THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISCELLANEOUS APPLICATION NO. 003 OF 2023

(Arising from EMA No. 74 of 2022)

THEMBO GIDEON MUJUNGU :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

MBAJU JACKSON :: RESPONDENT

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO

RULING

This is an application made by way of notice of motion under the provisions of section 82, 98 of The Civil Procedure Act, and Order 46 rules 1 and 8 of The Civil Procedure Rules seeking for orders that;

a) The assessment of costs by certificate of taxation in Election Petition No. 09 of 2021 dated 23rd November 2022 constituting of the orders of the Registrar of the Court as Taxing Master be reviewed and set aside
b) Execution of the decree of the court in Election Petition No. 09 of 2021 vide Execution Miscellaneous Application No. 74 of 2022 by way of assessment and recovery of costs be reviewed and set aside
c) Costs of the application be provided for.

Background

The applicant and the respondent contested in the 2021 general elections for the parliamentary seat for Busongora County South. The applicant was victorious, the respondent filed Election Petition No. 09 of 2021 before this court to challenge the applicant's victory, and the same was dismissed. The respondent appealed to the Court of Appeal and the judgment of this court

was set aside and a fresh election ordered. The Court of Appeal awarded costs of the Appeal, the cross appeal and of the petition in this court to the respondent. The applicant was the victor even in the fresh election/bye-election.

In the Court of Appeal, the applicant filed Civil Applications No. 854 and 855 of 2022 for stay and interim stay of execution respectively pending determination of the applicant's application for review vide Civil Application No. 600 of 2022 before the Court of Appeal. Application No. 854 was dismissed with costs and accordingly application No. 855 was closed. Meanwhile Civil Application No. 600 of 2022 for review seems still pending before the Court of Appeal.

The respondent sought to have the costs taxed and thereafter recovered. He filed Execution Miscellaneous Application No. 74 before the registrar of this court. The costs between the respondent and The Electoral Commission had been determined by consent of the parties at UGX 76,800,000/= and Electoral Commission paid the same in full. The costs between the applicant and the respondent had been taxed and allowed at UGX 183,618,000/=. The registrar of this court allowed the application for execution against the applicant and issued a warrant of arrest against him. It is this execution and assessment of costs that the applicant now seeks to review and set aside.

The application was supported by the affidavit of Thembo Gideon Mujungu that laid down the grounds of the application. They are as follows;

a) The impugned execution is affected by errors, illegalities, irregularities and judicial fraud apparent on the face of the record and particularly;

i. The process is premature as the decree on the costs is pending review by the Court of Appeal vide Civil Application No. 600 of 2022 and therefore erroneous, illegal, irregular, and fraudulent.
ii. The impugned execution process amounts to double execution of a single decree of the court and is thus erroneous, illegal, irregular, and fraudulent.
iii. The impugned execution is tainted by failure to follow due process, a notice to show cause was never served on him and the entire process is therefore erroneous, illegal, irregular, and fraudulent.
iv. The impugned execution process amounts to variation of the consent order between the petitioner and the Respondents in Election Petition No. 9 of 2021 to the detriment of the applicant and is therefore erroneous, illegal, irregular, and fraudulent.

The respondent deponed an affidavit in reply stating that the application is misconceived because there is nothing for the court to review as costs are awarded in the discretion of court. He notes that the purported application before the Court of Appeal is non-existent as the same has never been served upon him, never been fixed or even endorsed by the Registrar of the Court of Appeal, and even if the same were to be found to have been properly existent, there is no law that bars the respondent from recovering his costs.

The respondent also deponed that separate bills of costs were made and taxed against the Electoral Commission and the applicant and that it was not a duplication of taxation from the same decree. Further that this application is wholly without merit and not one fit for issuance of an order for review.

Thereafter, the parties filed several supplementary affidavits in support and in reply, submissions in rejoinder and supplementary submissions but the gist of them all has been captured herein above.

Representation;

Mr. Okello Oryem Alfred of M/s Okello-Oryem & Co. Advocates represented the Applicant. The respondent is represented by Guma & Co. Advocates. The hearing proceeded by way of written submissions filed by both counsel and the same have been considered herein.

Preliminary matters

In his written submissions, counsel for the respondent objected to the applicant's affidavit in support. He argues that the affidavit is tainted with fabricated, misleading and deliberate falsehoods that the court should not condone and should therefore strike out the affidavit. He argued that an affidavit being a statement on oath, it is criminal conduct under Section 94 of the Penal Code Act to swear to falsehoods. Counsel however did not point out in particular the alleged deliberate falsehoods in the applicant's affidavit. He relied on the case of ***Kakooza Vs Electoral Commission & Anor Election Petition No. 11 of 2007*** with following passage;

> '*We find that it would undermine the importance of affidavit evidence to leave intact on record a document purportedly made on oath that contains apparent falsehoods even if such falsehoods were made on an innocent but mistaken application of law*'

He then invited court to expunge the applicant's affidavit in support.

In response, counsel for the applicant stated that the law does not envisage the filing of supplementary affidavits and prayed that court validated the applicant's supplementary affidavits.

I need to note that the response by counsel for the applicant is misplaced as it does not directly respond to the respondent's objection.

I have carefully looked at the applicant's affidavit in support and on top of the respondent's failure to point out the paragraphs of the affidavit that contain deliberate falsehoods, courts have established the practice of severance when dealing with affidavits containing possible hearsay or facts that are not within the deponent's knowledge. When considering such type of affidavits courts have followed a liberal approach. In ***Col (Rtd) Dr. Kizza Besigye Vs Museveni & another, Election Petition No. 1 of 2001***. Much as this approach was adopted in an election petition which by many standards has peculiar circumstances, it poses great injustice to throw out an entire affidavit merely because a paragraph therein possibly contains information not based on the deponent's own knowledge. In applications where the mode of evidence is only by affidavit, there are higher chances of causing an injustice when affidavit is thrown out.

This objection is accordingly overruled.

Concerning the merits of the application, the only issue for determination is **Whether the applicant has sufficient grounds for review.**

The applicant relied on **Section 82 of the Civil Procedure Act**. He argued that the applicant has a pending application for Review before the Court of Appeal against the award of costs. An application for review has the same effect as a pending appeal under **Section 82 of the Civil Procedure Act** and if the impugned execution is allowed to proceed, the application for review will be rendered nugatory.

Counsel for the applicant also argued that without any legal basis and by nothing short of judicial fraud, the respondent filed two separate bills of costs in respect to the same decree in Election Petition No. 9 of 2021. He

contends that a process of double assessment and certification of costs followed by a double execution of a single decree is an erroneous and the error is glaringly on the face of the record. He referred court to the case of ***Hon. Ababiku Jesca Vs Eriyo Jesca Osuna Consolidated Misc. Applications No. 4, 31 & 37 of 2015*** where justice Mubiru arrived at the conclusion that a successful litigant cannot file multiple bills of costs in respect of a single decree. A taxing officer cannot also assess and certify multiple bills of costs in respect of a single decree. And there cannot be multiple executions in respect of the same decree.

Further, counsel for the applicant argued that the respondent executed a consent to the amount to be paid in costs with The Electoral Commission which was the 2nd respondent in Election Petition No. 09 of 2021 and the same were actually paid and settled. The respondent cannot now claim additional costs from the applicant because the law does not allow multiple execution in respect to the same decree.

In response, counsel for the respondent first extensively laid down the law relating to applications for review in line with **Section 82 of the Civil Procedure Act, Order 46 of the Civil Procedure Rules** and the case of ***Uganda Taxi Operators and Drivers Association Vs Uganda Revenue Authority Civil Application No. 24 of 2017***. He argued among others that even if there is an error in principle, court should only intervene only on being satisfied that the error substantially affected the discretion on the quantum of the costs and that upholding the amount would cause an injustice.

Counsel for the respondent argued that the case of ***Hon. Ababiku (supra***) as cited to support the applicant's case is actually distinguishable from the present circumstances. In fact, in that case, two bills were taxed and two separate executions were carried out. As such, it was cited out of context

by counsel for the applicant. Further that there is no pending application for review before the Court of Appeal as the alleged one has never been endorsed by the registrar of the said court, has never been fixed and has never been served on the respondent.

Counsel for the respondent argued that the taxation of the bills of costs followed the set principles, the law and due process. A notice to show cause why execution should not issue was also served on the applicant and no cause was actually shown. A demand to pay was also sent to the applicant as a matter of fairness but the same was used instead by the applicant to file the present application and the applications for stay and interim stay of execution. That there is no error apparent on the face of the record that warrants invoking the court's review jurisdiction.

Section 82 of the Civil Procedure Act Cap 71 which governs applications for review of court orders/judgment provides as follows;

"82. Review.

Any person considering himself or herself aggrieved—

(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit."

The provisions above are replicated in **Order 46 of the Civil Procedure Rules** which amplifies on the law by providing for the considerations when granting an application for review. It provides as follows;

"1. Application for review of judgment.

(1) Any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or made the order." (the underlining is for emphasis).

The considerations were restated in ***Re-Nakivubo Chemist (u) Ltd (1979) HCB 12,*** where Manyindo J, as he then was, held that the three cases in which a review of a judgment or orders is allowed are those of;

a. *Discovery of new and important matters of evidence previously overlooked by excusable misfortune.*
b. *Some mistake apparent on the face of record.*
c. *For any other sufficient reasons, but the expression "sufficient" should be read as meaning sufficiently analogous to (a) and (b) above.*

Of the three above, the instant application is brought under the aspect of "error apparent on the face of the record". This phrase is expounded upon

in ***Mulla The Code of Civil Procedure (18th Ed.) Vol. 1 at page 1147,*** as follows;

"Where a statement appears in the judgment of a court that a particular thing happened or did not happen before it, it ought not ordinarily to be permitted to be challenged by a party unless both parties to the litigation agree that the statement is wrong, or the court itself admits that the statement is erroneous. In such circumstances, the remedy available is review."

The learned authors (supra) further elucidated, at page 1146, that there is a clear distinction between an erroneous decision and an error apparent on the face of record. The first can be corrected by a higher forum; the latter can only be corrected by the exercise of the review jurisdiction. Only a manifest error would be a ground for review.

Also in the case of ***Attorney General & Others vs. Boniface Byanyima HCMA No. 1789 of 2000***, the court citing ***Levi Outa vs. Uganda Transport Company [1995] HCB 340,*** held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.

An error apparent on the face of the record cannot be defined precisely or exhaustively. There being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be

made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

I will now set out the errors complained of in the costs assessment and execution proceedings before the registrar of the court and determine whether they are sufficient to invoke this court's review jurisdiction.

The process is premature as the decree on the costs is pending review by the court of appeal vide Civil Application No. 600 of 2022.

As rightly submitted by counsel for the applicant, an application for review has the same effect as a pending appeal because both seek to challenge the decision of court based on some ground. However, it is now well settled that an appeal or an application for review for this matter does not act as a stay of execution and neither does it bar a taxation of costs. A party that files an appeal or an application for review has to take the extra step of applying for a stay of execution and if granted, the taxation of costs and attendant execution may be halted.

In the present case, the applicant actually exercised this option and filed Miscellaneous Applications No. 854 and 855 of 2022 in the Court of Appeal for stay and interim stay of execution respectively. Unfortunate for the applicant, the two applications were dismissed and there was nothing to stop the registrar of the court from taxing the bills of costs presented to him and to allow execution to recover the taxed costs.

In addition, in his affidavit in reply, the respondent deponed that Civil Application No. 600 of 2022 before the court of appeal has never been served on the respondent and neither has it been fixed for hearing. This evidence was not challenged by the applicant and it is proper to say that the respondent and the registrar of this court were not even aware that the said application was subsisting before the Court of Appeal until it was brought to their attention when the applicant filed Miscellaneous Applications Nos. 16 and 17 of 2023 for stay and interim stay of execution before this court.

The application for taxation of costs was made before the registrar in September 2022. The applicant participated in the taxation of costs and the same was concluded in November 2022 by issuance of a certificate of taxation. In fact, the applicant consented to all the costs against him except instruction fees. The application for execution was filed in December 2022, a notice to show cause was communicated to the applicant, a demand notice was served on the applicant and finally an arrest warrant against him. Through all that time, he had never complained that the processes before the registrar were improper or premature as he states now. This is surely an afterthought intended to delay execution and recovery of taxed costs. It does not amount to an error on the face of the record to warrant the exercise of this court's review jurisdiction over proceedings before the registrar.

<u>The impugned execution process amounts to double execution of a single decree</u>.

Under this, the applicant bases his argument on the fact the respondent presented two bills for taxation. One against the applicant and another against The Electoral Commission. The bill against Electoral Commission was taxed by consent and the same was settled by the Electoral

Commission. Counsel relied on the case of ***Hon. Ababiku Jesca (supra)*** to argue that no two bills should be taxed in respect to the same decree of court.

In in the first place, the authority quoted above differs from the circumstances of the present case. In that case, court found it improper to make separate awards to different counsel of the same party in the absence of a certificate of two counsel. In that case, Hon Ababiku Jesca employed three firms to defend her and as such the three firms could not file separate bills of costs for the same work done. In the present case, costs were awarded against the respondents in the petition and the appeal (the present applicant and The Electoral Commission). I find absolutely no problem when a party files different bills against two different losing parties to a suit. It may be a situation where two different respondents to the same petition take different steps in the petition and the appeal and such, costs may differ.

In addition, during the taxation, the applicant consented to all the costs against him except instruction fees. The consent was endorsed by the registrar on 23rd November 2022. It was held in the case of ***Lenina Kemigisha Mbabazi and Starfish Limited v. Jing Cheng International Trading Limited, High Court Misc. Application No. 344 of 2012*** that:

> *The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has not entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter consent judgment but has general instructions to defend the suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been*

terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.

By this application, the applicant seeks to set aside an award of costs that he consented to. This would not ordinarily be done in an application for review.

Again, there is no error apparent on the face of the record to warrant the exercise of this court's review jurisdiction over proceedings before the registrar.

The impugned execution is tainted by failure to follow due process, a notice to show cause was never served on him.

I agree with the averments and submissions of the respondent that a notice to show cause why execution should not issue was actually communicated to the applicant. When filing Civil Applications No. 854 and 855 of 2022 before the Court of Appeal, the applicant attached copies of the notice to show cause as annexure E thereto. The applications were received in the Court of Appeal on 13th December 2022, just 12 days after the application for execution had been received by this court. The applicant cannot now turn around and argue that the notice had never been communicated to him.

Besides, the applicant had participated in the taxation of costs proceedings and a certificate had been issued. Did he expect that after issuance of the certificate the respondent would not take steps to recover the taxed costs? I find that the applicant's averments in this regard are far from a display of good faith. There is no error apparent on the face of the record to warrant the exercise of this court's review jurisdiction over proceedings before the registrar.

The impugned execution process amounts to variation of the consent order between the petitioner and the Respondents in Election Petition No. 9 of 2021 to the detriment of the applicant.

The consent being referred to herein is one that was executed between the respondent and The Electoral Commission in respect to costs against the latter. It had nothing to do with the applicant. The applicant then entered into a consent in respect to the taxation of all the items in the bill against him except instruction fees. It is hard to comprehend the applicant's assertion in this regard. Which of the consents was varied?

I have already noted earlier that it is proper for to separate bills to be filed against separate losing parties to a suit. The settlement of the bill against Electoral Commission had nothing to do with the settlement of the bill against the applicant. I find that there is no error apparent on the face of the record to warrant the exercise of this court's review jurisdiction over proceedings before the registrar.

Before I take leave of the matter, I need to mention first that the remedies available to a person aggrieved by a decision of a taxing master are a reference to a Judge or an appeal against the same under **Section 62 of the Advocates Act**. Such an appeal ought to be filed within thirty days from the date of the decision. After participating in the taxation proceedings before the registrar and actually consenting to all items except one, and after finding himself outside the time set for appeal, the applicant now seeks to use this application as an appeal in disguise. This should not be allowed.

It is my finding that this application is an afterthought and only intended to delay the recovery of properly taxed costs. The applicant has not proved any of the grounds for review and I don't find this case a proper one to

warrant the review the proceedings before the registrar. The applicant has failed to prove that there was an error apparent on the face of the record.

Accordingly, this application is dismissed with costs to the respondent.

I need to mention that the applicant had also filed Miscellaneous Applications Nos. 16 and 17 of 2023 for stay and interim stay of execution before this court pending the determination of Civil Application No. 600 of 2022 before the Court of Appeal. The orders for the payment of costs were made by the Court of Appeal in Election Petition Appeal No. 046 of 2021. They are not orders made by this court. I don't know what informs the applicant that this court has the jurisdiction to stay orders of the Court of Appeal. The applications for stay of execution that were filed in the Court of Appeal were dismissed. These two applications before this court are also dismissed with no order as to costs.

It is so ordered

Dated at Fort Portal this 31st May 2023. .

Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the ruling to the parties

Vincent Emmy Mugabo

Judge

31st May 2023