

3. That the applicant was not party to the suit from which the order for sale arose.
4. That equity and fairness would demand that the order be reviewed and set aside.

When this application came up for hearing on 22/5/06, counsel for the first respondent raised some two basic preliminary objections to the application. He argued:

1. That the application seeks to review and set aside an order of the Court dated 6/10/05 which order has already been executed. In his view, an order that had been executed could not as a matter of law be reviewed or set aside.
2. That as a matter of procedure, for any question regarding the property to be resolved, it would require all the affected parties such as the applicant's husband and the buyer of the property, to participate in the proceedings. I over ruled him on both issues. The reasons for doing so appear in Ruling No. 1 delivered on 29/5/06. It is not necessary to go over those reasons again herein as that Ruling and the instant one must be read conjunctively.

Representations:

Mr. Arthur Mpeirwe for the applicant.

Mr. Masembe – Kanyerezi for the 1st respondent.

From the records, by agreement in writing dated 25/6/2004, Diamond Trust Bank (U) Ltd availed to one Joseph Muchope an overdraft of Ug. Shs.200m under a guarantee of a like amount. The said Muchope defaulted in the repayment of the loan installments leading to a demand for repayment of the whole loan sum outstanding which as at 14/2/2005 stood at Shs.266,633,246-. He still failed to pay. The loan to Mr. Muchope was secured by inter alia the personal guarantees of one Thomas Nkayarwa (now deceased) and one Joseph Rubahimbya. Following Muchope's default, Diamond Trust Bank (U) Ltd (hereinafter to be referred to as "*the Bank*") filed a suit at the Commercial Court, **HCCS No. 475/2005** against the borrower and the guarantors.

Following the filing of the suit, Nkayarwa settled his obligation with the Bank by effecting payment of Shs.150m. The suit was withdrawn against him as guarantor.

Joseph Muchope and Joseph Rubahimbya did not apply for leave to appear and defend the suit. A judgment in default of the defence was accordingly entered against them on 6/9/2005. In the meantime, according to the available records, before the suit was filed here by the Bank, there was an attempt by the Bank to evict the Muchope family from the matrimonial property in preparation for a sale. Upon learning of the intended sale, the applicant herein, a wife to the said Joseph Muchope, filed a suit at Nakawa vide **HCCS No. 45 of 2005**. She was complaining in that suit that the matrimonial property had been mortgaged by her husband without her consent. From the records, she withdrew that suit from Court on 15/4/2005. This was **before HCCS No. 475 of 2005** was filed at the Commercial Court on 27/6/2005. On learning about the default judgment against them, the defendants filed **HCMA No. 665/2005 on 9/9/2005**. It was for an order that judgment and decree entered against them on 6/9/2005 be set aside. In the meantime, the wrangle between husband and wife deepened. On 14/9/2005, a few days after judgment in default of the defence had been entered against her husband at the Commercial Court, the wife dragged him to Court again vide **HCCS No. 118/2005**. The suit was against the husband and the Bank jointly. Upon filing the suit, she proceeded to get an interim order to protect her from eviction from the suit property pending determination of her case. The common factor in the proceedings at the Commercial Court and at Nakawa was one Rugambanengwe, an Advocate, who apparently shared the confidence of the embattled husband and wife. As fate would have it, **HCMA No. 665/2005** for setting aside the default judgment was never heard on merit. The two lawyers involved in the matter, Mr. Masembe Kanyerezi for the Bank and Mr. Rugambanengwe for Joseph Muchope negotiated an out of Court deal in which they agreed that an order be made allowing the Bank to proceed to advertise and sell the judgment debtor's security with the Bank to recover the monies owed to it. This application arises out of that consent order whose effect was to render the applicant's case at Nakawa together with the interim order under it nugatory.

From the records and submissions of both counsel, I'm satisfied that I made the impugned order on 4/10/2005, which order gave rise to a decree dated 6/10/2005. The said order authorised the bank to advertise and sell the security of Joseph Muchope comprised in Kyadondo Block 232 plot 627 to recover the money owed to it. As I said earlier on, the order was negotiated outside Court. Court was not aware of any suit pending at Nakawa or of any dispute between husband

and wife over the suit property. As it has now turned out by the time I made approval of the order, the land was already the subject of an interim order issued at Nakawa prohibiting its sale by anybody while the dispute at Nakawa lasted. I said in the first ruling that before I make a final determination of the application, the Bank would have to explain why, in the event that it was aware of the Nakawa Court order, it went ahead to enter into a consent judgment over the same property. Evidence herein has been by way of affidavits. In paragraph 9 of the applicant's affidavit, she depones that the respondents were duly served with summons on plaint and with the aforesaid order. This is disputed by the 1st respondent's Betty Rukyalekere who states in her own affidavit that the alleged interim order "*has never been served on the 1st respondent nor have the pleadings, and/or the alleged injunction application.*"

By its very nature, the interim order was *exparte*. Only Rugambanengwe and the applicant can be credited with knowledge of it. Commenting on it in his letter to Court dated 11/10/2005, the said Rugambanengwe states:

"Although the order was procured through me, the applicant had, at the time of appearing before the said judge on the 4th of October 2005, informed me that he was in agreement with the said wife to give up the property for sale in order to settle and/or satisfy the respondent's decretal sum. It is for this reason that I and the applicant never brought the order to Court's attention and the attention of the judgment creditor. The wife has since denied any understanding with the husband of the applicant in respect of the sale of the property."

Mr. Rugambanengwe has not been challenged on this point. From his explanation, the possibility that the Bank had no knowledge of the Nakawa interim order cannot be ruled out. Since Mr. Rugambanengwe had participated in getting the interim order, he cannot of course be excused for not disclosing that fact to his opposite number, Mr. Masembe-Kanyerezi or to Court before the consent order was approved. Likewise, Mr. Rugambanengwe's explanation rules out the possibility that the applicant herein was consulted before the Bank and Joseph Muchope agreed upon the terms of the impugned order. He simply believed what Joseph Muchope told him about her. Court is satisfied that she is before the Court with clean hands. In all these

circumstances, Court has come to the conclusion that the impugned order was made in error. The very important information about the existence of an interim order prohibiting the sale of the suit property was withheld from the Court by Joseph Muchope's lawyer. I am satisfied that if the said information had been brought to the attention of the Court, the consent order would never have received approval in that form. Both Courts being of equivalent jurisdiction, the earlier order takes precedence. It is immaterial that it had been issued by the Registrar.

For the reasons stated above, I find merit in this application for review. As I stated in the first ruling, if the Court finds that there was an error; and that the same was under a mistake; and that the earlier judgment would not have been passed but for an erroneous assumption which in fact did not exist; and its perpetration has resulted in a miscarriage of justice, nothing would stop the Court from rectifying the error to put the record straight. This is grounded in the principle that an illegality once pointed out to Court cannot be ignored. Equity cannot suffer a wrong to pass unremedied. The impugned order if left to stand would have the undesired effect of denying the applicant the right to be heard in the dispute between her, her husband and the Bank over alleged mortgage of the matrimonial property now pending at Nakawa. In view of that pending Court case, I'm inclined to express no opinion on the validity or otherwise of the mortgage transaction itself.

In the result, this application is allowed. The impugned order is reviewed and set aside as well as any sale conducted under it. The suit property shall be restored to the owners, pending the outcome of HCCS No. 118 of 2005 at Nakawa, unless of course the parties together resolve the 2nd respondent's indebtedness to the 1st respondent in other lawful manner.

In view of the total failure of consideration, the purported buyer of the suit property shall be entitled to the refund of his money.

Finally as regards costs, Mr. Rugambanengwe was counsel for both the applicant and her husband in the Nakawa case. He appeared for the 2nd respondent, Joseph Muchope, in **Misc. Application No. 665 of 2005**. It is evident that he enjoyed the confidence of the couple as their counsel before the instant issue arose. He has not been challenged on this point. He has confessed to Court that he did not inform his opposite number in the said application about the

existence of the interim order at Nakawa. The non-disclosure of vital information is the root cause of all this. In all these circumstances, Court is inclined to order that each party foots its own costs herein. It is so ordered.

Yorokamu Bamwine

J U D G E

6/10/2006

Order: This ruling shall be delivered on my behalf by the learned Registrar of this Court.

Yorokamu Bamwine

J U D G E

6/10/2006