

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 0610 - 2013

(Arising from High Court Misc. Application No. 70 of 2013)
(Arising from M.A. No. 451 of 2005)
(Arising from Civil Suit No. 395 of 2002)

CHRISTOPHER KISEMBO & ANOTHER ::::::::::::::::::::
APPLICANT

VERSUS

PAPADA HOLDINGS & ANOTHER ::::::::::::::::::::
RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

The application filed in this court on 11 July 2013 was brought by Notice of motion under Order 44 Rule 1 and Order 52 Rule 1 of the Civil Procedure Rules SI 73-1.

It seeks orders for leave to appeal against the ruling in Misc Application No. 70 of 2013 and costs of the application.

The Notice of Motion is supported by the affidavit of Christopher Kiseembo, the 1st Applicant. In brief the grounds are that the learned judge erred in law to rule that the Respondents (Applicants then) had locus to file the application and that the order of vacant possession asked and granted to the respondent does not put in

consideration that the execution was set aside vide Misc Application No. 891 of 2006 after the ruling in Misc Application No. 451 of 2005.

Background of the Case:

A summary suit was filed by Cooperative Bank (In Liquidation) against the Applicants (Defendants then) vide CS 398/2002. The Applicant's application for leave to appear and defend was dismissed for want of prosecution and judgment entered in favour of the Plaintiff and a decree extracted on 16 October 2002. Execution issued and pursuant to a warrant of attachment, the bailiffs attached the Applicant's property comprised in Block 39 Plot 1224 Ishaka and sold it to one Lawrence Barugahi (2nd Respondent) in December 2003. Barugahi subsequently sold it to Papada Holdings Ltd (1st Respondent) on 26 September 2005.

On 13/6/2005, the Applicant filed Misc Application 451/2005 seeking orders that the sale be set aside for under valuation and a declaration that the Applicant's indebtedness with the Respondent (Cooperative Bank) was discharged by the sale of the said property.

In dismissing the application, **Justice Lameck Mukasa** held that the auction sale of the property had become absolute by the time of filing the application and in the absence of fraud on the part of the Auction purchaser, could not be set aside. Further, that the sale did not discharge the judgment debt.

Thereafter, the Applicant filed MA 891/2006 seeking to set aside the decree in CS 398/2003. In allowing the application on

22/7/2007, Justice Geoffrey Kiryabwire ordered that the decree in CS 398/2002 and execution be set aside and the Applicants were given leave to file a defense.

By several correspondences on record, the Applicant obtained a warrant to the bailiff to give vacant possession of the property and the Respondents were subsequently evicted.

In a judgment delivered on 26/08/09, the Plaintiff (Cooperative Bank) was the successful party. The Applicant obtained an interim order on 28/03/2012 from the Registrar of the Court of Appeal staying the execution of this decree vide Misc Application 61/2012.

The current Respondents filed Misc Application 70/2013 seeking orders to be put into vacant possession of the property. In dismissing the Preliminary Objection that the Respondents had no locus to bring the Application, the trial judge further held that the Interim Order obtained from the Registrar of the Court of Appeal was issued without jurisdiction. He subsequently granted vacant possession of the property to the Respondents.

This application seeks leave to appeal against this ruling.

While there are instances where courts have investigated and even set aside a sale, **Allen Nsubuga Ntananga V Micro Finance Ltd & Ors** HCMA 426/2006, each case must be looked at on its own merits and where the sale is absolute, the courts have been reluctant to set aside the sale.

An absolute sale is one where no application to have the sale set aside is made and where if such an application is made, it has been disallowed. **Bancroft & Anor V City Council of Nairobi and Another** [1971] 1 EA 151; **Sam Kaggwa V Beatrice Nakityo** [2001- 2002] 2 HCB 120.

In the instant case, the sale was done pursuant to a warrant of attachment and sale issued by court. It was advertised and sold in December 2003 in fulfillment of the order of court and subsequently sold to Papada Holdings Ltd (1st Respondent).

By these transactions of purchase the 1st Respondent acquired good title and interest in the property.

Section 49 of the Civil Procedure Act is to the effect that where immovable property is sold in execution of a decree, the sale shall become absolute on the payment of the full purchase price to the court, or to the officer appointed by the court to conduct the sale.

Counsel for the Applicant submitted that since the judgment and execution were set aside, the sale of the property also collapsed.

With respect, this sale was never set aside. In Justice Kiryabwire's own words, he said,

"In a bizarre twist of events, as the trial before me was proceeding, the subsequent orders of court were misinterpreted to mean that the present respondents could regain the suit property and the 1st Applicant who had bought the suit property from the 2nd Applicant was evicted from the suit property at the bidding of the Respondents."

From the foregoing, it's clear that when the learned Judge set aside the judgment, he did not set aside the sale of property. The point here is buttressed by Justice Mukasa's finding that the sale was absolute and having held that it was absolute, the Applicant would only have proceeded by a separate suit. **Sam Kaggwa V Beatrice Nakityo** [2001- 2002] 2 HCB 120. In any case the decision by Hon. Justice Mukasa was never appealed against.

Attempts had been made to set aside the sale but were unsuccessful, which confirms the absoluteness of the sale. Setting aside the sale would occasion injustice because the property has moved from the original purchaser Lawrence Barugahi to Papada Holdings Ltd. There is no evidence on record to show that the 1st Purchaser had any notice of illegality more so that the subsequent purchaser was aware of any failings or errors by the original purchaser.

One of the grounds for seeking leave to appeal is that the Respondents could not have filed an application in a matter where they had not been parties.

With respect, I do not agree and I take comfort in Section 34(1) of the Civil Procedure Act which provides 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 dissatisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

The Respondents were purchasers of property pursuant to a Court order. They acquired interest in the property by such purchase. They could therefore proceed under Section 34(1) of the Civil Procedure Act since this matter related to an execution.

I am further comforted by the words of **His Lordship Odoki C.J** (as he then was) in **Lawrence Muwanga V Stephen Kyeyune** SCCA No. 2/01, where he said *“It is now established that the wording of Section 34 covering “the parties to the suit or their representatives” would cover auction purchasers for the reason that the title was passed to the purchaser from the judgment debtor.*

It follows therefore that the Respondents became interested parties on purchase of the property. They therefore could and were free to bring the action the way they did.

The execution **Justice Kiryabwire** set aside was to stop future execution based on the then existing decree for the recovery of monies still owed to the Judgment creditor since it was clear from the ruling in Misc Application 451/2005 that for all the money to be recovered there would be further execution.

As to whether the trial judge disregarded the interim order of stay of execution granted by the Court of Appeal Registrar, it would be merely academic because the execution in respect of the property in question that the Registrar purported to stay was no longer pending since it had been finalized as far back as December 2003. Therefore his order for stay was in respect of a non existent

situation. I find that granting leave to appeal would be nothing but a promotion of multiplicity of litigation that has no basis.

The sum total is, that it is this court's finding that the Respondents had locus to file Misc Application 70/2013 and that the sale of the property was found to be absolute which finding was never challenged on appeal.

Lastly, leave can only be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration; **Sango Bay Estates Ltd V Dresdner Bank Attorney General** [1971] EA 17.

In the foregoing proceeding, I have not seen anything that merits serious judicial consideration or would occasion miscarriage of justice if not appealed against. I therefore find no merit in this application and accordingly dismiss it with costs to the Respondents.

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David K. Wangutusi
JUDGE

Date: 23 - 01 - 2014