

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS APPEAL NO.018 OF 2024
(ARISING FROM EMA NO.14 OF 2020 & CS NO. 170 OF 2005)

PATRICK SENYONDWA BUYINZA:.....:APPELLANT

VERSUS

LUCY NAKITTO:.....:RESPONDENT

(Suing through her lawful attorney Bunjo Francis)

BEFORE: HON. MR. JUSTICE TADEO ASIIMWE

RULING

This application was brought under Section 79 (1) (b) (2) & S.98 of the Civil Procedure Act (CPA) Order 50 rule 8 (CPR).

The applicant is seeking to set aside the Order of Execution issued by the Deputy Registrar on 13th February 2024, set aside the Order committing the Applicant to Civil Prison, set aside the Order of Eviction issued by the Registrar against the Applicant and Costs.

The application is supported by an affidavit sworn by Mr. Patrick Senyondwa Buyinza the Applicant dated 19/2/2024.



The grounds of the application as contained in the Notice of Motion and affidavit in support and briefly are that;

1. That the Learned Assistant Registrar erred in law and in fact when he disregarded the substantive application for an order of stay of execution pending appeal that was pending determination before the Honorable Judge and proceeded to grant execution orders to the Respondent.
2. That the Learned Assistant Registrar erred in law and in fact when he disregarded the substantive application for an order of stay of execution pending appeal that was pending determination before the Honorable Judge and proceeded to grant execution orders to the Respondent.
3. That the Learned Assistant Registrar erred in law and in fact when he disregarded Civil Appeal No. 462 of 2022 that was pending determination in the Court of Appeal and granted execution orders to the Respondent.
4. That the Learned Assistant Registrar erred in law and in fact when he relied on a defective affidavit of service of Court process and granted execution orders to the Respondent.
5. That the Learned Assistant Registrar erred in law and in fact when he failed to evaluate all the evidence of record and granted an eviction order and committed the Applicant to Civil Prison thus occasioning a miscarriage of justice.
6. That this Appeal has been made without any ordinate delay.

7. That it is in the interest of justice, equity and fairness that this Appeal is granted and the orders in EMA No. 14 of 2020 be set aside.

On the other hand, the Respondent opposed the application relying on an affidavit in reply was deponed by Mr. Damulira Pius dated 23/2/2024. The gist of his response is that the Application is frivolous, devoid of any legal merit and an abuse of Court process as the Applicant's earlier Applications (No. 1103/2018 & 1877/2020) were dismissed with Costs to the Respondent. That the orders of execution by the Deputy Registrar were properly issued in the absence of any order of stay that the Application is overtaken by events as the Execution Order is already effected and return filed in this Court. In addition, the Applicant has executed a consent where partial payment was paid and an undertaking to pay the balance was made. That the Applicant failed to show Court existence of an interim order during the execution proceedings hence the Registrar rightly issued execution orders.

At the hearing of this Application the Applicant was represented by Counsel Charles Nsubuga while Counsel George Muhangi appeared for the Respondent. Both Counsel made written submissions which I shall consider in this ruling.

RESOLUTION

I have considered the grounds of this miscellaneous appeal, the supporting affidavit and its attachments. I have also considered the arguments for both Counsel.

What is clear is that an interim order of stay was issued by the registrar on 14th march 2023 as can be seen from hand written proceedings. But the same was never extracted and or brought to the attention of the registrar during the execution proceedings.

The said order was not even uploaded into ECCMIS until the morning of 26th Feb. 2024 when this miscellaneous appeal came up for hearing at the request of this court.

Under normal circumstances, the pleadings of the party would have brought this order to the attention of the registrar prior to the issuance of the execution orders. The lower court record shows that when the applicant was arrested in execution, his counsel was asked to produce the said interim order in vain hence his committal to a civil prison. Courts are bound to rely on evidence and not submissions from the bar.

Unfortunately, no evidence was led before the executing officer. The applicant was under duty to extract, plead and prove the existence of the said order. This is what the burden of proof requires. The applicant simply failed to do this leading to execution against him. Decisions of court emanate from parties evidence not submissions from counsel. In this matter the registrar did not have any such evidence so as to bar him from executing the decision of Court. Leading evidence of existence of the interim order at this stage of appeal does not help the applicant as the same never formed a record before the trial court/ registrar. An Appellate Court deals with the evidence on record as captured by the Lower Court.

Further evidence before the registrar under EMA 14 of 2020 shows that execution has been substantially effected and returns filed in court actually indicate a complete execution although the Appellant's Counsel

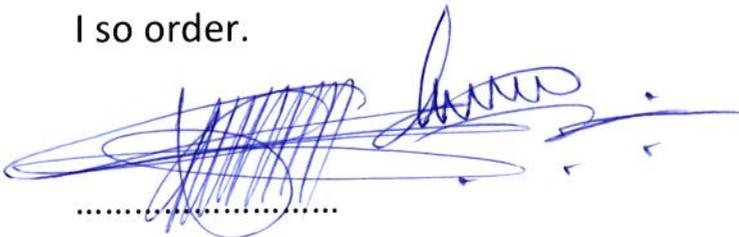
submitted that two (2) structures are still in the Applicant's possession and occupied by his tenants.

The Respondent also claimed possession of the two (2) structures having received them in execution and currently occupied by his tenants. Whereas the respondent's claim has a basis in light of the bailiff return on record, the applicant's claim cannot be determined in affidavit evidence. Such a claim can only be determined an ordinary suit.

Therefore, setting aside an order which is already executed makes it inconsequential and not necessary since the applicant has already entered in to a consent decree complying with the said order which leaves this court with no better remedy other than allowing parties to implement their consent decree which was entered on record by Court and part payment on the agreed amount paid. In the circumstances, the balance of convenience favors the Respondent.

For the above reasons, this Miscellaneous Appeal fails and it is dismissed with costs.

I so order.

A handwritten signature in blue ink, appearing to be 'Tadeo Asiimwe', written over a dotted line. The signature is stylized and somewhat messy.

TADEO ASIIMWE

JUDGE

12/03/2024.