



Striking out
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5 THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

MISC.APPLICATION NO.20 OF 2014

(Arising from Civil Appeal No.11 of 2014)

10 (Coram: Katureebe CJ; Arach-Amoko JSC; Odoki, Tsekooko,
Okello Ag.JJSC)

BETWEEN

MIRIAM KUTEESA:..... APPLICANT

AND

15 1.EDITH NANTUMBWE

2.JOSHUA MUKALAZI

3.DAUDI KIWUTA KIZITO

4.ERINA NANKYA

.....RESPONDENTS

RULING OF THE COURT

20 This is an application brought under Rules 2(2) and 78 of the Judicature
(Supreme Court Rules) Directions for orders to strike out:

a) *The Notice of Appeal in Court of Appeal Civil Application No. 294 of
2013 filed on 30th December, 2013.*

b) *Supreme Court Civil Appeal No.11 of 2014.*

25 c) *The interim consent order of stay of execution in Misc. Application
No.02 of 2014 issued on the 23rd of January 2014.*

Grounds

The grounds of the application set out in the Notice of Motion are that:

- i) *The Notice of Appeal in Court of Appeal Civil Application No. 294 of 2013 filed on 30th December, 2013 was not served on the applicant or her duly instructed Advocate on court record.*
- ii) *The appeal was filed outside the prescribed time.*
- iii) *The interim order of stay of execution was not supported by a valid Notice of Appeal and was consented to by counsel without the applicant's instructions.*
- iv) *It is an abuse of the Court process for the respondents to have pursued appeals in the Court of Appeal and the Supreme Court when the High Court decree had already been fully executed in favour of the applicant by being issued with a Special Certificate of Title and being registered thereon as the estate administrator/proprietor.*
- v) *The respondents have unlawfully sought Police to execute an exhausted Court order of the Court of Appeal to evict the applicant from the suit land without a court order.*

Affidavits

The application is supported by the affidavit affirmed on the 30th January, 2014 by one Asumani Kabali, described as an Attorney of the applicant.

The respondents opposed the application and relied on the affidavit sworn by Erina Nankya the 4th Respondent on the 20th February, 2014.

After the closure of the filing of written submissions, the applicant had filed an affidavit in rejoinder to that of the 4th respondent without the leave of court required by Rule 43 of the Supreme Court Rules. The Court struck

5 it out for that reason during the hearing, on an application by counsel for the respondent.

Background:

Before dealing with the grounds, it is instructive at this stage, to briefly give the factual background which led to the application. It is as follows:

10 On the 27th February 2009, the applicant and one Ssalongo brought an action against the respondents in the High Court as *HCCS No. 95 of 2009*, claiming ownership of property comprised in **Block 28 Plot 540 situated at Makerere**, as the administrators of the estate of one Musa Kalanzi Muganzi. The respondents did not file a defence and the suit was heard ex parte by Murangira, J, who issued an ex-parte judgment against them on 15 the 19th October 2010. A decree was extracted on the same date.

Upon learning of the decree, the respondents filed *Misc. Application No. 130 of 2011* in the High Court, seeking to set it aside. Murangira, J, heard the application and dismissed it for lack of merit.

20 The respondents were aggrieved by the dismissal and filed **Court of Appeal Civil Appeal No. 69 of 2012** in the Court of Appeal against it. They also filed applications for a stay of execution and for an interim stay of execution as well. At the hearing of the application for interim stay of execution, counsel for the applicant objected to it on the ground that there 25 was no valid appeal on which it was based. The Registrar overruled him. Counsel for the applicant then filed a reference to a single Justice against the Registrar's ruling. Kasule JA, who heard the reference dismissed it and ordered that the substantive application for stay of execution be fixed for hearing.

30 On the 20th December 2011, counsel for the applicant filed an application to strike out **Court of Appeal Civil Appeal No. 69 of 2012** on the ground that it had been filed out of time. Counsel for the respondents on his part, and in an apparent bid to pre-empt the said application, filed **Court of Appeal**

5 *Misc. Application No. 7 of 2012*, seeking for an order for extension of time within which to file the Notice of Appeal. His Worship Ajiji, the then Assistant Registrar of the Court of Appeal, who heard the said application, dismissed it on the 30th July, 2012, for lack of merit.

10 The respondents were dissatisfied with the Ruling of the Assistant Registrar and filed *Court of Appeal Civil Reference No.98 of 2012* against it before a single Justice. Twinomujuni JA (RIP), heard the Reference and reserved the ruling which has to date not been delivered.

15 Before the Ruling, on the 21st January, 2013, His Worship Kisawuzi, the then Registrar of the Court of Appeal, entered a Consent Judgment where the parties purportedly allowed the application for extension of time; validated the invalid appeal; set aside the High Court judgment; cancelled the applicant's certificate of title and validated the respondents' Certificate of title and agreed to pay the applicant the sum of shs. 500 million as a settlement of the case.

20 However, the firm of M/S Ahamyia & Associates, that was notably not representing any of the parties, wrote to the learned Registrar a letter dated 28th February, 2013, complaining about the Consent Judgment and pointing out to the Registrar that it was unlawful. On receipt of the said letter, the same Registrar set aside the Consent Order.

25 The respondents were aggrieved by the Registrar's action and filed *Court of Appeal Civil Reference No.36 of 2013*, before a single Justice, to set aside the Registrar's dismissal order. In the course of writing his ruling, Nshimye, JA; who had the Reference, was requested by counsel for parties to endorse yet another Consent Order purportedly agreed upon by the parties to settle the matter amicably. The learned Justice declined to
30 endorse the purported Consent Order, on the ground, *inter alia*, that Mr. Kintu Felix, who had purported to represent the applicant, was a stranger to the proceedings since he had not filed a Notice of Change of Advocates

5 indicating that he had taken over the conduct of the case from Mr. Muhwezi.

Nshimye JA, ruled that it required a full bench and dismissed the reference for lack of jurisdiction.

10 Subsequently, the respondents then filed *Court of Appeal Civil Reference No.294 of 2013*, before a full bench, seeking the same order. Mr. Simon Kiiza and Ms. Grace Nakalema who appeared on behalf of the respondents and the applicant, respectively, informed the Court that their instructions were to withdraw the said Reference so as to reach an amicable settlement and revive the impugned Consent Order by His Worship Kisawuzi.

15 However, their lordships disallowed the request and proceeded to determine the Reference on the basis of the material before Court. They concluded, after a thorough analysis, that the Consent Order was null and void as it was tainted with a number of illegalities including lack of jurisdiction. Consequently, their Lordships dismissed the Reference and
20 struck out the Consent Order.

Once more, the respondents were aggrieved by the decision of the Court of Appeal and filed a *Notice of Appeal in the Court of Appeal on the 30th December, 2013*, indicating that they intend to appeal against it.

25 The respondents also filed *Supreme Court Misc. Applications Nos. 1 and 2 of 2014*, for a substantive and interim stay of execution, respectively. On the 23rd January, 2014, the parties consented in **Supreme Court Misc. Application No. 2 of 2014**, to an interim stay of execution, pending the determination of the substantive application.

30 They have now filed the appeal which has been listed as **Supreme Court Civil Appeal No.11 of 2014**. The appeal and the substantive application for stay of execution are pending before this Court.

Representation

5 At the hearing of this application, Mr. Eric Muhwezi represented the applicant while Mr. Joseph Kyazze appeared on behalf of the respondents.

Submissions

Both Counsel adopted their written submissions which they had filed in court.

10 On the first ground, Mr. Muhwezi contended that M/S Kintu Nteza and Co. Advocates, on whom the Notice of Appeal was served had no instructions from the applicant and did not file a Notice of Change of Advocates. He submitted that the Notice of Appeal should for that reason be struck out for non-compliance with Rule 74(4) of the Supreme Court
15 Rules since it was not served on the applicant or her duly instructed lawyers, namely, Muhwezi Law Chambers Advocate, that were very well known by the respondent's lawyers who had been served with a certificate of instructions.

20 On the second ground, Mr. Muhwezi submitted that the incompetent Notice of Appeal cannot support an appeal. The appeal itself is therefore incompetent and should be struck out since an essential step in the proceedings was not taken prior to filing the appeal in accordance with Rule 78 of the Supreme Court Rules.

25 Regarding the third, fourth and fifth grounds, Mr. Muhwezi submitted that, in the event that the first two grounds succeed, there would be no need to address the prayer for striking out the interim order for stay of execution. However, he invited court to address the interim order which in his view is tainted with illegality and bad faith bordering on fraud in that it covered orders which were not the subject of the appeal before this Court
30 and it stayed the execution of the decree of the High Court which had long been executed. He cited the case of *Makula International Ltd v HE Cardinal Nsubuga & Another [1982] HCB 11* for the proposition that the court cannot sanction an illegality, once brought to the attention of the court.

5 He also relied on Rule 2(2) of the Supreme Court Rules in support of his argument that the interim order was an abuse of the court process by the respondents through their lawyer to get Police to interfere with the suit land under the guise of maintaining the *status quo*. He prayed that the interim order be declared null and void.

10 Mr. Kyazze opposed the application and contended that the Notice of Appeal and the letter were served on the said law firm because Ms. Grace Nakalema who appeared for the applicant in *Court of Appeal Civil Reference No.294 of 2013* which led to the appeal, is from the said law firm. That the service was therefore effected in accordance with Rule 74(2) on M/S Kintu Nteza as the applicant's last known address.

15 He contended that the applicant had given instructions to the said law firm in other matters touching the suit land, for example in **Misc. Application No.32 of 2013**.

20 His other contention was that by filing a Notice of Change indicating that they were taking over instructions from Kintu Nteza and Co. Advocates, M/S Muhwezi Law Chambers had actually acknowledged that the firm of M/S Kintu Nteza and Co. Advocates had got instructions from the applicant, and the applicant did not disown the firm in issue. The complaint was therefore an afterthought.

25 He argued further that he has already served *Supreme Court Civil Appeal No. 11 of 2014* on Muhwezi Law Chambers. The allegation that there is no valid Notice of Appeal is therefore devoid of merit. Otherwise, the applicant's contention would offend the rule on approbation and reprobation because Mr. Muhwezi could not file a notice that he was taking over instructions from M/S Kintu Nteza and Co. Advocates while at the same time argue that the latter had no instructions

30 He also submitted that the matter is *res judicata*, having been decided by court in *Supreme Court Misc Cause No. 02 of 2014*.

5 He prayed that the application should be dismissed with costs.

10 In his brief rejoinder Mr. Muhwezi maintained his earlier submissions and insisted that there was collusion between the respondents' counsel and M/S Kintu Nteza and Co. Advocates right from the Court of Appeal and the Supreme Court as evidenced by the dealings between the said law firms even when he knew the lawyers certified by court in the Ruling by Nshimye JA. He denied that *res judicata* applied to the situation at hand since the application referred to by Mr. Kyazze was not between the same parties. He reiterated his earlier prayers.

Consideration of the grounds of application

15 Before addressing the substantive grounds of the application, there is a preliminary point raised by Mr. Kyazze concerning the affidavit of Mr. Asuman Kabali in support of the application which we deemed appropriate to dispose of first. He argued that Mr. Kabali had no *locus standi* to swear the said affidavit because the applicant has filed the instant application in person. It is our view that this argument is not sustainable in light of the clear provisions of Rule 43 (1) which reads:

20 “ (1) *Every formal application to the court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts.*” (underlining is for emphasis).

25 Mr. Kabali deponed in his affidavit that:

“11. *That at all material times and all court causes in the High Court and the Court of Appeal, it is myself that have given evidence and signed pleadings and made affidavits as the applicant's lawful attorney for the purpose.*

30 12. *What I have deponed to hereinabove is true to the best of my knowledge save for paragraphs 6, 7, 8 and 9 which are on belief.*”

5 We think that Mr. Kabali swore the affidavit as a person who had knowledge of the facts since he had followed the matter in court right from the beginning. He had the *locus standi* to swear the said affidavit under Rule 43(1) of the Supreme Court Rules.

10 We shall now proceed to deal with the five grounds of the motion in the order in which they were set out in the Notice of motion.

1. *The Notice of Appeal was not served on the applicant or her duly instructed advocate.*

15 It is the case for the applicant that the lawyers for the respondents neither served the applicant's duly instructed lawyers M/S Muhwezi advocates whom they knew very well nor her attorney, Mr. Asuman Kabali, with the Notice of Appeal in this appeal and the letter dated 30th December, 2013, requesting for proceedings in **Court of Appeal Civil Reference No. 294 of 2013**, but they instead served the Notice of Appeal and the letter on M/S Kintu Nteza & Co. Advocates, who were not the applicant's lawyers and
20 this was even after Nteza's earlier rejection by Court. He contended that the Notice of Appeal and the letter are therefore invalid and of no legal consequence.

25 Mr. Kyazze on his part opposed the application and contended that the Notice of Appeal and the letter requesting for instructions were served on M/S Kintu Nteza & Co Advocates because they are the ones who represented the applicant in **Court of Appeal Reference No. 294 of 2013**, which led to the appeal. The complaint is therefore devoid of any merit.

30 After a careful examination of the history of the dispute between the parties, it shows that the applicant was represented by Counsel Erick Muhwezi formely of the firm of Muhanguzi, Muhwezi & Co. Advocates that instituted the suit in the High Court and Mr. Kyazze, who has all along represented the respondents, was fully aware of this. The firm later on changed to Muhwezi Law Chambers Advocates. However, the record also shows that there has been a concerted effort by lawyers from M/S

5 Nteza and Co. Advocates to represent the applicant in the dispute involving the said property and that at one stage, the controversy concerning the applicant's representation had to be resolved by Nshimye, JA; in his ruling in *Court of Appeal Civil Reference No.36 of 2013* at pages 1 and 4 where he stated that:

10 *"... at the hearing of her reference, the applicants were represented by Joseph Kyazze and Simon Kiiza, while Counsel Eric Muhwezi and Ronald Ruhinda were each claiming to have effective instructions to represent the respondent who was not in court. A short adjournment was granted to both counsel to trace their client so that the client would indicate which of the two counsel was representing her.*

15 *At the resumed hearing, Mr. Eric Muhwezi informed court that his client was travelling by boda boda and was on her way to court. Court declined to wait for the arrival of the respondent."*

At page 9 of the Ruling, his Lordship continued:

20 *"At the close of the applicant's submissions, the respondent had not yet arrived to disentangle counsel Muhwezi and Ruhinda on the issue of representation. I directed that both Counsel and the respondent appear before the Assistant Registrar to ascertain which counsel had genuine instructions to represent her. I directed further that Counsel who will be found to have instructions will file ... Both Counsel complied and in the presence of the Assistant Registrar, Mr. Eric Muhwezi was pointed out by the respondent as her legal counsel."*

30 At page 17 of his Ruling, Nshimye, JA, observed that during the course of drafting the Ruling, counsel wrote a letter to the Registrar for his Lordship's attention, to the effect that both parties had reached a settlement and had signed "Consent Order" which they were requesting his Lordship to approve and record. The opening paragraph of the "Consent Order" indicated that it had been entered by both parties:

5 *"In the presence of their respective counsel, Mr. Kiiza Kabudamu Esq. Counsel for the appellant and Mr. Kintu Felix Esq. Counsel for the respondent."*

The learned Justice refused to endorse the order and one of the reasons for refusal was that:

10 *"1...*

2. Mr. Kintu Felix who purported to act for the respondent was appearing towards the end of the matter without filing in court a "Notice of Change of Advocates" from Mr. Muhwezi, counsel who argued the reference for the respondent, to Kintu."

15 According to paragraph 5(l) of the affidavit in support of the application, after this, the applicant proceeded to make the declaration in the document entitled *"Certificate of Instructions to Lawyers"* before Her Worship Harriet Ssali on the 15th May, 2013 declaring that:

20 *"I, Miriam Kuteesa, hereby declare, confirm and clarify that my lawyers representing me in this matter are M/S Muhanguzi, Muhwezi & Co Advocates."*

There is an endorsement in Annexure "D" to the effect that a copy of the document was served on M/S Kyazze and Co. Advocates on the 22nd May, 2013 at 10:57 a.m.

25 Further, it is not in dispute that Mr. Kiiza appeared for the respondents and Ms Grace Nakalema from M/S Kintu Nteza and Co. Advocates represented the applicant in *Court of Appeal Reference No. 294 of 2013*. Again, there was no Notice of Change of Advocates by the said law firm.

30 Mr Kyazze has relied on the "Notice of Instruction" dated 5th June, 2014, in respect of *Misc. Application No. 32 of 2012*, but then, as rightly argued by Mr. Muhwezi, the parties indicated therein are different. They are "Muhammed Kisule (as the applicant) vs. Miriam Kuteesa (as the

5 respondent) and then 1.The Commissioner for Land Registration
2.Christine Nakalanzi 3. Edith Nantumbwe Kizito 4. Jimmy Kizito 5.
Joshua Mukalazi 6. Daudi Kiwuuta Kizito and 7. Erina Nankya.

10 Moreover, the purported Notice of Change of Instructions was neither
copied to the applicant nor Muhwezi Law Chambers who are her duly
instructed lawyers on court record in *Court of Appeal Civil Reference No.
36 of 2012*.

15 We would also have expected an affidavit from one of the lawyers from the
said law firm establishing that the applicant had instructed them to
represent her in court, but there is no such affidavit on court record. This
leaves us with only one conclusion, the applicant never instructed the firm
M/S Kintu Nteza to represent her at all in the suit.

20 In our view, their conduct, as evidenced by the contents of the impugned
“Consent Orders”, also points to an irresistible inference that the said law
firm was not in fact protecting the interest of the applicant, but that of the
respondents who desired to overturn the decision of the High Court which
was in favour of the applicant.

25 As for Mr. Kyazze’s argument that Mr. Muhwezi had acknowledged in
April 2014 that M/S Kintu Nteza and Co. Advocates had got instructions
from the applicant by indicating that they were taking over instructions
from the said firm, our opinion is that, having had no instructions to
represent the applicant initially, the act of taking over instructions by
Muhwezi cannot correct the irregularity we have already pointed out.

30 In the premises, we find merit in Mr. Muhwezi’s submission that the
Notice of Appeal contravened Rule 74(1) of the Supreme Court Rules
which provides that:

*“(1) An intended appellant shall, before or within seven days after
lodging notice of appeal, serve copies of it on all persons directly
affected by the appeal; but the court may on application, which may*

5 *be made ex parte, direct that service need not be effected on a person who took no part in the proceedings in the High Court or the Court of Appeal”.*

10 This Court has had occasion to consider the application of this rule before. In the case of **Francis Micah vs Nuwa Walakira, SCCA No. 24 of 1995**, for example, this Court held that the Rule is mandatory. That the object of the rule is to ensure that the rights of any party who is likely to be directly affected by the result of an appeal should not be affected without giving the party an opportunity of being heard.

15 The service of the Notice of Appeal on the firm of M/S Kintu Nteza and Co. Advocates was thus invalid since it was not the firm that was duly instructed by the applicant to represent her in the matter.

Rule 78 under which the application was brought provides that:

20 *“A person on whom a Notice of appeal has been served may at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.”*

25 The Notice of Appeal that has not been served on the persons directly affected by the appeal is accordingly struck out for that reason.

2. *The appeal was filed outside the prescribed time without leave of Court*

This ground was not canvassed by the applicant’s counsel. In any case it is superfluous, in light of our findings above.

3. *The interim order was consented to without the applicant’s instructions.*

30 The answer to ground 1 covers this ground as well. Besides, the interim order was entered on the basis that there was a valid Notice of Appeal. This ground succeeds as well.

5 4. & 5. *Abuse of the Court Process*

10 We make two findings under these two grounds on the basis of the evidence before court. The first one is that, since the application for extension of time within which to file the Notice of Appeal was dismissed by his Worship Ajiji on the 30th July, 2012, there is no appeal against the decree of the High Court on record. Therefore, all subsequent applications before the Courts including *Court of Appeal Reference No. 294 of 2013, and SCCA No. 11 of 2014*, have no basis in law.

15 The other important finding is that the decree in *High Court Civil Suit No.95 of 2009* was actually fully executed way back on the 1st January, 2010 under Instrument No. KLA 479500. According to the evidence on record, the name of the applicant was entered on the title deed as the registered proprietor. In the circumstances, all other subsequent efforts by the respondents to change the status quo by connivance between Mr. Kyazze and M/S Kintu Nteza and Co. Advocates using "Consent Orders" are therefore futile.

20 Their action is actually tantamount to the kind of abuse of the process of the court that this Court is enjoined to prevent by Rule 2(2) of the Supreme Court Rules.

25 For the reasons we have given above, we grant this application and order that:

1. *The Notice of Appeal in Court of Appeal Civil Application No. 294 of 2013 filed on 30th December, 2013 is hereby struck out.*
2. *Supreme Court Civil Appeal No.11 of 2014 is struck out.*
- 30 3. *The interim order of stay of execution in SC Misc. Application No. 02 of 2014 issued on the 23rd January, 2014 is vacated forthwith.*

5 Dated at Kampala this... 21st day of... July2015.

.....*B.M. Katureebe*.....

B.M.KATUREEBE
CHIEF JUSTICE

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.....*M.S. Arach-Amoko*.....

M.S.ARACH-AMOKO
JUSTICE OF THE SUPREME COURT

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.....*DR. B.J. Odoki*.....

DR.B.J.ODOKI
AG.JUSTICE OF SUPREME COURT

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.....*J.W.N Tsekooko*.....

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

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.....*G.M. Okello*.....

G.M.OKELLO
AG.JUSTICE OF THE SUPREME COURT