THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

HCMA NO. 87 OF 2006

(Arising in Misc. Appl. No. 520 of 2005 Nakawa Court)

(Arising from Misc. Appl. No. 513 of 2004)

(Arising of Misc. Appl. No. 32 of 2004)

(Arising from Chief Magistrates Court of Mengo Civil Suit No. 542 of 1997)

MAXWELL MULESA ONYAIT ::::::::::::::::::::::::::::::::APPLICANT

VERSUS

1. **MICHAEL SERUWU**
2. **WASSWA CHARLES**

::::::::::::::::::::::::RESPONDENTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This application by Notice of Motion was brought under O.48 r.1 and 3 of the Civil Procedure Rules and Section 64 (e) of the Civil Procedure Act. It would appear that the court file then disappeared or rather got misplaced. This file has been re-constituted using documents provided by counsel for the applicant. Hence the '***Received***' Stamp on them bearing the date '***15 OCT 2009.***' The law under which it is preferred has since been altered by learned Counsel for the applicant to Sections 83 (a) and (c) and 98 of the Civil Procedure Act and O.52 rules 1, 2 and 3 of the Civil Procedure Rules. It is for orders that:

a). A revision order be made revising the order/decision in Misc. Application No. 520 of 2006 (sic) issued by the Chief Magistrate's Court of Nakawa on 30th May 2006.

b). The decision of His Lordship (sic) Ariu Tadeo in Chief Magistrate's Court of Mengo Civil Suit No. 542 of 1997 be revised for lack of jurisdiction.

c). Costs of the application be provided for.

Representations:

M/s Kasozi, Omongole & Co. Advocates for the applicant

M/s Luzige – Kamya, Kavuma & Co. Advocates for the respondent.

BACKGROUND

The facts as gathered from the pleadings are that Maxwell Mulesa Onyait, the applicant, was sued by Michael Seruwu, the 1st Respondent in the Chief Magistrate's Court of Mengo at Mengo in 1997 vide Civil Suit No. 542 of 1997. The suit was for non-payment of Shs.3,000,000/= owed by the applicant to the 1st respondent. As security for the loan the applicant had pledged with the 1st respondent his certificate of title for land comprised in Leasehold Register Volume 801 Folio 4 Plot 83 Katale Road measuring approximately 0.055 of a hectare at Naguru, Kampala. The parties had agreed that in the event of the borrower defaulting to pay back the money as agreed the lender would have the right to sell the said property in order to recover the sum due.

As fate would have it, the applicant/borrower defaulted. The 1st respondent/lender filed a suit in court for recovery of the amount due. The suit proceeded ex parte upon the applicant failing to enter appearance and file a defence. Judgment was therefore entered in favour of the 1st respondent and an order for sale of the suit property was issued. The property was duly attached and the intended sale advertised in the press.

From the records also, the house was valued at Shs.21,000,000/= but no buyer offered that amount. It was eventually offered to the 2nd respondent for a sum of Shs.15,000,000/= which he paid in two installments. This application arises out of the above transactions.

The grounds in support of the application are contained in the affidavit of the applicant but briefly they are that:

a). The applicant was not served with Misc. Application No. 520 of 2005 filed at Nakawa Chief Magistrate's court on which the eviction order was issued and was not served with the eviction notice rendering it irregular.

b). The Chief Magistrate's court lacked jurisdiction to hear and decide Civil Suit No. 542 of 1997.

c). The trial Magistrate lacked jurisdiction to make an order over the matter still pending in High Court.

d). The whole process is tainted with illegality and done in abuse of court process.

e). The application is filed without reasonable delay and it is in the interest of justice that the application be allowed.

As regards the applicant's complaint that he was not served with Misc. Application No. 520/2005 filed at Nakawa Chief Magistrate's court, I have already indicated that the hearing of Civil Suit No. 542 of 1997 proceeded ex parte upon the defendant/applicant failing to enter appearance and file a defence.

Under O.8 r.3 of the Civil Procedure Rules, every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be admitted in the pleading of the opposite party, shall be taken to be admitted. From the records, the trial court was satisfied that the defendant/applicant had been served, he did not file a defence and judgment was entered against him. His liability to the defendant/1st respondent was determined at that stage.

Learned Counsel for the 1st respondent has submitted that the applicant chose not to defend ***Civil Suit No. 542/1997*** which was decided ex parte and he excluded himself from further process of court. That he cannot claim that he was not served with ***Misc. Application No. 520/2005*** because he had no right of audience before court. This submission cannot be faulted. The law is that a defendant who does not enter appearance

or file a defence is not to be heard; and can only challenge the correctness of the ex parte judgment entered against him in an application to set it aside: ***Kateeba vs Kanyehamye [1988 – 90] HCB 125.***

For as long as he had not succeeded in setting aside the ex parte judgment, his complaint in this regard lacks merit.

As regards the applicant's contention that the Chief Magistrate lacked jurisdiction to hear and decide ***Civil Suit No. 542 of 1997***, the applicant says that the value of the suit property was over Shs.200m; that the pecuniary jurisdiction of the Chief Magistrate at the time was Shs.5,000,000/=. Hence the contention that the trial court lacked jurisdiction.

From the pleadings, the applicant borrowed Shs.3,000,000/= from the 1st respondent. He failed to pay it back. The subject matter of the suit was for recovery of Shs.3,000,000/=. The value of the subject matter was therefore Shs.3,000,000/= and the pecuniary jurisdiction of the Chief Magistrate was Shs.5,000,000/=. He had jurisdiction to hear and determine the suit. The value of the subject matter would be Shs.200m if the loan was for Shs.200m. That was not the case.

This ground must also be rejected and I have done so.

As regards the complaint that the trial Magistrate lacked jurisdiction to make an order over the matter still pending in High Court, it is contended on behalf of the applicant that on 19th April 2006 his lawyers wrote to the Chief Magistrate Mengo over a purported eviction order granted after the file had been removed from its jurisdiction which letter was copied to the Registrar High Court. That the Registrar High Court then called for the said file from Nakawa Court and the same was handed over.

From the pleadings, the applicant's property was advertised for sale. It had been valued at Shs.21,000,000/= but no buyer offered that amount. From the records also the court broker sought permission from court to sell the house at Shs.15m which permission was granted. The house was subsequently sold to the 2nd respondent by the auctioneers

according to the Sale Agreement dated 25/01/1999. In fact the applicant filed Misc. Application No. 130 of 1999 (arising out of Civil Suit No. 542/97) for an order to cancel the sale of his land to the 2nd respondent but it was dismissed on 24/02/2000 according to an order of court duly signed by the applicant's counsel and court on 6/03/2000. Despite the many applications to block the execution, the applicant failed to have the ex parte judgment quashed. The lawyer he says frustrated his effort died in 2002 according to the death certificate he has exhibited.

It has been submitted by learned counsel for the respondents that the letter from the applicant's lawyers, Annexture D to the applicant's affidavit in support, could not stay execution and it was an abuse of the court process. He has submitted further that the procedure of staying execution when a case from the lower court is called by the High Court is clearly stated in O.43 r.4 of the Civil Procedure Rules and a party must make a formal application to court to stay execution and not by a mere letter as counsel for the applicant appears to have done in the instant case.

There is merit in this submission also.

It is noteworthy that the applicant's application for an order to cancel the sale (Misc. Application No. 130/1999) was dismissed on 24/02/2000. The application was heard and determined on merit. He sought leave to appeal against the order of dismissal vide Misc. Application No. 91 of 2000 but it also failed according to a ruling of the Chief Magistrate delivered on 8/05/2001. He brought his complaints to the High Court vide Misc. Application No. 32 of 2001 but it was also dismissed for want of prosecution on 25/06/2004. That's how the matter went back to the lower court for execution of its judgment. Although the applicant made an attempt vide HCMA No. 513 of 2004 to cause reinstatement of HCMA No. 32/2001 following the dismissal, it remained unheard till his lawyer withdrew it on 30/03/2009 in favour of proceeding with the instant application. While the application (HCMA No. 513/2004) was pending, the 2nd respondent was put in possession of the suit premises. In the absence of an application for stay of execution pending determination of HCMA No. 513 of 2004 and an order for stay of execution made there under, temporary or interim, I do not think that the applicant has reason to

complain. He had services of counsel. They never applied for stay of execution. The Chief Magistrate may have acted incorrectly by going ahead to give vacant possession of the suit premises to the 2nd respondent after High Court had called for the file yet once again, this would be an error or lapse which can be ignored. The second respondent as purchaser of the suit property would not forever be denied access of the property he had duly paid for and there was no order of court stopping execution. It is settled law that the court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature: ***Nanjibhai Prabohusdas & Co. Ltd vs Standard Bank Ltd [1968] E.A. 670***.

This ground must also fail for lack of merit and it fails.

As regards the complaint that the whole process was tainted with illegality and done in abuse of the process of court, I have already indicated that the appellant's complaint is based on the fact that he was not served with Misc. Application No. 520/2005 and also the eviction notice.

I cleared the respondents on this point when dealing with ground one.

He complains that no order was obtained prohibiting him from transferring or charging the property in any way and cites O.22 r.51 of the CPR. He forgets that he himself had handed over the certificate of title to the 1st respondent voluntarily and mandated him to sell the property in the event of a default in servicing the loan.

Learned Counsel for the applicant has submitted that the respondent (didn't specify who but it looks like he had the 1st respondent or curt bailiff in mind) did not further follow the process of sale of the applicant's property. He claims for instance that the 2nd respondent deposited Shs.7,500,000/= instead of Shs.15,000,000/= which court had ordered to be deposited and that the proceeds of the sale were mishandled. Court takes the view that for the sale to be valid, it has to comply with the law as laid down in O.22 rules 62, 63, 64 and 65 of the CPR. Under O.22 r.62, except otherwise prescribed, every sale in execution

of decree shall be conducted by an officer of the court or by such other person as the court may appoint for that purpose. The sale must be made by public auction in the prescribed manner.

In the instant case the warrant was issued M/s Quickway Auctioneers & Court Bailiffs. They are the ones who conducted the sale.
The second respondent has objected to this application, saying that he was wrongly joined as a party to the application whereas he was never a party to the Civil Suit No. 532/1997 nor was he party to Misc. Application No. 520/2005 under which a revisional order is now being sought. Learned Counsel for the 2nd respondent has submitted that no leave of court was sought to add him as a party to the main suit and cannot therefore be a party to this particular application; and that the procedure laid down under O.1 r.10 (2) was never followed.

I have already indicated that the 2nd respondent responded to an advertisement in the press for the sale of the suit property. His bid was successful and a sale agreement was concluded between him and the court bailiff. He is what lawyers call a bona fide purchaser for value without notice, until his interest in the suit property is successfully challenged. If the appellant has issues with him regarding his interest in the suit property, he can file an ordinary suit on the plaint challenging his proprietorship. It would be improper to challenge his proprietary interest in an application for revision arising out of a suit or proceeding in which he was not a party. The issues herein are not questions arising between the parties to the suit in which the decree was passed, or their representatives, relating to the execution, discharge or satisfaction of a decree which under Section 34 of the Civil Procedure Act are determined by the court executing the decree. The applicant therefore requires a separate suit to challenge the 2nd respondent's title. He was wrongly joined in this application.

As regards the other alleged irregularities, in case I am wrong on the above, O.22 r.77 (1) requires that for a person to be declared a purchaser, he/she should pay immediately after the declaration a deposit of 25% on the purchase price to the officer or other person conducting the sale. In the instant case he deposited more than 25% of the purchase

price. He deposited Shs.10,000,000/=. The law required him to pay the balance within 15 days and he did just that. Upon completion of payment an instrument of transfer was executed in his favour. There was therefore due compliance with O.22 r.78 (2) (a) of the Civil Procedure Rules.

It is conceded by learned counsel for the respondents that money was deposited in court after deducting costs of the sale. He submitted, however, that this was not the responsibility of the 2nd respondent.

I agree. His responsibility stopped at ensuring that payment was to the officer conducting the sale. Receipts have been produced indicating that the sale proceeds were paid to the auctioneers in the names of counsel for the judgment creditor. Besides, the sale was approved by court. There is documentary evidence to show that the property was valued at Shs.21m but was sold at Shs.15m with the approval of the court. I have not seen any irregularity in the sale to write home about.

Finally, the applicant alleges that the suit property was a matrimonial property which called for the consent of the applicant's spouse and children in accordance with Section 39 of the Land Act. I think the applicant has been misguided. He borrowed the money from the 1st respondent in 1996, before the Land Act came into force. He therefore took the 1st respondent's money at a time when the law did not require spousal consent before the property could be mortgaged. In any case as learned counsel for the respondent has correctly submitted a matrimonial home can also be attached and sold in execution like any other property.

As regards the submission that the application was filed without reasonable delay and it is in the interest of justice that it be allowed, I would think that justice is not a one way affair. It (justice) is an entitlement of each party to the dispute.

The borrowing/lending transaction was concluded in 1996. The applicant voluntarily parted with his certificate of title in respect of the suit property and mandated the 1st respondent to sell the suit property in the event that he fails to pay. The sale took place in

1999 and the 2nd respondent took possession of the suit property in 2006. Judgment in Civil Suit No. 542 of 1997 is still valid as it has not been set aside on appeal or otherwise. The applicant did not apply for stay of execution or lodge caveat on the property to protect his hitherto interest in it. He has filed application after application all lacking in merit. Under Section 83 of the Civil Procedure Act, a court should not exercise its revisional power where there is lapse of time or where the exercise of such power would involve serious hardship to any person: ***Kabwengure vs Kanjabi [1977] HCB 89***.

I am satisfied that in the exercise of its jurisdiction the trial court did not act with any material irregularity and injustice to warrant any revisional order. It cannot therefore be in the interest justice that the impugned order be revised.

The application is disallowed with costs to the respondents.

Orders accordingly.

Dated at Kampala this …28th day of May 2010.

Yorokamu Bamwine
JUDGE