**THE REPUBLIC OF UGANDA**

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

**(COMMERCIAL COURT DIVISION)**

**HCT - 00 - CC - CA - 12- 2010**

**1. PROGRESSIVE GROUP OF SCHOOLS LTD**
**2. ERISA KAAHWA AMOOTI**
**3. AB AMOOTI INVESTMENTS LTD**
**4. ARNOLD KISEMBO** **:::::::::::::: APPELLANTS**

**VERSUS**

**LUYANZI ACADEMIC FOUNDATION LTD :::::::::::::::::::::::: RESPONDENT**

**BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE**

**R u l i n g**

This is an appeal against the ruling and orders of the Registrar of this court Her Worship Gladys Nakibuule dated 19th May 2010 in Miscellaneous Cause No. 20 of 2010. It is made under Sections 79 of the Civil Procedure Act (CPA) Orders 50 r 8 of the Civil Procedure Rules (CPR) Section 33 of the Judicature Act (cap 13) and Article 126 of the Constitution.

The appeal seeks orders that

a) This appeal be admitted as duly filled out of the prescribed limitation period.
b) The Appellants' appeal against the decision, ruling and orders of the Registrar (Commercial Court) dated 19th May, 2010 be allowed and the decision and orders be set aside and declared a nullity.
c) The order for vacant possession and all subsequent orders enforcing the impugned order be nullified and/or rescinded.

d) The Respondent be ordered to pay the Appellants costs of this appeal.

The grounds of the appeal as contained in the appeal are:

a) The appellants filed a suit vide HCCS No. 204 of 2009 against M/s Barclays Bank of Uganda Ltd. and the Respondent seeking, inter alia, a declaration that the purported sale and transfer of the Appellant's securities is illegal, unlawful and in contravention of the loan agreement, recovery of the securities mortgaged and cancellation of transfer.

b) That Civil Suit No. 204 of 2009 was amended to include the Respondent as the co-defendant and is still pending before the Hon. Lady Justice Stella Arach Amoko for hearing. (This position has changed following the learned Judge's elevation to the Court of Appeal).

c) That on the 25th of May, 2010, the Appellants learned of the existence of MC No. 20 of 2010 after being served with a warrant of execution and contacted their counsel, M/s Balyejuza & Co. Advocates to file on appeal on their behalf who promptly filed the appeal on 28th May, 2010.

d) That in spite of the existence of the said suit, the Respondent purporting to have purchased the suit property from Barclays Bank of Uganda Ltd filed Miscellaneous Cause No. 20 of 2010 seeking to obtain an order for vacant possession against the Appellants in respect of Kyadondo Block 227 Plots 756, 966 and 1424 at Bweyogerere and Kyadondo Block 226 Plots 43, 72 and 89 of Buto being securities complained of in HCCS No. 204 of 2009 which same matter is in issue in HCCS No. 204 of 2009.

e) That the aforesaid Miscellaneous Cause was entertained and proceeded ex-parte without any application to dispense with notice contrary to the provisions of Order 52 rule 2 of the Civil Procedure Rules.

f) That the Registrar acted without jurisdiction, illegally and ultra vires her powers as a Registrar as prescribed in the Judicature Act, Civil Procedure Rules and Practice Direction No. 1 of 2003 in as far as:

i) The subject matter of MC No. 20 of 2010 is contentious and pending hearing in HCCS No. 204 of 2009 between the Appellants and the Respondent.
ii) MC No. 20 of 2010 was not a formal or interlocutory matter or arising from any matter in court but entirely a suit;
iii) The order for vacant possession that was sought and issued in MC No. 20 of 2010 is not execution of a decree of the Court but entirely a suit involving declarations of proprietary rights of the parties;
iv) The suit for vacant possession is not one of the orders envisaged under Practice Directions No. 1 of 2003;
v) No notice of hearing of MC No. 20 of 2010 was issued to the Appellants nor are there reasons to justify the exparte proceedings.
vi) That the justice of the matter requires that the decision and subsequent orders of the Registrar in MC No. 20 of 2010 together with the purported warrant of execution and purported execution of the illegal order and any other orders that have on effect determining matters in issue or disposal of Civil Suit No. 204 of 2009 be declared a nullity and rescinded and the appeal be allowed.

The grounds are further supported by the affidavits of Mr. Erisa Kaahwa Amooti (the first Appellant) and Ms Alziik Namutebi (counsel for the Appellants).
The motion is opposed by the affidavits of Mr. Noah Wasige (Counsel for the Respondent).

At the hearing the Appellants were represented by Mr. Mohammed Mbabazi while the Respondents were represented by Mr. K. Masembe and Mr. E. Ssembatya.

Case for the Appellants

The case for the Appellants is that the learned Registrar in MC 20 of 2010 acted without jurisdiction, illegally and ultra vires her powers as prescribed in the Judicature Act, The Civil

Procedure Rules and Practice Direction No. 1 of 2003 and made an order against the appellants for vacant possession in respect of the property/land known as Kyadondo Block 227 Plots 756, 966 and 1424 at Bweyogerere and Kyadondo Block 226 Plot 43, 72, and 89 Buto (hereinafter known as the "suit property") yet the said suit property was still in issue in HCCS No. 204 of 2009.

It is also the case for the Appellant that the subject matter in MC No. 20 of 2010 is also a contentious matter by reason of the pending hearing in HCCS No. 204 of 2009. Furthermore MC No. 20 of 2010 was not a formal or interlocutory matter or arising from any matter in court but was entirely a new suit. It was therefore not an execution of a decree of the court. furthermore MC 20 of 2010 was heard exparte with no recorded reasons for the exparte proceedings.

The Appellants further state that the justice of the matter requires that the proceedings and orders in MC 20 of 2010 be declared a nullity and are rescinded so that the appeal is that the appeal is allowed.

Mr. Kaahwa Amooti the second Appellant and proprietor of the first and second Appellant companies on the 11th June 2010 deponed an affidavit that he only learnt of MC 20 of 2010 when he was served with the order for vacant possession. He further states that this took him by surprise as he had filed civil suit No. 204 of 2009 against the Respondent and Barclays Bank. Mr. Kaahwa Amooti also stated that the order for vacant possession in MC No. 20 of 2010 had the effect of determining the rights of the parties in HCCS No. 204 of 2009 thus disposing of it which should not be condoned or allowed.

Legal arguments for the Appellant

Ms. Namutebi counsel for the Appellants deponed an affidavit dated 11th June 2010 and stated that she reviewed the court file in MC No. 20 of 2010. She further stated she discovered that the Appellant's former counsel M/S Balyejusa & Co. Advocates in that matter had filed a Memorandum of Appeal vide civil Appeal No. 11 of 2010 which was the wrong procedure as such an appeal from an order of a Registrar had to be by Notice of Motion which now has been rectified by this present application.

Ms. Namutebi deponed that the learned Registrar acted ultra vires her powers and therefore the orders were a nullity. She further deponed that the order of vacant possession was made while there was a subsisting case to determine the rights of the parties which is an abuse of court process.

Counsel for the Appellants during the hearing submitted that Section 79 of the CPA allowed for an appeal to be filed out of time. He further submitted that the former lawyers of the Appellants made error which should not be visited on his client.

He further submitted that it was in the interests of justice to uphold the application. This is because the said orders were made exparte with no justification, and secondly, they were made ultra vires Practice Direction No. 1 of 2003 on powers of the Registrar.

Counsel for the Appellants further submitted that it was illegal for the learned Registrar to deal with matters substantially in issue in substantive suit. He further submitted that the whole matter was handled in haste as even Section 10 of the Mortgage Act was not to his recollection operational.

The case for the Respondent

Based on the affidavit in reply by Mr. Wasige it is the case of the respondent that this appeal is incompetent because it is filed late by over 22 days and no order for extension of time to file the appeal has been given.

Furthermore that when the second Appellant was served with the court order on the 21st May 2010, he chose to file a complaint with the police and the Inspector of Courts instead of pursuing his appeal in court which was his choice.

It is also the case of the Respondent that the learned Registrar did not determine any propriety rights as the Respondent is registered proprietor of the suit property and the only issue remaining was one of possession.

It is also the case of the Respondent that the Appellant originally pledged the suit property to Barclays Bank for an advance which the Appellants defaulted on. The bank then sold the suit property to the Respondents under the existing mortgage instruments and the Respondent was duly registered as the new proprietor of the suit property.

It is the case for the Respondent that the Appellants filed HCCS No. 204 of 2009 against the bank seeking an injunction against the sale of the suit property together with MA No. 301 of 2009 for a temporary injunction. MA No. 301 of 2009 was dismissed on the 3rd August, 2009.

Mr. Wasige further depones that the second Appellant is said to be a Member of Parliament has been involved in political influence peddling in an attempt to stop the Respondent from obtaining possession of the suit property.

Furthermore, the first Appellant as a principal shareholder in the third Appellant filed in Nakawa High Court HCCS No. 186 of 2009 **Ab'amooti Investments Ltd V Barclays Bank of Uganda and Progressive Group of Schools Ltd** (the present first Appellant) seeking an injunction against the disposal of the suit property.

Lastly, attempts by the Inspector General of the Police to mediate an amicable settlement in this dispute came to nothing when the second Appellant refused to sign a Memorandum of Understanding that the parties reached.

Legal arguments for the respondent

At the hearing of this application, counsel for the Respondent submitted that the dispute between the parties was litigated upon before my sister Judge Lady Justice Stella Arach Amoko (as she then was) and resolved in favour of the bank and that an Appeal there from to the Court of Appeal was dismissed.

He further submitted that even the police had cleared the said bank with regard to this dispute.

Counsel for the Respondent submitted that the Appellants did not come to court with clean hands and therefore were not entitled to the discretion of court or equity. He further submitted that this dispute was about debt collection and nothing else.

Counsel for the Respondent submitted that this application does not meet the tests for extension of time. In this regard he referred me to the case of

**Tiberio Okeny & Anor V The Attorney General and 2 ors** CA 51 of 2001.

In that case **Justice Amos Twinomujuni** (JA) held that

> "*(a) First and foremost, the application must show sufficient reason related to the liability or failure to take some particular step within the prescribed time. The general requirement notwithstanding each case must be decided on facts.*
>
> *(b) The administration of justice normally requires that substance of all disputes should be investigated and decided on the merits and that error and lapses should not necessarily debar a litigant from pursuit of his rights.*
>
> *(c) Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.*
>
> *(d) Unless the Appellant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.*
>
> *(e) Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law …"*

The **Hon. Justice Twinomujuni** further held that

> *"it is only after "sufficient reason" has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors …".*

In this application counsel for the respondent submitted that the appellant's former counsel had simply failed to follow the law and that does not amount to sufficient cause.

Findings and decision of Court

I have read the motion and the affidavit for and against it. I have also considered the submission of both counsel for which I am grateful.

The motion as filed seeks several reliefs but it is general agreed by the parties as being out of time. The first prayer therefore is that time should be expanded so that it can be heard. In the case of **Tiberio Okeny** (Court of Appeal supra), it was held that it is only after the issue of extension of time has been dealt with that other considerations can be made. The test is that of "sufficient reason". In this regard, each case should be considered on its own merits. It should also be borne in mind that the administration of justice normally requires that all disputes be investigated and decided on their merits.

In this application, it is stated that original counsel for the Appellants M/s Balyejjusa & Co. Advocates filed a Memorandum of Appeal on the 28th May, 2010 dated 27th May, 2010 which was the wrong procedure. Furthermore, the instant motion was filed on the 11th June 2010 twenty two days from the date of the order complained of. My own calculation is twenty one days.

Section 79 (1) (b) of the CPA provides that

> *"except as otherwise specifically provided in any other law, every appeal shall be entered-*

*… (b) within seven days of the date of the order of a Registrar as the case may be, appealed against; but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed …"*

In this matter, time would have elapsed after the 28th May, 2010.

This dispute has generated several multiple cases and applications. A look at the various applications shows some interesting findings. On the 26th May 2010 under another MA 323 of 2010, M/s Balyejjusa & Co. Advocates (the former lawyers of the Appellants) filed an application against the Respondents for orders that

*"(a) The ex-parte order granted in Miscellaneous Cause No. 20 of 2010 be set aside.*

*(b) Costs of this application be provided for …"*

MA No. 323 of 2010 essentially sought part of the same orders as in this present application. MA No. 323 of 2010 was not pursued nor endorsed by court. It appears to have been abandoned in favour of an appeal to a High Court Judge. It was that appeal by way of Memorandum of Appeal that was filed the next day but admittedly using the wrong procedure. That notwithstanding if the right procedure had been used, the said appeal would have been within time. Clearly, the former lawyer of the Appellants was juggling different possibilities within the prescribed time but ultimately got it wrong. This to my mind amounts to error of judgment on the part of the lawyer.

It is also stated that the learned Registrar did not have jurisdiction to hear the application as it was ultra vires her powers under the CPA, CPR and PD No. 1 of 2003. It was submitted by counsel for the Appellants that the learned Registrar did not have these powers under the Practice Direction as orders for vacant possession were not provided for therein.

The preamble of the Practice Direction however, provides

*"… in order to ensure expeditious disposal of cases, the powers of Registrars shall include* ***but not be limited to*** *entertaining matters under the following orders and rules …" (emphasis mine)*

The Practice Direction therefore is not as restrictive as counsel for the Appellants would have it.

That notwithstanding, MC No. 20 of 2010 clearly stipulates the provisions of law and rules applicable to it. It is made under orders 52 rules 1 and 2 of the CPR Section 98 of the CPA and Section 10 of Mortgage Act.

To my mind the active procedure shown in the Motion is order 52 rules 1 and 2 of the CPR.

The motion itself is headed **"Notice of Motion (ex-parte)"** meaning that service of the motion on the Respondents was not envisaged. However, Order 52 rule 2 under which it is made provides

> *"…No motion shall be made without notice to the parties affected by the motion; except that the court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order ex-parte upon such terms … as to court may seen just …"*

Clearly, this rule was not followed by learned Registrar. This is an error on the face of the record and is clearly ultra vires the Registrar's powers.

Looked at everything as a whole, I find that there was error of judgment on the part of counsel and also a procedural error on the face of record by the learned Registrar. This amounts to sufficient cause to enlarge time.

That being the case the orders of the learned Registrar of the 19th May, 2010 are hereby set aside.

Since justice normally requires that substance of all disputes should be investigated and decided on the merits I further direct that motion in MC No. 20 of 2010 be served on the Respondents within 7 days and the Respondents file an affidavit in response within usual the prescribed time.

MC. No. 20 of 2010 shall then be heard by me as trial Judge on its merits.

Costs of this application to the Appellants.

**……..…….**

**Geoffrey Kiryabwire**

**JUDGE**

**Date: 13/12/2012**

13/12/12

9: 57 a.m.

**Ruling read and signed in open court in the presence of;**

- Richard Kabatsi h/b for M. Mbabazi for Appellant
- Bwogi Kalibala h/b for E. Ssembatya for Respondent

In Court

- A. Somani – Director of Respondent
- 2nd Appellant
- Rose Emeru – Court Clerk

**……..……**
**Geoffrey Kiryabwire**
**JUDGE**

**Date: 13/12/2012**