

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC. APPLICATION NO 61, 62 OF 2004

(Arising from HCCS No. 738 of 2003)

NASUKA ENGINEERING SERVICE LTD.....PLAINTIFF/RESPONDENT

VERSUS

SAMUEL KIVUMBI DEFENDANT

3rd March, 2004

BEFORE: THE HON. MR. JUSTICE R.O. OKUMU WENGI

RULING:

This is an objection proceeding brought by the applicant against the Respondents challenging execution of a decree of this court. It is brought under order 19 rules 55, 56,57 and order 48 of the Civil Procedure rules and Section 98 of the Civil Procedure Act. The objector contends that he is not liable to displacement in execution of a court order from a plot of land along the Kampala Gayaza road at Kalerwe where there is a market. The back ground to this case is that the land in question is the scene a of popular city market. There are many vendors and petty traders operating in the market. But at the same time the very land on which the market thrives has been at the centre of a bitter and long drawn contest for ownership. There have been dealings in the land and of course various persons in the market environment have staked their lives on the market and would get caught in the struggle for control of the land. This being the case there have been transactions and various categories of claims over the land. And the same

land has given rise to 3 civil suits and this application. Outside of these proceedings there have been some physical displacements of people in the market and construction of permanent and temporary structures. But there have also been incidents of destruction and despoliations giving the picture of severe tension. One of the episodes of displacement arose following a warrant of eviction that sparked off recent discomfort and this application. There is also a pending application by eleven other vendors reacting to these evictions. Indeed three spirited persons claiming to be vendors filed an epistolary complaint with the Chief Justice. They blamed their woes on conflicting decisions or orders of this court in the various cases that have come for adjudication. However this complaint arose due to an awareness on the part of the aggrieved vendors of the fact that the court order made by this court on 5/2/2004 was a result of an agreement by both counsel to maintain the status quo in the pendency of these objections. It did not authorize any eviction or displacement. Understandably though, by their very insecure status, the vendors were reacting to defend their own interests as they are entitled to do. In this context they have invoked the epistolary jurisdiction of the court. This is essentially the inherent power of the court but whose exercise can be invoked by an informal letter of complaint to the court. It is a well established practice as developed in other jurisdictions particularly India. A complainant would write a letter and if it reveals a serious complaint such as the one in this case wherein bloodshed would result, a court can entertain it. In this context the practice offers greater access to the court with little formality and technicality. It can present a paradigm of popular justice if not abused, such as is envisaged in article 126 of the constitution of Uganda. I will however deal with the application as it is hoping that in the result the summering up tension in the market will be put under control. At least in the immediate short run as the long time conflict over this market may take time to wear off.

The legal history of this case is that Mr. Jackson Musoke Kikayira who is the objector, filed a suit in this court namely HCCS No. 119/1999 against one Yahaya Walusimbi and Rosemary Nalubega. The latter previously owned Block 5 plot 548. She subdivided it into two plots 1120 and 1121 she transferred plot 1120 to Yahaya Walusimbi and retained Plot 1121. The plaintiff in that suit 119/99, claimed the land on his own behalf and also on behalf of his siblings and they remained in possession of the land. This family had allowed, to be operated on the land, a

market by the apt names of Bivamuntuyo market. It was operated by themselves and others. By a decree of this Court dated 13/5/2003 it was ordered as follows:

- (a) The plaintiff and his siblings are bona fide occupants of the land comprised in Kampala instrument 201910
- (b) The original land comprised in Block 5 plot 584 be restored to the register.
- (c) The subdivision into Plot 1120 and 1121 are hereby cancelled.
- (d) The first defendant as administrator of the Estate of the late TITO LUKANIKA to satisfy the interest of the estate of the late Erisa Musoke in accordance with the caveat lodged in 1932 in accordance with s. 288 succession Act.
- (e) Instruments 21006 dated 22 December of 1932 KLA 189917 dated 1 August 1997 and 190472 dated 16 September 1997 signifying caveats by Erisa Musoke Levi Luyombya, Namisango and the plaintiff to be restored on the register.
- (f) The second defendant is not a bona – fide purchaser for value of plot 1120 and his title is hereby cancelled.
- (g) The defendants are permanently restrained from disturbing the plaintiff on the occupation of the land unless they follow the law.
- (h) The defendants will pay costs of the this suit to the plaintiff”

As a result of this decree and as contended by Mr. Ayigihungu the plaintiff became the successful party in that case 119/99. But as it has become known, Yahaya Walusimbi appealed against that decree and also secured a stay of execution. The stay was granted but was conditioned to stop any further development on the land or its alienation by the said Yahaya Walusimbi”

However before the decree and during the pendency of that suit 119/99 Yahaya Walusimbi is said to have granted a 20 year long lease of the disputed land. The lease related to plot 1120, and was made in favour of a third party namely Nansuka Engineering Services Ltd the present Respondent. It has also come to light that the Respondent went about developing the land presumably under this lease dated 22/10/2002. This company is then said to have let the land to one Samuel Kivumbi on 24/1/2003 before the decree. The said Samuel Kivumbi is then said to have overseen the operation of market over the same land under the tenancy agreement. In so doing he is said to have engaged on the land perhaps over 300 vendors. The vendors and other operators including the elusive Samuel Kivumbi now became a thorn in the flesh of Nansuka Engineering Services the lessee and of course its lessor Yahaya Walusimbi. The market people would not leave the land for construction and further development. Indeed if they changed sides and ignored the medium of Samuel Kivumbi and dealt with the objector this would give the objector the upper hand over Yahaya Walusimbi and his side. If this is what happened, It may not be known but what transpired is that the lessee or Respondent herein filed a blitz summary suit No. 738/2003 against Samuel Kivumbi. The latter, if he exists, did not contest the suit and an exparte decree was recorded against him. It is this decree whose execution, with the purpose of putting Nansuka Engineering Service in possession, that sparked off the present dispute and whatever commotion that was experienced at the Kalerwe side market. The company used that decree against a Lethargic if not nominal defendant Kivumbi to have him and anyone claiming under him evicted.

According to counsel Ayigihugu Civil Suit 738/2003 was fraudulently filed. He told court that the intention of this recent case was to get an order to destroy Kiosks and other developments in the market to pave way for Yahaya Walusimbi to reclaim control of the land that had been dealt with in Civil Suit 119/99. Counsel contends that the execution was wrongful and unjustified as it covered even the other plot 1121 where no appeal is pending and over which Yahaya Walusimbi had not title.

According to Mr. Sulaiman Musoke learned counsel for the Respondent his client had a valid lease over the suit land for 20 years. He further contended that the lessor Yahaya Walusimbi acknowledged the lease. That further the Respondent had engaged Samuel Kivumbi to oversee

the market land on their behalf as construction was in progress. But that it soon became apparent that his occupation or running of the market had to be terminated. This, he said, necessitated the filing of the now controversial Civil Suit No. 738/2003. He contended that execution of the case was normal and intended to secure the rights of the Respondent against an intransigent Samuel Kivumbi. He prayed that court should allow execution to proceed. In reply, Mr. Ayigihugu contended that the stay of execution as granted conditionally does not permit Yahaya Walusimbi to alienate the land or to develop it either himself or through a lessee.

In dealing with an objection the question to be decided is whether the objector was in possession of the suit property on his own account or in trust for the Judgment debtor. The sole question to be investigated is one of possession. The issue of title is only relevant if it explains whether possession is on account of or in trust for some other person. See Sokempex Interstate Co. Ltd Vs Euroafro General Import & Export Co. Ltd (1981) HCB 73. In the present case it is clear that the applicant has been in possession of the land in question on his own account and in trust and or together with his siblings. It is also true that the vendors including G. Kanya who made a written complaint and who thereby sought to crowd in with the applicant in his objection and whom I heard and who attended court have been in possession of their spaces on their own account. The Respondent seems to have lost real possession if he did have it as a result of the unclear involvement or disappearance of Samuel Kivumbi. The latter first of all surrendered his lease and retreated into oblivion. The vendors of the market including those said to be claiming under him seem to be in real possession but no longer rely on him as the source of authority for their possession. They could have changed allegiance and are resisting execution of the decree subject of this application. I therefore find that the applicant's objection is well founded as he is in possession of the land subject of this conflict, on his own account, without reference to Kivumbi. Therefore any execution by way of eviction of the applicant as indeed of the vendors as a way of recovering land from Samuel Kivumbi by the Respondent is unjustified.

I have seen the tenancy agreement executed between the Respondent and Samuel Kivumbi. I have also seen the long lease executed between Yahaya Walusimbi and the Respondent. The lease itself is not registered. Neither of these documents is stamped as required by the stamps Act Cap 342 laws of Uganda. By section 42 thereof these two documents are inadmissible in

evidence. I therefore cannot admit them in evidence to show that there is a valid lease held by the Respondent from Yahaya Walusimbi. I cannot also accept that there was a tenancy agreement between the Respondent and Samuel Kivumbi; it cannot therefore be said that these transactions or termination thereof could give rise to a claim for recovery of land and therefore execution by eviction of Kivumbi and his assumed vendors. To make it worse the applicant is not such vendor put in by the said Kivumbi under an invalid tenancy agreement. He is on the land in his own right however adverse. The execution of the decree by removing possession from the applicant and indeed the vendors is unjustified in law or in fact. This being the case and given the fact that Kivumbi had earlier on surrendered his so called tenancy and disappeared from the scene, and did not even contest the suit filed against him, there is no need for this court to order execution and to evict the objectors or the in place of an assumed or putative landlord Samuel Kivumbi.

Indeed I have come to believe that Civil Suit No. 738/2003 was filed in abuse of the court process to victimize persons such as the objector rather than to recover land from Kivumbi. The suit is also vexatious and was wrongly endorsed as a summary suit. The unregistered lease is invalid. The lease and tenancy agreements annexed to the plaint are not stamped nor verified and are inadmissible in evidence. In effect therefore I would not only cancel the warrant and set aside execution which I hereby do, but I would also set aside the decree as issued by this court. I also dismiss the summary suit which should not have been prosecuted as such. The affidavit in support of the summary suit was not sworn by Samuel Kivumbi but by another Samuel Sebikenga. He does not state how he came to know of the unverified transactions or correspondence between Kivumbi and the plaintiff. On the face of it the summary suit should not have led to the decree of this court and any eviction. The process of this court was abused by a crude litigant and its lawyers who should not have done what has sadly transpired as a shoddy piece of lawyering gimmickry. The suit could easily have led to bloodshed and a severe breach of the peace. In saying this I order that the land under dispute be left in the possession of the objector and the vendors and it be removed from any attachment in execution of the impugned decree. I also order the respondent to pay the costs of these proceedings.

R.O. Okumu Wengi

JUDGE

26/2/2004.

3/3/2004

Ayigihugu for objector

Musoke for Respondent

Objector and others in court.

Senabulya Court Clerk.

Ruling read in open court in presence of above.

R.O. Okumu Wengi

JUDGE

3/3/2004.