

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION**

HCT-00-CC-MA-0230-2006
(Arising from HCT-00-CC-MA-0380-2004)
(Arising from HCT-00-CC-CS-0737-2003)

YUSUFU MUGARURA APPLICANT

VERSUS

SIMON MASSA RESPONDENT

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application for an Order that the execution of the Orders in Misc. Application No. 380 of 2004 be stayed pending the appeal therefrom. The application is brought by Notice of Motion under section 98 of the Civil Procedure Act, Section 33 of the Judicature Act and Order 48 (now under 52) rules 1 and 2 of the Civil Procedure Rules.

The background to this application is briefly that Misc. Application No. 380 of 2004 arose from Civil Suit No.737 of 2003 wherein Haji Haruna Musiwa was the plaintiff and Simon Massa (the current respondent) the defendant. Under Civil Suit No. 737 of 2003 both parties consented to a judgment in the sum of Shs20, 500,000/=. The defendant who was the judgment debtor under the consent judgment failed to honour the judgment. Consequently the Registrar of the Commercial Court issued a warrant of attachment in the sum of Shs21,748,000/= authorizing Bamulude David an agent of M/S Spider Links Auctioneer and Court Bailiff (the 1st Respondent in Misc. App. No. 380 of 2004) to attach the suit premises. On 17th April 2004 the said Auctioneer advertised the suit premises. On 18th May 2004 the Registrar of the Commercial Court made an Order authorizing the sale of the suit premises. Subsequently the said Auctioneer sold the suit premises to the highest bidder (the applicant) who was the 3rd Respondent in Misc. Application No 380 of 2004 for a sum of shs25, 000,000/= The Respondent Simon Massa, who was the plaintiff in Civil Suit No. 737 of 2003 and the Applicant in Misc. Application No. 380 of 2004 was dissatisfied with the sale of the suit premises. He filed Misc. Appl. No 380 of 2004 for orders that:-

- (a) Court should declare the Registrar's order authorizing the sale of the suit premises a nullity
- (b) The purported sale of the suit premises be set aside and the suit premises be released to the applicant (the respondent now)
- (c) Court should declare that the 3rd Respondent (the applicant now) did not get indefeasible right to the suit premises from the above sale.

The above order was granted by Justice E.S. Lugayizi in his ruling dated 3rd April 2006. The ramification of the said order as pointed out by the learned judge, was inter alia, that the applicant (the respondent now) was to immediately take possession of the suit premises.

The applicant filed this application upon the grounds that:-

1. The applicant has preferred an appeal against the ruling and orders in Misc. Application No. 380 of 2004.

2. The Respondent is in the process of executing the said ruling and orders.
3. It is in the interest of justice that execution be stayed pending the determination of the appeal.

This application is brought under sections 98 of the Civil Procedure Act and Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act provides:

“Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of Court to make such orders as may be necessary for the ends of the justice or to prevent abuse of the process of the court.”

While section 33 of the Judicature Act provides:-

“The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it think just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multipractices of legal proceedings concerning any of those matters avoided.”

In *Norah Mayanja & 2 others Vs Habre International Trading Co Ltd (1988-90) HCB 163* each of the applicants had a permanence residence on the disputed land and it was argued on their behalf that they would suffer injustice if their buildings were demolished before the appeal to the High Court was disposed of. Tsekoko J (as he then was) held, inter alia, that Court has inherent powers to stay execution. In *Eriabu Kabigiza Vs Lawrence Sserwanja (1995) HCB 199*, the applicant, who was the defendant in a suit filed against him in the High Court under Summary Procedure did not apply for leave to appear and defend the suit within the prescribed time. Judgment was accordingly entered against him exparte. Later on he applied for the exparte judgment to be set aside but the judge refused. The applicant appealed to the Court of Appeal. In the meantime he applied for stay of execution pending an appeal. Manyindo J. (as he

then was) held, inter alia, that the main criteria for staying execution should be whether the judgment debtor would suffer substantial loss if the decree was executed notwithstanding that the decree might subsequently be set aside.

Having outlined the law applicable, I now proceed to consider the merits of the application. In paragraphs 3, 4 and 5 of his affidavit in support of this application Yusufu Mugarura, the applicant, avers that he has commenced the appeal process against the said ruling and order by filing a notice of appeal and requesting for a typed record of proceedings so the memorandum can be prepared and filed. He attached a draft memorandum of appeal marked "C". That the Respondent is in the process of executing the said ruling and orders by evicting the applicant from the suit premises. The applicant contends that if the execution is carried out before the appeal is heard and determined it will be rendered nugatory and he shall suffer irreparable damage.

In this affidavit in reply Simon Massa, the Respondent, avers as follows:-

"3. That according to the draft memorandum of appeal the applicant is aggrieved with the finding that he is not a bonafide purchaser of the suit premises for value without notice who should be protected by law.

4. That the applicant knew all along that he bought unregistered land (Kibanja) with premises thereon and therefore does not fall within the preview of purchasers protected by law.

5. That the appeal has no chances of success."

In his ruling in Misc. Application N. 380 of 2004 Justice Lugayizi, in reference to section 181 of the Registration of Titles Act stated:-

"Clearly the above provision of the law applied only to land registered under the Registration of Titles Act (Cap 230) where the purchaser derived his or her interest in

the land from a seller who procured his or her interest in the said land by way of fraud or error. It does not apply in the instant case where there is no evidence on record that the suit premises are registered under the Registration of Titles Act (Cap 230) and that the interest the purchaser (i.e. 3rd respondent) holds in respect thereof derives from a proprietor who acquired it through fraud or error. For those reasons, the 3rd respondent) holds in respect thereof derives from a proprietor who acquired it through fraud or error. For those reasons the 3rd respondent cannot lawfully use the principle in section 181 of the Registration of Titles Act (Cap 230) as a shield to protect him against the application that is the subject of this ruling.”

The Applicant who was the 3rd Respondent, had argued that he had acquired a valid interest in the suit premises since he was a bonafide purchaser for value who acquired the interest in the suit premises without prior notice of the irregularities preceeding the sale of the suit premises.

However the applicant in paragraph 4 of his affidavit in rejoinder avers:-

“That the major ground of appeal now is that the learned trial judge erred in both law and fact when he found and held that the suit property was not registered and therefore the statutory protection given to bonafide purchaser for value without notice would not (be) available to me when in actual fact the suit property was under the operation of the Registration of Titles Act as evidenced from the various documents annexed hereto and collectively marked “A”.

Among the documents in annexure “A” above is a Certificate of Title in respect of land described thereon as LRV 32667 Folio 7 Plot No. 14 Wagagai Road Mbale. The respondent had been registered thereon as proprietor under Inst No. 346012 of 23rd August 2004 while the Applicant was registered thereon as proprietor under Inst No. 348571 of 16th November 2004. Misc. application No. 380 of 2004 was filed on 14th June 2004 and the Applicant added as 3rd Respondent by order of Court issued on 18th February 2005. Mr. Katutsi for the applicant submitted that the applicant in paragraph 4 above depones to the additional evidence that he

seeks to adduce at the Court of Appeal. However there is no evidence adduced to show that the applicant had made any application pending before the Court of Appeal for leave to adduce fresh evidence. The learned Judge had based his ruling on the evidence before him and on record. The applicant is seeking this Court to base its ruling on evidence which was not before the learned Judge. The applicant has failed to show that he has very high chances of success as contended in his affidavits.

In paragraph 7 of his affidavit in Rejoinder the applicant avers that at the time he purchased the suit premises the same were valued at not more than Shs30, 000,000/= but that he had since improved the same and the correct value thereof is now over Shs80, 000,000/= and contends that if the Respondent is not restrained from disposing of the same before the appeal is heard the applicant will suffer irreparable damage.

The record shows that a valuation report was required for approval by the Registrar before the sale. The valuation Report approved by the Registrar on 6th May 2004 had put the suit premises at a market value of Shs45,000,000/= and a forced sale value of Shs30,000,000/=. The applicant did not support his averment in paragraph 7 above with a fresh valuation to show that the suit premises had since been improved in value to over Shs80, 000,000/=.

The above notwithstanding, if the applicant was to succeed on appeal he can have a remedy in compensation for any loss that he might have incurred as a result of the transaction.

In the final result this application is dismissed with costs to the Respondent. I so order.

Hon. Mr. Lameck N. Mukasa

Judge
21/08/2006