

THE REPUBLIC OF UGANDA

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

*[Coram: Owiny-Dollo, DCJ, Egonda-Ntende & Tuhaise,
JJA]*

Civil Application No. 247 of 2018

(Arising from Civil Application No. 202 of 2018)

BETWEEN

Uganda Bankers Credit and Savings Society====Applicant

AND

Joan Nansubuga=====Respondent No.1

Julian Namubiru =====Respondent No.2

Israel Lwanga=====Respondent No. 3

RULING OF FREDRICK EGONDA-NTENDE, JA

Introduction

- [1] This is an application for review brought under Rule 2(2) of the Judicature (Court of Appeal Rules) Directions S.I 13-10. The applicant seeks this court to review and set aside the interim order issued in Court of Appeal Civil Application No. 202 of 2018. The applicant also prays for costs.
- [2] The background of this application is that respondents no.1 and no.2 together with Lydia Namutebi and Leonard Mubiru instituted High Court Civil Suit No. 64 of 2008 against the respondent no.3 and Kizito Leonard seeking the recovery of land comprised in Busiro Block 396 Plot 37 at Bweya. High

Court found that Leonard Kizito had acquired and transferred the suit land to the respondent no.3 fraudulently and therefore ordered him to compensate the respondents no.1, no.2 and Lydia Namutebi for the land at the current market values and to pay damages of UGX 10,000,000. The trial court found the respondent no.3 to be a *bona fide* purchaser for value without notice.

[3] Dissatisfied with the decision of the trial court, respondents no. 1 and no.2 appealed against the decision in Court of Appeal Civil Appeal No. 78 of 2016. They also filed High Court Miscellaneous Application No. 746 of 2017 against the third respondent seeking orders for stay of execution of the judgement in High Court Civil Suit No. 64 of 2008 which was withdrawn. The respondents no.1 and no.2 then filed Court of Appeal Civil Application No. 202 of 2018 against the respondent no.3 seeking a temporary injunction to restrain the respondent no.3 from removing the caveat on the suit land or carrying out transactions on the same until disposal of the appeal. The application was heard by Muhanguzi, JA, as a single justice of appeal, and he issued an interim order to maintain the status quo pending the delivery of the ruling in the application. This interim order was issued on 24th July 2018.

[4] It is this interim order that the applicant seeks to review on the following grounds:

‘1. The Applicant is an equitable owner of the land comprised in Busiro Block 396 Plot 37 at Bweya by virtue of a Sale Agreement dated 4th July, 2018 whereby the 3rd Respondent sold the said land to the

Applicant for a consideration of Ug.shs. 770,000,000/=.

2. The Applicant concluded the said transaction for the acquisition of the said land on the basis of a search report showing that the said land was duly registered in the 3rd Respondent's name and in the absence of any registered encumbrances on the said land.

3. Upon settlement of the said purchase price on 4th July, 2018 the 3rd Respondent put the Applicant in possession of the said land.

4. On the basis of the said order, on 1st August, 2018 the Uganda Police at Kajjansi stopped the Applicant from grading the said land.

5. The Applicant is aggrieved by the said order which is adversely affecting the Applicant's equitable interest in the said land.'

6. It is in the interest of justice that the said order be reviewed by this court and set aside to protect the Applicant's property right in the said land.

- [5] The respondents no.1 and no.2 oppose this application while the respondent no.3 is in support of it.

Submissions of Counsel

- [6] At the hearing of the appeal, the applicant was represented by Mr. John Fisher Kanyemibwa, the respondents no. 1 and no.2 were represented by Mr. Ssempala and Mr. Kwemara Kafuzi while the respondent no.3 was represented by Mr. Mutyaba Bernard

- [7] It was Mr. Kanyemibwa's submission that at the time of hearing Court of Appeal Civil Application No. 202 of 2018, the applicant had already purchased and taken possession of the subject land. He argued that the applicant in this case has an equitable interest that is directly being affected by the interim order in respect of which it was not given a hearing. Counsel for the applicant implored this court to invoke its inherent powers under rule 2(2) of the of the Judicature (Court of Appeal Rules) Directions to review and set aside the interim order issued by Justice Muhanguzi in filed Court of Appeal Civil Application No. 202 of 2018
- [8] Mr. Mutyaba submitted that the first and third respondents were not vigilant in securing a stay of execution despite threats of execution and three years have passed since the decree in High Court Civil Suit No. 64 of 2008. Further, he argued that the third respondent was declared by court in High Court Civil Suit No. 64 of 2008 a *bona fide* purchaser of value without notice and therefore passed a good title. He also submitted that the first and second respondents were given compensation for the interest they lost in the suit land therefore it would be unfair to prevent the applicant from enjoying his interest.
- [9] The applicant prayed that this court allows this application and set aside the interim order issued by Muhanguzi, JA, in Court of Appeal Civil Application No. 202 of 2018.
- [10] Counsel for the respondent no.3 was of the view that the pendency of legal proceedings in court does not affect the transfer of property in this jurisprudence. He relied on the decision in W.R Kazooru v M.L.S Rukuba [1993] UGSC 2 for this proposition. He contended that since it is this court

excluding the applicant from his property, it should allow to review the interim order. Mr. Mutyaba also averred that the applicant had carried out due diligence and confirmed that there were not any registered encumbrances on the suit land prior to execution of the sale agreement and that the court order is against the respondent no.3, who is a trustee to the applicant. He relied on the cases of Ismail Jaffer Allibhai & 2 others v Nandlal Harjivan Karia & Anor Supreme Court Civil Appeal No. 53 of 1995 (unreported) and Turinawe & 4 Ors v Eng.Turinawe & Anor [2018] UGSC 43.

[11] In reply, Mr. Ssempala submitted that this application is before this court prematurely because the ruling in Court of Appeal Civil Application No. 202 of 2018 has not yet been delivered. Therefore it would be erroneous for this court to adjudicate on a matter that is pending before it. Mr. Ssempala also contended that the applicant and respondent no. 3 executed the sale agreement while aware of the pending appeal and the likelihood of the sale being challenged. He argued that this was supported by the fact that the parties covenanted to keep the sale agreement confidential and the fact that respondent no.3 undertook to compensate the applicant in case the applicant's title is successfully challenged after the sale. He further submitted that the cancelled caveat that was entered onto the certificate of title should have put the applicant to notice.

[12] Counsel for the respondents no. 1 and no.2 further submitted that that the applicant does not have clean hands under the law of equity that it seeks to invoke. He contended that the applicant was not vigilant by failing to carry out due diligence on the ground. He also submitted that LC 1 chairperson who was a witness to the sale agreement knew about the pending

matter in this court. Mr. Ssempala contended that equity follows the law and cannot override the provisions of the law. To support this averment, Mr. Ssempala submitted that the law on registration of land provides that a person becomes a proprietor of land upon registration and that by the time this court issued the impugned order, the applicant was not the registered proprietor of the suit land. He relied on Lawrence Musitwa Kyazze v. Eunice Busingye Supreme Court Civil Application No. 18 of 1990 (unreported). He further submitted that the sale was not brought to the attention of court. It cannot be faulted for the order that it issued.

[13] Mr Kafuzi in reply submitted that this application is grounded on the inherent powers of this court and this court should put into consideration the fact that granting this application will render the appeal before it nugatory. He also submitted that Counsel for the respondents no.1 and no.2 conducted a search on the suit land on 20th July 2018 and found that the subject land was still registered in the names of the third respondent. He further submitted that the applicant came into possession of the land on 26th July 2018 after the order had been served upon counsel for the respondent no.3. He also submitted that this interim order is in *rem*.

[14] Mr. Kafuzi further argued that this application is improperly before this court because the applicant is not 'any third party aggrieved' as envisaged by the law on review. He relied on the case of Mohamed Alibahai v W.E Bukenya and another Supreme Court Civil Appeal No. 56 of 1996 (unreported) for this proposition. He also submitted that this application should have been brought before the judge who heard Court of Appeal Civil Application No. 202 of 2018 instead of a full bench because review is before the judge who made the decision.

[15] The respondents no.1 and no.2 prayed that this court dismisses the application with costs.

Analysis

[16] This application is brought under rule 2 (2) of the of the Judicature (Court of Appeal Rules) Directions S.I 13-10. The applicant seeks an order for review of the interim order issued by Justice Muhanguzi on 24th July 2018. The order issued protects the status quo of the suit property and bars any dealings in the land until final determination of Civil Application No. 202 0d 2018 or other further orders. Rule 2(2) provides:

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

[17] Whereas this court is empowered with wide discretion under Rule 2 (2) of the rules of this court above to make such orders as are necessary to meet the ends of justice, this power should be exercised judiciously and I am of the opinion that it does not extend to applications such as this instant one. See

National Social Security Fund v Alcon International Ltd [2011] UGCA 2. It should be noted that this application arises from Court of Appeal Civil Application No. 202 of 2018 that is pending determination before this court. Although the applicant was not a party to the application, it had the option of applying to be joined as a party to the proceedings which it did not exercise.

[18] Further, Muhanguzi, JA, made his decision based on the existing evidence presented to court at the time. The respondent no.3 who is in support of this application was in position to bring to the attention of court in case of any alteration of the status quo of the suit property. The sale agreement was executed between the third respondent and the applicant on 4th July 2018 but the third respondent failed to bring the sale to the attention of court in his affidavit in reply to Court of Appeal Civil Application No. 202 of 2018 that was sworn on 23rd July 2018. The respondents no.1 and no.2 conducted a search on the suit land on 12th July 2018 and it was found that the respondent no.3 was still the proprietor of the suit property.

[19] Since this is an application for review and owing to the fact that Court of Appeal Application No.202 of 2018 is before a single justice of this court, this matter should have been brought before the same justice of appeal for review of his own decision. The matter would then only come to a full bench through a reference. Court cannot exercise its inherent powers where to do so would have the effect of defeating the purpose of the law. Section 12(2) of the Judicature Act states:

'12. Powers of a single justice of the Court of Appeal.

A single justice of the Court of Appeal may exercise any power

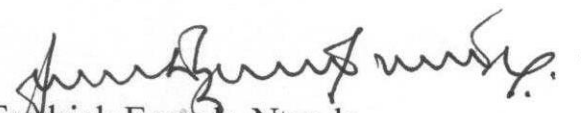
vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal.

(1) Any person dissatisfied with the decision of a single justice of the Court of Appeal in the exercise of any power under subsection (1) shall be entitled to have the matter determined by a bench of three justices of the Court of Appeal which may confirm, vary or reverse the decision.'

[20] It also appears that the applicant is seeking to establish his interest in the suit property through this application. This is not a court of first instance save in matters specifically provided by the law. It is my view that the applicant should have instituted a separate and original action to establish his rights as against the respondents.

[21] For the aforementioned reasons, I would dismiss this application with costs to respondents no.1 and no.2.

Signed, dated and delivered at Kampala this ^{23rd} day of ^{Oct} 2019


Frederick Egonda-Ntende
Justice of Appeal

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

CORAM: OWINY - DOLLO DCJ, EGONDA - NTENDE AND TUHAISE JJA.

CIVIL APPLICATION NO 247 OF 2018

(Appeal from the Ruling of Justice Ezekiel Muhanguzi in Civil Application No. 202 of 2018)

UGANDA BANKERS CREDIT & SAVINGS SOCIETY.....APPELLANT

VERSUS

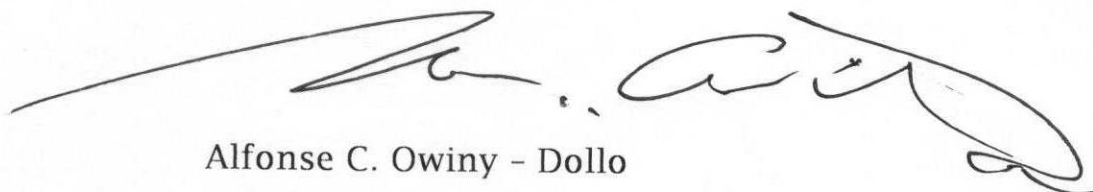
JOAN NANSUBUGA&2 ANOR.....RESPONDENTS

RULING OF OWINY - DOLLO; DCJ

I have had the benefit of reading the ruling of my learned brother, Egonda-Ntende JA in draft. I agree with him that the application fails on grounds that this is a Court of first instance; save in matters specifically provided for by the law.

Since Tuhaise JA also agrees, this application therefore stands dismissed with costs to the first and second Respondents as proposed by Egonda-Ntende, JA.

Dated, and signed at Kampala this ^{23rd} day of ^{Oct}..... 2019



Alfonse C. Owiny - Dollo
Deputy Chief Justice

THE REPUBLIC OF UGANDA
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Uganda Bankers Credit and Savings Society.....Applicant

Versus

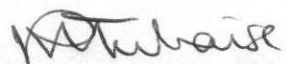
1. Joan Nansubuga.....Respondent
2. Julian NamubiruRespondent
3. Israel Lwanga.....Respondent

RULING OF PERCY NIGHT TUHAISE, JA

I have read in draft the ruling of Fredrick Egonda-Ntende, JA.

I agree with him that this application should be dismissed with costs to the first and second respondents.

Dated, signed and delivered at Kampala this.....^{23rd} day of ^{out}..... 2019


Percy Night Tuhaise
Justice of Appeal