

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL REFERENCE NO. 22 OF 2010.
(Arising from Civil Application No. 35 of 2010)

1. **BURUNDI TOBACCO CO. S.A.R.L**
2. **LEAF TOBACCO & COMMODITY (U) LTD:.....APPLICANT**

VERSUS

BRITISH AMERICAN TOBACCO (U) LTD :..... RESPONDENT

CORAM: HON JUSTICE A.E.N MPAGI-BAHIGEINE, JA. (SINGLE JUSTICE)

RULING

This is a reference from the ruling of the Asst. Registrar, His Worship Deo Nizeyimana, dated 29.03.2010.

It is brought under **rules 6 and 53** of the Rules of this Court.

The application before the Registrar was brought under **rules 2(2), 6(2) (b), 32 and 53 (1)** of the Rules of this Court, seeking an interim order for stay of execution of the High Court order in **Misc. Application No. 678/2009**. The said order reads;

“A temporary injunction is hereby issued restraining the Respondents, their agents, servants, successors in title, assigns or representatives from using the newly registered Trademark Registration No. 2009/40/21 SUPERMATCH whose logo, trade dress, design, layout and colours appear confusingly similar or closely resembles that of the Applicant’s SPORTSMAN trademark, pending final determination of High Court Civil Suit No. 445 of 2009”.

The respondents filed a Notice of Appeal to this court with the application seeking an interim order for stay of execution pending a substantive application before a full bench.

Before the hearing commenced, Mr. Christopher Madrama, learned counsel for the applicant raised three preliminary objections in points of law, only two of which are relevant to this reference namely that:

- a) The registrar had no jurisdiction in as far as the application had been brought under **Rule 53(1)** which gives power to a single judge to hear such applications;
- b) That the order of the High Court was not capable of being executed and thus no order of stay can issue against it.

The learned Registrar overruled the objections and ordered that the application proceed. However, Mr. Madrama objected and applied for a reference. Hence this reference to a single justice.

Mr. Madrama addressed me at great length often delving into the substantive issues of the main application. I will nonetheless confine myself to what I consider pertinent to the application before the Registrar.

Learned counsel contended that the Registrar had no jurisdiction to entertain the application before him because an order of stay would interfere with the judgement of the High Court.

In his view an order for an injunction is absolute and takes immediate effect. Therefore it cannot be stayed and can only be set aside. He cited several authorities amongst which are **Knight and Another Vs Chifan & Ors (1971)2 ALL ER. 380 at 381** and especially **Hastens Transport (St. Helena) Ltd Vs Transport and General Workers Union...(1972) 3 ALL E.R 101**. He asked me to deduce from the said authorities that an injunction takes effect immediately and cannot be executed.

He submitted that in view of the foregoing, there is no order capable of execution in the instant application and consequently an interim order of stay of execution would not be required. The interim order of the Registrar purporting to stay an order of a temporary injunction would not only be ultra vires Practice Directions No. 1 of 2004 but is also without jurisdiction. It is not one of those orders envisaged by the Practice Direction. It would interfere with the High Court judgement which it would reverse, since it took effect immediately upon pronouncement of the judgement. The Practice Direction No. 1 of 2004 does not vest the Registrar or even a single judge with powers to grant the interim order of stay. That power resides in the full bench. – **East**

African General Insurance Co. Ltd V Mambhai Patel & 2others C.A Civil Application No. 14 of 2001.

An order of stay of execution can only be granted where the order sought to be stayed is capable of execution in any of the ways prescribed under Section 38 of the Civil Procedure Act, which concerns an order not yet implemented or executed.

Mr. Madrama submitted that it is anomalous that a Registrar who is supposed to support the powers of a single judge could have more powers than the judge.

A single judge has no powers or jurisdiction to entertain an application for an interim order of stay of an order of a temporary injunction.

Rules 53, 6(2) (b) and 2(2) under which the application was brought apply to a single judge. However, the Registrar may make an interim order where it does not interfere with the judgement.

He prayed court to uphold grounds 1 and 2 and dismiss the application for stay of execution for want of jurisdiction.

Ground No. 3 was in the alternative that the Registrar erred to entertain an application for stay of execution made first to the Court of Appeal when it should have first been made before the High Court. No exceptional grounds had been shown for adopting that procedure. He cited **Francis Mansi Micah Vs Nuwa Walakira S.C.C.Application No. 9 of 1990**, and **National Pharmacy Limited Vs Kampala City Council (1979) HCB 132**.

In reply, Mr. Kabiito Karamagi for the respondents opposed all the grounds advanced by Mr. Madrama. He observed that much of the arguments advanced ought to have been made before the full bench. The Registrar ought to have been given a chance to rule on the application on its merits.

Regarding Ground 1 Mr. Kabiito asserted that the Practice Directions does not impose such limitations as is apparent on its face.

The order before the Registrar is executable – **O.41 rule 2(3)** allows court to attach property or arrest a person who disobeys court orders.

That prohibitive orders take immediate effect is superfluous; Mr. Kabiito contended all judgements once delivered take immediate effect unless otherwise directed in the judgement.

The Practice Direction gives powers to the registrar to attend to applications of an interim nature under **Rule 6**. These interim orders are given under compelling circumstances – **Wilson Mukiibi Vs James Semusambwa SC Civil Application No. 9 of 2003** pp. 2 and 3.

Learned counsel argued that an interim order is not a substitute to the main application and should be given by a single judge in exercise of the inherent powers to prevent justice being defeated.

He rejected the argument that the Practice Direction gives more powers to the registrar than a single justice.

The Directions only allow the Registrar to attend to interim applications under the inherent powers of the court to assist in the administration of justice. He observed that the preliminary objections raised centered on the prayer for an injunction, ignoring the rest of the judgement.

He submitted that this court recognizes the power of the registrar to grant interim orders of injunction and stay of execution.

- **Mandela Auto Spares V Marketing Information Systems Ltd CA Ref. No. 74 of 2008** and **Tropical Bank CA Ref. No. 64 of 2009**.

Regarding Ground No.3 Mr. Kabiito pointed out that exceptional grounds did not have to be pleaded as they were of a legal nature. They would go to the merit of the application and would be addressed before a full bench. The High Court granted an injunction and the respondent had also applied for an injunction. Under the circumstances it was best to come to this court for such prayer. These matters would not be addressed by the Registrar – **Wilson Mukiibi V James Semusambwa (supra)**.

In rejoinder Mr. Madrama reiterated his earlier submissions that an order which takes immediate effect cannot be stayed, but can only be set aside, citing **Sergeant V Patel (1949) 16 EACA 63**. That the Registrar's order would interfere with the High Court judgement.

I consider it necessary to reproduce **The Court of Appeal (Judicial Powers of Registrars) Practice Direction No. 1 of 2004** which reads:

“Pursuant to the Court of Appeal Rules Directions 1996 made under Section 41(1) (v) of the Judicature Act, 2000, and in order to ensure expeditious disposal of cases, the powers of Registrars shall include, but not be limited to entertaining matters under the following rules.

1.....

2....Rule 5 – Applications for interim orders.....”

Under Section 41 of the Judicature Act the Rules committee is empowered to make rules for regulating the practice and procedure of the courts and thus assign special duties to officers of the court in order to expedite court business. Hence Practice Direction No. 1 of 2004 which mandates a Registrar to entertain applications for interim orders.

An interim order therefore should not be confused with a substantive application for stay of execution as is often the case. The two are quite distinct. The distinction was succinctly spelt out by Mulenga JSC in **Wilson Mukiibi V James Semusambwa S.C Civil Application No. 9 of 2003** thus;

*“.....invoking that interim procedure must neither be taken as an alternative to or substitute for the procedure for obtaining a stay, which is envisaged under **sub-rule (2)** nor should it be used to negative the import of that sub-rule. The interim order ought to be made only in compelling circumstances, to prevent defeat of justice, and strictly pending ascertained hearing of a substantive application by the full Court”.*

Sub-rule (2) of rule 49 of the Rules of the Supreme Court excludes inter-alia an application for a stay of execution. This is pari materia rule 53 of the Rules of this Court.

Nonetheless the Registrar is empowered only to weigh the circumstances of the application and to ascertain whether the process is not likely to be abused as is often the case and that the application is made in good faith. Delving into the substantive issues is beyond the Registrar’s mandate.

With the above in mind, Mr. Madrama's contention that the Registrar had no jurisdiction to entertain the present application on ground that an injunction is unexecutable is unsustainable. All court orders are executable only the mode varies – See Section 38 Civil Procedure Rules. Breach of an injunction may carry penal consequences even loss of liberty. See **Order XLI rule 2(3)** Civil Procedure Rules. Further see;

- **Knight & another V Clifton & Ors (1971)2 ALL ER 380 at 381; Heaton Transport (St. Helen V Transport (1972)3 ALL ER 101.** These are cases were cited by Mr. Madrama and contradict his claim that injunctive orders are not executable, though he asked me to deduce otherwise. Courts cannot make own deductions where provisions are so clear and precise as not to permit any other inferences.

Grounds 1 & 2 of the Reference in my view fail.

Regarding Ground No. 3 that the application should have been first made in the High Court, **rule 42** states:

1. **Whenever an application may be made either in the court or in the High Court, it shall be made first in the High Court.**
2. **Notwithstanding sub-rule (1) of this rule, in any civil or criminal matter, the court may, on application or of its own motion give leave to appeal and grant a consequential extension of time for doing any act as the justice of the case requires or entertain an application under rule 6(2) (b) of these Rules, in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court.”**

Mr. Kabiito explained the circumstances of this case in that both parties had each applied for an injunction. He submitted that it would have been anomalous for the court which had already granted one to grant the application to respondent.

Be that as it may the court has discretion in the matter.

I consider that the circumstances of this case are such that the respondent ought to be listened to on the merits of this application. This court has recognized the Registrar's mandate to make such orders – See **Civil Reference No. 64 of 2009 Tropical Bank Ltd & Anor V Lweza Clays Ltd**

**& Anor; Mandela Auto Spares V Marketing Information Systems Ltd, Civil Appeal
Reference No. 74 of 2008.**

In sum this reference stands dismissed with costs. It is ordered that the record be returned to the Registrar to complete the hearing of the application on its merits.

Dated at Kampala...25thday of...*May*....2010.

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A.EN. MPAGI-BAHIGEINE
JUSTICE OF APPEAL