

UGANDA / JUDGMENT

**Katayira Francis v Rogers Bosco
Bugembe (Civil Application 23 of
2016) [2017] UGSC 70 (6 April 2017)**
[2017] UGSC 70

COURT

Supreme Court of Uganda

BEFORE

Mwangusya, JSC, Kisaakye, JSC, Tumwesigye, JSC,
Mwondha, JSC, Opio-Aweri, JSC

CASE / FILE NUMBER

Civil Application 23 of 2016

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THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF UGANDA

[CORAM: HON. JUSTICE PROF. TIBATEMWA-EKIRIKUBINZA, JSC]

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CIVIL APPLICATION NO. 23 OF 2016

(Itself arising from Civil Application No.22 of 2016) (Arising out of Court of Appeal
Civil Application No.0139 of 2016)

BETWEEN

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KATAYIRA FRANCIS ::::::::::::::::::::

AND

ROGERS BOSCO BUGEMBE :::::::::::::::::::::::::::::: 20

RULING OF COURT

The applicant, Katayira Francis, brought this application for an interim order pending determination of the substantive application for Stay of Execution vide Civil Application No.22 of 2016 in this Court.

Representation

At the hearing of this application, the Applicant was represented by Mr. Luwairamuham holding brief for Mr. Justine Semuyaba of M/S Semuyaba, Iga & Co. Advocates while Mr. Wilfred Niwagaba of M/S Niwagaba & Mwebesa Advocates appeared for the Respondent.

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Both the Respondent and the Applicant were present in court. $\mathbf{S}$

Counsel for the applicant and the respondent filed written submissions. At the hearing of the application, both counsel adopted their written submissions.

Background

- The applicant was sued in the High Court by Rogers Bosco 10 (Respondent) as an Administrator of the estate of the late Kristofa Wadda for:
- 1. Recovery of land comprised in Kibuga Block 14 Plot 124 at Ndeeba
- 2. An order directing the Chief Registrar of Titles to cancel the applicant's names from the Certificate of Title of the suit land and substituted with his names.
- 3. General damages
- 4. Mesne profits
- 5. An eviction order
- 6. Costs of the suit.

In the High Court suit, the respondent argued that the applicant had got registered on the suit land through/ by fraudulent means. That there was no evidence of sale agreement to show that he was a bonafide purchaser.

The trial judge found the applicant not to be a bonafide purchaser for value without notice for the reason that by the time the defendant purchased the land in February 2000, there were tenants occupying the suit land with visible developments. That if the applicant had inquired from them about the status of the land, he would have found out that the land belonged to the estate of the late Kristofa Wadda. The applicant was therefore not a bonafide purchaser for value without notice because he had purchased the suit land when he had actual notice of people on the land.

Basing on the above finding, the trial judge ordered and declared that 35 the suit land to belong to the estate of Kristofa Wadda. The trial judge

also directed the Chief Registrar of Titles to cancel the applicant's S name from the Certificate of Title and substitute it with that of the respondent.

Dissatisfied with the High Court decision, the applicant filed a Notice of Appeal in the High Court on 23rd October 2014 wherein he indicated his address of service of court proceedings as Makada & Partners Advocates and Solicitors.

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On 10th August 2015, the Registrar of the High Court, through a letter informed the applicant's lawyers- Makada & Partners that the court proceedings were ready for collection. However, one of the lawyers from the said firm – Fred Makada swore an affidavit to the effect that he no longer represented the applicant and had lost touch with him at the time when the certified proceedings were ready for collection.

On 23rd September 2016, the respondent filed Miscellaneous Application No. 139 of 2016 to strike out the applicant's Notice of Appeal because a period of 2 years had lapsed without him filing a 20 Memorandum of Appeal. This was contrary to Rule 82 of the Court of Appeal Rules which requires an appellant to file a Memorandum of Appeal within 60 days after lodging a Notice of Appeal.

On 27th September 2016, the said Miscellaneous Application was heard in court. Whereas counsel for the respondent was present in 25 court, the applicant's counsel was not. However, the applicant was in court. He informed court that his lawyer was unable to be present at the hearing because he was not in the country and that it was difficult for him to find an interim lawyer. He prayed to court to be granted an adjournment so that he could get a lawyer to represent 30 him.

On the same day, at the close of hearing Miscellaneous Application No. 139 of 2016, the Court of Appeal delivered its ruling. The court held that the applicant's Notice of Appeal was withdrawn by operation of law. (i.e. Rule 84 of the Court of Appeal Rules). The Rule is to the effect that, a party who lodges a Notice of Appeal and fails to institute an appeal within the prescribed time is taken to have withdrawn it.

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The Court of Appeal in considering the lapse of 60 days from the date $\text{\textit{S}}$ when the court record was ready for collection (10th August 2015), held that the applicant had failed to lodge his appeal within time and therefore it was withdrawn by operation of law.

It is on this basis that the applicant has come to this Court seeking inter alia an interim order of stay on ground that the Court of Appeal 10 struck out his Notice of Appeal without giving him a right to be heard. A further ground supporting his application is that the failure to lodge his appeal on time was because his former lawyers- Makada & Partners had not received the certified copy of proceedings in time.

The application 15

The application was brought by Notice of Motion under Rules 2 (2), 6 (2), (b), 42, 43, 50 and 51 of the Supreme Court Rules on the following grounds:

- a. That the applicant being dissatisfied with the decision of the High Court filed a Notice of Appeal in accordance with Rule 72 of the Court of Appeal Rules Directions.
- b. That the ruling of the Court of Appeal to strike out the said Notice of Appeal was in error since the Court did not accord the applicant the right to be heard on the matter.
- c. That the intended appeal raises several legal issues that warrant serious judicial consideration by the Supreme Court.
- d. That the applicant has filed a substantive application for stay of execution without undue delay.
- e. That there is a serious threat to execute the decree of the High 35 Court which will have the effect of cancelling the applicant's name from the certificate of title and substituting it with that of the respondent.

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- f. That the balance of convenience in maintaining the status quo is in favour of the applicant who is still in possession of the suit land.
- g. That the applicant could not formally apply for stay of Execution in the Court of Appeal since his Notice of Appeal had been struck out.
- h. That the applicant in exercise of his right of appeal has appealed to this court.
- i. That the respondent be restrained from evicting the applicant and restrained from recovering the taxed costs in the High Court and Court of Appeal.
- j. Costs of this application be provided for in the main cause.

The above grounds were elaborated in the applicant's affidavit in support of the Notice of Motion and a supplementary affidavit.

- In response to the applicant's averments, the respondent filed an affidavit in reply wherein he stated as follows:
- 1) The applicant had a duty to follow up with the court on the progress of preparing the proceedings which duty the applicant and his counsel failed to perform. That both the applicant and his advocate had a duty to collect the proceedings from Court but decided to sit on their right.
- 2) There was no Application for enlargement of time and the question of whether the Notice of Appeal was deemed withdrawn was a matter of law which was properly adjudicated upon.
- 3) There was no denial of a right to be heard since the applicant was served and personally appeared in court.

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- 4) That the applicant did not show sufficient cause as to why there was failure in taking an essential step in prosecuting his appeal and that the appeal has no likelihood of success.

Submissions of the Applicant

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The applicant submitted that his intended appeal raises several legal issues that warrant consideration by this Court. The central issue is that the Court of Appeal struck out the applicant's Notice of Appeal without giving him a right to be heard. The applicant contends that he is a bonafide purchaser of the suit land and therefore his appeal has a high chance of success.

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It was also submitted on behalf of the applicant that there is evidence of a serious threat to execute and implement the judgment/decrees/orders of the High Court. The order of the High Court judge is to the effect that the applicant's name be removed from the certificate of title of the suit land and substituted with that of the

- respondent. The applicant contends that the respondent has already extracted the decree of the High Court and commenced execution process. That the respondent has on several occasions visited the suit land and threatened to evict the applicant.
- Counsel thus argued that if an interim order is not granted, the implementation of the order will render the application for stay of execution and the appeal nugatory. In addition, counsel submitted that the eviction shall cause the applicant substantial loss which cannot be compensated for monetarily.
- In relation to the above argument, the applicant's counsel submitted that the Notice of Appeal and the instant application were filed without unreasonable delay. He emphasized that the Notice of Appeal was filed on 3rd October 2016 and the interim application filed on 19th December 2016. Counsel relied on several authorities of this court

vide Lawrence Musiitwa Kyazze vs. Eunice Busingye SCCA 35 18/1990, Akankwasa Damain vs. Uganda Constitutional Application Nos. 7 and 9 of 2011, Kyambogo University vs. Prof. Isaiah Omolo Ndiege Constitutional application No. 341 of 2013,

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- National Enterprise Corporation vs. Mukisa Foods (Misc. Appl. $\S$ No.7 of 1998) for the proposition that for an interim order to be granted, the application has to be made without unreasonable delay.
- Counsel further submitted that the balance of convenience lies in favour of the applicant since he is still the registered proprietor and 10 is in possession of the suit land.

The applicant therefore prayed that:

- (a) The respondent and or his agents be restrained from evicting him from the suit land in order to safeguard his right of appeal.
- (b) The Certificate of Title should remain in the names of the applicant pending determination of the substantive application and appeal.
- (c) The respondent be restrained from recovering the taxed costs of proceedings in the High Court and the Court of Appeal.
- (d) Costs of the application abide the outcome of the main application and main appeal.

Submissions of the Respondent

- The respondent opposed the application and argued that the applicant had no right of appeal to lodge an application for stay of 25 execution and subsequently an interim order in this Court. That appeals to the Supreme Court lie from the decisions of the Court of Appeal as may be prescribed by law. The laws prescribing for such appeals are the Judicature Act and the Civil Procedure Act.
- The relevant provision in the **Judicature Act** is **Section 6 (1)** which 30 provides: "An appeal lies as of right to the Supreme Court where the Court of Appeal confirms, varies or reverses a judgment or order given by the High Court."
- Basing on the above provision of the Judicature Act, counsel for the applicant argued that in the present matter, there was no 35 confirmation, variation or reversal of the judgment of the High Court. That an appeal against a finding by the Court of Appeal on the

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I so order. S

α i Dated at Kampala this .. $\bigcup$ day of. $\$$

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L. balemule 10 PROF. DR. LILLIAN TIBATEMWA-EKIRKUBINZA JUSTICE OF THE SUPREME COURT

**THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF UGANDA AT KOLOLO
CONSTITUTIONAL APPLICATION NO. 1 OF 2016**

(Arising from Constitutional Appeal No. 3 of 2006)

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JOHN SANYU KATURAMU AND 49 OTHERS:.....APPLICANTS VERSUS

ATTORNEY GENERAL OF UGANDA:.....

Coram: 15

> Tumwesigye; Kisaakye; Nshimye; Mwangusya; Opio Aweri; Mwondha; Tibatemwa - Ekirikubinza; JJSC.

RULING OF THE COURT.

Introduction

This is a ruling on an application brought by Notice of Motion 20 under Section 99 CPA 0.52 r 1 CPR, Rules 2 (2), 34 (2), 35 (1) and (2), 42 (1) of the Supreme Court Rules, OR in the alternative under section 82 (b) CPA, 0.46 (1) (b) CPR Rules 2 (2), 42 (1) SCR.

The application sought for the following orders:-

- 1) A declaration that the order of court dated 21^{ST} January 25 2009 in Attorney General VS Susan Kigula and 417 others SCCA No. 3 of 2006 referred to as the 1st order, was an

accidental "slip or omission or was a mistake or error of law apparent on the face of the record".

- 2) An order that the accidental slip or omission be corrected with the result that the applicant shall be entitled to remission on their sentences as per the relevant provisions of the Prisons Act.
- 3) Or in the alternative to paragraph 2 above, an order that the mistake or error of law apparent on the face of the record be corrected with the result that the applicants shall be entitled to remission on their sentences as per the relevant provisions of the Prisons Act.
- 4) An order that the respondent bear the costs of the application.

The application was supported by the grounds set out in the affidavits of the head applicant John Sanyu Katuramu and Gabula Africa Evans Bright Ronald.

Briefly they are:-

- 1) The applicants had all been sentenced to suffer death for various offences for which each had been convicted.
- 2) The applicants' death sentences arose from their respective convictions for offences where court could only mandatorily impose a death sentence.
- 3) That when the applicants appealed to the Supreme Court, the highest court, the applicants could only appeal against conviction, since the death sentence was mandatory,.

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- 4) That when the Supreme Court confirmed the sentences, it is only because the court had confirmed their respective convictions.

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- 5) That when the Supreme Court in Attorney General VS Susan Kigula SCCA No. 3 of 2006 upheld the findings of the Constitutional Court that mandatory death sentences were unconstitutional. It meant that the sentences of the appellants in that appeal were unconstitutional.
- 6) That consequently court revisited the sentences and in order No. 2 asked the High Court to hear submissions in mitigation of sentences.
- 7) That by slip or omission the court ordered that the applicants to whom order No. 1 pertains, should serve life imprisonment without remissions.
- 8) Or in the alternative, because of the mistake or error apparent on the face of the record, court ordered that the applicants, to whom order No. 1 pertains, serve life imprisonment without remission.
- 9) That order No. 1 was not a logical consequence of the holding of the court that each convict is entitled to be heard in mitigation of sentence.
- 10) That if the accidental slip or omission had not occurred, court would have ordered that the applicants are entitled to remission of sentence as per the Prisons Act.
- 11) That if the mistake or error apparent on the face of the record, had not occurred, court would have ordered that the

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appellants are entitled to remission of sentences as per the Prisons Act.

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- 12) That it is only fair and just that the applicants be allowed to benefit from the provisions of the Prisons Act on remission of sentences.
- The application was opposed by way of affidavit deposed by \$10\$ Elisha Bafirawala, a Principal State Attorney in the Attorney General Chambers.

Briefly that:-

- 1) The findings of the Court in Constitutional Appeal No. 3 of 2006, Attorney General VS Susan Kigula sought by the applicants.
- 2) The application is devoid of sufficient grounds to merit the remedy sought under the slip rule.

Background facts.

- The applicants were parties to Constitutional Appeal No. 3 of 20 2006 Attorney General VS Susan Kigula and others (the Kigula case). They had filed a petition in the Constitutional Court challenging the constitutionality of the death penalty under the Constitution of Uganda. They were persons who at different times had been convicted of diverse capital offences under the Penal Code Act and had been sentenced to death as provided for under the laws of Uganda. They petitioned that the imposition on them of the death sentence was inconsistent with Articles 24 and 44 of the Constitution.
- They further contended in the alternative that:-30

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- 1) The various provisions of the Laws of Uganda which provide for a mandatory death sentence were unconstitutional because they are inconsistent with Article 20,21,22,24 and 44 (a) of the Constitution because they deny the convicted persons the right to appeal against sentence, thereby denying them the right of equality before the law and the right to a fair hearing as provided for in the Constitution.

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- 2) The long delay between the pronouncement by the court of the death sentence and the actual execution, allows for the death row syndrome to set in. Therefore the carrying out of the death sentence after such a long delay constitutes cruel, inhuman and degrading treatment contrary to Articles 24 and 44 (a) of the Constitution.
- 3) Section 99 (1) of the Trial on Indictments Act which provides for hanging as legal mode of carrying out the death sentence, is cruel, inhuman and degrading contrary to Article 24 and 44 of the Constitution.

The Attorney General opposed the petition contending that the death penalty was provided for in the Constitution of Uganda 25 and its imposition, whether as a mandatory sentences or as a maximum sentence, was constitutional.

The Constitutional Court heard the petition and made the following declarations:-

- 1) The imposition of the death penalty does not constitute 30 cruel, inhuman or degrading punishment in terms of Articles 24 and 44 of the Constitution and therefore the

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various provisions of the laws of Uganda prescribing the not inconsistent with $\$ \mathrm{or} \$$ in death sentence are contravention of Articles 24, and 44 or any provisions of the Constitution.

- 2) The various provisions of the laws of Uganda which prescribe a mandatory death sentence are inconsistent with Articles 21, 22, (1) 24, 28, 44 (a) and 44 (c) of the Constitution and, therefore, are unconstitutional.
- 3) Implementing the carrying out of the death sentence by hanging is constitutional as it operationalizes Article 22 (1) of the Constitution. Therefore, section 99 (1) of the Trial on Indictment Act is not unconstitutional or inconsistent with Articles 24 and 44 (a) of the Constitution.
- 4) A delay beyond three years after a death sentence has been confirmed by the highest appellate court is an inordinate delay. Therefore, for the condemned prisoners who have been on death row for three years and above after their sentences had been confirmed by the highest appellate court, it would be unconstitutional to carry out the death sentence as it would be inconsistent with Articles 24 and 44 (a) of the Constitution.

Consequently, the court made the following orders:-

- a) For those petitioners whose appeal process is completed and their sentence of death has been confirmed by the Supreme Court, their redress will be put on hold for two years to enable the Executive to exercise its discretion under Article 121 of the Constitution. They may return to court for redress after the expiration of that period.

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- b) For the petitioners whose appeals are still pending before an appellate court:-
- Shall be afforded a hearing in mitigation of sentence. $\$ \backslash \mathrm{bigoplus} \$$.

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- The court shall exercise its discretion whether or not to confirm the sentence.
- Therefore, in respect of those whose sentence of death will be confirmed, the discretion under Article 121. Should be exercised within three years.

The Attorney General was not wholly satisfied by the above decision and appealed to the Supreme Court. The petitioners were also dissatisfied with parts of the decision of the 15 Constitutional Court and filed a cross appeal to the Supreme Court.

By unanimous decision, the Supreme Court dismissed the appeal and by majority decision the same court also dismissed the cross-appeal.

The Supreme Court confirmed the declarations made by the Constitutional Court but modified the Orders made by the court as follows:-

- 1) For those respondents whose sentences were already confirmed by the highest court, their petitions for mercy under Article 121 of the Constitution must be processed within three years from the date of confirmation of sentence. Where after three years no decision had been made by the Executive, the death sentence shall be deemed commuted to imprisonment for life without remission.

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- 2) For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate court, their cases shall be remitted to the High Court for them to be heard only on mitigations of sentence, and the high Court may pass such sentence as it deems fit under the law.
- 3) Each party shall bear its own costs.

The instant application is challenging the first order on the ground that it was issued in error which error should be corrected.

Representation. 15

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The applicants were represented by Mr. Kiiza Rwakafuzi assisted by M/S Carol Namara while the Respondent was represented by Mr. Batanda, State Attorney in the Attorney General's Chambers.

Both counsel filed written arguments but were allowed to orally highlight their written arguments in court. 20

- 1) Whether the applicants are guilty of dilatory and indolent conduct in the institution of the instant application.
- 2) Whether the order of the court mandating commutation of the applicants' sentences to imprisonment for life without remission was an accidental slip or omission; and
- 3) If so, whether the applicants are entitled to remission on their sentences.

ISSUE No. 1 30

It was the contention of counsel for the respondent that the S applicants are guilty of indolent conduct in the institution of the instant application. This was because the applicants filed the instant application 8 years and two months from the date the decision in **Kigula** case was handed down on 21st January 2008. Learned counsel contended that the above dilatory conduct did 10 offend the principle of "interest republican finis litmus (in the interest of society as a whole, litigation must come to an end). Counsel relied on the case of DAVID Muhende VS Humprey Mirembe SCCA No. 5 of 2012 to support the above contention.

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In reply the learned counsel for the applicants contended that 15 they could not file this application on time because at that time the Supreme Court lacked Coram. Counsel further contended that in matters concerning enforcement of constitutional rights there is no time limit. That was why the Kigula case was filed in 2003; it benefitted people who had been on death row in the 20 1990's. In view of the above argument, counsel contended that it cannot be said that this application is late.

It is trite law that under the inherent powers of the court and slip rule; the court's jurisdiction is circumscribed and must not be invoked to circumvent the principle of finality of the court's 25 decisions. The above position was emphasized in the case of David Muhende (supra) which was

cited by counsel for the respondent. In that case, the applicant filed his application under rules 2 (2) and 35 of the Judicature (Supreme Court Rules) Directions. The application was filed 12 (twelve) years after the 30 date of court's judgment under slip rule. An objection was raised on the question of delay by the applicant in filing the application after 12 years.

While upholding the objection this court observed as follows:- S

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"We think that the reasons the applicant is advancing to justify his delay are not convincing, considering the long period of his inaction, and so there was inordinate delay in bringing this application in court..... delayed application brought under rules 2 (2) and 35 of the rules of this court unless sufficient reasons are shown to justify the delay. We agree with the learned counsel for the respondent that the phrase "at any time" appearing in rules of this court should not be interpreted to mean that inordinately delayed applications without justification will be permitted by this court".

It must be noted that this court handed down its decision in the Kigula case on 21st January, 2008. The instant application to correct the error in the above judgment was filed on 22nd March, 2016. It is not denied that this application was indeed filed 8 years and two months from the date of the decision.

It is clear from the record that controversy surrounding the impugned order arose within one year from the decision of the court. One would wonder why it took the applicants over eight years to file their application under slip rule.

The reason that by that time the Supreme Court had no Coram is 25 untenable. The above allegation was not based on evidence at all. It was submission from the bar. We agree with counsel for the respondent that during the alleged period this court had Coram and continued in its business and entertained applications and

delivered rulings and judgments. In any case even if the court 30 had no Coram the applicant was still bound to file this matter in court, and to leave the issue of constituting the Coram to the court. Lack of Coram could not have given the applicant license 5 to sit back and twiddle their thumbs.

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life without remission was not accidental slip or omission. He submitted that this court made its position clear as the import of the impugned order by adopting 20 the opinion of the Solicitor General on the issue. The learned counsel concluded that the applicants were baiting this court to sit on appeal in its own decision.

We have carefully perused the notice of motion, the affidavits in support and objection to the same. We have also studied the 25 submissions of the parties and the authorities they relied upon in support and opposition to this application. The circumstances under which this court is required to apply slip rule under Rules 2 (2) and 35 of the Rules of this Court to correct the error or injustice have been put beyond doubt in a number of authorities. 30 The recent case of David Muhenda VS Humprey Mirembe (supra) summarizes them all as follows:-

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"Under Rule 2 (2) of the Judicature (supreme Court Rules) \$\mathsf{S}\$ Directions S1 11-13, This court has power to recall its judgment and make orders as may be necessary for achieving the end of justice. In doing so, it is not limited to rule 35 of the rule of this court, see for example Livingstone Sewanyana VS Martin Alier Misc. Application No. 40 of 1991 and Nsereko Joseph Kisukye 10 VS Bank of Uganda, Civil Appeal No. 1 of 2012 and Orient Bank Ltd VS Fredrick Zaabwe and another, Civil Application No. 17 of 2007. In Nsereko Joseph Kisukye case, for example, the court recalled the judgment and made clarifications on the orders it had made to make them implementable. 15

However, the power of the court in this regard is not open ended. As it was stated in Orient Bank VS Fredrick Zambwe (supra) "the decision of this court on any issue or law is final, so that the unsuccessful party cannot apply for its reversal". This principle is based on the decision of Lakhamshi Brothers Ltd VS R. Raja and sons [1966] EA 313 page 314 where Sir Charles Newbold P. stated.

"..... exercise its jurisdiction and recall its judgment, that is, only in order to give effect to what clearly would have been its intention 25 had there not been an omission in relation to the particular matter. But this application and the two or three others to which I have referred go far beyond that. It asks, as I have said, this court in the same proceeding to sit on its own previous judgment. There is a principle which is of the greatest importance in the administration of justice and the principle is this, it is in the interest of all persons that there should be an end to litigation".

This principle was restated in the case of Fangmin VS Dr. Kaijuka \$\mathsf{S}\$ Mutabazi Emmanuel SCCA No. 06 of 2009".

In UDB VS Oil Seeds (U) Ltd Civil Application No. 15 of 1977, it was held thus;

"A slip order will only be made where the court is fully satisfied that it is giving effect to the intention of the court at the time 10 when judgment was given, or in the case of a matter which was overlooked, where it is satisfied beyond reasonable doubt, as to the order which it would have made had the matter been brought to its attention".

In the instant case we are persuaded that the two orders this 15 court made were deliberate, well intended and were meant to serve independent purposes. The two above orders were first made by the Court of Appeal and later slightly modified by the Supreme Court on appeal. The first order applied to those who were convicted under mandatory death sentences whose 20 convictions had been affirmed by the Supreme Court while the 2nd order was in respect of those convicted under mandatory death sentences whose appeals were still pending before the appellate court. In the 1st category, the Supreme Court commuted their sentences from death to life imprisonment 25 without remission. In the 2nd order, the convicts were to be remitted to the High Court for mitigation of sentences.

The above intention of the Supreme Court in Kigula case was confirmed in the case of Ambaa Jacob and another VS Uganda,

Criminal Appeal No. 10 3of 2009 (SC) where Supreme Court 30 confirmed the differences between the 1st and 2nd order. In the above case, the Court of Appeal dismissed the appellant's appeal

and proceeded to hear submissions on mitigation of sentence. 5 The Supreme Court held that in view of the decision in the Kigula case, the Court of Appeal ought to have remitted the case to the High Court to enable the appellants to make submissions in mitigation of the death sentence.

The court stated as follows:-10

"We would like to emphasize that, after the Constitutional Court held that the mandatory death sentence was unconstitutional, and the decision was confirmed by this court, it meant that the condemned persons remained with their convictions, but without death sentence. Normally the sentence is passed by the trial court (High Court in this case) so that the convicted person may exercise his or her right of appeal against a conviction and sentence to the Court of Appeal. This was the reason why this court decided that the pending cases go back to the trial court which was now in a position to exercise judicial discretion in passing sentence. It is within the jurisdiction of the High Court as trial court to maintain the death sentence even after receiving submission in mitigation. The convicted persons as indicted, could then still appeal to the Court of Appeal against sentence"

It is clear from the above passage and decision in the Kigula case 25 that the above two orders of the Supreme Court were in respect of two categories of cases; 1st order was in respect of convicts whose death sentences had gone through the appeal processes and had been confirmed by the Supreme Court and were waiting execution. Due to their pleas of death syndrome, they were 30 saved from execution by the court deliberately substituting their

sentence with one of life without remission. For the second category, their appeals were still pending in either the Court of

Appeal or Supreme Court; they were referred to the High Court S for mitigation of their sentences.

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In the same vein, we also find that there was no mistake on the face of the record. It was a manifest intention of the Court when it made the first order commuting sentence from death to life imprisonment without remission for convicts whose death sentences had been confirmed by the Supreme Court. This was logical because their cases could not be remitted to the High Court for mitigation.

An error or mistake on the face of the record would have occurred under the 1st order if the court had allowed the 15 execution to be carried on after concluding that mandatory death sentence was unconstitutional.

In view of the above analysis, we find that this application is misconceived and untenable under rule 2 (2) and 35 of the Supreme Court Rules. It is an attempt to induce this court to correct a mistake arising from misunderstanding law with regard to remission under the Prisons Act. To do so, would tantamount to the court sitting on appeal in its own judgment. In Ahmed Kawoya Kanga VS Banga Aggrey Fred [2007] KALR 164, it was held as follows:- $\overline{25}$

"The error or omission must be an error in expressing manifest intention of the court. Court cannot correct a mistake of its own in law or otherwise even where apparent on the face of the record. Under slip Rule court cannot correct a mistake arising from its misunderstanding of the law"

In the result, we find that the instant application is devoid of sufficient grounds to merit remedy sought under slip rule.

Issue No. 3 $\overline{5}$

We are of the view that issue No. 2 disposes of issue No. 3. We would only add that remission would only be available in the circumstances after presidential prerogative of mercy under Article 121 of the Constitution.

In conclusion, we find that the present application attempts to implore this court to correct what the applicants perceive to be a misunderstanding by the court of the law on mitigation of sentences under the Prisons Act which is not tenable under the Slip rule. The application is dismissed.

In the interest of justice parties should bear their own costs. 15

<table>

Dated at Kololo this.....

Hon. Justice Jotham Tumwesigye, JSC

Hon. Justice Dr. Esther Kisaakye, JSC

Hon. Justice Augustine Nshimye, JSC

Hon. Justice Eldad Mwargusya, JSC. Hon. Justice Opio-Aweri, JSC

Hon. Justice Faith Mwendha, JSC

Hon. Justice Prof. Dr. Lillian Tibatemwa-Ekirikubinza, JSC

We also find that the present application attempts to implore this court to correct what the applicants perceive to be a misunderstanding by the court of the law on mitigation of sentences under the Prisons Act which is not tenable under the Slip rule. The application is dismissed.

their In the interest of justice parties should bear own costs.

Dated at Kololo this. $2\frac{3}{2}$ day of $\frac{402}{2017}$ \$ 15

Hon. Justice Jotham Tumwesigye, JSC

Thursdakey

Hon. Justice Dr. Esther Kisaakye, JSC

Hon. Justice Augustine Ashimye, JSC Hon. Justice Eldad Mylangusya, JSC. Hon. Justice Opio-Aweri, JSC

Hon. Justice Faith Mwendha, JSC

Hon. Justice Prof. Dr. Lillian Tibatemwa-Ekirikubinza, JSC

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