

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HCT-OO-CC-MA-142 2009
(Arising from H.C.C.S NO. 140/08)

AKRIGHT PROJECTS LIMITED.....APPLICANT

VS

EXECUTIVE PROPERTY HOLDING LIMITED.....RESPONDENT

BEFORE: HONOURABLE MR. JUSTICE ANUP SINGH CHOUDRY

RULING

(Execution irregular while court procedures and rules not following. Bailiff sale set aside, because sale not to highest bidder without proper notice. Sale by Private Treaty. Payment to law firms unlawful).

This is application brought under Order 52 Rule 1 & 3 CPR, Section 171-1, Section 98, section 34 CPA, Section 33 of JCA, the Judicature (Court Bailiff's Rules), Rules 113-16 by way of Notice of Motion and the Applicants seek for orders that:

1. Executive Warrant of attachment issued by this court on the 25th February 2009, be set aside.
2. The property attached under the warrant in respect of land comprised in Block 276 and the plots as per schedule attached be released from attachment.
3. The sale of land comprised in Block 276 and the plots as per schedule attached, purported to have taken place on the 12th March 2009, be cancelled and annulled and all owner's certificates of Titles returned to the Applicant.

The Applicants relied on the following facts/grounds:

- i) A warrant of attachment was issued by M/s Tropical General Auctioneers on the 29th January.
- ii) M/s Tropical General Auctioneers carried advertisement in the Red Pepper on January 30th 2009, and Daily Monitor on January 30th 2009.
- iii) The Applicant filed Miscellaneous Application No. 33 of 2009 to set aside the Warrant of Attachment on the 28th January 2009.
- iv) The Auctioneers renewed the Warrant of Attachment for another 30 days on the 25th February 2009.
- v) On the 26th February a day after the renewal of the Warrant Court stayed it till the 11th March 2009.
- vi) On the 11th March 2009, at 4:30 p.m. court dismissed Miscellaneous Application No. 33 of 2009, hence putting the renewed Warrant back to life.
- vii) On the 12th March 2009, M/s Tropical General Auctioneers made a return to court indicating that all the Plots as per the schedule had been sold out to M/s Kenroy Investments Limited, Mellan Ranchers Limited and Semwogerere Rogers.
- viii) The Auctioneers sold the property by Private Treaty since there was no advertisement after the expiry of the 1st Warrant.
- ix) The Auctioneers as per their return never deposited the proceeds to court but handled it to the Advocates of the Respondents/Defendants.
- x) The Auctioneers over attached the property of the Applicant.
- xi) The Auctioneers never served the purported renewed Warrant upon the Commissioner Land Registration as required by Law.
- xii) Auctioneers sold the property on credit.
- xiii) Auctioneers never deposited owner's Certificate of titles with court during the life time of the Warrant of Attachment.
- xiv) The Judgment Debtor has always been ready and willing to settle the Judgment Debt.

BACKGROUND:

This application arose from HCCT No. 140 of 2008 on which I gave a judgment on 11th March 2009 against the Applicants on the grounds that debt under Consent Judgment had not

been paid and the payment to individual Directors did not amount to payment to the company or the Respondent and hence were entitled to enforce the Consent Judgment.

SUBMISSION:

Before addressing the grounds in the Notice of Motion Mr. Kituuma Magala Counsel for the Applicant made an application for the Judge to rescue himself on the ground that his client felt that I was biased. Mr. Magala pointed out that the hearing of application No. 140 affidavits were not served by the other side which Counsel for the Respondent denied and that the Judge went ahead with giving the judgment. The subject matter complained was not material to my ruling anyway.

The application to rescue was refused on the grounds of delay and that probing a point of law by the Judge as I did at the last hearing to ensure that the legal arguments were tenable should not be construed as bias. I took Judicature Oath to administer justice to all manner of people without fear or favour, affection or ill will and I have acted independently impartially and professionally and I have been put here in this court by the state to ensure that justice is done.

Mr. Magala however made eloquent submissions.

The application he said was brought under Sec. 34 where there was an issue to be determined by the court executing the decree, Sec 34(1) states that:

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

In Micah –v- Walakira it was held that Section 35 would cover auction purchasers for the reason that title had passed to the purchaser from Judgment debtor. The reason for this application is primarily that the Bailiff as Agent of the court did not follow the correct procedures and the sale became private as opposed to public Auction and hence due to irregularities the execution of Warrant of Attachment issued on 25th February 2009 should be set aside and sale of Block 276 and the plots as per the schedule to the Warrant should be cancelled and annulled and the title returned to members.

In the Hable International and ORS –v- Ibrahim Alakhia (12.12.96 by Mpagie – Bahiseine. J) it was also held that Section 35(1) Civil Procedure Act requires that any question arising between the parties concerning execution be decide by the court executing the decree and not separate suit.

Order 22 Rule (1) All monies payable under a decree shall be paid as follows:

- (a) Into the court;
- (b) Directly to the decree holder; or
- (c) Otherwise as the court which made the decree directs.

The proceeds of sale of plots were not paid into the court within 7 days. Order 22 Rule 2(1) where any money payable under a decree of any kind is paid direct to the decree holder or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree holder, the decree holder shall certify the payment or adjustment to the court whose duty it is to execute the decree, and the court shall record the payment or adjustment according.

Order 22 Rule 2(2) The judgment debtor also may inform the court of such payment or adjustment, and apply to the court to issue a notice to the decree holder and if, after service of the notice, the decree holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record it accordingly.

Mr. Magala cited the case of **Hannington Wasswa –v- Ssemutu** in which it was stressed that a Court Broker or Court Bailiff is an agent of the court and not the parties and then as Mr. Magala put renewal of court Warrant dated 27th January 2009 was by the Bailiff and not the Judgment Creditor.

Under Order 22 Rule 51 CAP 71, the renewal of the Warrant was not in conformity with Form 23.

Section 51(1) stipulates that where the property attached is immovable, the attachment shall be made by an order prohibiting the judgment debtor from transferring or charging the property in any way, and all persons from taking any benefit from the transfer or charge and ordering the judgment debtor to deliver up to the court the duplicate certificate of titles to the property. No title deed were deposited I relation to this execution.

Under order 22 Rule 62, except as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the court or by such other person as the court may appoint for this purpose, and shall be made by public auction in the prescribed manner.

Order 22 Rule 63 states that where any immovable property is ordered to be sold by public auction in execution of a decree the court shall cause a copy a copy of the order to be served in the manner set out in rule 51(2) of this order for the immovable property, shall also cause public notice and advertisement of the intended sale in such manner as the court thinks fit.

There was no re-advertisement of the property after stay where the stay was for more than 7 days as required under 22 Rule 65(1) unless it was waived by the judgment debtor.

In Hable International & ORS –V- Ibrahim Alaratkhan it was held that in the execution of sales on immovable property it was a material irregularity if the sale was not done at the time of sale.

In Standard Bank of South Africa Ltd –v- S.D Senkubuge (CC No. 919 of 1958 – High Court Uganda) the court held that court has no power to order a sale of judgment debtor's land by a private treaty.

The sale was by way of Private Treaty because the Bailiff sold it on credit and did not deposit the title deeds with the court within 7 days as per Rule 15(1) of the Judicature Act(Court Bailiffs Rules) under Order 22 Rule 11 certified copies of title of properties attached were not brought to the court.

Mr. Magala also contended that under Section 48 of the RTA Cap 230 requires the warrant to be registered the 2nd Warrant that was renewed was not registered. Under Section 48, every instrument, excepting a transfer, presented for registration may be in duplicate and shall be registered in the order of and as from the purporting to effect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves.

And under Section 135 No decree of execution shall in itself bind, charge or affect any land, lease or mortgage; but the Registrar on being served with a copy of any decree of execution issued out of any court, accompanied by a statement signed by any party interested or his or her advocate or agent, specifying the land, lease or mortgage sought to be affected by the decree shall, after marking upon the copy the time of the service enter the decree in the register book.

And after any land, lease or mortgage so specified has been sold under any such decree, the Registrar shall, on receiving a transfer thereof in such one of the forms in the Fourteenth Schedule to this Act as the case requires (which transfer shall have the same effect as if made by the proprietor), register the transfer; and on such entry being made, purchaser shall become the transfer and be deemed the proprietor of such land, lease or such decree of execution shall be valid as against a purchaser for valuable consideration, notwithstanding that the decree was actually lodged for execution at the time of the purchase, and notwithstanding that the purchaser had actual or constructive notice of the lodgment of the decree.

SUBMISSION BY RESPONDENT'S COUNSEL

Under Section 6 of Civil Procedure Act matters raised here are matters pending in the Court of Appeal.

The Respondent's Counsel submitted that under Rule 6 Civil Procedure Act CAP 71 no court shall proceed with trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigation under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed.

Counsel contended that order 22 Rule 11 was discretionary and that entries on the register under RTA were to protect the 3rd parties.

I do not accept submissions by Respondent's Counsel because it is quite clear that the application under Section 35(1) was properly made notwithstanding the appeal (Hable International –v- Alarakhan) Section 35(1) deals with matters arising in connection with execution.

The Applicants complain is that the procedures for auction sale by the Bailiffs as agents of the court were all flouted in a manner that the sale became a private sale.

The Warrant of Attachment issued on 27th January and 25th February 2009 did not give proper description of the Plots although Respondents Counsel pointed out that they were included in the

same title. Even then they did not disclose the volume of the title under which they were registered.

The Warrant filed did not specify where the Advertisement was to be placed or the details of the newspapers. The advertisement itself was defective because it did not show the day, the date and did not clearly indicate the venue where the auction was to take place, this was not very clear.

No conditions or special conditions were specified or brought to the attention of the bidders nor did it specify where the copies of title deeds could be obtained.

The original 30 days Notice of Advertisement pursuant to Warrant dated 28th January 2009 lapsed on 28th February 2009. When the stay was lifted on 11th March 2009, sale on 12th March 2009 was not in accordance with the rules or procedures because there was no valid advertisement and did not give notice to the world to come and bid on 12th March 2009.

The whole sale was rushed through by the Bailiff who took over the role as agent for the Creditor as opposed to agent of the court.

The Applicants had all the good reasons to bring this application before the court to set aside the sale. The Bailiff went ahead selling the property on credit, failing to deposit the Title deeds in the court and omitting to register the Warrant or other encumbrances at the Land Registry, and did not pay monies into the court within 7 days.

Counsel for the Respondent contended that the monies had been paid to the Law firm. My view is that this is unacceptable and unlawful because the Law firms are not regulated to hold client monies, and to pay their monies would be taking great risks at the detriment of the parties.

In my view the purpose of rules and procedures with respect to execution by court Bailiff is to ensure that at the auction the property or land is sold to the highest bidder and this will only be possible if there is transparency and sale is above board. Any irregularity in the stipulated procedures will defeat the exercise of sale by auction.

It is vitally important to understand that bidders need to be provided with all the information about the property in order that they may determine on the basis of documents whether it is worth their while bidding at a particular price on the fall of the hammer.

A property with a sitting tenant is unlikely to fetch the same price as property with vacant possession. The bailiff ought to have specified in specified in special conditions any defects, discrepancies, encumbrances, court orders, warrants etc. for the knowledge of the bidder and this ought to have been registered so that on making the appropriate searches they would have surfaced as part of document of titles.

And as Respondent's Counsel pointed out correctly that registration is meant for the production of 3rd parties, this is precisely the purpose of registration to protect the bidders who may want to commit themselves at the auction so that there is no misrepresentation as to what is offered and sold and enable bidders to determine and express their interest.

The Bailiff clearly did not sell by auction, no notice was given to the bidders and the sale could not have been to the highest bidder. In my judgment in the case of ***Stirling Civil Engineering-vs-Petro (U) Ltd*** & two others I set aside the Bailiff sale of goods on the grounds that it was advertised in a local newspaper and hence the sale could not have been to the highest bidder as there was no proper notice to the world at large.

The whole execution in this case was irregular and would be set for having violated the rules of the rules of the court. The Plots in Blocks 276 be released from sale and the Title deeds should be returned to the Applicants, costs to the Applicants. And finally I should add that Mr. Magala had very competently addressed this court on this issues and I give him credit for that.

Anup Singh Choudry

Judge

9/04/2009