

5

THE REPUBLIC OF UGANDA,

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: OWINY – DOLLO, CJ, CHIBITA, MUSOKE, MUSOTA & MADRAMA, JJSC)

CIVIL APPLICATION NO 08 OF 2023

10

(ARISING FROM MISCELLANEOUS APPLICATION NO 4 OF 2021)

(ARISING FROM CIVIL APPEAL NO. 03 OF 2015)

INCAFEX LIMITED} APPLICANT

VERSUS

MATHEW RUKIKAIRE}RESPONDENT

15

AND

MISCELLANEOUS APPLICATION NO 14 OF 2022

(ARISING FROM CIVIL APPEAL NO. 03 OF 2015)

MATHEW RUKIKAIRE} APPLICANT

VERSUS

20

INCAFEX LIMITED}RESPONDENT

RULING OF CHRISTOPHER MADRAMA IZAMA, JSC

The applicant commenced Civil Application No 08 of 2023 by Notice of Motion under sections 33 of the Judicature Act, 98 of the Civil Procedure Act, and Rules 2 (2), 42 and 43 of the Judicature (Supreme Court Rules) Directions for orders that the hearing and/rehearing of Civil Application No 4 of 2021 be stayed pending the final disposal of Constitutional Petition No 6 of 2023. Secondly, the applicant prays that the costs of the application be in the cause.

30 The grounds of the application are that:

- 5 1. The applicant has filed a Constitutional Petition to challenge the constitutionality of the hearing of Civil Application No 4 of 2021 after it had been heard and determined by Hon. Mr Justice Mike Chibita, JSC and a Petition is pending hearing and determination by the Constitutional Court.
- 10 2. The hearing of Civil Application No 4 of 2021 before disposal of the Constitutional Petition will render the said Petition nugatory and irreparably deny the applicant of its right to a fair hearing of the petition.
- 15 3. It is in the interest of Justice that the hearing/rehearing of Civil Application No 4 of 2021 be stayed.

The application is supported by the affidavit of Mr James Musinguzi Garuga who deposed that he made it in his capacity as the managing director of the applicant. He deposed that on 9th February 2021, the first respondent filed Civil Application No 4 of 2021 before this court and the said application was fixed for hearing on the 15th April 2021. On the 12th of April 2021, the applicant was served with the application and on the 15th of May 2021, the parties' counsel appeared before Hon Mr Justice Mike Chibita, JSC for hearing and the court gave timelines for filing supplementary affidavits, respondent's affidavit in reply, applicant's affidavit in rejoinder whereupon submissions were accordingly scheduled. On 16th April 2021, the first respondent filed a supplementary affidavit. On the 5th of May 2021 the applicant filed an affidavit in reply. On the 24th of May 2021, the first respondent filed the applicant's submissions. On the 4th of June 2021, the applicant filed the respondent's submissions. On 16th June 2021, the first respondent filed the applicant's submissions in rejoinder.

Further on 3rd January 2022, the applicant was served with a ruling notice and on 4th January 2022, the court delivered its ruling wherein it dismissed the application and ordered that each party bears its own costs. Thereafter the respondent never challenged the ruling of the court delivered by Hon Mr Justice Mike Chibita on 4th January 2022. On 13th January 2023, the applicant was surprised to be served with a hearing notice for Civil Application No 4 of 2021, a matter that had already been

5 concluded by Hon Mr Justice Mike Chibita. On 18th January 2021, the
applicant through their lawyers Messieurs KBW advocates wrote to the
Registrar of the Supreme Court addressing the issue and stating that the
court is *functus officio* in the matter. The applicant thereafter requested
10 for new pleadings on the basis on which the application was fixed for
hearing but he did not receive any response from the registrar of the
Supreme Court which prompted the petitioner through their lawyers
Messieurs KBW Advocates to write to the Hon the Chief Justice on 8th
February 2023 requesting him to advise on the matter but again received
no response.

15 Subsequently on 16th March 2023, the applicant was served with a hearing
notice for Civil Application No 14 of 2022 Mathew Rukikaire vs Incafex
Limited which was slated for hearing on 22nd March 2023. The application
sought different reliefs from that of the concluded Civil Application No 04
of 2021.

20 Mr James Musinguzi Garuga further deposed that on the 22nd of March
2023 the applicant represented by him and Mr Agaba Maguru, the
Company Secretary and counsel appeared in court for the hearing of Civil
Application No 14 of 2022.

During the hearing of Civil Application, No 14 of 2022, counsel for the
25 applicant (Mr Mathew Rukikaire) learned SC Mwesigwa Rukutana
intimated to court that there were two applications coming for hearing
namely Civil Application No 14 of 2022 and Civil Application No 04 of 2021
and prayed that both application should be heard together. The applicants
counsel Mr Peter Walubiri informed the court that only Civil Application
30 No 14 of 2022 scheduled for hearing on 22 March 2023 and that they only
received hearing notices for it. Thereafter counsel for the applicant
insisted that on their part, they were served with hearing notices for both
applications whereupon the Hon the Chief Justice ascertained from the
court records and ruled that no evidence of court service of Civil
35 Application No 04 of 2021 was on the file and directed that the application
be heard after proper service. On 23rd March 2023 counsel for the
applicant received a letter from Messieurs Barenzi & company advocates
addressed to the Registrar Supreme Court requesting for Civil

5 Application No 04 of 2021 to be fixed for hearing. Further on 23rd of March
2023, counsel for the applicant was served with a hearing notice for Civil
Application No 04 of 2021 indicating that the application will be heard on
28th of March 2023. Neither the applicant nor the applicant's advocates
10 have ever been served with any letter, written request or pleadings in
the Supreme Court afresh, review, appeal or reference or otherwise to
reconsider Civil Application No 04 of 2021.

On the basis of advice of his lawyers the applicant deposed that the
Supreme Court is *functus officio* in Civil Application No 04 of 2021 which
was heard and disposed of by Hon Justice Mr Mike Chibita, JSC. Further
15 he deposed that the applicant has since filed a Constitutional Petition to
challenge the constitutionality of the hearing of Civil Application No 04 of
2021 after it had been heard and determined by Hon. Justice Mike Chibita
JSC. The petition is pending hearing and determination by the
Constitutional Court. Further on the basis of advice of his lawyers
20 Messieurs KBW Advocates, the hearing of the Civil Application No 04 of
2021 before disposal of the constitutional petition will render the said
petition nugatory and irreparably deprive the appellant of its right to a
fair hearing of the petition. On further advice of his lawyers he deposed
that the concluded Civil Application, if heard afresh by the Supreme
25 Court, would be without jurisdiction and the petitioner's right to fair
hearing and speedy trial would be compromised. Further that it is in the
interest of Justice that the hearing of Civil Application No 04 of 2021 is
stayed pending the final disposal of the Constitutional Petition. He further
states that the balance of convenience is in favour of maintaining the
30 status quo until the disposal of the constitutional petition which is
pending in the Constitutional Court.

The respondent opposed the application and deposed to an affidavit dated
31st March 2023 and filed on court record on 3rd April 2023. Mr Matthew
Rukikaire stated that with the help of his lawyers, he read and
35 understood the contents of Miscellaneous Application No 08 of 2023 and
the affidavit in support and his response is as follows:

Hon Mr Justice Mike Chibita in his ruling delivered on 4th of January 2022,
declined jurisdiction and restrained himself from determining the

5 application before him on its merits. After declining jurisdiction Justice
Chibita, JSC ordered that the parties to submit to PWC for the audit
ordered by the Supreme Court in Civil Appeal No 03 of 2015. Thereafter,
Hon. Mr Justice Mike Chibita, JSC never dismissed the application and
only declined to grant the orders prayed for and made no order as to
10 costs.

Further he deposed that after the Justice declined jurisdiction, he
decided to focus on compliance with the orders for the parties to return
to PWC for the special audit.

In that effort, the deponent stated that upon his express instructions on
15 6th January 2022, his lawyers; Messieurs Barenzi and company
advocates, wrote to Price Water House Coopers about the need to
commence the audit process. On 19th January 2022, PWC wrote back
inviting the parties for a meeting scheduled for 27th January 2022 to
discuss the terms of engagement. On 27th of January 2022, the meeting
20 could not go on as scheduled since there was no quorum as neither the
applicant nor its advocates were in attendance. The lawyers availed the
contact of counsel Peter Walubiri to the auditors on the understanding
that he would be called to schedule another meeting at his convenience.
On 1st February 2022, the auditors got back to all the parties informing
25 them that they had contacted Mr Peter Walubiri who explained to them
that he had not discussed the matter with his client. He stated that he
would be available for a meeting in the week starting 31st January 2022.
Auditors went on to schedule the meeting for 2nd February 2022 at 10 AM
and share the video link on which to be conducted but the link failed. On
30 1st February 2022 the respondent through its lawyers KPW Advocates
responded to PWC letter claiming that the managing director of the
applicant had not given his lawyers specific instructions since he was
involved in funeral arrangements for the late Governor of the Bank of
Uganda. Secondly, counsel Peter Walubiri, the lawyer handling the
35 matter would not be available for the meeting scheduled for 2nd February
2022 as he would be at the Ministry of Education attending to a meeting
to finalise and sign a memorandum of understanding on the takeover of
Busoga University. They further advised the registrar of the Supreme
Court who had been copied in by PWC in the correspondence and invited

5 for the virtual meeting to keep away from the audit and wait for the results to be submitted to court.

10 Thereafter, the virtual meeting did not proceed as planned and PWC wrote to Messieurs KBW Advocates on 14th of February 2022 asking them to advise on the availability of the next ten working days between 11th February 2022 up to 25th February 2022 to enable it schedule a meeting to discuss the special audit ordered by the Supreme Court. PWC further went on to request that the respondent provides three slots for consideration by other parties.

15 Thereafter the applicant's lawyers replied to the PWC letter on 15th of February 2022 stating that the decision not to attend by the registrar of subsequent meetings cured an obvious irregularity and was welcome. However, they implored PWC to also attend to the related irregularity of "periodic reports to the registrar". Secondly that Peter Walubiri and the applicant's director had other commitments on the day suggested for the meetings. They suggested the dates to be chosen. These were the 15th, 18th, 21st, 22nd, 23rd, 24th, 28th, 29th or 31st March 2022 at 10 AM.

25 Upon consultation, it was agreed that a meeting be scheduled for 15th March 2022 at 10 AM. Consequently, on 3rd March 2022, a meeting invitation was sent by PWC to all the parties with the applicant's invitation being sent by email. The petition was inviting the parties for a meeting to discuss the modalities and arrangements of the audit of the shareholding in the applicant company as ordered by the Supreme Court. On 15th March 2022, the meeting started. However only the respondent's lawyers Mr Benson Tumasirwe, Johnny Patrick Barenzi and Joshua Wakabi attended the meeting with the auditors at the time and date agreed upon by all the relevant parties.

35 Further, the deponent stated that at the meeting, Mr Johnstone Mwendwa PWC official who chaired the meeting contacted Mr Peter Walubiri on his cell phone to inquire about his attendance whereupon Mr Peter Walubiri informed him that the matter had slipped his memory and he was leaving a court session and would join the meeting once he got to his office. They waited for the virtual meeting session for about two hours but Mr Peter Walubiri did not join the meeting and subsequently did not respond to

5 calls and text messages from Mr Johnstone. Further on 28th March 2022, PWC wrote to the parties detailing the numerous attempts by the parties to hold a meeting and referred the matter back to court for guidance on the next course of action.

10 Thereafter in further reply, Mr Matthew Rukikaire on the basis of information of his lawyers stated that Hon Mr Justice Mike Chibita JSC did not bring finality to the issues in Civil Application No 4 of 2021. Secondly, the issues in Civil Application No 4 of 2021 are still subsisting in that the special audit which the court had ordered it is yet to be done and the delay was due to frustration by the applicant. Further the ruling
15 sought to enforce orders in Civil Appeal No 03 of 2015 where this court retained a supervisory role for the implementation of its orders therein and the courts continued hearing of the matter is an exercise of its supervisory role.

20 Further, and on the basis of the advice of his lawyers, he deposed that the constitutional petition No 06 of 2023 is frivolous, vexatious and a delaying tactic employed by the present applicant to stall the determination of Civil Application No 04 of 2021 and Civil Appeal No 03 of 2015. Further that the application is intended to delay the contempt of court application proceeding against the applicant for failure or refusal
25 to obey the orders of the court in Civil Appeal No 03 of 2015.

In further reply Mr. Mathew Rukikaire on the basis of the advice of his lawyers deposed that the right of the applicant to a fair hearing shall not be violated because the matters raised in the Constitutional Court can also be handled by this court. Further that the balance of convenience
30 does not favour the applicant. On the other hand, stay of proceedings shall leave the present respondent in a state of limbo in the matter of the frustrated audit and the applicant would continue to be in contempt of court orders. In addition, Civil Application No 04 of 2021 shall not render the constitutional petition nugatory because the petition lacks merit. The
35 hearing of the application would be in line with the exercise of the mandate of the Justices of the Supreme Court and the decision of a single Justice of the Supreme Court can be varied or reversed by a panel of three Justices.

5 In addition, and on the basis of advice of his lawyers, the deponent states that the application has been lodged in the wrong forum and ought to have been lodged in the Constitutional Court. Last but not least that it is in the interest of Justice that Civil Application No 04 of 2021 is heard in order to determine the rights of the parties to the application and prevent
10 further delays occasioned by the present applicant on numerous occasions.

The parties were given a schedule for filing of written submissions when the matter came for hearing in Miscellaneous Application No 04 of 2021. The applicant to this application was represented by learned counsel Mr
15 Peter Walubiri and the respondent was represented by learned senior counsel Mr Mwesigwa Rukutana. The court was addressed in written submissions and ruling was reserved on notice.

In the written submissions the applicant's counsel objected to the affidavit in rejoinder of the deponent which he claimed was purportedly
20 deposed to on 31st March but filed on 3rd of April 2023 and served on 4th March 2023 and that it is incurably defective. It was drawn on 31st March 2023 before the deponent had seen the notice of motion and affidavit in support and was filed and served late without the leave of court. He submitted that Mr Matthew Rukikaire simply signed on the jurat page on
25 31st March 2023 without reading what he was responding to. He submitted that this explains the big blank part after paragraph 14 of the affidavit in reply and prayed that we find it to be a false and incurably defective affidavit which ought to be struck out. Counsel relied on **Twinamasiko Onesmus vs Agaba Aisa & another; the Electoral Petition No 007 of 2021**
30 where the High Court cast doubt on and rejected affidavits where the jurat appeared on separate pages when it could have been accommodated on the previous pages. Counsel contended that the applicant's affidavit in support would therefore be contested and relied on **GH Gandesha and another vs GJ Lutaya; Civil Application No 14 of 1989**
35 (Supreme Court).

On the merits of the application, the applicants counsel submitted that the grounds 1, 2 and 3 of the application are based on the Constitutional Petition No 06 of 2023 and the grounds can be argued together. The

5 essence of the petition is that Civil Application No 04 of 23 had been heard and disposed of by Chibita JSC.

The petitioner's counsel submitted that to continue with hearing the application would be an illegality contrary to article 126 (1) of the Constitution which provides that judicial power shall be exercised in
10 conformity with the law and this court cannot exercise judicial power without authority of law.

The applicant's counsel submitted that execution jurisdiction is vested in the High Court and contended that Civil Application No 04 of 2021 essentially seeks reliefs to enforce orders of audit made in the Company
15 Cause No 003 of 2004 as affirmed by the Supreme Court in Civil Appeal No 03 of 2015. He contended that since this is an issue of execution, jurisdiction is vested in the High Court by virtue of section 29 (1) (a) of the Civil Procedure Act, since the order to be executed was passed by the
20 Supreme Court which exercises appellate jurisdiction. That it is a court of first instance to carry out execution proceedings for the order to carry out an audit. Further in accordance with section 34 (1) of the Civil Procedure Act, all questions arising between the parties to the suit in which the decree was passed relating to the execution, discharge or
25 satisfaction of the decree shall be determined by the court executing the decree and not by separate suit. He relied on **Sinba (K) Ltd and 4 others vs Uganda Broadcasting Corporation; Supreme Court Civil Appeal No 03 of 2024** and the case of **Francis Micah vs Noah Walakira [1995 - 1998] 2 EA 191**.

The appellant's counsel submitted that the Supreme Court only exercises
30 appellate jurisdiction which is a creature of statute in terms of article 132 of the Constitution. Further other jurisdictions such as preserved by rule 2 (2) of the Rules of this court are ancillary to the appellate jurisdiction and intended to preserve and protect the right of appeal.

The applicant's counsel submitted that Application No 04 was heard and
35 determined by Chibita JSC who accepted jurisdiction, heard Miscellaneous Application No 04 of 2021 and refused to grant the orders sought and even disposed of the issue of costs in the application. He did not make a reference or adjourn the application for disposal by a panel

5 under rule 50 (1), or for a review, reference and there is no application
for an order filed under rule 2 (2) 52 (1) of the Judicature (Supreme Court
Rules) Directions by the applicants. He contended that the matter came
back to the court from nowhere and there is no legal basis as required
10 by article 126 (1) of the Constitution for the exercise of jurisdiction by
Court.

Further that if the application is fixed and heard without jurisdiction, it
would compromise the applicant's non-derogable right to a fair hearing
contrary to article 28 (1) and 44 (c) of the Constitution.

15 The applicant's counsel submitted that there was a need to preserve the
supremacy and sanctity of the Constitution and that there is merit in
Constitutional Petition No 04 of 2023 and it is necessary for this court to
act with restraint and to stay proceedings to enable articles 28 (1), 44 (1)
and 126 (1) and 132 of the Constitution to be interpreted in light of the
attempt to hear Application No 04 of 2023 afresh.

20 The applicant's counsel submitted that article 2 of the Constitution
provides that the Constitution is the supreme law of Uganda and has
binding force on everyone and authority. That any allegation under article
137 (3) (a) of the Constitution such as the allegation by the applicants in
Constitutional Petition No 04 of 2023, that any act or omission by any
25 person or authority is inconsistent with the Constitution, allows a petition
to be filed. Further he submitted that because of the supremacy of the
Constitution, the hearing of constitutional petitions take priority under
article 137 (7) of the Constitution.

30 Further, the applicant's counsel submitted that there is a prima facie
petition challenging the act of fixing Civil Application No 04 of 2023. He
contended that the principle of the supremacy of the Constitution
requires there to be a stay of proceedings in Civil Application No 04 of
2023 to allow the Constitutional Court to inquire into allegations that
35 article 28 (1), 44 (c), 126 (1) and 132 of the Constitution will be contravened
by the act of hearing that application. That if this court proceeds to hear
Civil Application No 04 of 2021, before the constitutional petition is heard
and determined, then the petition which seeks to preserve the
supremacy of the Constitution will be rendered nugatory.

5 The applicant's counsel relied on **Onyango Obbo & another vs Attorney General; Civil Appeal No 02 of 2022** where Mulenga JSC dealt with the decision of the Constitutional Court staying the hearing of a constitutional petition in preference to a criminal trial of disputed penal provisions taking place. With reference to article 137 (7) of the Constitution he held
10 that:

15 "The rationale for these provisions is obvious. The Constitution is the basic law from which all laws and actions derive validity. Where the constitutional validity of any law or action awaits determination by the Constitutional Court, it is important to expedite the determination in order to avoid applying a law or taking action whose validity is questionable.

The applicant's counsel prayed that this court is guided by the principle enunciated above to stay proceedings in Civil Application No 04 of 2021 since the constitutional validity of the hearing that application is being challenged in the Constitutional Court.

20 In reply, the respondent's counsel submitted that the application before the court lacks any legal foundation. He contended that section 33 of the Judicature Act, only vests jurisdiction in the High Court and not the Supreme Court. Similarly, section 98 of the Civil Procedure Act does not apply to the Supreme Court by virtue of section 1 which limits the CPA to
25 the proceedings in the High Court and Magistrates Courts. Further rule 2 (2) of the Judicature (Supreme Court Rules) Directions does not also apply to an application of the nature before the court. He submitted that the rule applicable for stay of proceedings is rule 6 and the explanatory notes thereof are that the institution of an appeal shall not operate to
30 suspend any sentence or to stay execution but the court may in any civil proceedings where a notice of appeal has been lodged in accordance with rule 72 of the rules of the court, order a stay of execution, an injunction or stay of proceedings as the court may consider just.

35 The respondent's counsel contends that the essential element underpinning the rule is that the applicant also filed a notice of appeal and that rule 2 (2) of the Rules of this court cannot override the obligation of applicant to apply with the procedural imperatives of the rules as they seek Justice of this court.

5 Further, the respondent's counsel submitted that the institution of a constitutional petition at the lower court cannot be a foundation for the grant of a stay of proceedings under the Rules. He contended that it borders on abuse of process and undermines the superiority of this court. The respondent's counsel relied on **Utex Industries Ltd Vs Attorney**
10 **General; SCCA No 52 of 1997** for the holding that procedural rules serve the ends of Justice to be applied with due regard to the circumstances of each case. Further in **Mulindwa George William vs Kisubika Joseph; SCCA No 14 of 2014**, it was held that justice must be administered in accordance with the law. He contended that the present application is
15 incompetent and ought to be dismissed with costs.

On the question of whether the respondent's affidavit in rejoinder is incurably defective, the respondent's counsel submitted that apart from the jurat allegedly being on a separate page, there is no issue raised regarding the authority of the Commissioner of oaths before whom the
20 affidavit was deponed and which is alleged to have fallen foul of the law. The substance of the matters set out in the affidavit in reply arise directly from the application of the Commissioner for Oaths Act, cap 5 and it does not provide for striking out of an affidavit for a jurat being on a separate page.

25 The respondent's counsel submitted that the facts in the Judgment of **Twinamatsiko Onesmus vs Agaba Aisa & Another; High Court Election Petition No 007 of 2021** are distinguishable from the facts of this case. Here the attestation clause, captures the deponent, and the Commissioner for oath and law firms in one page and the respondent
30 complied with this. Further, the respondent's counsel submitted that Commissioner for Oaths Act, cap 5 which is the controlling statute does not penalise an affidavit with a jurat on a separate page nor do the rules made thereunder. Further whenever any form is not prescribed by any written law, an instrument or document which purports to be in such
35 form, cannot be void by reason of any definition therefore which does not affect the substance of such instrument or document. He contended that the subsidiary legislation is to read in conformity with the enabling legislation and cannot purport to prescribe or impose obligations on any

5 party different from those or more onerous than those contemplated in the parent Act.

In the premises, the respondent's counsel submitted that the affidavit was properly taken by a qualified person at the place and date indicated and can be used in evidence. There was no failure on the part of the
10 respondent to comply with any statutory requirement. Counsel relied on **Kanabolic Group of Companies (U) Ltd vs Sugar Corporation of (U) Ltd; SCCA No 040 of 1995** where the Supreme Court on similar points complained of, stated that there were minor technicalities which should not be allowed by the court as a bar from proceeding to hear the merits
15 of the case.

The respondent's counsel submitted that we find that it is in the interest of Justice that the affidavit in reply be saved and rendered receivable in the proceedings for purposes of dealing with the substance and that there is sufficient material for determination of the dispute.

20 The respondent's counsel also submitted on the propriety of Constitutional Petition No 04 of 2021 & No 6 of 2023. He contended that the respondent is not a party to the said constitutional Petition No 04 of 2021 and it is inapplicable to the application.

Further, counsel for the respondent contended that the matters raised in
25 Constitutional Petition 06 of 2023 are misconceived, frivolous and vexatious and raise no issues or questions as to interpretation of the Constitution. He stated that the petition is merely an abuse of court process intended to frustrate the orders of this court issued in the main appeal. Further that as a frivolous and vexatious petition, it cannot be
30 rendered nugatory. He contended that the petition filed in the lower court to stay proceedings in this court is defective and incompetent and the court below ought to dismiss it on that ground. Further the issues raised in the petition can still be competently addressed by the Supreme Court in the substantive hearing of Miscellaneous Application No 04 of 2021 and
35 such a determination cannot occasion any prejudice to the parties.

In the relation to the jurisdiction of the Supreme Court, the respondents counsel submitted that rule 35 of the Judicature (Supreme Court Rules)

5 Directions empowers this Court on its own motion or on an application
of any interested person to correct any order it issued if it does not
correspond with the orders it purports to embody. This discretion applies
where the Court is satisfied beyond doubt that the order one it would
10 (see **Uganda Development Bank Vs Oil Seeds (U) Ltd; Supreme Court Civil
Application No 15 of 1997** and **Orient Bank Ltd vs Frederick Zaabwe and
Mars Trading Ltd; Civil Application No 17 of 2007.**)

The respondent wondered how the discharge of a judicial function of the
Supreme Court exercisable under the Judicature (Supreme Court Rules)
15 Directions can be illegal. He submitted that article 126 (1) of the
Constitution was quoted out of context by the applicant's counsel. Further
that if it is understood that this court enjoys very wide discretion to make
such orders sought in Miscellaneous Application No 04 of 2021, It is
imperative that it makes such orders as are necessary to achieve the
20 ends of Justice and to prevent abuse of the process by the applicant (See
**Theodore Sekikubo and Others vs Attorney General and Others: SCCA
No. 04 of 2014** and **Alcon International Ltd vs New Vision Printing and
Publishing Co. Ltd and the Editor in Chief New Vision and Sunday Vision;
SCCA No 04 of 2010.**)

25 The respondent's counsel further submitted on the question of whether
Miscellaneous Application No 04 of 2021 was heard and determined
finally. He contended that the application was never determined on its
merits and that Chibita JSC while giving his qualified acceptance of
jurisdiction resolved that once he had jurisdiction to hear the party's
30 application, he did not have the jurisdiction to issue orders sought as the
matter could only be disposed of by a full panel and his Lordship issued
orders that were subject to the main appeal. Because the matter in the
present appeal has not been finally determined, it is just for this court to
reopen it and rehear the matter.

35 Further, counsel submitted that it is in the interest of Justice for a panel
of the court to proceed to Miscellaneous Application No 04 of 2021 and
consider and determine it on the merits. The respondent's counsel relied
on **McCarthy vs Agard [1933] 2 K.B 417** for the holding that this court has

5 the inherent jurisdiction to issue such orders as are necessary to fulfil its intention.

On the question of whether execution jurisdiction is vested in the High Court only, the respondent's counsel submitted that the applicant relied on section 34 of the Civil Procedure Act but what is in the application
10 before court is that the respondent did not apply for execution in Miscellaneous Application No 04 of 2021. The respondent sought *inter alia* an order that the applicant be found in contempt of the orders of the court for instance on the question of the audit. He submitted that there cannot be execution proceedings without an audit of what is to be implemented
15 through execution. Further, the respondent's refusal to participate in the audit was contrary to the Constitution where this court reiterated the necessity for a successful party in any litigation to enjoy the fruits of his Judgment. He contended that to suggest that there is no prejudice occasioned by the endless proceedings when the respondent has an
20 executable judgment because of the applicant's refusal to participate in the audit is a statement made without conviction.

On a need to preserve supremacy and sanctity of the Constitution, the respondent's counsel contended that the applicant's submissions are lifeless, riddled with speculation and are purely academic. Further that
25 they are deficient on the actual narration and application of arguments. He submitted that there is no need to preserve the supremacy and sanctity of the Constitution in a matter of Constitutional Petition No 04 of 2023 because that petition is devoid of merit. Further, the prayers sought in that petition are to issue an injunction against the Supreme Court from
30 hearing a matter.

Further counsel submitted that this court would unprecedentedly abdicate its judicial function or shirk its obligation if it allows the lower court a blanket immunity to inquire into its mandate and give it directions to the Supreme Court. He prayed that this court's discretion is exercised
35 judicially with the utmost equanimity especially that the Court is faced with an application that seeks to undermine the sanctity of the Supreme Court.

5 In addition, the respondent's counsel submitted that it is trite law that at
an interlocutory stage, the applicant party should demonstrate the right
to the relief it seeks clearly. Having scanned through the petition and the
materials placed before the court by the applicant, the respondent
submitted that the applicant has not demonstrated that it has any
10 valuable prima facie case with a likelihood of success and that in the
absence of such a conservation order, it is likely to suffer prejudice. This
is because the applicant failed to prove a clear breach of the Constitution
or legislation violated by this Court in determining Miscellaneous
Application No 04 of 2021 and the orders sought in the petition are too
15 global. He submitted that it sufficed to state that the applicant will not
suffer any prejudice as it enjoys a right to be heard in opposition of the
application which is consistent with articles 28 (1) 44 (c), 126 (1) and 137
(7) of the Constitution as interpreted in **Constitutional Petition 06 of 1999
Hon Zachary Olum & Hon Rainer Kafiire vs the Attorney General.**

20 The respondent's counsel also submitted that the principles set out for
the grant of an injunction or stay are in **American Cyanamid Co vs Ethicon
Ltd [1975] AC 396**, are relevant and the question for the court to consider
is whether there is a serious question to be tried. Secondly what the
balance of convenience of each party is and whether there are any
25 special factors.

Counsel submitted that the applicant failed to prove any of the above
grounds so as to entitle it to the introductory relief as set out by Lord
Diplock in **American Cynamide Co (1) vs Ethicon Ltd [1975] AC 396** and
prayed that the application be dismissed with costs to the respondent.

30 I have further considered the submissions in rejoinder of the applicant's
counsel that had been filed on court record on 17th April 2023 and I do not
need to specifically reproduce them though I have taken them into
account.

Consideration of the application.

35 I have carefully considered the applicant's application, the affidavit in
support, the affidavit in reply as well as the submissions and the court
record.

5 The applicant's counsel objected to the affidavit in reply of Mr Matthew
Rukikaire on the ground that the affidavit in rejoinder is incurably
defective. The affidavit was deposed to on 4th April 2023. It was filed on
court record on 5th of April 2023. There is another affidavit in reply to the
10 Notice of Motion filed on court record on 3rd April 23 dated 31st of March
2023. The affidavit is dated by the Commissioner for Oaths and not the
deponent. I have carefully considered the applicant's application and the
submissions of counsel and there is nothing in the affidavit which is
necessary for the disposal of the application for stay of proceedings as I
will demonstrate in this ruling and I do not need to rule on the issue.

15 I need to point out that the applicant's application is an application for
orders that the hearing and or rehearing of Civil Application No 04 of 2021
be stayed pending the disposal of Constitutional Petition No 06 of 2023
and for costs of the application to be in the cause.

I further need to set out the basis of the application which are that the
20 applicant filed a constitutional petition to challenge the constitutionality
of the hearing or rehearing of Civil Application No 04 of 2021 after it had
been determined by Chibita JSC and that the petition is pending hearing
and determination by the Constitutional Court. Secondly that the hearing
of the Civil Application No 04 of 2021 before disposal of the constitutional
25 petition will render the petition nugatory and irreparably deprive the
applicant of its right to a fair hearing of the petition. Finally, that it is in
the interest of justice that the hearing of Civil Application No 04 of 2021
be stayed.

While the application seems to be a straightforward one, in that a
30 constitutional petition had been filed in the Constitutional Petition No 06
of 2023, the issue is not as straightforward when considered in light of
the background to the petition. For purposes of context, the appeal
underlying in this application had been determined by the Supreme Court
in Civil Appeal No 03 of 2015. Thereafter, the respondent filed Civil
35 Application No 04 of 2021 which was placed before a single Justice and
heard by Chibita JSC.

The matter was commenced as a company cause in High Court
Commercial Court Division Companies Cause No 03 of 2004 where the

5 petitioner who is now the respondent to this application prayed for winding up of the applicant company under section 211 of the Companies Act cap 110 (repealed). In the trial resulted in an order that the petition is allowed with costs and in addition other orders as to the terms of reference of a special audit were issued by the court. These orders were:

- 10 1. That a special audit shall be carried out by any of the following reputable audit firms, PricewaterhouseCoopers, Ernest and Young, Deloitte and Touche, KPMG or PKF Uganda to be jointly appointed by the petitioner and the respondent within 30 days of the judgment.
- 15 2. That the petitioner and the respondent company shall share the cost of the audit in the proportions of 1/3rd for the petitioner and 2/3rd for the respondent company.
3. That the preliminary findings of the special audit shall be made available to the parties within 45 days of the appointment for comments which comments shall be made within another 14 days
20 of receipt by them of the preliminary report.
4. The final report shall be made to court and the parties within 14 days.
5. The final report shall be binding upon the parties,
- 25 6. The special report shall address the following issues;
 - a. Based on the letter of M/S Agaba & Co Advocates to Mr. James Musinguzi 15th December 2003 whether the 40% foreign shareholders represented by the petitioner of Messieurs Incafex Ltd withdrew and were compensated for their shares. Precise details as to the minutes, dates and
30 payment amounts are to be provided by the parties.
 - b. If the said foreign shareholders were not compensated for their shares, what will be fair value for their compensation? This is to pave way for the purchase of the said shares by other members of the company or by the company.
35
 - c. Establish whether the respondent has been preparing and maintaining annual audited accounts and if not, to make appropriate recommendations to court.

- 5
- d. To establish whether the respondent company has been holding regular meetings of the company and if not to make appropriate recommendations to court.
 - e. To make such other recommendations to court to ensure good corporate governance within the respondent company.

10 The applicant company was aggrieved and appealed to the Court of Appeal which overturned the judgment of the High Court and the respondent filed a further appeal in the Supreme Court vide Civil Appeal No. 03 of 2015. The Supreme Court allowed the appeal and reinstated the orders of the High Court with some modifications. Subsequently the
15 applicant applied in Civil Application No 37 of 2017 for correction of the orders issued by the Supreme Court in Civil Appeal No 03 of 2015 and the final orders issued by the Supreme Court corrected paragraphs (a) and (b) of the orders. The initial orders of the Supreme Court were as follows:

20 I would allow grounds 1, 2, 4 and 5 of this appeal and make the following orders:

- (i) The appellant is a member and shareholder of the respondent company;
- (ii) The appellant was oppressed by other Directors/shareholders of the respondent company;
- 25 (iii) That an audit of the books of the company be done as ordered by Kiryabwire, J (as he then was) and thereafter the parties report back to the High Court for consequential orders;
- (iv) The appellant is awarded costs in this court and in the court below.

30 Subsequent proceedings in the Supreme Court related to order (iii) which in essence reinstated the judgment of the High Court on the aspect of the audit of the books of the company making a further order that the parties report back to the High Court for consequential orders (after the audit). It can therefore be observed that the matter before this court relates specifically to the process of audit ordered by the High Court and not to
35 other orders. It is in that context that the orders of the Supreme Court in the Civil Appeal No 03 of 2015 were corrected on the aspect of the appointment of auditors in paragraphs (a) and (b) of the orders of the High Court so that the orders of the High Court which had been reinstated in the said paragraph would read as follows:

5 The orders of the Court in Civil Appeal No 03 of 2015 therefore amended as follows:

- a. The auditor be agreed upon by all the parties to the petition.
- b. The auditor be given specific terms of reference including;
 - 10 (i) The duty to receive evidence on whether the petitioner paid for his shares.
 - (ii) The auditor should not consider evidence already availed in court and addressed in the Judgment.
 - (iii) The auditors draft report be availed to the parties for their comments.
- 15 c. The final orders be made by Court after the process in (a) and (b) concluded.

In my analysis of the orders, the word "Court" in item (c) above cannot be taken to be the Supreme Court because the Supreme Court reinstated the orders of the High Court which provides that the reports are to be
20 filed in the High Court. Secondly the Supreme Court made specific orders that the matter be referred to the High Court for consequential orders. Further the High Court had made a reference to auditors and the matter remained pending before the High Court pending conclusion of the audit. The relevant law applicable is section 27 of the Judicature Act cap 13 laws
25 of Uganda which provides that the High Court may refer an issue for trial by a referee or arbitrator or referees or arbitrators. The relevant provision is section 27 (c) of the Judicature Act Cap 13 which provides that:

- 27.Trial by referee or arbitrator.
- 30 Where in any cause or matter, other than a criminal proceeding –
- (a) all the parties interested who are not under disability consent;
 - (b)
 - (c) the question in dispute consists wholly or partly of accounts,
35 the High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court.

References to referees or arbitrators are ordinarily made to experts who are expected to examine or try the issue as experts in the relevant area.
40 Generally, a reference may either be made for opinion which the court

5 may adopt wholly or in part as part of judgment of the court or a
reference may be made for trial by referees and the outcome of the trial
is a binding award which may only be set aside only on grounds for
setting aside arbitral awards. In either case scenario, the suit remains
pending until the issue is referred back to court for final orders or
10 conclusion of the suit after receiving the opinion of the experts or the
award where there was a trial by referees.

Section 27 of the Judicature Act is enforced under Order 47 of the Civil
Procedure Rules which provides the procedure for references to
arbitrators by consent of the parties. References may be made where
15 there is no arbitration clause and it is desirable that the matter be
referred to arbitrators. The matter was referred by the High Court for
trial by auditors under section 27 (c) of the Judicature Act. Where it is so
referred, the court is precluded from trying the question referred afresh.

Order 47 rule 3 (2) of the Civil Procedure Rules provides that the court:

20 "shall not, except in the manner and to the extent provided in this Order, deal
with the matter in the suit."

Order 47 rules 15 of the CPR gives the grounds for setting aside an award
of a referee or arbitrator who has tried an issue. The grounds for
application to court to set aside an award of the referees include
25 misconduct or corruption, fraudulent concealment of any matter by one
of the parties or the award being made after proceeding with the suit by
the court. Had the matter proceeded under the Arbitration and
Conciliation Act, section 32 thereof provides for termination of the
arbitral proceedings either by a final award or by an order of the arbitral
30 tribunal.

Where the matter is referred by the trial court for opinion, the court
proceeds under section 26 of the Judicature Act which provides that:

26. References to referees.

35 (1) The High Court may, in accordance with rules of court, refer to an official or
special referee for inquiry and report any question arising in any cause or
matter, other than in a criminal proceeding.

5 (2) The report of an official or special referee may be adopted wholly or partly by the High Court and if so adopted may be enforced as a judgment or order of the High Court.

10 Where the issue or question arising in any cause or matter is referred for inquiry and report, the trial court has discretionary powers whether to adopt the report wholly or partly as a judgment or order of the High Court. In this case the learned trial judge of the High Court in his order number 5 clearly stated that the finding of the auditors shall be binding. This demonstrates that the trial court proceeded under section 27 of the
15 Judicature Act and he had made a reference for trial of a question or questions by referees who happened to be auditors. The suit remained pending the outcome of the audit with final orders yet to be issued where necessary.

20 With the above background in mind, the respondent to this application filed the Civil Application No 04 of 2021 seeking various orders in the matter of the audit exercise. As far as is relevant, Chibita JSC ruled that:

25 This is a matter that was handled by this court sitting as a full panel. The decision of the court was made and communicated to the parties. I am convinced that their Lordships sitting as a full panel already considered all the issues now at play. From the submissions by counsel, it is clear that the parties did not submit to the special audit as envisaged by their Lordships.

I am alive to the provisions of section 8 of the Judicature Act.

Section 8 of the Judicature Act provides as follows:

30 (1) A single justice of the Supreme Court may exercise any power vested in the Supreme Court in any interlocutory cause or matter before the Supreme Court.

I am therefore in no doubt as to the legality of a single justice entertaining and determining the instant application.

35 It is not only prudent but also premature, in this case, for a single judge, of the same court, to sit and make further, additional or different orders, before the orders of the full panel have been properly and exhaustively implemented. It is improper and borders on abuse of process.

5 Otherwise there will never be an end to litigation. The Supreme Court would never stop hearing appeals disguised as applications for review, revision, clarification and a myriad of other prayers.

As Newbold P held in **Lakhamashi Brothers Ltd Vs Raja & Sons (1966) EA 313, 314:**

10 "there is a simple principle which is of very great importance in the administration of justice and that principle is this:

"it is in the interest of all interested persons that there should be an end to litigation."

15 The principle was cited in the case of **Obote William vs Uganda; SCCA No 1 of 2017** and **Mulindwa vs Kisubika SCCA No 12 of 2014.**

I decline to grant the orders prayed for. The parties are advised to return to PWC for the special audit as ordered in the Supreme Court Civil Appeal No 03 of 2015, now that the areas of disagreement have been clarified by the parties as per their submissions in this application. There is no order as to costs.

20 Coming to the application before Court, the saga started when on the 2nd of March 2023, **Civil Application No 14 of 2022 arising from Civil Appeal No 03 of 2015; Mathew Rukikaire vs Incafex Ltd** came for hearing. Learned Senior Counsel Mwesigwa Rukutana assisted by learned counsel Edgar Tusasirwe, learned counsel Benson Tusasirwe and
25 learned counsel Johnny Barenzi, represented Mr. Mathew Rukikaire, the applicant therein while learned counsel Peter Walubiri appearing with learned counsel Emmanuel Kiirya represented Incafex Ltd, the respondent therein. Mr Walubiri informed the court that there were two applications pending court namely Civil Application No 04 of 2021 and
30 Civil Application No 15 of 2022. The court gave the parties a schedule for the filing of written submissions in Civil Application No 14 of 2022.

Further Mr Peter Walubiri stated that they were not served with the Civil Application No 04 of 2021 and this matter was adjourned to 28th March 2023 to enable service on the respondents. On 28th March 2023, learned
35 counsel Mr Walubiri intimated to court that he had written to the Registrar of the Supreme Court stating that the **Civil Application No 04 of 2021; Mathew Rukikaire vs Incafex Ltd** had been heard and determined and any attempt to reopen it would be unconstitutional. He further informed the court that they had filed in the Constitutional Court,

5 Constitutional Petition No 06 of 2023 for interpretation of the
Constitution. Subsequently they also filed an application for stay of
proceedings of Civil Application No 04 of 2021 pending the hearing and
determination of the constitutional petition. Further, they objected to the
court hearing Civil Application No 04 of 2021 and prayed that the court
10 first hears Civil Application No. 08 of 2023 for stay of proceedings. Lastly
they conceded to an interim stay order restraining the respondent from
alienating any company property, a remedy sought in Civil Application No
14 of 2022 pending the hearing and determination of Civil Application No
08 of 2023 which is the application for stay of proceedings pending the
15 hearing of the recently commenced constitutional petition. The court
directed counsel for both parties to file written submissions in Civil
Application No 08 of 2023 and ruling was reserved on notice.

I note that the single justice of this Court considered the issue of audit as
pivotal to everything though failure to conduct the audit was part of the
20 issues to be dealt with and the application sought in its entirety a wide
range of orders as stated hereunder:

- a. An order that the Respondent is in contempt of the orders of this
court issued by the Supreme Court in Civil Appeal No 03 of 2015.
- b. A declaration that the filing by the respondent of High Court Civil
25 Suit No 887 of 2018 was an abuse of court process.
- c. A declaration that the commercial Division of the High Court, in
which Civil Suit No 887 of 2018 was filed, lacks jurisdiction to
overturn, vary or interpret a decision rendered in Supreme Court
Civil Appeal No 03 of 2015 attached as annexure F to the
30 Respondent's plaint.
- d. An order that the affairs of the Respondent Company be
immediately wound up.
- e. An order appointing a liquidator in respect of the affairs of the
company, with directives to the liquidator to immediately take
35 charge of and distribute the assets and properties of the company,
so that the applicant is allocated his 45% share thereof.
- f. An order that the applicant be paid 45% of the sum due and owing
to the respondent from the government of Uganda arising from

5 past dealings between the respondent and the government of
Uganda.

g. Costs of this application to be provided for.

Clearly, when the single justice of the Supreme Court declined to grant
the orders prayed for, he determined the application by declining to issue
10 the orders sought but did not specifically address each of the orders
sought on the merits. Chibita JSC advised the parties to return to PWC
for the special audit as ordered in the appeal and issued no order as to
costs. I note that the orders sought in (d), (e) and (f) above could be
sought as consequential orders to the audit exercise after the audit
15 report is filed in the trial court and as ordered by the Supreme Court.

Having declined to deal with the merits of the application, it cannot be
said that the application remains pending and has not determined. It is
the applicant to Civil Application No. 4 of 2021 who caused that application
to be fixed before the fully constituted panel of the Supreme Court. The
20 Applicant may be faulted for fixing the application for hearing. The
Registrar who fixed it for hearing did not necessarily have to first read
the ruling of Chibita, JSC to determine whether the matter was still
pending and she obviously left it to the court to deal with the issue. The
applicant could have made a reference to the full panel to determine the
25 application on the merits. Instead, the respondent to this application Civil
Application No. 08 of 2023, and as clearly reflected in his affidavit in
opposition to this application tried to comply with the orders of Chibita,
JSC to return to PWC for the previously frustrated special audit exercise
as ordered by the Court but again he hit a bottleneck and contended that
30 the applicant to this application; Messrs Incafex Ltd, frustrated the
process. In this application, I do not need to go into the merits of the facts
leading to the parties hitting an impasse and the audit ordered by court
being frustrated.

Civil Application No 04 of 2021 having been determined, it was sufficient
35 for the respondent's counsel to object to Civil Application No. 04 of 2021
being heard on the merits on the ground that Chibita JSC had finally
determined it. That essentially is an assertion that this court has no
further jurisdiction to determine the matters raised in that application.

5 The application had been fixed for hearing before the court and the court had not yet considered any matter such as whether the application was competent or whether it had jurisdiction to reopen the matter. Secondly, instead of seeking to present his arguments for the application not to be heard as a preliminary point of law, Mr Peter Walubiri on behalf of his
10 client decided to file a constitutional petition in the Constitutional Court. He clearly wanted to avoid this court looking into the matter and determining whether it has jurisdiction to determine the remainder of the application. There are serious ramifications to this approach as I shall demonstrate hereunder.

15 There are two matters that need to be highlighted. The first one is that the Supreme Court had determined the appeal finally and Civil Application No 04 of 2021 was an application inter alia for orders to find the officials of Incafex Ltd in contempt of court orders. Chibita JSC declined to issue the orders. At this stage this court cannot say that he
20 reserved some of the orders for consideration at a later stage. Further, I wish to highlight the fact that fixing a matter for hearing before a single justice does not mean that the applicant intended it to be heard by a single justice of the court. A single justice of the Court only has powers to hear interlocutory causes or matters before the Supreme Court.
25 Section 8 of the Judicature Act provides that:

8. Powers of a single justice of the Supreme Court.

(1) A single justice of the Supreme Court may exercise any power vested in the Supreme Court in any interlocutory cause or matter before the Supreme Court.

30 It is quite clear that there was no appeal pending before the Supreme Court by the time Civil Application No 04 of 2021 was a filed. In fact, Civil Appeal No 03 of 2015 had been determined by this court. What was left was the execution of orders of the Supreme Court. I particularly want to highlight the fact that the order of the Supreme Court envisaged further
35 consequential orders of the High Court after the audit of the Incafex Ltd that had been ordered. Because the High Court had residual powers to issue consequential orders after receipt of the audit award, the matter remains pending in the High Court and not the Supreme Court. For this

5 reason, it was sufficient for the single justice of the Supreme Court to
decline to hear Civil Application No 04 of 2021 as he did. In other words,
the applicant to Civil Application No 08 of 2023 should have waited for
the court to determine whether it has jurisdiction to sit and consider the
grievances of the applicant in Civil Application No. 04 of 2021. Application
10 of the petitioner in the Constitutional Court has the effect of stopping this
court from considering the matter on the merits of the objection to the
jurisdiction of this court in Civil Application No 04 of 2021.

The above notwithstanding, the second matter concerns the power to
make a reference of any question as to interpretation of the Constitution
15 arising in proceedings before the Supreme Court in Civil Application No.
4 of 2021 as provided for under article 137 (5) of the Constitution. Yet the
applicant has filed an original constitutional petition under article 137 (3)
of the Constitution where a reference by this Court is not envisaged.

20 Firstly, the question of whether the matter was pending for consideration
or whether this court still has jurisdiction in the matter has not been
determined and was still to be determined in the application. What was
required was for the applicant's lawyer to object to the hearing of the
application on the ground that the application had been finally
determined and could not be reopened by fixing it for hearing again. The
25 point being that if there are no proceedings properly before the Supreme
Court, there cannot even be a reference under article 137 (5) of the
Constitution because the envisaged proceedings would have been
determined by the Supreme Court upholding the preliminary objection on
the ground of want of jurisdiction of the Supreme Court. Further, where
30 in the course of considering whether the matter was properly before the
court and any question as to interpretation of the Constitution is raised,
the Supreme Court can evaluate whether there is any issue or question
or dispute as to interpretation of the Constitution that requires a
reference to be made to the Constitutional Court as the original court to
35 interpret the Constitution. In any case, Mr Peter Walubiri, counsel for the
applicant had the right to raise any question as to interpretation of the
Constitution for consideration by the Supreme Court for purposes of such
a reference.

5 the hearing, the petitioner's counsel Mr Peter Walubiri informed the court that only Civil Application No 14 of 2022 was cause listed for hearing. Subsequently they were served with a hearing notice from Civil Application No 04 of 2021. That the act of the Supreme Court of fixing a fresh hearing was inconsistent with and in contravention of articles 28
10 (1), 44 (c) and article 132 of the Constitution of the Republic of Uganda.

I need not make any comments as to the merits of the petition except to point out that under article 137 (5) of the Constitution, the Supreme Court can make a reference to the Constitutional Court if it is of the opinion that a question as to interpretation of a provision of the Constitution has a
15 substantial question of law. It seems a matter fixed for hearing per se does not forestall any preliminary objection as to the jurisdiction of the court to hear the matter or any preliminary objection as to the competence of the application. Further rushing to the Constitutional Court was contemptuous of the court and suggests that the Supreme
20 Court cannot on its own determine any preliminary objection as to its competence, jurisdiction or to determine whether it should make any reference to the Constitutional Court if the petitioner's counsel so raised any question as to interpretation of the Constitution. The ramification of a reference is that the Constitutional Court determines it and refers the
25 question back with directions so the Court can continue with the proceeding. Where this Court directs termination of the proceedings, it would for instance be on the basis of jurisdiction, something which every court should in the first instance have a right to determine. Where it is determined in an Original Petition such as Constitutional Petition No 6 of
30 2023, the matter does not get back per se to the Supreme Court in Civil Application No. 04 of 2021 and further there is a right of appeal to the Supreme Court before a panel of all Justices of the Supreme Court. This leads to nothing but delay in a matter that was concluded on appeal by the Supreme Court contrary to article 126 (2) (b) of the Constitution which
35 provides that: "*Justice shall not be delayed*".

As I have indicated above Civil Application No 04 of 2021 had been determined according to the wording of the ruling thereof though several other matters had been sought in that application. The remedy of the applicant then is not to fix the matter afresh for hearing but to seek for

5 the matter to be reopened, if that is necessary. In my ruling therefore
there is thus far, no proceeding before the Supreme Court as envisaged
under article 137 (5) of the Constitution. The question of whether the
matter should be heard or not and whether it should proceed or not is
still to be determined by the court. Further, the applicant to this
10 application on his own raised the question of whether the Supreme Court
was a competent court to deal with Civil Application No. 04 of 2021 light
of the provisions of sections 29 - 34 of the Civil Procedure Act.

Before even considering the provisions of the Civil Procedure Act, it is
pertinent to point out that the Supreme Court in the main appeal
15 resurrected the orders of the High Court that the matters relating to the
audit shall be dealt with by the High Court after the audit is completed.
No audit has been conducted and the fact that an audit shall be done was
finally and conclusively determined by the Supreme Court. The question
that is left is whether the applicant to this application is willing to have
20 the audit conducted and their conduct thus far would further clog the
process of carrying out the audit ordered by the High Court which order
was upheld by the Supreme Court, the highest appellate court in the
matter. Protracting the proceedings interlocutory to conducting an audit
operates to delay justice because the issue that the audit be conducted
25 was concluded by the Supreme Court.

The Supreme Court ordered that the parties would report to the High
Court after the audit for consequential orders. There is an alleged
impasse that is created by the conduct of the Incafex Ltd according to the
applicant in Civil Application No. 14 of 2022, where the applicant seeks in
30 the interim and pending audit for the company to be restrained from
alienating its property and assets pending audit and final orders of court.

This court has power to order any stay of proceedings and this power is
reserved under **rule 6 (2) (b) of the Judicature (Supreme Court Rules)**
Directions which provides that:

35 (b) in any civil proceedings, where a notice of appeal has been lodged in
accordance with rule 72 of these Rules, order a stay of execution, an injunction
or stay of proceedings as the court may consider just.

5 The above rule is however inapplicable to the present matter as no notice
of appeal has been filed against a decision of the Court of Appeal. The
rule envisages a notice of appeal against the decision of the Court of
Appeal. It is the Civil Procedure Act as imported with the necessary
modifications by rule 23 of **the Constitutional Court (Petitions and**
10 **References) Rules, 2005** which provides that:

23. Civil Procedure Act, and rules to apply

(1) Subject to the provisions of these Rules, the practice and procedure in
respect of a petition or a reference shall be regulated, as nearly as may be, in
accordance with the Civil Procedure Act and the rules made under that Act
15 and the Court of Appeal Rules, with such modifications as the Court may
consider necessary in the interest of justice and expedition of the proceedings.

(2) For purposes of appeals against a decision of the Court, the Supreme Court
Rules shall apply with such modifications as may be necessary.

The application before this court is governed *inter alia* by the above rule
20 and the Supreme Court Rules as modified by the above rules. Such rules
could apply to a reference. Thus far there is no application for a
reference. Rules relating to Petitions apply to the Constitutional Court.

In relation to inherent powers under rule 2 (2) of the Rules of this court,
such powers can be exercised when the court is moved to consider
25 matters under its rules. Rule 2 of the Rules of this Court provides that:

2. Application.

(1) The practice and procedure of the court in connection with appeals and
intended appeals from the Court of Appeal and the practice and procedure of
the Court of Appeal in connection with appeals to the court shall be as set out
30 in these Rules.

(2) Nothing in these Rules shall be taken to limit or otherwise affect the
inherent power of the court, and the Court of Appeal, to make such orders as
may be necessary for achieving the ends of justice or to prevent abuse of the
process of any such court, and that power shall extend to setting aside
35 judgments which have been proved null and void after they have been passed,
and shall be exercised to prevent an abuse of the process of any court caused
by delay.

5 Rule 1 is concerned with the practice and procedure in appeals and intended appeals. Rule 2 (2) saves the inherent powers of Court in connection to hearing such appeals and intended appeals.

Where there is an application to make a reference to the Constitutional Court, the court can exercise its jurisdiction to stay its own proceedings pending resolution of any dispute as to interpretation of a provision of the Constitution and await the outcome of the interpretation. However, there is no application for reference before this court and what the applicant has presented is an application for stay of proceedings pending the hearing of a constitutional petition filed in the Constitutional Court. It does not fall within the ambit of matters over which this court can exercise jurisdiction over since this court is an appellate court when duly constituted for purposes of the decisions of the Constitutional Court. The application for stay of proceedings ought to have been filed in the Constitutional Court.

20 Ordinarily the principles to be followed in granting an order of stay of proceedings were those set out in **Wilson v Church (1879) 12 Ch. D 454** and followed in Uganda that:

25 "As a matter of practice, where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in ordinary cases to make such order for staying proceedings in the Judgment appealed from as will prevent the appeal if successful from being rendered nugatory."

30 In the matter before court, the applicant opted not to state any question as to interpretation of the Constitution but rather to avoid the court and file a petition challenging anticipated proceedings. There is in such circumstances no unrestricted right to do so. The proper course as pointed out earlier is to object to the jurisdiction of this court to hear Civil Application No. 4 of 2021. If the objection is overruled, then the counsel can raise a question as to interpretation of the Constitution for reference to the Constitutional Court.

35 Finally, the applicant raised the question of whether this court can execute its own judgment. The answer is that as a matter of fact the court reinstated the High Court order in its judgement in Civil Appeal No. 03 of 2015 and also specifically ordered the audit of Incafex Limited to be

5 28. Powers of referees and arbitrators.

In all cases of reference to a referee or arbitrator under this Act, the referee or arbitrator shall be deemed to be an officer of the High Court and, subject to rules of court, shall have such powers and conduct the reference in such manner as the High Court may direct.

10 Clearly such a trial and manner of the trial is still in the hands of the High Court as envisaged by section 28 of the Judicature Act. For emphasis Chibita JSC declined to issue the orders inclusive of the order to find the respondent to Civil Application No. 04 of 2021 guilty of contempt of court for allegedly frustrating the audit exercise. Let that matter go to the trial
15 court because it is an issue relating to trial of a question referred by the High Court to auditors and with the suit still pending conclusion after the award of the auditors. The High Court is the Court seized with jurisdiction to deal with any frustrating factors in the trial by the auditors. The High Court may direct how the trial shall be conducted.

20 By the time this application was heard and considered on the basis of written submissions, there was pending to be determined, a question as to whether this court should proceed to hear Civil Application No 04 of 2021 and the question was whether this court has jurisdiction to proceed with the application. The applicant to this application has clearly objected
25 to the conduct of any proceedings in Civil Application No 4 of 2021. Mr. Mathew Rukikaire, the applicant therein has the option to seek protection of this court on any allegations of contempt of court orders but this will not proceed in Civil Application No. 04 of 2021 which was declined by Chibita JSC. While this court may entertain a fresh application for
30 contempt of its orders, the appropriate court is the High Court which has power to deal with issues arising in trial before the referee (the auditor appointed by the parties).

At the commencement of this application, the court issued orders in the interim preserving by consent of the parties the status quo to the effect
35 that no property shall be transferred or alienated by Incafex Ltd pending determination of its Civil Application No. 08 of 2023 for stay of proceedings. In the premises, I find no merit in the applicant's application because there is technically no pending matter before the Supreme Court

5 to be stayed pursuant to finding that Civil Application No. 04 of 2021 was
determined and what is pending is the issue of whether it can be
reopened, a question for this Court to rule on whether it has jurisdiction.
In the premises, Civil Application No. 08 of 2023 as well as Constitutional
10 Petition No. 06 of 2023 cannot be based on non-existent or merely
anticipated proceedings as far as this court is concerned.

However, it is in the interest of justice that the orders of the High Court
affirmed by this court are not rendered nugatory by alienation of any
property of the company before the trial by auditors is done and
concluded and before any consequential orders of the High Court maybe
15 issued. I would make orders invoking inherent powers of this court under
rule 2 (2) of the Rules of this Court to ensure that the cause of justice is
upheld and that justice shall not be delayed through protracted
proceedings that would prolong the carrying out of a final order to carry
out an audit by ordered as affirmed by the Supreme Court in Civil Appeal
20 No. 03 of 2015 affirming the orders of the High Court. I would in the
premises, issue the following orders:

1. Civil Application No. 08 of 2023 is dismissed with costs.
2. Civil Application No. 14 of 2022 is hereby referred to the High Court
for further management.
- 25 3. An interim injunction issues pending audit and issuance of any final
consequential orders of the High Court pursuant to the decree in
Civil Appeal No. 03 of 2015 so that: Messrs INCAFEX LIMITED, its
directors, shareholders, officers, employees and or agents are
restrained from selling, mortgaging pledging, or alienating its
30 ranches and or properties comprised in:
 - a. Block 937 Plot 2 Bulemezi at Kitintale/Kyambogo measuring
2,567.7660 hectares;
 - b. Block 163 Plot 3 Buruli at Gamba, Wampiti Wantyaba, measuring
201.3 hectares;
 - 35 c. Block 1005 Plot 5 Bulemezi at Lwankoma Estate;
 - d. Block 1002 Plot 7 Bulemezi at Kyabatangwa, measuring 777
hectares;
 - e. Block 1004 Plots 2,3,4 Bulemezi at Nakalama Estate measuring
0.2417 Hectares;

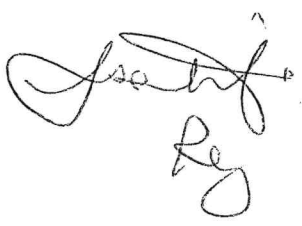
- 5 f. Block 145 Plot 13 Bulemezi, Buruli at Wabtyabya Estate, measuring 510.70 hectares
- g. LRV 1210 Folio 9 Ranch No. 15 at Kabula Ranching Scheme measuring 2339.80 hectares;
- h. LRV 1560 Folio 16 Ranch No. 9 Bunyoro Ranching scheme;
- 10 i. LRV 740 Folio 1 Ranch No. 6A, Buruli Ranching Scheme;
- j. LRV 1083 Folio 10, Ranch No. 35, Bunyoro Ranching Scheme
- The injunction shall last until final conclusion of the audit ordered by the Supreme Court in Civil Appeal No. 3 of 2015 and until the award of the auditors is submitted to the High Court and any final
- 15 consequential orders issued by the High Court.
4. Any questions relating to trial by auditors shall be determined by the High Court.
5. Civil Application No. 14 of 2022 Mathew Rukikaire vs Incafex Ltd is referred to the High Court Commercial Division with no order as to
- 20 costs.
6. The costs of Civil Application No. 04 of 2021 and Civil Application No. 08 of 2023 shall be in the cause of the main suit in the High Court which is pending trial by Auditors.

25 Dated at Kampala the 17th day of Nov 2023


Christopher Madrama Izama

Justice of the Supreme Court

Delivered by the registrar 17/11/23


Reg

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(Coram: Owiny-Dollo, CJ; Chibita; Musoke; Musota; Madrama, JJ.S.C)

CIVIL APPLICATION NO. 08 OF 2023

(ARISING FROM MISCELLANEOUS APPLICATION NO.04 OF 2021)

(ARISING FROM CIVIL APPEAL NO. 03 OF 2015)

INCAFEX LIMITED APPLICANT

VERSUS

MATHEW RUKIKAIRE.....RESPONDENT

AND

MISCELLANEOUS APPLICATION NO. 14 OF 2022

(ARISING FROM CIVIL APPEAL NO.03 OF 2015)

MATHEW RUKIKAIRE..... APPLICANT

VERSUS

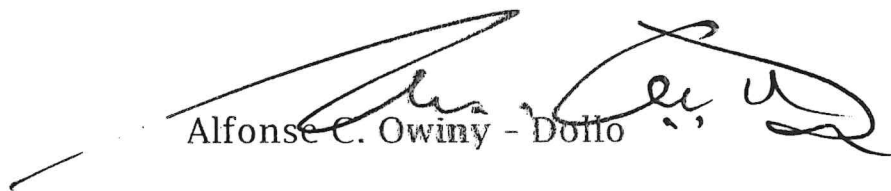
INCAFEX LIMITED RESPONDENT

RULING OF OWINY - DOLLO, CJ


I have had the benefit of reading, in draft, the ruling of my learned brother Madrama, JSC on the two consolidated applications. I agree with his reasoning and decision that; Civil Application No. 08 of 2023 be dismissed and Miscellaneous Application No. 14 of 2022 be referred to the High Court for further management.

Since Chibita, Musoke and Musota; JJ.S.C. also agree, orders are issued in the terms proposed by Madrama JSC.

Dated, and signed at Kampala this ¹⁷ day of ~~November~~ ^{November} 2023


Alfonse C. Owiny - Dollo

Chief Justice

Delivered by the registrar 17/11/23


THE REPUBLIC OF UGANDA,
IN THE SUPREME COURT OF UGANDA AT
KAMPALA

(CORAM: OWINY - DOLLO, CJ, CHIBITA, MUSOKE, MUSOTA & MADRAMA, JJSC)

CIVIL APPLICATION NO 08 OF 2023

(ARISING FROM MISCELLANEOUS APPLICATION NO 4 OF 2021)

(ARISING FROM CIVIL APPEAL NO. 03 OF 2015)

INCAFEX LIMITED APPLICANT

VERSUS

MATHEW RUKIKAIRE RESPONDENT

RULING OF MIKE J. CHIBITA, JSC

I have read through the Ruling of Madrama, JSC.

Regarding whether MISCELLANEOUS APPLICATION NO 4 OF 2021 disposed of the matter or not, it never was my intention to determine the application as the extract below clearly shows:

“It is not only prudent but also premature, in this case, for a single judge, of the same court, to sit and make further, additional or different orders, before the orders of the full panel have been properly and exhaustively implemented. It is improper and borders on abuse of process.”

That notwithstanding, since the orders address the fundamental issues between the parties, I agree with all the orders proposed in the ruling.

Dated at Kampala this 17th day of November, 2023



Hon. Mike J. Chibita

JUSTICE OF THE SUPREME COURT

Delivered on 7/11/23 by the registrar 

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL APPLICATION NO. 08 OF 2023
(Arising from Miscellaneous Application No. 4 of 2021)
(Arising from Civil Appeal No. 03 of 2015)

INCAFEX LIMITED:.....APPLICANT

VERSUS

MATTHEW RUKIKAIRE:.....RESPONDENT

AND

CIVIL APPLICATION NO. 14 OF 2022
(Arising from Civil Appeal No. 03 of 2015)

MATTHEW RUKIKAIRE:.....APPLICANT

VERSUS

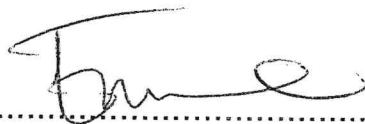
INCAFEX LIMITED:.....RESPONDENT

CORAM: HON. MR. JUSTICE ALFONSE OWINY-DOLLO, CJ
HON. MR. JUSTICE MIKE CHIBITA, JSC
HON. LADY JUSTICE ELIZABETH MUSOKE, JSC
HON. MR. JUSTICE STEPHEN MUSOTA, JSC
HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA, JSC

RULING OF ELIZABETH MUSOKE, JSC

I have had the benefit of reading the ruling of my learned brother Madrama, JSC and I agree with his reasoning, conclusions and the orders he has proposed.

Dated at Kampala this 17th day of November 2023.



Elizabeth Musoke

Justice of the Supreme Court

Reviewed by the registrar 17/11/23
