

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 76 OF 2010

1. TUMUSIIME JOEL
2. TUMUSIIME PAUL
(*Suing through their next friend Christine Kyomugisha*).....APPLICANTS

VERSUS

1. EDIRISA DAMULIRA
2. CHIEF REGISTRAR OF TITLES.....RESPONDENTS

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by notice of motion brought under sections 177, 188 of the Registration of Titles Act, cap 230; section 33 of the Judicature Act, cap 13, as amended; and Order 52 rules 1 & 2 of the Civil Procedure Rules (CPR), for orders that:-

- (a) The Chief Registrar of Titles cancels the registration of the 1st Respondent on certificate of title of the property comprised in Kyadondo Block 262 plot 872 land at Kibuye.
- (b) The Chief Registrar of Title reinstates the Applicants as registered proprietors of suit property.
- (c) Costs of the application be provided for.

The grounds on which the application is based are that:-

1. The Applicants recovered the said land from the 1st Respondent by proceedings in the Chief Magistrate's court of Nakawa.
2. It is just that the aforesaid consequential orders be made.

The application is supported by the affidavit of **Christine Kyomugisha** the mother of the Applicants and their next friend in the suit. The application is opposed by the 1st Respondent **Edirisa Damulira** who filed an affidavit in reply. The 2nd Respondent, the Chief Registrar of Titles did not file any affidavit in reply nor did she appear at the hearing of the application.

In his submissions, learned Counsel Francis Bwengye relied on the affidavit of **Christine Kyomugisha** in support of the application. She deponed that the Applicants are infants who were registered proprietors of the suit property and that the Respondent with the father of the Applicant fraudulently transferred the suit property into the names of the Respondent without the knowledge of the registered proprietors. The Respondents sued through their next friend to have the purported buyer's name cancelled from the certificate of title. Eventually the Chief Magistrate entered a consent judgment which the parties agreed on in court. After that the court issued a warrant of execution which was eventually carried out. There was no application by the Respondent to stay the execution. The Respondent was ejected from the suit property and Applicants were given possession of the same.

Counsel Bwengye drew this court's attention to to paragraph 4 of the 1st Respondent's affidavit in reply and contended that in the said paragraph the said Respondent admits that the land was sold to him by a person as opposed to persons and that Christine Kyomugisha was the former spouse to that person. He maintained that this in effect is an admission that the land was sold to him by a person who is not the owner. He also contended that paragraph 6 of the Respondent's affidavit in reply is a blantant lie in that it avers that Christine Kyomugisha is the one who sued him whereas in essence it was the registered proprietors who sued him through their next friend. He further submitted that paragraphs 6, 7, 8, 9, 10 and 11 of the same affidavit in reply are also lies, especially that the Respondent was in court without Counsel and yet all along he has had Counsel's representation. He also maintained that paragraph 16 was a lie that the Respondent protested when the consent judgment was entered into and the decree issued, yet the Respondent did not appeal. He further submitted that the averment by the Respondent in paragraph 16 that he has applied to Nakawa Chief Magistrate's court for revision is misleading as there is no such application. He submitted that it is also a lie in paragraph 17 that the Respondent has applied to the High Court for revision to set aside the order. He maintained that such applications would be inconsequential even if the were made. He cited the case of **Bitaitana V Kananura [1977] HCB 34** to support his request that the Respondent's affidavit should be struck out for being full of falsehoods.

Secondly, Counsel Bwengye argued that the 1st Respondent's affidavit in reply does not provide a reasonable answer to the matters raised in the application. He submitted that it is narrative and oppressive with 20 paragraphs, and literally talking about the law. He cited the case of **Nakiridde V Hotel International [1987] HCB 85** to support his request to have it struck out for being argumentative. He also cited the case of **Massa V Achieng [1978] HCB 297** to request court to accept the Applicant's affidavit evidence as unrebutted and to issue the orders prayed for and provide for costs of the application.

The application was opposed by Counsel Kabanda for the Respondents who contended that the same emanates from an irregularity. He denied that the 1st Respondent applied for revision in the Chief Magistrate's court. Relying on the 1st Respondent's affidavit in reply, he submitted that the 1st Respondent deponed that he applied for revision of civil suit no. 123 of 2008, that the way the suit was handled exhibited irregularities when it allowed a purported consent not agreed upon between both parties to be reduced into a court order (paragraph 16). Counsel further submitted that during that hearing, the Plaintiff/Appellant's Counsel suggested an out of court settlement (paragraph 6) and the 1st Respondent agreed on condition that they refund the purchase price and interest accruing since the day of the purchase (paragraph 7). The Applicants at their own volition decided to refund U.Shs. 18,000,000/= (paragraph 8). The 1st Respondent suggested that the hearing in the Chief Magistrate's court proceeds on its merits but when the case was adjourned, the Plaintiff/Applicant and their Counsel never appeared (paragraph 10). He was shocked to be served with a draft consent judgment which neither he nor his Counsel signed (paragraph 12). A warrant of attachment was issued and he was forcibly evicted from his house (paragraphs 14 and 15). He had applied to court for the purported consent judgment and the resultant decree to be set aside in Civil Application No. 1 of 2011, a copy of which application is annexed to the affidavit in reply as Annexure E. In paragraph 9, the Respondent denies admitting that he bought the land through fraudulent means, but avers that he had asked the Chief Magistrate's court to proceed with the case on merit, though the Plaintiff's and their Counsel went ahead to file a consent judgment, which consent judgment was not signed by him or his Counsel. He cited **Bank of Uganda & Ors V Bassajabalaba & Ors Misc. Application No. 566 of 2008**, unreported, to support his case. He maintained that the Respondent's affidavit in reply was not argumentative but only depones to what transpired before the purported judgment in respect to which the parties came to court. He also referred to paragraph 16 of the Respondent's affidavit in reply where it was deponed that the Respondent has applied to Nakawa court to have the purported judgment and decree set aside. He submitted that in such cases the evidence is submitted to court through affidavits, 20 paragraphs of an affidavit is in no way illegal or argumentative. He contended that if the application was allowed to proceed justice would not be served since he had sought the Nakawa court to revise and set aside the consent order, and that it would be a miscarriage of justice if the certificate of title was cancelled in such circumstances.

In rejoinder, Counsel Bwengye submitted that the the case of **Bank of Uganda & Ors V Bassajabalaba & Ors** does not say that consent which is not signed has to be entered by two parties. It must be on record that the two parties entered consent before the Chief Magistrate. He stated that the 1st Respondent employed several Counsel and as a result could not know what went on in court. He also contended that this court cannot put back the clock as regards the execution and the fact that the Applicants are in possession of the property. He maintained that there are no likely chances of success of the application for review of the case.

I have carefully addressed the pleadings and the affidavit evidence on record, including the submissions of both Counsel on the matter. I will point out, without going into the merits of this application, that the court record indicates that the basis on which this application is based, that is, a consent judgment in respect of *Civil Suit No. 223 of 2008 Tumusiime Joel & Tumusiime Paul V Edirisa Damulira* is a subject of revision pending before the High Court at Nakawa in *Civil Application No. 001 of 2011 Edirisa Damulira V Tumusiime Joel & Tumusiime Paul*. The consent judgment is being challenged by the Respondent to this application who was the Defendant in civil suit no.223 of 2008. A copy of the application for revision is annexed to the Respondent's affidavit in reply as annexure "E". Counsel for the Applicant on one hand contends that even if the application for such revision was there it would be inconsequential. The Respondent's Counsel on the other hand maintains that if the application was allowed to proceed justice would not be served since he had sought the Nakawa court to revise and set aside the consent order, and that it would be a miscarriage of justice if the certificate of title was cancelled in such circumstances.

I will state right from the start that the affidavits on record as well as both Counsel's submissions greatly delve into the merits and demerits of the issue of the consent judgment issued in *Civil Suit No. 223 of 2008 Tumusiime Joel & Tumusiime Paul V Edirisa Damulira* but now pending revision before the High Court in Nakawa in *Civil Application No. 001 of 2011 Edirisa Damulira V Tumusiime Joel & Tumusiime Paul*.

Section 33 of the Judicature Act, cap 13 provides as follows:-

"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 those matters avoided."

In my opinion, if this application was allowed to proceed, it would lead to multiplicity of proceedings since the consent order on which it is based is challenged in an application before the High Court in Nakawa. The application for revision seeks to revise and set the consent order aside. It is also my opinion that, as is implicit from the application, the affidavits as well as the submissions of both Counsel, it is premature at this stage to entertain this application before the issue of the consent order on which it is based is resolved. The first reason for my opinion is that handling this application before the revision is concluded will involve delving into the merits of the pending application for revision and thus pre-empting it if not prejudicing its outcome. Secondly, any orders granted by this court would be in vain for as long as the application for revision is pending since the very basis of this application, the consent order is

disputed in the said application for revision. With respect, it would even appear that this application was ill conceived, if not an abuse of court process. It would therefore be a miscarriage of justice if the certificate of title was cancelled in such circumstances before the application for revision is heard on the merits. In any case granting the said orders would render the pending application in the High Court of Nakawa nugatory.

In the premises, and for the reasons given above, I would dismiss this application with costs.

Dated at Kampala this 8th day of December 2011.

Percy Night Tuhaise

JUDGE.