

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL APPEAL No. 0323 OF 2023**

5 (Arising from Civil Suit No. 0289 of 2014)

**KCB BANK LIMITED** ..... **APPELLANT**

**VERSUS**

10 **1. GICHOHI NGARI** }  
**2. ANNE WANGUI GICHOHI** } ..... **RESPONDENTS**  
**3. SAMSON GICHOHI NGAI** }

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

a. Background.

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The three respondents are directors of M/s Formula feeds Limited. On or about 30<sup>th</sup> June, 2011 the three of them furnished personal guarantees for a sum of shs. 3,700,000,000/= borrowed by the company from the applicant. The borrowing was further secured by title deeds to eighteen (18) plots of land severally registered in the name of the 1<sup>st</sup> respondent and the company, as well as a debenture. Subsequently, the 1<sup>st</sup> respondent and the company sued the applicant seeking, *inter alia*, a declaration that the mortgage deed they had executed with the applicant was a nullity, the debenture deed executed in favour of the applicant was unenforceable, the personal guarantees executed by the respondents were unenforceable, and recovery of a sum of money. Before the suit could be heard, the parties entered into a partial consent judgment by which the 1<sup>st</sup> respondent and the company admitted liability to the applicant in the sum of shs. 2,159,000,000/= The applicant then commenced execution of the partial decree by way of attachment and sale of the eighteen (18) plots of land mortgaged to it, situated at Wattuba and Katalamwa registered in the name of the 1<sup>st</sup> respondent and the company.

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In the meantime, hearing of the rest of the claim proceeded resulting in a judgment which was delivered partly in favour of the 1<sup>st</sup> respondent and the company on 10<sup>th</sup> February, 2016. By that decision, the mortgage deed was declared null and void, the debenture unenforceable, but the personal guarantees enforceable. It was also declared that the company was indebted to the

applicant in the sum of shs. 4,272,740,116/= with interest accruing thereon at the rate of 21% per annum from the date of judgment until payment in full, as well as the costs of the suit. The 1<sup>st</sup> respondent and the company appealed the decree, to the Court of Appeal.

5 The Court of Appeal in its judgment delivered on 8<sup>th</sup> July, 2019 upheld the decision of the trial court and found, *inter alia*, that being non-citizens, leasehold title deeds ought to have been issued to the 1<sup>st</sup> respondent and the company, instead of the mailo land title deeds. By the time of that decision, the respondent had completed execution of the partial decree by way of attachment and sale of the eighteen (18) plots, to M/s Southgate Properties Limited. However in a decision  
10 delivered by the then Executions Division of this court on 26<sup>th</sup> August, 2020 those sales were declared illegal and were set aside on account of the fact that being non-citizens, the 1<sup>st</sup> respondent and the company were incapable of owning mailo land and therefore the land was not available for attachment in execution of the decree. The applicant was directed to refund the purchase price to the buyer. A permanent injunction was issued restraining the applicant from  
15 dealing with the land in any way and from evicting the 1<sup>st</sup> respondent and the company from the land. The buyer, M/s Southgate Properties Limited, was directed to deliver up all the certificates of title to the court for safe custody and subsequent transmission to the Commissioner Land Registration for cancellation of that registration and their return thereafter to the 1<sup>st</sup> respondent and the company for rectification.

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The applicant sought a review of the orders which application was dismissed in a ruling delivered on 4<sup>th</sup> February, 2021. The court however construed the pronouncement by the Court of Appeal as a recommendation towards rectification of the titles to cater for the 1<sup>st</sup> respondent and the company's interest in the land. Although the Judge in the Executions Division had ordered  
25 M/s Southgate Properties Limited as purchaser to deposit the title deeds into the custody of court, it so happened that it was the applicant instead who delivered the title deeds into the custody of this court on 18<sup>th</sup> December, 2020. Thereafter, by a letter dated 29<sup>th</sup> March, 2021 the Deputy Registrar of the court submitted them to the Commissioner Land Registration for implementation of that order, where after they were to be returned to the custody of the court, for onward  
30 transmission to the 1<sup>st</sup> respondent and the company to cause the rectification directed by court.

By the time the duplicate certificates of title were delivered into the custody of the court and transmitted to the Commissioner Land Registration, the 1<sup>st</sup> respondent had previously applied for and obtained special certificates of title to the eighteen (18) plots of land. Thereafter, between 28<sup>th</sup> April, and 10<sup>th</sup> May, 2021 the 1<sup>st</sup> respondent and the company caused a transfer of the titles  
5 into the names of the Woodlane Properties Estates Limited and Ms. Namakula Annet.

The applicant then sought orders that the 1<sup>st</sup> respondent and the company together with the Commissioner Land Registration be cited for contempt of court, that the 1<sup>st</sup> respondent be detained in civil prison for contempt of court and that the title deeds to the eighteen (18) plots of  
10 land issued by the Commissioner Land Registration to the 1<sup>st</sup> respondent and the company in contravention of a court order be cancelled. In a ruling delivered on 12<sup>th</sup> September, 2022 this Court, *inter alia*, found that both the 1<sup>st</sup> respondent and the company were guilty of contempt of court by flouting the order of the now defunct Executions Division and directed that if within a period of fourteen (14) days from the date of the ruling the 1<sup>st</sup> respondent would not have caused  
15 the surrender to the Commissioner Land Registration of all title deeds to the land, duly executed all documents required for conversion of the mailo certificates of title to leaseholds registered in the names of the 1<sup>st</sup> respondent and the company respectively and paid all the fees and taxes required for the completion of that process, and presented to court proof of discharge of each of the said obligations within the said period, the 1<sup>st</sup> respondent was to forthwith be committed to  
20 civil imprisonment, to be kept in custody until he had so complied, or until further orders of this court.

In the meantime, the judgment of this Court delivered on 10<sup>th</sup> February, 2016 by which it was declared that the company was indebted to the respondent in the sum of shs. 4,272,740,116/= with interest accruing thereon at the rate of 21% per annum from the date of judgment until  
25 payment in full, as well as the costs of the suit, having upheld by the Court of Appeal, the 1<sup>st</sup> respondent and the company appealed further to the Supreme Court and the appeal is fixed for hearing on 28<sup>th</sup> March, 2023. Pending the determination of that appeal, the applicant took steps towards execution of the judgment of this court, when on 3<sup>rd</sup> October, 2022 it filed an application  
30 seeking recovery of shs. 10,104,983,078/= the mode of execution sought by the applicant was by way of arrest and imprisonment of the respondents as the guarantors of the loan.

In her Ruling delivered on 7<sup>th</sup> December, 2022, the Ag. Assistant Registrar of this Court declined to grant the application for execution on grounds, *inter alia*, that committing the respondents to civil prison will interfere with their constitutional rights to personal liberty by impeding their ability to appear in court in person to pursue their cause. She decided as follows;

10 It follows therefore that under the provisions of order 22 rule 37 (1) of *The Civil Procedure Rules*, where a Judgment debtor appears before the court in obedience to a notice issued under rule 34 of this order or is brought before the court after being arrested in execution of a decree for the payment of money and it appears to the court that the Judgment debtor is unable, from poverty or other sufficient cause to pay the amount of the decree or if that amount is payable by instalments, the amount of any instalment, the court may upon such terms as it thinks fit make an order disallowing the application for his or her arrest and detention or directing his or her release as the case may be.

15 Before making an order under sub rule (1) of this rule under sub rule (2) the court may take into consideration any allegation of the decree holder touching any of the following.

- 20 (b) The transfer, concealment or removal by the Judgment debtor of any part of his or her property after the date of the institution of the suit in which the decree was passed or the commission by him or her after that date of any other act of bad faith in relation to his or her property with the object or effect of obstructing or delaying the decree holder in the execution of the decree.
- 25 (d) Refusal or neglect on the part of the Judgment debtor to pay the amount of the decree or part of it when he or she has or since the date of the decree has had the means of paying it; or
- 30 (e) The likelihood of the Judgment debtor absconding or leaving the jurisdiction of the court with the object, or effect, of obstructing or delaying the decree holder in the execution of the decree.

35 It was submitted for the applicant that the respondents sold and transferred land comprised in Kyadondo Block 101 plots No. 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270 and 275 at Wattuba and Kyadondo plot 190, 397, 460 and 459 land at Ketemwa to Wood lane Real estate property limited and Namakula Annet and did not allocate any of the proceeds of sale to the payment of the decretal sums, this constitutes refusal or neglect on the part of the respondents to pay the decretal

sums when they have since the date of the decree had the means of paying it as per order 22 r 37 (2) (d) of *The Civil Procedure Rules*.

Under order 22 r 37 (2) of *The Civil Procedure Rules*, there was a requirement on the side of the Judgment creditor to demand or request for payment of the decretal sums.

5 In the instant application there is also the need for the Judgment debtor was paid large sums of money after the issuance of the decree. The rationale of court's being slow at issuing an arrest against Judgment debtors is enshrined, under article 23 (1) of *The Constitution of the Republic of Uganda*, that provides that no person shall be deprived of personal liberty.

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What is however undisputed in respect to Civil Suit No. 289 of 2014 is that several applications arose thereafter thus preventing execution of the decree issued by this court. This application was filed on 3<sup>rd</sup> October, 2022 at 9:15am and on 26<sup>th</sup> October 2022 the court of Appeal granted an interim stay of execution of the decree of the High court in Misc. App. No. 0681 of 2021. It follows therefore that while an appeal does not stay execution, it is sufficient cause as to why execution should not take place and in particular execution by way of arrest and detention of the Judgment debtor, who lodged the appeal since this will infringe on his rights to appear in court in person to pursue his/their cause. This application is therefore not granted, however this court orders that each party bears his/their own costs.

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The appellant contends that the Assistant Registrar in so deciding, erred in law and fact when she failed to properly exercise her judicial discretion hence, her decision ought to be set aside.

25. The grounds of appeal.

Being wholly dissatisfied with the decision, the appellant appealed to this Court on the following grounds, namely;

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1) The learned Ag. Assistant Registrar erred in law and fact in holding that sufficient cause had been established for declining to grant the application for the execution of the Decree by way of arrest and committal to civil prison of the respondents.

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2) The learned Ag. Assistant Registrar further erred in law and fact and misdirected herself in declining to commit the respondents to civil prison on ground that the said committal would interfere with the respondents' constitutional rights to liberty.

3) The learned Ag. Assistant Registrar injudiciously exercised her discretion when she declined to commit the Respondents to civil prison without making any consequential orders for the settlement of the judgment debt by the respondents.

5 The appellant seeks orders that the order issued by the learned Ag. Assistant Registrar in EMA No. 0279 of 2022 dismissing the appellant's application for execution of the Decree in HCCS No.289 of 2014 by way of committal of the respondents to civil prison be set aside or varied, and that the respondents be committed to civil prison in execution of the said Decree. The appellant further seeks the issuance of any further orders against the respondents as may be just for the  
10 execution of the Decree and payment of the judgment debt, and the costs of the appeal.

c. Submissions of counsel for the appellant.

M/s H & G Advocates on behalf of the appellant submitted that the appeal is on three grounds; a  
15 challenge to the holding of the Assistant Registrar to the effect that insufficient cause has been established for deciding grant of the application to commit the respondents to civil prison. The registrar relied on Order 22 rule 37 which she misapplied. There are two instances for declining an arrest; poverty which was not canvassed or relied upon by the respondent and the second is sufficient cause. Order 37 rule 3 determine sufficient cause, evidence was before the Registrar to  
20 the effect that the respondents had concealed their assets in an attempt to defeat their obligations under the decree. Order 37 (2) (d) there was evidence on record that they have deliberately refused or neglected to pay the judgment debt. She had no option but to commit the respondents.

On the second ground, the Registrar misapplied the law when she relied on the existence of an  
25 appeal to decline to commit the respondents to civil prison. An appeal does not operate as a stay of execution. It can only be helpful where there appeal has a reasonable chance of success. Misc. Application 1647 of 2022 at page 7. The evidence before the Registrar was that the appeal did not have a chance of success. The respondents had failed to furnish security as directed by the Supreme Court. There was no application for stay of execution on record before the Registrar  
30 when she declined the request for committal to civil prison. Even when the application was filed, it was dismissed.

The third ground is against the holding that to commit the respondents to civil prison would interfere with their constitutional rights. This was a misapplication of the constitutional provisions. Article 23 (1) (b) a person can be deprived in execution of court order made to secure an obligation imposed on that person by law. *High Court Misc. Application Nos. 81 and 82 Opio v. Obote case*, the matter is relevant where indigence is pleaded. There is no averment of that nature on record.

Having declined to cause the arrest and committal of the respondents to civil prison, she had a duty to provide other conditions to ensure the payment of the judgement debt. Order 22 rule 37 (1) enjoins the Registrar only to decline on such terms as Court thinks. Not providing for alternative remedies e.g. as to the deposit of the decretal amount of furnishing any other security was an error.

The interest of justice in light of the history of the matter. At every turn the respondents come up with an application to defeat the fruits of the judgment. The amount outstanding now is over ten billion shillings. The respondents guaranteed by signing personal guarantees that if for one reason or another the borrower was unable to pay, they would step in. Those obligations are not part of the issues between the borrower and the appellant. Under section 98 of *The Civil Procedure Act*, the court should dispense justice with finality and have the respondents committed to civil prison until they have paid the judgement debt.

d. Submissions of counsel for the respondents.

M/s Gem Advocates together with M/s Ambrose Tebyasa and Co. Advocates, on behalf of respondents submitted that the record reflects only three things; application for execution filed by M/s Kabayiza, Kavuma, Mugerwa and Ali Advocates in respect of the decree in Civil Suit 289 of 2014. The decretal sum is stated to be shs. 9,728,119,468/= it is dated 19<sup>th</sup> August, 2022. The second pleading was another application for execution filed for the appellant by a different law firm H & G Advocates where the sum due is shs. 10,104,983,078/= dated 30<sup>th</sup> September, 2022 three weeks after the filing of the first. An affidavit in reply was filed on behalf of the respondents by the 1<sup>st</sup> respondent dated 8<sup>th</sup> November, 2022. The Registrar decided that the Court

had discretion whether to commit or not a judgment debtor to civil prison. She cited Order 22 rule 37 there was a requirement on the side of the judgment creditor to demand for payment, as held in *Opio v. Obote* which was cited to the Registrar.

5 There was no evidence before the Registrar that the debtor could but would not pay. There was proof that the judgment debtors had made attempts at payment and had paid shs. 30,000,000/= being part of the taxed costs of shs. 71,000,000/= There was no proof of business engagement, accounts, etc. The obligation is on the Judgment Creditor under Order 22. The burden should be on the judgment creditor, that there were attempts to recover which were unsuccessful, or to  
10 establish the asset were futile. Then the obligation would shift to the judgment debtor to prove inability. They should make an application under Order 22 rule 38 to examine the judgment debtor as to the ability to pay or asset that can satisfy the decree. That avenue was not explored and there was no evidence to show that attempts made to ascertain that the judgment debtor could pay but refused. There should be evidence of a pattern of dissipation.

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There must be proof of a demand made and a refusal to pay. There was no evidence that a demand was made and that it was accompanied by a refusal. All the respondents are guarantors. There was no proof that the judgement debtors had bad faith. The titles are attached by an order of court. The delicate certificates are in the custody of court. The appellant bank has comfort in  
20 that. Although an appeal is not stay, she chose not to proceed with the execution in light of the Supreme Court proceedings. The value at 2017 of the titles was 7.5 billion. There were two sums in two separate applications of execution. The decision of the Assistant Registrar should be upheld. The respondents proved sufficient cause, and she was justified in declining execution to proceed.

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It is not true as submitted in the Notice of Motion that the learned Assistant Registrar declined on the basis that it would interfere with the Constitutional Rights of the respondents. At page 7 of the ruling, the rationale in not issuing the warrant as in article 32 (1) of the Constitution. She followed *Opio v. Obote*. It would be erroneous to fault the Assistant Registrar for identifying the  
30 rationale for reluctance of issuing warrants for civil debts. It was to enable them pursue that cause. There was no reason to commit them. It is erroneous for a reason that the Court cannot

issue orders that are not justified by the facts before it or as a matter of course. Having found that there was sufficient cause and in the absence of any information or evidence that would warrant the issuance of consequential orders; attachment of accounts, property, it would be unfair to fault her for not making a decision on what was not available before her. There was no proposal made.

5 The justice of the case considering the sum in the range of shs. 10,000,000,000/= There is an appeal before the Supreme Court for hearing on 28<sup>th</sup> March, 2023 at 9.00 am. The suit properties are attached in Misc. Application 681 of 2021. The title are in the custody of Court. No third party interests are involved since the transfers were reversed. The respondents are in possession. The appeal should be dismissed with costs. The underlying dispute is that the decretal sums are  
10 not owed because the contract between the appellant and the borrower was breached and money was not disbursed.

e. The decision.

15 This being a first appeal, it is the duty of this court to re-hear the case by subjecting the evidence presented to the court below to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the  
20 conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*). The appellate court may interfere with a finding of fact if the court below is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the findings of fact of the  
25 court below if it appears either that it clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

i. Preliminaries.

There is no inherent, inferred or assumed right of appeal (see *Mohamed Kalisa v. Gladys Nyangire Karumu and two others*, S. C. Civil Reference No. 139 of 2013). It is according to Order 50 Rule 8 of *The Civil Procedure Rules* that any person aggrieved by any order of a Registrar may appeal from the order to the High Court. The appeal is by motion on notice.

5 Sections 76 (1) (h) and 79 (1) (b) of *The Civil procedure Act* require such appeals to be filed within seven days of the date of the order of a Registrar. The appeal in the instant case is from an order of the Assistant Registrar of this court, dismissing an application for an execution of the decree by way of arrest and imprisonment of the respondents, as judgment debtors. The ruling was delivered on 7<sup>th</sup> December, 2022. The appeal was filed timeously on 14<sup>th</sup> December, 2022.

10

It is trite that decisions regarding modes of execution are discretionary. The general rules governing appeals from such orders seem well settled. Courts in Uganda have, as a matter of judicial policy, exercised considerable restraint in intervening in decisions characterised as involving the exercise of a discretion (see *Banco Arabe Espanol v. Bank of Uganda*, S. C. Civil

15 *Appeal No. 8 of 1998*). Where the decision challenged involves the exercise of a discretion, broadly described to include states of satisfaction and value judgments, the appellant must identify either specific error of fact or law or inferred error (e.g. where the decision is unreasonable or clearly unjust). The appellate court will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a

20 material consideration, or an error in principle. It should not interfere with the exercise of discretion unless it is satisfied that the Registrar in exercising his or her discretion misdirected himself or herself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Registrar has been clearly wrong in the exercise of his discretion and that as a result there has been injustice (see *Mbogo and another v. Shah [1968] 1*

25 *EA 93*).

The formulation and application of the above rule reflects an inherent tension where legislation both confers a power on a judicial officer to make a subjective choice and also provides a right of appeal from that choice. An appeal of this nature requires the appellate court to exercise

30 judgment as to the appropriateness of its intervention, while deferring to the exercise of discretion by the Registrar, in light of the nature of the appeal, the issues of fact and law

involved, the primary facts and inferences presented to the Registrar, the level of satisfaction, the value judgments involved, rule-application, reasonableness of the decision, proportionality and rationality of the decision, in particular as to whether its decision will provide a more just outcome.

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Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, identification of error in the Assistant Registrar's exercise of discretion is the basis upon which the court will uphold the appeal. It would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the Registrar at first instance, in the absence of error on his or her part. If the Registrar acted upon a wrong principle, or allowed extraneous or irrelevant matters to guide or affect him or her, if he or she mistook the facts, if he or she did not take into account some material consideration, or where it not evident how he or she reached the result embodied in his or her order, or where upon the facts the order is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the Registrar thus his or her determination should be reviewed.

Therefore, allowing an appeal from a discretionary order is predicated on proof of: (i) "specific error," i.e. an error of law (including acting upon a wrong principle), a mistake as to the facts, relying upon an irrelevant consideration or ignoring a relevant consideration, or (exceptionally) giving inappropriate weight to such considerations (relevancy grounds); and (ii) "inferred error," i.e. where, in the absence of identification of specific error, the decision is regarded as unreasonable or clearly unjust. Where inferred error is found, this will have been brought about by some unidentifiable specific error.

ii. Misdirection regarding stay of execution pending appeal.

An appeal by itself does not operate as a stay of proceedings under a decree or order appealed from nor should execution of a decree be stayed by reason only of an appeal having been preferred from the decree (see Order 43 rule 4 of *The Civil Procedure Rules*; Rule 6 (2) of *The*

*Judicature (Court of Appeal Rules) Directions* and Rule 6 (2) of *The Judicature (Supreme Court) Directions*). In other words, the ordinary rule is that an execution of the decree need not be stayed pending an appeal unless the appellant shows good cause. A presumption lies in favour of the integrity of the proceedings of any court of general jurisdiction. The administration of justice rests largely upon the presumption of the law that a court, acting within its jurisdiction, has acted impartially and honestly, and with integrity such that a final judgment of a court of general and competent jurisdiction is always presumed to be right.

Consequently, a challenge to a decree or order, or the assertion that the decree order is null or void or irregular, is no defence to the uncompromising obligation to obey court orders (see *Hadkinson v. Hadknison [1952] 2 All ER 567*; *Erasmus Masiko v. John Imaniraguha and two others, H. C. Misc. Application No. 1481 of 2016*; *Sendege Senyondo v. The Bank Secretary Bank of Uganda and another, H. C. Misc. Application No. 98 of 2018* and *Ekau David v. Dr. Jane Ruth Aceng and two others, H. C. Misc. Application No. 746 of 2018*). To the contrary, the Assistant Registrar held as follows;

It follows therefore that while an appeal does not stay execution, it is sufficient cause as to why execution should not take place.....

In coming to that conclusion, the learned Assistant Registrar misdirected herself in two ways; first in construing the reference to “other sufficient cause” found in Order 22 rule 27 (1) of *The Civil Procedure Rules* as a reference to reasons “as to why execution should not take place,” instead of reasons as to why “the judgment debtor is unable....to pay the amount of the decree.” Secondly, by assuming a jurisdiction not vested in her by Order 50 of *The Civil Procedure Rules*.

The power conferred upon a Registrar under Order 22 rule 27 (1) of *The Civil Procedure Rules* is limited to making “an order disallowing the application” for the arrest and detention of the Judgment Debtor, or “directing his or her release,” but does not extend to suspending or staying execution. By holding that an appeal is sufficient cause as to why execution should not take place, the Assistant Registrar was in effect staying execution pending the appeal. By virtue of Order 50 rules 3 and 4 of *The Civil Procedure Rules*, “formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and imprisonment in

execution of a decree of the High Court,” and “all formal steps preliminary to the trial, and all interlocutory applications, may be made and taken before the registrar.” A Registrar therefore has jurisdiction over all formal steps preliminary to and all interlocutory applications during the trial, appeal or other proceeding before the Court, as well as formal orders for execution of decrees. “Interlocutory applications” are applications to the Court in any suit, appeal or proceeding already instituted in such Court (and not any other Court), other than a proceeding for execution of a decree or order.

Interlocutory applications usually seek orders which are interlocutory in nature with regard to suits, appeals or proceedings instituted and still pending in the Court, such as those intended to preserve or protect a party’s legal position, to facilitate the efficient preparation of the matter for hearing and ensuring effective progress to final hearing and determination of the real issues between the parties. Order 50 rules 3 and 4 of *The Civil Procedure Rules*, does not confer jurisdiction upon Registrars to give post judgment interlocutory relief. Since interlocutory relief is essentially intended to preserve the status quo until the court has had an opportunity to adjudicate, after judgment is delivered, there is no longer any suit, appeal or proceeding instituted and still pending in the Court on basis of which the Registrar may grant post judgment interlocutory relief. Since preserving the status quo can mean either preserving a physical object in dispute or preserving the legal right to that object, for the trial Court, all post judgment relief cannot be interlocutory in nature since it has the attributes and characteristics of finality as far as the court is concerned. Because of they are interlocutory in nature as far as they relate to proceedings pending before another Court, such matters may only be decided by the Judge. Therefore all applications for grant of an order of stay of execution of a decree, interim or otherwise, are the preserve of the Judge.

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The Assistant Registrar thus exercised a jurisdiction not vested in her when she held that while the appeal now pending before the Supreme Court did not stay execution, it was a sufficient cause as to why execution should not take place. Instead of deciding whether or not sufficient reasons had been furnished to explain why the judgment debtors were unable to pay the amount of the decree so as to justify a decision disallowing the application for their arrest and detention, or directing their release, she digressed into extraneous and irrelevant matters. In doing so, she

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failed to properly exercise her discretion. It is an improper exercise of discretion when a judicial officer takes irrelevant considerations into account in arriving at a discretionary determination. For that reason the first ground of appeal succeeds.

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iii. Misdirection on the principles regarding the deprivation of personal liberty for failure to pay contractual debts.

10 As regards the mode of execution sought by the appellant; which is by way of arrest and  
detention in civil imprisonment of the respondents as guarantors of the loan, the foreign policy  
objective under state policy No. xviii and Article 287 of *The Constitution of the Republic of  
Uganda, 1995* promotes the respect for international law and treaty obligations. Article 11 and  
21 of *The International Covenant on Civil and Political Rights (ICCPR)* to which Uganda is  
15 signatory provides that no one should be imprisoned merely on grounds of inability to fulfil  
contractual obligations. An order for imprisonment can only be made after a creditor has  
satisfied the Court that a debtor's failure to make repayments is due not to his inability to pay but  
rather due to his willful refusal or culpable neglect. To commit a debtor to prison who through  
poverty is unable to satisfy the judgment debt is contrary to the purpose of civil imprisonment  
20 which is to coerce payment. Its only real effect on an impoverished debtor is that of punishment.  
It is a punishment that can be avoided by a debtor who is able but unwilling to pay, for  
satisfaction of the judgment remains within his power. But it becomes mandatory against one  
without the means to pay. It discriminates between the one and the other. Poverty-stricken  
judgment debtors should not be consigned to jail.

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Enforcement of court orders is essential to the maintenance of public confidence in the judicial  
system, since the administration of justice would be undermined if an order of any court could be  
disregarded with impunity. Where a person refuses to obey a court order relating to providing a  
remedy for contractual default to another person or organisation, imprisonment may be one of a  
30 number of remedies ultimately for non-compliance. There can be no doubt that committing  
someone to prison involves a severe curtailment of that person's freedom and personal security.

What is prohibited is the deprivation of liberty for the sole reason that the individual has not the material means to fulfil his or her material obligations. The law does not protect persons who simply refuse to honour a debt which they are able to pay.

5 For example article 23 (1) (b) of *The Constitution of the Republic of Uganda, 1995* provides that no person may be deprived of personal liberty except in execution of the order of a court made to secure the fulfilment of any obligation imposed on that person by law. Section 33 (1) of *The Contracts Act, 7 of 2010* requires parties to a contract to perform or offer to perform, their respective promises, unless the performance is dispensed with or excused under the Act or any  
10 other law. The prohibition against deprivation of personal liberty therefore does not apply to a debtor who acts with malicious or fraudulent intent; or to a debtor who deliberately refuses to fulfil an obligation, irrespective of his reasons therefor, nor if his inability to meet a commitment is due to negligence. In these circumstances, the failure to fulfil a contractual obligation may legitimately justify imprisonment in execution of the order of a court.

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According to section 38 (d) of *The Civil Procedure Act*, subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree holder, order execution of the decree by arrest and detention in prison of any person. Similarly Order 22 rule  
20 27 of *The Civil Procedure Rules* provides that every decree for the payment of money, including a decree for the payment of money as an alternative to some other relief, may be executed by the detention in the civil prison of the judgment debtor, or by the attachment and sale of his or her property, or by both detention and attachment. It seems fair to surmise that a person who in fact can comply with a court order, but who refuses to do so and thus tempts civil contempt and possible incarceration, is motivated either by deep-felt principle or by self-interest. Whatever the  
25 motivation, the proposition is that evasive purpose would be overcome by the threat or reality of jail time. The threat of committal for a short period is not an inappropriate sanction for debtors who are able to pay, but refuse to do so. It serves as a deterrent and acts as a stimulus to proper behavior in order to protect an important public interest.

30 For that reason imprisonment for a civil debt remains a lawful mechanism for enforcing court orders in the face of the wilful and obstinate refusal to obey the same; persons who are able to

pay, but are refusing to do so. A simple default is not enough, there must be an element of bad faith beyond mere indifference to paying; some deliberate refusal or the present means to pay a decree or a substantial part of it (see *Jolly George Verghese and another v. The Bank of Cochin*. (1980) AIR 470; 1980 SCR (2) 913; 1980 SCC (2) 360). Imprisonment is to be used only as a last resort when mediation so that payment of the amount adjudged is postponed, or is to be made by instalments on such terms as to the payment of interest, or by way of attachment of the property of the judgment debtor instead, or the taking of security from him or her has failed, or where the debtor has no assets/goods available for execution and where the default is due to the debtors wilful refusal or culpable neglect. If the debtor simply has no means to pay, he or she should not be arrested and detained.

To justify an order for arrest and detention in execution of a decree of court for the recovery of money, the court for reasons recorded in writing, must be satisfied; either that the judgement debtor with the object of delaying the execution of the decree is likely to abscond from the jurisdiction of the court or has dishonestly transferred, concealed or removed his or her property, or has done any other act done in bad faith, or that the judgement debtor has the means to pay the amount or a substantial part of it and refuses to pay the same. The impossibility or inability defence cannot be a contrivance; a self-created failure.

In her ruling, the learned Assistant Registrar opined that, “.....execution by way of arrest and detention of the Judgment debtor, who lodged the appeal ..... will infringe on his rights to appear in court in person to pursue his/their cause.” In coming to that conclusion, the learned Assistant Registrar did not take into account the provisions of article 23 (1) (b) of *The Constitution of the Republic of Uganda, 1995* by virtue of which persons may be deprived of personal liberty in execution of the order of a court made to secure the fulfilment of obligations imposed upon them by law. A judicial officer must consider all relevant factors prior to making a decision. The failure of a judicial officer to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. It is an improper exercise of discretion when a judicial officer neglects to take into consideration relevant factors in arriving at a discretionary determination.

iv. Misdirection on the procedural safeguards for that deprivation.

Courts must ensure that this mode of execution is not used for the purpose of harassment or abuse of process. For purposes of ascertaining the debtor's affairs, the Court may invoke Order  
5 22 rules 34 (1) and 38 of *The Civil Procedure Rules* by virtue of which the Court may call upon the Judgment Debtor to appear before it on a day specified in a notice and show cause why he or she should not be committed to a civil prison. The procedure of giving a notice to show cause is the acknowledgement of the rule of natural justice that any person shall not be condemned unheard. The objective of serving notice is to prevent the arrest and detention of an honest debtor  
10 who is not able to pay the debt due to some sufficient cause. The Judgment Debtor may then be orally examined as to whether any or what debts are owing to the judgment debtor, and whether the judgment debtor has any and what property or means of satisfying the decree.

At that examination, the Judgment Debtor may also be required to explain why he or she hasn't  
15 paid the Judgment Creditor. The debtor has to explain the default, to disclose his financial state and affairs, and to submit to interrogation on those matters, lying largely as they do within his own peculiar knowledge. Whereas it is reasonable to expect that the Judgment Creditor can obtain information against the Judgment Debtor in relation to the latter's immovable property or other types of registrable property at registries accessible to the public, information as to the  
20 location and position of some types of assets of a Judgment Debtor is not publicly available, in the sense that in the absence of a court judgment/order ordering the disclosure of relevant information, one cannot obtain information with regard to the location and position of the property assets of the Judgment Debtor. Under Order 22 rules 34 (1) of *The Civil Procedure Rules*, the onus is on the Judgment Debtor when summoned to "show cause why he or she should  
25 not be committed to a civil prison" and if he or she fails to appear or to show cause to the satisfaction of the court, the court may make such order as to committal as it considers just.

In order to show absence of means of satisfying the judgment debt the Judgment Debtor also must show that such lack of means is not due to willful disposal of assets in order to avoid  
30 payment of the judgment debt, willful refusal to pay such debt, squandering of money or living beyond his or her means, or incurring of additional debts after the original judgment date; any

poverty afflicting him or her which is not attributable to his own improvidence should be considered. Whereas the initial evidential burden is cast on the Judgment Debtor, ultimately, however, the Judgment Creditor bears the onus to prove directly or inferentially, but positively in any event, the Judgment Debtor's ability in his or her particular circumstances, to pay the amount owed or a substantial part of it and either a downright refusal by him or her to do so or the sheer willfulness of his or her default.

Where a Judgment Debtor appears before the court and shows the reasonable cause for his or her inability to pay the decretal amount and the court is satisfied that he or she is unable to pay, the court may reject the application for arrest, or if already under arrest, order the release of the Judgment Debtor. However, if the Judgment Debtor fails to satisfy the court, he or she may be committed to the civil prison. The Court should be satisfied, for reasons to be recorded in writing that the Judgment Debtor has or has had, since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and that the Judgment Debtor has refused or neglected to pay the same. Similarly, if upon such examination it is found that the Judgment Debtor has and still refuses or neglects to honour his or her obligation or if he or she committed acts of bad faith, he or she is liable to imprisonment in execution of the decree. There is therefore need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree, such as where the judgment debtor has had the ability to pay but has improperly evaded or postponed doing so, or otherwise dishonestly or maliciously committed acts of bad faith respecting their assets.

Alternatively, when disallowing the application for the arrest and detention, or directing the release of a Judgment Debtor the Registrar is required to do so, "upon such terms as it thinks fit." Such term involve making some other order instead, for example; an order for the attachment of debts owed to the Judgment Debtor, or for a garnishee on the Judgment Debtor's wages, or for execution to be levied against the Judgment Debtor's property by way of attachment of the property of the judgment debtor, or the taking of security from him or her or for the payment in instalments of the judgment debt under Order 21 rule 12 (2) of *The Civil Procedure Rules* by virtue of which the court may, on the application of the Judgment Debtor, and with the consent of the decree holder, order that payment of the amount adjudged shall be postponed or shall be

made by instalments on such terms as to the payment of interest, or otherwise as it thinks fit. If there is an agreement between the Judgment Creditor and the Judgment Debtor on the payment method, a “consent order” will be entered as per the terms agreed by parties.

5 Malice, in the sense in which the courts use it as a basis for civil imprisonment, does not mean spite or ill will, the common definition, but merely conscious wrongdoing; acts done in utter disregard of the rights of others. The malice here intended is nothing more than that disregard of duty which is found in the intentional doing of a willful act to the injury of another. It implies that the judgment debtor was actuated by improper or dishonest motives. The term does not  
10 necessarily mean that the judgment debtor bears any spite, grudge, or ill will towards the judgment creditor. When the judgment debtor is concealing assets not exempt from execution, and an execution against his property has been returned unsatisfied, or where the Court finds that such debtor has estate, goods, chattels, lands and tenements not exempt from execution, which he refuses to surrender, or that since the debt was contracted or the cause of action accrued, the  
15 creditor has conveyed, concealed, or otherwise disposed of some part of his estate, with design to secure same to his own use, or defraud his creditors, civil imprisonment in execution of the decree may be an unavoidable outcome.

Before making an order disallowing an application for the arrest and detention, or directing the  
20 release of a Judgment Debtor, Order 22 rule 37 (2) (b) of *The Civil Procedure Rules* requires the Registrar to consider any allegations of the transfer, concealment or removal by the judgment debtor of any part of the Judgment Debtor’s property after the date of the institution of the suit in which the decree was passed, or the commission by him or her after that date of any other act of bad faith in relation to his or her property, with the object or effect of obstructing or delaying the  
25 decree holder in the execution of the decree. By reason of this provision, when, within one year before the service of process on the Judgment Debtor in the original proceeding or suit, the Judgment Debtor has had title to, or paid the purchase price of, any personal or real property to which the a Judgment Debtor’s spouse, any relative, business associate or any person on confidential terms with the Judgment Debtor claims title and right of possession, the Judgment  
30 Debtor has the burden of proof to establish that such transfer or gift was not made to delay,

hinder, or defraud creditors, or with the object or effect of obstructing or delaying the decree holder in the execution of the decree.

5 Apart from reproducing aspects of the provisions in Order 22 rule 37 (2) of *The Civil Procedure Rules* the Assistant Registrar did not apply them to the facts of the case. This appears to have been due to the fact that instead of showing reasonable cause for their inability to pay the decretal amount and seeking to satisfy the Court that they are willing but unable to pay, the thrust of the respondents' argument before the Assistant Registrar and in this appeal was, and still is, that Supreme Court Civil Appeal No. 13 of 2020 is still pending hearing and final determination, and has been fixed for hearing. As a consequence of that appeal, imprisonment as civil debtors would impede their ability to pursue the appeals and applications in person.

15 The issue before the Assistant Registrar was whether or not the respondents were willing but unable to pay the decretal sum, and had a reasonable justification for their failure to do so. In arriving at that determination, the Assistant Registrar had to take into account the respondents' current assets and liabilities, their conduct towards assets in their name since the commencement of the litigation, and to bear in mind that the initial evidential burden lay on the respondents to show cause why they should not be committed to a civil prison. The learned Assistant Registrar not only failed to properly direct herself as regards the scope of the subject matter of the proceedings before her, but also erroneously misdirected herself as regards the factors that she ought to have considered in arriving at the decision to disallow the application for their arrest and detention. Even after arriving at the decision to disallow the application for the arrest and detention of the respondents, she failed in her duty to condition it upon such terms as she thought fit.

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It is an improper exercise of discretion when a judicial officer misdirects herself on the subject matter of the decision that has to be made, the factors that ought to be considered in arriving at the decision and the conditions upon which the decision should be fashioned. For those reasons the third ground of appeal succeeds.

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v. Justifications for the relief claimed in the instant appeal.

In the instant appeal, it is the respondents' case that the transfer of the eighteen (18) plots of land between 28<sup>th</sup> April, 2021 and 10<sup>th</sup> May, 2021 into the names of the M/s Woodlane Properties Estates Limited and Ms. Namakula Annet, was done in good faith and in compliance with the orders of the Court of Appeal in C. A. Civil Appeal No. 76 of 2016 and High Court Miscellaneous Application No. 208 of 2020. This is a very disingenuous assertion. Considering that the said 18 title deeds had been mortgaged to the applicant, only to be declared later by Court that the 1<sup>st</sup> respondent and the company did not have legal interest in the land as mailo owners, but that rather they could acquire one by way of leases, achieving the original intent of using the land as security for the borrowing, would have required them to create leases rather than the purported transfers to third parties. By those transfers, the 1<sup>st</sup> respondent and the company committed acts of concealment or removal of their property, after the date of the institution of the suit in which the decree was passed, with the object or effect of obstructing or delaying the appellant in the execution of the decree.

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The genuine motive for the transfers is revealed in the 1<sup>st</sup> respondent's averment to the effect that the applicants find themselves "unable to pay the decretal sum as [the] business that [they] operated under Formula Feeds Limited was frustrated by the appellant's facility." The argument seems to be that since the respondents' business failed on account of something that went wrong with the credit arrangement between the appellant and their company, as directors of the company and guarantors of the loan, they have the right to deny the appellant recourse to theirs and their company property to be used in satisfaction of the decree. This shows that the Judgment Debtors bear some form of spite, grudge, or ill will towards the Judgment Creditor.

25 All in all, it was not demonstrated to the Assistant Registrar that any of the respondents is impoverished to the extent of being unable to fulfil their contractual obligations to repay the debt. Had the Assistant Registrar properly directed herself regarding the factual and procedural history of this litigation by which the respondents have gone to great lengths to avoid the perfection of the securitisation of the principal debtor's borrowing, thereby attempting to put assets previously in the principal debtor's name and that of the 1<sup>st</sup> respondent beyond the reach of

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the appellant, she would have come to the conclusion that the appellant was left with no choice but to seek to cause their arrest and imprisonment as a method to coerce payment.

5 It was argued that the appellant failed to prove that it ever made any demand for payment of the decretal sum and that the same was ignored or that the respondents, yet they were able to pay but wilfully refused to pay the decretal sum. Much as such a demand would be necessary in respect of a judgment debtor against whom a default or *ex-parte* judgment is sought to be enforced, it is not a prerequisite as against a judgment debtor privy to the proceedings leading up to and after the decree. The respondents have at all material time been aware of the obligation under the  
10 decree.

Where the Judgment Creditor has after conduct of a reasonable search for registrable property of the Judgment Debtors at registries accessible to the public has not found attachable property of the Judgment Debtors, or has found that their known or readily ascertainable property is not available for attachment, and has exhausted all other lawful means that are usable by for the  
15 execution of the judgment, opportunity has been given for a full enquiry into the reasons why the Judgment Debtors have failed to pay the amount that they owe by way of a hearing attended by them personally and conducted in compliance with the dictates of procedural fairness, but the Judgment Debtors have not furnished any reasonable explanation for that failure, yet the facts reveal that the Judgment Debtors bear some form of spite, grudge, or ill will towards the  
20 Judgment Creditor, a Registrar would come to the wrong conclusion when he or she nevertheless disallows an application for the arrest and detention of the Judgment Debtors, or directing their release.

It is on that account that I have found both specific and inferred error in the decision appealed.  
25 The Order of the Assistant Registrar is therefore hereby set aside and replaced with an order for the issuance of the warrants of arrest of the respondents in execution of the decree. The file is accordingly returned to the Assistant Registrar to issue the said warrants of arrest applied for by the appellant. The appeal is allowed with costs to the appellant.

30 Delivered electronically this 20<sup>th</sup> day of March, 2023  
**Mubiru**.....

.....**Stephen**

Stephen Mubiru

Judge,  
20<sup>th</sup> March, 2023.