

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA; AT FORT PORTAL
CIVIL REVISION No. 0014 OF 2008
(From Kyenjojo Misc Applica. No. 11 of 2008; arising from Misc. Applica. No. 10 of 2008; arising from Civ. Suit No. 24 of 2008)

BYAKAGABA JACKSON APPLICANT

VERSUS

KUSEMERERWA FRANCIS..... DEFENDANT

VERSUS

KOMUHENDO JOSELINE OBJECTOR/RESPONDENT

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY –

DOLLO

RULING

The background to this matter is fairly simple. The Applicant had obtained judgment against the Defendant in Civ. Suit No. 24 of 2008 of Kyenjojo Magistrate's Court for a sum of U. shs. 634,000/=. A bailiff, who is not a party to the instant application before me, was granted the warrant of execution of that decree by the arrest, for imprisonment, of the Defendant as judgment debtor. The bailiff however failed to execute that warrant; whereupon, of his own accord, he applied to Court for execution of the decree by attachment of the Defendant's cattle. This was granted; and he then attached some cattle in execution thereof.

Soon after the attachment of the cattle by the bailiff, The Objector/Respondent herein moved vide Misc. Application No. 10 of 2008 objecting to the attachment on the ground that 20 head of cattle were attached and these were not property of the judgment debtor, but hers instead and were in her possession at the time of attachment; hence the Court should restrain the bailiff from any disposal of them,

and have them released to her. Upon default by the Applicant (judgment creditor) to appear and defend the application, the Court made an ex parte order directing the bailiff to unconditionally release the cattle in his custody to the Objector as prayed.

The Applicant (judgment creditor) however brought Misc. Application No. 11 of 2008 supported by an affidavit sworn by the Court bailiff, for Court to set aside the ex-parte order made in Misc. Application No. 10 of 2008, stay the order that the cattle attached be released to the Objector/Respondent, and to grant him leave to appear and defend the application. This, the Court granted; and ordered the Applicant (judgment creditor) to make his reply to the Application within seven days. The Applicant (judgment creditor) however failed to abide by this order of Court; whereupon the counsel for the Objector moved Court, by letter, to:

‘make a ruling sustaining the orders of Court granted to the Respondent Misc. Application No. 10 of 2008; and since the cattle is already sold, a consequential order that the Applicants pay to the Respondent current monetary value of 20 heads of cattle since the fact of 20 heads of cattle is now not disputed.’

In response, the learned trial Magistrate stated as follows:

*“**Court:** Having received letter from M/s Nyamutale & Co. Advocates and the period of 7 days having expired which was given to the applicants to file relevant document in their defence; it is hereby ordered that the orders of the court granted to the respondent in FPT 16 – CV – MA – 10 – 2008 are hereby reinstated and since the cattle were sold and the applicants did not as well file affidavit to dispute the 20 heads of cattle. It is further ordered that the applicants pay the respondent the current money value of the 20 heads after the proper assessment by the court ...”*

The Applicant has now brought this application for revision of the Magistrate's ruling in Misc. Application No. 10 of 2008. The grounds for this application are that: –

1. The Magistrate acted with material irregularity when he upheld objector proceedings when the subject of the proceedings had already been disposed of.
2. The Magistrate acted with material irregularity in ordering that the refund of the 20 heads of cattle be met by the Applicant when execution was ordered by Court, the impounding of the cattle by a Court bailiff, and mistake as to the identity of the farm where the cattle were to be impounded from, if any, made by the Court bailiff.
3. The Court issued a warrant of attachment for 12 heads of cattle when the Applicant's judgment debt of only 643,000/= could have been met by attachment of 2 or 3 cows; and the over attachment cannot be visited on the Applicant.

I really find this application strange since it seeks a revision of the Court's ex-parte order in Misc. Application No. 10 of 2008 which the Applicant had, through Misc. Application No. 11 of 2008 caused Court to set aside. It was his failure, yet again, to defend that objector application that caused Court to make the final order. Once the Court set aside the ex-parte order it had made in Misc. Application No. 10 of 2008, it had disposed of or vacated the order; hence the order was no longer extant. The dead order could only have been resurrected either through the remedy of review or on appeal as provided for in the Civil Procedure Act and the Civil Procedure Rules; which neither of the parties herein pursued.

Accordingly, it was wrong for the Court, upon being moved by the Objector's counsel's letter, upon the Applicant's second default, to purport to reinstate the

order he had already vacated. In any case, counsel for the Objector had asked Court to *'make a ruling sustaining the orders of Court granted to the Respondent in Misc. Application No. 10 of 2008'*. While this letter by counsel, by itself, was an improper procedure as it offended the rules laid down in the Civil Procedure Rules, it did not ask Court to reinstate a vacated order. The proper procedure was for Court to grant another ex-parte order; and this would admittedly have had the same effect as the one it had vacated, in view of the evidence on record being constant.

Be that it may, I consider that the procedure the Court took was a technical defect; and pursuant to the provisions of Article 126 of the Constitution, I am justified in disregarding it; as no miscarriage of justice was occasioned by the defect in procedure. The substance of the matter was the Court order, in force, that the cattle attached was to be released to the Objector. The real issue in contention is really what course of action Court should take in the light of the revelation by the bailiff that the cattle attached has been disposed of. The Applicant (judgment creditor) contends that he should not be held to blame for the conduct of the bailiff who was assigned by Court order to carry out the execution.

However, in his affidavit in support of Misc. Application No. 11 of 2008, the bailiff deponed that he had attached the cattle in issue with the guidance of the Applicant (the judgment creditor). The Applicant himself did not controvert this as he deponed in his affidavit in support of that application that the cattle were attached from the farm of the Defendant (judgment debtor). Worse still, one Kahigwa Tomasi the LC1 Chairperson of Butara Nyarutoma, deponed in his affidavit in support of the objector application that he had pointed out to the bailiff that the cattle he had come to attach did not belong to the judgment debtor; and objected to the attachment of those cattle, and had offered to take the bailiff to the judgment debtor's farm, but the bailiff insisted and attached the Objector's cattle, to which he declined to sign as witness to the execution.

There is on record an undated 'execution report' apparently smuggled into the Court file as it does not bear any endorsement thereon as having been received by Court, as it should have been. In it the bailiff does corroborate that the LC1 Chairperson of the area declined to sign in acknowledgement of the attachment. From the Applicant's clear participation in the attachment above, I am satisfied that the trial Magistrate infringed no provision of the law in ordering that the cattle which were attached should be paid for by the Applicant. The bailiff disclosed in his affidavit and report of execution referred to above that he disposed of the cattle he attached almost immediately. This, as the record shows, he did without the knowledge, leave alone the authority, of the Court.

It was therefore in contravention of the provisions of O. 22, r. 40(1) of the Civil Procedure Rules, which tasks the bailiff strictly with custody of the moveable property attached by him or her, pending the sale thereof in accordance with the provision for advertisement and disposal by public auction. It is only under the provision of rule 40(2) that the bailiff has the discretion of disposing of moveable property attached, without recourse to Court, when such property is at the risk of speedy decay, or the cost of keeping it in custody or maintenance is prohibitive. However, the bailiff's discretion to dispose of moveable property attached is however restricted to properties other than livestock; for which the Court has to make a decision.

It is quite evident that at the time the Court made the ex-parte order for the release of the cattle attached in execution, it had not known that the bailiff had already disposed of them; meaning that the speedy sale was done without prior recourse to Court. Accordingly, the Court was justified in ordering that the Applicant meet the costs of these cattle which were plainly wrongfully sold in execution. He was, on the evidence, a full participant alongside the bailiff in perpetrating this abuse of process; at the very least, at the time of effecting the attachment from the

Objector's farm as the ultimate beneficiary, and against the clear objection of the local authority of the area.

It is no extenuating factor for the Applicant that the Court ordered for the attachment of a woefully large number of cattle to satisfy a debt of just shs. 643,000/=; which could have been met by the forced sale of no more than three head of cattle. Other than raise his hand against this, he instead gave effect to it; and for this he is, just like the bailiff, liable to compensate the Objector in the terms ordered by the Magistrate. The bailiff was, unfortunately, not made a party to the application. Either the Applicant or the Objector may wish to take this up by separate proceedings against him.

In the result, I find that in bringing this application for revision of the order that had already been vacated by Court, and was dead, the Applicant was making a futile attempt to circumvent his self imposed impediment through non compliance with the earlier Court order that he makes his reply within seven days of the Court's vacation of the ex parte order it had made. The application for revision is therefore ill founded, and I have to dismiss it with costs. I direct that the file be sent back to the trial Court to give effect to its order for compensation of the Objector by the Applicant.

Alfonse Chigamoy Owiny – Dollo

JUDGE

15 – 06 – 2012