IN THE COURT OF APPEAL OF UGANDA

Coram: Mutangula Kibeedi, Mulyagonja and Luswata, JJA

CIVIL APPLICATION NO 39 OF 2022

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

AND

CIVIL REFERENCE NO. 91 OF 2022

{Arising from the decision of Madrama Izama, JA dated 25th February 2022 in Civil Application No. 40 of 2022, Arising from Civil Application No. 39 of 2022

BETWEEN

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

AND

ATTORNEY GENERAL :: RESPONDENT

RULING OF THE COURT

Introduction

The applicant filed Civil Application No 39 of 2022 under the provisions of Article 28 (1), 44(c) and 134 (2) of the Constitution, section 33 Judicature Act, and rules 6 (2) (b), 42 (2), 43 (1) and (2) of the Court of Appeal Rules. He sought a substantive order to stay execution of the orders of Sekana, J issued on the 27th January 2022 in HCMA No 843 of 2021. He also filed Civil Application No 40 of 2022 for an interim order to stay execution of the same order pending the hearing and disposal of Civil Application No 39 of 2022.

On 25th February 2022, Madrama, JA delivered his ruling in Civil Application No. 40 of 2022 and he partially allowed the application.

Being dissatisfied with the decision, the applicant sought a reference of the matter to a panel of three judges.

Background

The application and reference that are before us have a checkered history which it is necessary to lay down in some detail to facilitate an understanding of the dispute and our final decision in this matter. The facts upon which the two proceedings are based are that during the hearing of **HCMC No. 287 of 2021, Male Mabirizi v. Capital Markets Authority**, in which the Attorney General represented the Capital Markets Authority, it was alleged that before and after the delivery of the ruling by the trial judge therein, Phillip Odoki, J, on 20th, 22nd, 26th, 27th, 28th, 29th and 30th November 2021, and the 1st and 2nd of December 2021, the applicant posted several statements on his Twitter Handle @MabiriziHKK and his Facebook page, *"Uganda Peoples' Interests,"* which were circulated widely to bring the presiding judge in disrepute. The posts included that the said judicial officer was corrupt, incompetent and incapable of performing his duties in a case involving the *"richest telecommunications company"* in Uganda. Some of the statements were explicit, including that his ruling in the matter before him was *"concocted, incompetent"* and it amounted to *"aggravated robbery."*

It was further alleged that in one of his posts, the applicant stated that the trial judge, Phillip Odoki, was the son of the former Chief Justice, the Honourable Justice Benjamin Odoki. Further, that the former Chief Justice and the former Prime Minister, Honourable Amam Mbabazi, attended his wedding and the latter donated a bull to the couple. Subsequently, the applicant in another tweet imputed that the decision of Phillip Odoki, J in the matter was the product of a *"rogue system"*

which the applicant here was fighting through his attacks on the judiciary and its officers.

As the head of the Bar, Chief Legal Advisor to Government and counsel for the Capital Markets Authority in the matter before Odoki, J. the Attorney General filed Miscellaneous Application No. 843 of 2021 in the High Court. Therein, he sought a declaration that the applicant was in contempt of court and that he be committed to prison and any other orders that the court deemed fit to grant. The application was heard by Sekana, J who delivered his ruling on the 27th January 2021. He declared that the applicant was in contempt of court, ordered that he pays a fine of UGX 300,000,000/= and issued a strong warning that he stops attacking judicial officers in the future, with costs to the Attorney General.

Thereafter, it was alleged that the applicant issued more statements on his Twitter handle @MaleMabiriziHKK. According to a report of the Uganda Communications Commission on the record, the applicant's profile issued statements about Sekana J, including that *"Ssekana 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 ..."*

Another advocate, not the subject of the orders of the High Court in HCMA No 843 of 2021, joined the fray and expanded the comments including a statement about Sekana, J that: *"The judge has either a small brain or small penis – but neither of his lordship's inferiorities will be cured by the UGX 300million (USD 85,000) fine imposed on our Rule of Law Champion. @judiciary should do more to restrain its 'young Turks' from embarrassing the ..."*

The Attorney General then made an application within HCMA 843 of 2021 for the court to issue a notice to the applicant to show cause why he should not be committed to prison for violating the order of 27th January 2022. Notice was issued to him but he did not appear before court on the 11th February 2021, the day that the notice was to be returned. Instead, he filed a letter accompanied by an affidavit stating reasons why the application should be adjourned to another date and sent a representative, learned counsel Mr Nuwe Noel, to represent him. The court did not adjourn the application; it was heard and on 15th February 2022 court declared that the applicant was in contempt for the second time after a strong warning was issued to him to desist from and stop attacking judicial officers. Court further ordered that the applicant be arrested and imprisoned for 18 months. A warrant was issued and he was arrested on the 21st February 2022 and committed to Kitalya Minimax Prison.

But before his arrest, the applicant filed Court of Appeal Civil Application No. 39 of 2022 on 11th February 2022. He sought an order to stay execution of all the orders in HCMA No 843 of 2021 until the determination of his appeal in this court, registered as Civil Appeal No. 549 of 2022. On the same day, he filed Civil Application No. 40 of 2022 in which he sought an interim order to stay all orders in HCMA No. 843 of 2021, until final disposal of Civil Application No. 39 of 2022.

Civil Application No 40 of 2022 was heard and a decision thereon was rendered by Madrama, JA on 25th February 2022. Being dissatisfied with that decision, the applicant applied for a reference to a panel of three judges. The application was set down before us together with Civil Application No 39 of 2022, as well as several other applications in which the applicant sought orders that he be released from prison pending his appeal against the orders of Ssekana, J and/or for temporary release

from prison. At the hearing of the matters on 29th June 2022, by consent of the parties, we decided to hear the reference and Application No. 39 of 2022 together because they were premised on the same facts.

Representation

When the matters were called for hearing, the applicant appeared *pro se*. The respondent was represented by Mr. Richard Adrole (PSA) and Ms. Goretti Atwiine (SSA) both counsel from the Attorney General's Chambers.

The parties each filed written submissions as directed by Court. The applicant filed his submissions in CACA No. 39 of 2022 on 28th June 2022. The Attorney General filed a reply on 4th July 2022, after the hearing. In Civil Reference No. 91 of 2022, the applicant filed his submissions on 28th June 2022 while the Attorney General's reply was filed on 4th of July 2022, with leave of court. The matters were therefore both disposed of on the basis of written submissions only.

MISCELLANEOUS APPLICATION NO 39 OF 2022

In this application, the applicant sought for an order to stay execution of all orders in HCMA No 843 of 2021 until final determination of his appeal, and the costs of the application. The grounds for the application were briefly stated in the Notice of Motion but amplified in his affidavit in support dated 10th February 2022.

In the affidavit, the applicant stated that he is a lawyer by profession with a degree in law, a businessman by choice and owner of multinational companies which generate enormous incomes from selling goods and services to Ugandans. Further that he filed a notice of appeal after the decision in HCMA No 843 of 2021 was delivered on 27th January 2021 and requested for the record of proceedings. He went on

to state that he had come across a Notice to Show Cause why he should not be committed to civil prison for violating a court order and he was supposed to appear before the High Court on Friday 11th February 2022.

The applicant asserted that he did not know the court order he was alleged to have violated and the particulars of the application made by the respondent. Further that he perceived that the intention of the Notice to Show Cause was to render his appeal nugatory because if he was committed to prison, the subject matter of the appeal would be disposed of yet he was of the view that the said appeal had high and reasonable chances of success. He added that he filed this application without delay, before the issue of the Notice to Show Cause, but there was a serious threat of execution since the Notice had already been issued.

The applicant further averred that if this application is not granted he would suffer substantial loss because he would be subjected to a process resulting from a decision that he is challenging. That the balance of convenience was in his favour and in the interests of justice, equity and fairness, as well as the need to preserve the rule of law, this application should be allowed.

On the 17th February 2022, the applicant filed his 1st supplementary affidavit deposed on 10th February 2022. On 28th June the applicant filed yet another supplementary affidavit deposed on 16th June 2022. There is no evidence on the record that these affidavits were served on the respondent.

In the 1st supplementary affidavit the applicant deposed that he filed an application for stay of execution in the High Court as HCMA 85 of 2022 and another application for an interim order for stay of execution as

EL.

HCMA No 86 of 2022, but they had not been heard by the time he filed this application. Further that he filed an application for the recusal of Musa Ssekaana, J. but it had not been heard by the time he filed this application. He went on to state that on 11th February 2022, he filed opposition to the application to have him committed to prison on the grounds that he had never been served with the order in HCMA 843 of 2021 alleged to have been violated. He attached a copy of the opposition, a letter to the Deputy Registrar, High Court Civil Division dated 10th February 2022, to the affidavit as Annexure E.

He further averred that the advocates representing him in tne proceedings where he was committed to prison informed him that though they drew this letter to the attention of the trial judge, he ignored it. Further that the trial judge also ignored the information that the applicant applied that he recuses himself. That their application that the judge first deals with the application for stay of execution before the High Court was also ignored by the judge. And that therefore the trial judge determined an application by the Attorney General by letter without hearing him and thereafter ordered that he be imprisoned for 18 months.

The applicant went on to state that at the time he deposed the 1st supplementary affidavit, the Uganda Police was hunting him down in order to have him arrested. That they almost did so in Kawempe Division in Kampala City on 15th February 2022 when they raided his friend's home but found when he had just left. That the threat of execution of the order was imminent and had materialised. Therefore, this court ought to grant the application.

In the second supplementary affidavit the applicant stated that he had since obtained a copy of the ruling that was delivered on 15th February

2022, online. That he knows that since the order for imprisonment arose from the strong warning issued on 27th January 2022, it was one of the orders sought to be staged in this application by way of a temporary release from prison. Further that on 21st February 2022 he was arrested and is now in prison. He prayed that he be temporarily released from prison pending the hearing of his appeal.

The Attorney General filed an affidavit in reply deposed by Kodoli Wanyama, Principal State Attorney, on 28th June 2022, in which he opposed the application. In the said affidavit, which was filed on 29th June 2022, Mr. Wanyama stated that he was aware that the applicant was found guilty of contempt of court in HCMA 843 of 2021 on 27th January 2022. That he was, among others, issued with a strong warning against future contempts. He attached a copy of the ruling to his affidavit.

Mr Wanyama went on to state that immediately after the ruling of 27th January 2022, the applicant made a series of attacks on the court and the trial judge through his social media pages to wit: Uganda People's Interests, a Facebook page and his twitter handle @MaleMabiriziHHK. Further, that by letter dated 11th February 2022, the respondent brought it to the attention of the court that the applicant made the said attacks on the court and the trial judge, in blatant disregard of the warning to desist from doing so.

He went on to state that the applicant was then summoned to court to show cause why he should not be held in further contempt of court. That the court considered the matter, and during the proceedings the applicant was represented by learned counsel. That on the 15th February 2022 the court found the applicant in further contempt of court and ordered that he be sentenced to 18 months' imprisonment. A

copy of the order was attached to the affidavit as Annexure B. And that subsequently, a warrant was issued for the arrest of the applicant, Annexure C to the affidavit, upon which he was arrested and committed to Kitalya Minimax Prison.

Mr. Wanyama further stated that he was aware that the applicant filed HCMA No 85 of 2022, and that it was heard and dismissed by the High Court. He asserted that there was no imminent threat of execution of the decision of 27th January 2022 and in his view the applicant does not have arguable grounds of appeal with any degree of success. Further that the applicant would not suffer substantial loss that cannot be sufficiently atoned by way of damages and the balance of convenience was not in his favour. That the application is frivolous and vexatious, devoid of merit and an abuse of court process and should be dismissed.

Applicant's Submissions

In his submissions, the applicant relied on the decision in **Gashumba v Nkundiye, Supreme Court Civil Application No. 24 of 2015** for the criteria that are followed in determining applications for stay or execution.

The applicant went on to submit that the appeal that he intends to file will raise serious issues and in **Gashumba's case** (supra) it was held that for the court to grant an order for stay of execution, it must be satisfied that the appeal raises issues which merit the consideration of court. He explained that his appeal has arguable grounds with higher and reasonable chances of success. That the intended appeal raises questions relating to whether he was given a fair hearing, the Attorney General's *locus standi* to institute civil proceedings for contempt of court arising from cases where he is not a party, the scope and nature of

evidence in contempt proceedings and the legality of the fine of UGX 300 million imposed upon him, among other things.

The applicant contended that he was not given an opportunity to respond to the proceedings wherein he was committed to civil prison. He explained that in his letter, Annexure A to the affidavit in support, he stated that he intended to respond to the Attorney General's submissions on 31st January 2022 since they were served on him on 24th January 2022. But the court rendered its decision on 27th January 2022 before he could respond to the submissions. The applicant asserted that for that reason, he was oppressed by the court. And that had it not been for the interim order to stay execution issued by this court to prevent the collection of the fine of UGX 300 million, the respondent would have executed the same against him. He went on to present the arguments that would be made in the intended appeal at length, including the application for Sekana J. to recuse himself, which we did not deem it necessary to repeat here.

With regard to proof of irreparable damage, he submitted that he was being subjected to the consequences of a decision he was challenging and so he will suffer irreparable damage. He referred us to the decision in **Tusingwire v Attorney General; Constitutional Court Application No. 6 of 2013**, where it was held that infringement of the right to a fair hearing would most likely lead to irreparable damage that cannot be atoned in terms of monetary damages. He concluded his submissions on this criterion with the statement that any further implementation of the orders of 27th January 2022, which had since expanded to imprisonment will no doubt cause irreparable injury. That this was because the imprisonment was on the strength of orders that were in breach of every principle relating to a fair hearing,

With regard to the balance of convenience, he submitted that there is no doubt that refusal to grant the application would make him suffer continued imprisonment without a hearing being accorded to him. Further that execution for UGX 300 million might also ensue before the determination of his appeal. He again referred us to the decision of the Supreme Court in **Tusingwire** (supra) where the court weighed the balance of convenience in constitutional matters, and submitted that if this court on appeal finds that there was sufficient evidence for liability to the fine imposed upon him, he would continue serving the sentence from where he will have left off. That it would be a great inconvenience to him to continue suffering the hardships of imprisonment and then later succeed in the appeal.

Mr Mabirizi further submitted that this application was filed without delay. He prayed that this court exercises its discretion under rule 2 (2) of the Rules of this Court and considers other relevant factors surrounding the dispute such as the refusal of the High Court to entertain his application for stay of execution, which led him to file this application in this court. He emphasised that if an order is granted to stay the orders in HCMA 834 of 2021, the same can continue if he is unsuccessful in his appeal. He relied on sections 42 (2) (e) of the CPA which allows for release from civil prison before expiration of the period for which the subject is detained with leave of court, section 43 (3) of the CPA which allows the release from civil prison in the event that the prisoner suffers from a serious illness and section 6 (2) CPA which provides that court may order stay of execution, an injunction or stay of proceedings on such terms as the court deems just.

Mr Mabirizi asserted that imprisonment as a mode of execution does not render an application such as the one now before court to have been overtaken by events. He referred to the decision in **Gashumba's case**

(supra) as an example of a situation in which stay of execution was granted where execution of the order in issue had not been completed. He submitted that though the order for his imprisonment was for 18 months, he had spent only 4 of them in prison and time is still running. He impressed it upon us that this was a proper case in which execution could be stayed. He prayed that an order be issued for his release from prison with costs against the respondent.

Respondent's Submissions

In reply, counsel for the respondent submitted that the rationale for the grant of an order to stay execution is to maintain the *status quo*. He explained that the *status quo* was that the applicant was on the 15th February convicted to a term of imprisonment of 18 months for contempt of court, after which he was arrested and committed to prison. That as a result the application has no merit.

Counsel for the respondent agreed with the criteria that have to be considered by court on an application for an order to stay execution as they were stated in **Gashumba's case** (supra). He went on to advance arguments about each of them.

With regard to the issue whether the applicant's intended appeal has chances of success, he pointed out that though the applicant intends to appeal on the ground that he was not given a hearing, it is evident from the ruling of the trial judge that the applicant filed a reply to the application, including an affidavit. Further that it was shown in the ruling that the applicant was given notice of the hearing where the parties were directed to file written submissions. That the applicant chose not to file submissions and a decision was entered against him without them. He added that this did not prejudice the applicant because the court was seized with the jurisdiction to decide the matter.

With regard to his application for the judge to recuse himself, he submitted that the trial judge rejected it. He went on to contend that the applicant did not appear to present his application for recusal and he did not present a copy thereof before this court to prove that he made it. He concluded that the applicant was accorded a fair hearing and his ground that he was not has no likelihood of success.

With regard to the applicant's submission that the Attorney General did not have the *locus standi* to bring an application for contempt of court against him, the respondent's counsel submitted that everybody has the duty to protect the integrity of the courts, the vanguard of our rights and justice as a whole. He referred us to the decision in **Dawaru v. Angumale & Another, Miscellaneous Application No. 96 of 2016, [2017] UGHCCD 18 (29th March 2017)** as persuasive authority for the dicta that contempt of court that is not committed in the face of the court is *sui generis*. He added that contempt proceedings are matters between the court and the contemnor. That the person who brings the contempt to the attention of the court is not a party to the proceedings, though he/she may still assist the court. That as a result, the proposed ground of appeal was not likely to succeed, either.

With regard to the ground that the fine of UGX 300 million imposed upon the applicant was illegal, counsel for the respondent reiterated that this too was between the contemnor and the court. That the court rightly fined the applicant in the sum of UGX 300 million and so his proposed appeal on that ground was not likely to succeed.

As to whether the applicant proved that an injury which cannot be atoned by damages will be occasioned to him if the application is not granted, the respondent's advocates submitted that irreparable injury must be substantial or material and not capable of being adequately

compensated in damages. He explained that the Attorney General already conceded to an order to stay payment of the fine of UGX 300m pending the determination of this application. That there is therefore no likelihood that the applicant will suffer any damage. He went on to submit that the applicant will not suffer even if the order to pay the fine is executed by the respondent because in the unlikely event that the applicant's proposed appeal is successful, the Attorney General is in a position to refund the money. He relied on the decision in **American Cyanamid v Ethicon Ltd [1975] AC, at page 396,** to support his submission. He concluded his argument on this point by asserting that the applicant did not prove that he would suffer any injury from the execution of the order.

Turning to the balance of convenience in the matter, counsel for the respondent submitted that it tilts in favour of the respondent since granting the order to stay execution of the ruling will give a bad example to the public. That it would then be inferred that it is acceptable to abuse judicial officers because one who does so can be granted a stay of execution of the orders against him for contempt of court, including release from prison.

Counsel for the respondent also objected to the admissions of the 2 supplementary affidavits filed by the applicant in this application. The reasons that he gave were that the applicant tried to stretch this application to cover and stay orders in the ruling of the High Court delivered on 15th February 2022 in which he was sentenced to 18 months' imprisonment for fresh contempts. He went on to argue that the applicant did not file a Notice of Appeal against the said decision and an attempt to include prayers with regard to the second ruling would amounts to abuse of the court process. That this was especially so because the applicant subsequently filed a Notice of Appeal against

the decision and an application for temporary release from prison pending the determination of his appeal. He relied on the decision of the Supreme Court of Nigeria in **Chief B Alannah & Others v Mr Kanayo Kpolokwu & Others NWLR Part 1507,** at page 1, where Amitu Sanusi JSC, held that the concept of abuse of court process is not precise. That in a nutshell the common feature of abuse of court process centres on improper use of judicial process by a party in litigation aimed or targeting interference with the administration of justice.

He concluded that the supplementary affidavits had no evidential value in the instant application because they did not relate to it but to the order of 15th February 2022. And that therefore the said affidavits should be ignored because they seek to introduce grounds that were not part of the contemnor's application.

Without prejudice to the submissions above, the respondent's counsel responded to the contents of the supplementary affidavits with regard to the proposed grounds raised therein that the applicant thought would lead to the success of his appeal; viz: detention without trial and the right to be heard. He then concluded that the applicant had not shown that he has a *prima facie* case with a likelihood of success; neither had he proved that there is a threat of execution of the orders issued on 27th January 2022 by demanding the payment of UGX 300m, nor had the applicant proved that he would suffer irreparable damage if this application is not granted. He concluded that the application was incompetent and misconceived and should be dismissed with costs.

Determination

We have considered the submissions of the parties and the authorities referred to and those that were not but which are relevant to the determination of this application. We note that the jurisdiction of this

court to grant orders for stay of execution in civil proceedings is contained in rule 6 (2) (b) of the Rules of this Court which provides as follows:

> **(2) Subject to subrule (1) of this rule, the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may—**
>
> **(a) ...**
>
> **(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction, or a stay of proceedings on such terms as the court may think just.**

The paramount consideration is therefore that a notice of appeal must have been lodged in this court before an application is considered under rule 6 (2) (b) of the Court of Appeal Rules.

Further criteria for determining whether to grant the order were restated by the Supreme Court in **Gashumba's case** (supra) where the court relying on its decision in **Theodore Ssekikubo v Attorney General, Constitutional Application No. 06 of 2013** listed the principles as follows:

1. The applicant must establish that his appeal has a likelihood of success; or a prima facie case of his right to appeal;
2. It must also be established that the applicant will suffer irreparable damage or that the appeal will be rendered nugatory if a stay is not granted;
3. If 1 and 2 above have not been established, Court must consider where the balance of convenience lies;
4. That the applicant must also establish that the application was instituted without delay.

There is proof on the record before us that the applicant lodged a Notice of Appeal in the High Court in HCMA No. 843 of 2021 on 27th January 2022. In the said notice he stated thus:

> ***"TAKE NOTICE** that **MALE H. MABIRIZI K. KIWANUKA** being dissatisfied with the ruling and orders of Judge Ssekaana Musa delivered on the 27th day of January 2022, without considering his submissions, him having been served with the applicant's submissions on 24th January 2022 and planning to respond by 31st January 22, as per court's own schedule, intends to make an appeal to the Court of Appeal of Uganda against the said ruling."*

However, the order that has brought the applicant before us is not really the order of 27th January 2022 in which the applicant was ordered to pay UGX 300 million as a fine for contempt of court. This is because there has been no attempt whatsoever to levy execution against him to pay the fine which is due to the Government of Uganda. Rather, his application was targeted at staying execution of an order which was issued on the same file, as a further order for different contempts from those in issue in the first application.

The order that the applicant really sought to stay was dated 15th February 2022 and in his ruling, the trial judge stated thus:

> *"The repeated nature of the attacks after the strong warning would invite this court to give a deterrent sentence to the respondent as a reflection of the gravity of the likely effect of his contemptuous statements on the administration of justice in Uganda.*
>
> *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."*

There is no evidence on the record before us that the applicant filed notice to appeal against the order above which is contained in a separate ruling from that which was delivered on 27th January 2022. We therefore find that the requirement in rule 6 (2) (b) that orders to stay execution are granted where a notice of appeal has been lodged in

this court pursuant to rule 76 of the Rules of this Court was not satisfied.

However, for the sake of completeness, we will explore whether the rest of the criteria that we have listed above were satisfied and whether they have merit to persuade us to order that the applicant be released from prison. There is no reason for us to dwell on whether the application was filed without delay. The main order in HCMA No 843 of 2021 was issued on the 27th January 2021 and this application was filed on 11th February 2022 without delay. We shall now consider the rest of the criteria that we set out above.

1. ***Whether the applicant's intended appeal has a likelihood of success or whether there is a prima facie case made out by the applicant.***

The Supreme Court in **Michael Mabiike v. Law Development Centre, Miscellaneous Application No 14 of 2015,** gave the reason for considering whether the appeal that is proposed by the applicant for an order for stay of execution has a likelihood of success as follows:

> *"For court to determine whether the appeal has a likelihood of success, the court has to look at the judgments of the lower courts to see the reasons why the suit or appeal went against the applicant/intending appellant. This was the point in the case of J.W.R Kazoora vs M.L.S. Rukuba, Civil Application No. 49 of 1991. In that case the court noted as follows:*
>
> > *'Nevertheless we should have a sight of that judgment and know at least the reasons why the suit went against rather than in favour of the applicant. Were we to be unaware of why the High Court decided a particular case as it did, then we should find ourselves in a position of having to grant every application for a stay pending Appeal. This in turn would encourage frivolous appeals merely to delay the satisfaction of the judgment…'"*

It is for those reasons that we considered some of complaints raised about the ruling of the trial judge that it is proposed to appeal against.

In his submissions, the applicant states, first of all, that he was not heard by the trial judge before the order of 15th February 2022 was issued against him. That in his intended appeal, one of the questions that will be determined relates to the abuse of his inherent and non derogable right to be heard, contrary to the provisions of Articles 28 (1) and 44 (c) of the Constitution of the Republic of Uganda.

We note that the applicant was aware of the hearing scheduled for the 11th February 2022. This is from his own affidavit in support of this application dated 10th February 2022, in which he states in paragraph 4 that he had *"come across a Notice to show cause why he should not be arrested, for tomorrow, 11th February 2022."* However, the applicant chose not to attend court on that day. The reason he gave in his affidavit in support was that he was not aware which court order he had violated, the number of the purported application and its particulars. He added that he thought that if he attended the hearing, he would be arrested, which would render his appeal nugatory because if he was committed to civil prison, the subject matter of the appeal would be disposed of and it would be overtaken by events.

In addition to the averments above, the applicant filed 2 supplementary affidavits; one on the 17th February 2022 and the other on 28th February 2022. In the two affidavits, he avers that his appeal against both orders of the trial judge has a strong likelihood of success. He advances many reasons why he thinks so. However, when he appeared before us on the 29th June 2022, he did not seek leave to have these supplementary affidavits admitted onto the record of this court as is required by rule

44 of the Rules of this Court. The rule provides for supporting documents 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.**
>
> **(2) An applicant may, with the leave of a judge or with the consent of the other party, lodge one or more supplementary affidavits.**
>
> **(3) Application for leave under sub rule (2) of this rule may be made informally.**

In his submissions, counsel for the respondent opposed the admission of the two supplementary affidavits for the reason that there was no notice of appeal filed to challenge the decision of the trial judge that was rendered on 15th February 2022, He contended that admitting them would be in abuse of the process of the court.

We already considered and accepted his submission that there was no notice to appeal the said decision. But in addition, the two supplementary affidavits cannot be accepted because they offend rule 44 (2) and (3) of the Court of Appeal Rules. Therefore, the said affidavits will not be considered in coming to the decision in this application.

Going back to the applicant's argument that the intended appeal has a high probability of success because he was not accorded the right to be heard, in his ruling of 15th February, the trial judge explained how he considered the representation of the applicant at the hearing. At page 6 of the ruling, the trial judge stated thus:

> *"The respondent filed a letter addressed to the trial judge dated 10th February 2022 titled* ***OPPOSITION TO APPLICATION TO HAVE ME COMMITTED TO PRISON FOR ALLEGED 'VIOLATING A COURT ORDER' IN MISC. APPLICATION NO. 843 OF 2021 ATTORNEY GENERAL V. MALE H MABIRIZI KIWANUKA*** *stating that:*

1. *I have come across your owned (sic) signed notice to show cause why I should not be committed to Prison for violating a court order. I state that there is no reason to tamper with my liberty.*
2. *Constrained by the short notice, the reasons against committal are:*
    1. *I have never been served with any court order for Misc. Application No. 843 of 2021 either by the Respondent or any other person.*
    2. *I am not aware of which court order was allegedly violated.*
    3. *Miscellaneous Application No. 843 of 2021 is on APPEAL.*
    4. *I have filed Misc. Applications No 85 & 86 of 2022 for stay of execution and they are pending determination by court.*
    5. *I have applied for Recusal of Judge Ssekaana Musa and I am yet to get the mandatory response.*
    6. *I am not aware of any order stating committal to prison as an alternative to compliance with it, hence it has no basis.*
    7. *Civil prison is not available in the instant case since it is designed to enforce a positive action.*
3. *I pray for time to file my written submissions to back up the above with modern binding and persuasive authorities.*
4. *Supported by my affidavit, I pray for ruling on recusal, allocation and fix (sic) hearing of Misc. Applications No 85 and 86 of 2022 for stay of execution."*

The trial judge then went on to note that the respondent filed an affidavit in support of the letter and repeated the same statements as his evidence in support of the opposition to the notice to show cause. Further that he was represented by learned counsel, Mr. Nuwe Noel from M/s Ojok Advocates. And that at the hearing, the parties presented their submissions which he considered in his ruling.

The applicant could have attended the hearing and shown cause why he should not be committed to prison but he chose to be elsewhere at the time. It seems he thought he had more pressing matters than his own freedom or liberty. It is also clear from his own affidavit that he chose to avoid court for fear of being arrested and committed to prison and so responded in writing and sent counsel to represent him and argue the application on his behalf.

There is therefore no doubt that the applicant was accorded the right to be heard on the notice to show cause why he should not be committed to prison for further contempts. He responded to it and filed an affidavit in support of his defence against the Attorney General's prayer to have him committed. He was represented in court by learned counsel of his own choice. An appeal based on this point therefore stands no chances of success, in our view.

Jurisdiction of the trial judge or application for the judge to recuse himself

In his submissions, the applicant states that one of the reasons why his intended appeal has a strong likelihood of success is because he lodged an application for Sekana, J. to recuse himself from entertaining the application for his committal to prison. The jurisdiction of the trial judge to make the order to have the applicant committed to prison therefore comes into question. The application for recusal was not placed before us in this application. However, we had the benefit of reviewing it for it was **Annexure "D"** to the supplementary affidavit dated 16th February 2022, filed in Civil Application No. 40 of 2022, on the 17th February 2022. The decision in that application is before us on a reference to the panel of three judges, also the subject of this ruling.

In Civil Application No. 40 of 2022, **Annexure D** to the applicant's supplementary affidavit was a letter addressed to Judge Musa Sekana, through the Deputy Registrar, High Court Civil Division. It was dated 10th February 2022 and the heading in the letter was: **"Recusal from Notice to show cause and execution proceedings for Misc. Application No 843 of 2021 [Attorney General v Male H. Mabirizi Kiwanuka]."** It is important that we set down the alleged application for recusal, verbatim, for clarity of our decision on this point, because the

jurisdiction of any court to entertain any matter is of paramount importance to the proceedings and any decision taken in them. In his application, the applicant stated thus:

> *"1. I have come across your own-signed Notice to show cause why I should not be committed to Civil Prison for violating a court order for tomorrow, Friday 11th February 2022.*
>
> *2. However, as you are aware, my 31st January 2022 letter to Judicial Service Commission requires it to expand their investigations and expedite your removal from office meaning that your impartiality in a matter involving me, who wants to have you removed from office will reasonably be questioned.*
>
> *3. Further, the Uganda Judicial Officers' Association has also written a 1st February 2022 letter alleging that "Mr. Male made similar insults" against you making you already conflicted by the allegation that I insulted you.*
>
> *4. The above facts squarely fall within "The Constitution (Recusal of Judicial Officers) Practice Directions, Legal Notice No. 7 of 2019 which provides under paragraphs:*
>
> *...*
>
> *5. Since "... Judicial prestige and authority are at their greatest when the judiciary is seen by the community, ... to conform to the discipline of law which it administers. The rule of law is not enforced by an army. It depends upon the public confidence ... Public confidence demands that the rule of law be respected, above all, by the judiciary" PLEASE RECUSE YOURSELF."*

The apparent attitude in the letter is that of *'talking down'* to the judge; the arrogance with which the applicant made his application therefore did not escape our observation. Nonetheless, the application was signed by the applicant and filed in court on 11th February 2022, the day of the return of the notice to show cause. It was supported by his affidavit dated 10th February 2022. Though the applicant states that the trial judge did not address the application for recusal, or that he did not respond to it, it is clear from the ruling of 15th February 2022, at page

9, that the trial judge did consider the application. He also responded or ruled on it as follows:

> *"The respondent in addition filed another letter requesting for recusal of myself in the matter as he has always done in all matters involving himself before this court. The respondent has made it a habit to always seek recusal of judicial officers and this court declined to respond until when the matter is heard.*
>
> ***The application for recusal by the respondent lacked merit and he was raising the same grounds as this court earlier refused in the similar application for recusal.*** *The application for recusal should not be made repetitively or used as a way of stalling court proceedings which is a fashion the respondent has always intended to use in different matters."* *{Emphasis supplied}*

The Constitution (Recusal of Judicial Officers) (Practice) Directions, 2019, Legal Notice No. 7 of 2019, provide for the procedure to be followed on such applications in rule 8 thereof. In respect of a judicial officer who declines to recuse, sub rule (4) provides that,

> **(4) Where a judicial officer declines to recuse himself or herself, the reasons for declining shall be noted on the record and the matter shall proceed for hearing.**

The trial judge in this matter did not simply note the reasons on the record; he ruled on the application as it is shown in above. He declared that it had no merit. Impliedly, he declined to recuse for the reason he gave; in short it carried no merit to cause him to recuse himself. Thereafter, the applicant had the right to state the reasons why he was dissatisfied with the decision of the judicial officer not to recuse after which the proceedings would and did continue. However, the applicant was not before court to receive the decision on the application to recuse. He chose to be elsewhere and so missed out on enforcing the right to state his dissatisfaction with the decision. As a matter of fact, he missed out on the decision because once again he was not in court on the 15th February 2022 when the ruling was read in open court. It appears it is

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for that reason that he thought the trial judge made no decision on the matter.

We note that paragraph 9 of LN No 7 of 2019 (the Recusal Rules) provides that an appeal arising out of the failure to grant an application for recusal shall be made after the matter has been determined. In this case, the matter was determined on 15th February 2022. The applicant has filed many applications in this court since then, by his own admission, 12 of them. None of them is an appeal against the decision of the trial judge to recuse himself. We therefore find that the applicant did not prove that the proposed appeal has a likelihood of success due to his allegations that the trial judge did not respond to the application to recuse himself, because he did so.

The applicant advanced further reasons why he thought that his intended appeal against committal to prison would be successful, as follows:

i) That the Attorney General had no *locus standi* to institute contempt proceedings in a case where he was not a party;
ii) The evidence that was adduced to prove that he was in contempt of court was not backed by evidence from managers of Twitter and Facebook;
iii) Legality of the fine of UGX 300,000,000 imposed upon him that was not pleaded;
iv) Failure by the trial judge to give reasons for the decision to impose the fine of UGX 300m and support it with precedent or law;
v) Alleged political persecution by imposing the fine against him;
vi) Alleged detention without trial.

It is not our call to deal with all of the grounds that the applicant proposes to raise in his appeal. All that we are required to do is to establish whether there is a *prima facie* case that would merit an appeal before this court. We therefore did not consider these reasons in detail for it is our view that they would be the subject of the appeal which the applicant intends to file in this court. They will be considered if he finally lodges an appeal against both decisions that are the subject of his applications here.

2. Whether the applicant will suffer irreparable damage that cannot be atoned by damages

The applicant's main contention in this regard is that he has been subjected to a process that resulted from a decision that he is challenging in this court. He referred us to the decision in the case of **Tusingwire** (supra) where irreparable injury for purposes of breach of constitutional rights was defined by the court. The respondent's counsel on the other hand referred to the decision in **American Cyanamid v. Ethicon Limited [1975] AC** at page 396, where the court laid down the broad parameters for establishing whether or not damages are adequate to atone for injury. Counsel then submitted that the applicant did not demonstrate that the injury to be suffered cannot be atoned for by payment of damages.

We observed that in paragraph 12 of his affidavit the applicant simply adverts to substantial loss since he is being subjected to a process resulting from a decision he is challenging. He gives no further details of the anticipated loss. Neither does he do so in his submissions.

As we already observed above, the order that the appellant sought to stay was the order for imprisonment, or to stop the term of imprisonment that was imposed and was already running. We are of

the view that in the circumstances he had to prove that his imprisonment cannot be atoned for by monetary compensation in damages. This is because it is trite law that where it is proved that imprisonment was wrongful, it is a tort that can be atoned by the payment of damages in compensation.

We note that the first order that was imposed upon the applicant was for the payment of UGX 300 million as a fine. There is no evidence that any one had proceeded to have this fine collected from him at any one point in time since the order was pronounced on the 27th January 2022. Neither did the appellant advert to any loss on account of that order in order to justify the grant of an order to stay its execution. However, he wishes to appeal against the fine. His right to do so ought to be preserved and therefore an order to stay execution by collecting the fine of UGX 300 million from him ought to be and it is hereby granted.

However, with regard to the order to stay or stop his imprisonment, we find that the applicant did not prove the criterion that the refusal of the order will occasion him irreparable loss that cannot be atoned by payment of damages.

3. Whether the balance of convenience in the matter is in favour of the applicant.

The applicant has not established that his intended appeal against the order to commit him to civil prison has a like hood of success. Neither has he proved that he will suffer irreparable loss if his imprisonment is not stayed/stopped, because it already commenced. We therefore must consider whether the balance of convenience lies in his favour before we make a final decision on this application.

The applicant argues that if an order is issued by this court to release him from prison, if his appeal is not successful, he would continue to serve the term of imprisonment. And that therefore the balance of convenience lies in favour of granting the order he seeks to stop his imprisonment.

This court would have considered this argument if it was shown that there was a notice of appeal filed in this court in which it was proposed that the order in HCMA 843 of 2022 issued on 15th January 2022 is to be appealed against, pursuant to rule 6 (2) of the Rules of this Court. Unfortunately, the applicant did not prove that fact to this court. 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 that, another order was issued in the same application for him to be arrested and committed to 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.

In the circumstances, we find that the balance of convenience is against granting the order that the applicant sought, only in his submissions and supplementary affidavits that were brought onto the record without leave of this court and/or the consent of the respondent.

In conclusion therefore, Court of Appeal Civil Application No. 39 of 2021 partially succeeds in that the order to stay execution of the payment of the fine of UGX 300 million is granted. The subsequent informal

application to stay his imprisonment is hereby dismissed and the costs shall be paid by the applicant.

CIVIL REFERENCE NO. 91 OF 2022

In this reference, the applicant complained about the decision of Madrama, JA in **CACA No 40 of 2022** on two grounds stated in the Letter of Reference as follows:

1. The learned single Justice of Appeal erred in law and fact in holding that he lacked jurisdiction to suspend the applicant's imprisonment and set him free pending his substantive application or appeal.
2. The learned single Justice of Appeal erred in law and fact in holding that the prayer for stay of execution with regard to the Notice to Show Cause issued by the High Court on 9th February 2022 was overtaken by events.

The applicant prayed that the reference be allowed and that he be released from prison pending determination of his substantive application, CACA No 39 of 2022, and the costs of the Reference. The said application has been disposed of and it was partially successful, as is evident from our decision above. We now proceed to determine the applicant's grounds stated above in the order that they were framed.

Submissions of the parties

With regard to the first ground of the reference, the applicant contended that the findings therein were reached without a careful and proper consideration of the law in the light of the facts which were laid out before Madrama, JA. That the decision of the judge therefore meant that there had to be multiple Notices of Appeal from the same Miscellaneous Application, simply because of the fact that the court made multiple

decisions therein. He added that this was contrary to section 34 (1) and section 77 (1) CPA and rule 87 (1) (j) of the Rules of this Court.

The applicant further submitted that the provisions above do not envisage multiple appeals from one file as the single Justice of Appeal ruled. He explained that the provisions state that one Notice of Appeal suffices on all matters arising from the same file in the lower court. He pointed out that the application before the court was one for stay of execution of the orders of the High Court made on 27th January 2022 in which he is the *"judgment debtor"* as defined by section 2(k) CPA. That a decree was issued against him which, among others, included *"a strong warning"* which it was alleged he did not heed resulting in his imprisonment. He asserted that there was no way in which the two orders could be separated from each other to result in two notices of appeal.

The applicant further pointed out that the single justice appreciated this at page 25 of his ruling when he stated that the facts of the application were that there was a decision of the High Court dated 27th January, 2022. And that subsequently, the Attorney General alleged that the applicant committed contempt of the court order which culminated in a ruling dated 15th February 2022, but he later deviated from this, hence this reference.

The applicant referred us to the decision of the East African Court of Justice in **Attorney General of Uganda v. Media Legal Defence Initiative & 19 Others, EACJ Appellate Division Consolidated Applications No. 4 and 6 of 2018,** where it was held that well intentioned parties against whom separate decisions are made which do not have the effect of disposing of the final reference, application or claim should sparingly resort to the right of appeal against interlocutory

rulings or orders which are likely, in the long run, to lead to a miscarriage of justice if no immediate redress is sought or obtained. He pointed out that the decision of that court is binding on us under Article 33 (2) of the Treaty for Establishment of the East African Community. He prayed that we find that the single justice erred when he made the finding that the court did not have the jurisdiction to entertain his application to be released from prison.

With regard to the 2nd ground, the applicant submitted that at page 28 of his ruling, the single Justice of Appeal held that the prayer to stay execution with regard to the Notice to show cause issued on 9th February 2022 had been overtaken by events because the applicant was arrested on 21st February 2022 and committed to Kitalya Prison. He went on to explain that his understanding of the import of that statement or decision was that execution of the "strong warning" or the order for his imprisonment was completed upon his arrest and delivery to the prison. He contended that the order was made on 15th February 2022 in his absence and he was arrested on 21st February 2022 and taken to prison directly without appearing before any judicial officer.

The applicant contends further that this was contrary to several provisions of the law which make it clear that execution by arrest and detention becomes complete upon service of the entire period as opposed to arrest and admission to prison. He referred us to the provisions of section 42 (2) (e) and 43 (3) (b) CPA, and rule 6(2) (b) of the Rules of this Court and submitted that imprisonment as a mode of execution continues up to the last day in prison. That the mere arrest of a person does not result in the right to stay execution being overtaken by the event of his arrest. That the single Justice of Appeal therefore erred when he held that stay of execution was overtaken by events.

The applicant went on to refer us to the decision of the Supreme Court in **Gashumba v Nkundiye** (supra) where it was held that execution of the order was only partial and the rest of it could be stayed. He explained that though he was arrested in execution of the order of 15th February 2022 he had only served a period of 4 days (when he brought the application) and the rest of the 18 months continued to run. And that therefore, the application was not overtaken by the event of his arrest and imprisonment. He prayed that the reference be allowed.

In reply counsel for the respondent submitted that the applicant filed CACA No 40 of 2022 for an interim order to stay execution of the order that was issued on 27th January 2022. That the application was filed pending the appeal whose notice he had lodged. That at the hearing of the application, the respondent conceded to an order to stay execution of the order for the fine of UGX 300 million, and the application was allowed to that extent.

Counsel further explained that during the hearing of CACA No. 40 of 2022, the applicant prayed that the court releases him in the interim pending the hearing of his appeal. He further submitted that the single Justice of Appeal was alive to the principles of the law and the Rules of this Court on interim orders for stay pending the hearing of an appeal. That at page 22 of his ruling he referred to rule 6(2)(b) of the Rules of this Court which provides for the jurisdiction of this court to stay execution. Further that the lone Justice of Appeal took note of the inherent powers of the court and made his decision at page 23, in paragraphs 25-35, that the subsequent application by the applicant to be released from prison was not the subject of the Notice of Appeal in that application. He supported the findings and decision of the trial judge in that regard.

With regard to the 2nd ground of the reference, counsel for the respondent submitted that the applicant correctly admitted that by the time of the ruling he was already serving his sentence issued by the High Court. He referred us to the decision of the single Justice of Appeal at page 28, paragraph 15. He submitted that the respondent entirely agrees with the decision because execution had already been implemented; the applicant had already been arrested and was serving the sentence of 18 months and his application had been overtaken by events.

Counsel for the respondent further referred us to the decision in **China Henan International Corporation Group Company Ltd v. Justus Kyabahwa, Supreme Court Civil Application No. 30 of 2021; [2021] USC19,** where it was held that in situations where execution is complete the proper remedy would be to apply to set the order that resulted into execution aside. He then concluded that since the execution of the order of the High Court had been effected, the remedy of staying the applicant's arrest and imprisonment was overtaken by events. That the only remedy that was available to him was to appeal or apply to set aside the decision to commit him to prison. He prayed that the reference be dismissed with costs.

Determination

The powers of the panel of three judges of this court to entertain a reference are drawn from rule 55 of the Rules of this Court which provides as follows:

55. Reference from decision of a single judge.

(1) Where under section 12(2) of the Act, any person being dissatisfied with the decision of a single judge of the court—

(a) in any criminal matter wishes to have his or her application determined by the court; or

(b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the court, the applicant may apply for it informally to the judge at the time when the decision is given or by writing to the registrar within seven days after that date.

(2) At the hearing by three judges of the court of an application previously decided by a single judge, no additional evidence shall be adduced except with the leave of the court.

We shall therefore observe and be guided by the parameters that were set for us in sub rule 1 (b) above.

We have considered the submissions of counsel for both parties in this matter and the authorities that they cited and those not cited that relate to the matter. We shall dispose of the grounds raised in the reference in the same order that they have been argued by the parties.

Ground 1

The complaint of the applicant in ground 1 was that the trial judge erred when he found and ruled that he lacked the jurisdiction to suspend the applicant's imprisonment and set him free. The grievance was founded upon the decision of the single judge which appears at pages 25-26 of his ruling as follows:

> *Consequently, in this matter, there has to, in the least, be a notice of appeal from the decision of 15th February 2022 to base the jurisdiction under article 134 (2) of the Constitution to suspend the sentence imposed on the applicant pending appeal as envisaged by Rule 6 (1) of the Rules of this court or to set aside or stay the orders issued after the decision of the High Court dated 27th of January 2022.*
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> ...
>
> *Secondly, a single justice of this court only exercises appellate jurisdiction and the inherent powers of the court are exercised when a decision of the High Court has been challenged in the minimum step by lodging a notice*

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of appeal against it within 14 days of the decision. The court is therefore constrained on a fundamental point of jurisdiction from considering the submissions of the Applicant's Counsel. The Applicant was not and is not precluded from seeking a remedy on the basis of any allegation that his fundamental rights and freedoms have been infringed. In any case such a remedy can be considered by an appellate court after the impugned decision has been duly challenged in a competent court or tribunal exercising original jurisdiction for enforcement of fundamental rights and freedoms.

{Emphasis supplied}

In his submissions before us, the applicant contended that the filing of several Notices of Appeal from the same decision of the High Court is prohibited by law. He referred us to sections 34(1) and 77(1) of the CPA and rule 87(1)(j) of the Rules of this Court. We therefore considered the import of the said provisions and whether they apply to the situation at hand, in some detail.

Section 34 (1) of the CPA provides as follows:

> **(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.**

The applicant came to this court to appeal against the decision of the High Court wherein he was found to have acted in contempt of the orders of that court. The complaint about execution of a further order issued by that court only came before us after it had been effected by that court. The provision above clearly does not apply to the matter at hand because this court was not executing the orders of the High Court.

With regard to the applicability of section 77(1) CPA in preventing multiple appeals, it provides for other orders as follows:

(1) Except as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal.

{Emphasis supplied}

We note that the applicant has not yet filed his memorandum of appeal in respect of the Notice of Appeal that he lodged in this court on the 27th January 2021, in respect of the decision of Sekana, J that was delivered on the same date. We also do not think that the decision that was delivered on 15th February 2022 is part of the earlier decision though the two were related to each other. The decision of 15th February 2022 arose from different proceedings from those that the earlier decision arose.

The applicant could have filed a single Notice of Appeal in respect of both decisions since they arose out of the same file though handed down on different dates, but he did not do so. Having filed a Notice of Appeal in respect of the decision of 27th January, 2022, he could not premise his application for leave to appeal against the decision of 15th February 2022 on the same because it had not been delivered yet. However, in the event that the applicant files a Notice of Appeal in respect of the latter decision, he is entitled to file a single Memorandum of Appeal in respect of both decisions in this court pursuant to section 77(1) CPA. We therefore find that the provision was not applicable to CACA No 40 of 2022 at the time that the decision of Madrama, JA was handed down.

With regard to the applicability of rule 87 (1) (j) of the Rules of this Court, it is clear that the Attorney General's complaint alleging that the applicant committed further contempts after the order of 27th January 2022 came after that order was issued against him. Rule 87 (1) (j) of the

Judicature (Court of Appeal Rules) Directions provides that the Record of Appeal may include:

> **"(j) any other documents necessary for the proper determination of the appeal, including *any interlocutory proceedings* which may be directly relevant."**
>
> ***{Emphasis supplied}***

In his submissions, the applicant tried to persuade us to consider the decision of 15th February as an interlocutory matter in the whole of HCMA 843 of 2021. However, the word *"interlocutory"* is defined by Black's Law Dictionary (9th Edition, by West Publishers) at page 889 as:

> *"(Of an order, judgment, appeal, etc.) interim or temporary; not constituting a final resolution of the whole controversy."*

An *"interlocutory application"* is defined at page 115 of the same source as, *"A motion for equitable or legal relief sought before a final decision."*

The final decision in HCMA No. 843 of 2021 was handed down on 27th January 2022. The applicant was alleged to have violated orders that arose from that decision when he made scurrilous remarks about the trial judge, the subject of HCMA No 843 of 2021, and other judicial officers. In terms of causes of action, the defamatory aspersions attributed to the applicant in the complaint filed by the Attorney General by letter dated 11th February 2022 and supported by the affidavit of Jimmy Oburu Odoi dated the same day, in which evidence of the alleged contempts was brought before the court, and lodged in the High Court Civil Division on 14th February 2022, constituted fresh causes of action for contempt of court. We find so though they were related to the previous cause of action because the invective directed at the judicial officers was separate and on different dates from that which was the subject of the order of 27th January 2022. Before the court

therefore, were a series of events that could be considered as separate causes of action separately or together, all against the applicant.

We therefore find that the complaint of the Attorney General in respect of further contempts alleged to have been committed after the order of 27th January 2022 could not be subsumed under the previous complaint, though on the same file. Therefore, in relation to invoking the jurisdiction of this court under rule 6 (2) (b) of the Court of Appeal Rules to stay execution, rule 87 (1) (j) of the same Rules did not *necessarily* apply to it.

As to whether the inclusion of the decision of 15th January 2022 in Civil Application No 40 of 2022 absolved the applicant from filing a separate Notice of Appeal, it is emphasised that the Attorney General's application filed on 14th February 2022, though informal, gave rise to a separate decision of the court in its own right, the violation of the order of 27th January 2022 in which the applicant was warned *"to stop attacking judicial officers in the future."* Being a decision in its own right, after the decision of the same court on 27th January 2022, it could have been included in the same Notice of Appeal as the previous decision but the Notice in respect of that decision had already been lodged in this Court. The applicant therefore had to lodge a separate Notice of Appeal in that regard, after which he could then exercise the option of lodging a joint Memorandum of Appeal in respect of both decisions from the same file. Absent that, any appeal lodged in this court in respect of the decision of 15th February 2022 would be challenged for failure to take an essential step in the appeal, under the provisions of rule 82 of the Rules of this Court.

Going on to the applicant's specific complaints about the decision of the single Justice of Appeal, we observed that his decision was, first and

foremost, based on the prayers in the notice of motion and the submissions of both counsel. We further observed that in the Notice of Motion the applicant sought an interim order staying all orders in HCMA No. 843 of 2021 until final determination of his substantive application for stay of execution and the costs of the application. One of the grounds was that he lodged a Notice of Appeal and requested for a copy of the typed proceedings from the High Court.

The applicant did not amend his notice of motion as filed on 11th February 2022 but he filed a document which was entitled *"1st supplementary affidavit in support of the Notice of Motion"* on 17th February 2022. In that affidavit, the applicant raised the issues of the alleged denial of the right to be heard before an order was made on the 15th February 2022 that he be committed to prison for further contempts of court. He further stated that the police were hunting him down in order to arrest him and execute the order of 15th February 2022. We note that this supplementary affidavit was sworn on 16th February 2021, before the applicant was arrested on 21st February 2021.

At the hearing of the application before Marama, JA, counsel for the respondent, Ms Patricia Mutesi, conceded to the application to stay execution of the order against the applicant to pay a fine of UGX 300 million and the court entered the order. However, at page 20 of the ruling, the single justice of appeal noted that Ms Mutesi strongly objected to the application on the aspect of the committal of the applicant to prison because it had been overtaken by events. She also argued that the application in that regard was incompetent because it sought to introduce, by way of the supplementary affidavit, issues of committal and the arrest warrant issued against the applicant which were extraneous matters alien to the application then before court.

For the applicant, Mr Semakadde argued that this court has inherent powers arising from the Constitution to enforce the fundamental rights and freedoms of the applicant who had a grievance. The grievance was that the warrant of arrest was enforced against the applicant when he had a pending matter in this court; and that this was in bad faith and this court should not tolerate it. He relied on the decision of the High Court in **Erias Lukwago Lord Mayor v. Attorney General & Others; Supreme Court Miscellaneous Application No. 13 of 2015.**

In his analysis, the learned Justice of Appeal laid down the law relating to the jurisdiction of this court as an appellate court and the provisions of the Constitution from which it arises. He emphasised that the jurisdiction strictly arises out of statute and that for purposes of applications to stay execution pending appeal this court is guided by rule 6 of the Judicature (Court of Appeal Rules) Directions which require that before such an order is granted, there must be a Notice of Appeal filed in this court in respect of the decision that it is intended to appeal. He concluded that in the absence of such a document on the record, he could not entertain the application to stay execution.

The learned single Justice of Appeal also explained that since the applicant's counsel sought for the order to release the applicant on the basis of provisions of the Constitution, such proceedings could not be brought to the Court of Appeal as a court of first instance. That the procedure for such proceedings was provided for elsewhere, in Article 50 of the Constitution and the Human Rights (Enforcement) Act, 2019. He explained that jurisdiction in such matters is vested in the subordinate courts and the High Court. The judge summed it up at page 27 of his ruling where he found and held that:

> *"The Court of Appeal is not a competent court envisaged under Article 50 except when handling an appeal. It is an appellate court envisaged under*

article 134 (2) of the Constitution. Secondly in Uganda the enforcement of fundamental rights and freedoms is further governed by a procedural law that was envisaged by article 50 (a) of the Constitution of the Republic of Uganda. The Act of Parliament is the Human Rights (Enforcement) Act, 2019. Particularly sections 3, 4 and 5 deal with enforcement of fundamental rights and freedoms by competent courts which include the High Court and subordinate courts. This (sic) courts are empowered with original jurisdiction."

We maintained the position of the single Justice of Appeal in our decision above in CACA No 39 of 2022, the substantive application in which the applicant sought for an order to release him from prison, based on facts similar to those in CACA No. 40 of 2022. However, we did not deem it necessary to consider the second limb of the decision which was based on the constitutional rights alleged to have been violated. But for the avoidance of doubt, we agree with Madrama, JA that this court is not a court of first instance for the enforcement of fundamental rights and freedoms under the Constitution, except in limited circumstances when it sits as the Constitutional Court.

We therefore find that the learned single Judge made no error when he held that the court lacked the jurisdiction at the time to set aside an order that was not the subject of an intended appeal to this court, for it was not based on a Notice of Appeal under rule 76 of the Rules of this Court. Ground 1 of the reference therefore fails.

Ground 2

This was a complaint that the single Justice of Appeal erred when he held that the prayer for stay of execution with regard to the Notice to Show Cause issued by the High Court on 9th February 2022 was overtaken by events.

The application in CACA No 39 of 2022 and this reference was to prevent any action being taken in pursuit of the orders issued by the High Court

on 27th January 2022. But before any of the applications were heard, the applicant was arrested on 21st February 2022. In his ruling, the single judge found and held that:

> *"The prayer to stay execution with regard to the Notice to show cause issued by the High Court on 9th February 2022 why the Applicant should not be committed to prison for violation of a court order has been overtaken by events as the Applicant was arrested on 21st of February 2022 and committed to Kitalya Prison."*

The facts relating to this aspect of the application were that the applicant filed this application and CACA No 40 of 2022 on the 17th February 2022. At the time, the orders in HCMA No 843 of 2022 wherein he was ordered to pay a fine of UGX 300 million and issued with a strong warning to desist from making further attacks against judicial officers in the future had not yet been executed. In both this application and CACA No 40 of 2022, the applicant sought orders to stay all the orders issued in HCMA No 843 of 2021.

However, it was alleged that the applicant committed further contempts of court after the order of 27th January 2022. The contempts were said to have been committed on 28th, 29th and 30th January 2022 and 1st February 2022. On 15th February 2022, Sekana, J found and held that the applicant was guilty of contempt of court when he published the alleged disparaging remarks on those dates about several judicial officers on his Twitter handle. The last paragraph of his ruling is instructive and it was as follows:

> *"Therefore, **the respondent is in contempt of court 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. I so order."*
>
> ***{Emphasis supplied}***

We observed that consideration of the application before Madrama, JA could not be based on the order of 15th February 2022 because it had not been issued at the time the applicant filed his application. The application before Madrama, JA was based on the order issued on 27th January 2022, only. Though the applicant tried to prevent his arrest by seeking orders from this court to stay *"all orders in Miscellaneous Application No. 843 of 2021,"* he did not take the necessary steps to ensure that the order that was issued for his arrest and imprisonment was included in the application. He did not seek to amend the application to include those facts; neither did he prove that he filed a Notice of Appeal in respect of the order issued on 15th February 2022 to enable the court to invoke its jurisdiction under rule 6(2)(b) of the Judicature (Court of Appeal Rules) Directions.

It is trite law that the rationale for an order for stay of execution pending appeal is to preserve the *status quo* before the determination of the rights of the parties in the appeal. This presupposes that the order that it is intended to be stayed has not yet been implemented/executed. In this case, the applicant's argument was that since it was ordered that he be imprisoned for 18 months and the sentence had not yet been completed, the rest of it, less what he had served, could be stayed. However, we do not think that this argument holds water. The order that the applicant sought to stay was clear and unambiguous. At the risk of repetition but for emphasis we shall set it down here again; it was as follows:

> *"The respondent is in contempt of court 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 18 months****."*
>
> ***{Emphasis supplied}***

A warrant of arrest was issued against him on the 15th February 2022. It required any police officer *"to arrest and deliver the applicant to a prison mentioned in the committal warrant with immediate effect."* The warrant described as *"Warrant of Arrest in Execution"* did not require anything else. The applicant was thus arrested and delivered to the Prison at Kitalya on 21st February 2022. He began to serve his sentence on that day and should do so until further orders are issued by a court with competent jurisdiction.

The applicant referred us to the decision of the Supreme Court in the case of **Gashumba v Nkundiye** (supra) where the court observed that execution in a case for recovery of land was incomplete and held thus:

> *"The evidence on record therefore indicates that there is a permanent house that is yet to be demolished. This means that the process of execution is not yet complete. If the appeal succeeds after execution has been completed, it would be difficult for the applicant to construct another permanent house. In the circumstances, there is no doubt that substantial loss will result to the applicant if a stay is not granted."*

We are of the view that execution of an order for recovery of land which includes demolition of structures is clearly distinguishable from execution of an order for arrest and delivery of a person to prison. In the former situation, the court found that a permanent house was still standing. The order had not been executed against that particular house on the land and so it could be preserved by an order to stay execution; the status quo could still be maintained. The situation in that case can be likened to the instant case in terms of the order for the payment of a fine of UGX 300,000,000/= which has not been set in motion against the applicant. It is for that reason that stay of execution of that order was issued by Madrama, JA., and we agreed with his decision in Civil Application No. 39 of 2022.

The Supreme Court in **Hon Michael Mabikke v. Law Development Centre, Civil Application No 14 of 2015**, in which the applicant applied to stay the orders of this court pending filing an appeal in the Supreme Court made a similar decision to that of Madrama, JA. The orders that the applicant in that case sought to stay had already been executed by the cancellation of his diploma, the subject of the dispute. The Supreme Court thus found and held that:

> *"We also observe that the application has been overtaken by events when the applicant subjected himself to proceedings as a result of which he had his Diploma cancelled. A grant of this application would indeed stay nothing of essence and the law cannot be seen to operate in a vacuum."*

The Supreme Court made a similar decision in **China Henan International Corporation Group Company Ltd (supra)** where a garnishee order had been made absolute requiring the bank to pay the judgment debtor. The court found that an order to stay execution could not be granted because execution of the order that the applicant sought to stay had been completed.

We therefore find that since there was no application before this court to stay execution of the order issued in HCMA No 843 of 2021 on the 15th February 2022 and the applicant was arrested on 21st February 2022, his application to stay execution of his arrest and imprisonment was overtaken by events. Execution by delivering him to a prison was complete and there was nothing left to be stayed. Maintaining the *status quo* in the circumstance could only imply that the applicant continues to serve his sentence in prison. The single Justice of Appeal therefore made no error when he found and held that the application was overtaken by events.

We note that since the 15th of February 2022 when the High Court ordered that the applicant be arrested, he has taken no further step in

pursing his appeal by following up the record of proceedings in the High Court. Instead, by his own admission, he filed 12 applications in this court to stay execution of the order to have him committed to prison. The applicant ought to follow up the proceedings to enable him to file his appeal in as industrious a manner as he has demonstrated by filing multiple applications in his court.

Conclusion

The gist of this decision is that Civil Reference No 91 of 2022 had no merit. It is therefore dismissed and the costs shall be in the cause. Since Civil Application No. 39 of 2022 has also substantially failed, we make the following orders:

i) Execution of the fine of UGX 300,000,000/= issued against the applicant on 27th January is hereby stayed pending the hearing of his appeal.

ii) The applicant shall continue to serve his sentence of 18 months imposed on him on the 15th February 2022 until it expires or until further orders of a court with competent jurisdiction.

iii) Costs shall be in the cause.

Dated at Kampala this 19th Day of August 2022

Muzamiru Kibeedi

Muzamiru Mutangala Kibeedi
JUSTICE COURT OF APPEAL

Irene Mulyagonja

Irene Mulyagonja
JUSTICE COURT OF APPEAL

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Eva Luswata

JUSTICE COURT OF APPEAL