

THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 14 OF 2016

(ARISING FROM MISCELLANEOUS APPLICATION NO 935 OF 2015)

(ALSO ARISING FROM CIVIL SUIT NO 743 OF 2015)

MIAO HUAXIAN}.....APPLICANT

VS

1. CRANE BANK LTD}

2. FIT AUCTIONEERS & COURT BAILIFFS}.....RESPONDENTS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicant commenced this application and cited section 33 of the Judicature Act Cap 13 laws of Uganda as well as section 98 of the Civil Procedure Act cap 71 laws of Uganda as the enabling laws and Order 52 rules 1 and 3 of the Civil Procedure Rules for the procedure. It is for orders that:

- (a) The Respondent's Directors be punished by detention in civil prison for disobeying a Court Order.
- (b) The Respondents be punished by payment of exemplary/punitive damages of Uganda shillings 2,000,000,000/=.
- (c) The Respondents be fined in the sum of Uganda shillings 500,000,000/= only.

(d) The injunction earlier issued be extended and made clear to the parties and the condition of payment of Uganda shillings 4,000,000,000/= by the Applicant to the first Respondent be recalled until the main suit is heard and determined.

(e) Provision be made for the costs of the application.

The grounds of the application contained in the Notice of Motion are that the Applicant filed High Court Miscellaneous Application Number 935 of 2015 arising from the main suit against the Respondents. Secondly the application was heard inter partes and determined on 21 December 2015 whereupon the court issued an order stopping the Respondents from selling the Applicant's property comprised in LRV 2744 Folio 25 Plot 47 Nabugabo Road and LRV 2339 Folio 19 Plot 53 McKenzie Vale, Kololo, Kampala. Thirdly the court in its ruling also directed that any advertisement of the Applicant's property for sale can only be done after 14 January 2016 in the event that the Applicant failed to pay the ordered deposit of Uganda shillings 4,000,000,000/=. Fourthly the Respondent is in contempt of the court ruling/order and went ahead and advertised for sale the Applicant's property on 24 December 2015. Fifthly the Applicant has been left wondering whether she could proceed to effect the payment or not since the Respondent is inclined to selling her property and not abiding by orders of court. On the sixth ground, the Applicant avers that she will suffer irreparable damage if the application is not granted. Lastly the Applicant avers that it is just and fair that the application is granted.

The application is supported by the affidavit of Counsel Andrew Oluka of Messieurs Muwema and Company Advocates and Solicitors which gives the background to the application. He deposes that the Applicant's application for a temporary injunction was heard on 21 December 2015 and the court made a ruling and order the Respondent should not to sell or advertise the Applicant's property until 14 January 2016 and only in the event that the Applicant failed to pay to the Respondents Uganda shillings 4,000,000,000/=. That the Respondents in contempt of the court order, advertised the property for sale on 24 December 2015 according to an extract copy of the New Vision newspaper of Thursday, December 24, 2015 attached to the application. On 24 December 2015 his firm duly notified the first Respondent of an intention to sue for the disobedience of the court order. He further deposes that because of the advertisement the Applicant informed him that she does not know what court order to follow because her property

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is in danger of being sold and many people have been frequenting her buildings and inconveniencing her and her business. Unless the Respondent's actions are restrained the Applicant will suffer irreparable damage. The rest of the deposition repeats the grounds in the Notice of Motion. Further relevant is the fact that the date of sale in the New Vision advertisement was fixed for 28 January 2016 at 11 AM.

In reply the affidavit in opposition to the application is deposed by another Counsel, Counsel Ernest Sembatya Kaggwa, an advocate of the High Court practising with Messieurs Masembe, Makubuya, Adriko, Karugaba and Sekatawa Advocates (MMAKS advocates). He deposes that it is not true that the Respondents are in contempt of the ruling of the court issued on 21 December 2015 neither is it true that the ruling was ambiguous or requires interpretation. The party's lawyers upon delivery of the ruling raised before the judge such questions on which clarity was sought and his Lordship clarified in the ruling that the mortgaged security could be re-advertised in the event of non-payment of Uganda shillings 4,000,000,000/= by the Applicant. He further interprets the ruling of court and I will have occasion to deal with the ruling of this court in this matter. His interpretation is that re-advertisement was permitted immediately upon delivery of the ruling. Secondly the Applicant never paid the deposit ordered by the court. Lastly the application is not an application for review and it is not an appeal having been filed against the ruling of the court and is not open for the Applicant to seek to have the earlier court ruling varied or recalled as sought in the application.

In the affidavit in rejoinder Counsel Andrew Oluka reiterated earlier facts in the affidavit and contended that in the ruling the advertisement of the property was forbidden before 14 January 2016. Secondly he was informed by the Applicant that she could not go ahead to deposit what was ordered when her property was advertised in contempt of the court order to avoid a double loss. He further deposes that the court has power to review its earlier decision to punish the party in contempt of the court order.

The application was fixed for hearing on 27 January 2016 at 11 AM yet the property had been advertised for sale on 29 January 2016 at 11 AM. At the hearing Counsel Masembe Kanyerezi represented the Respondent while Counsel Friday Robert Kagoro represented the Applicant.

I have carefully considered the submissions and what transpired in court at the hearing. The gist of the application is that the Respondent was in contempt of the court order by re-advertising the property for sale on the 24th of December 2015.

Counsel Friday Robert Kagoro submitted the application is for the orders sought in the Notice of Motion already set out above. The grounds of the application are as given in detail under paragraphs 1 - 7 of the Notice of motion and supported by the affidavit of Andrew Oluka. It is the Applicant's submission that on 21st of December 2015, this court made a ruling and ordered the Applicant to pay 4 billion Uganda shillings. This money was to be paid by the 14th of January 2016. The court ordered that in the event that the payment is not made the court ordered that the Respondent should not advertise the suit property at page 10 of the ruling and the last three paragraphs. In his interpretation the court in the last line of page 10 forbade any re-advertisement.

He further submitted after the court clarified the ruling that the interpretation of the ruling at page 10 was that the Respondent was supposed to re-advertise the property after 14th of January 2016 and only if the Applicant failed to deposit security. In contempt of the ruling of the court, the Respondent on the 24th of December 2015 advertised the property for sale. It is the Applicant's submission that the acts of the Respondent were in contempt of the ruling. He prayed that the court finds the Respondent acts are contemptuous and the court grants the application as prayed for in the notice of motion. In support of the application counsel relied on five precedents which I do not need to quote for the moment until and unless I find as a matter of fact that there was disobedience of a court order by the Respondent.

In reply Counsel Masembe Kanyerezi opposed the application and submitted that the prayers in items (a) (b) and (c) of the Notice of Motion have nothing to do with contempt on the ground of the re-advertisement of the property having been published on 24 December 2015. He relied on page 10 last paragraph and page 11 first paragraph of the ruling of the court. It indicates that re-advertisement was not prohibited. Secondly he relies on the Annexure "B" attached to the affidavit in reply indicating that the Applicant's Counsel wrote objecting to the advertisement. However in the reply the Respondent's Counsel also wrote indicating that advertisement had not

been forbidden and quoted the specific provision of the court ruling that I will quote later on in this ruling.

I have carefully considered the application and I must say that it is a very unique situation in which an Applicant for a temporary injunction upon getting the injunction which gives specific terms and conditions chooses not to fulfil the terms or the condition for the injunction to be sustained. First of all this application was filed in this court on 13 January 2016 one day before the last day when the Applicant was required to deposit with the Respondents Uganda shillings 4,000,000,000/=. Secondly I have carefully noted that the advertisement which was published in the New Vision on 24 December 2015 set the date of sale of the mortgaged property as the 28th of January 2016 about two weeks after the 14th of January 2016 when the Applicant should have complied with the conditional injunction terms by making a deposit of the ordered security with the Respondent as undertaken. Last but not least this application was fixed for hearing on 27 January 2016 by the registrar yet the sale which the Respondent advertised is due for the 28th of January 2016. The matter was argued at 3.00 o'clock in the afternoon due to the busy schedule of the court that day. It was not possible to deliver a ruling there and then and secondly the ruling could not be written and delivered the subsequent day because I had several engagements of hearings and a judgment to prepare for delivery on 28 January 2016.

An interim injunction could not be issued on the date of the hearing on the ground that the injunction issued by the court had lapsed due to the inaction of the Applicant not deposit with the Respondent Uganda shillings 4,000,000,000/= by 14 January 2016. The court order issued on the 21st of December 2015 is follows:

“In the premises the following orders are issued:

1. The Applicant shall deposit a sum of Uganda shillings 4,000,000,000/= with the Respondent bank by 14 January 2016.
2. A temporary injunction issues restraining the Respondent, their agents, servants or anybody deriving authority from them from selling the Applicant’s mortgaged property comprised in LRV 2744 Folio of 25 Plot 47 Nabugabo Road and LRV 2339 Folio 19 Plot 53 Mackenzie Vale, Kololo Kampala for the period to be specified.

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3. In the event of failure to deposit the sum of money indicated above, the injunction shall lapse.
4. Upon the deposit of the sum of money in order 1 above by the Applicant, the injunction shall last for 50 days from the date of this order unless otherwise the period is extended by this court from time to time or by consent of the parties.
5. In the circumstances of this case, the costs of this application shall be borne by the Applicant.

Ruling delivered in open court on 21 December 2015”

Order number 3 of the court order clearly provides that in the event of failure to deposit the sum of money as ordered in order number 1, the injunction shall lapse. At the time the matter came for hearing the Applicant had not deposited what was ordered in item 1 of the order according to representations made to court. Consequently the temporary injunction lapsed at the end of the 14th of January 2016. That being the case I had no further jurisdiction to grant another injunction stopping the sale of the property. I have simply exhausted my jurisdiction by ordering that the injunction would lapse if the Applicant did not deposit security which she had undertaken to do by 14 January 2016. The matter was then left to the parties and the ruling was fixed for today 29th of January 2016.

On the question of whether the Respondent was in contempt of the court by advertising the property I need to make one comment. The Applicants application would have made perfect sense if she had deposited the security that had been ordered because had she done so, the injunction would be in force and any sale of the suit property would be illegal and in contempt of the court order. As it is she chose to sit on her rights and decided not to comply with the terms of the court order. Secondly there is no express order banning re-advertisement of the property in the ruling of the court dated 21st of December 2015. Neither is the ruling capable of different interpretations. Part of the relevant ruling of the court on the matter at pages 10 and 11 are

reproduced for ease of reference and emphasis that there was no such order. At pages 10 and 11 the court ruled as follows:

“This ruling will be read on 21 December 2015. Thereafter if the Respondent is to re-advertise the property for sale, the sale shall be in January 2016. The practical effect of the period of notice is that the proposal of the Applicant to deposit Uganda shillings 4,000,000,000/= is the most practical way to comply with the law if the injunction application is refused. In other words the Applicant can still deposit the amount of money to stop the sale for purposes of redemption of the property under regulation 13 (1), (4) or (5) of the Mortgage Regulations. In such cases the person conducting the sale namely the second Respondent upon getting a deposit of money as prescribed by the regulations of 30% for adjournment or 50% for redemption of the property is obliged to stop the sale. 21 working days from the 21st of December 2015 will exclude Christmas Day which is the 25th and the 26th and 27th of December 2015, the 1st of January 2016, the 2nd and 3rd of January 2016 as well as the 9th and 10th of January 2015. This comes to about 29 calendar days. In other words any re-advertisement of the property for sale implies that it would not take place before the 14th of January 2016. In the premises even if the application was not allowed both parties would not suffer any further prejudice.

I have further considered the regulations to the effect that under regulation 13 (1) the court may adjourn the sale upon an application being made. The other requests for adjournment or stoppage can be made direct to the person conducting the sale of the mortgaged property. At this point in time there is no advertised date and place of sale and therefore there is no new date and place for conducting a public auction of the mortgaged property. There is nothing to adjourn.

In the circumstances and using the traditional jurisdiction of the Court in granting injunctions as an equitable remedy I hold that the purpose of the application can be met by giving a conditional injunction restraining the Respondents, their agents or servants or anybody deriving authority from them from conducting a sale of the mortgaged property upon deposit of security with the Respondent bank as proposed by the Applicant’s Counsel. Such an order ensures that before the Respondent can lawfully conduct a sale

after the requisite advertisement prescribed by the Mortgage Regulations 2012 and specifically Regulations 13 (7) and regulation 8, the Applicant would have had time to deposit the proposed amount.”

The clear context of the ruling was that under the regulations, the Respondent could not sell the property without re-advertising it first. Secondly the court considered the regulations providing that no sale would take place after stoppage of a public auction of mortgaged property for more than 14 days without re-advertising the property for sale under Regulation 8 of the Mortgage Regulations. Secondly the same regulation provided that the advertisement would not run for less than 21 working days. The court went ahead to calculate the number of days left if at all the property is ever re-advertised and reached the conclusion that the proposal of the Applicant to deposit Uganda shillings 4,000,000,000/= by 14 January 2016 could be made without any danger of the Applicants property being sold even if the property was advertised for sale thereafter. This is because even if the property was advertised after the ruling, the advertisement would have run for a minimum of 29 days before the property could be validly sold under the regulations. By that time the Applicant would have had an opportunity to deposit the security she had represented to court through Counsel she was able to pay by 14 January 2016. That notwithstanding the court went ahead to make an order of injunction restraining the Respondent from selling the property on condition that the Applicant deposits the security which she said she was able to do by the 14th of January 2016.

In the premises by not fulfilling the terms of the injunction, the injunction lapsed and the Applicant shut herself out of court on the question of injunction to stop the Respondent’s intended sale. I further need to comment about the actions of the Applicant’s Counsel. I have carefully considered annexure "B" which is addressed to the Applicant’s Counsel by MMAKS advocates and which reproduced page 10 of the ruling and the relevant part to explain whether the sale of the property could not take place before 14 January 2016. Secondly they wrote that re-advertisement of the property was not forbidden. Thirdly I have considered the letter of the Applicant’s Counsel Annexure "D" to the affidavit of Counsel Andrew Oluka. The Applicant’s lawyers demanded an apology for the re-advertisement of the property. It is my humble opinion and ruling that the advocates of the Applicant owed a duty to their client to advise her that the injunction would lapse if she did not deposit the security whether there was contempt of the

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Respondent or not. Like I have noted above there was no order expressly forbidding the Respondent from advertising the property in the ruling. What they exercised was a heavy responsibility and they should accept the consequences of their role in the Applicant's predicament if worse than before.

I can only say that the advertisement in the circumstances was improper but not illegal. If anything it was harmless. It assumed that the Applicant would not deposit the security. That was not contempt of the court. It invited members of the public to a public auction which may not take place if the Applicant deposited security. In other words it misrepresented to members of the public that there was property for sale when the property was the subject of a court order stopping the sale if the Applicant deposited security by the 14th of January 2016. It was premised on an assumption that the Applicant would not make the deposit by 14 January 2016. To make matters worse the Applicant has actually not made the deposit. I would have considered the Applicant's application for contempt on the above ground only had she made the deposit by the 14th of January 2016. In the premises she filed the application well knowing that she had no intention of fulfilling the terms of the sustenance of the court injunction.

In the premises I see no ground for penalising the Respondent for misrepresenting to the public that there would be a public auction when there was a court order in place in which a deposit may or may not be made. It was prudent for them to wait until after the Applicant failed to make the deposit. That notwithstanding this application serves no useful purpose and is accordingly dismissed. Given the predicament of the Applicant, and exercising Courts discretion under section 27 of the Civil Procedure Act, each party will bear own costs of the application.

Ruling delivered in open court on 29 January 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Ernest Sembatya for the Respondent

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Counsel Friday Robert Kagoro for the Applicant

Mr. Ramachandran Head Credit of first Respondent in court

Alan Ongima Legal Officer of the Respondent in court

Ms Winnie appears in court on behalf of Applicant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

29/January /2016