IN THE COURT OF APPEAL OF UGANDA

Coram: Mutangula Kibeedi, Mulyagonja and Luswata, JJA

CIVIL APPLICATION NO 549 OF 2022

(Former Civil Application No 67 of 2022)

{Arising from the decisions of Sekana Musa, J. dated 27th January 2022 and 15th February 2022 in High Court Miscellaneous Application No 843 of 2021}

BETWEEN

MALE H. MABIRIZI KIWANUKA :::::::::::::::::::::::::::::::: APPLICANT

AND

ATTORNEY GENERAL :: RESPONDENT

RULING OF THE COURT

Introduction

The applicant brought this application under the provisions of Article 28(1), 44 (c) and 134 (2) of the Constitution, section 3[illegible] of the Judicature Act and rules 6 (2), 42 (2), 43 (1) and (2) of the Judicature (Court of Appeal Rules) Directions. He sought an order that he be temporarily released from prison until the final determination of his appeal challenging the decision of the High Court to sentence him to 18 months' imprisonment for contempt of court, and the costs of the application.

The grounds of the application were set out briefly in the Notice of Motion but amplified in his affidavit in support affirmed on the 28th February 2022. The applicant also filed a supplementary affidavit deposed by Obwana Martin on 28th February 2022. The respondent filed an affidavit in reply to oppose the application deposed by Mr

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Kodoli Wanyama, Principal State Attorney in the Ministry of Justice and Constitutional Affairs on the 28th June 2022.

Representation

When the application was called for hearing on the 29th June 2022, the applicant (also herein referred to as "the contemnor") appeared *pro se*. The Attorney General was represented by Mr Richard Adrole, Principal State Attorney who appeared with Ms Gorretti Arinaitwe and Mr Hillary Ebila, both State Attorneys from the Ministry of Justice & Constitutional Affairs.

The Parties' Affidavits

In his affidavit in support, the applicant stated that he was dissatisfied with the decision of Sekana, J delivered on 15th February 2022 upon which he filed a Notice of Appeal and requested for a typed record of proceedings. He clarified that he was the respondent in HCMA No 843 of 2021 whose ruling was delivered on 27th January 2022. That subsequently, another ruling was delivered in the same application on 15th February 2022 in which it was found that he was in contempt of court and he was sentenced to 18 months in prison.

The applicant further stated that on the 10th February 2022 he came across a Notice to Show Cause why he should not be committed to Prison for violating a court order, for the 11th February 2022. He contended that he was not aware of the court order he violated and the registration number of the Application filed by the Attorney General in that regard but he knew that the Notice would render his appeal nugatory because if he was committed to civil prison the subject matter of the appeal would be disposed of and overtaken by events. He further deposed that in the evening of 10th February 2022,

he filed HCMA Nos 85 and 86 of 2022 for stay of execution and interim orders for stay of execution but they have never been heard.

The applicant went on to state that on 11th February 2022 he filed an application for Judge Musa Sekana to recuse himself but by the 15th February 2022, it had not been determined, so he had not yet got the mandatory response to his application from the said Judge. Further that on the same day he filed opposition to the application to have him committed to prison on the grounds that he had not been served with any court order in HCMA No 843 of 2021 by any person. And that HCMA No 843 of 2021 is on appeal, and he filed HCMA Nos 85 and 86 of 2022 for stay of execution but they were still pending before court. He added that he was not aware of any order stating that committal to prison was an alternative that could be exercised if he did not comply. Hence the order for committal has no basis.

He further stated that on 14th February 2022 he requested for a signed ruling of the judge in HCMA No 843 of 2021 but his Clerk informed him that she had none. And that in the evening of 14th February 2022 service of a letter from the Attorney General to the Principal Judge requesting that he be summoned to substantiate allegations and show cause why he should not be held in contempt of court was effected upon his lawyers. He explained that it was not possible for him to file affidavits in reply because in the morning of 15th February 2022 he was scheduled to appear before the East African Court of Justice Appellate Division for hearing of an application between himself and the Attorney General of Uganda; Application No 02 of 2022.

The applicant further explained that indeed on that day he did appear before that court with the Attorney General himself and nine (9) lawyers on his team. Further that with regard to the notice to show cause his lawyers, Ojok Advocates represented him and they informed

him that they were served in court with the order in HCMA No 843 of 2021. That they also informed him that they made an application that the court first determines the application for recusal since the trial judge was the very person mentioned in the complaint in the Attorney General's letter but the judge did not respond. That the lawyers further informed him that they objected to an application by letter contrary to procedures required by the law but the objection was overruled. That they further referred to his written opposition to imprisonment but the trial judge ignored it. And that similarly, the trial judge refused to first hear his application for stay of execution referred to above. That the judge then made an order that he be arrested and committed to prison for 18 months on account of breach a court order of "STRONG WARNING."

The applicant went on to contend that as a lawyer, he knows that a strong warning cannot be enforced since it did not require any positive action from him. That he also knows that the judge having received his applications for stay of execution earlier went ahead to determine letters and sentenced him to imprisonment for 18 months, a clear indication that the court refused to hear his applications, meaning that this court has to exercise its jurisdiction. That when the applications for stay of execution were called on for hearing, Judge Sekana recused himself from the case on the basis of the applicant's application on the 10th February 2022 that he recuses himself. That he knows that the recusal rendered the ruling that he be committed to prison null and void since the Judge was disqualified from sitting.

The applicant further stated that on 15th February 2022, the Registrar issued a warrant of arrest without any application for execution of the order for imprisonment. And that on 21st February 2022 he was arrested and is currently in prison despite appealing against the entire

decision in HCMA No 843 of 2021. Further that in his ruling on 25th February 2022 Madrama, JA stayed execution of the order to pay a fine of UGX 300 million but declined to stay execution of his imprisonment on the ground that he had to file another appeal. That without prejudice to the reference against his decision, he had since filed a Notice of Appeal against the decision of 15th February 2022 and a letter requesting for the proceedings.

The applicant went on that there are arguable grounds of appeal and he knows that his appeal has a strong likelihood of success. That the application was filed without delay and there is a serious and real danger of keeping him in prison despite the appeal against the order for imprisonment. Further that his right to be heard will be curtailed if this application is not granted. That he would also suffer substantial loss if it is not granted and since the imprisonment is the result of a process that he is challenging on appeal the ultimate result will be a liability resulting from a disputed decision. He contended that the balance of convenience is in his favour and in the interests of justice, equity, fairness and the need to preserve the rule of law, this application should be allowed.

The contemnor filed a supplementary affidavit to support his application on the 28th June 2022. On the 30th June 2022, he wrote a letter to the Registrar of this court, received on 8th July 2022, and the Registrar brought the letter to our attention. It referred to the applicant's supplementary affidavit filed on the 28th June 2022 and he requested the Registrar to bring the affidavit to our attention because he forgot to do so when he appeared before us on 29th June 2022. He requested that we consider the affidavit before we deliver our ruling in this matter.

We have considered the informal application by the applicant. We have also perused the submissions of the respondent on this application. There is no evidence at all presented to this court that the said supplementary affidavit, which has 17 paragraphs with annexures thereto, was served on the respondent. Needless to say, the respondent did not file a reply to any of the allegations in the said affidavit. It is also clear from the respondent's submissions filed on 4th July 2022, several days after the affidavit was received by this court, that the contents of the supplementary affidavits were not addressed by the respondent.

Rule 44 of the Court of Appeal provides for supporting documents in applications before this court, in part, as follows:

> **(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.**
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> **(2) An applicant may, with the leave of a judge or with the consent of the other party, lodge one or more supplementary affidavits.**
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> **(3) Application for leave under subrule (2) of this rule may be made informally.**

We would have considered the contents of the supplementary affidavit but it was never served on the respondent. The provisions of rule 44 (4) of the Court of Appeal Rules appear to us to be mandatory and for obvious reasons. This court has control of its proceedings. It also has the duty to ensure that the management of court process is fair to all parties. The supplementary affidavit contains new facts, including that the contemnor's life is at risk from infestation of the prison by bugs, lice and mosquitoes, and so his life is in danger if this court does not grant the order to release him, to which the respondent would be entitled to a reply. In view of the fact that there is no evidence that the

Attorney General was served with a copy of the supplementary affidavit, and he did not consent to its admission, we are unable to admit it onto the record.

The Attorney General's affidavit in reply sworn by Kodoli Wanyama, PSA, states that following the ruling of the High Court in HCMA No 843 of 2021 on 27th January 2022, the applicant made a series of attacks on the court and the trial judge, Sekana, J on his social media accounts, to wit: Uganda People's Interests on Facebook and @MaleMabiriziHKK on Twitter. That by letters dated 7th and 11th February 2022, the respondent brought the posts to the attention of the High Court stating that the applicant acted in blatant disregard of the orders issued on 27th January 2022. Further that the applicant was summoned by the court to show cause why he should not be held in further contempt of court.

Mr Wanyama further averred that at the hearing on 11th February 2022, the applicant was represented by counsel. The court heard the applicant and found him guilty of further contempt and sentenced him to 18 months' imprisonment. A copy of the court order was attached to his affidavit as Annexure "B." He further stated that a warrant of arrest was issued in execution of the court order and the applicant was arrested and committed to Kitalya Minimax Prison to implement the order of court. A copy of the warrant, marked "B" was attached to the affidavit. He added that he knowns that the application to stay execution of the said order has been overtaken by events because the applicant has already been incarcerated and is serving the sentence handed down by court on 15th February 2022.

He went on to state that the applicant filed applications for temporary release from prison before the High Court but they have since been dismissed. That the applicant's proposed appeal does not have

arguable grounds and has no likelihood of success. That the applicant is a convict for criminal contempt and the remedy of a temporary release is not available to him. Further that he will not suffer substantial loss or any loss that he may suffer can be sufficiently atoned by damages. Finally, that the balance of convenience is not in his favour and his application is frivolous, vexatious and devoid of merit and an abuse of court process.

Applicant's Submissions

In his submissions, the applicant referred us to the decision of the Supreme Court in **Hon Theodore Ssekikubo & 3 Others v. Attorney General, Constitutional Application No 06 of 2012** for the proposition that where a party is exercising his unrestricted right of appeal and the appeal has a likelihood of success, it is the duty of the court to make such orders as will prevent the appeal from being rendered nugatory. He further referred us to the four (4) criteria that are considered by this court to arrive at the decision whether or not to grant the order sought, viz: (i) the appeal has a likelihood of success (ii) the applicant will suffer irreparable damage or the appeal will be rendered nugatory if the order is not granted; (iii) if criteria (i) and (ii) have not been established court must consider where the balance of convenience lies, and (iv) the application was filed without delay.

With regard to whether the appeal has a likelihood of success or a *prima facie* case, the applicant referred us to the decision of the Supreme Court in **Gashumba v Nkundiye, Civil Application No 24 of 2015,** where it was held that though the court is not at the stage of deciding the appeal, it must be satisfied that the appeal raises issues which merit consideration by the court. The applicant then drew our attention to the proposed grounds of appeal as follows:

1. That he was not accorded a fair hearing contrary to Article 44 (c) of the Constitution. He referred us to the decision in **Constitutional Petition No. 16 of 2006, Turyatemba & Others v. Uganda Land Commission,** where it was held that the right to be heard is a fundamental human right.
2. Article 28 (1) of the Constitution which provides for the right to be heard and Black's Law Dictionary (6th Edition) for the proposition that fair hearing involves the right to present evidence, to cross examine and to have a finding supported by evidence. He referred to the decision of the Supreme Court in **Election Petition No. 4 of 2009, Bakaluba Mukasa v Nambooze Betty Bakireke**.
3. That all the safeguards relating to a fair hearing were not observed by the High Court as it was stated in paragraphs 11 to 25 of his affidavit. He emphasised that he is confined in a prison despite never having appeared before any judicial officer for that purpose.
4. That it is a question for determination on appeal whether Sekana, J was a judicial officer qualified to sit in his case because he had lodged an application for the judge to recuse himself which was still pending before him but he ignored it and opted to make a far-reaching decision imprisoning him for 18 months. That an order was made for his imprisonment after service contrary to the normal 15 days given in the High Court.
5. That the warrant for his committal was issued before his arrest and upon arrest he was driven straight to prison. And that the facts above amounted to detention without trial or without any hearing and contrary to Article 6 (d) of the Treaty on the Establishment of the East African Community, which too provides for the fundamental principles that govern the achievement of the objectives of the Community by partner

states, including promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. He also cited Articles 7 (2) and 33 (2) of the same Treaty.

Mr Mabirizi referred to many other provisions of the law including Article 123 (1) of the Constitution, paragraph 28 of the National Objectives and Directive Principles of State Policy, section 39 (1) of the Judicature Act which vests jurisdiction in the High Court and section 40 (1) CPA which provides that a judgement debtor may be arrested and shall as soon as practicable be brought before the court; section 6 of the Oaths Act which he said was contravened because the affidavit of Jimmy Oburu supporting the letter upon which the court relied to issue an order for his imprisonment did not state the date on which the oath was taken. He raised many other procedural issues which he intends to raise as grounds of appeal which we did not find it useful to reproduce here.

The applicant then went on to submit that he intends to raise the question about evidence in proceedings for contempt of court in the appeal. He submitted that it is a contentious matter as to whether contempt of court can extend to alleged conversations in cyberspace, leave alone the evidence admitted about them. He referred us to **Stella Nyanzi v. Uganda**, a decision of the High Court, the full citation of which he did not provide, in which he said the trial judge made it clear that evidence is required from managers of social media sites to determine whether the offending material was posted. He complained that the court denied him the opportunity to make such submissions on both occasions. He referred to Black's Law Dictionary for the definition of contempt and contended that it cannot be proved in the absence of direct evidence, and similarly, neither can defiance of

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authority or dignity. He asserted that the case now before us is an unprecedented case.

The applicant went on to submit that it is in issue and will be raised in the appeal whether the sentence of 18 months' imprisonment was legal. He contended that it was not in doubt that the proceedings in the High Court were civil proceedings governed by the Civil Procedure Act and at no time was criminal contempt under the provisions of section 107 of the Penal Code Act brought into view. That however the trial judge went far beyond the maximum of 6 weeks set by the Civil Procedure Act in a case where there is no money to be paid which was clearly illegal. He referred to section 42 (1) (a) CPA for the submission that commitment to civil prison is in execution of decrees for payment of sums of money but the order dated 15th February 2022 did not order for payment of any money and therefore fell under cases in which imprisonment would be for a period not exceeding 6 weeks. He contended that he had spent 16 weeks in prison, which was 10 weeks beyond the statutory period.

With regard to the criterion that an applicant for stay of execution must prove that if the order is not granted he will suffer irreparable damage or substantial loss, the applicant submitted that he is being subjected to a process resulting from a decision he is challenging in this court. He referred us to the decision of the Supreme Court in **Tusingwire v Atorney General, Constitutional Application No. 6 of 2013**, where it was held that in matters relating to fundamental human rights damages cannot be easily ascertained because there is no fixed and generally accepted standard of measurement. And that an infringement of the right to a fair hearing contrary to Article 28 of the Constitution is most likely to result in irreparable damage that cannot be atoned in damages. That the continued imprisonment on

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the strength of orders which he maintains breached principles of fair hearing will no doubt cause irreparable injury.

With regard to the balance of convenience the applicant submitted that he has satisfied the conditions of a *prima facie* case and irreparable injury. The applicant nevertheless, referred us to the decision of the Supreme Court in the case of **Tusingwire** (supra) where it was held that the balance of convenience would be in favour of the applicant because if the disposal of the main petition was to find that the prosecution should continue, the same would resume without any inconvenience to the state. But on the other hand should court find that the proceedings before the court as structured were unconstitutional and therefore null and void, that would have been conclusively dealt with by the court and indeed those that would still be subjected to such proceedings would have been extremely inconvenienced. He thus concluded that in his case if the court finds that his rights were infringed, especially the right to a fair hearing, and that the imprisonment was unlawful, he would continue serving the sentence from where he will have stopped, but it will be a great inconvenience to him to continue going through the hardships of imprisonment and later succeeding in the appeal. He concluded that the balance of convenience was in his favour.

Mr Mabirizi referred us to what he described as *"other relevant considerations"* including the powers of this court under rule 2 (2) of the Court of Appeal Rules which empowers us to look at other factors surrounding the dispute in order that we make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of the court caused by delay. He referred to the decision of the Supreme Court in the case of **Alcon International Limited v. The New Vision Printing and Publishing Co Ltd & Another, Civil**

Application No. 4 of 2010, where the court issued orders against a person who was not a party in the main appeal.

The applicant went on to submit that imprisonment can be stayed at any time before its completion the same way a criminal sentence is suspended by way of bail pending appeal. He submitted that this proposition is grounded on sections 42 (2) (e) and 43 (3) (b) of the Civil Procedure Act, which relate to committal of a judgement debtor and release from prison on the ground of his suffering from any serious illness, and rule 6 (2) (b) of the Rules of this Court which provides that the court may order a stay of execution, injunction, or stay of proceedings on such terms as the court may think just.

The applicant also contends that imprisonment is a mode of execution and it continues up to the last day in prison and arrest does not render it overtaken by events because staying in prison amounts to partial execution. He again referred us to the decision of the Supreme Court in the case of **Gashumba** (supra) where it was held that the destruction of 2 semi-permanent houses which belonged to one of the parties was stopped before the destruction of the permanent house. That the court therefore found that this was partial execution that could be stayed. That therefore, in the instant case though it is true that he was imprisoned he had only spent 4 out of the 18 months in prison and the rest of his term was still running, meaning that execution was continuing and could be stayed.

The applicant drew our attention to the decision of Madrama, JA, in **Court of Appeal Civil Application No 40 of 2022**, where he held that the court had no jurisdiction to stay orders issued by the High Court on 15 February, 2022 until or unless the applicant challenges them by means envisaged under rule 6 (2) and 76 of the Rules of this Court. That the prayer to suspend the applicant's imprisonment and set him

free pending his application or appeal could not be granted for want of jurisdiction. The applicant submitted that he had since filed a Notice of Appeal against the orders of 15th February, 2022 and certified copies of the ruling were requested for.

Mr Mabirizi also drew our attention to another fact which he thought should be considered, that is, that his imprisonment is contrary to the Constitution which in clear terms prohibits detention without trial. He asserted that paragraphs 11 to 25 of his affidavit in support of the application show that he was detained without trial because he never appeared before any judicial officer before his detention. The applicant referred us to Article 23 (6) (a) of the Constitution to support the submission that the provision provides that where a person is arrested in respect of a criminal offence, that person is entitled to apply to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable. That in the case of an offence which is triable by the High Court as well as by a subordinate court, if that person has been remanded in custody in respect of the offence for 60 days before trial that person shall be released on bail on such conditions as the court considers reasonable. He contended that he had spent more than 60 days in jail by 20 April, 2022 but he is still in prison and no trial has taken place.

He further referred to the definition in section 15 (4) (b, e to h) of the Human Rights Enforcement Act of 2019 which provides for the criteria for determining unreasonable detention. He then submitted that his case meets the above conditions for unconditional release because on 20 June, 2022 he made 120 days in prison without trial because the proceedings under which he was imprisoned were irregular and unlawful and amounted to a miscarriage of justice.

He finally submitted that this court is required to uphold human rights and the Constitution by suspending or staying his continued detention without trial. And that having satisfied the mandatory conditions for the grant of his application for temporary release from prison, the application be allowed and he be released from prison and awarded costs of the application.

Respondent's Submissions

The respondent submits that the remedy of temporary release sought by the applicant is alien and unknown to our legal system. That therefore this court lacks jurisdiction to either entertain it or grant such a remedy as it is not provided for in any law in Uganda. That the applicant relies on rule 6 (2) (b) of the Court of Appeal Rules and the only remedies permissible under this rule are either a stay of execution, an injunction or stay of proceedings. Secondly the respondent submits that the applicant was convicted of criminal contempt in accordance with Article 28 (12) of the Constitution of Uganda and that therefore the only remedy that is available to him is bail pending appeal, not temporary release from prison or stay of execution as the applicant suggests.

Counsel for the respondent reminded us that the applicant has been convicted of contempt of court twice already. That the principle of law is that a contemnor who has not purged himself of contempt has no audience before the court. Counsel relied on the decision in **Housing Finance Bank Ltd v. Edward Musisi, Court of Appeal Miscellaneous Application No 188 of 2010.** He emphasised that because he has not paid the fine of UGX 300,000,000 and served the full-term of his imprisonment of 18 months, the applicant has no right to be heard before this court. Nonetheless, counsel for the respondent

went on to address us about the criteria for the grant of applications for stay of execution that are normally considered by this court.

He submitted that the power of this court to grant applications for stay of execution is derived from rule 6 (2) (b) of the Court of Appeal Rules. And that in the case of **Hon Theodore Ssekikubo** (supra) the Supreme Court held that the rationale of that provision is to preserve the *status quo* pending the determination of the appeal. He contended that the *status quo* in this case is that the applicant was convicted to serve a period of 18 months in prison for contempt of court; a warrant of arrest was extracted and the applicant was apprehended and is now detained in prison. Further that in **Civil Application No. 40 of 2022, Male Mabirizi v Attorney General,** a single justice of this court held that the application for stay of execution with regard to the notice to show cause issued by the High Court on 9th February, 2022 for violation of a court order had been overtaken by events because the applicant had already been arrested and committed to prison.

The respondent's counsel further drew our attention to the decision of the Supreme Court in **China Henan International Corporation Group v Justus Kyabahwa**, **Civil Application No. 30 of 2021, UGSC 19,** in which the court held, where an order absolute had been granted in garnishee proceedings, that it could not stay execution since the execution was completed on the grant of the decree absolute. That the only remedy in such a situation was for the applicant to apply to set aside the order, for convincing reasons. He then invited us to find that the application for stay of execution or temporary release from prison is moot and academic since it has been overtaken by events. Nonetheless, he went on to address the court on the established criteria considered by the courts for the grant of stay of

execution, as they were restated in the case of **Gashumba v Nkundiye** (supra).

With regard to the criterion whether the applicant has a *prima facie* case or whether the appeal has a likelihood of success, counsel for the respondent submitted that although the applicant has not yet filed the appeal which would reveal the grounds of his appeal and aid this court in determining whether the appeal would have triable issues, the appeal has no likelihood of success.

With regard to the submission that the appeal would raise issues on the question of a fair hearing and the illegality or otherwise of the 18-month sentence by the High Court, counsel submitted that from the ruling of the court dated 15th February, 2022 the court enumerated the brief facts about how the contempt allegations were brought to its attention. That it was in 2 letters filed by the Attorney General that laid out the facts. That the court issued a notice to show cause why the applicant should not be held in contempt and the applicant responded by letter and later by affidavit denying the said allegations. And that at the hearing it was indicated that the applicant was represented by learned counsel, Nuwe Noe,l from the firm of Ojok & Co, Advocates.

The respondent's counsel went on to agree with the applicant that the right to be heard is derived from Article 28 and 44 (c) of the Constitution. Further that it has been enunciated in several decisions flowing from **Cooper v. Wandsworth Board of Works [1863] 143 ER at 414,** where the court held that even God afforded that right to Adam and Eve in the garden of Eden. He asserted that it was evident from the ruling of the High Court that the applicant responded to the notice to show cause and even went ahead to file an affidavit in further response. Further that he was represented at all times during the

hearing and it defeats logic for him to turn round and allege that he was not accorded a hearing. Counsel then concluded that *prima facie* this ground lacks even the slimmest chance of success on appeal.

Counsel further submitted that the applicant argues that he made an application for the Judge Sekana to recuse himself from hearing the case and the judge rejected it, but this issue goes to the merits of the appeal and would require evidence from the record of proceedings of the lower court to determine its veracity.

With regard to the proposed ground that the sentence of 18 months in prison is illegal, the respondent's counsel submitted that contempt of court proceedings are between the court and the contemnor. Further that Article 28 (12) of the Constitution provides that except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty prescribed by law. Counsel referred us to the decision in the case of **Ivan Ssebaduka v Chairman of Electoral Commission & 3 Others** (Arising from Presidential Electoral Petition No. 1 of 2020) in which the Supreme Court held that the Constitution recognised the gravity of criminal contempt as well as civil contempt when it singled out the provision on prohibition of trial and conviction of anyone for the offence which is not expressly defined by law and for which no penalty is prescribed.

The respondent's counsel further referred us to the decision in **Dawaru v. Angumale & Another, HCMCA No 96 of 2016 [2017] UGHCCCD 18 (29 March 2017),** as persuasive authority, where the court held that contempt which is not committed in the face of the court is a kind that is *sui generis*. That it is initiated by a litigant who by motion brings to the attention of court conduct that is presumed to be contemptuous. That all contempt proceedings are matters between the court and the alleged contemnor and any person who moves the

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machinery of the court for contempt only brings to the notice of the court certain facts constituting contempt of court. And that after furnishing such information he or she may still assist the court but it must always be born in mind that in contempt proceeding there are only 2 parties, namely, the court and the contemnor.

Counsel concluded the submission on this point by stating that a judicial officer has wide discretion to prescribe a penalty for contempt of court and that the applicant's suggestion that the maximum sentence he should have received for the said contempt was 6 weeks was incorrect. And that therefore, the proposed appeal had no chance of success on the basis of that proposed ground as well.

As to whether injury which cannot be atoned by damages with be occasioned to the applicant if this application is not granted, counsel for the respondent submitted that the applicant was condemned to 18 months in prison and he had already started serving the same. That in the unlikely event that the appeal is heard and determined in his favour the respondent is in a financial position to pay the damages with interest, if court orders them. He referred us to the principles that were enunciated in **American Cyanamid v Ethicon Ltd [1975] AC at page 396,** that if damages at common law would be an adequate remedy and if the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the plaintiff's claim appears. Counsel then submitted that the applicant if he suffers any injury can be compensated by an award of damages.

Going onto the balance of convenience counsel for the respondent submitted that the balance of convenience tilts towards the respondent. The respondent as an officer of the court has a legal duty to ensure that courts of law are respected. That in case the applicant

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is granted a stay of execution this would send the wrong message to the general public that a person can be contemptuous by abusing court and judges and when sentenced easily obtain a stay of execution. Counsel emphasised that the respondent as head of the bar and officer of this court is enjoined to protect the sanctity of court and dissuade court users and the entire public from defiling and abusing the court. That in such proceedings if the respondent sits on the fence, he would by implication be condoning the defilement of the temple of justice. That the balance of convenience is on the respondent's side since the applicant is a contemnor who has not purged himself of contempt. He concluded that the applicant had not presented his case to the required standard to meet the grounds for the grant of stay of execution of the ruling of the High Court and his application should be dismissed with costs.

Determination

Before we dispose of this application, it is pertinent to note that the applicant's efforts to obtain an order to stay execution of the orders issued against him on 27th January 2022 and 15th February 2022 in HCMA No 843 of 2021 for contempt of court resulted in the filing of the following applications in respect of the same matter in this court:

1. Civil Application No. 39 of 2022, in which the applicant sought an order to stay all orders in HCMA No 843 of 2021 until final determination of his appeal;
2. Civil Application No 40 of 2022 for an interim order to stay all orders in HCMA No 843 until final disposal of his application in CACA No 39 of 2022;
3. Civil Reference No 91 of 2022 being a reference to the full bench in respect of the orders of Madrama, JA in Civil Application No

40 of 2022 refusing to grant him an order to stay execution or release him from prison;

4. Civil Application 433 of 2022 for an interim order for interim release from prison until final determination of his substantive application for temporary release upon an application to nullify the decision of Madrama, JA in Civil Application No 40 of 2022 where he refused to release the applicant;
5. Civil Application No 64 of 2022 for temporary release from prison until final determination of the Reference No. 91 of 2022;
6. Civil Application No. 434 of 2022, filed in June 2022, in which the applicant sought for temporary release from prison until final determination of an application to declare the ruling of Madrama, JA refusing to grant an order to release him from prison in his ruling in Civil Application No 40 of 2022, null and void;
7. Civil Application No. 436 of 2022 in which the applicant sought for interim release from prison until final determination of his application for an interim order, arising out of his application for a temporary order pending hearing of his application to nullify the ruling of Madrama, JA, wherein he declined to release the applicant from prison in his ruling in Civil Application No 40 of 2022;
8. Civil Application No. 546 of 2022, in which he sought for an *ex parte* order for interim release from prison until final determination of his application *inter parte,* for interim release pending determination of the appeal challenging the decision of the High Court to sentence him to 18 months' imprisonment for contempt of court;

9. Civil Application No. 547, former CA No. 66 of 2022, filed on 1st March 2022 in which the applicant sought an *ex parte* interim order for interim release from prison;
10. Civil Application No. 548 of 2022 filed on 1st March 2022, in which the applicant sought an interim order for interim release from prison until final determination of his substantive application for temporary release from prison, pending determination of his appeal challenging the decision of the High Court to sentence him to 18 months' imprisonment for contempt of court;
11. Civil Application No 550 of 2022 in which the applicant sought an order for interim release from prison until final determination of the reference challenging refusal by Madrama, JA to release him from prison in Civil Application No. 40 of 2022; this application arose out of the instant application; and
12. Civil Application No 549 of 2022, the instant application, in which the applicant seeks temporary release from prison pending the determination of his appeal, not yet filed in this court.

We shall comment about the multiplicity of applications filed by the applicant in this court in response to the orders of the High Court against him in HCMA No 843 of 2021 as we conclude our decision in this matter.

We recall that on 29th June 2022, all the applications above were set down for hearing and disposal before us. We made the decision to consolidate Civil Application No 39 of 2022 with Civil Application No. 91 of 2022, the Reference from the decision of Madrama, JA in Civil Application No. 40 of 2022 and stayed the rest of the applications, except the instant application. In Civil Applications No 39 and 91 of

2022, we declined to grant an order to stay the order that the applicant be imprisoned for contempt of court but we upheld the decision of Madrama, JA that the payment of the fine of UGX 300,000,000 imposed upon him on 27th January 2022 be stayed, for the reasons that we stated therein.

We note that the only difference between the facts stated in the instant Application and Civil Applications No. 39 and 40 of 2022 is that while he had not filed a Notice of Appeal in respect of the decision of Sekana, J that was delivered on 15th February 2022 committing him to prison at the time that Civil Application No 40 of 2022 was heard, the applicant filed a Notice of Appeal against that decision on the 25th February 2022, the date on which Madrama, JA rendered his decision. That brings him within the ambit of rules 6(2)(b) and 76 of the Court of Appeal Rules for this court to exercise its jurisdiction with regard to his application for stay of execution or release from prison, as he calls it.

In Civil Application No 39 of 2022 in which the applicant applied to stay execution of all orders in HCMA 843 of 2021, we considered his application against the four (4) criteria that have been established by the courts in order to stay execution as they were restated in **Gashumba's case** (supra). We found that there was no competent application to stay the arrest and detention of the applicant before court at the time. And that even if there was, it would have been overtaken by events. The conclusion on that application is at page 28 of our ruling as follows:

> *"... In addition, where a party seeks to stay execution of an order, the application can only be granted before execution sets in. In this case, the applicant brought the application to stay execution of the order against him to pay UGX 300 million. Subsequent to the order, another order was issued in the same application for him to be arrested and*

committed to civil prison on separate allegations of contempt of court. That order was executed and the applicant is now in prison serving the sentence imposed of 18 months' imprisonment. If there was any valid application before this court to stay that order, it would have been overtaken by the event of his arrest and imprisonment, but we have established that there was in fact no application at all in that regard.

For that reason and the fact that the applicant did not prove that the appeal that he proposed had a likelihood of success and that he would suffer irreparable damage, we dismissed the application. We therefore do not think it expedient to revisit the arguments that were made on the basis of the criteria considered in applications for stay of execution that are considered by this court on applications brought under rule 6 (2) of the Rules of this Court.

The remedy that the applicant seeks in this application is that this court makes an order that he be released from prison temporarily before the determination of his proposed appeal against the decision of the High Court to commit him to prison for 18 months for contempt of court. Apart from rule 6 (2) of the Court of Appeal rules, the applicant based his Notice of Motion upon the provisions of Article 28 (1), 44 (c) & 134 of the Constitution and section 33 of the Judicature Act, and rules 42 (2) and 43 (1) and (2) of the Court of Appeal Rules.

Counsel for respondent argued that (i) the remedy of release from prison following a committal for contempt of court is not available to the applicant under the laws of Uganda; (ii) the applicant has no audience before this court till he purges himself of contempt and that the purgation would be by the payment of the fine of UGX 300,000,000/= ordered by the High Court. It is pertinent to note that when he appeared before us on the 29th June 2022, the applicant opted not to file submissions in rejoinder to those of the Attorney General wherein these important issues were raised. In spite of that, it

behoves this court to consider the following issues raised by the Attorney General in the determination of this application:

i) Whether the contempts for which the applicant was committed to prison were criminal or civil contempts.

ii) Whether the contemnor is under the obligation to purge himself of the contested contempts; and if so, how;

iii) Whether the remedy of release from prison following a committal for contempt of court is available to the contemnor.

Whether the contempts for which the applicant was committed were criminal or civil contempts.

We note that there is a contradiction in terms in this case which requires us to establish the kind of contempt that is alleged to have been committed by the contemnor. The Attorney General's application to the court was hinged on the precursor that the court on 27th January 2022 issued a strong warning to Mr Male Mabirizi to stop attacking judicial officers. That the subsequent posts on his Twitter handle were in blatant violation of the said court order. The proceedings that were initiated against the contemnor by the Attorney General therefore seemed, at first to be for the violation of a court order, usually placed in the category of civil contempt but the order that was made by the court did not state that he was committed to a civil prison.

The applicant on the other hand asserts that he was committed to civil prison and so cites various provisions in the Civil Procedure Act which he contends limit the period of imprisonment in such circumstances. In the same breath, he asserts that Article 23 (6) of the Constitution applies to his case. That where a person is arrested in respect of a criminal offence, that person is entitled to apply for and be released on

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bail on reasonable conditions. And that in case of an offence triable by the High Court or a subordinate court, if that person has been remanded in custody for 60 days, he shall be released on bail on conditions that the court deems reasonable. It is because of these contradictions that we deemed it necessary to establish the difference between civil and criminal contempt and establish which of the two apply to the applicant's case, because the remedies available for the two have some variations.

Civil versus Criminal contempt of court

Black's Law Dictionary (9th Edition, West Publishing Co.) defines *"civil contempt,"* at page 360, as:

> *"The failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the court order. The act (or failure to act) complained of must be within the defendant's power to perform, and the contempt order must state how the contempt may be purged. Imprisonment for civil contempt is indefinite and for a term that lasts until the contemnor complies with the decree."*

Criminal contempt on the other hand is defined by the same source as follows:

> *"An act that obstructs justice or attacks the integrity of the court. A criminal contempt proceeding is punitive in nature. The purpose of criminal contempt proceedings is to punish the repeated or aggravated failure to comply with a court order. All the protections of criminal law and procedure apply and the commitment must be for a definite period."*

In **Poje v. Attorney General for British Columbia, [1953] 1 S.C.R. 516 at 522**, the Supreme Court of Canada distinguished the two different forms of contempt in the text below:

"[T]he distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; but that contempt in disregarding orders or judgments of a Civil Court or in not doing something ordered to be done in a cause, is not criminal in its nature. In other words, where contempt involves a public injury or offence, it is criminal in its nature, and the proper remedy is committal - but where the contempt involves a private injury only it is not criminal in its nature."

In **Home Office v Harman [1983]1 AC 280, at page 310,** Lord Scarman explained the difference between criminal and civil contempt in the following passage:

"...The distinction between 'civil' and 'criminal' contempt is no longer of much importance, but it does draw attention to the differences between on the one hand contempts such as 'scandalising the court', physically interfering with the course of justice, or publishing matter likely to prejudice fair trial, and on the other those contempts which arise from non-compliance with an order made, or undertaking required, in legal proceedings. The former are usually the business of the Attorney-General to prosecute by committal proceedings (or otherwise); the latter, constituting as they do an injury to the private rights of a litigant, are usually left to him to bring to the notice of the court. And he may decide not to act: he may waive, or consent to, the non-compliance."

And in **Attorney-General v Times Newspapers Ltd [1992] 1 AC 191,** at pages 217-218**,** Lord Oliver distinguished the two forms of contempt as follows:

"A distinction (which has been variously described as 'unhelpful' or 'largely meaningless') is sometimes drawn between what is described as 'civil contempt', that is to say, contempt by a party to proceedings in a matter of procedure, and 'criminal contempt'. One particular form of contempt by a party to proceedings is that constituted by an intentional act which is in breach of the order of a competent court. Where this occurs as a result of the act of a party who is bound by the order or of others acting at his direction or on his instigation, it constitutes a civil contempt by him which is punishable by the court at the instance of the party for whose benefit the order was made and which can be waived by him. The intention with which the act was done will, of course, be of

the highest relevance in the determination of the penalty (if any) to be imposed by the court, but the liability here is a strict one in the sense that all that requires to be proved is service of the order and the subsequent doing by the party bound of that which is prohibited. When, however, the prohibited act is done not by the party bound himself but by a third party, a stranger to the litigation, that person may also be liable for contempt. There is, however, this essential distinction that his liability is for criminal contempt and arises not because the contemnor is himself affected by the prohibition contained in the order but because his act constitutes a wilful interference with the administration of justice by the court in the proceedings in which the order was made. Here the liability is not strict in the sense referred to, for there has to be shown not only knowledge of the order but an intention to interfere with or impede the administration of justice – an intention which can of course be inferred from the circumstances."

In his ruling dated 15th February 2022, Sekana, J. laid down the allegations of contempt contained in the publications of the contemnor on his Twitter account in detail when he reproduced the contents of the affidavit in support of the application for a Notice to Show Cause why he should not be committed for contempt. It is pertinent to the orders that we make that we reproduce here the statements that were found to have been published by the contemnor and for which he was held to be in contempt of court. They were as follows:

1. *In a letter to the Uganda Judicial Officers Association, a notice of intention to sue Sekana, J over UGX 850 million he wrote: "It is unfortunate that **COWARDLY Judge Sekaana Musa**, who is facing disciplinary actions in Judicial Service Commission for purposes of having him removed from office has resorted to using your office to resolve his personal unethical challenges. You ought not to have allowed your Association to be misused. Let Sekaana carry his own cross until when he is removed from office."*
2. *On 28th January 22 Mr Mabirizi posted on his twitter account @MaleMabirizi the words: **"SSEKAANA IS A DISGRACE."***
3. *On 28th January 2022 Mr. Male Mabirizi posted on his Twitter account @Male MabiriziHKK the following captioned words: "SSEKAANA, who can't know that imposing "a fine of 300m" and "a strong WARNING" in the same conduct is DOUBLE JEOPARDY is not fit to even sit in a small family tribunal....@IsaacSsemakadde".*

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4. *On 28th January 2022 Mr. Male Mabirizi posted to his Twitter account @MaleMabiriziHKK the following captioned words: "SSEKAANA was never qualified for this @ug-lawsociety 'award' he is extremely unethical & incompetent even to win a Magistrate Grade 2 Award...@IsaacSsemakadde come and see a fake award." He attached to this post an image of Justice Ssekaana with the words "Award winner for Excellence from the bench" Uganda Law Society 2021 Awards'.*
5. *On 29th January 2022 Mr. Male Mabirizi on his Twitter Account @MaleMabirizi replied to the post which stated that "Sekaana needs to be taken for mental check-up" by stating the following captioned words: MENTAL CASE: @Comrade@IsaacSsemakadde, please go through with a view of approving..."*
6. *On 30th January 2022, Mr. Male Mabirizi posted to his Twitter account @MaleMabiriziHKK the following captioned words: "SSEKAANA aiso "lacks courage to do justice without fear & favour, is biased, suffers from the vice of self-interest, is tardy, indolent & incompetent...fall in romance of aggrandizement & populism (he) is a danger to the state & society" @IsaacSsemakadde" He attached to this post a picture of his letter to the Secretary of the Judicial Service Commission seeking the removal from office of Justice Phillip Odoki.*
7. *On 30th January 2022, Mr. Male Mabirizi posted to his Twitter account @MaleMabiriziHKK the following captioned words: "SSEKAANA'S decision is NULL AND VOID". He attached to this post a picture statement signed by himself which was titled "SSEKAANA'S CONTEMPT 'RULING' THAT I PAY A FINE OF UGX 300,000,000/= IS NULL & VOID"*
8. *On 1st February 2022 Mr. Male Mabirizi posted on his Twitter account @MAleMabirizi the following captioned words: "..850...COWARDLY Judge Ssekaana...facing multiple disciplinary actions in Judicial Service Commission...having him removed...has resorted to using your office to solve his ...unethical challenges...demonstrates the rot and hypocrisy in our court system...03 days..." He attached to this post a picture of his letter dated 1st February 2022.*
9. *The respondent made additional comments from his @MaleMabiriziHKK to @IsaacSsemakadde as captured in the Investigation report by Uganda Communications Commission through his twitter account as hereunder; SSEKAANA did not make an order that I pay 300m fine. All judges in trying to defend the size of his ka 'animal' say he recommended sanctions "I REJECT the recommendations...then We argue ULS...oba LUBAALE WE KYANAMUKAAKA YAMULUMA? Anti afuuse KISEKERERWA..... Comrade @IsaacSsemakadde, I am looking for @musa_ssekaana's wives & concubines to tell me how small the*

'thing' is.....this was made in reply to a post by @IsaacSsemakadde that:This 'judge' has either a small brain or small penis-but neither of his lordhip's inferiorities will be cured by UGX 300million (85,000/-) fine imposed on our Rule of Law Champion. @JudiciaryUG shoud do more to restrain its 'young Turks' from embarrassing. Comrade @IsaacSsemakadde ono omwana agenda kututwala buli wa NAKYEYOMBEKEDDE wa 'judge' to tell us the size of his ka 'animal'.....eno yalinye ya maggye... Comrade @IsaacSsemakadde you are good to go on with ascertaining the actual size of the judge's ka 'animal' since upon sealing and signing of the NOTICE OF APPEAL by Court & serving it upon KIRYOWA KIWANUKA. COURT OF APPEAL will determine the size of his brain..... Comrade@IsaacSsemakadde obujulizi buubuno, mbu work myeeee....akaninkini tekalasa bulungi.....wamma kyava yeyisa atyo..... SSEKAANA MUSA's "Multiple concubines.....bano abaana bamanyi ebyaama.....sobi at the respondent's Twitter handle is @MaleMabiriziHKK."

Unfortunately, the comments about Judge Sekana in Luganda were not translated into English. However, there is sufficient evidence in the tweets in English to establish the nature of contempt that resulted in the incarceration of the contemnor.

After analysing the impugned publications of the applicant, the trial judge found, at pages 9, 10 and 13of his ruling, respectively, as follows:

"The said abusive attacks in the letters and tweets by the respondent are intended to scandalize the court and intimidate the entire judiciary in exercise of their constitutional mandate. The strong warning given to the respondent in addition to the fine of 300,000,000/= was intended to send a strong signal against such attacks on judicial officers. Court Orders are not made in vain and are intended to serve the purpose for which they are issued. <u>However 'stupid' or 'useless' an order may appear, it must be obeyed. This is a country of laws not of men and we must uphold the rule of law through obeying orders of court</u>. The country will descend into anarchy if such a culture of disobeying lawful court orders is allowed to flourish.

The respondent in total defiance has continued to make relentless attacks on the judicial officers and the entire judiciary with the sole purpose of undermining its authority."

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...

Therefore, scandalizing court is an attack on individual judicial officers or the court as (a) whole or without reference to particular cases, casting unwarranted and defamatory aspersions upon the character or ability of the judges. Such conduct is punished as contempt for this reason that it tends to create distrust in the particular mind and impair the confidence of the people in the courts which are of prime (sic) to litigants in the protection of their rights and liberties.

...

The respondent's statements on his twitter handle @MaleMabiriziHKK and letter were contemptuous and intended to scandalize the court or to show that the respondent is above the law and 'untouchable'."

He then concluded and ordered as follows:

"Therefore, the respondent is in contempt for the second time ***after the court had earlier issued a STRONG WARNING to him to desist and/or stop attacking judicial officers.*** *The respondent should be arrested and imprisoned for a period of Eighteen (18) months. The costs shall be in the cause."*

{Emphasis supplied}

Much as the order that was issued against the contemnor to desist/and or stop attacking judicial officers was violated when he published the statements above, we agree with the trial judge that the acts of the contemnor amounted more to scandalising the court than a mere breach of the court order. We therefore will not construe them as a breach of the prior order, bringing them in the ambit of civil contempt because they fell in the category where the contemnor engaged in publishing comments that demeaned a judicial officer and amounted to scandalising the court and judicial officers, in the most horrendous manner.

Scandalising the court was described by the Supreme Court of Ghana in **Republic v Mensah-Bonsu & Others; Ex parte Attorney General [1995-96]1 GLR 377** as:

"Any act or writing published calculated to bring the court or judge into contempt, and which has the tendency of impairing public confidence in them."

In the same case, Bamford-Addo, JSC, at page 478, had this to say about scandalising the court:

"Once the matter published scandalises the court, truth is no defence nor is justification. The reason is that the contempt of scandalising the court is committed against the administration of justice itself not against an individual judge, qua judge. The mischief in publishing "scurrilous abuse" about a judge is its tendency to bring the administration of the law into disrepute, to lower the authority of the court and impair public confidence in the judiciary."

We therefore accept the submission of counsel for the Attorney General that the contemnor was sentenced to prison for criminal contempt of court because he engaged in conduct that amounted to scandalising the court.

Whether the contemnor is under the obligation to purge himself of the contested contempts; and if so, how;

Black's Law Dictionary (supra) defines the word *"purge"* to mean *"exonerate oneself or another of guilt."* In some jurisdictions, the principle of purgation of contempt of court is codified in the written law. For example, in the United Kingdom the principle is codified, among others, in the Family Procedure Rules (2010) where rule 37.30(1) provides that a person committed to court may apply to be discharged from contempt of court.

In Australia, the Civil Trials Bench Book[1] explains the power to discharge a contemnor at paragraph [10-0700]. It states that if the

[1] https://www.judcom.nsw.gov.au/publications/benchbks/civil/purging_contempt.html

Supreme Court has committed a contemnor to a correctional centre for a term, the court may order the contemnor's discharge before the expiry of the term. [SCR Pt 55]. It goes on to state that Contempt in the form of breach of orders may be purged by apology, payment of compensation/reparation and payment of costs **[See Australian Consolidated Press Ltd v. Morgan (1965) 112 CLR 483 at 489; Evans v Citibank Ltd [2000] NSWSC 1017].**

In **The Matter of Ravindar Balli (Also known as Ravindar Singh) [2011] EWHC 1865 (Ch),** the High Court of England and Wales laid down the principles for discharge in the following text at page 4 of its judgment:

> *"A committal order is an order of last resort; in the context of civil proceedings, it is also draconian. It should only be made where, having regard to all the circumstances, it is absolutely necessary.*
>
> *By way of temper, a contemnor has an unqualified right to apply to the court to purge his/her contempt and seek an order for immediate release. This is not a 'once only' right, rather it is a continuing right running throughout the duration of the sentence.*
>
> *The origins of this right appear to be twofold : (1) being rooted in the quasi-religious concepts of purification, expiation and atonement (**Harris v Harris [2002] Fam 253**, Thorpe LJ at paragraph 21); and, (2) prior to the coming into force of s.14 of the Contempt of Court Act 1981, being the means by which release from prison was secured following committal to prison for an unspecified period under common law (the 'price' of release being, as part of the purging, compliance with a mandatory order or a credible promise not to disobey a prohibitive order in the future).*
>
> *With these considerations in mind, a contemnor's right to apply to purge his/her contempt became enshrined in a procedural rule, currently RSC Ord 52 Rule 8(1), now in the CPR Sch 1, which provides:*
>
> > *'The court may, on the application of any person committed to prison for any contempt of court, discharge him'."*

Unlike the other jurisdictions that we have mentioned above, in Uganda we do not have a comprehensive law on **civil** contempt. Thus the authorities mentioned would be persuasive in our finding that that civil contempt can be purged and upon recanting the contempt,

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the contemnor may be discharged by the court that found him in contempt. The contemnor may also obey the order that was violated and upon compliance, he/she is discharged from contempt. This explains the oft cited expression in contempt jurisprudence that in cases of civil contempt, *"the contemnor carries the key to his prison cell in his pocket."* {***Turner v Rogers* 564 US 10-10 2011**}.

With regard to criminal contempt, Section 107 of the Penal Code Act provides for offences against judicial proceedings in great detail and includes contempt before the court and outside court. It is stated therein that a person who does any of the acts that are listed in the provision commits a *"misdemeanour."* We note that the provision provides for contempt of the court in the face of or in the precincts of the court but it omits other kinds of contempt. However, subsection (3) thereof provides that:

> **(3) The provisions of this section shall be deemed to be in addition to and not in derogation of the power of the High Court to punish for contempt of court.**

Article 28 (12) of the Constitution takes cognisance of the broad nature of contempt of court when it provides the following exception to the provisions in that same article as follows:

> **(12) Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.**

Therefore, what amounts to contempt of court is prescribed by the particular court; the punishment is then determined by the same court. There is no prescribed maximum sentence in Uganda and we observed that the Supreme Court in the case of **Ivan Ssebadduka v Chairperson of the Electoral Commission & 3 Others, Presidential Petition No. 001 of 2002**, where the contemnor committed

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contempts in his pleadings and repeated them in the face of the court, the court sentenced him to 3 years in prison. Contempt of court is therefore that one criminal offence where the complainant lawfully acts as the prosecutor and judge in his or her own cause.

In **Bloom v. Illinois, 391 U.S 194 (1968)** it was held that criminal contempt was a crime *in every essential respect*. At page 201 Justice White who delivered the opinion of the Court stated thus:

> *"Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both... Criminally contemptuous conduct may violate other provisions of the criminal law, but even when this is not the case, convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seems identical – protection of the institutions of our government and enforcement of their mandate."*

We accept this statement as good law and that it is clearly applicable to this jurisdiction. We shall therefore employ the principle in coming to our decision in this matter.

In **Pravin C. Shah v. K. A. Mohd Ali & Another, Appeal (Civil) 3050 of 2000,** the Supreme Court of India considered the possibility of purgation of contempt. It contradistinguished the application of the principle in civil and criminal contempt at pages 6 and 7 of its judgment, in a case where an advocate was found to be in contempt of court, in the following passages:

> *"Obeying the orders of the court would be a mode by which one can make the purging process in a substantial manner when it is a civil contempt. Even for such a civil contempt the purging process would not be treated as completed merely by the contemnor undergoing the penalty imposed on him unless he has obeyed the order of the court or he has undone the wrong. If that is the position in regard to civil contempt the position regarding criminal contempt must be stronger.*

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Section 2 of the Contempt of Courts Act categorises contempt of court into two categories. The first category is civil contempt which is the wilful disobedience of the order of the court including breach of an undertaking given to the court. But criminal contempt includes doing any act whatsoever which tends to scandalise or lowers the authority of any court, or tends to interfere with the due course of a judicial proceeding or interferes with, or obstructs the administration of justice in any other manner.

We cannot therefore approve the view that merely undergoing the penalty imposed on a contemnor is sufficient to complete the process of purging himself of the contempt, particularly in a case where the contemnor is convicted of criminal contempt. The danger in giving accord to the said view of the learned single Judge in the before-cited decision is that if a contemnor is sentenced to a fine he can immediately pay it and continue to commit contempt in the same court, and then again pay the fine and persist with his contemptuous conduct. There must be something more to be done to get oneself purged of the contempt when it is a case of criminal contempt.

...

Thus a mere statement made by a contemnor before court that he apologises is hardly enough to amount to purging himself of the contempt. The court must be satisfied of the genuineness of the apology. If the court is so satisfied and on its basis accepts the apology as genuine the court has to make an order holding that the contemnor has purged himself of the contempt. Till such an order is passed by the court the delinquent advocate would continue to be under the spell of the interdict contained in Rule 11 of the Rules."

Rule 11 of the Rules framed by the High Court of Kerala under Section 34(1) of the Advocates Act, 1961, regarding conditions and practice of Advocates provides that:

"No advocate who has been found guilty of contempt of Court shall be permitted to appear, act or plead in any Court unless he has purged himself of the contempt."

We therefore came to the conclusion that criminal contempts, though pardonable, cannot be purged. Since convictions and sentences resulting from criminal contempt are final, the contemnor cannot purge his contempt by simply paying a fine, however large. However,

the contemnor may apologise to the court of which he/she was found to be in contempt but such apology must be genuine, signifying that the contemnor is truly contrite. The Supreme Court of India in **Pravin C. Shah** (supra), at page 7 of the judgment, laid down the following dicta about pardoning the contemnor:

> *"...The first thing to be done in that direction when a contemnor is found guilty of criminal contempt is to infuse in his own mind real remorse about his conduct which the court found to have amounted to contempt of court. Next step is to seek pardon from the court concerned for what he did on the ground that he really and genuinely repented and that he has resolved not to commit any such act in future. It is not enough that he tenders an apology. The apology tendered should impress the court to be genuine and sincere. If the court, on being impressed of his genuiness accepts the apology then it could be said that the contemnor has purged himself of guilt."*

Otherwise, the only remedy available is for the contemnor to appeal against either or both conviction and sentence. **{Se Atta v. Mohamadu [1980] GLR 862 (HC), pp. 865-866}.**

Counsel for the respondent advanced the further argument that a contemnor who has not purged his contempt should have no right of audience before court. He relied on the decision in **Housing Finance Bank Ltd v Edward Musisi, Court of Appeal Miscellaneous Application No. 188 of 2010,** in which the applicant seeking stay of execution failed or refused to comply with the order of the court in a civil matter over the repayment of a loan. The court ruled that a party who has disobeyed a court order does not have audience in a different but related cause or matter until he purges himself of the contempt.

The principle on that point was laid down in the decision of the House of Lords in **X Ltd v Morgan-Grampian (Publishers) Ltd [1991] AC 1**. Lord Bridge cited a passage from the earlier judgment of Brandon LJ

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in **The Messiniaki Tolmi [1981] 2 Lloyd's Rep 595** in which, at page 602, it was stated thus:

> *"I accept that, while the general rule is that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt."*

The oft cited decision on the point is the dicta that was laid down by Denning LJ in **Hadkinson v Hadkinson [1952] P285** as follows:

> *"It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would like to refer to what Sir George Jessel MR said in a similar connexion in In re Clements, Republic of Costa Rica v Erlanger (1877) 46 LJCh 375, 383: 'I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction.' Applying this principle I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."*

The decisions above clearly apply to civil contempt which can be easily purged. But with regard to a committed contemnor for criminal contempt, where the rules relating to appeals state that the contemnor has access as of right, the contemnor must be heard. This is especially so where the contemnor challenges the order against him/her for

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contempt. A denial of audience in such a case would be contrary to the provisions of Article 28 of the Constitution.

For those reasons therefore, we find that the applicant here cannot be denied his right to be heard for failure to purge the contempt, though he is a committed criminal contemnor.

Whether the remedy of release from prison following committal for contempt of court is available to the contemnor.

It has been established that the contemnor was committed for a criminal contempt, an offence that is subject to the inherent jurisdiction of the court. He was sentenced to imprisonment for 18 months and that was in the discretion of the court. It has also been established that the sentence of a contemnor committed for criminal contempt is similar to any other sentence under the criminal laws of Uganda.

Section 40 (2) of the Criminal Procedure Code provides that:

> **(2) The appellate court may, if it sees fit, admit an appellant to bail pending the determination of his or her appeal; but when a magistrate's court refuses to release a person on bail, that person may apply for bail to the appellate court.**

We find that there is no other law under which the contemnor can be released from jail pending his inchoate appeal other than on an application for bail pending appeal. We therefore accept the submissions of the respondent in that regard.

But before we take leave of this matter, we wish to draw attention to the length of time that it has taken the applicant to lodge his appeal in this court. Mr Male Mabirizi was cited for and found guilty of contempt of court on 27th January and 15th February 2022, respectively. He was

arrested on 21st February 2022 and has served part of his sentence of 18 months; a significant portion of about 12 months remains to be served at the time of preparing this ruling.

Mr Mabirizi first applied for the record of proceedings to enable him file his appeal on 27th January 2022. A subsequent application for the record for the proceedings which resulted in the order of 15th February 2022 was made on the 25th February 2022. When he appeared before us on 29th June 2022, we asked him why he has not filed his appeal but he has instead, admittedly, filed 12 applications in this court seeking to be released pending hearing of his appeal. His response was that he has not received a copy of the record of proceedings. Asked whether he has followed up its preparation with the Registrar of the High Court, he said he had not. We wondered why the contemnor did not demonstrate as much industry and ingenuity in pursuing the record of proceedings from the High Court as he did in filling the 12 applications in this court, if he indeed intends to appeal against its orders.

Subsequently, we were made aware of the fact that on the 30th June 2022, the applicant wrote to the Registrar of the High Court to remind that court to provide him with copies of the typed record of proceedings to enable him to file his appeal. We too requested the Registrar of this court to inquire from the Registrar of the High Court why Mr Male Mabirizi had not been provided with typed proceedings to enable him file his appeal. The Registrar did write to the Deputy Registrar, Civil Division, wherein the applicant was convicted of contempt of court, on 29th June 2022. She received a reply on 1st July 2022 stating that the proceedings were sent to Mr Male Mabirizi. We do hope that the applicant has now taken steps to lodge his appeal

which will then be the basis of his application for bail from this court, if so choses to apply.

We also recall that on the 29th of June 2022, we stayed the hearing of nine (9) other applications wherein the applicant sought for stay of execution of the orders of the High Court in HCMA 843 of 2021, or release from prison pending the hearing of his applications and his appeal, yet to be filed in this court. In view of our findings here and our decision in Civil Application No. 39 of 2022 and Civil Reference No 91 of 2021, we strongly believe that the rest of the applications listed at pages 20 to 22 of this ruling that are yet to be disposed of by this court stand no chances of success at all.

We are also of the view that the filing of numerous applications where no appeal has been filed in this court amounts to an abuse of court process. The applications are similar to each other, all seeking the same order though using different terms in the various applications, for the release of the contemnor from prison before the filing and hearing of his appeal in this court. The applications appear to us to be intended, if not to intimidate the respondent, than to exert pressure on him to agree that the contemnor be released from prison.

We observed that the facts stated in the affidavits in support of each of the motions in the contemnor's applications that were stayed were the same and similar to those stated in support of the instant application. Four of the applications [No. 433, 436, 547 and 546 of 2022] were never served upon the respondent. We further noted that in the five applications that were served upon the respondent [Civil Applications No. 425, 433, 434, 436, 548 and 550 of 2022] the respondent filed affidavits in reply to the claims made by the contemnor. It was stated in each of the respondent's affidavits, all

deposed by Mr Kodoli Wanyama, that each of the applications was *"frivolous, vexatious, devoid of merit and an abuse of court process"* and that the *contemnor "was not entitled to the remedies claimed."* We propose to explore whether this is indeed the case.

"Abuse of court process" has been variously defined. Black's Law Dictionary (supra) defines it at page 11 as:

> *"The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope."*

The filing of numerous suits in respect of the same cause has in some cases been found to amount to abuse of court process. In **Manson v. Vooght & Others [1999] BPIR 376**, cited in **Johnson v Gore Wood & Company; [2001] All ER 481**, May L.J explained the limits of the powers of the court in finding that its process has been abused as follows:

> *"It is of course axiomatic that the court will only strike out a claim as an abuse after most careful consideration. But the court has to balance a plaintiff's right to bring before the court genuine and legitimate claims with a defendant's right to be protected from being harassed by multiple proceedings where one should have sufficed. Abuse of process is a concept which defies precise definition in the abstract. In particular cases, the court has to decide whether there is abuse sufficiently serious to justify preventing the offending litigant from proceeding. In cases such as the present, the abuse is sufficiently defined in Henderson which itself is encapsulated in the proposition that the litigant could and should have raised the matter in question in earlier concluded proceedings. Special circumstances may negative or excuse what would otherwise be an abuse. But there may in particular cases be elements of abuse additional to the mere fact that the matter could and should have been raised in the earlier proceedings."*

Lord Bingham went on to distinguish *res judicata*, the main subject of the discussion in **Henderson v. Henderson, (1843) 3 Hare 100 at 114** from abuse of process when he stated thus:

> *"But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter.* ***This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."***
>
> ***{Emphasis supplied}***

Lord Bingham went on to state that as one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.

In the matters placed before us, we think that the filing of 12 applications claiming the same remedy, the release of the contemnor from prison, all against the same party was on the high side. It amounted to abuse of court process because at most, two substantive applications could have been filed on the basis of the orders that were issued against the contemnor by the High Court on the 27th January and 15th February 2022. Indeed, when we asked the contemnor on the 29th July 2022, which of the applications before us he really wished to have disposed of by the court, he chose three of them as the stem applications that he wanted us to dispose of, and we granted him his request.

Going on to vexatious applications or suits, Black's Law Dictionary (supra) defines a *"vexatious suit"* at page 1701 as *"A lawsuit instituted maliciously and without good grounds, meant to create trouble and*

expense for the party being sued." Such suits are variously defined as *"vexatious lawsuits, vexatious litigation and vexatious proceedings."*

In the United Kingdom, section 42 of the Supreme Court Act, 1981, the equivalent of the Judicature Act in Uganda, provides for restriction of vexatious legal proceedings. The provision provides in part that:

> **(1) If, on an application made by the Attorney General for Restriction under this section, the High Court is satisfied that any person has of vexatious habitually and persistently and without any reasonable ground-**
>
> **(a) instituted vexatious legal proceedings, whether, in the High Court or any inferior court, and whether against the same person or against different persons; or**
>
> **b) made vexatious applications in any legal proceedings, whether in the High Court or any inferior court, and whether instituted by him or another, the court may, after hearing that person or giving him an opportunity of being heard, order-**
>
> **(i) that no legal proceedings shall without the leave of the High Court be instituted by him in any court; and**
>
> **(ii) that any legal proceedings instituted by him in any court before the making of the order shall not be continued by him without the leave of the High Court; and**
>
> **(iii) that no application (other than an application for leave under this section) shall without the leave of the High Court be made by him in any legal proceedings instituted, whether by him or another, in any court.**

Such applications are brought by the Attorney General and a list of vexatious litigants is published to give the public and the courts notice of who the persons adjudged to be vexatious litigants are at any one time. The orders are not without contest from persons adjudged to be vexatious litigants and we considered some of the pertinent litigation here below.

In **HM Attorney General v. Gadaljhu Ebert, [2001] EWCA Civ 707**, the applicant brought an application that he be given leave to appeal against the civil proceedings order made against him by the Divisional Court at the suit of the Attorney General declaring him a vexatious litigant. The application was refused but before it was dismissed, the court observed that:

> *"It is an extraordinary fact that no one knows how many applications Mr Ebert has brought in relation to the original judgment given against him by the Midland Bank and in relation to the bankruptcy petition and the orders made thereunder. But it seems to me that it is now well over a hundred. The unfortunate situation is that, intelligent and resourceful as Mr Ebert undoubtedly is, he has proceeded vexatiously, and one thing that the Divisional Court, rightly in my judgment, took into account was the fact that he had made applications to commit two solicitors for contempt... That was just one of the elements which persuaded the Divisional Court that his applications had become vexatious and that he should be declared a vexatious litigant. What Laws LJ said was that Mr Ebert's vexatious proceedings have been:*
>
> > *'... very damaging to the public interest: quite aside from the oppression they have afflicted on his adversaries.'*
> >
> > ...
> >
> > ***The real vice here, apart from the vexing of Mr Ebert's opponents, is that scarce and valuable judicial resources have been extravagantly wasted on barren and misconceived litigation, to the detriment of other litigants with real cases to try.'"***
>
> ***{Emphasis supplied}***

The England and Wales Court of Appeal has also on several occasions considered whether such orders contravene the rights of litigants to bring actions in the courts. We reviewed two (2) consolidated applications by two litigants against whom civil proceedings orders were made in **Attorney General v Covey; Attorney General v Matthews [2001] EWCA Civ 254**. On authority of **Tolstoy Miloslavsky v United Kingdom (1999) 20 EHRR 442**, the court found that the right of access to the courts secured by Article 6(1) of

the European Convention on Human Rights may be subject to limitations. That the State enjoys a certain margin of appreciation but the court must be satisfied, firstly that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. And that secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aims sought to be achieved. The court thus affirmed the decision of the lower court granting restriction orders against the applicants as vexatious litigants and dismissed their applications to appeal against the said orders.

We are aware of the provisions of Order 6 rule 30 of the Civil Procedure Rules which provides for striking out of pleadings in the High Court and the Subordinate Courts as follows:

> **(1) The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as may be just.**

However, the rule does not deal with specific litigants that are habitual litigants and file cases accompanied by numerous applications and clog the diaries of the courts and judicial officers, yet in any jurisdiction, such litigants are well known. In this jurisdiction they go about their vexatious business unhindered until they hit a legal impediment, as the contemnor in this application did.

The Registrar of this court had to source for a special panel to entertain the contemnor's applications before this court because he has made his habit to strike at all judicial officers who do not come up

with the decisions that he desires as corrupt or biased against him. He has severally filed complaints against judicial officers before the Judicial Service Commission. He also files applications for judicial officers to recuse themselves from hearing his suits in the various courts so frequently that he is about to exhaust the limited reserves of this court.

We are therefore of the well-considered opinion that the Chief Justice should consider the gravity of this matter and make rules under the Civil Procedure Act to provide for restrictions on litigation by vexatious litigants. Implementation of such rules would go a long way to save the time of the courts as well as to spare the limited resources that the Judiciary has to implement its mandate of ensuring access to justice to all citizens.

For the reasons that we have given above and on the basis of our findings in this application, we are inclined to strike out the eight (8) applications brought by the contemnor that were stayed pending the disposal of this application, Civil Application 39 of 2022 and Civil Reference 91 of 2022, under the powers vested in this court by section 98 of the Civil Procedure Act and rule 2 (2) (b) of the Court of Appeal Rules.

Rule 2 (2) (b) of the Rules of this Court is an explication of the inherent powers of the court that are saved by section 98 of the CPA. It provides as follows:

> **(2) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be**

exercised to prevent abuse of the process of any court caused by delay.

Pursuant to the powers that are vested in this court under this rule, we hereby exercise our discretion to strike out the eight (8) applications referred to above because they were filed in abuse of the process of this court and to vex the Attorney General who had the temerity to cite the applicant for contempt of court. We do so to make way for the audience of other litigants that may have pending matters that require expeditious disposal and to reduce the backlog of pending applications in this court.

Conclusion

In the end result, this application had no merit because there is no legal right vested in a contemnor who has been committed to prison for criminal contempt to be released, save on an application for bail pending appeal or the pardon of the court that committed him for criminal contempt. The application therefore substantially fails and it is dismissed with the following orders:

i) The contemnor will continue to serve his sentence of 18 months in prison until further orders of a court with competent jurisdiction.

ii) The contemnor may apply for bail pending appeal after filing his appeal that was yet to be filed on the date of hearing this application.

iii) The contemnor is also free to exercise his right to seek the pardon of the court that committed him to prison in respect of the contempts for which he was so committed.

iv) Civil Applications 433 of 2022; 64 of 2022; 434 of 2022; 436 of 2022; 546 of 2022; 547 of 2022, former CA No. 66 of 2022; 548

of 2022; and 550 of 2022 are hereby struck out with no orders as to costs.

v) Costs for this application shall, in any event, be borne by the applicant.

Dated at Kampala this 19th Day of Aug 2022.

Muzamiru Mutangula Kibeedi
JUSTICE COURT OF APPEAL

Irene Mulyagonja
JUSTICE COURT OF APPEAL

Eva Luswata
JUSTICE COURT OF APPEAL