THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL REVISION NO. 002 OF 2007

(Arising from Miscellaneous Application No. 43 of 2006 in

Jinja Chief Magistrates Court Civil Suit No. 124 of 2006)

NOOR MUHAMMED ::APPLICANT

VERSUS

JAFFERY WANAMI ::RESPONDENT

REVISION ORDER

The applicant brought this application under the provisions of s.83 of the Civil Procedure Act (CPA) for orders that the ruling of His Worship Ssalaamu Godfrey Ngobi, Magistrate Grade I sitting at Jinja which was delivered on the 19/01/2007 be revised and set aside and for costs of the application. The application was supported by the affidavit dated 22/01/2007 deposed by Mr. Wafula Charles, an advocate with the firm of Mangeni, Wafula & Co., Advocates, (the applicant's advocates). The respondents filed an affidavit in reply dated the 19/07/2007, deposed by Jacob Osilo, an advocate with M/s Okalang Law Chambers (the respondent's advocates).

When the application came up for hearing on 9/04/2009, counsel for the respondent raised two preliminary objections. One related to the procedure adopted here while the other related to the affidavit in support of the application. There was also contention about the propriety of the affidavit in reply to the application. I found that the procedure adopted in the matter was proper and struck out the affidavit in support of the application, as well as the affidavit in reply thereto, for not disclosing the sources of the information contained in them. Nonetheless, I allowed the application to proceed on its merits and my reasons are stated in my ruling dated 06/07/2009.

In order to fully appreciate the issues and point to be disposed of in this application, I found it necessary to set out the facts from which the application arose in some detail. They are that by a specially endorsed plaint, the applicant sued the respondent in Civil Suit No. 124 of 2005 at the Chief Magistrates Court in Jinja. He claimed for shs. 1,900,000/=, being the balance due and outstanding on account of a lorry that the respondent bought from him. The respondent did not apply for leave to defend the summary suit. As a result, on the 3/03/2006 the Chief Magistrate entered

judgment and a decree for the respondent to pay to the applicant shs. 1,900,000/= and the costs of the suit.

At the request of counsel for the applicant, the plaintiff's Bill of Costs was taxed *ex parte* on the 27/02/2006 and allowed at shs. 1,611,600/=. On 17/04/2006, the first warrant of attachment and sale was issued in respect of the respondent's property (the motor vehicle for which the balance in the suit was claimed which had been registered as No UAE 725H. The warrant was returned on 23/03/2006 with a report that the respondent had dismantled the vehicle and made execution impossible. Kigulu Express Auctioneers applied for a renewal of the warrant by arrest of the respondent. On the same day, a warrant was issued for the arrest of the respondent to recover shs. 1,900,000/= plus costs of shs. 1,611,000/= making a total of shs. 3,514,600/=.

On the same day (23/03/2006) the parties entered into a settlement agreement. It was signed by the respondent (judgment debtor), counsel for the applicant (judgment creditor) and Lugwire Peter (the court bailiff). It was therein agreed that the judgment debtor had paid shs. 500,000/= towards the judgment debt, that the balance outstanding was shs. 2m, that would be paid in two equal instalments of shs. 1m. It was further agreed that the 1st of such instalments would be paid on 23/04/2006 while the second one would be paid on 23/05/2006. It was also agreed that on failure to do so, the respondent would be arrested or other execution would be carried out to levy the amount. The respondent also agreed to pay the bailiff's fees of shs. 500,000/= in equal instalments, on the same dates as the agreed balance due. The consent was lodged in court and endorsed by the magistrate on 20/04/2006.

It appears the respondent did not honour the consent settlement because on 31/05/2006 a warrant for the attachment and sale of the respondent's property (a permanent lock up, No. 25B Cathedral Road, Bugembe) was issued to recover shs 1,400,000/= being the decretal sum due to the plaintiff and further costs of shs. 1,611,000/= (altogether a total of shs. 3,011,600/=). The approximate value to be recovered by the sale was stated in the warrant to be shs. 5,000,000/=. Auction of the property was advertised in Bukedde news paper on 3/06/2006 and it was to take place within 30 days of the advertisement.

On 26/07/2006 the respondent deposed an affidavit in which he stated that he had paid the applicant's advocates shs. 17,560,000/=. He attached several receipts in respect of payments made to

the applicant totalling that amount. He further averred that his property was under attachment due to a claim of shs. 3,011,600/= yet that was not the amount outstanding from him. He prayed that execution be stayed. After reading the affidavit the Magistrate G1 issued an order for stay of execution in which he stated that he was satisfied that sale ought to be stayed. The court bailiff was directed to halt any attempts to sell the property.

By letter dated 28/07/2006 filed in court on the 17/08/2006, the auctioneers filed a return in court in respect of the warrant that had been issued to them. It included an agreement of sale to show that on 10/07/2006, Kibstar General Auctioneers sold the respondent's lock up at Bugembe to one Musa Wadhuwa for shs 4,700,000/=. On 18/08/2006 the Chief Magistrate issued an order for delivery to purchaser of the land to enable the auctioneer to put the purchaser in possession thereof. On 21/08/2006 the bailiff reported that he had effected the order.

But before that, on 01/08/2006 the respondent had filed Misc. Application No 43/2006 under the provisions of s.34 of the CPA in the Magistrates' Court. He sought for a declaration that the decree in C/S No. 124 of 2006 had been duly discharged and/or satisfied, and for orders that the attachment of his house be lifted, as well as for costs of the application.

The applicant (herein) opposed the application on the grounds that the respondent had been duly indebted to the applicant at the time of filing the suit. Further that the respondent had entered into a consent settlement on the 23/03/2006 wherein shs 500,000/= was deducted from the outstanding amount but he still failed to pay the balance. That upon the respondent's failure to pay, execution issued to attach and sell his lock-up No. 25B situate at Bugembe. The applicant further averred that the decree in Civil Suit No. 124 of 2004 was duly satisfied upon attachment and sale of the lock-up and a return of the execution was filed in court. It was the applicant's contention that in the interests of justice and equity court ought to dismiss the application for having no merit.

The trial magistrate delivered his ruling on the 19/01/07 after hearing submissions from counsel for both parties. He concluded that the applicant herein had gone to court and put up a false claim and obtained a judgment leading to the sale of the respondent's property. Relying on the provisions of Article 126 (2) (e) of the Constitution of the Republic of Uganda, he decided that the whole process was illegal and could not be countenanced by a court of law. He released the respondent's property from attachment and ordered that the purchaser be evicted from it. The decree complained against

was not lifted and remains subsisting. The trial magistrate further ordered that the applicant (now the respondent) be paid ¾ of the taxed costs for the application.

The applicant then filed this application on the 22/01/2007 for revision of the proceedings and for an order setting aside the trial magistrate's ruling and orders. Numerous grounds for the application were stated in the notice of motion; but I found that the grounds were only 5 as follows:

1. That the trial magistrate's order was issued in total disregard of the consent settlement signed by the same magistrate.
2. That the trial magistrate erred when he granted the application to nullify the attachment without first granting the applicant leave to defend (the suit).
3. That the trial magistrate acted with bias when he issued an order during the court vacation, without a certificate of urgency, to stop the court bailiff from selling the suit land when the same had already been sold.
4. That it was illegal and irregular to grant an eviction order against a bona fide purchaser in possession who had bought the land pursuant to a court order, without giving him an opportunity to be heard.
5. That the trial magistrate exercised his jurisdiction illegally and acted with material irregularity when he cancelled the execution.

The advocates representing both parties filed written submissions to dispose of the application. M/s Wafula & Co. Advocates who represented the applicant filed submissions on 8/04/2009. Okalang Law Chambers for the respondent filed submissions on his behalf on 27/08/2009.

In their submissions, the applicant's advocates argued that the trial magistrate acted illegally or with material irregularity when he purported to lift the attachment of the respondent's property. Counsel for the applicant argued so because the trial magistrate allowed the respondent who had not applied for leave to defend the suit or filed a defence to contest the contents of the judgment in default of a defence. In their view, when he failed to apply for leave and file a defence, he admitted all that was contained in the plaint and could not thereafter challenge it as he did in Miscellaneous Application No. 43 of 2006. That by entertaining the respondent's claims that he paid over and above what was due to the applicant was in a way allowing the respondent to file a defence in the suit after judgment had been entered against him.

Counsel for the applicant further argued that following his failure to file a defence, the respondent entered into a consent settlement wherein he undertook to pay the applicant certain monies in two instalments. That his attempt to bring evidence to the effect that he was coerced into entering that consent was not supported by any evidence and the trial magistrate erred when he relied on it. It was also contended for the applicant that the trial magistrate's finding that the decree was obtained through fraud was erroneous because he also found that by the time judgment was entered against the respondent, he was still indebted to the applicant though not in the amount claimed in the plaint. Counsel further submitted that the trial magistrate acted illegally when he came to the finding that at the time of filing the suit the respondent was indebted to the applicant in the sum of shs. 500,000/= only. In his view the trial magistrate could not have come to that conclusion because there was no WSD filed to enable him to do so. He challenged the magistrate's reliance on certain notes that had been made on Annexure "B" to the applicant's affidavit in support of the application as not being part of the document between the parties thereto.

Counsel for the applicant finally submitted that the trial magistrate's order lifting the attachment occasioned a miscarriage of justice, because the sale had already been concluded and an independent party had taken possession of the property. That in addition, the trial magistrate did so without giving that party an opportunity to be heard. It was also his view that the order to set aside the attachment could have only been made after an application to set it aside. He concluded this was not only irregular but illegal.

In reply, counsel for the respondent pointed out the contradictions in the amounts named in the warrants that were issued in attachment of the respondent's property. The respondent's counsel also pointed out the fact that while the applicant insisted that execution issued following the consent settlement, the same was abandoned and the respondent instead resorted to the original decree which was based on an erroneous amount that had been stated in the plaint.

Counsel for the respondent then submitted that an applicant under s.34 of the Civil Procedure Act requires court to consider all questions arising from the execution of a decree, i.e. whether they be connected to execution, discharge or satisfaction of the decree. In his view this court had to answer three questions, viz:

i) How much of the decretal amount was still due?

ii) Whether the consent settlement affected the decree, and if so whether it was legal.

iii) Whether the execution in question was lawful.

With regard to the first question counsel for the respondent argued that the decree had been discharged because the respondent proved that he had paid the whole of the purchase price for the lorry by the time the decree was obtained. It was therefore his submission that the respondent was entitled to a declaration that the decree had been discharged. As to whether the sale of the property was lawfully done, counsel for the respondent argued that it was illegal because the respondent did not owe the applicant shs. 3,011,600/=, as was indicated in the warrant of attachment. He relied on the summary of payments attached to the respondent's affidavit (dated 31/07/2006 for the application to lift the attachment of his property). Counsel for the respondent further contended that the sale was illegal and void because though it was advertised to be by public auction to be held within 30 days of the advertisement (i.e. by 2/07/2006), the return of the warrant indicated that it was held on 10/07/2006, about 8 days after that period had expired.

Counsel for the respondent further contended that by the time the respondent filed the application for a declaration that the decree had been discharged the bailiff had not yet filed a return in respect of the warrant. He challenged the return for having been back-dated because though the letter submitting the return was dated the 28/07/2006; the court stamp indicated that the letter was received in court on 17/08/2006. That in addition, the sale was carried out in spite of an order for stay of execution that had been issued on 26/07/2006. It was further contended for the respondent that the sale was illegal because the bailiff did not explain what happened to the balance from the shs. 4,700,000/= recovered from the sale, after he remitted shs. 3,011,600/= to the judgment debtor's advocates.

Finally, counsel for the respondent argued that setting aside of the sale did not prejudice the buyer because he could have recourse to judgment debtor in another suit. That in view of the illegalities pointed out, the trial magistrate was right when he lifted the execution and ordered that the property be returned to the respondent.

In view of the submissions presented by counsel for both parties and the grounds raised in the application, 7 questions need to be answered in this revision as follows:

i) Whether the application was properly disposed of under the provisions of s.34 of the Civil Procedure Act.
ii) Whether the default judgment and decree entered against the respondent were valid.
iii) Whether the agreement to settle the decree was valid; if so, what was its effect on the decree?
iv) Whether the order for stay of execution issued on the 27/07/06 was valid.
v) Whether the order for cancellation of the execution was issued with material irregularity or illegality.
vi) Whether the order to return the property to the respondent was illegal and/or occasioned a miscarriage of justice.
vii) Whether the applicant is entitled to the remedies claimed.

I will now proceed to dispose of the questions in the same order that they appear above.

i) Whether the application was properly disposed of under the provisions of s.34 of the Civil Procedure Act.

It was contended for the applicant that the trial magistrate should not have entertained an investigation into whether the respondent had paid off the debt due before the suit was filed, without first allowing the respondent to file a WSD. This requires this court to examine the purpose of s.34 of the CPA in order to establish whether the magistrate had the power to look into that question. S. 34 of the CPA provides as follows:

> (1) 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, shall be determined by the court executing the decree and not by a separate suit.
>
> (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

The rationale for s.34 of the CPA was succinctly given in **The Registered Trustees of Kampala Archdiocese & Dan Mpungu v. Harriet Namakula, Richard Mugaba T/A Bamu Partners & Auctioneers, Kaggwa Nantamu Mike & G. Wakulyaka; H.C.C.A. No. 1024 of 1997,** which arose

from **Harriet Namakula v. The Registrar of Titles, H.C.C.S No 47 of 1996.** In H.C.C.A No. 1024 of 1997, Ntabgoba, J. discussed the purpose of s. 101 and s.34 (now s.35) of the CPA, put together with s.35 of the Judicature Statute (1996), which is now s.33 of the Judicature Act. S.33 of the Judicature Act provides for remedies, generally as follows:

> "33. The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided."

Ntabgoba, J. observed that s.101 (now s.98) of the CPA is an important provision in that it restates the limitless "inherent power of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." He went on to state that subsection (2) of S.35 (now s. 34) of the Civil Procedure Act is a deliberate provision made to assist the court in its compliance with s.35 (1) of the Judicature Statute, if the Court must, as is the intention of the two provisions, avoid a multiplicity of actions by determining all the matters arising out of the execution of decrees.

Ntabgoba, J. identified some situations in which the provisions of s.35 of the Judicature Statute, 1996 could be employed as follows:

> *"As far as I can understand the law, where in an execution a party to the case assists, connives or colludes with the bailiff, resulting in unlawful execution, then neither the party nor the bailiff can escape liability and the Court then should invoke S.35 (2) of the C.P.A. to avoid a multiplicity of suits so as to settle the matter within the same procedure. Examples are not far to find. They include a situation in which the judgment creditor identifies the wrong property to the bailiff for attachment, where the bailiff is privy to the truth. It also involves a situation in which the bailiff colludes with the judgment creditor to undervalue for sale the attached property. …"*

It is therefore the case that any question that is related to a wrongful or irregular execution falls within the ambit of situations that can be investigated under the provisions of s. 34 CPA. If necessary, the court will consider the investigation as a new suit by virtue of s. 34 (2) CPA. By implication, the court may re-open the suit in order to achieve the ends of justice and prevent the abuse of court process, as it is empowered to do by s. 98 of the CPA.

In the circumstances, I do not agree with the argument by counsel for the applicant that the trial magistrate had first to allow the respondent to file a defence before he could go into an investigation whether there were any monies due to the applicant before the decree was obtained. The trial magistrate had before him the equivalent of a new suit in which any question relating to C/S No. 124 of 2005 and the execution therein could be canvassed. All he had to do to clearly show that it was a new suit was to levy fees for it, and that was entirely in his discretion to do so or refrain from doing so. The questions that were raised in the application were therefore properly entertained by the court.

ii) <u>Whether the default judgment and decree entered against the respondent was valid.</u>

In respect of the decree and the execution that ensued, the trial magistrate ruled as follows:

> *In view of the fact that the plaintiff claimed for a sum not due and owing its (sic) clear that he obtained the subsequent decree with fraud. He even swore an affidavit to the effect that the defendant is truly and justly indebted to him to the tune of 1,900,000/= and that the same was still due and owing at the time of filing the suit. This is not true. … The claim of shs 1,900,000/= by the respondent plaintiff was manifestly illegal and fraudulent on his part. I am inclined to impute fraud on the part of the respondent/plaintiff as it was not a mistake to still claim for the whole shs 1,900,000/= at the time of execution yet shs 500,000/= had already been paid to him. For (the) applicant under cash receipt No.009 of the respondent's agents dated 3.3.06 paid shs 500,000/= and the application for execution was first made on 16th March 2006 without showing payment adjustments.*

In coming to these findings the trial magistrate relied on evidence that had been placed before him in Annexure "A" to Mr. Wanami's affidavit in support of the application. The annexure comprised of a

series of 17 memoranda of acknowledgement of receipt of monies by Pride Bonitas Enterprises Ltd., Jinja Law Office & Co. Advocates and Noor Mohammed. In his affidavit in reply to the application dated 9/09/2006, Mr. Noor Mohammed did not challenge the receipts; in fact he said nothing about them at all. This must had made the trial magistrate come to the conclusion that he/or his agents indeed received the amounts of money stated on the dates named in the receipts. The total amount towards the agreed price of the motor vehicle that had been received as at 22/04/2005, before the suit was filed on 22/12/2005 was shs 17,060,000/=. This left a balance of shs 500,000/= only outstanding, according to the agreement of sale, Annexure "B" to Mr. Wanami's affidavit dated 22/09/2006.

It was the respondent's case before the trial magistrate that he tried to have accounts reconciled with Mr. Noor Mohammed's lawyer. At the behest of Mr. Wafula, on 28/11/06 Mr. Wanami appeared in court to be cross-examined about the averments in his affidavits in support of the application. He then stated as follows:

> *"You induced me when I came to you to explain to you about the receipts. You did not want me to count the money from the time I started paying. You were angry that day. You drove the vehicle by your driver up to the police station where you entered the office of OC CID as I was explaining to OC CID you got up and directed the driver to break down vehicle and you headed for Bugiri. I also boarded a vehicle and headed for home. I got you personally trying to tow the vehicle away. I kept away as you were angry. …*
> *On 3.3.06 I brought the receipts to you and you merely picked them and left for Lira together with my receipts. You came back with the consent document and forced me to sign it. He could not accept reconciling the receipts. He said if I do not accept the document I was going to lose my house. For such fear of loss of my property I signed the document."*

It is unfortunate that the applicant's advocate did not give the respondent a hearing in relation to the amount that was claimed by his client. It was also negligent of the applicant when he did not reconcile his accounts before he filed the suit against the respondent. If he had, perhaps he would have discovered that the respondent had paid almost all that was due to him on account of the contract and this debacle would have been avoided.

A “decree” is defined by s. 2 (c) of the CPA as the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. Though the decree that was obtained in this suit purported to be a final decree, it is clear that the matters in controversy between the parties had not been conclusively determined. The applicant had either through a mistake by himself or his advocate, or through deliberate untruthfulness sued for more than he was entitled to.

That being the case, I am inclined to agree with the trial magistrate that the acts of the applicant were fraudulent. Osborn’s Concise Law Dictionary (1983, 7th Edition, Sweet & Maxwell, London) defines fraud as obtaining a material advantage by unfair or wrongful means; it involves moral obliquity. It must be proved to construct the common law action of deceit. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false. Fraud may also be constructive and in such cases, equity gives relief against acts and contracts, although untainted by any actual evil design, on the ground of general public policy, or on some fixed policy of the law.

The applicant had business records as was demonstrated by the respondent when he produced memoranda upon which the payments he made were accepted by the applicant’s employees and advocates. He therefore had no justification for claiming more in the suit than he was entitled to, except perhaps sharp practice. I find that whether it was actual or constructive, the applicant acted in a fraudulent manner when he lodged a suit for more than he was entitled to. The decree that he obtained was therefore null and void, *ab initio*.

iii) <u>Whether the agreement to settle the decree was valid; if so, what was its effect on the decree?</u>

The agreement to settle the decree was reached on 23/03/2006 between the respondent, counsel for the applicant and the court bailiff. This followed the issue of a warrant for arrest in execution on the same day in which the applicant claimed that the respondent was still indebted to him in the sum of shs 1,900,000/= together with costs of shs 1,611,000/=, i.e. altogether shs 3,511,000/=, but the warrant stated that the total then outstanding was shs 3,514,600/=.

It seems that in the consent settlement, the applicant's advocates purported to reduce the decretal amount and costs and they agreed with the respondent that he would pay a total of shs 2,500,000/= consisting of the decretal sum and the advocates' costs instead of shs 3,511,000/= as was reflected in the decree and the taxed bill of costs. It was then agreed that the respondent pay shs 500,000/= that day and the balance of shs 2,000,000/= would be paid in 2 equal instalments by 23/04/06 and 23/05/06. It was further agreed that the respondent would pay the bailiffs fees of shs 500,000/= in two instalments on the dates mentioned above. The applicant was to pay his advocates a further sum of shs 400,000/= as costs. For the judgment creditor, M/s Jinja Law Office acknowledged receipt of shs 500,000/= as part payment of the judgment debt in the suit.

If the decree had been valid the agreement above would have been a valid one changing the terms of the decree. Since it was filed in court and endorsed by the trial magistrate, it would then be the new decree upon which any execution would be levied. But I have already ruled that the decree in place was obtained fraudulently. And by virtue of the testimony of the respondent when he was cross-examined by Mr. Wafula in the court below, it appears he was coerced into signing the consent settlement. In the face of such illegalities the document could not be the basis of any legal action because illegality vitiates all that follows the alleged illegal act. No court can sanction what is illegal and illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon (**Makula International Ltd. v. Cardinal Nsubuga, 1982 HCB 11**).

iv) <u>Whether the order for stay of execution issued by the trial magistrate on the 27/07/06 was valid.</u>

The respondent appeared before the trial magistrate on the 26/07/2006 and upon an affidavit in which he averred that he had paid the shs 17,560,000/= to the applicant's advocates but a warrant had been issued against his property to recover shs 3,011,600/=. The trial magistrate issued an order for stay of execution, till further orders of the court. It was contended that the order was improperly obtained because no leave was sought to file the application for it yet the 26/07/06 was a day during the court vacation. Counsel for the applicant was of the view that an application first had to be made to move the court to entertain the application during vacation.

I perused the Judicature (Court Vacation) Rules (now SI 13-20). Save for a provision in rule 4 thereof that the court shall not sit to discharge civil business other than such civil business that shall, in the opinion of the presiding judge, be of an urgent nature, I did not find any specific requirement

for applications for certificates of urgency. Such applications are normally brought under the provisions of Order 52 rule 1 CPR. All that needs to be proved on such an application is that the matter is urgent. I am therefore of the opinion that if the trial magistrate thought the matter was urgent enough to be disposed of, then he had the discretion to so dispose of it, even without leave first being obtained to do so. There was therefore a valid order for stay of execution but it was issued after the 10/07/2006 when the sale is alleged to have taken place, but before the respondent was evicted from the property under execution.

Execution could have remained stayed but on the 18/08/06, I think by some mistake, the Chief Magistrate issued an order for delivery of the land to the purchaser. This compounded the problems in the execution process but it cannot be blamed on either party.

v) Whether the order for cancellation of the execution was issued with material irregularity or illegality.

It was argued for the applicant that when the trial magistrate entertained the respondent's claim that he was sued for more than he owed, he thereby indirectly allowed the respondent to give his defence yet a final decree had already been issued against him and executed. Counsel for the applicant was of the view that the trial magistrate ought to have first allowed the respondent to file a defence before entertaining the application.

Ordinarily, the procedure for achieving what the respondent achieved by his application under s.34 of the CPA would have been through the provisions of Order 33 rule 11 (now Order 36 rule 11) of the CPR. That provision gives court the power to set aside a decree obtained in default of applying for leave to defend the suit as follows:

> "After the decree the court may, if satisfied that the service of the summons was not effective, **or for any other good cause, which shall be recorded, set aside the decree, and if necessary stay or set aside execution,** and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit."
>
> **{Emphasis was supplied}**

Where the defendant opts to adapt this procedure, the trial magistrate would have had to set aside the decree first before considering whether to set aside the execution, if necessary. The reasons for allowing an application (good cause) under the provisions of Order 36 rule 11 are not limited. All the trial court needs to do is evaluate the reason and if it deems it good reason to set aside a decree the court records it and sets the decree aside. If it deems it reasonable to do so, the court would allow the defendant to file a defence in the suit and then proceeded to hear it on its merits. I therefore find that it was not mandatory that the respondent be allowed to file a WSD before his complaints about the proceedings and the execution that ensued could be entertained.

In addition, the provisions of Order 33 rule 11 and those of s.34 are not mutually exclusive. A party could opt into either of the two procedures given the needs/expediency of the situation at hand. In this case, there were a lot of anomalies related to the execution of the decree. One of them happened to be the fact that the applicant tried to unjustly enrich himself at the expense of a party who had not filed a defence. Suffice it to summarize it here and state that the rules of procedure are a guide to the orderly disposal of suits and a means of achieving justice between the parties. They should never be used to deny justice to a party entitled to a remedy (**Nassanga v. Nanyonga, [1977] HCB, 352**). The trial magistrate therefore occasioned no illegality or irregularity when he considered the evidence set out before him about the amount that was owed by the respondent before the suit was filed.

It was also argued for the applicant that the order to return the property that had been attached to the respondent was illegal because execution had been completed and a return filed in court. With all due respect to counsel for the applicant, his arguments were misplaced. The court could not stay execution that had been completed but it certainly could set it aside. This is apparent from the provisions of Order 36 rule 11 CPR. Court should also set aside any process of court that is vitiated by any illegality or an abuse of the process of court under the provisions of s.98 of the CPA.

vi) <u>Whether the order to return the property to the respondent was illegal and/or occasioned a miscarriage of justice.</u>

It was the opinion of counsel for the applicant that in such a case the court could not set aside the sale and order a return of the property in issue to the judgment debtor, especially without hearing the buyer out. Counsel submitted that the buyer was a bona fide purchaser of the auctioned property. He relied on the return to court for the submission that the execution was completed and therefore could not be lifted.

I closely reviewed the relevant legal provisions and the documents that were filed by the bailiff on the 17/08/2006 as the return of the warrant. The advertisement for sale of the property was placed in Bukedde of 3/06/2006. Auction of the property was to be 30 days from the date of advertisement. The terms of the sale were payment of cash or a bank draft. If the advertisement ran on 3/06/2006, then the day on which the auction should have been held was 3/07/2006. Order 22 rule 64 CPR (which was then order 19 rule 64) provided for the time of sale as follows:

> **"64. Time of sale.**
> No sale hereunder shall take place until after the expiration of at least thirty days in the case of immovable property, and, except in the case of property of the nature described in rule 40(2) of this Order, of at least fifteen days in the case of movable property, calculated from the date on which the public notice of sale has been advertised as provided in these Rules; except that in the case of movable property the judgment debtor may consent in writing to a less period."

Having advertised the sale, the same could not be adjourned to another day except by following the rules. Order 19 rule 65 (1) then provided for adjournment or stoppage of sale as follows:

> "(1) The court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his or her discretion adjourn the sale, recording his or her reasons for the adjournment; except that where the sale is made in, or within the precincts of, the courthouse no such adjournment shall be made without leave of the court."

Rule 65 (2) then went on to provide that were a sale is adjourned under sub rule (1) for a longer period than seven days, fresh public notice would be given, unless the judgment debtor consented to waive it. If the property was sold on 10/07/06 the fresh public notice was not necessary for the sale would have still have been within the time allowed by the rules. I however found fault with the purported adjournment in this case. No reason was assigned for it in the return to court, contrary to rule 65(1) above.

There were also other anomalies with the sale that made me question the bona fides of the bailiff. When the bailiff made his return to court, he annexed to it a Photostat copy of a memorandum of acknowledgment of receipt dated 25/07/2006 and issued by M/s Mangeni, Wafula & Co. Advocates, for shs 3,011,600/=. If he indeed sold the property on the 10/07/2006 and the buyer paid cash on that day, as was stated in the agreement of sale, why did the bailiff wait for 15 days before remitting shs 3,011,600/= to the applicant's advocates?

This behaviour on the part of the bailiff was suspicious. It appears he failed to dispose of the property within the time specified by the rules. Being placed in that position, the bailiff opted to fabricate documents instead of following the procedures laid down for such sales. In particular, Order 19 rule 77 (1) then provided that on every sale of immovable property the person declared to be the purchaser shall pay immediately after the declaration a deposit of 25 percent on the amount of his or her purchase money to the officer or other person conducting the sale, and, in default of the deposit, the property shall immediately be resold.

In addition to the above, the agreement of sale showed that the property was sold for shs 4,700,000/=. The bailiff paid shs 3,011,600/= to the applicant's advocates. What happened to the balance of shs 1,688,400/=? It has been held in numerous decisions of the courts in Uganda that Court Bailiffs are not supposed to pay themselves or anybody else from the proceeds of the sale in execution. According to rule 15 of the Judicature (Court Bailiffs) Rules which were then still in force, a court bailiff shall remit in court all proceeds of his or her execution within seven days of the execution and thereafter submit his or her bill of costs, including his or her fees and disbursement for taxation. In **Harriet Namakula v. Registrar of Titles** (supra) it was held that this rule is mandatory.

When he failed to remit the proceeds to the magistrate as well as declare the balance after he paid shs 3,011,600/= to the applicant's advocates, the court bailiff acted contrary to the law. He was also clearly fraudulent. If there was a balance after remitting what was due, then that was to be paid over to the judgment debtor. Since that did not happen, the trial magistrate was for the reasons that he gave in his ruling and for the ones stated here above correct when he set the execution aside. No irregularity or illegality was occasioned by his order, and I find so.

As to whether a miscarriage of justice was occasioned when the buyer was not given an opportunity to be heard, I do not agree that it was the trial magistrate's legal obligation to bring the buyer into the dispute over execution. The parties to the suit were those that are before the court in this application.

Court could take representations from them, their advocates and the bailiff involved. The record was also available for the magistrate to verify whether all that had been done was within the law and above board. Having established that the trial magistrate did everything that he was required to do in the circumstances; if any injustice was occasioned to the buyer then he had recourse in a separate action, not the application under revision herein. Order 19 rule 71 of the CPR then provided that no irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of the irregularity at the hand of any other person may institute a suit against him or her for compensation, or (if that person is the purchaser) for the recovery of the specific property and for compensation in default of the recovery.

The Court Broker or Court Bailiff has been declared by the Courts in Uganda as an agent of the Court and not of the parties. A court Bailiff has immunity under S.46 of the Judicature Act, so long as he acts lawfully. S. 46 (2) of the Judicature Act provided that an officer of the court or other person bonded to execute any order or warrant of any judge or person referred to in subsection (1) acting judicially, shall not be liable to be sued in any civil court in respect of any lawful or authorised act done in the execution of any such order or warrant. This means that where a Court bailiff acts unlawfully in the execution of his duties, he is not allowed the immunity (**Francis Nansio Micah v. Nuwa Walakira, Supreme Court C/A No. 9 of 1990**). The buyer may therefore have recourse to the respondent, the court bailiff or both.

Before I wind up this issue, I find it pertinent to comment about the behaviour of the applicant's advocates during the process of execution. Execution of orders is the duty of the registrar/magistrate and the court bailiff. The advocate has no mandate to actively participate in execution. In this case it seems the advocates were fully and physically involved in the execution of the order as though the court had not engaged a bailiff. When he was cross-examined the respondent, Mr. Wafula opened a can of worms that squirmed out much to his embarrassment. The respondent revealed that while they were at the police station, Mr. Wafula personally ordered the driver of a breakdown vehicle to tow the suit vehicle away in attachment. This behaviour on the part of an advocate was doubt unprofessional. Advocates should desist from personally or physically participating in execution proceedings. Once a bailiff is appointed the advocate should step aside and let the bailiff do his work.

vii) <u>Whether the applicant is entitled to the remedies claimed.</u>

The applicant sought for orders that the orders of the trial magistrate be set aside. This would mean that the attachment resumes and the buyer is re-instated in the property. Section 83 of the CPA provides that the High Court may exercise its powers of revision in matters where a magistrates' court has exercised a jurisdiction not vested in it in law; failed to exercise a jurisdiction so vested in it; or acted in the exercise of its jurisdiction illegally or with material irregularity or injustice. This court may then make such orders in it as it thinks after the parties are given the opportunity of being heard. However, according to s. 83 (d) CPA the powers of revision shall not be exercised where from lapse of time or other cause, the exercise of such powers would involve serious hardship to any person.

The applicant did not prove that the trial magistrate exercised a jurisdiction that was not vested in him. Neither did he prove that he exercised his jurisdiction illegally or with material irregularity or injustice. The applicant is therefore not entitled to any of the remedies that he claimed in his application and it is hereby dismissed with costs to the respondent.

Irene Mulyagonja Kakooza
JUDGE
14/06/2010