraph 10 of the affidavit in reply, Counsel also stated that the garnishee order nisi was only addressed to the garnishee Banks without indicating the bank accounts to be attached. And under paragraph 16, it is indicated that the accounts attached by banks included public accounts meant to execute the corporation's statutory mandate /duty. And that it would therefore be a gross injustice for the accounts to be attached, as it would hinder the operations of the Respondent in its duties.

He reiterated earlier prayers.

10

In rejoinder, Counsel for the Appellant commenting about the prayer to make the garnishee order absolute, contended that S.98 CPA had not been addressed by Counsel for the Respondent. And that granting the garnishee order absolute will not in any way prejudice the Respondent as it owes the money claimed.

15

As to the default judgment being distinguishable from an order, Counsel argued that matters of law are interpreted ejusdem generis and it is trite law that these orders are sometimes analogous in principle to other orders under the rules.

20 That the claim that the order nisi is transitional was not substantiated or supported by any authority and therefore court is not persuaded. And there is nothing in the rules that talks of a transitional order. He referred court to S.2 (0) CPA for definition of the word "**order**".

25 Also that the case of **Unique Holdings (Supra)** is distinguishable from the authorities relied upon by the Appellant as it just explains what an order nisi is, but does not explain or show that a Registrar has powers to set aside an order nisi. And that the submissions of Counsel for the Respondent in this respect are concoctions meant to harmonize his submissions to his convenience but it is not a position of the law.

30 It was the further contention of Counsel for the Applicant that Counsel for the Respondent confirms that powers of Registrars are limited to entertainment of applications for execution but not setting aside any of the orders passed.

He asserted that the submissions are misconceived and should be ignored. And that while Respondent's Counsel labored to dismiss the Appellant's submissions as trivial; he did not cite any authorities or positions of the law that cure the contradiction between the Arbitration Act and the rules. And that cases show that courts are at crossroads as to whether to adopt
5 the rules or the Act.

Also that the Court of Appeal decision is binding on the High Court ***“in absence of clear road map between the rules and the Act, the Act prevails”***.

10 As to the application pending before the Commercial Court and the provisions of the Constitution, Counsel reiterated that all superior courts have held that ***“once the days for contesting the award have expired, the rights are waived and the application is a nullity before the law”***.

15 He insisted that under S.33 of the Arbitration Act, the days start running on receipt of the award and not from the date of its registration. He pointed out that present case the award was received on 07.10.15 and the Respondent waited until there was an application for execution to try and set aside the award. He condemned the conduct as being in bad faith and meant to delay the application.

20

In respect to the failure to mention particular bank accounts, Counsel stated that, that was an oversight that was not fatal to the application and it was cured when the garnishee banks appeared in court and confirmed the availability of funds and also furnished the right accounts on which the funds are held. And that it was wrong for the Registrar to ignore that
25 and rule that failure to furnish accounts was fatal.

Earlier prayers were reiterated.

Having carefully gone through the application, the supporting affidavits and the affidavits in
30 reply, and after listening to the submissions of both Counsel, the following issues are framed for determination:-

- 1) Whether the Registrar erred in law in revisiting his order Nisi and lifting or vacating the same.

2) What remedies are available to the parties.

The issues will be dealt with in that order.

5 **Whether the Registrar erred in law in revisiting his order Nisi and lifting or vacating the same.**

The Registrar vacated the order on the ground that its issuance had to await the outcome of the application for setting aside the arbitral award Application No. 978/15 which had been
10 filed in the Commercial Court.

He overruled the submissions of Counsel for the Appellant to the effect that the application in the Commercial Court had been filed outside the time stipulated by the law, on the ground that S.34 (3) of the Arbitration Act was not couched in mandatory terms.

15

Further that the duty of considering the merits of the application are vested with the court where the application had been made, and the evidence of the application having been filed was sufficient for court to halt the garnishee proceedings till the matter had been heard and determined.

20

This court finds it necessary to look at the powers of Registrars in order to determine what there are mandated to do and not do.

0.50 C.P.R spells out the powers of Registrars. 0.50 R 4 C.P.R concerning execution
25 provides that ***“formal orders for attachment and sale of property and for the issue of notices to show cause on applications for the arrest and imprisonment in execution of a decree of the High Court may be made by the Registrar.”***

While r 6 provides that a Registrar is deemed a civil court for the purposes of rules 1, 2, 3 and
30 4 of this order.

The Registrars accordingly have several powers to do any act or thing provided for under the Act or in the rules made there under.

Under 0.50 r 2 C.P.R, the Registrars have powers to enter judgment in uncontested cases and in cases where the parties consent to judgment being entered in the agreed terms.

5 Rule 3 of the order, allows the Registrar to deal with formal steps preliminary to trial and interlocutory matters.

Under 0.23 C.P.R and S. 38 (c) CPA, Registrars can deal with matters concerning attachment of debts.

10 From all those provisions set out above, it is apparent that the Registrar has power to issue order nisi attaching bank accounts.

However, Counsel for the Appellant contends that the Registrar misapplied and misdirected himself as to the law relating to the powers of Registrars.

15

The question that arises therefore is, **whether after issuing the order nisi, the Registrar could set it aside at the hearing of the application to make the order absolute.**

20 It is worth noting that, at the time the Registrar set aside the order nisi, the garnishee has appeared before court and did not dispute the due or that there was no money to pay it.

Guidance on this matter is garnered from the decisions of the Supreme Court. The Supreme Court has held that *“while under 0.50 r 6 C.P.R, the Registrar is deemed to be a civil court for purposes of exercising power of execution, interalia, that should not be a basis for the view that the Registrar has powers of review.”* The court explicitly stated that *“though rules 7 and 8 of 0.50 C.P.R respectively provide for the Registrar referring any matter to the High Court and the person aggrieved by a Registrar’s decision to appeal to the High Court”; rule 6 does not create a subordinate court to the High Court. It rather underscores*
25 *the special status of the Registrar as an official of the High Court to whom some limited functions of that court are delegated.”* – Refer to the case of **Attorney General and Uganda Land Commission vs. James Mark Kamoga and James Kamala SCCA 08/2004.**
30

Applying the holding in the above case to the present application, this court finds that the Registrar had no jurisdiction to set aside his own order nisi and ought to have referred the matter to the Judge under 0.50 r 7 C.P.R.

5 Although the authority relied upon by Counsel for the Appellant – Reconciling the **Gospel World Wide (Supra)** referred to default judgment, the principle remains the same that a Registrar has no power to set aside his own orders.

10 While it is true as submitted by Counsel for the Respondent that an order nisi operates as an injunction that prevents the bank from paying out the money until the order is made absolute or is discharged – 0.23 r 2 C.P.R and **Unique Holdings Ltd vs. Business Skills (Supra)** that did not confer power upon the Registrar to set aside his own order nisi.

15 The Registrar set aside his own order to give the Respondent a chance to prosecute the application for setting aside Arbitral award that is pending in the Commercial Court and that all accounts in the garnishee banks had been wrongly attached.

20 Counsel for the Respondent had objected to the proceedings to make the order nisi absolute on the ground that the ninety days provided for under the Arbitration rules to object to the award had not expired. The Application No. 978/15 had already been filed.

25 Counsel for the Appellant objected to the submission on the ground that the application before the Commercial Court had been filed out of time as it ought to have been made within one month from the date of the award.

The Registrar rejected the submissions of Counsel for the Appellant on the ground that a court of law cannot stop any party to the proceedings from challenging any decision of court. He added that S.34 (3) of the Arbitration Act was not concluded in mandatory terms as it says “**may not**” which according to the Registrar means that the awards can be challenged even after one month. The Registrar relied upon the case of **Owega Construction Ltd vs. KCCA and Another** – where court deferred execution and waited for determination of the application before the Commercial Court.

The Registrar asserted that the duty of looking into the merits of the application were rested with the court where the application had been filed. And that, evidence of such application was sufficient for court to halt the proceedings until the matter had been heard and determined.

5

Having decided to stay the hearing of the application to make the garnishee nisi absolute pending the hearing of the application contesting the Arbitral award, the Registrar ought to have refrained from commenting on the issues likely to arise the refrom.

10 This court finds that the issues will be better dealt with by the court where the application challenging the Arbitral award was filed. Although both Counsel raised the same issues in this appeal, this court will also not delve into them for to do so will amount to preempting the decision of the Commercial Court were the application is pending determination.

15 Suffice it to state that the case of **Roko Construction vs. Mohammed Mohammed Hamid (Supra)** relied upon by Counsel for the Appellant was set aside by the Supreme Court in **SCCA 1/2013 – Mohammed Mohammed Hamid vs. Roko Construction Ltd.**

The case was set aside for reasons of lack of Coram and failure to follow the proper
20 procedure. The matter was referred back to the Court of Appeal for it to constitute a suitable and different Coram to hear and decide the appeal.

The case cannot therefore be relied upon. Both Counsel are urged to take note and find out if the matter was redetermined by the Court of Appeal.

25

Court also notes that, there is no indication in the Registrar's ruling that he extended the time within which the Arbitral award should be contested.

30 Be that as it may, this court agrees with Counsel for the Appellant that it was also wrong for the Registrar to set aside the order nisi on the ground that all the accounts of the Respondent had been attached, when it is not disputed that the right bank accounts on which the funds were, were furnished by the Garnishee banks.

All in all, court finds that the Registrar erred to set aside the order attaching the bank accounts for all the reasons set out in this ruling.

5 The appeal is accordingly partly allowed and the order releasing the accounts is set aside and the attachment is reinstated pending the disposal of the application challenging the Arbitral award pending before the commercial court.

The order staying the proceedings to make the order nisi absolute are stayed until the application in commercial court is disposed of.

10

Half the costs of this appeal are granted to the Appellant.

15 **FLAVIA SENOGA ANGLIN**

JUDGE

02.05.16