

# REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

## CIVIL REFERENCE NO.70 OF 2013

(Arising from Miscellaneous Applications Nos. 111 and 112 of  
2013)

(Arising from High Court Civil Appeal No.064 of 2010)

BUTERA EDWARD :::::::::::::::::::::::::::::::::::::::APPLICANT/APPELLANT

VERSUS

MUTALEMWA GODFREY :::::::::::::::::::::::::::::::::::::::RESPONDENT

10 Coram: Hon. Mr. Justice Remmy Kasule, JA, sitting as a single  
Justice.

### RULING

This Ruling is in respect of a **Reference** from the decision of  
Ssali Harriet Nalukwago, Assistant Registrar of this Court, dated  
15 07.05.2013 made in **Miscellaneous Application No.112 of  
2013** whereby the said application was dismissed with costs.

The applicant had applied for an interim order of stay of  
execution of the decree in **High Court Civil Appeal No.064 of  
2010** pending determination of the substantive **Court of Appeal  
20 Civil Application No.111 of 2013** for stay of execution.

The background to this Reference is that on 12.04.2013, the  
**High Court (Civil Division) (Zehurikize, J.)** issued a decree

against the Applicant in favour of the Respondent whereby the applicant was to give vacant possession of some Kampala city commercial suit premises, pay damages and costs to the Respondent.

5 Dissatisfied, the applicant filed on 12.04.2013 a Notice of appeal to this Court as well as **Civil Application No.111 of 2013** for a substantive stay of execution of the decree. He also filed **Application No.112 of 2013** for an Interim Order of stay. It is this application that the Assistant Registrar dismissed on  
10 07.05.2013. Hence this Reference.

Learned Counsel Denis Mudola appeared for the applicant, while the respondent was represented by learned Counsel Patrick Kasumba.

The issues framed are:

15 ***1. Whether the Reference is properly brought before this court comprised of a single justice.***

***2. Whether the learned Assistant Registrar erred in law and in fact when she dismissed the application for interim stay.***

20 ***3. Whether the applicant is entitled to the prayers sought in the Reference.***

For the applicant it was submitted in respect of the first issue that the Reference is properly brought before this court under **Rules 53, 54 and 55 of the Rules of this Court.**

As to the second issue it was submitted that the Assistant Registrar erred to dismiss the interim application on the ground that the same ought to have been first lodged and disposed of by the High Court.

5 With respect to the third issue, Counsel submitted that the applicant was entitled to an order setting aside the order of dismissal of the application by the Assistant Registrar and to have the same substituted by an Interim Order of stay of execution of the decree in **High Court Civil Appeal No.064 of 2010**.

10 Further, the applicant had shown, prima facie, that he had lodged a notice of appeal to this court, there was a threat of execution of the suit decree by having him give vacant possession of the suit premises as well as payment of damages and costs as ordered in the decree. If execution was to be carried  
15 out, then the intended appeal would be rendered nugatory and the applicant would be subjected to suffer loss and inconvenience, much of it not capable of being atoned for by way of damages. He had filed an application for stay of execution in the High Court, but he had failed to secure a hearing date for the  
20 same due to the transfer of judges and registrars that was going on, at the material time, in the High Court, including the Civil Division thereof.

For the Respondent, Counsel submitted that, in law, a Reference could not be preferred from the decision of the  
25 Registrar to a single justice. The Rules of the court did not so provide.

As to the second and third issues **Rule 42 (1)** of the Rules of this Court mandated that the application first be filed and disposed of by the High Court and not directly in this Court. The respondent had not yet been served with the substantial application for stay of execution and the applicant had not filed a Memorandum of Appeal in this court and as such there was no pending appeal. He prayed for dismissal of the Reference with costs.

I have carefully considered the submissions of Counsel for the respective parties, the authorities submitted, as well as their pleadings in the Reference. I now proceed to resolve the issues.

Pursuant to **Practice Direction No.1 of 2004** issued by His Lordship the **Chief Justice** on 02.07.2004 pursuant to **Section 41 (1) (v) of the Judicature Act, 2000**, Registrars were vested with powers to extend time under **Rule 4** and to entertain applications for Interim Orders under **Rule 5** of the Rules of this Court, amongst other powers. The issuance of the Practice Direction was in order to ensure expeditious disposal of cases.

Like is the case in **Rules 15 (4)** and **110 (3)** of this Court Reference against the Registrar's decision in respect of documents being filed in Court and in taxation of costs has to be made to a single Justice and not to a Bench of three Justices. The Bench of three justices only entertains References from a single Justice under **Section 12 (2) of the Judicature Act** and **Rule 55 (2) of the Rules of this Court**.

It logically follows therefore that Reference to a single Justice has to be made in respect of a decision of a Registrar made in exercise of the Registrar's enhanced powers. This Reference is therefore properly before this Court in as much as it is in the nature of an appeal against the decision of the Assistant Registrar in dismissing **Application No.112 of 2013** for an interim order of stay of execution.

As to whether the **Application No.112 of 2013** ought to have been first filed and resolved upon by the High Court, as the trial court, I appreciate the import of **Rule 42 (1)** of the Rules of this court that whenever an application may be made either in this court or in the High Court, it shall be made first in the High Court. **Rule 42 (2)** however is a rider to **Rule 42 (1)**. The whole **Rule 42** states:

15 **"42**

**(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.**

20 **(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)**  
25 **(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.”**

In **Lawrence Musiitwa Kyazze Vs Eunice Busingye, Uganda Supreme Court Civil Application No.18 of 1990, [1992] KALR 561**, the court dealt with the then **Rule 41 of the Court of Appeal Rules** which was similar in wording to the present **Rule 42** of this court. The Court held that:

**“The Supreme Court would prefer the High Court to deal with the application for stay on its own merits first, before the application is made to the Supreme Court. However, if the High Court refuses to accept jurisdiction or refuses jurisdiction for manifestly wrong reasons, or there is great delay, the Supreme Court may intervene and accept jurisdiction in the interests of justice.....”**

**The court can so act only after it has been appraised of all the facts”.**

The Supreme Court did not hold, as the Assistant Registrar seems to imply in her Ruling, that invariably, regardless of any circumstances, that an application to stay had to be first made to the trial judge who decided the case, and that it is only when that court refuses to grant the application that the losing party resorts to the appellate court.

Indeed in **Supreme Court Civil Application No.06 of 2010 Kitende Appolonales Kalibogha & 2 Others Vs Mrs Eleonora Wismer**, the Supreme Court (Okello JSC,) held:

5 “.....for an interim order of stay, it suffices to show that a substantive application is pending and that there is a serious threat of execution before the hearing of the pending substantive application. It is not necessary to pre-empt consideration of matters necessary in deciding whether or not to grant the  
10 substantive application for stay.”

In the affidavit in support of his application for interim stay, the applicant asserted that though the court decree in **Civil Appeal No.064 of 2010** was given on 12.04.2013, by 23.04.2013 the respondent was in high gear and speed of  
15 executing the said decree and on 22.04.2013 the Deputy Registrar Civil Division, had forwarded the court file of the decree and other relevant documents to the Deputy Registrar, Execution and Bailiffs Division, for execution purposes. The execution, given the nature of the decree, would include an order for vacant  
20 possession of the suit premises which are commercial premises at Nakasero market, Kampala City, where the applicant carries on his business.

If execution was to be carried out the applicant would lose possession and occupation of his commercial premises, be made  
25 to pay damages, and incur loss in the business. The intended appeal would thus be rendered nugatory. The applicant also

showed that he had filed a Notice of appeal, applied for proceedings and served the same upon Counsel for the respondent who had refused service. The affidavit of service dated 19.04.2013 was attached to the application. It was also  
5 explained that given the pending transfer of Judges and Registrars of the High Court at the material time, it had not been possible for the applicant to pursue an application for stay in the High Court. Yet execution of the decree was imminent.

The learned Assistant Registrar did not address herself to the  
10 above facts of the application which tended to show and justify the lodgement of the interim and substantive orders for stay of execution direct to this court pursuant to **Rules 6 (2) (b) and 42 of this Court** and also given the overall jurisdiction of this court, in matters like this one, as is expounded in the **Lawrence**  
15 **Musiitwa Kyazze** case (supra).

I have re-appraised myself of all the relevant facts of the application and I am satisfied that, given the imminent threatened execution, the effect of the transfer of Judges and Registrars on-going in the High Court at the material time, the fact that the  
20 applicant filed a Notice of appeal, applied for proceedings, attempted to serve Counsel for the respondent with the Notice of Appeal and the letter applying for proceedings, that a substantive **Application No.111 of 2013** to stay execution has been filed and is pending disposal in this Court, and the fact that this Court  
25 is now in possession and is appraised of the relevant facts of all the matters concerning the applications and intended appeal, all



these entitle the applicant to be granted an interim order of stay of execution.

Accordingly this Reference is allowed. The order of the Assistant Registrar of this court dated 07.05.2013 dismissing  
5 **Application No.112 of 2013** is set aside. It is substituted by an order of interim stay of execution of the **High Court (Civil Division) Decree in Civil Appeal No.064 of 2010**. The order of interim stay herein granted is to be for a duration of three (3) calendar months, within which the applicant is to take such steps  
10 to prosecute to completion the application for stay of execution **No.111 of 2013**, otherwise he shall have to seek from this court, and provide justification, for further order (s) for extending the operation of this order. If not extended, this order shall be taken as having lapsed after the said period of three (3) calendar  
15 months from the date of its delivery.

As to costs of this application the same shall abide the event of the substantive **Application for stay of execution No.111 of 2013**, or any further orders of this Court.

It is so ordered.

20 Dated at Kampala this...**14<sup>th</sup>** ...day of .....**June**.....**2013**.

Remmy Kasule  
**JUSTICE OF APPEAL**