

**THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT
KAMPALA**

[Coram: Owiny-Dollo, DCJ., Egonda-Ntende & Obura, JJA]

CIVIL APPEAL NO. 35 OF 2008 (Arising from H.C.M.A No. 317 of 2006)

BETWEEN

JULIUS OKWI.....APPELLANT

AND

MOSES KIRUNDA.....RESPONDENT

(On appeal from a judgment of High Court of Uganda (Kiryabwire, J., delivered at
Kampala on the 16th January 2008)

JUDGMENT OF THE COURT

INTRODUCTION

1. This appeal arises out of execution proceedings. The brief facts of the case are that appellant on or about 20th February 2004, obtained a loan from M/s Victoria Finance Company Limited in the sum of UGX 20,000,000/= and pledged his piece of land comprised in Block 216 Plot 2729 located at Buye in Kampala as security. Upon default on his payment, M/s Victoria Finance Company Limited filed a summary suit against the respondent.
2. The appellant applied for leave to defend the summary suit. The appellant did not deny the loan but sought to contest the interest charged. Leave to defend the summary suit was granted on the condition that the appellant deposited UGX

12.0. 000/= or its equivalent in security in court within 30 days. The appellant filed a written statement of defence but however failed to effect the total payment in court within the prescribed time whereupon Judgement was entered against the applicant on 24th May 2005 and a decree was extracted on 1st June 2005.

3. The appellant then filed M.A No. 477 of 2005 to set aside the Judgement entered by the Registrar and for orders that the main suit proceed. When the application

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came up for hearing the parties agreed to enter a consent Judgement and the decretal sum was to be paid within three months from the date of Judgement. The consent Judgement was not honoured and M/s Victoria Finance Co. Ltd, the respondents proceeded to execute against the appellant.

4. The appellant then filed M.A No. 844 of 2005 to stay the attachment and sale of the property on grounds that a temporary injunction had issued against the sale in the Kampala Land Tribunal. Upon inquiry by the trial court, it was established that the property had already been sold to Moses Lubega at a sum of UGX

51.0. 000/= which led to the withdrawal of the application. Mr Moses Lubega rescinded the sale agreement when it transpired the property in question was comprised in 2 separate titles of land and he had only purchased one title. The titles were Block 216 Plot No 2729 and Block 216 Plot No. 2732. Plot No. 2732 had been mortgaged to another person.

5. The Judgment Creditor then applied for attachment and sale of both plots of land. A warrant was issued by the registrar for attachment and sale of the said two plots of land dated the 16th January 2006. The property was advertised in Bukede Newspaper of 21st January 2006 and sold on the 20th February 2006 to M/s Good Rest Ltd for the sum of Shs.50,000,000.00.

6. The appellant filed M.A No. 317 of 2006 (from which this appeal lies) challenging the

validity of the sale / execution on the ground that the sale was illegal and thus null and void. The respondent in this appeal was added as a party being the court bailiff who conducted the sale. Kiryabwire, J., (as he then was),
held that the execution / sale was valid and lawful and dismissed the application on 16th January 2008.

7. The appellant being dissatisfied with the decision of the learned trial Judge filed this appeal on 2nd June 2008 setting forth the following grounds of appeal.

(1) That the learned Judge erred in law in finding the execution was valid/lawful and in declining and or failing to set aside the alleged sale.

(2) That the learned Judge erred in law by relying on the evidence not on the record and failing to properly evaluate the evidence before court consequently coming to a wrong conclusion.

(3) That the learned Judge erred in law in ordering the appellant to deliver his title to court without setting aside the sale and in the alternative ordering for the issuance of a special Certificate of Title.'

8. The appellant prays that this court sets aside the ruling of the High Court; sets aside the sale of plot no. 2732 and restore it to the appellant with costs here and below. The respondent opposed this appeal.

SUBMISSIONS OF COUNSEL

9. At the hearing, the appellant was represented by Mr. Ojambo Robert Mugeni and the respondent by Mr. Kandeede Ntambirweki. Counsel agreed to rely on their scheduling notes as their written submissions in this appeal.

10. Mr Kandeebe Ntambirweki raised a point of law under Rule 78(1), 82 of this court apparently raised in M. A No. 101 of 2009. He contends that this appeal is incompetent because the appellant did not serve M/s Good Rest Ltd as a person directly affected by the appeal under Rule 78(1). That M/s Good Rest Ltd is the

current proprietor of the property whose sale is the subject of the appeal and the appellant was aware of this fact. In his conferencing notes the respondent relies on the case of Sam Kirembwe v Attorney General Civil Application No. 53 of 2004 (unreported) and Nvasio Micah v Nuwa Walakira, Supreme Court Civil Appeal No. 14 of 2002 (unreported) for the proposition that service of notice of appeal on a person affected is an essential step within the meaning of Rule 82 of the Court of Appeal rules. He cites The Environment Action Network Ltd v Attorney General and others. Court of Appeal Civil Application No. 63 of 2003 (unreported); Nyine Bitahwa v L. I. Ndyanabo, EPA No. 14 of 2002 (unreported) for the proposition that failure to serve affected persons is fatal to the appeal. He avers that the prayers the appellant is seeking from this Court directly affect the proprietary interest of Good Rest Ltd in the land hence it was fair and necessary to serve it the notice of appeal under Rule 82 of this court. He also relied on Horizon Coaches Ltd v Francis Mutabazi, Supreme Court Civil Appeal no. 20 of 2001 (unreported).

11. Counsel for the respondent submitted that M/s Good Rest Ltd was duly served by way of substituted service in the Daily Monitor newspaper and the affidavit of service dated 30th October 2017 is on court record as evidence of service. Counsel further submits that the applicant has not obtained the leave of this court to proceed under Rule 82.
12. On the first ground, counsel for the appellant submits that at the time of the purported sale on 20th February 2006, neither the duplicate certificate of title nor a special certificate of title for the appellant's property comprised in Buye Block 216 plot 2732 had been deposited in court contrary to sections 48(1), (2) (3) and (4) of the Civil Procedure Act which is mandatory. There were other irregularities that in effect render the sale null and void. The special certificate of title was issued after the sale of the land to M/s Good Rest Ltd contrary to the law. Further that the special certificate of

title, which the respondent alleges was issued under Section 71 of the Registration of Titles Act was issued contrary to the provisions of the said law. He concluded that the sale was by private treaty contrary to court orders and the law. Counsel for the appellant cited the case of Rosemary Eleanor Karamagi v Angoliga Malimouda, Miscellaneous Application No. 733 of 2005 (unreported) in support of his submissions.

13. In reply counsel for the respondents submits that the learned trial Judge found rightly that the execution was valid and lawful. He contends that the land comprised in Buye Block 216 Plot 2732 was lawfully attached and sold. He referred to the ruling of the trial court where the court held that the absence of the title in Plot 2732 should not fault the sale to a willing and innocent buyer which sale did not prejudice the applicant at all. He further submits that the certificate was issued under section 48(4) of the Civil Procedure Act and not section 71 of the Land Act as the respondent alleges. He argues that if the issuance of a new certificate of title was under section 71 of the Registration of Titles Act CAP 230 and not a specific law preferred by the appellant, that mistake can be cured by the principle laid down in Katondwaki v Biraro, 1977 HCB 36. The respondent in his submissions alleges fraud on the part of the appellant.

14. On the second ground, Counsel for the appellant submits that the trial Judge failed to evaluate the evidence on record and came to a wrong conclusion. He submitted that plot 2729 and plot 2732 are separate and independent properties. The applicant did not pledge the title for plot 2732 as security and the conclusion by the learned trial judge to that effect is not supported by any evidence. He relies on the affidavit evidence on record and the case of Gandesha v Lutaava, S.C.C.A No. 14/89 for this submission. Furthermore that the court's conclusion that if the property was valued at UGX 300,000,000/= the appellant would not have accepted a cheque of UGX 35,000,000/= was a misinterpretation of the evidence and a lack of evaluation by

court. Section 48 of the Civil Procedure Act relates to title and not possession and section 33 of the Judicature Act which the trial court relied on is not a licence to disregard the law. He submits that section 33 Judicature Act must be read in light of section 14(2) of the Judicature Act. Counsel for the respondent reiterated by submitting that the learned trial Judge properly evaluated the evidence on record and came to the right conclusion.

15. On the third ground, counsel for the appellant submits that due to the irregularities and blatant disregard of the procedure laid down by the law which is mandatory, the learned Judge should not have ordered the appellant to deliver his duplicate certificate of title in court or in the alternative ordering the issuance of a special certificate of title without setting aside the sale. He relies on Rosemary Eleanor Karamagi Vs Angoliga Malimouda (supra). That the alternative order of the trial court for the issuance of a special certificate would mean authority to create a second special certificate of title without cancelling the first which is an absurdity.

ANALYSIS

16. The respondent has raised a preliminary point of law under Rules 82 and 78(1) of the Judicature (Court of Appeal Rules) Direction. Rule 78(1) states as follows;

“An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies of it on all persons directly affected by the appeal; but the court may, on application, which may be made ex parte, direct that service need not be effected on any person who took no part in the proceedings in the High Court.”

17. The respondent claims that M/s Good Rest Ltd, which has a proprietary interest in the suit property was not served with a notice of appeal as required under Rule 78(1). He relies on the cases of Sam Kirembwe v Nuwa Walakira, SCCA 24/94, Horizon Coaches v Francis Mutabazi, CA No. 20 of 2001 and The Environmental Action Network Ltd v Attorney General (supra).

18. The response of the appellant was that this same point had been raised earlier on in an application brought by the respondent before this court. This court had ordered the appellant to serve Good Rest Ltd which he had done by way of substituted service. M/s Good Rest Ltd was not a party in the original proceedings. This information was supplied from the bar.

19. In this regard the counsel have been less than helpful in supplying information to this court on this point. If this matter had been the subject of earlier adjudication by this court it is improper to raise it again. I tried to trace the application in question. It was registered as Miscellaneous Application No. 101 of 2009 filed by the respondent seeking to strike out the notice of appeal on the ground that not all parties affected by the appeal, and in particular M/s Good Rest Ltd, had been served with a notice of appeal. The file that was brought to my attention does not contain any proceedings or ruling on the matter. The problem may be record keeping of this court. Nevertheless counsel in this appeal, especially counsel for the respondent, who brought this application should have been more forthright as to what had actually happened to this application.

20. It would have been desirable in order to prevent a multiplicity of proceedings that both the judgment debtor and the party that purchased the property in issue were parties to the proceedings in the High Court. Unfortunately the judgment creditor was released from the proceedings and the purchaser of the property was not made a party. These lapses may have consequences but they do not make this appeal incompetent. The parties to the decision that is challenged are before this court. The respondent is the actor responsible for the actions challenged as unlawful. This is sufficient for this appeal to proceed.

21. We wish to observe that M/s Good Rest Ltd was not a party in the original proceedings unlike in the cases of Sam Kirembwe v Nuwa Walakira, SCCA 24 of

1994 (unreported) and Horizon Coaches v Francis Mutabazi, SCCA No. 20 of 2001 (unreported) that the applicant is relying on. In each of those cases it was actually a party to the original proceedings that had not been served with the notice of appeal within the prescribed time. On that ground alone those cases are distinguishable from this appeal.

22. Neither is The Environment Action Network Ltd v the Attorney General of Uganda Court of Appeal Civil Application No. 63 of 2003 (unreported) applicable to the facts of this case. What was challenged under this rule was the failure to make a party to the original proceedings, NEMA, a party on appeal, and serve it with a copy of the notice of Appeal. This case is distinguishable from the facts of this case.

23. We dismiss the preliminary objection.

Ground 1

24. The law sets out an elaborate procedure for the sale of immovable property in the Civil Procedure Act and the Rules thereunder. Under Section 48(1) of the Civil Procedure Act and Order 22 rule 51(1) of the CPR, the duplicate certificate of title or special certificate of title has to be deposited in court before the sale. This provision is mandatory. Under subsection 2, the court ordering the sale has power to order the judgment debtor (in this case the Appellant) to deliver up the duplicate certificate of title to the property to be sold or to appear and show cause why the certificate of title should not be delivered up. Sections 48(3) and (4) lay down the procedures to follow in case the Judgment debtor has not complied with the order.

25. Section 48 of the Civil Procedure Act states,

‘Duplicate certificate of title to immovable property to be lodged with court before sale

(1) The court may order, but shall not proceed further with, the sale of any immovable property under a decree of execution until there has been lodged with the court the duplicate certificate of title to the property or the special certificate of title mentioned in subsection (3).

(2) The court ordering such sale shall have power to order the judgment debtor to deliver up the duplicate certificate of title to the property to be sold or to appear and show cause why the certificate of title should not be delivered up.

(3) Where the court is satisfied that a judgment debtor has wilfully refused or neglected to deliver up such certificate when ordered to do so, the court may commit him or her to prison for a period not exceeding thirty days.

(4) If the court is satisfied that such duplicate certificate of title has been lost or destroyed or that the judgment debtor cannot be served with an order under this section or is wilfully withholding such certificate, the court shall call upon the registrar of titles to issue a special certificate as prescribed by the Registration of Titles Act.

26. The Supreme Court in Sinba (K) Ltd & Ors v Uganda Broadcasting Corporation, SCCA No. 3 of 2014 (unreported) held that compliance with Section 48 of the Civil Procedure Act was mandatory before a sale of immovable property could occur. If the duplicate certificate of title was not deposited in court and or in the absence of a duplicate certificate of title, a special certificate of title had not been issued for that purpose such sale was illegal, null and void.

27. On the record, there is a warrant of attachment authorizing the sale of property comprised Kyadondo Block 216 Plot 2732 (annexureHI) .The warrant required the

appellant to deliver the duplicate Certificate of Title with court before the sale. From the affidavit evidence, it is not disputed that the sale of the property took place on 20th February 2006 (paragraph 23 of the appellant's affidavit and paragraph 15 of the affidavit in reply, annexure K) and neither is it disputed that that at the time of sale the duplicate certificate of title to Block 216 Plot 2732 was

not in court as required by the warrant of attachment (paragraph 11 and 12 of the supplementary affidavit). The appellant is still in possession of the duplicate certificate of title to date and was ordered to deliver it up only when he sought to set aside the execution and sale of his property.

28. Although an order of attachment was issued by the Registrar, there is no evidence whatsoever that the appellant was aware or notified of the events that were taking place. He claims under paragraph 29, 30 and 33 of his affidavit in support that he was never requested to surrender his titles nor was any notice placed on his properties prior to the purported sale which he only became aware of on 30th December 2006 when his tenants and family were being evicted from the suit properties. The respondent under paragraph 14 of his affidavit in reply alleges that a copy of the warrant of attachment was served on the appellant and posted at the premises which the appellant allegedly tore into pieces. There is no affidavit of service on the court record to that effect. This failure to serve the order of attachment on the judgment debtor was in contravention of Section 48 of the Civil Procedure Act and Order 22 rule 51 (2) of the Civil Procedure Rules.

29. Further no special certificate of title for Kyadondo Block No. 216 Plot 2732 was in court in accordance with the provisions of section 48(1) and (4) of the Civil Procedure Act prior to the time of sale. The respondent avers under paragraph 14 of his supplementary affidavit in reply that the special certificate of title was issued on 8th May 2006 way after the sale. It would appear that the Registrar (if at all that is the case as there is no evidence of such order on record) ordered the Registrar of Titles to

issue a special certificate without causing the Appellant to appear and explain why he refused to produce to court the duplicate certificate as required under S. 48(2). The mode of issuance of the special certificate of title is

also questionable. There is no evidence on the record of any order to the Registrar of Titles to issue a special certificate of title and the steps supposed to be taken under section 71, the law under which it was issued. Needless to say the issuance of a special certificate is a delicate matter that should be exercised only in exceptional circumstances where the Court satisfies itself of the impossibility for the duplicate certificate to be adduced. See Buso Foundation Ltd v Bob Mate Phillips & Anon (CIVIL APPEAL NQ.40 OF 2009) r20171 UGHCCD 161 (22 December 2017). In these circumstances, the special certificate that was issued for the suit property and all transactions thereon were erroneous.

30. Under Order 22 rule 62 of the Civil Procedure Rules, the sale should be by public auction unless court directs otherwise. The respondent stated in his affidavit that prior to the sale scheduled on 20th February 2006 he had been receiving bids for purchase of Block 216 Plot 2732. This was contrary to the law as the sale had to be by public auction on the announced date for the auction. In reality the sale was in effect conducted by private treaty rather than by public auction.

31. In Rosemary Eleanor Karamagi v Angoliga Malimound, Misc App No. 733 of 2005 (unreported) Kiryabwire, J., (as he then was) quoted James Kabaterine v Charles Oundo & Anor, HCCS 177 of 1994 where Mpagi-Bahigeine, J., (as she then was) held that

an execution has been held to be irregular when any of the requirements of the rules of court or parties for the time being have not been complied with. When execution has been irregularly executed the court is enjoined to make an order of restoration.”

32. The order of learned trial Judge directing the appellant to deliver up the duplicate certificate of title to Block 216 Plot 2732 amounts to court sanctioning an illegality. The sale of the land comprised in Kyadondo Block 216 Plot 2732 was marred by illegalities and irregularities. There was disregard of the law. It was held in Makula International Ltd v. His Eminence Cardinal Nsubuga & Anor, (1982) HCB 11 that a court of law cannot sanction what is illegal and illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon. In Sinba (K) Ltd & Ors v Uganda Broadcasting Corporation Ltd, (supra), court approved the principle stated in Kanoonya David v Kivumbi & 2 Others, HCCS No. 616 of 2003 (unreported) that “an illegality vitiates the transfer of title with the result that the sold property remains the property of its owner..

33. We find that the learned trial Judge erred in law by sanctioning an illegality in contravention of section 48 (1) of the Civil Procedure Act. This is sufficient cause to set aside the sale and cancel the special certificate of title issued. Ground 1 of the appeal is allowed.

34. The learned trial Judge held that the Kyadondo Block 216 Plot 2729 and Plot 2732 is a single property with two titles. The respondent in his affidavit in reply at paragraph 10 states that he conducted a search at the land office and established that the property of the applicant is indeed two separate plots of land with two different titles to each

plot of land. He confirms this in his supplementary affidavit paragraphs 3, 4 and 5. Looking at annexure H, letter to the Registrar dated 5th January 2004 from counsel for the respondent, under

paragraph 3 and 4, it is clear that the subject properties are two distinct properties though adjacent to each other. The fact that the appellant pledged Kyadondo Block 216 Plot 2729 as security for a loan obtained from Victoria Finance Company Limited and obtained a separate loan from Stanbic (U) Ltd Bank using Kyadondo Block 216 Plot 2732 shows that the two properties are separate and distinct. The main house was on one title. And the servants' quarters were on another title.

Decision

35. We allow the appeal with costs here and below. We set aside the judgment of the High Court and make the following orders and declaration;

- 1) The sale and transfer of the land comprised in Kyadondo Block 216 Plot 2732 was illegal, null and void *ab initio*.
- 2) The Registrar Of Titles cancels the special certificate of title issued to M/s Good Rest Ltd on 8th May 2006 for land comprised in Kyadondo Block 216 Plot 2732

Signed, dated and delivered at Kampala this 25th day of June 2018.

Alfonse Owiny-Dollo Deputy Chief Justice

Egonda-Ntende

Justice of Appeal

Hellen Obura

Justice of Appeal

