

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

MISCELLANEOUS APPLICATION No. 0129 OF 2023

5 **(Arising from Civil Suit No. 0224 of 2010)**

BEATRICE ODONGO
APPLICANT

VERSUS

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1. TAMP ENGINEERING CONSULTANTS LIMITED}
2. ANDREW TADHUBA } **RESPONDENTS**
3. BWENGYE & ASSOCIATED ADVOCATES }

Before: Hon Justice Stephen Mubiru.

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RULING

a. Background.

The facts in as far as they can be discerned from the pleadings now before Court are that 1st respondent sued M/s Macdowell Limited, a company for which the applicant is one of the directors. The Judgment in that suit, H.C.C.S. No. 224 of 2010, was delivered in the 1st respondent's favour on 24th January, 2016. Subsequently the 1st respondent sought the lifting of the corporate veil in order to execute the decree against the applicant as director of the company. That application was granted, but on 5th July, 2018 the then Executions and Bailiffs' Division of the High Court granted an order of stay of execution of the decree against the applicant and her co-director, Mr. Noah Ochola, pending an appeal to the Court of Appeal by both directors challenging order that lifted the veil of incorporation. As a condition for the grant of that order of stay of execution, the Court directed the applicant to deposit in court, for onward transmission to the 1st and 2nd respondent's advocates, the 3rd respondent, her title deed to land comprised in in LRV 2582 Folio 19 at Plot 47, Princess Anne Drive, Bugolobi, Kampala measuring approximately 0.2280 Hectares. The 3rd respondent still has that title deed in its custody.

Judgment was delivered dismissing Civil Appeal No. 08 of 2020 with costs to the 1st respondent, by which the applicant and her co-director, Noah Ochola, had appealed against the order that

lifted the veil of incorporation. The 1st respondent had accordingly filed its bill of costs which was pending taxation. In the meantime, judgment in the appeal by M/s Macdowell Limited challenging the decree was delivered in its favour on 18th March, 2022. By that judgment, the decree of the trial Court was set aside. A re-trial was ordered for the purposes of completion of the hearing of the appellant's case before Judgment is delivered. In its judgment, the Court of Appeal ordered that “any execution proceedings and orders pursuant to the judgment in High Court (Commercial Division) Civil Suit No. 224 of 2010 cannot proceed, the judgment from which the execution proceedings arose having been set aside in this appeal pending the hearing and outcome of High Court Civil Suit No. 224 of 2010 pursuant to [the order setting aside the judgment in that suit].”

b. The application.

This application is made under the provisions of section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Rules* and Order 52 rules 1, 2 and 3 of *The Civil Procedure Rules*. The applicant seeks an order directing the respondents jointly and severally to return to her possession, the certificate of title to her land comprised in in LRV 2582 Folio 19 at Plot 47, Princess Anne Drive, Bugolobi, Kampala measuring approximately 0.2280 Hectares. It is her case that on 18th March, 2022 the said title deed ceased being security for the judgment delivered in *H.C.C.S. No. 224 of 2010; Tamp Engineering Consultants Limited v. Macdowell Limited*, upon the delivery of the Court of Appeal Judgment in Civil Appeal No. 180 of 2019 which set aside the decree and execution proceedings and orders that had arisen from it. Nevertheless, the respondents have to-date unjustifiably refused to return the title deed to her possession, hence the application.

c. The affidavits in reply;

By its affidavit in reply the 1st respondent avers that the caveat lodged against the property during the year 2017 was only done to prevent the applicant from disposing of the property without the 1st respondent's knowledge. At the time, there was a Judgment in H.C.C.S. No.224 of 2010 capable of being executed and for which execution proceedings had issued. The 1st applicant

does not trust that the applicant whose company Macdowell Limited has no known physical address and no known assets is capable of paying the costs in T.A. No. 02 of 2023. Although the property comprised in LRV 2582 Folio 19 at Plot 47, Princess Anne Drive, Bugolobi, Kampala measuring approximately 0.2280 Hectares ceased being security for the judgment delivered in
5 *H.C.C.S. No. 224 of 2010 (Tamp Engineering Consultants Limited v. Macdowell Limited)* upon the delivery of Judgment in the applicant's favour in Court of Appeal Civil Appeal No. 180 of 2019 (*Macdowell Limited v. Tamp Engineering consultants Limited*), the 1st respondent declines to release at this point the certificate of title to the applicant. The basis for this is that the 1st respondent as the successful party in the Court of Appeal Civil Appeal No. 08 of 2020 (*Beatrice
10 Odong & Noah Qchola v. Tamp Engineering Consultants Limited*) was awarded costs against the applicant and Mr. Noah Ochola in their personal capacities that are pending taxation. The 1st respondent has a lien over the applicant's property for the unpaid costs.

The 1st respondent also has good reason to believe that the applicant is not liquid enough to settle
15 the costs that will be awarded in T.A. No. 02 of 2023, as many of her properties have been put up for sale by Stanbic Bank. The instant Application seeks to defeat the 1st respondent's only known security held against the applicant, whose only clear intent is to dispose of the only known unencumbered property the applicant owns, to the prejudice of the 1st respondent who will have taxed costs that the applicant cannot pay. The applicant is clearly more eager to get her title back
20 than prepare to have the hearing of the main case completed. This application is to that extent frivolous, vexatious, and misconceived, and without merit in law. The 1st respondent has kept the Applicant's title for five (5) years without incident, and implores the court to dismiss the instant Application with costs to the 1st and 2nd respondents and fix the main suit for hearing of the applicant's case, which the applicant's company Macdowell Limited has had to spend eight (8)
25 years eagerly waiting for.

By their affidavit in reply, the 3rd respondent aver that in the matter now before Court, they only acted in accordance with the instructions of their client, the 1st Respondent not to release the certificate of title to the applicant or her lawyers. All actions were done in pursuance of the
30 advocate-client fiduciary relationship. Further, the law firm as a partnership has no capacity of being sued in its firm name.

d. Submissions of counsel for the applicant.

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M/s, Nambale, Nerima & Co. Advocates on behalf of the applicant submitted that the title deed was deposited a security for due performance of a decree against the company and the order lifting the veil made against the directors. The applicant is one of the directors of the company and deposited it as security. It was set aside by the Court of appeal. It ordered that any execution cannot proceed. Paragraph 4 of the decree of the Court of Appeal. Principles of law in Civil Appeal No. 8 of 2020 upheld but the execution could not proceed. The substratum for keeping custody of the title deed was lost. Paragraph 6 of the affidavit in reply admits the certificate of title ceased to be security. He claims that the 1st respondent has a lien for unpaid costs. A lien does not arise. The applicant had to deposit the title in court, but by consent of the parties the Court had to hand it over to the respondent for safe custody. The Court of Appeal Judgment addressed all orders and they were all set aside. This Court cannot override the decision of the Court of Appeal. Attachment before taxation should be sought in the Court of appeal. The applicant is not up to any mischief.

20. Submissions of counsel for the respondent.

M/s Bwengye & Associated Advocates, on behalf of respondent submitted that it was by consent of the parties that the title was deposited with the respondent. The circumstances were that one of the parties to the contract was an Engineer and the other a contractor. Other property belonging to the hirer of service can be kept as substitute in exercise of a lien. The case should be treated an exceptional one on its facts. The lien should be exercised in respect of the issue of costs now pending taxation of the bill of costs in the Court of appeal. The applicant is up to some mischief in seeking to retrieve the title yet the company has not provided other security.

30. The decision.

The legal effect of setting aside a Court decree is that all that was done pursuant to the decree becomes *non est* as against the parties and therefore it can no longer bind them. It basically means that it no longer exists, and cannot be enforceable. When a judgment or order is set aside, any enforcement of the judgment or orders arising therefrom ceases to have effect unless the
5 Court otherwise orders. When a judgment is set aside, the parties are put back in the position they were in immediately before the judgment. In the instant case, the title deed to the land comprised in LRV 2582 Folio 19 at Plot 47, Princess Anne Drive, Bugolobi, Kampala measuring approximately 0.2280 Hectares was in the applicant's possession immediately before the judgment of 24th January, 2016 in High Court (Commercial Division) Civil Suit No. 224 of 2010.
10 The rules of procedure though do not provide for procedures of such restoration.

Considering that the title deed now in issue had been handed over to the respondents as security given by the applicant for the due performance of the decree or order as was and may have ultimately been binding upon her, and subsequently the decree was set aside, there is no longer
15 any lawful justification for the respondents' continued custody of the title. In effect the applicant has invoked this Court's inherent jurisdiction in order to achieve restitution following an order setting aside the judgment. Inherent power is the power possessed by a court simply because it is a court; it is an authority that inheres in the very nature of a judicial body and requires no grant of power other than that which creates the court and gives it jurisdiction. The "inherent power"
20 or "inherent jurisdiction" of the court was defined in *Grobbelaar v. News Group Newspapers Ltd. [2002] 1 WLR 3024* at 3037B, as follows:

The inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary
25 whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." (Jacob, *The Inherent Jurisdiction of the Court*, (1970) 23 Current Legal Problems, 23).

30 The inherent jurisdiction of the Court is more fundamental than, and goes beyond, mere procedure. At the root of the decisions in *Boyd, Gilmour and Co. v. Glasgow and South Western Railway Co. (1888) 16 R 104* and *Hutchison v. Galloway Engineering Co. 1922 SC 497* must be the inherent jurisdiction of the Court. The Court has to retain the flexibility needed to deal with

unusual situations unless it had clearly deprived itself of the power to do so. A Rule of Court is not to be interpreted as altering a settled rule of law unless that is expressly stated or followed by necessary implication. Otherwise the inherent jurisdiction of the Court would be emasculated. Construction of the Rules of Court in such a way as to have that effect would not serve the interests of justice. The Court cannot regard itself as constrained, simply because there is no Rule of Court. In exercise of this power, Courts have the ability to do all things reasonably necessary for the administration of justice.

Parties to litigation expect courts to operate both predictably and fairly. A core part of this expectation is the presence of codified rules of procedure, which ensure fairness while constraining, and making more predictable, the ebb and flow of litigation. A court cannot exercise its inherent jurisdiction in contravention of legislation or rules of court. The situations in which it is necessary to rely on the inherent power therefore are likely to be rare but most commonly are situations where there is little or no precedent, statutory or common law, yet it is necessary so as to do justice between the parties, and therefore justified through the invocation of the Court's inherent jurisdiction. These cases present themselves whenever there are procedural gaps and omissions that arise when the Constitution, statutes, court rules, or cases fail to address the legal issues that have arisen. In such situations, if courts had no reliance on inherent authority, they would have no alternative but to either (a) leave procedural problems unresolved, or (b) offer strained interpretations of existing rules to address those problems in light of codified rules. There are circumstances in which considerations of fairness are imperfectly addressed by written rules, and allowing flexibility through the exercise of inherent power is an important safety valve.

Written rules provide notice to parties about how a court's authority is going to be exercised, articulate relevant standards that govern the exercise of authority for all to see (and to criticise or seek to change, should the need arise), and provide guidance for appellate courts in determining whether a trial court's exercise of discretion in a particular case was appropriate or not. While the unconstrained exercise of inherent power is ever-less acceptable in a legal system that is increasingly moving toward written rules, the absence of such authority would have its own

perverse effects. With written procedure, parties are aware of the most likely procedural choices and the considerations that factor into making those choices.

5 Allowing inherent power to be exercised without constraint threatens to surprise litigants by
subjecting them to unknown and unclear standards and limits the ability of appellate courts to
properly assess the exercise of that authority by the court below. Because inherent power is
exercised only in circumstances in which courts believe that existing law does not adequately
address the problem at hand, the process of exercise of their inherent power requires; (i) an
10 evaluation of existing rules of written procedure to assess whether the use of inherent power is
necessary at all, and (ii) a clear statement about the standards that the court is using to determine
precisely how its inherent power should be exercised in a particular circumstance. The court
should therefore take care to search all relevant written authority for guidance regarding either
(a) the exercise of power without resort to inherent authority, or (b) the exercise of inherent
15 authority, albeit in a manner constrained by articulated written rules. If the court concludes that
written procedures actually do provide all necessary guidance in resolving the legal problem
presented, the court need not press forward with the use of inherent power.

A court resorts to inherent power in circumstances in which there are no particular options to
choose between; there is simply a perceived need to act. That court is left to call upon its
20 inherent power in deciding whether to exercise that power, the scope of options available to it in
doing so, and which of the available options it has to choose. Through inherent jurisdiction, a
court possesses all of the common law equity tools to process litigation to a just and equitable
conclusion. Exercise of the power is bound up with the very nature of courts and judicial
decision-making. To that end, the exercise of inherent power is also properly thought of in a
25 functional way: a necessary means to ensuring that courts are able to manage interactions
between parties, counsel, third parties, and the courts themselves. Inherent power though should
be exercised with caution, used only when absolutely necessary to accomplish the underlying
needs of the court and always with sensitivity to the purposes underlying relevant written rules,
even the marginally relevant written rules.

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To avoid restitution, the respondents rely on a claimed lien over the title deed. A lien is a claim or legal right against assets that are typically used as collateral to satisfy a debt. There are three types of liens; consensual, statutory and judgment. Consensual liens are those to which the debtor voluntarily consents, as a result of a loan or other advance of credit. Statutory liens arise in situations where creditors obtain security interests by the operation of statutory or common law. These include; mechanic's liens which arise when a contractor or mechanic performs work on property and is not paid; tax liens placed against property by government, as authorised by statute, for delinquent taxes; an advocate's lien which is the right of an advocate to hold a client's property, including business files, official documents, and money awarded by a court, until the client pays for legal services provided. A judicial lien is created when a court grants a creditor an interest in the debtor's property, after a court judgment.

A lien provides a creditor with the legal right to seize and sell the collateral property or asset of a debtor who fails to meet the obligations of contract. The owner cannot sell the property that which is the subject of a lien without the consent of the lien holder. In the instant case none of the respondents has obtained the consent of the applicant to retain custody of her title deed. None of the respondents claims a lien over it recognised by statute or common law, yet the judicial order by which they obtained possession has since been set aside. None of the respondents therefore has any legal right to the continued retention of the title deed. Furthermore, considering that the caveat lodged on the title was based on the judgment lien, it too can no longer hold; it has to be vacated. The respondent's fear that the applicant may deal with the property in manner that puts it out of the reach of the Court in the event of a judgment against her are addressed by Order 40 rule 1 (a) (iii) of *The Civil Procedure Rules*, whereupon relief may be granted upon proof that the applicant with intent to delay the respondents, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against her has disposed of or removed from the local limits of the jurisdiction of this court his or her property or any part of it. Until that happens, to assume so is mere speculation and not a lawful justification for keeping custody of the title.

The doctrine of restitution contemplates the case where property has been received by a decree-holder in execution of a decree, and the decree, or part thereof, is subsequently varied or reversed

on appeal by the judgement-debtor, or even in a separate suit or otherwise. Section 92 (1) of *The Civil Procedure Act* provides that where and insofar as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part of it as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on the variation or reversal. It is not the case that if the case is not covered under the specified provision then no restitution can be granted. This provision is not the fountain source of restitution, it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. The jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands.

The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of section 92 (1) of *The Civil Procedure Act*. In the instant case it so happens that it is the duty of the court under that provision to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reserved.

In conclusion, the applicant has made out a proper case for the restoration of her title deed to her possession. Consequently, the application is allowed. The respondents are hereby ordered jointly and severally to forthwith return to the applicant's possession, free from all encumbrances, the title deed to her land comprised in LRV 2582 Folio 19 at Plot 47, Princess Anne Drive, Bugolobi, Kampala measuring approximately 0.2280 Hectares. The costs of the application are awarded to the applicant.

Delivered electronically this 20th day of February, 2023
Mubiru.....

.....**Stephen**

Stephen Mubiru
Judge,
20th February, 2023.