

**REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**LAND DIVISION**

**MISCELLANEOUS APPLICATION NO. 17 OF 2011**

*(ARISING FROM MISCELLANEOUS APPLICATION NO. 767 OF 2010)*

*(ITSELF ARISING OUT OF ENTEBBE CHIEF MAGISTRATE'S COURT CIVIL SUIT  
NO. 384 OF 2008)*

**1. EDCO LTD**

**2. GEORGE RAGUI KAMONI.....APPLICANTS**

**VERSUS**

**MISISI GABRIEL.....RESPONDENTS**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This was an application brought under section 98 of the Civil Procedure Act, cap 71; section 33 of the Judicature Act, cap 13; and Order 52 of the Civil Procedure Rules for an order that an interim order for stay of execution of the judgment and decree in Entebbe Chief Magistrate's court in civil suit no. 384 of 2008 granted by His Worship A. G. Opifeni Assistant Registrar on 22<sup>nd</sup> October 2010 be set aside unconditionally; and for costs of the application.

The grounds of the application are set out in two affidavits of Patrick Tumwine a Director of the 1<sup>st</sup> Applicant company.

The application is opposed by the Respondent Gabriel Musisi who filed an affidavit in reply.

Counsel were requested to file written submissions on the matter within given time schedules. Counsel for the Respondent however delayed in filing his written submissions consequent to which the Applicant's Counsel applied by letter to have judgment on the matter delivered in default. By the time the Applicant's letter was drawn to my notice, but before I proceeded to write this ruling, Counsel for the Respondents had filed their submissions in reply. I exercised my discretion and allowed the submissions to be part of the record though they were filed late so that all the issues in this application are addressed. It was also for the sake of administering substantive justice without undue regard to technicalities under Article 126(2)(e) of the Constitution.

In their submissions learned Counsel for the Applicants relied on the affidavit evidence of Patrick Tumwine which was summarised in the application. The affidavit evidence was to the effect that High Court Miscellaneous Application 767 of 2010 under which the interim stay of execution was granted was *res judicata* and therefore liable to be dismissed. The Respondent filed Civil Suit No. 384 of 2008 to be declared a *bona fide* occupant of the 1<sup>st</sup> Applicant's land comprised in Mailo Register Busiro Block 452 plot nos. 13 & 27 at Ntabo (the suit land). The suit was dismissed with costs as evidenced in annexure A to the supporting affidavit. The Respondent then filed Miscellaneous Application No. 94 of 2010 in Entebbe Chief Magistrate's Court for a stay of execution. The application was heard on the merits and dismissed with costs on 27/09/2010 as evidenced in annexure B to the supporting affidavit. On 14/09/2010 the Respondent filed Civil Appeal No. 52 of 2010 in this court against the decree in Civil Suit No. 384 of 2008 and not against the ruling in Miscellaneous Application No. 94 of 2010. On 22/10/2010 the Respondent filed Miscellaneous Application No. 767 of 2010 for an order of stay of execution of the decree in Civil Suit No. 384 of 2008. He deliberately concealed the fact that a similar application Misc. Applic. No. 94 of 2010 had been heard on the merits and had been dismissed with costs. The decree in Civil Suit No. 384 of 2008 was executed and a warrant of return was filed ten days before the filing of Civil Suit No. 384 of 2008.

On the question of whether the matter was *res judicata*, the Respondent's affidavit evidence is that as a result of the Applicants' having successfully obtained a decree of execution in respect of the judgment in Civil Suit No. 384 of 2008, he filed Miscellaneous Application No. 84(sic it is 94) of 2010 for stay of execution. The application was dismissed by Entebbe Chief Magistrate's

Court. He then filed another application for interim stay of execution, annexure N to his affidavit. He obtained the order of interim stay from the Registrar of this court vide Miscellaneous Application No. 767 of 2010. It is also his evidence that the failure to disclose the dismissed application was an oversight considering that he changed lawyers. Counsel for the Respondent submitted on this point that the concealment by the previous lawyers should not be visited on the Respondent. He also submitted without prejudice that it is a requirement of the law that an application for stay should be filed in the High Court as per the decision in **Lawrence Musiitwa Kyazze V Eunice Busingye SCCA No.18 of 1990**.

It is not in dispute that the Respondent's application for stay of execution had been dismissed in an earlier suit, Miscellaneous Application No. 94 of 2010 in Entebbe Chief Magistrate's Court after the same was heard on the merits. A certified copy of the ruling to that effect is on record marked B. This ruling has never been appealed from by the Respondent. Instead the Respondent filed a similar application in the High Court for an interim order of stay of execution which was granted by the Registrar of this court. The Respondent did not disclose to the Registrar's court that a similar application had been dismissed by the Entebbe Chief Magistrate's court. The Respondent avers in his affidavit in reply to this application that omitting to disclose the dismissed application was an oversight because his current lawyers were not representing him then. If this is correct, it is unfortunate since any prudent lawyer should peruse the entire record of the case or at least appreciate its background before taking on instructions to handle it.

Section 7 of the Civil Procedure Act, cap 71 provides that a court shall not try any suit or issue in which the matter in issue has been previously heard and finally decided by a court competent to try the issue. It is now settled law that for a matter to be *res judicata*, the matter ought to have been heard and determined on the merits (**Nakiride V Hotel International Ltd [1979] HCB 179**). Once *res judicata* is successfully pleaded the suit must be dismissed (**Kamunye & Ors V The Pioneer General Insurance Co Ltd [1971] EA 263**). Counsel's filing the same application between the same parties in another court was a way of seeking a different ruling from another court and avoiding the mechanism of appeal. In **Peter Mulira V Mitchell Cotts Ltd [2001] KALR 2002** an injunction issued in such circumstances was set aside.

I have looked at the ruling in Miscellaneous Application No. 94 of 2010. It was heard *inter partes* in that both parties filed affidavits to support their respective cases and their Counsel

presented oral submissions in court, after which the Magistrate made a ruling dismissing the application. The matter is clearly *res judicata*. I may only add that the filing of the same application which had been dismissed by court with competent jurisdiction was clearly an abuse of court process. Secondly, I am of the opinion that the case of **Lawrence Musiitwa Kyazze V Eunice Busingye, supra** that learned Counsel for the Respondent cited to justify his filing Miscellaneous Application No. 767 of 2010 in this court is not applicable to this situation. In that case the Supreme court held that the application to stay should be filed in the High court because that was the court of first instance. In this case the court of first instance was the Entebbe Chief Magistrate's court. Indeed that is where the Respondent first filed the application. My understanding of the holding in the **Musiitwa** case is that one can appeal against the decision of that court's refusal to grant the stay. This position does not definitely allow one to make another similar application after the same application has been determined by the court of first instance.

Having ruled that the matter was *res judicata* and that it should not have been entertained by the Registrar in the first instance, I find it unnecessary to proceed and rule on the other grounds as it would only be for academic or moot purposes. The ground of the matter being *res judicata* alone would justify the setting aside of the Registrar's orders.

In the premises, and on the foregoing authorities, I would set aside the interim order of stay of execution issued by the Registrar of this court. This is on grounds that the application under which it was issued was *res judicata* having been earlier disposed of by a court of competent jurisdiction.

The costs of this application are awarded to the Applicant.

**Dated at Kampala** this 23<sup>rd</sup> day of February 2012.

Percy Night Tuhaise

**JUDGE.**

