THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

CORAM: ODOKI, CJ, TSEKOOKO AND MULENGA, JJSC

CIVIL REFERENCE No. 1 OF 2007

BETWEEN

A. K. P. M. LUTAAYA :::::::::::::::::::::::::
APPLICANT

AND

ATTORNEY GENERAL ::::::::::::::::::::
RESPONDENT

[Reference from the decision of a single Justice (Katureebe JSC) dated 13th day of June, 2007 in Civil Application No. 12 of 2007]

RULING OF THE COURT

This ruling concerns a reference made by the applicant, A. K. P. M. Lutaaya, from a decision of Katureebe, JSC, as a single Judge of this Court, who granted leave to the respondent to institute an appeal out of time. The reference was initially correctly made

informally (orally) by Mr. Semuyaba, counsel for the applicant after the ruling was delivered on 13th June, 2007. Two days later on 15th June, 2007 the same counsel made an application formally by notice of motion to which he attached the applicant's fresh evidence (an affidavit) to which were annexed numerous documents. Parties filed written arguments.

On the 24th July, 2007 after perusing the proceedings before the learned single Judge, the affidavit filed subsequently and upon perusal of the written arguments, and after hearing Mr. Semuyaba, counsel for the applicant and Mr. Kalemera counsel for the respondent, we confirmed the order of the single Judge and promised to give our reasons on notice. We now give the reasons

Before giving our reason we must set out the background of this reference which has a chequered history.

The applicant instituted a suit in the High Court against the respondent alleging that soldiers of the Uganda Peoples Defence Forces (UPDF) trespassed on his land and committed certain wrongful acts. Ntabgoba, PJ., heard the case and dismissed the suit. His decision which was upheld by the Court of Appeal was reversed by this Court which then remitted the case to the High Court for assessment of damages. Damages were subsequently assessed by a Judge of the High Court who made no orders as to costs or interest. He did not explain why no costs or interest would be given.

The applicant who was dissatisfied with the amount awarded and the failure to award costs and interest, successfully appealed to the Court of Appeal which on 21st December, 2005 enhanced the award of damages, and awarded interest and costs. The respondent filed a notice of appeal against that decision of the Court of Appeal. As correctly observed by Katureebe, JSC, in his ruling, what followed appears to have been a series of errors and confusion on the part of the respondent Attorney-General's Chambers.

In the mistaken belief that it had not served a notice of appeal on the applicant, the respondent filed Civil Application No. 14 of 2006 in this Court seeking extension of time within which to serve the notice of appeal. In reply the applicant showed that in fact the notice of appeal had been served. Consequently when the application came before our brother as a single Judge of this Court on 24th January, 2007, the respondent applied and was allowed to withdraw it.

The respondent then filed Civil Application No. 1 of 2007 seeking extension of time within which to institute and serve the record of appeal. That application was purportedly supported by an affidavit of a Mr. Joseph Matsiko, an Ag. Director of Civil Litigation in the Attorney General's Chambers. That application also came up before our learned brother as a single Judge on the 22nd March, 2007. As fate would have it, it transpired that the so called

supporting affidavit by Mr. Matsiko was not sworn. Court consequently ruled that as the application was not supported by a valid affidavit, it was incompetent and struck it off with costs. That ruling was delivered on 29th March, 2007. The respondent thereafter filed civil application No. 12 of 2007 once again seeking extension of time within which to institute and serve the record of Appeal. The application was supported, this time, by a sworn affidavit of the same Mr. Matsiko, Ag. Director, Civil Litigation. It was heard by the same single Judge of this Court.

At the hearing of the fresh application, Mr. Kalemera, State Attorney, argued that there was sufficient cause as to why essential steps to institute an appeal had not been taken within the time prescribed by the Rules. Basing his arguments on the affidavit of Mr. Matsiko, he informed the learned single Judge that the problem had come about as a result of the resignation from service of one Wamambe, a Senior State Attorney, who had been personally in charge of the case and the case file. The affidavit evidence showed that when Wamambe resigned, he did not hand over the files he was handling to the Director of Civil Litigation, but merely forwarded them to the Attorney General's Civil Registry. Apparently, the files were not only many and voluminous, but the registry took long to transfer them to the office of the Director of Civil Litigation, who, according to Matsiko's affidavit, had to peruse them and re-allocate them to other officers. When Mr. Matsiko read the file in the instant case he did not find any evidence on the file that the Notice of Appeal,

though filed, had been served on the applicant; hence the first application for extension of time within which to serve the Notice of Appeal.

Eventually, as we have already stated the respondent applied for leave to file an appeal out of time on the grounds that the failure to file it in time was due to lapses and mistakes in the Attorney General's Chambers. The application was strenuously opposed by counsel for the applicant on a number of grounds, one of which has been raised in the present reference. On 13th June, 2007 the single Judge granted the application, allowing the respondent to institute the intended appeal out of time. He however awarded costs against the respondent. The present reference is from that order of the single Judge. In the reference, the applicant seeks for orders that this Court **varies, discharges or reverses the decision of the single Judge allowing the respondent extension of time to file a memorandum of appeal**.

The Notice of motion sets out five grounds and is supported by an affidavit sworn by the applicant. To that affidavit are annexed copies of previous notices of motion, proceedings there-from, and rulings. The respondent has also filed 2 affidavits in reply followed by seven page written submissions.

The notice sets out these five grounds:

(i) *Justice Bart Katureebe sitting as a single Judge delivered a ruling allowing the respondent time within which to file a memorandum of appeal.*

(ii) *The applicant is making a reference against that ruling on the grounds that the said learned Single Judge was* ***functus officio*** *because he had earlier on entertained a similar application Civil Application No. 1/2007 on the same subject matter and struck it out with costs.*

(iii) *That the respondent instead of filling a reference under the Judicature Act and the Supreme Court Rules went ahead to file another application Civil Application No. 12/2007 on the same subject matter after it had been struck out with costs.*

(iv) *That the learned Single Judge erred in law and fact when he ruled that the respondent had adduced sufficient grounds for extension of time within which to file a memorandum of appeal whereas they had not.*

(v) *That the learned Single Judge erred in law and fact when he ruled that Mr. Joseph Matsiko Acting Director of Civil Litigation Attorney General's Chambers could competently swear an affidavit on facts not well within in his own knowledge and being hearsay.*

The parties subsequently filed lengthy written arguments. We think that this whole procedure of filing notice of motion accompanied by affidavits and followed by written arguments and counter written arguments is wrong. References in this Court are made by virtue of S. 8(2) of the Judicature Act read together with Rule 52 of the Rules of the Court. The Rule in so far as relevant reads as follows:-

(1) **Where under section 8(2) of the Act, any person who is dissatisfied with the decision of a single Judge of the Court-**

(b) in any civil matter wishes to have any order, direction or decision of a single Judge varied, discharged or reversed by the Court,

the applicant may apply for it informally to the judge at the time when the decision is given or by writing to the Registrar within seven days after that date.

(2) **At the hearing by three judges of the Court of an Application previously decided by a single Judge, no additional evidence shall be adduced except with the leave of the Court.**

Clearly a reference under the rule is envisaged to be made in two alternative ways.

First after the ruling or order of a Single Judge, a dissatisfied person may apply orally for a reference to be made to the Court. No evidence is required. Only original materials which were on the file before a single Judge are sufficient.
Second, as an alternative, an aggrieved person who fails or omits to make an oral application at the time a single Judge delivers a ruling may apply by writing to a Registrar within seven days after decision of a single Judge asking for a reference to be made. Again, no evidence is needed. Only materials on the file are sufficient. The applicant can however seek leave of the Court to adduce additional evidence.

As mentioned earlier, after the Judge read his ruling, the applicant correctly made an oral application for a reference to be made which the Judge granted. Therefore the Notice of Motion in this reference was made in violation of Rule 52 in that even though an oral informal application had been properly made on 13th June, 2007, a fresh application was again made by Notice of Motion accompanied by additional evidence (affidavit) together with all manner of annextures, making the whole reference different from what is envisaged under Rule 52.

A study of previous rules on the same subject namely reference from a decision or orders by a single Judge of this Court and its predecessors, shows that essentially the three Justices are expected to have a record which was before a single Judge,

placed before them for study to decide whether on the materials available before him, the Single Judge made the right decision.

Whereas in the original Rule 19 of the Eastern Africa Court of Appeal Rules, 1954, it was explicitly stated that what had to be placed before the full Court were copies of the record before the single judge, the current rule only stipulates that no additional evidence is to be filed except with leave. In our view, the purport of the current rule is the same as that of the original rule.

When this reference came up for hearing, we drew the attention of Mr. Semuyaba, counsel for the applicant, to the fact that the procedure he adopted of filing a notice of motion in addition to the oral application was erroneous and inconsistent with Rule 52 of the Rules of this Court. In response learned counsel argued that the procedure was in order as it enables the applicant to clearly articulate the grounds of the reference in the notice of motion. In addition he submitted that it was the procedure commonly practised. In support of the latter submission, he cited the rulings in **Motor Mart (U) Ltd. Vs. Yona Kanyomozi** (Supreme Court Civil Application No. 6 of 1999) (unreported) and **Kabogere coffee factory Ltd. And Hajji Bruhan Mugerwa Vs. Hajji Twaibu Kigongo** (Supreme Court Civil Application No. 10 of 1993) (unreported). We think that although the two rulings relate to extension of time, they do not in anyway decide that a reference under Rule 52 of the **Rules** of this **Court** must or should be made by a notice of motion. Even if a number of similar

applications have previously come before this Court or its predecessors by way of notice of motion, that does not establish a modification of the procedure envisaged and specified under Rule 52 itself.

We must stress that Rule 52 is a special rule with its own mode of operation regulating the conduct of applications specified therein. It comes towards the end of the rules regulating institution of applications in the Court and especially, well after Rule 42, which sets out the general form in which other applications to Court are to be instituted. Rule 42 in fact specifically states that applications to this Court shall be by motion save those which under any other rule may be made informally.

Therefore if a reference under Rule 52 had to be made by notice of motion there would have been no need for the direction in Rule 52 that the application has to be made either informally orally or by application in writing to the Registrar. The rule provides a simple procedure for a simple process whereby the substantive application which was heard and determined by a single Judge should be referred to and be reviewed by the Court. Therefore we hold that the procedure adopted by Mr. Semuyaba which is apparently commonly practised by other members of the bar is wrong and must be discontinued.

The procedure which is to be followed is as follows: Where an oral application for a reference is made before a single Judge, that

Judge should pass the file to the Registrar with direction that the number of appropriate copies of pleadings and proceedings before him or her be produced so that the application is fixed for hearing by three Justices. Where an application in writing is made to the Registrar, the Registrar shall ensure that an appropriate number of copies of the pleadings and proceedings before the single Justice is produced after which the application is fixed for hearing by three Justices. Thereafter the parties should be served with hearing notices. In either case no additional evidence must be filed without leave of the Court.

We now turn to the merits of the reference. Mr. Semuyaba's principal argument against the single Judge hearing the application is encapsulated in ground 2 of the notice of motion. As we have pointed out the notice is a wrong procedure but since the applicant initially complied with Rule 52(1) (b) by making informal oral application, we will reluctantly refer to the notice as if it merely formalised the oral application.

We have read and considered the written arguments of counsel for both parties. The principal contention of Mr. Semuyaba, counsel for the applicant is that when the learned single Judge decided Civil Application No. 1 of 2007 he became **functus officio**. In support of his contention that the learned single Judge should not have considered Civil Application No. 12 of 2007 from which this reference arose, learned counsel referred to the cases of **Motor Mart Vs. Yona Kanyomozi** (Supra) **Meru Farmers Vs. A. A. Sulaiman (1966)** E. A. 449 and **Crane Finance**

Company Ltd. Vs. Makerere Properties Ltd. (Civil Appeal No. 1 of 2001). This last case was concerned with **functus officio** but its facts are distinguishable. We are not persuaded that the three decisions support the contentions of Mr. Semuyaba to the effect that the single Judge in this case was **functus officio** when he heard the application.

With respect to learned counsel, we think that he has misunderstood the meaning of the expression **"Functus officio"** as it relates to performance of judicial work. To illustrate this, it suffices to refer to the definition of the expression in two dictionaries.

Stroud's Judicial Dictionary, *4th edition, Volume 2, page 131, explains the expression thus-*

FUNCTUS OFFICIO. *(1) An arbitrator or referee cannot be said to be functus officio when he has given a decision which is held to be no decision at all.*

(2) Where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay

(3) An arbitrator or umpire who has made his award is functus officio, and could not by common law alter it in any way whatsoever; he could not even correct an obvious clerical mistake.

Similarly, ***Black's Law Dictionary,*** *5th Edition, a Page 606 explains the expression* ***Functus officio*** *as follows:*

(a) ***A task performed.***

(b) ***Having fulfilled the function, discharged the office, or Accomplished the purpose, and therefore of no further force or authority.***

Each of the three cases relied upon by Mr. Semuyaba dealt with situations which were different from the complaint raised in present reference. In deciding Civil Application No. 1 of 2007, the learned Judge did not consider the merits of the application in order to determine to either allow or not allow the applicant to institute an appeal out of time. He only considered whether in the absence of a sworn affidavit, the application before him was competent. Rule 43 requires that a motion should be supported by affidavit. As is apparent, the application was incurably defective and therefore liable to being struck off which the learned Judge did. By striking out that application, the learned single Judge did not make a final decision on its merits. He did not therefore exhaust his powers and so never became **functus officio.**

Consequently, when the learned Judge considered Civil application No. 12 of 2007 which is the genesis of this reference, he was dealing with a new and different matter in which he was

called upon to decide the merits of the application in the form of a notice of motion supported by a sworn affidavit. In the end he gave a final order. Clearly the two situations are completely different. Therefore the Judge was not **functus officio** when he entertained the last application. Ground two must fail. We think that our conclusion on this ground disposes of this reference.

As regards the remaining grounds, we have studied the ruling of the single Judge, considered all the material placed before him including submissions of the applicant and of the respondent, we have not been persuaded that his conclusions were erroneous. There was no need for the respondent to apply for a reference as suggested in the third ground. The fourth ground has no merit as we are satisfied that there were sufficient material before the Judge justifying granting the leave sought by the respondent.

It was because of the foregoing reasons that we confirmed the decision of the single Judge and granted the respondent thirty (30) days within which to institute the appeal. We order that the costs of this reference do abide the decision by this Court in the intended appeal.

Delivered at Mengo this 21st day of September 2007.

B. J. ODOKI
CHIEF JUSTICE

J. W. N.TSEKOOKO
JUSTICE OF THE SUPREME COURT

J. N. MULENGA
JUSTICE OF THE SUPREME COURT