

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

HCT-04-CV-MA-137-2013

(ARISING FROM CIVIL SUIT NO. 127 OF 2005)

**PAUL KANYASI.....APPLICANT
VERSUS
FRED HASIBIRI.....RESPONDENT**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING

This is an application for vacant possession to the applicant in light of the an unequivocal court order by **Justice JBA Katutsi** dated 8th of July 2009 setting aside the exparte Judgment and Decree in Civil Suit No. 127 of 2005 following corrections in Miscellaneous Application 169 of 2006.

The applicant further seeks orders that the Commissioner for Land Registration cancels entries of the respondent on title vide LRV 3549 F25 and that the execution be set aside and respondent consequently evicted from the suit premises. He also prays for the costs of the application be provided for.

Applicant relied on the affidavit sworn by **Paul Kanyasi**; dated 28th June 2013. The application is by Notice of Motion brought under Article 26, 126 (2) (e), 139 (1), 126, and S.14 and 35 of the Judicature Act, O.52 r. 1 and 2 of the Civil Procedure Rules.

Respondent filed an affidavit in reply deponed by **Fred Hasibiri** in which he opposed the application above.

During the hearing of the application, **Counsel Masanga Isaac** appeared for the applicant while **Nagemi** appeared for respondent.

On 5th September, 2013, **Counsel Masanga** for applicant informed court that there were 4 issues for determination, while **Counsel John Nagemi**, provided two other supplementary issues.

This application is a very involving matter based on a number of prior court actions, some concluded others still pending in court, as argued by both counsel in their pleadings.

I will therefore not reproduce the arguments in premateria as on record for purposes of consistency.

I however hereby take note of all counsels arguments as they are on record. I will refer to the specific arguments raised by each counsel on each issue; as I resolve them.

The brief background to this application is that the applicant was sued by the Respondent on 18th November 2005 in the High Court for recovery of shs. 6,650,000/= . Respondent obtained an exparte Judgment and decree in Civil Suit No. 127 of 2005. He applied for vacant possession and was granted the same (of plot 9 Samson Were Road in Busia). The applicant applied to court to vacate the order and on 1st August 2007 **Hon. JBA Katutsi** vacated the order for substituted service in HCTY-04-CV-MA-0169 of 2006. **Hon. J. Katutsi** later again upon application, moved under section 99 of the Judicature Act, amended his order and set aside the exparte Judgment and orders and made an order that the suit should be set down and heard on merit.

Following the orders by **Hon. J. Katutsi** the applicant, is now moving court for the orders that he seeks now as being consequential orders arising from the aforesaid status quo.

The defence case briefly though objects to that position and put up a parallel argument as shall be disused hereunder.

The agreed issues were set down as here below.

1. Whether the retired **Hon. JB Katutsi** in his ruling dated 8th July 2009 in which he set aside the exparte Judgment and resultant exparte Decree intended that the execution would remain in force.
2. Whether this court has jurisdiction under section 99 to grant the orders as prayed.
3. Whether the execution would have remained in effect had it been brought to the attention of the **Hon. JB Katutsi**.
4. Whether the affidavit in reply offends the provisions of O. 6 r.10 of the Civil Procedure Rules and O.6 Rule 30 of the Civil Procedure Rules.
5. Whether reliefs sought by the applicant in this application is not *res-judicata*.
6. Whether this Honourable Court isn't *functus officio* in being asked to rehear an application which the same court has already adjudicated.

ISSUE 4: WHETHER AFFIDAVIT IN REPLY OFFENDS O.6 R.10, AND R. 30 OF THE CIVIL PROCEDURE RULES.

When the matter was argued, both parties preferred to begin their arguments with issue No.4, as to whether the affidavit in reply offends the provisions of O.6 r.10 and O.6 r.30 of the Civil Procedure Rules.

O.6 r. 10 provides that:

*“When a party in any pleading denies an allegation of fact
.....he or she must not do so evasively...”* and,

O.6 r.30 states that:

*“ the court may upon application, order any pleading to be
struck out on the ground that it discloses no cause of
action.....”*

I have looked at the affidavit in reply filed by the respondent and deponed by **Fred Hasibiri**. This affidavit, contrary to what applicant stated, addressed the issue of execution in paragraph 7. The paragraph states that;

*“ I am informed by my counsel that by Misc. App. No. 169/2006,
applicant unsuccessfully applied to set aside execution of the
impugned decree before this Honourable Court.”*

The assertion that affidavit is evasive is therefore not correct.

The affidavit however in paragraphs 8 and 9 raises matters which are not before court. The affidavit as rightly pointed out by applicants introduces strange issues therein. The reliefs sought are injunctive and cannot be pleaded in reply. The attempt to plead issues which were not specifically deponed by the affidavit in his affidavit in support of the motion renders this affidavit offensive to the provisions of O.6 r. 8- requiring pleadings to be specific. I agree with applicants that the gist of this application is to determine issues related to the execution which arose out of the **Justice J.B. Katutsi** Court order. The issues deponed to in paragraphs 8 and 9

therefore are strange to the pleadings and ought to be struck out for being unnecessary under O.6 r. 19.

(See *Italian Ashalthaulage Ltd v. Assist (U) Ltd CA No. 90 of 2000*- on affidavits. Also *KIIZA BESIGYE V. MUSEVENI*).

In conclusion, I find that the affidavit in reply answers the question for determination, whether the execution arising out of the **Justice Katutsi** order is legally tenable or not. However paragraphs 8, and 9 thereof are struck out as they raise unnecessary issues that were never addressed by applicant in his affidavit. The affidavit will therefore only be relied on in the exclusion of the offensive paragraphs. See the case of *BWIRE & ANOR. V. NDYOMUGENYI CVR 016/2011*, quoting (*KIIZA BESIGYE VS Y.K. MUSEVENI EP 1/2001*) and *ROSSAGE V. ROSSAGE 1960 WLR 249*) holding that the offensive parts of an affidavit can be expunged therefrom, and the non offensive parts left there for action thereon.

Having resolved the above issue I now turn to the two issues raised by the Respondents, because they will determine whether this suit is *res judicata* and whether this court is *functus officio*. I resolve them as here below.

ISSUE 5: WHETHER THE SUIT IS RES-JUDICARTA.

It was argued by counsel for respondent that the issues were applicant is seeking were determined conclusively in MA No. 119/2009, MA 80/2009, and MA 221/2011. He referred to S.7 of the Civil Procedure Rules.

I have carefully considered the above matters and concluded that, the matters before me are not *res judicata* for the following reasons.

Application No.80 of 2009, and application 221 of 2011 according to Court records were never heard on merit and dismissed by court. The issue before court of the fate of the purported execution was never determined upon by court. The record shows that both cases were merely withdrawn from court by consent of both parties. It is not therefore true that this application raises matters that were already decided on in Application 80/2009 or 221 of 2011.

Concerning **J.B. Katutsi**'s order of (MA) No. 119/2009, setting aside the exparte Judgment passed against the applicant, respondents contend that, though applicants had sought the execution to be set aside or stayed, this was not expressly granted by **Justice Katutsi**.

Counsel argued that in the absence of an appeal, applicants cannot bring the present action. It was counsel's contention that the above actions prove that the matters were already decided on. I beg to differ. The **Justice Katutsi** order, from which this application arises was an order given under section 99 of the CPA to correct and give effect to the intention of court at the time of Judgment. The present application is seeking an interpretation and enforcement of that order. It is not seeking a retrial of what **Justice JB Katutsi** already decided. The issue of *res judicata* does not arise, and this issue must fail.

ISSUE 6 WHETHER THIS COURT IS FUNCTUS OFFICIO

It was argued for respondents that the decision of court in MA 169/2006 by **J. Katutsi**, which did not expressly grant the application to set aside the decree, renders the present application bad in law for being brought before a court which is "*functus officio*."

I have already found above that the applicant in this matter, in my view is not before me to argue and be granted an order for stay of execution- But is before court to request court to interpret and enforce its own order given by Hon. J. Katutsi.

It is my finding therefore that the matter before me is not *res judicata* and this court is not *functus officio*. This issue also fails.

Having disposed off the above issues I now turn to the rest of the issues as they were argued by both parties; under issues 1, 2 and 3. Basically, these issues can be joined in one broad issue whether the order by **Justice JB Katutsi** intended that the execution ordered as a result of the judgment should remain in force; and whether court can grant the orders sought. I resolve the issues above as follows:

ISSUE 1: WHETHER JBA KATUTSI IN HIS RULING DATED 8TH JULY 2009 INTENDED THE EXECUTION TO REMAIN IN EFFECT

With due respect to the arguments raised by both counsel in this matter, I find that this was a matter originating from a ruling by **Hon. J.B.A Katutsi** dated 01/08/2007; setting aside an order of substituted service by a Registrar whereby, the Judge ordered as follows:

“The order by the learned Ag. Deputy Registrar for substituted service was made in a manner that served to perpetuate injustice and cannot be permitted to stand. It is vacated. Applicant should file his pleading within 21 days.....”

On 21st day of August 2007 the same Judge made another ruling under Misc. Application 119/2009 (from MA 169/2006) to the effect that;

“under section 99 of the CPA, clerical and mathematical mistakes in judgments, decrees or orders or errors arising from them from accidental slip or omission may at anytime be corrected by the court. In my ruling dated 1/08/2007 I omitted to state that the exparte judgment be set aside. It is now corrected and the exparte Judgment passed against the applicant is hereby set aside. The suit should be set down and heard on merit.”

Without going into the arguments. I wish to comment on the meaning of JB Katutsi’s order.

“The order of the court was that the exparte judgment be set aside and suit be set down and be heard on merit.”

This was correcting an omission in the ruling which had observed that the mode of service ordered by the learned Deputy Registrar perpetuated injustice. The order was vacated. The applicant was ordered to file his pleadings within 21 days.

When an order is vacated, the parties are sent back on the drawing board, to where they started. The effect of **Justice JB Katutsi**’s order was to put the parties back to the original status quo before, the court’s purported orders by the Deputy Registrar. What was that status?

Each party came with something to court. The applicant came with his land/property, the respondent came with his claim for that property when court granted the order for staying proceedings, the respondent was meant to stay put and wait for the further orders of court before purporting to deal with the land/property which he later executed to his benefit. The order for execution is always issued upon a court Decree; and a Court order. When Court vacates its own order, sets aside the Judgment, signs a ruling in which it mentions the need to

protect the property rights of the parties where does the respondent get his authority to execute?

If the decree is removed, what is being executed? Which order are you enforcing? The law is clear. Courts will not without good reason delay a successful plaintiff in obtaining the fruits of his judgment, but court also protects the defendant from unwarranted execution.

In this case **JB Katutsi**'s order set aside the Judgment. No party was successful at that stage. No execution was ordered therefore by any court. Respondent therefore abused the process of court, to go ahead and execute property belonging to applicant who had obtained a court order setting aside the exparte judgment and decree.

ODGERS, Principles of pleadings at page 365, states that,

“the general rule is that execution follows Judgment. It cannot stand alone...”

In conclusion on this issue, it is my finding that the order given by **Justice JB Katutsi** was a specific order arising out of proceedings brought under summary procedure. Judgments under this procedure once proved that service was wrongly effected can be set aside. Once they are set aside they stay all proceedings therefrom. No execution can be done, when the Judgment has been set aside. The applicant therefore has proved this issue and it has succeeded. The affidavit in reply does not deny the issues deponed to. It is the finding of this court that the execution was done illegally and it cannot stand in view of the above clarifications.

ISSUE 2: WHETHER THIS COURT CAN GRANT THE ORDERS SOUGHT

Under section 99 CPA, court can correct omissions from any accidental slip or omission, on its own motion or on application of any of the parties. This court therefore has the jurisdiction to entertain this matter and to grant the reliefs sought.

Section 98 CPA, this court has the power to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

This is a proper case where court should intervene and prevent the abuse of the process of Justice in this case. The applicant is therefore entitled to the reliefs sought from this court. This issue terminates in the positive. (See: *MAKULA INTERNATIONAL V. CARDINAL NSUBUGA (1982) HCB 11*)- Court cannot keep a blind eye to an illegality once it is brought to its attention.

In the result this application succeeds. The court hereby orders that the illegal execution conducted by Respondent in this matter should be vacated; and Applicant be put back into his property as he was at the time **Justice JB Katutsi** made the orders. I so order.

Costs granted to the Applicant.

Henry I. Kawesa

JUDGE

19.12.2013

