THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL No. 17 of 2018

NEGESA AMINA ---------- APPELLANT

VERSUS

KALIBBALA PETER ---------- RESPONDENTS

BEFORE: HON. JUSTICE MICHAEL ELUBU

JUDGMENT

This is an appeal against the decision in the decision of **H/W SUMAYA KASULE Magistrate Grade I** which was delivered at Jinja on the 4th day of April 2018.

The background to this appeal is that the appellant here, NEGESA AMINAH, whom for ease I shall hereafter refer to as the appellant filed an application before the Chief Magistrates Court, on the 6th of February 2018, seeking orders for a Special Certificate to levy distress for rent and eviction of one JOHN KIRKWOOD, from premises situate at Plot 19 Wilson Avenue. The appellant stated that the said Kirkwood was in rent arrears worth 20,000,000/- (twenty million shillings). That he had refused to pay or vacate the premises despite the appellants demands to pay. The appellant prayed for the lower Court to authorise a distress for rent and an order to attach property. She also prayed for the eviction of John Kirkwood.

On the 8th of February 2018 a Records Assistant called Kalera Tonny, attached to Iganga Court, received the application for service on Kirkwood. In his affidavit of service, he deposes that he went to the premises on Plot 19 Wilson Road where when he got to the gate, he met a man who said he was a domestic worker. The man told Kalera that Kirkwood was absent. He handed the application to the man who refused to endorse it with his signature saying he was not authorised to sign.

On the 14th of March 2018 the application was granted, Kirkwood was evicted and a special certificate to levy distress by attachment of several household pieces of property was issued.

On the 21st of March 2018 the respondent in this appeal, PETER KALIBALA filed Miscellaneous Application No 29 of 2018 seeking orders that the special certificate issued to levy distress for rent on the property be reviewed and set aside. The trial court heard the application interparties and granted it.

The appellant being dissatisfied with the decision filed this appeal with five grounds namely:

i. The learned trial magistrate erred in law and in fact when she entertained an application for review of the orders of another magistrate still attached to the chief magistrate's court of Jinja.
ii. The learned trial magistrate erred in law and in fact when she reviewed and set aside the orders in M.A. No. 29 of 2018 without any grounds.
iii. The learned trial magistrate erred in law and in fact when she determined the issue of ownership of the disputed property without a full hearing.
iv. The learned trial magistrate erred in law and in fact when she descended into the arena thereby reaching a wrong decision which occasioned a miscarriage of justice.

v. The learned trial magistrate erred in law and in fact when she failed to properly consider and adequately scrutinise and evaluate the party's pleadings and evidence on record and in so doing came to a wrong conclusion.

The appellant prayed that:

a. The appeal be allowed
b. The orders of the Learned Magistrate HW Kasule Sumaya be set aside
c. The respondent be ordered to pay costs of this appeal and costs in courts below.

Mr Kakeete Edward appeared for the appellant while Mr Mangeni Ivan Geoffrey and Mr Esarait Robert appeared jointly for the respondent.

This is a first appellate Court whose duty is to subject the evidence as a whole to a fresh scrutiny, and on a balance of probability come to its own conclusions based on the evidence and the Law applicable.

Ground i

The learned trial magistrate erred in law and in fact when she entertained an application for review of the orders of another magistrate still attached to the chief magistrate's court of Jinja.

It is the submission of Counsel for the appellant that it was a material error and an illegality for HW Sumaya Kasule, to hear and determine M.A. No. 29 of 2018 in which she reviewed and set aside, orders issued and granted by HW Mugezi Amon in Misc. Cause No 2 of 2018, where the appellant had filed an application for distress for rent.

He stated that Order 46 r. 4 of **the Civil Procedure Rules** stipulates that applications for review must be made to the very Judge or Judicial Officer who made the order

the applicant wishes to have reviewed unless the Judicial Officer is no longer at the station. He cited **AG and Anor vs James Mark Kamoga and Anor SCCA 8 of 2004.** He submitted that in this instant case HW Mugezi Amon was still attached to Jinja Court and should have handled the application.

The respondent, in reply, contends that the Learned Trial Magistrate had the jurisdiction to hear and determine the application. That O. 46 r.4 of the CPR and the Kamoga case (supra) which was cited by the appellant supports that position.

Turning now to the merits of this first ground, Review is governed by S. 82 of **the Civil Procedure Act** and Order 46 of **Civil Procedure Rules**. As I understand it, an application for Review may be brought by an aggrieved party upon the grounds of discovery of new and important matter or evidence; or of the existence of a clerical or arithmetical mistake; or error apparent on the face of the record.

The law does not however limit applications to these grounds. Any other sufficient reason may be a ground.

What is key is that where an application is filed based on any other sufficient reason then only the Magistrate who heard the parties and passed the decree should ordinarily handle the application. For the other grounds listed above however, any Judicial Officer may handle and determine the application (see Order 46 rr 2 and 4) and Kamoga (supra).

In this instant case the Trial Magistrate granted the application on two grounds. Firstly that the applicant in Misc Cause No 2 of 2018 did not meet the conditions for distress for rent and secondly that the respondent in that same application was not properly served.

In my view if this be the case, it would be an error on the face of the record and would be a proper case for action by the trial magistrate.

I shall return to this later.

Ground ii and iii

ii. **The learned trial magistrate erred in law and in fact when she reviewed and set aside the orders in M.A. 29 of 2018 without any grounds**

iii. **The learned trial magistrate erred in law and in fact when she determined the issue of ownership of the disputed property without a full hearing.**

Counsel argued these two grounds together. He stated that the Trial Magistrate erred in law in that she made the review under the head of '... any other sufficient cause'. Counsel argues the trial Magistrates first finding was that the respondent in MISC CAUSE No 2 of 2018 had not been properly served. The contention of counsel was that this was erroneous because the respondent was properly served. That service can be properly effected on any adult member of the family as was done here.

Secondly that the trial magistrate considered the fact that the applicant in MA 29 of 2018 held a certificate of title. In effect the Trial Magistrate made a finding on the genuineness of the certificate of title which she had no mandate to do in such an application.

There were no other grounds considered by the trial magistrate. It was argued that the learned trial magistrate ought to have considered the fact that the execution of the courts orders had been completed and the application was therefore overtaken by events and could not be reviewed.

In reply to these grounds, Counsel for the respondent contends that there was no proper service effected in this case because: the record shows that the person who effected service was not a proper process server but a records assistant; the respondent was not at the premises when the application was served; the person who

was at the premises expressly stated that he was not authorised to receive any documents on behalf of the respondent.

The second error was the order issued included an order of eviction. Section 2 of the Distress for Rent Act only provides for distress and not eviction. The order issued was illegal.

Thirdly, it was argued that the preconditions for distress are that there must be a landlord and tenant relationship; that the rent must be certain; and that the respondent must be in arrears. In this case the rent demanded was a block figure of 20,000,000 shillings. That figure was said to include rent and utilities bills but there was no evidence of breakdown of the figure or how it accrued.

Lastly, the respondent submitted that the complaint that the trial magistrate heard the application after execution had been completed was misplaced. Execution is no bar to subsequent proceedings including applications opposing the execution.

In resolving these two grounds this court will turn first to the question of service. The affidavit of service sworn by one Kalera Tonny shows that when he went to the respondents premises he found a gentleman who informed him that he was a domestic worker and said the respondent was not around. The man refused to avail the phone number of the respondent. The man took the documents but did not acknowledge receipt claiming that he did not have the authority to sign for the documents. He advised Kalera Tonny to return the next day.

The learned trial magistrate found that this service was not effective as the process server did not sate the name of the domestic worker who was clearly not an agent.

I note that the desired result when effecting service is to ensure that the respondent is made aware of the proceedings brought against him (see ***Geoffrey Gatete and ors vs William Kyobe Supreme Court Civil appeal No 7 of 2005).***

In this case the process server did not state what efforts he made to trace for the respondent before he chose to serve a person who clearly informed him that the respondent was not around, that he was not authorized to receive documents and who refused to sign the court documents. The starting point is service must be personal. There is no evidence of what efforts to trace the respondent were made or shown to be made before a choice was made to serve the man at the gate. The service could also have been made in the presence of a local leader. Even here where a man at the home was served it is not clear whether he was an agent or a member of the respondent's family. In sum, service is clearly wanting.

Courts have consistently held that service even where the wife was served and no effort is made to trace a husband would still be deemed ineffective (see **Erukana Kavuma vs Mehta [1960] 1 EA 305, Waweru Waweru v Kiromo [1969] 1 EA 172**).

Secondly, the application in MISC CAUSE No 2 of 2018 was brought under **the Distress For Rent Act Cap 76.** It is trite law that to sustain a distress certificate under this law the following conditions must be in place:

(a) There must be a relationship of landlord and tenant obtaining;

(b) There must be certainty of rent, and

(c) The rent must be in arrears

(See **Joy Tumushabe and Another vs M/S Anglo – African Ltd and Another Civil Appeal SCCA 7 of 1999)**

In this instant case no tenancy relationship was established by evidence or tenancy agreement produced or alluded to. This court could not therefore find any evidence of a land lord tenant relationship. Aside from the block figure of 20,000,000/-

deposed to in the affidavit in support of the application, there was nothing to indicate how that figure had arisen. For example what was the monthly rate or how long it had been due. In such circumstances the Court could not have properly granted the order prayed for in Misc Cause No 2 of 2018 because the conditions did not warrant it.

Additionally the applicant prayed for an eviction based on the same law. In the the Oxford Dictionary of Law *Distress for rent* is defined as the seizing of a tenant's goods by the landlord to secure payment of rent arrears. If the tenant fails to pay the rent arrears after distress has been levied, the land lord may sell the goods and keep the amount due (**Oxford Dictionary of Law** *5th Edition. Oxford University Press*).

Looking at the above definition and **the Distress For Rent Act**, the grant of an order of eviction pursuant to an application for distress for rent was clearly an illegality.

As stated earlier one of the heads under which an application for Review can be made is an error on the face of the record. In **Edison Kanyabwera vs Pastori Tumwebaze SCCA 6 Of 2004** the Supreme Court cited, with approval, the **A.I.R. Commentaries: The Code of Civil Procedure by Manohar and Chitaley, volume 5, 1908, where** it is stated that in order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The **"error"** may be one of fact, but it is not limited to matters of fact, and includes also error of law'.

In my view it is clear that the two errors pointed out in the application for review are manifest errors. They are evident without any need for argument. They are also

plainly illegal. They therefore do not need long submission or argument to show that they are incorrect.

It is accordingly my finding that there was a clear error apparent in the orders granted in Misc Cause No. 2 of 2018.

Regarding ownership, a perusal of the ruling shows that no finding was made in regard to the ownership of the suit property.

Having found as I have, I return now to Ground i of the appeal. Where there is a manifest error apparent on the record, then Order 46 r. 2 of the CPR permits any judicial officer, to hear and determine an application for review on that ground.

For that reason (and based on my finding in Ground ii and iii) I find no merit in Ground i of this appeal and is it dismissed.

Ground ii and iii also fail and are dismissed.

Ground iv and v

iv. **The learned trial magistrate erred in law and in fact when she descended into the arena thereby reaching a wrong decision which occasioned a miscarriage of justice.**

v. **The learned trial magistrate erred in law and in fact when she failed to properly consider and adequately scrutinise and evaluate the party's pleadings and evidence on record and on so doing came to a wrong conclusion.**

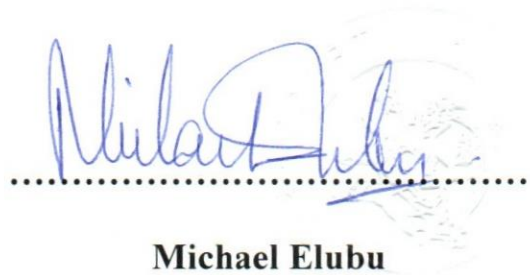
Learned counsel for the appellant argued these grounds by attacking the affidavit of service stating that the trial magistrate descended into the arena when she attacked the manner service was done.

I have resolved the question of service in grounds ii and iii. I accordingly find no merit in Grounds iv and v.

In the result, this appeal stands dismissed.

The findings and orders of the Trail Magistrate are upheld and confirmed.

The respondent shall have the costs here and in the Courts below.



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Michael Elubu

Judge

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