

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

MISCELLANEOUS APPLICATION No. 0497 OF 2021

5 (Arising from Civil Suit No. 0398 of 2002)

1. PAPADA HOLDINGS LIMITED } APPLICANTS
2. LAWRENCE BARUGAHI } }

VERSUS

10 **1. CHRISTOPHER KISEMBO }**
2. PROSCOVIA KISEMBO } RESPONDENTS

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

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The respondents mortgaged land comprised in Ankole Block 39 Plot 1224 being residential property at Ishaka, to the now defunct Cooperative Bank Limited, as security for a loan they obtained from that bank. Upon the respondent's default, the bank instituted Civil Suit No. 398 of 2002 against the respondents seeking foreclosure. The respondents in turn filed Civil Suit No. 336
20 of 2006 against the bank seeking a declaration that the bank had wrongfully withheld their title deeds. The two suits were consolidated and Judgment was entered in favour of the bank since the respondents were found to be in default. Appeals by the respondents to the Court of Appeal and to the Supreme Court, against that decision, were dismissed.

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Before disposal of the appeals, the bank had applied for and was granted a warrant of attachment and sale of the mortgaged property. The bank went ahead and advertised the property for sale. Upon a successful sale, the property was transferred into the name of the 2nd applicant as purchaser. The respondents unsuccessfully applied to have the sale set aside. The 2nd applicant during the year 2005 re-sold the property to the 1st applicant. The 1st applicant sought to take physical
30 possession of the property but was resisted by the respondents. During the years 2013 and 2014 the 1st applicant filed applications for vacant possession and orders were made for the respondents to vacate the premises, to no avail, hence a fresh application that was filed on 24th November, 2021 seeking an order of eviction to issue against the respondents in execution of the court orders.

b. The case stated:

When the matter came up before the Registrar for consideration, he decided to refer that question to this court for its opinion in light of the unusual complexity of the facts in whose context it arose.

5 Under Order 50 rule 7 of *The Civil Procedure Rules*, if any matter appears to the registrar to be proper for the decision of the High Court the registrar may refer the matter to the High Court and a judge of the High Court may either dispose of the matter or refer it back to the registrar with such directions as he or she may think fit. At common law a consultative case stated is a procedure by which a court can ask another court for its opinion on a point of law. A consultative case stated is

10 made at the discretion of a presiding judicial officer before he or she determines the case before the court. The higher court to which the case is stated will refer the case back to the referring court with directions to correct its decision. The decision of the higher court is transmitted to the lower court which can then resume its hearing of the case, with the benefit of the legal advice of the higher court. Where a case is stated after aspects of the decision have been made, the higher may

15 reverse, affirm or amend the determination in respect of which the case has been stated.

The court may reserve a question of law if it is satisfied that it is in the interests of justice to do so. A consultative case stated can be made at any time during proceedings before a final determination has been made. Before stating a case, the court below must consider: the extent of any disruption

20 or delay to the trial process that may arise if the question of law is reserved; whether the determination of the question of law may; - (i) render the trial or hearing unnecessary; (ii) substantially reduce the time required for the trial or hearing; (iii) resolve a novel question of law that is necessary for the proper conduct of the trial or hearing; or (iv) in the case of questions reserved in relation to a trial, reduce the likelihood of a successful appeal. It is essential that the

25 court below has made the necessary findings of fact on which the question(s) of law to be stated will be based (see *DPP (Travers) v. Brennan [1998] 4 IR 67 at 70*). In the meantime the final decision in the case is suspended until the case stated has been determined.

The factors which should weigh in the lower court's decision to require a case stated to a higher

30 court are: (a) there has to be a real and substantial point of law open to serious argument and appropriate for decision by a higher court, (b) the point should be clear cut and capable of being

accurately stated as a point of law and not a matter of fact dressed up, (c) the point should be of such importance that the resolution of it is necessary for the proper determination of the case. If those factors are satisfied the lower should state a case (see *Halfdan Greig & Co. A/S v. Sterling Coal and Navigation Corporation and A. C. Neleman's Handel-En Transportonderneming (The "Lysland")* [1973] 1 Lloyd's Rep. 296). On a stated case, this Court cannot receive additional evidence. It can only examine the record from which it may make additional findings of fact or draw inferences. It must determine the matter based on the facts included in the stated case.

c. Submissions of counsel for the applicants.

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M/s Lawgic Advocates on behalf of the applicants submitted that the order sought to be enforced by execution has never been appealed. During the years 2013 and 2014 the 1st applicant filed applications for vacant possession and orders were made for the respondents to vacate the premises, to no avail. Instead the respondents frustrated the efforts of execution by colluding with the local police and other security agencies. The 1st applicant is the registered proprietor of the land in issue and the respondents have no lawful justification for retaining possession. There is no order in place preventing or staying execution. The respondents have not furnished this court with any reason as to whet execution should not ensue. The warrant should issue accordingly.

20d. Submissions of counsel for the respondents.

M/s Abaine-Buregyeya and Co. Advocates on behalf of the respondents submitted that when the 1st applicant purchased the land from the 2nd applicant, he mortgaged it to DFCU Bank, which subsequently recalled the loan. The director of the 1st applicant is now deceased and there is no proof that his share sin the company were transmitted. The 1st applicant is currently not in a position to pass any resolution. Counsel representing the applicants is not on record having not filed a notice of instructions. Although it claims an interest in the property as mortgagee, DFCU Bank has not been joined to the proceedings. There is no one capable of instructing the advocates and none capable of taking physical possession of the property. In none of the court proceedings relating to that property was an order of vacant possession made, or evidence of a sale having taken place adduced. Execution of the decree was stayed at every stage of the appeals right up to the

Supreme Court. It is only the decree passed by the Supreme Court that should be executed rather than proceed by way of execution of the decrees passed by the courts below.

e. The decision.

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According to section 34 (1) of *The Civil Procedure Act*, 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, have to be determined by the court executing the decree and not by a separate suit. This ancillary jurisdiction serves two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees. The purpose of this provision is to create a cheap and expeditious remedy for determination of certain question in execution so as to avoid the multiplicity of suits in a limited class of cases relating to discharge or satisfaction of a decree.

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Such questions may arise before, during or after the execution of the decree, but; (i) must arise between the parties to the suit or their representatives; (ii) must arise in the suit in which the decree was passed, and; (iii) must relate to the execution, discharge or satisfaction of the decree. The court executing the decree can decide two types of questions: (a) questions which are related with the execution, discharge and satisfaction of the decree, and (b) questions which are related with whether a person is a representative of the party or not. These will ordinarily be questions such as; whether a decree is executable? Whether the property is liable to be sold in execution of the decree? Whether a decree is fully satisfied? Whether a particular property is included or not in decree? Questions regarding attachment, sale or delivery of property.

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The key questions arising from the pleadings and submissions of counsel are; (i) whether the order of this court issued in High Court Misc. Application No. 70 of 2013 granting the applicant vacant possession of land comprised in Ankole Block 39 Plot 1224 being residential property at Ishaka is executable; and (ii) whether any of the applicants have *locus standi* to seek the enforcement of that

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order. The two issues will be answered within the context of the criteria applied when invoking section 34 (1) and (3) of *The Civil Procedure Act*.

i. Questions arising between the parties to the suit or their representatives.

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The parties to the suit are the persons who actually contest the suit as plaintiff or defendant up to the time of the passing of the decree. However, for the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit. The purchaser of the property sold in execution too is considered as party under this section,
10 of the suit in which decree has been passed.

The term representative as used in section 34 (1) and (3) of *The Civil Procedure Act*, does not mean only the legal representative of a party, i.e. executor or administrator, but it means his or her representative in interest, and includes a purchaser of his or her interest who, so far as such interest
15 is concerned, is bound by the decree. Every purchaser of the judgment-debtor's interest, who is bound by the decree, is a representative of the judgment-debtor within the meaning of the section. Whether he or she is a purchaser under a private sale from the judgment-debtor or a purchaser at a compulsory sale, held in execution of a decree obtained against the judgment-debtor. The parties
20 must be arrayed as decree-holder or his representative on the one side and judgment-debtor or his representative on the other. Any question arising between the decree-holder and his or her own representative or between the judgment-debtor and his or her representative, save the question as to whether any person is or is not the representative of a party, is clearly not a question with in the purview of this section. The section does not as well apply when a question arises as to the execution of a decree between two persons each of whom claims to be the representative of the
25 decree-holder.

The parties to High Court Miscellaneous Civil Application Number 70 of 2013 are the same parties now before court, bound by the order and the underlying decrees. In *Lawrence Muwanga v. Stephen Kyeyune S. C. Civil Appeal No. 2 of 2001*, it was held that the wording of Section 34 of
30 *The Civil Procedure Act*; “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 is

thus evident that the issues which have arisen involve the same parties to the suit or their representatives.

ii. Questions arising in the suit in which the decree or order was passed.

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Although the object of section 34 (1) of *The Civil Procedure Act* is to preclude the un-necessary expense and delay that fresh trials entail, and such a provision must naturally be construed as liberally as the language would permit, ordinarily, the execution Court cannot go behind the decree and must execute it as it stands. The powers of the court executing the decree under section 34 (1) of *The Civil Procedure Act* cannot go beyond the decree, i.e. the court cannot consider the merits and demerits of decree. Where the decree *prima facie* appears to be vague or ambiguous the question of the correctness of decree may not be amenable to this process. Questions such as whether or not the decree was obtained by fraud or whether the decree was obtained against the wrong person, or contains terms incorporated by reference, cannot be resolved by a proceeding under this section. Disputed rights of the parties cannot be decided under this provision.

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A proceeding in execution cannot be said to be completed, at least so far as a decree-holder is concerned, until he or she has obtained the proceeds and benefit of the decree or the execution of his or her decree cannot be said to be satisfied or until all reliefs granted have been effectively realised. The issues that have arisen relate to the enforcement of the orders made in High Court Miscellaneous Civil Application Number 70 of 2013 made on 23rd August, 2007 made under consolidated civil suit numbers No. 398 of 2002 and No. 336 of 2006. They are questions arising in the suit in which the order was passed.

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25 iii. Questions relating to the execution, discharge or satisfaction of the decree.

Execution connotes the steps leading to and achieving the satisfaction of the decree. Therefore all questions relating to the delivery of possession of the property to the purchaser or his representative, will be considered as related to execution, discharge and satisfaction of the decree. A question relating to execution, discharge or satisfaction of a decree may be raised by the decree-holder or by the judgment debtor at any time after the decree is passed until its full satisfaction.

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The pendency of an application for execution by the decree-holder is not a condition of the exercise of this power.

5 In High Court Civil Suit No. 398 of 2002, the respondents, both trading as Ishaka General Hardware, operated three bank accounts at Ishaka branch with the defunct Cooperative Bank Limited, namely; account No. 879, account No.003 and account NF12. Upon the respondents' request and instance, the respondents were allowed to obtain credit by overdrawing their account from time to time. As at 26th July 2001, the respondents were indebted to the bank in a sum of shs. 149,263,069/= which continued to attract interest at a rate of 21% p.a. In a judgment delivered on 10 26th August, 2009 the court found that the respondents were indebted to the bank in the sum claimed. Judgment was entered in favour of the bank against the respondents in the sum of shs. 149,263,069/= with interest thereon at the rate of 21% per annum from 26th July 2001 until payment in full and costs for the suit.

15 Being dissatisfied with the decision, the respondents appealed to the Court of appeal by way of Civil Appeal No. 93 of 2010 contending that; (1) the learned trial Judge erred in law and fact when he ruled that the appellants were indebted to the respondent; (2) the learned trial Judge erred in law and fact when he ordered the appellants to pay Shs.149,000,000.00 plus 8% interest to the respondent yet the appellants are not indebted to the respondent to that tune; and (3) that the learned 20 trial Judge erred in law and fact when he consolidated Civil Suit No. 336 of 2006 together with Civil Suit No. 398 of 2002 but did not rule on the merits in the consolidated Civil Suit No.336 of 2006. In a judgment delivered on 21st May, 2015 the appeal was dismissed with costs.

25 Being dissatisfied further with the decision of the Court of Appeal, the respondents appealed to the Supreme Court by way of Civil Appeal No. 1 of 2018 contending that the Court of Appeal had erred when it found that the respondents were indebted to the bank, that they had defaulted in respect of loans extended to them by the bank, and that the bank had a lien over the respondents' titles. In a judgment delivered on 26th September, 2019 the appeal was dismissed with costs. The respondents were found to be indebted to the bank in the sum of shs 101,456,303/= Therefore there 30 is no pending appeal anymore.

- a. Whether the order issued in H. C. Misc. Application No. 70 of 2013 is executable.

According to section 2 (o) of *The Civil Procedure Act*, an “order” means the formal expression of any decision of a civil court which is not a decree. Execution is the enforcement of decrees and orders by the process of the Court, so as to enable the decree-holder to realise the fruits of the decree or order. For an order to be executable; (i) there must have been an adjudication in a court proceeding; (ii) it must have determined the substantive as opposed to the procedural rights of the parties with regard to all or any matter in dispute in the proceeding; (iii) the determination must be of a conclusive nature; (iv) there must be a formal and unambiguous expression of the adjudication; and (v) its enforcement must not be barred by limitation or other circumstances; (vi) it must force of execution and not merely declaratory of rights; (vii) there should be unfulfilled or pending obligations due from the judgment debtor to the judgment creditor under the terms of the order.

Execution is complete when the judgment-creditor or decree-holder gets money or other thing awarded to him by the judgment, decree or order (see *In re Overseas Aviation Engineering (GB) Ltd [1963] 1 Ch 24; [1962] 3 WLR 594*). Filing of an appeal does not affect the enforceability of the decree or order of the court below, unless the Appellate Court stays its operation. But if the appeal results in a decree or order that supersedes, modifies or sets aside, the decree passed by the lower court, then it is the Appellate Court decree which becomes enforceable. The trial court will merge in the decree of the appellate court when the appeal is decided on the merits. When the appellate order or decree does not supersede, set aside or modify, but rather affirms that of the court below, the lower court decree or order continues to be enforceable. In the instant case, none of the appellate decrees stayed, modified, reversed or superseded the order sought to be enforced.

The order sought to be enforced arose out of *Papada Holding and another v. Kisembo and another, H. C. Misc. Application No. 70 of 2013* where the applicants sought an order of vacant possession of land comprised in Ankole Block 39 Plot 1224 being residential property at Ishaka. The respondents objected to the application contending that the applicants did not have *locus standi* to seek those orders. The objection was overruled. The trial judge further held that the interim order obtained from the Registrar of the Court of Appeal, in C. A. Misc. Application No. 61 of 2012, restraining the applicants from execution of the decree of the High Court issued on 26th August,

2009 in consolidated Civil Suit No. 336 of 2006 and No. 398 of 2002, was issued without jurisdiction. The court thus granted vacant possession of the property to the applicants.

5 In *Kisembo and another v. Papada Holding and another*, H. C. Misc. Application No. 610 of 2013 delivered on 23rd January, 2014 while dismissing an application for leave to appeal the decision granting the applicants vacant possession of the property now in dispute, it was decided that the sale was done pursuant to a warrant of attachment and sale issued by court. 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 (see *Bancroft and another v. City Council of Nairobi and Another* [1971] 1
10 EA 151 and *Sam Kaggwa v. Beatrice Nakityo* [2001- 2002] 2 HCB 120). The property was advertised and sold in December 2003 in fulfilment of the order of court and subsequently sold to Papada Holdings Ltd. By those transactions of purchase Papada Holdings Ltd. acquired good title and interest in the property.

15 It is therefore clear that attempts to have the order given in H. C. Misc. Application No. 70 of 2013 set aside on appeal were futile as leave was denied. As matters stand, there is no pending litigation in any of the appellate courts or any subsiding orders by any of those courts restraining the execution of this order. As far as this court is concerned, issues of ownership and right to possession of that property were by that ruling finally determined and now the court is *funtus*
20 *officio* over that issue. An order by a court of competent jurisdiction is conclusive between the same parties and their privies, as to all matters which are put in issue, or which under the rules of law might have been put in issue in the cause wherein the order was rendered, until such order is reversed or set aside. This means that this court is now not at liberty to entertain any argument that seeks to change that decision. The matter stands conclusively resolved as far as this court is
25 concerned.

That notwithstanding, according to section 3 (2) of *The Limitation Act*, no action may be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable. Similarly section 35 (1) (a) of *The Civil Procedure Act* provides that no order
30 for the execution of the decree may be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed.

Unless the court declares a decree or order enforceable on some future date or on the happening of certain specified events, it is normally enforceable as soon as it is passed. The Order sought to be executed having been delivered during the year 2013, time began to run then and the limitation period thus expires in the year 2025. Execution of the order in the instant case not being barred by limitation, and there being no subsisting orders of stay of execution preventing its enforcement, the order having been the outcome of an adjudication in a court proceeding, the order having determined the substantive as opposed to the procedural rights of the parties with regard to matters in dispute in the proceeding in a conclusive manner, and the order having been expressed in a formal and unambiguous ruling of this court, yet the respondents are yet to comply with its terms, I find that the order is executable.

b. Whether the applicants have *locus standi* to seek enforcement of the order.

A decree or order may require payment by one person to another or into Court a sum of money or it may require a person to do or to abstain from doing a particular act or acts. The decree or order is meant to be obeyed without demand and if there is default in obedience, the Judgment Creditor is entitled to commence enforcement proceedings. A decree or order of a Court of competent jurisdiction is valid until set aside on appeal and as such must be obeyed. Once a decree or order is passed by the court, it is the obligation of the person against whom the order or decree is passed (judgment-debtor), to give effect to it so as to enable the decree-holder to enjoy its benefits. When there is no voluntary compliance with the decree or order by the judgment debtor, then execution of the decree or order becomes necessary, indeed inevitable.

All proceedings in execution commence with the filing of an application for execution. According to Order 22 rule 7 of *The Civil Procedure Rules*, where the holder of a decree [or order] desires to execute it, he or she has to apply to the court which passed the decree or order. Rule 13 (a) thereof provides that where the interest of any decree holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the court which passed it, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by the decree holder, except that notice of the

application for its execution has to be given to the transferor and the judgment debtor, and the decree should not be executed until the court has heard their objections, if any, to its execution.

5 It follows that it is either; (i) the holder of a decree or; (ii) the assignee in writing or by operation of law, of the interest of the decree holder in the decree, who has the *locus standi* to apply for its execution. A decree-holder therefore means any person in whose favour a decree has been passed or an order capable of execution has been made, and includes the assignee of such decree or order. Just as a transferee is also entitled to execute the decree, likewise, a legal representative of the decree holder, though his or her name may not be inscribed in the decree or order, can execute it.

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A person who is neither a decree-holder, a legal representative of a decree holder (where the decree holder is deceased), nor an assignee in writing or by operation of law of the interest of the decree holder in the decree, who therefore has no right to execute the decree, cannot apply for its execution. In the instant case, both applicants are named as the persons in whose favour the order
15 was made. Both therefore have the *locus standi* to seek its execution.

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A third party or a stranger has no right to apply for execution, even if he or she is a beneficiary of the decree. At the point of execution of a decree or order, the court executing the decree need only be satisfied that the person seeking execution of the decree, by the terms of the decree itself or
20 from its nature, is legally entitled to seek its execution. Therefore when a corporate body files an application for execution, and on the face of it that application the corporation is party to the litigation entitled to execute the order or decree, there is no requirement to look into the internal irregularities, and even if there are any irregularities, that is a part of the internal management of the company and a court dealing with the company at that stage of the proceeding is not required
25 to enquire about it, except upon complaint of a shareholder in the company. There is no complaint before court from the shareholders of the company regarding the application filed by the company. The judgment debtor cannot complain in that regard on the judgment creditor's behalf. The argument that the applicants lack *locus standi* therefore is misconceived and rejected.

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c. Whether there is any legal impediment to the execution of the order.

In some situations, execution of a decree might be impeded by the fact that it will affect proprietary rights in either real or personal property which have lawfully arisen in favour of a third party or others claiming through him or her. The Court has the mandate to exclude property from execution proceedings, once satisfied that the property is not in the possession of the judgment debtor or in possession of some other person on account of or in trust of the judgment debtor. There is no evidence before court to suggest that this is a possibility in the instant case.

This court finally considers that the requirements of Order 22 13 (a) of *The Civil Procedure Rules*, has been complied with. The judgment debtors were served with notice to show cause and indeed have been heard as to whether they have any legal ground for objecting to the execution sought. Having examined all their arguments, I have come to the conclusion that they have not. According to Order 22 rule 20 (1) of *The Civil Procedure Rules*, where the person to whom a notice to show cause why execution should not issue does not show cause to the satisfaction of the court why the decree should not be executed, the court shall order the decree to be executed. It is thus ordered that a warrant of execution granting the applicants vacant possession of the land comprised in in Ankole Block 39 Plot 1224 being residential property at Ishaka should issue forthwith. The applicants are granted the costs of this application.

Signed, dated and delivered this 16th day of March, 2022

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Stephen Mubiru
Judge,
16th March, 2022.