THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: MWONDHA, TIBATEMWA EKIRIKUBINZA, CHIBITA, MUSOTA, MADRAMA, JJSC**)**

MISCELLANEOUS Cause NO. 0012 OF 2022

AND

MISCELLANEOUS CAUSE NO. 13 OF 2022

CHINA ROAD BRIDGE CORPORATION ..... APPLICANT

VERSUS

WELT MACHINEN ENGINEERING LTD ..... RESPONDENT

AND

CHINA ROAD BRIDGE CORPORATION ..... APPLICANT

AND

(1) WELT MACHINEN ENGINEERING LTD
(2) ATTORNEY GENERAL **..... RESPONDENTS**

(ARISING FROM COMBINED SUPREME COURT CIVIL APPEALS NO. 13 & 14 OF 2019)

RULING OF THE COURT

The applicant brought this application under rules 6(2) b, 42(1) & (2) and 43(1) of the Judicature (Supreme Court Rules) Directions for the orders that this Court stays execution of the judgment and orders of the Supreme Court in the consolidated Civil Appeals Judgment No. 13 and 14 of 2019, **China Road Bridge Corporation v. Welt Machinen Engineering Limited** and **Attorney General and China Road Bridge Corporation v. Welt Machinen Engineering Limited**, pending determination of the Application for recall and review of the above mentioned judgment.

The Applicant also filed Miscellaneous Cause No. 13 of 2022 which was brought by the same Applicant but with two respondents China Road and Bridge Corporation versus (1) Welt Machinen Engineering Ltd and (2) Attorney General

It was brought under Section 98 of the Civil Procedure Act, Rules 2(2), 6 (2) (b), 42 and 43 of the Judicature (Supreme Court Rules) Directions S, I No. 13 – 11) and it was seeking for orders that

(1) An Interim Order of Stay of Execution be granted to Stay the Execution of the judgment and orders of the Supreme Court in SCCA No. 13 and 14 of 2019 and the main Application for Stay of Execution, which had been filed in this Court.

(2) Costs to be provided for:-

But before we reproduce the grounds of Miscellaneous Cause 12 of 2022 we would state on the onset that though Miscellaneous Application No. 12 was brought before this Court under Rules 6(2)(b), 42 (I) and (2) and 43 (I) of this Court Rules, And Miscellaneous Cause 13 of 2022 was brought under S.98 of the Civil Procedure rules and rule 2(2) of 6(2) (b), 42 and 43 of this Court Rules. The subject matter is Stay of execution in interim and so it is inconsequential. We are disposing of, Miscellaneous Cause No. 12 of 2022, which means Miscellaneous Cause 13 of 2022 shall fall by the way side following the disposal of Miscellaneous Cause 12 of 2022.

The grounds supporting the Application Miscellaneous Application 12 of 2022 were contained in the affidavit attached to the Notice of Motion deposed by one Ding Jianming Deputy General Manager of the Applicants company and briefly stated as follows:-

(1) That the Applicant has filed an application for review and recall of the judgment and orders of the consolidated Supreme Court Civil Appeals No. 13 and 14 of 2019 in this Court.

(2) That the application for review and recall has high chances of success for the following reasons.

(a) The Supreme Court judgment and orders directed the first respondent to pay the sum of 23,995,130,000/= to Nakapiripirit District Land Board whereas what was due to the said Land Board was Shs287,694,151/=.

(b) New evidence has come up to show that the Applicants monies previously deposited in the High Court amounting to Uganda Shillings 20,744,711,490/= has already been paid to the first respondent and to Okurut Okalebo, Outuke & Co Advocates in the sum of Uganda Shs.4,786,537,000/= with whom the applicant has no dealings at all.

(c) The sum of Shs.20,457,617,339 being the difference between what was earned by the applicant under the interim payment Certificates and deposited in the High Court by UNRA and subsequently paid out to the first respondent and Okurut, Okalebo and Outuke Co Advocates is the Applicants money and needs to be secured pending the Application for review.

(3) That unless the Order for Stay of Execution is granted the judgment and orders will be executed and the 1st Respondent will pay the decretal amount to the Nakapiripirit Land Board within 60 days of the judgment i.e. from 2nd February, 2022.

(4) Unless the order is granted the application for review will be rendered nugatory and the applicant will be denied her rights and benefits of the Application for review and will further suffer financial loss.

(5) The applicant is ready to provide security for due performance of the orders as may ultimately be binding.

(6) That it's in the interest of justice that their application is granted.

2nd Respondent reply

The second Respondent filed an affidavit in reply deponed by Wanyama Kadoli Principal State Attorney General Chamber and opposed the application as follows:

(1) That he makes no admissions of all the contents of the affidavit in support of the application and so denied all the contents.

(2) That there was no serious threat of execution before the hearing of the pending substantive application.

(3) That the Application for review and recall of the judgment has no merit or any chances of success.

(4) That there is no pending appeal before this Court.

(5) That the Applicant has not provided evidence of threat of execution to warrant the orders sought.

(6) That the contents of paragraph 4 and its sub of the affidavit in support of the application are not within the 2nd respondents' knowledge.

(7) That the consolidated impugned judgment of the Supreme Court found that the rightful entity to receive the compensation pursuant to Article 241 of the Constitution and Sections 59 and 60 of the Land Act is the Nakapiripirit District Land Board.

(8) That the Nakapiripirit District Land Board is a body established under the provisions of S.56 (I) and (2) of the Land Act Cap 227 of the Laws of Uganda and is a body corporate with perpetual succession, a common seal and may sue or be sued in its own name.

(9) That this Court ordered the 1st respondent to pay the sum of 23,995,130,000/= (Twenty three billion, nine hundred ninety five million one hundred thirty thousand) to Nakapiripirit District Land Board within 60 day from the date of the Order being the value of the granite stone that was wrongfully exploited from the Kamusalaba rock by the appellant Company.

(10) That the application was misconceived and abuse of Court process.

(11) That it was in the interest of justice, good conscience, public interest and equality that the orders sought are not issued.

Background

As discerned from the facts of the whole case as provided in the impugned judgment of **SCCA No 13 and 14 of 2019** it has a checkered history because of the multiplicity of proceeding perpetuated by the trial Court at Soroti. It culminated in two High Court suits, about 8 miscellaneous applications and resulted in abuse of the process of Court. The suits impugned S.7 of the CPA.

Two appeals in the Court of Appeal, and most importantly the Supreme Court Appeal Judgment from which this application arose from was not the original suit but one of the Misc. applications. The facts show that **Misc. Application No 700 of 2016** by **Welt Michinen Engineering Limited v. Attorney General** was filed seeking orders that judgment on admission be entered in its favour in accordance with the 1st respondents prayers and the unequivocal admissions of the 2nd respondent and for costs to be provided for. Pursuant to this **Misc. Application HCCS No. 278 of 2016** was settled. Both parties filed a consent judgment on 11th August 2016 in the following terms.

(1) The defendant/respondent be paid the sum of shs10,505,296,659/= (shillings ten billion, five hundred and five million two hundred ninety six thousand, six hundred fifty nine only) being the value of 165, 053, 85 tonnes of granite extracted outside location licence area LL1194.

(2) The plaintiff/applicant be paid the sum of (Eight billion six hundred and seventy eight thousand nine hundred sixty eight million six hundred and seventy eight thousand nine hundred ninety nine only) being the value of 561,974,48 tonnes of granite from location licence area LL 1194 (sic).

Each party to bear its own costs. The defendant was permanently restrained upon admission from making any claim or taking benefit from the right of the plaintiff in the value of the granite mentioned in (2) above among others.

The applicant appealed to the Court of Appeal but the Court of Appeal dismissed the appeal. The Applicant appealed to the Supreme Court. The Supreme Court allowed the appeal and ordered that the 1st Respondent refunds the sum of 23,995,130,000/= the value of Aggregates as per the Contract Bills of Quantities be paid to the Nakapiripirit District Land Board.

Representation

At the hearing of the application Mr. Tumusiime Enos represented the Applicant and Mr. Terrence Kavuma represented the first respondent, the learned State Attorney Ms Imelda Adong represented the 2nd respondent (Attorney General)

Applicant submission

Counsel identified four issues that were submitted on as follows:-

(1) Whether the applicant filed an application for recall and review of SCCA Nos. 13 and 14 of 2019. Counsel submitted that under paragraph 2 of the Application, the applicant stated that the Applicant has filed an application for recall and review of the Judgment in SCCA No 13 and 14 of 2019. The copy of the said Application Misc. No. 14 of 2022 and the Application had been fixed for hearing on 26th April, 2022.

(2) On the issue whether the Application for review and recall has high chances of success. Counsel submitted that the application for review was brought under Sections 82 (b) of the Civil Procedure Act, Rules 2(2) of the Judicature (Supreme Court) Rules. Under rule 35 (I) of the said rules, an error arising in any judgment from accidental slip or omission may be corrected by Court on the application of any interested person so as to give effect to what was the intention of the Court when the judgment was given.

Counsel submitted that the applicant was an interested person and filed the application for review and recall of the judgment and orders as above stated in Misc. Application No. 14 of 2022. He further

submitted that at page 2 paragraphs (b) (i), (ii) and (iii) and in Ding Jianmings affidavit paragraph 4, stated the grounds of the Application for recall and review of the impugned judgment as follows:-

(a) The Supreme Court mistook the value as the costs of the crashed aggregates that was applied to the road surface as contained in the Contract Bill of Quantities whereas not and this called the correction of judgment.

(b) The applicant has obtained fresh evidence that out of Shs20,958,174,490/= of the funds deposited in Court, the first respondent took Shs15,958,174,490/= and total stranger to the applicant Okurut, Okalebo Outuke & Co. Advocates took the balance 4,786,537,000/= and this calls for correction of judgment.

(c) New evidence has come up to prove that Nakapiripirit District Land Board is entitled to Shs287,694,151/= but not shs 23,995,130,000/= and the balances of the moneys deposited in Court of Ug.Shs.20,457017,339/= is due and owing to the applicant and the judgment and orders should be accordingly corrected. Counsel submitted that from the foregoing the main Application for recall and review of the impugned judgment and orders of the Supreme Court Civil Appeal No. 13 and 14 of 2019 has very high chances of success.

(3) Whether the Applicant will suffer irreparable damage/substantial loss if the stay is not granted. Showed that if the prayers are not granted the 1st Respondent will pay to the Nakapiripirit District Land Board. That the execution was eminent since the Court ordered the 1st respondent to pay within 60 days from the date of the judgment which was on 2nd February, 2022.

Further Counsel submitted that the Applicants money which was sequestrated from UNRA was Ug.shs.20,744,711,490/= and the applicant stands to lose it and yet it's substantial. He further submitted that this will lead her to bankruptcy. Counsel also added that once the money is paid to the Nakapiripirit District Land Board, it will irretrievably be lost as the applicant does not know of any

financial resources or otherwise of the said District Land Board from which the applicant can recover the money.

Counsel submitted that unless the prayer of Stay of Execution is granted, the applicant will suffer irreparable damage and or substantial loss to her finances as it is likely to become bankrupt and the Application for review will be rendered nugatory.

(4) Whether the Applicant has met the following conditions for stay of execution:-

(a) Whether the application has been filed without undue delay.

Counsel submitted that judgment was delivered on 2nd February, 2022. That this application was filed on 24th February, 2022. Therefore the application was filed/made without undue delay.

(b) Whether the Applicant has given security for the due performance of the Decrees/Orders as may be ultimately be binding on it.

Counsel submitted that in paragraph 8 of the affidavit of the Deputy General Manager Ding Jianmings, in support of the application the applicant made a commitment to provide security for due performance of the orders as they may be ultimately be binding on her.

Counsel further submitted that the applicant therefore had already deposited in Court Ug.Shs.20,744,714,490/= which was sufficient security for the amounts that the subject matter of this application. He further submitted that it would be double jeopardy if the applicant was asked to provide more security in this matter.

Counsel submitted that the Applicant had satisfied all the conditions for the grant of stay of execution pending the hearing and disposal of Miscellaneous Application No 14 of 2022.

Counsel prayed that this Court stays execution of the judgment and order of SCCA No. 13 and 14 pending determination of Miscellaneous Application No. 14 of 2022 in as far as paying to the Nakapiripirit District Land Board Ug.Shs.23,995,130,000/= is concerned (2) Costs be provided for.

2nd Respondent submissions:-

Counsel for the 2nd respondent raised two issues (i) whether there was ground for grant of the order sought and (ii) whether Counsel showed that the applicant has sufficient grounds to grant the order sought. Counsel submitted among others that the jurisdiction of the Supreme Court is prescribed and cannot be invoked to circumvent the principles of finality of Court decisions.

He submitted, inter alia, that there was no pending appeal lodged in accordance with the rules of this Court, and the applicant adduced no evidence on possible irreparable loss to be suffered if application was not granted.

Counsel submitted that the jurisdiction of this Court is provided in "rule 6 (2) (b) of this Court Rules."

"Subject to the sub rule (I) the institution of an appeal shall not operate to suspend any sentence or stay execution but the Court may

(a) .....

(b) In any Civil proceedings, where a notice of appeal has been lodged in accordance with rule 72 of the Rules of this Court may order a stay of execution ... on such items as the Court may deem just."

Counsel submitted, that the rule gives discretion to Court, which discretion must be exercised on well-established principles. Counsel relied on the case of **Hon Theodore Sekikubo and others v. Attorney General Constitutional Application No. 06 of 2013**, which restated the principles as hereunder:-

(1) That applicant must establish that his appeal has a likelihood of success or a prima facie case of his right to appeal.

(2) It has to be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if the stay is not granted.

(3) If 1 and 2 above are not established Court must consider where the balance of circumstance lies.

(4) That the applicant must show that the application was instituted without delay.

Counsel contented, that there is no appeal and in the affidavit in support of the application, this was conceded to by the Deputy Manager of the Applicant. Counsel argued that rule 6(2) (b) only applies to situations where there is a pending appeal, and so it does not apply to this situation. And further that the Applicant has not provided any evidence of eminent threat of Execution of the order and that the likelihood of success of the recall and review of the application have not been established. Counsel prayed that the application be dismissed with costs.

Consideration of the Application

This is an application brought under rule 6(2)(b) 42(I) and (2)and 43(I) of this Court rules for stay of execution of the judgment and orders pending the disposal of the review and recall of the application for the consolidated appeals 13 and 14 of 2019. It sought for costs to be provided for.

Rule 6(2)(b) of this Court rules provides inter alia as follows:– **"Subject to sub rule (I) of this rule the institution of an appeal shall not operate to suspend any sentence or to stay of execution, but the Court may**

(a) ...

(b) in any civil proceedings where the Notice of Appeal has been lodged in accordance with rule 72 of these rules order a stay of execution, an injunction or stay of proceedings as the Court consider just."

Definitely this was not an application for Stay of execution pending determination of a substantive application pending disposal/determination of an appeal. It is an application pending recall and review. Review is provided for under the Civil Procedures Act S. 82

"Any person considering himself or herself aggrieved

(a) By a decree or order from which an appeal is allowed by this Act but from which no appeal has been preferred or

(b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order on the decree or order as it thinks fit."

This means that the rules provided in the Civil Procedure Act and Rules thereto Cap 71 apply since this application was not an application pending appeal as provided for in rule 6(2)(b) of this Court Rules.

We are cognisant of the fact that, the requirements necessary for stay of execution pending Appeal have been put in place by case law in a number of cases like Theodore Ssekikubo (Supra), to assist in justifying the grant of the order of the Stay of Execution. We are of the view that in an application such as this those requirements may be applied with modification as the justice of the case demands.

This application is for review under S.82 of the Civil Procedure Act. There is distinction between appeals, review and recall of judgment, as will be seen later in this ruling. Therefore rule 6(2)(b) of this Court Rules cannot be invoked.

It would be an abuse of the process of Court.

The above compels me to address the definitions of appeal, review and recall of judgment before I deal with the merits of this application.

Appeal is defined as a challenge to a previous legal determination. It is directed towards a legal power higher than the power making the challenged determination see (**legal information institute www.law.cornel.edu**)

Whereas recall has three definitions according to the Black's Law Dictionary 9th Edn. The third definition is the one relevant for this purpose. Recall means revocation of judgment for factual or legal reasons, annulment,

cancellation or reversal or a judgment or retract. Whereas review means a second or subsequent reading or code broadly over.

According to decided cases in other jurisdictions of the Commonwealth for example India, the Supreme Court has affirmed that the power to recall is different from the power of altering, or reversing judgment. The court has held that there's a vital significant difference between the words alter, review and recall.

The *Punjab v. Davinder Singh Bhullar and others 2012* Cr LJ Supreme Court of India (decision on 7 December 2011, it held, **"if a judgment has been pronounced without jurisdiction or in violation of principals or natural justice or where an order has been pronounced without giving opportunity of being heard to a party affected by it or there where order was obtained by abuse of Court process which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for reasons that in such an eventuality the order becomes a nullity ... In such an eventuality the judgment is manifestly contrary to the audi alteram partem rule of Natural Justice**.

It was observed that the party seeking recall has to establish that it was not at fault.

See also the case of Supreme Court of Uganda – **Mohammed Mohammed Hamid (Applicant) v. Roko Construction Limited** (Respondent) Ruling of Mwondha JSC). **Misc. Cause No. 18 of 2017 dated 29/Jan/2019**. I am aware that the decision is of persuasive nature but it lays down important principles for grant or non-grant of review or recall causes and the interlocutory proceedings like this one of stay of execution pending determination of review or recall of judgment and orders Applications.

From the above it is clear the mixing of review and recall of orders and judgments is not proper because the two words review and recall according to the authorities cited are not synonymous to be used interchangeably.

Rule 6(2)(b) is there to secure a stay of execution pending a decision of the pending Appeal. The vital significant difference is that in recall the decision must have been taken without jurisdiction and in violation of principals of natural justice and there is a decree holder and a judgment debtor after the final Court decision. The parties filing such applications have to be clear so as to avoid disguising reviews and recalls as 3rd appeals in the final Court. And clearly S.82 of the Civil Procedure Act provides and for review only not recall.

Going to the merits of this Application, the Applicant raised five issues already pointed out in this ruling.

We will resolve the issue of whether the application has high chances of success. The applicant's main submission was that he obtained fresh evidence that, **out of the money paid into the High Court by UNRA, the 1st Respondent took Shs 15,958,174,490/= and the lawyers Ms Okurut, Okalebo and Outuke & Co. Advocates took the sum of 4,786,537,000/= making a total of 20,744,711,490/= from the High Court of Uganda. It was deposed that the Land Board was only supposed to be paid 287,694,151/= not 23,995,130,000.** Counsel also submitted that the Supreme Court mistook the value of the Kamusalaba Rock to be the same value as the costs of the crashed aggregates that was applied to the Road Surface as contained in the contract Bill of Quantities. And this needed to be corrected. Counsel submitted that the applicant has obtained other fresh evidence that out of Shs20,958,179,490/= of the funds deposited in Court by the 1st respondent took Shs.15,958,179,490/= and a total stranger to the Applicant Okurut, Okalego, Outuke & Co Advocates took the balance of Ugshs4,780,537,000/- which calls for collection of judgment. Counsel also submitted that new evidence has come up to prove that Nakapiripirit District Land Board is entitled to Shs.287,694,151/= but not shs20,457,017,339/= is due and owing to the Applicant and so the judgment and orders should be accordingly corrected. And that show that the main Application for review has high chances of success.

Considering the above foregoing it is evident that the applicant is adducing fresh evidence by bringing up figures and calculations which were not part of the record and therefore this Court did not make any mistake in its decision above stated which requires correction. I am aware that this is an application for review but the rules of this Court prohibits this Court to have discretion to take additional evidence (rule 30 (I) of this Court Rules. This application is an incidental application arising from the final decision of this Court on appeal. So the rule 30(I) of this Court rules is applicable to the facts and circumstances of this application.

There was nothing on record which included or mentioned costs of extraction, crushing and laying out. The above stated show that the likelihood of success of the application for review is not there. Besides the whole transaction was marred and or based on an illegality in that the Administration of Nakapiripirit assumed the powers of the District Land Board of Nakapiripirit to enter into contract with the Applicant, when it had no power to do so. The applicant therefore cannot be protected. Last but not least, the Court orders were to be effected within 60 days from the date of judgment, 2nd February 2021 which has long lapsed so there is nothing to stay.

The discretionary powers of this Court to grant or not to grant are in Rule of (2)(2) of this Court rules. This Court has powers inherent to make such orders as may be necessary to achieve the ends of justice.

It is clear to me that this application would be dismissed with costs to the 2nd respondent. The reason is that there's no sufficient reason to justify the grant of the order sought and so the issue of likelihood of success is answered in the negative.

The Court having determined that Nakapiripirit District Local Government clearly lacked the capacity to contract or enter into any agreement regarding the suit Rock and that the rightful entity to contract with regarding the suit Rock was Nakapiripirit District Land Board and having declared the applicants transaction with Nakapiripirit Local Government void ab nitio/illegal as it contravened the provisions of the Constitution and Land

Act, the applicant took itself out of the protection of the law as the foundation of its transaction was an illegality.

In the case of **Hilda Wilson Namusoke & Anor vs. Owalla's Home Investment Trust (E.A) & Anor. SCCA No. 15 o 2017**, Justice Prof. Tibatemwa-Ekirikubinza, JSC adopted Black's Law Dictionary 9th Edition @ 185 definition of the term "illegality"

(i) An act that is not authorised by law.

(ii) The state of not being legally authorised.

(iii)The state or condition of being unlawful.

She went to add that "**not every illegality is rooted in fraud. Some unauthorised actions may be a result of ignorance of the law.**" (Emphasis added)

A court of law cannot enforce an illegal contract. This position is contained in a maximum "*Exturpi Causa non oritur action.*" The application of this principal was discussed by this Court in the case of **Active Auto Mobile Spares Ltd vs. No. 21 of 2001,** where the Court adopted the passage by Lindley L. J in the case of **Scott vs. Brown Doering –MCNO1 & Co (3) (1892) 2 QD, 724** at 728 as follows:

"... no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to rise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If he evidence by the plaintiff proves the illegality, the Court ought not to assist him."

This position is trite. Equity will not allow a remedy that is contrary to the law. This is based on the maxim that "*Aequitas sequitur legem" which mean "Equity follows the law.*"

Again in the case of **Active Auto Mobile Spares Ltd vs Crane Bank Ltd and Anor,** (Supra) it was stated that:

"if a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the Court will not assist him."

What is important is the fact that there is a nexus between the improper or illegal act to the right sought to be enforced by the applicant.

There is a clear nexus between the applicant company's improper acts and the very rights he seeks to enforce. The failure of the applicant to do due diligence to establish the right entity to transact with, especially when the rightful entity is clearly stipulated in the Constitution and the Land Act, the fact that the applicant paid Shs50,000,000/= (Fifty million shillings only) for the suit Rock to the Nakapiripirit Local Government which it now claims to have been worth 287,694,151/= (Two hundred eight seven million, six hundred ninety four thousand, one hundred and fifty-one shillings) shows bad faith on the applicants part and intent on its part to take short cut so as not to pay the real value for the Rock to the detriment of Nakapiripirit Local Government.

Also, the crushed aggregate can no longer be taken back to Rock to establish the real value of the Rock that was illegally crushed. What is clear however is that the applicant having illegally processed the suit Rock into aggregate cannot seek the aid of Court since to do that would mean rewarding the applicant for going against the law.

Furthermore, the case of **Mukwano Enterprises Limited vs Ranchhobhai Shivabhai Patel and Anor, SCCA No 16 of 2019** on which the applicant seeks to rely on as an authority for the review of its case, a similar prayer was made by the applicant who had perpetuated an illegal transaction for the refund of monies that had been paid by the applicant company to clear a debt that was owed by ATM (in liquidation) in pursuit of its illegal transaction and monies that were subsequently spent on repairs of building. This Court denied the prayer and cited the applicants'

participation in the illegality as a precluding factor for the applicant company to claim the refund. This case though cited by the applicant does not support the applicant company's case but rather goes against it.

Ordering for the recovery of the said sums would be condoning improper conduct. The purpose of the aforesaid principles is to protect the integrity of the Court. The Court would lose the moral authority to order litigants to abide by the law if it engaged in promotion of illegal/improper conduct.

The chances of success of the application for review cannot be there according to the above.

This application is evidence of abuse of Court process and, **"the Court has to look for sufficiently compelling reason that may justify granting of the order of stay of execution sought. And this sufficiently compelling reason, must be outweighing the importance of finality and justify the opening up questions following the procurement of the order in open Court which appeared to have been finally answered (sic).** See **AID Ltd v. The Federal Airports Authority of Nigeria [2020] EWACA (IV1585(CA)** Coulson LJ further said, **"when considering an application to reconsider, the Courts need to ensure that their jurisdiction must be carefully patrolled so that the principle of finality in litigation is not undermined. (The Law Society Gazette (Article by Mosood Ahmed https://www.co.uk>51).**

For purposes of completion on resolution of the other issues raised – whether the Applicant would suffer irreparable damage or substantial loss. It is evident from the facts that all the activities of the applicant were marred with illegalities right from the start of the purported execution of the contract between the company and Nakapiripirit Local Administration Board to the detriment of the District Land Board which is a body corporate and constitutionally and legally mandated to allocate, lease and sell. This was a void contract and or illegal Contract which could not be enforceable by both parties under the law.

It is interesting that despite the consent judgment entered on admission which had one of the terms as follows: **the defendant (Applicant) is restrained upon admission from making any claim or taking benefiting from the right of the plaintiff in the value of granite mentioned in (2) above),** the Applicant filed this application for review contrary to what they agreed on This is further illustration of the abuse of process of Court by the applicant.

There was nothing to justify the grant of the order for stay of execution. The execution was to be done 60 days running from 2nd February 2012 it apparent that this application was overtaken by events.

The issue of whether the application was filed without undue delay becomes academic and since the applicant was trying to benefit from an illegal and void contract, the question of delay or not delay cannot arise.

On the issue whether the applicant has furnished security in light of what has been determined above it is of no effect/consequence since it is only in a case where the applicant has shown that the application has a likelihood to success which is not the case for this application.

So on the balance of convenience the application fails as it has no merit.

Accordingly it is dismissed with costs to the 2nd respondent and Miscellaneous Cause 13 of 2022 stands dismissed.

Dated at Kampala this 9th day of AUG 2023.

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Mwondha,

JUSTICE OF THE SUPREME COURT

.....

Chibita

JUSTICE OF THE SUPREME COURT

.....

Musota

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA,

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: MWONDHA, TIBATEMWA, CHIBITA, MUSOTA & MADRAMA, JJSC)

MISCELLANEOUS CAUSE NO 12 OF 2022

AND CONSOLIDATED WITH

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(ARISING FROM COMBINED SUPREME COURT CIVIL APPEALS NOS 13 AND 14 OF 2019)

CHINA ROAD BRIDGE CORPORATION} ..... APPLICANT

VERSUS

WELT MACHINEN ENGINEERING LTD} .....RESPONDENT

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CHINA ROAD BRIDGE CORPORATION} ..... APPLICANT

VERSUS

1. WELT MACHINEN ENGINEERING LTD}
2. ATTORNEY GENERAL} .....RESPONDENTS

RULING OF CHRISTOPHER MADRAMA IZAMA, JSC

The Applicant filed Miscellaneous Application No. 13 of 2022 for an interim order of stay of execution of the orders of the Supreme Court in Supreme Court Civil Appeals Nos 13 and 14 of 2019 until the main application; Miscellaneous Cause No. 12 of 2022, is heard and determined.

Secondly, the applicant filed the main cause being Miscellaneous Cause No 12 of 2022 this application citing rules 6 (2) (b), 42 (1) and (2) and 43 (1) of the Judicature (Supreme Court Rules) Directions for orders that this court stays execution of the judgment and orders of the Supreme Court in

combined **Civil Appeals Nos 13 and 14 of 2019, China Road Bridge Corporation vs Welt Machinen Engineering Ltd** and **the Attorney General**, and **China Road and Bridge Corporation vs Welt Machinen Engineering Ltd**, pending the determination of the application for recall and review of the judgment and orders in SCCA Nos 13 and 14 of 2019 and for the costs of the application to be provided for.

The applications came for hearing at the same time and therefore the hearing of the main application in Miscellaneous Cause No. 12 of 2022 would determine the outcome of Miscellaneous Cause No. 13 of 2022 and these applications are therefore consolidated. In the premises, Miscellaneous Cause No. 12 of 2022 will be determined first.

In Miscellaneous Cause No. 12 of 2022, the grounds of the application are contained in the Notice of Motion and further in the affidavit of the Mr. Ding Jianming, the Deputy General Manager of the applicant. The grounds of the application averred in the Notice of Motion are that:

1. The Applicant has filed an application for review and recall of the judgment and orders in SCCA Nos 13 and 14 of 2022 which is pending hearing in the Supreme Court.
2. The application for review has a high chance of success for the following reasons:
    a. The Supreme Court judgment and orders directed the first respondent to pay the sum of Uganda shillings 23,995,130,000/= to Nakapiritpirit District Land Board whereas what is due to the said Land Board is Uganda shillings 287,694 151/=.
    b. New evidence has come up to show that the applicants monies previously deposited in the High Court amounting to Uganda shillings 20,744,711,490/= has already been paid to the first respondent and to Okurut, Okalebo, Outuke & Co. Advocates in the sum of Uganda shillings of 4,786,537,000/= with whom the applicant has no dealings at all.
    c. The sum of Uganda shillings 20,457,017,339/-being the difference between what was earned by the applicant under the

interim payment certificates and deposited in the High Court by Uganda National Roads Authority and subsequently paid out to the first respondent and Okurut, Okalebo, Outuke & Co. Advocates is the applicant's money and needs to be secured pending the application for review.

3. Unless the order of stay of execution of the judgment and orders of the Supreme Court in SCCA No 13 and 14 of 2019, is granted, the first respondent would pay the decretal amount to the Nakapiritpirit District Land Board within 60 days of the judgment i.e., from 2 February 2022.
4. Unless the order of stay of execution is granted, the application for review will be rendered nugatory and the applicant will be denied her rights and the benefits of the application for review and further will suffer serious financial loss.
5. The applicant is ready to provide security for due performance of the orders as may ultimately be binding on her.
6. It is in the interest of justice that this application be granted.

The facts in support of the application are deposed to by the Deputy General Manager of the applicant Mr. Ding Jianming while the affidavit in opposition is that of the second respondent and deposed to by the Principal State Attorney Mr Wanyama Kodoli.

The facts in support of the application and deposed to by the Deputy General Manager of the applicant Mr. Ding Jianming are that on 2nd February 2022 the Supreme Court of Uganda delivered the Judgment and orders in combined Civil Appeals Nos 13 and 14 of 2022 between China Road Bridge Corporation and the first respondent and between China Road Bridge Corporation and the first respondent and the Attorney General according to a copy of the judgment annexed. In that Judgment the Supreme Court directed the first respondent to pay the sums averred in the grounds of the appeal. The applicant was dissatisfied with the Judgment and orders and filed an application for review in the Supreme Court to recall and review the said judgment and orders on the following grounds.

The applicant averred that the Supreme Court mistakenly took the value of Kamusalaba rock to be the price in the bills of quantities payable to the District Land Board. However, the correct value of the rock before extraction is that comprised in the bills of quantities attached to the contract for works for Moroto - Nakapiritpirit and is that the amount earned by the applicant under the Interim Payment Certificates less the cost of blasting the rock, crashing it into aggregates, transporting and laying it on the road, according to a table showing the value of the raw rock payable to the District Land Board of Uganda shillings 287,694,154/= in Annexure B attached. Secondly, the applicant obtained fresh evidence from the High Court of Uganda that out of the monies paid out into the court by the Uganda National Roads Authority, the first respondent was paid a sum of Uganda shillings 15,958,174,490/= and the lawyers Messieurs Okurut, Okalebo, Outuke & company advocates were paid a sum of Uganda shillings 4,786,537,000/= making a total of Uganda shillings 20,744,711,490/=.

Further, whereas the Supreme Court ordered the first respondent to pay Uganda shillings 23,995,130,000/= to Nakapiritpirit District Land Board, only the monies due to the said Land Board is only Uganda shillings 287,694,151/= being the value of the rock before extraction, crashing, transport and placement on the road. The balance of Uganda shillings 20,457,017,339/= is due to the applicant from the first and second respondents, and this error ought to be corrected through review and recall of the judgment and orders of this court.

He deposed that he believes that the application has high chances of success for reasons stated. That if the orders made are not stayed but executed, and the application for review succeeds, the orders sought would be rendered nugatory. That unless an order of stay of execution is granted, the applicant stands to lose the sum of Uganda shillings 20,457,017,339/= which would cause serious financial loss to the applicant and lead to her bankruptcy. Further that the applicant is ready to provide security for the due performance of the orders as may ultimately be binding on her.

The second respondent namely the Attorney General opposed the application and filed an affidavit of the Principal State Attorney Mr Wanyama Kodoli in reply to the application. Mr Wanyama Kodoli stated that he read and understood the contents of Miscellaneous Cause No 12 of 2022 and the evidence of Ding Jianming in the supporting affidavit. He observed that the application is seeking orders of stay of execution, to stay the execution of the judgment and orders of the Supreme Court in the Consolidated S.C.C.A Nos 13 and 14 of 2019, pending the application for review and recall of the said judgment and orders of the Supreme Court. He deposed that there was no serious threat of execution before the hearing of the pending substantive application. Secondly that the application for review and recall of the Judgment has no merit or any chance of success. Thirdly, that there is no pending appeal before this court. Fourthly that he knows that the applicant has not produced any evidence of a threat of execution to warrant the grant of an order of stay of execution. Fifthly that the applicant has not proved that it would suffer irreparable injury or loss if the order of stay is not granted. Further that the contents of the deposition about the value of the rock extraction and any alleged errors of the Supreme Court was not within the knowledge of the deponent.

Representation.

At the hearing of the appeal learned counsel Mr. Enos Tumusiime, appeared for the respondent. Learned Counsel Mr. Terrence Kavuma represented the first respondent and the learned Senior State Attorney Ms Imelda Adong represented the Attorney General. The court was addressed by way of written submissions and ruling reserved on notice.

Submissions of counsel

The applicants counsel submitted that the applicant, who is a contractor executed a contract with the Uganda National Roads Authority to construct the Nakapiritpirit - Moroto Road. The applicant executed a contract with a district local government to extract the granite from the Kamusalaba rock (hereinafter referred to as the rock) for the road construction purposes. The

first respondent claimed a right to the said rock and sued the applicant for the value of the rock. Whereas the first respondent suit was dismissed, the court ordered the applicant to pay royalties of the stones from the said rock to the Government of Uganda. The first respondent later executed a consent Judgment with the second respondent and attached Uganda shillings 20,744,711,490/= of the applicant's money from Uganda National Roads Authority. The applicant appealed to the Court of Appeal and the Court of Appeal dismissed the appeal. The applicant thereafter appealed to the Supreme Court and the Supreme Court allowed the appeal but ordered the first respondent to refund the sequestrated sum of Uganda shillings 23,995,130,000/=, the value of the aggregates as contained in the contract bill of quantities and costs to be paid to the District Land Board where the rock is situated and not to the applicant.

Counsel submitted that new evidence had come up showing that out of the sum of Uganda shillings 20,744,711,490/= of the applicants funds deposited in court by UNRA, the first respondent was paid a sum of Uganda shillings 15,958,174,490/= and the balance of Uganda shillings 4,786,537,000/= was paid to the aforementioned lawyers who had no dealings at all with the applicant. Further new evidence had emerged and proves that the value of the rock before extraction, crashing, transporting and laying on the road is Uganda shillings 287,694,151/= and that is what the District Land Board is entitled to. The balance of Uganda shillings 20,457,017,339/= belongs to the applicant. Further the applicant filed Miscellaneous Application No 14 of 2022 to recall and review the Judgment of the Supreme Court and the applicant has fixed it for hearing on 26th of April 2022. That the Supreme Court ordered the first respondent to pay the sum of Uganda shillings 23,995,130,000/= to the District Land Board within 60 days from 2nd February 2022 and the applicant brought the application for stay of execution of the order until the application for recall and review of the judgment is heard and disposed of.

The applicants counsel submitted on four issues. The first issue is whether the applicant has filed an application for recall and review of the Judgment

in SCCA No 13 and 14 of 2019. The applicants counsel referred to the application and the affidavit in support and submitted that the applicant has filed the application for review and recall of the judgment and orders under which the application is brought.

On the second issue of whether the application for recall and review has a high chance of success, the applicant's counsel submitted that under section 82 (b) of the Civil Procedure Act, and rules 2 (2) and 35 (1) of the Judicature (Supreme Court Rules) Directions, an error arising in any judgment from an accidental slip or omission may be corrected by the court on the application of an interested party so as to give effect to what was the intention of court when judgment was delivered.

Counsel submitted that there is no doubt that an interested person can file an application for recall and review of the Judgment as aforesaid and the grounds for the review are contained in the affidavit of the deponent in support of the application which has been reproduced above. From those premises, he submitted that the main application for recall and review of the judgment and orders of the Supreme Court in the Supreme Court Civil Appeal No 13 and 14 of 2019 has a very high chances of success.

On the question of whether the applicant will suffer irreparable damage or substantial loss if the stay of execution application is not granted, the applicants counsel relied on the affidavit in support of the application. He submitted that the affidavit proves that unless the orders are granted, the first respondent would pay the applicant's money to the District Land Board. That execution is imminent since the court ordered the first respondent to pay within 60 days. Further the applicant's money was sequestrated from UNRA in the sum of Uganda shillings 20,744,711,490/= and it stands to lose this money which is quite substantial to the District Land Board. As the Deputy General Manager of the applicant who is also the deponent to the affidavit in support of the application stated, it would cause serious financial loss to the applicant which will lead to her bankruptcy. Secondly that if the funds are paid to the District Land Board, it will be irretrievably lost as the applicant does not know of any financial resources of the District Land

Board from which he can recover that money. In the premises the applicant's counsel submitted that unless the order of stay is granted, the applicant will suffer substantial loss and irreparable damages to its finances or its existence as it is likely to become bankrupt and the application for review will be rendered nugatory.

The applicant's counsel further submitted on whether the applicant has met the conditions for stay of execution. These are:

Whether the application had been filed without undue delay? He submitted that Judgment was delivered on 2 February 2022 and the instant application was filed on 24 February 2022 and therefore it was made without undue delay.

Secondly **whether the applicant has security for the due performance of the decree/order as may ultimately be binding on it**? Counsel submitted that the applicant has committed to provide security for the due performance of the orders as may ultimately be binding on her. Secondly the applicant had already deposited in court a sum of Uganda shillings 20,744,711,490/= which is sufficient security for the amounts that are the subject matter of the application. That it will be double jeopardy if the applicant was asked to provide more security in this matter. In the premises he contended that the applicant has satisfied all the conditions for the grant of a stay of execution pending the hearing and disposal of Miscellaneous Application No 14 of 2022. The applicant further prayed for the costs of the application be provided for.

In reply, the second respondent's counsel by way of background regurgitated the facts and submitted that judgment was rendered in the following manner. Firstly, it was decided that granite stone is not a mineral but a stone commonly used for building purposes. Secondly that the Mining Act, does not apply to a substance excluded from the definition of a mineral in the Constitution. That the location licences Nos LL 1194 and LL 1195 held by the first respondent are null and void. Fourthly that the rightful entity to hold and allocate land is not any person in the District but the District Land

Board. Fifthly the first respondent shall pay a sum of Uganda shillings 23,995,130,000/= to Nakapiritpirit District Land Board within 60 days from the date of the Judgment, being the value of the granite stone that was wrongly exploited from the rock by the appellant company. Lastly that Parliament may pass a law to regulate the expectation of any substance excluded from the definition of mineral when ex provided for commercial purposes in accordance with article 244 (6) of the Constitution. Lastly each party was to bear its own costs.

Following the judgment of the Supreme Court, the applicant filed an application for review of the judgment together with an application for an interim stay of execution as well as the current application seeking for an order of stay of execution. These applications were served on 23 March 2022 and the Attorney General filed the replies to the application on 25 March 2022. In the Miscellaneous Application No 12 of 2022, the applicant sought orders which are indicated in the application.

The second respondent's counsel submitted on the issue of whether there are grounds for an order of stay of execution? He submitted that the applicant has not raised any grounds for the grant of an order of stay of execution. Secondly, the second respondent's grounds of opposing the application are contained in the affidavit of the Wanyama Kodoli, a Principal State Attorney at the Attorney General's Chambers. He submitted that based on the grounds in the affidavit, the jurisdiction of the Supreme Court is circumscribed and cannot be invoked to circumvent the principle of finality of court decisions. The jurisdiction of the Supreme Court to grant a stay of execution under rule 6 (2) (b) of the Judicature (Supreme Court Rules) Directions only gives discretion in civil proceedings where a notice of appeal has been lodged in accordance with rule 72 of the Rules of the Supreme Court to stay execution in appropriate cases and on terms that it thinks fit. That judicial discretion must be based on the exercise of well-established principles. Further the second respondent's counsel submitted that the paramount duty of the court to which an application for stay of execution pending appeal is made is to ensure that the appeal, if successful,

is not rendered nugatory. Further that this court has in a number of cases laid down the principles governing the exercise of the discretion conferred by the rules. Particularly counsel relied on **Hon. Theodore Ssekikubo & Others vs Attorney General and another; Constitutional Application No 06 of 2013 for** the following principles. That the applicant must establish that his appeal has a likelihood of success, or a prima facie case of his right to appeal. Secondly it must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted. Thirdly if the conditions in 1 and 2 above have not been established, the court must consider where the balance of convenience lies. Fourthly the applicant must also establish that the application was instituted without delay.

The second respondent's counsel contends that the most important issue for determination by this court is whether the applicant has adduced sufficient reasons to justify the grant of a stay of execution. He submitted that in the current situation, there is no pending appeal as the appeal had been conclusively determined on 2nd February 2022. In the premises the applicants have not establish the first ground for the grant of an application for stay of execution as there would be no appeal to be rendered nugatory.

Secondly, the application for review or recall of judgment is not an appeal. Counsel relied on the definition of an appeal under Rule 3 (b) of the Rules of the Supreme Court to mean an appeal or intended appeal. He submitted that the Supreme Court is the highest appellate court in Uganda and there is no higher court that the Supreme Court in terms of article 132 (1) of the Constitution.

He submitted that the pending application for the recall and review of the Judgment is not an appeal and it is not made to a higher authority but the same court. In the premises he submitted that there is no basis on which this court can even consider the balance of convenience, there being no pending appeal.

Further, counsel submitted that the application is wrongly before this court without any law to support it because 6 (2) (b) of the Rules of this court only provides for situations where there is a pending appeal but does not apply for the application of the nature before the court. Counsel relied on **Dr Ahmed Mohammed Kisuule vs. Greenland Bank (In Liquidation); Supreme Court Civil Application No 07 of 2020** where the court emphasised that an application for stay of execution can only succeed where the applicant proves that he or she has lodged a notice of appeal in accordance with Rule 72 of the Rules of this court.

Further the applicant's counsel submitted that the other factors considered for grant of an order of stay of execution are all subject to the precondition that a notice of appeal must first be lodged against the decision of the Court of Appeal. In the premises, there is no evidence of a threat of execution to warrant the grant of an order of stay of execution.

Lastly the second respondents counsel submitted that the application for the recall and review of the Judgment has no chance of success at all and for that reason prayed that the application is dismissed with costs to the Attorney General.

Consideration of the Application

I have carefully considered the applicant's application, the affidavit in reply as well as the submissions of counsel from either side. Further I have had the benefit of reading in draft the judgment of my learned senior sister Hon. Lady Justice Mwondha, JSC dismissing the application of the applicants inter alia on the core issue that the amount of Uganda shillings 23,995,130,000/- ought to be paid to the Nakapiritpirit District Land Board and this reflects the outcome of the Ruling of the Supreme Court.

I very respectfully do not agree that the application be dismissed and I give my reasons hereunder.

To start with procedural issues, the second respondent's counsel objected to the application on the ground that there is no appeal pending in the

Supreme Court and therefore the Supreme Court has no jurisdiction to consider it. That rule 6 (2) (b) of the Judicature (Supreme Court Rules) Directions, only comes into play when there is an intended appeal to the Supreme Court. She argued that the minimum requirement for a valid application for stay of execution, is a notice of appeal under rule 72 of the Rules of this Court. Obviously, 6 (2) (b) of the Judicature (Supreme Court Rules) Directions, does not apply to the circumstances of this appeal because it provides that:

> (b) in any proceedings, where a notice of appeal has been lodged in accordance with rule 72 of these Rules, order a stay of execution, an injunction or stay of proceedings as the court may consider just.

Further, Rule 72 (1) provides that:

> 72.Notice of appeal.
>
> (1) any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the Court of Appeal.

In the circumstances of this appeal, Consolidated Supreme Court Appeals Nos 14 and 13 of 2019 was disposed of in a Judgment dated 2nd February 2022 and therefore there is no appeal pending before this court. It follows that the authority cited by the parties' counsel which interprets rule 6 (2) (b) of the Rules of the Supreme Court and the principles derived from that rule are not directly applicable. Both parties addressed court on the decision of this court in **Dr. Ahmed Muhammed Kisuule vs Greenland Bank (In Liquidation) Supreme Court Civil Application No. 07 of 2010** where the application was brought under rule 6 (2) (b) of the Rules of this Court. Secondly in that decision it was held that an applicant must satisfy the court that a notice of appeal had been filed under rule 72 of the Rules of this court as an essential ingredient to succeed in an application for stay of execution.

The applicant's application is not an application for stay of execution pending appeal but rather an application for stay of execution pending an application to recall and review the Judgment of this court which was delivered on 2nd February 2022. That being the case, the question is whether

the application can be considered under the provisions of rule 2 (2) of the rules of this court which provides that:

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

The applicant also cited rule 2 (2) of the Rules of the Supreme Court and has filed an application for review and recall of the Judgment of the Supreme Court and therefore acknowledges the fact that there is no appeal pending before this court. The principles for application of rule 2 (2) of the Rules of this court should be derived among other things from the rule itself and which rule is worded differently from rule 6 (2) (b) of the Rules of this court.

Further the applicant moved under section 82 of the Civil Procedure Act which provides that:

> Any person considering himself or herself aggrieved –
>
> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.

While section 82 (b) of the Civil Procedure Act applies to the High Court, its application in the Supreme Court may be doubted because the law was enacted in January 1929; that is before the promulgation of the Constitution of the Republic of Uganda 1995 which created the Supreme Court for the first time. Further that the highest appellate court then heard appeals from the High Court was the Court of Appeal of Uganda. An appeal lies from the Court of Appeal of Uganda since October 1995, to the Supreme Court which

is a new or recently created court and it hears appeals from the appellate court. Section 1 of the Civil Procedure Act provides that:

> This Act shall extend to proceedings in the High Court and magistrates courts.

While the Supreme Court could not have been in contemplation of the legislature at the time of enactment of the Civil Procedure Act, the same cannot be said of the Judicature Act which was promulgated in 1996. Section 7 of the Judicature Act, cap 13 laws of Uganda is clear that for purposes of hearing an appeal, the Supreme Court has powers and jurisdiction vested in the original court from which the appeal originally emanated. It provides that:

> 7. Supreme Court to have powers of the court of original jurisdiction.
> For the purposes of hearing and determining an appeal, the Supreme Court shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated.

It is therefore clear that section 82 (b) of the Civil Procedure Act is applicable to the Supreme Court by virtue of it having exercised appellate jurisdiction as a second appellate court in a suit originating from the trial court and in this case, High Court. Such an application for review of the Judgment can be filed under the inherent powers of the Court and the question being under what grounds or circumstances can this jurisdiction be invoked.

Rule 2 (2) of the Judicature (Supreme Court Rules) Directions enables the Court to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of such court and the power extends to setting aside judgments which have been proved null and void after they have been passed.

In the circumstances of this application, the applicant's grievance is addressed in the application for review and our task in this application is to establish whether there are any grounds for which the court may exercise its jurisdiction to review its own decision. Secondly, whether the applicant

is a person aggrieved. The applicant wants a review of the order of the court awarding the District Land Board of Nakapiritpirit a sum of Uganda shillings 23,995,130,000/=. This award can be found at page 76 of the Judgment of the Supreme Court where Chibita, JSC in the lead Judgment of court said as follows:

> I would proceed to determine the quantum of compensation due to Nakapiritpirit District Land Board.
>
> The monetary value of the aggregate that was presented to the High Court of Uganda in a valuation report made by the Chief Government Valuer cannot be relied upon because it was ordered by a court that lacked jurisdiction and therefore the proceedings thereunder were of no consequence.
>
> The evaluation of the excavated aggregate can only be found in the Procurement Ref No: UNRA/Works/09/10/00001/18/01 UNRA ID No 142 Volume 5: Priced Bill of Quantities which formed part of the contract for works for Moroto Nakapiritpirit Road. The Priced Bill of Quantities placed the cost of granite stones to be used in the construction at Ugx. 23,995,130,000/=.
>
> This evidence was presented in the proceedings of HCCS No. 16 2014. All these monies were paid to the first respondent pursuant to the decision of the Court of Appeal.
>
> That money ought to be paid to Nakapiritpirit District Land Board, the constitutionally sanctioned entity to hold, allocate, sell as well as lease the suit rock. Conceding to the first respondent's holding the money would amount to unjust enrichment.
>
> The appeal succeeds in part.

Following the above finding of the court, an order was issued to pay the said sum to the Nakapiritpirit District Land Board.

The contention of the applicant is that the above sum includes its labour and the cost for blasting and processing the rock and that the cost of the rock before processing it is Uganda shillings 287,694,151/= which is what ought to be paid to the District Land Board. The rest of the amount belongs to the applicant to take care of its costs in processing such as the procuration of explosives for blasting the rock, the costs of equipment for the work, labour

et cetera. These costs cover the costs of blasting, processing and transporting the rock up to the time it is poured on the road for construction.

Clearly there are some arguable points which may be considered inclusive of the fact as to whether this is new evidence or whether it is available in the court proceedings from which inferences may be drawn to reach a conclusion as to the just entitlement of the District Land Board in terms of the quantum of compensation. It has to be emphasised that no new evidence ought to be taken by the Supreme Court in the circumstances. Particularly relevant is rule 30 (1) of the Judicature (Supreme Court Rules) Directions which provides that:

> 30. Power to reappraise evidence.
>
> (1) Where the Court of Appeal has reversed, affirmed or varied a decision of the High Court acting in its original jurisdiction, the court may decide matters of law or mixed law and fact, but shall not have discretion to take additional evidence.

The Supreme Court has no discretionary powers to take additional evidence. However as considered from the quoted passage in the Judgment on appeal, the issue of entitlement of the District Land Board was a consequential issue and determined by the Supreme Court after reaching the conclusion about who is entitled to the sum of money originally paid to the first respondent Messrs Welt Machinen Engineering Ltd. The court however reviewed the record in HCCS No. 16 of 2014. This was available on the record and therefore it is not a new fact but what may be considered from the evidence on record.

I have accordingly read the record of appeal in this Court in Civil Appeal No. 14 of 2019 China Road & Bridge Construction Vs Welt Machinen Engineering Ltd and was able to establish some facts about the sum of money in issue.

The action originally arose from High Court Civil Suit No 0016 of 2015 wherein Welt Machinen Engineering Ltd filed an action against the applicant in this application, UNRA and the Nakapiritpirit District Local Government (a third party). The action was *inter alia* for injunction restraining the defendants from trespassing upon the suit land. They wanted a finding that

the defendants had no right to extract and *mine* granite stones from the suit land. They also sought special damages of Uganda shillings 8,582,022,000/=, aggravated and exemplary damages, interests and costs of the suit. *They averred* that the defendants were carrying out quarrying activities on the "Kamusalaba Rock" where the plaintiff had a prospecting licence or a location licence for purposes of mining. However, the record shows in exhibit P 17 the contract bill of quantities wherein the applicant was quoting for purposes of the contract what it would charge for crushed aggregate CRR. The sum of money quoted is Uganda shillings 23,993,130,000/=. Further I have examined the Judgment of the High Court. The court awarded shillings 500,000,000/= as general damages. Secondly the court made an order that the applicant to this application was to render an account of the quantity of aggregates extracted from the suit property. Thirdly at page 23 of the Judgment of the High Court, the cost of the crushed aggregate was awarded on the basis of the testimony of PW4 Mr Ronald Olaki from UNRA who had presented the approved Bill of Quantities from UNRA. The trial judge pegged the award on the basis of the testimony of PW4 that the value in the bill of quantities was about Uganda shillings 23,000,000,000/= and assessed special damages at 4 billion shillings for loss on account of excavations on the suit property which she awarded to the plaintiff. The special damages were derived for the budget of crushed aggregate of 23 billion shillings.

For purposes of an application for stay of execution, there are arguable points as to whether the actual sum payable is the sum awarded by the court based on the bill of quantities issued by the applicant. The resolution of that question ought to be left to the determination of the application for the recall and review of the Judgment of this court but in the circumstances I note that it shows a high chance of success of the application. It also reveals the source of the amount awarded by the Supreme Court to the District Land Board. This sum was money quoted by the applicant for blasting and processing rock into aggravate and was payable to it by the Employer, Uganda National Roads Authority. The applicant's application

alleges the arguable point that the award appropriates its labour and resources which was used to produce the aggregates.

In the premises, there are arguable points for consideration by the Supreme Court in the application for review that is pending. Secondly, the question of whether the application has a likelihood of success is answered by the finding that there are arguable points for consideration by the court.

The respondents counsel submitted that there is no evidence that execution is imminent. However, the judgment of the court is that payment should be made within 60 days. There is therefore a potential danger, based on the order of the court that the money, the subject matter of the application for review would be paid over to a third party and therefore the applicant's application would be rendered nugatory. None of the parties revealed where this sum is and such a colossal sum which was already paid by UNRA should not be left as a mystery. There is no evidence that Welt Machinen or any other person has paid the Nakapiritpirit District Local Government. This is a question of fact.

As far as rule 2 (2) of the Rules of this Court are concerned, the Supreme Court in **Uganda Revenue Authority vs Nsubuga Guster and another; Supreme Court Miscellaneous Application No 16 of 2018 [2019] UGSC 15** held that rule 2 (2) gives the court very wide discretionary powers to make such orders as may be necessary to achieve the ends of justice. Further that one of the ends of justice is to preserve the right of appeal and to help the parties to preserve the status quo before their dispute can be considered on the merits by the full court according to the rules and the main concern being whether there is a serious threat of execution before hearing of the substantive application. In **Theodore Ssekikubo and 4 others vs the Attorney General and 4 others, Supreme Court Constitutional Application No 4 of 2014 [2014] UGSC 11**, the Supreme Court held that the grant of interim orders is meant to help the parties preserve the status quo until the main issues between them are determined in the main application. These principles rhyme with the decision of the Chancery Division of England in **Wilson v Church (1879) 12 Ch. D 454** that:

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

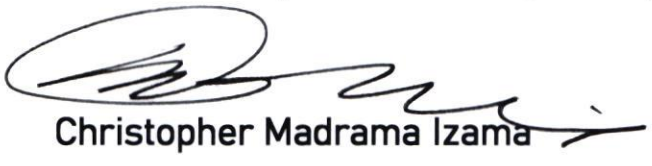
The purpose of an application for stay of proceedings, stay of execution or an injunction issued at this level is to maintain the status quo to enable the applicant or the appellant to have their pending matter heard before the status quo is changed to their detriment. It therefore preserves their right to have the order challenged in the application for review and recall of the judgment on appeal before it is implemented thereby changing the status quo. Where the status quo is changed, the money would be paid to Nakapiritpirit District Land Board which is a third party and not a party to the appeal. If the review succeeds, the effort to retrieve the money would have to be made against a third party in fresh proceedings and therefore would potentially be to the inconvenience of the applicant.

The principle applicable therefore is the same principle applicable to the grant of interim orders of stay of execution pending determination of the main application so that the status quo is maintained to preserve the right of the applicant to be heard before what is challenged happens or the subject matter changes hands.

I therefore find merit in the applicant's application and will issue an order of stay of execution of the Judgement and orders of the Supreme Court in combined **Civil Appeals Nos 13 and 14 of 2019 China Road Bridge Corporation vs Welt Machinen Engineering Ltd and Attorney General and China Road Bridge Corporation vs Welt Machinen Engineering Ltd** pending the hearing and determination of the applicants application for review and recall of the Judgement and Orders in **SCCA No. 14 of 2019** or until further orders of this court. The costs of this application shall be in the cause.

Because Civil Application No. 13 of 2022 is an application for an interim order for stay of execution pending the hearing of this application, which has now been heard and determined, it is overtaken by events. Civil Application No. 13 of 2022 accordingly stands dismissed with no order as to costs.

Dated at Kampala the 8th day of Aug July 2023



Christopher Madrama Izama

Justice of the Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

MISCELLANEOUS CAUSE NO.12 OF 2022

CONSOLIDATED WITH

MISCELLANEOUS CAUSE NO.13 OF 2022

(Arising from consolidated Supreme Court Civil Appeals No. 13 & 14 of 2019)

[CORAM: MWONDHA; TIBATEMWA-EKIRIKUBINZA, CHIBITA, MUSOTA, MADRAMA, JJSC.]

BETWEEN

CHINA ROAD BRIDGE CORPORATION :::::::::::::::::: APPLICANT

AND

WELT MACHINEN ENGINEERING LTD :::::::::::::::::: RESPONDENT

AND

BETWEEN

CHINA ROAD BRIDGE CORPORATION:::::::::::::::::: APPLICANT

AND

1.WELT MACHINEN ENGINEERING LTD
2. ATTORNEY GENERAL :::::::::::::::::: RESPONDENTS

RULING OF PROF. TIBATEMWA-EKIRIKUBINZA, JSC (Dissent).

I have had the opportunity to read in advance the decision of the majority Justices.

I have also read the decision prepared by my learned brother Hon. Justice Christopher Madrama Izama, JSC which is a dissent from the majority decision.

I respectfully differ from the Ruling of the majority and I agree with the reasoning of Hon. Justice Madrama, JSC that the application for stay of execution has merit and ought to be granted on the premise that there is an arguable point on the compensatory sum of Uganda Shillings 23,995,130,000/= awarded to the District Land Board of Nakapiritpirit by this Court in consolidated Civil Appeals No.13 and 14 of 2019 *vide China Road Bridge Construction vs. Welt Machinen Enginnering Ltd.*

Dated at Kampala this 9th day of Aug 2023.

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PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.