THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT MBALE

HCT-04-CV-CA-0072-2009

(From Mbale Misc. Application No. 51/2008, Civil Suit No.14 of 1995 and Misc. Application No.31 of 2002)

MWAJUMA NABUDDE…….APPELLANT

VERSUS

MUYA KIKUMI……..……..RESPONDENT

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is an appeal from the Ruling of the Chief Magistrate Mbale in Misc. Application 51/2008 which arose out of Misc. Application 31/2002 all arising from Civil Suit 14 of 1995. The appellant **Mwajuma Nabudde** is represented by M/s Mutembuli & Co. Advocates while the respondent **Muya Kikumi** is represented by M/s Madaba & Co. Advocates.

Upon perusal of this bulky record, I found out that the mother suit to all the subsequent applications in this matter was civil suit No.14 of 1995 which was between **Musa Liloba** as plaintiff against 4 defendants to wit **Massa Musa, Muya Kikuma (Kikumi), Sowedi Khauka** and **Patrick Matsanga**. The said suit was

decided and a decree in original suit dated 28th November 2001 was issued. The wording of the said decree is as follows:-

> "*Whereas the plaintiff filed this suit against the defendants jointly and the said plaintiff died before the final determination of this suit*
>
> *Whereas no person has shown interest in persuing the suit in any capacity as legal representative of the late plaintiff.*
>
> *Whereas the 2nd defendant Muya Kikuma has obtained letters of administration with his mother Anna Ndila to the estate of late Francis Kikuma Malua the known proprietor of the land in issue and whereas the said letters of Administration were dully resealed by the High Court of Uganda at Mbale on the 6th day of November 2001.*
>
> *It is ordered that the 2nd defendant Muya Kikuma and his mother Anna Ndila be put in possession of all the land in issue in this case.*
>
> *Signed: Chief Magistrate*."

It appears that as a result of the said decree, one **Mwajuma Nabude** the appellant herein filed objector proceedings vide Misc. Application 31 of 2002 because she believed her land was in danger of being erroneously attached and given to the decree holder in civil suit 14/1995. The Chief Magistrate had issued a warrant to give vacant possession dated 8th February 2002 which was partially executed.

However, on 19th October 2005, the appellant herein through her lawyers M/s Musiiho & Co. Advocates told court that:

> "*Musiiho: My client has been complainant but later events led to her land being free of execution. We have no further matter here*."

Consequently the learned Chief Magistrate ruled thus:

> "*Since the Objector has no further problems, as she has advised counsel and the same is seen from the letter of the LC.I Chairman, I do so find that with no further claim, the matter is closed*. (sic)"

In effect the appellant herein withdrew the objector proceedings vide Misc. Application 57/2008. Subsequently execution was ordered by the learned Chief Magistrate vide a warrant to give vacant possession of land under O.XIX r. 32 CPR dated 8th July 2009. It described the land to be given as;

> "*All land which the late plaintiff was holding in trust for the defendants situated at Mutoto Cell, Mooni, Mbale Municipality*."

By a return dated 9th July 2009, the court bailiff reported a successful execution of the warrant and that **Muya Kikuma** gained possession of the land. The present appeal is against the order of the Chief Magistrate Mbale in Misc. Application 51 of 2003 in which she allowed a hand over of the land to the respondent.

The grounds of appeal are that:

1. The learned Chief Magistrate erred in law and fact when she failed to evaluate the evidence on record before allowing the application to hand over the suit land to the respondent.
2. The learned Chief Magistrate erred in law and fact when she held that the appellant was served with hearing notices yet there was no evidence on record to support the same.
3. The learned Chief Magistrate erred in law and fact when she failed to consider the evidence of the appellant that was on record.
4. The learned Chief Magistrate erred in law and fact when she just allowed the application without considering whether it had merit or not.
5. The learned Chief Magistrate erred in law and fact when she failed to consider the fact that the appellant's land was nolonger subject to execution.
6. The learned Chief Magistrate erred in law and fact when she ordered a hand over of the applicant's land to the respondent yet it was not part of the subject matter in civil suit 14/1995.
7. The learned Chief Magistrate erred in law and fact when she failed to consider the appellant's evidence to the effect that execution in Civil Suit 14/1995 took place in 2002.
8. The learned Chief Magistrate erred in law and fact when she ordered execution against the appellant as if she was a party to civil suit No.14/1995.
9. The decision of the learned trial Magistrate has occasioned a miscarriage of justice.

The appellant prayed that:

(a) The appeal be allowed.

(b) The orders of the learned Chief Magistrate be set aside.

(c) This court finds that the appellant's land was not subject to execution vide civil suit No.14/1995.

In the alternative the court orders a retrial of civil application 51 of 2008.

The appellant prayed for the costs of this appeal.

I allowed respective counsel to file written submissions which I have thoroughly studied and comprehended. I have meticulously studied the jumbled lower court record.

It is my considered view that the court system has contributed to the confusion in this matter which ought to have been concluded long ago in Civil Suit 14/1995!

It is clear from the record that when Civil Suit 14/1995 was concluded and execution ordered, the appellant herein filed objector proceedings. However when she realized that her interests were not threatened if the decree in Civil Suit 14/1995 was executed, she, through M./s Musiiho & Co. Advocates withdrew her complain. When the respondent and **Anna Ndila** got letters of administration to the estate of the late **Francis Kikuma** the suit land in Civil Suit 14/1995 was decreed to them. This was way back on 28 November 2001 not by **Her Worship Margaret Tibulya** but by **His Worship David Batema** then Chief Magistrate.

M/s Sky Auctioneers partially handed over the suit land to the respondent and his co-executrix on 9.3.2002.

As rightly submitted by **Mr. Madaba** learned counsel for the respondent, the appellant herein was not a party to civil suit 14/1995. She is also not a personal representative of the late **Musa Liloba** who was the plaintiff in the lower court. The appellant has never been appointed to administer the estate of the late **Liloba** or any

part thereof as required under S. 2(1) of the Succession Act Cap.162. The appellant herein is not even related to the deceased in any way. She had the right to institute objector proceedings as she did but after withdrawing the same she could not appear in court in any other capacity unless she filed her independent suit.

The above not withstanding after perusing the lower court's record, I discovered that the plaintiff in the head civil suit 14/1995, the late **Musa Liloba** conceded that the suit land belonged to the father of the respondent and he was only suing because he was not sure if the respondent was the rightful person to be handed the land he was holding in trust. That is why when the respondent got letters of administration together with his mother, it confirmed that they were the rightful owners of the suit land, and judgment was given in their favour.

It appears that filing the unnecessary Misc. Application 51 of 2008 instead of an application for execution was due to frustration by the applicant therein because of the continued disturbance he was getting on his land and partial execution done by Sky Auctioneers. Useless as the application was, there is evidence on record that the respondent **Nabudde Mwajuma** was effectively served as evidence by the affidavit of one **Appollo Masette** the process Server deponed on 16th February 2009. The service was in respect of a hearing scheduled for 17.2.2009. In paragraph 3 thereof, **Masette** deponed that:

> *"……on 16.02.2009 at around 3:00p.m I went to the respondent's home at Mooni trading centre, I got her at home explained to her the purpose of my visit to her home thereafter I gave her a copy of the hearing notices*."

The Process Server says she refused to sign but accepted service.

Having held that the appellant was not a party to the lower court suit there is no way she could have led evidence relating to the suit land. The appellant dropped her objector proceedings against the respondent. This meant that the land decreed to the respondent did not include that of the appellant. The appellant therefore had no *locus-standi* to file this appeal in the first place. Civil Suit 14/1995 was concluded long ago.

Consequently I will order that this appeal be and is hereby dismissed with ½ the costs of this appeal to the respondent. All subsisting orders are set aside.

Stephen Musota

JUDGE

14.03.2013