

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL REVISION NO. 37 OF 2017

**[ARISING FROM MENGO CHIEF MAGISTRATE’S COURT CIVIL SUIT NO. 550
5 OF 2014]**

NASUNA JANEAPPLICANT

V

SONG XUESSEN T/A HONG CHANG

INTERNATIONAL CO. LTD.....RESPONDENT

10 BEFORE HON. LADY JUSTICE H. WOLAYO

RULING

Introduction

By a motion under sections 83 and 98 of the CPA; order 52 r 1 & 3 of the CPR, the applicant sought revision orders against the Ruling of HW Kule Moses Lubangula Grade one
15 magistrate dated 21st December 2016 in which the learned trial magistrate upheld submissions of counsel for the current respondent Song Xuessen t/a Hong Chang International Co. Ltd and set aside a prior ruling dated 4th February 2016.

Background

Song Xuessen t/a Hong Chang International ltd the current respondent filed a suit under
20 summary procedure on 9.4.2014 against Nasuna, the current applicant for recovery of 6,200,000/ being an outstanding loan of 4,000,000 plus accumulated interest. An ex parte judgment was entered and a decree was sealed on 11th June 2014.

Subsequently by MA No. 574 of 2015 filed on 25.8. 2015 , Nasuna applied to set aside the ex parte judgment and by ruling dated 4.2.2016 the learned magistrate set aside the ex parte
25 judgment on the grounds Nasuna had made out a case there were triable issues . Nasuna proceeded to file a written statement of defence and the case was set down for hearing.

On 13.12. 2016, counsel Namanya appeared for the plaintiff company while the defendant Nasuna and her counsel were absent whereupon counsel Namanya applied to make written submissions to the effect the decree had already been executed by the High Court Execution Division. The case was adjourned to 19. 12. 2016 ^{for} ruling.

5 On 19.12.2016, counsel Kasolo appeared for the defendant Nasuna while the plaintiff appeared in person through Abdul. Counsel Kasolo applied for an adjournment to peruse the file so as to effectively represent her client Nasuna whereupon the court directed her to file written submissions in reply to an alleged Preliminary Objection.

10 ON 21.12.2016, the court delivered a ruling upholding an alleged preliminary objection and set aside the court's ruling of 4.2.2016, and reinstated the ex parte judgment of 11.6.2014. The reason for reversing his earlier decision to set aside the ex parte judgment was because it had already been executed on 4.7.2015 and yet the said ex parte judgment was set aside on 4.2.2016, six months later.

15 The ex parte judgment was based on a loan agreement between Nasuna and Song Xuessen t/a Hong Chang International ltd for a sum of 4,000,000/ that was paid to her on 10.1.2014 but increased to 6,200,000/ as a result of accumulated interest.

The evidence in the High Court

20 The respondent filed an affidavit in reply of Abdul Hakim Karama who described himself as the secretary of Hong Chang International ltd and attached a sale agreement for land located in Bwebaja Zone LC1, Kitende parish, Wakiso district. The seller of this land is Kassimwe Francis t/a Fraka associates who sold under a warrant of attachment and sale in Mengo C.S. 550 of 2014. Under an order of sale dated 8.7.2015, by the deputy registrar the land was sold to Tushemererwe Felix at 38m. These details are contained in the sale agreement and I must emphasize I did not have the execution file before me as I wrote this Ruling.

25 Submissions by counsel

Counsel for the applicant submitted that Mr. Abdul was not an authorised agent for Mr. Song Xuessen and therefore he cannot swear an affidavit on his behalf. I note that throughout the proceedings in the lower court, Mr. Abdul always stood in for Mr. Song Xuessen and therefore he is deemed to be an agent of Mr. Song Xuessen for purposes of court proceedings.

In the affidavit, Abdul describes himself as secretary of Hong Chang International ltd under whose name Mr. Song Xuessen did business as a money lender. Mr. Abdul is therefore a recognised agent of both the company and Mr. Song Xuessen.

To the extent the parties do not dispute the sale of the suit land under a warrant of attachment,
5 I take it the same is admitted as the correct position.

The law

The applicant sought a revision order under section 83 of the CPA. A revision order is available where three conditions are met:

10 The magistrate's court exercised jurisdiction not vested in him or her by law; or failed to exercise jurisdiction so vested; or acted in the exercise of its jurisdiction illegally or with material irregularity or injustice, except that a revision order may not be made if it would involve serious hardship to any person as a result of the lapse of time or some other cause.

The issue as framed by counsel for the applicant is

15 Whether the learned magistrate exercised jurisdiction not vested in him in law and/or acted with material irregularity or injustice when he revisited his earlier order he made on the 4th February 2016.

Both counsel filed written submissions that I have carefully considered.

Resolution of the case

20 It's apparent from the record that the magistrate reversed his own decision in an irregular manner based on a preliminary objection. The objection was that the execution process had been concluded with notice to Nasuna. The reasons given by the respondent Song Xuessen t/a Hong Chang International are basically the same as those given in the application to set
25 aside the ex parte judgment. These are that execution was completed. The affidavit in reply of Song Xuessen in opposition to the application to set aside captures these same arguments.

I reproduce the relevant portions:

- Par. 7: the file was returned to execution Division and execution process commenced.

- Para. 8: Notice to Show cause was served on the applicant but she did not comply.
 - The execution Division directed a valuation be done and court appointed the Valuer.
- 5
- The property was advertised and sold on 13.7.2015 and a return filed on 7.8.2015.
 - The application has been overtaken by events.

Therefore when counsel for the plaintiff in the case raised a ‘preliminary objection’, he was simply asking the magistrate to re-visit his decision. At this point, the only recourse left to the plaintiff was to seek leave to appeal the decision of the magistrate.

Counsel for the current respondent Song Xuessen t/a Hong Chang International Ltd did not directly respond to this fundamental point in his submissions. However, in the affidavit in reply, Mr. Abdul pleads that Mr. Song Xuessen left the country that the property has been sold to a third party and that granting this application will cause hardship.

15 While I agree time has lapsed since the sale in July 2015, the fact that it was on the basis of an ex parte judgment means the applicant was condemned unheard contrary to the common law principles of natural justice.

Although to allow this application for revision will cause hardship to third parties, they are deemed to have had constructive notice of the very real possibility the ex parte judgment would be challenged.

In the premises, I find that the trial magistrate acted with material irregularity when he reversed his decision setting aside the ex parte judgment.

Before I take leave of this case, I want to comment on the practical challenges that arise from execution by the High Court Division of magistrate’s judgments.

25 In this case, the magistrate acted within the law to set aside the ex parte judgment but because it had been executed by the High Court Division, he could not set aside the execution proceedings on account of jurisdiction issues and yet in theory, the setting aside of an ex parte judgment automatically means the execution proceedings had no legal basis.

I do recommend magistrates be stationed in the Division to handle executions arising from magistrates' courts in order to regularise the current situation where the registrar, who executes decrees of the High Court under the Civil procedure Rules but executes decrees of the lower court under an administrative instruction which has no legal basis. Registrars execute decrees of the High Court under order 50 rule 4 but do not have legal powers to execute decrees of magistrate's courts, hence my recommendation.

Nevertheless, because a sale has taken place, the applicant must seek leave of the trial court to join to the suit third parties who acquired interest in the property, so that they too are heard in the proceedings.

10 **Costs**

The principle regulating allocation of costs is that costs follow the event except the court has discretion to depart from this principle. In most revision causes, I have ordered costs in the cause for the reason the parties are still litigating in the lower court. In the instant case, however, I will award the applicant costs because of the pertinent issues this revision has raised.

In summary, these are my findings.

The trial magistrate exercised jurisdiction with material irregularity when he reversed his decision to set aside the ex parte judgment of 11.6.2014.

Although there has been lapse of time since the sale and this court's decision, the ex parte judgment condemned the applicant unheard contrary to the common law principle of natural justice that a party has a right to be heard. As a result, the applicant must be given an opportunity to be heard in the suit.

The third parties who acquired interest in the property will be made parties to the suit through third party notices at the instance of the defendant Nasuna.

25 In the result, I make the following orders:

1. The application for revision orders is allowed
2. The ruling dated 21.12.2016 is nullified as it was made with material irregularity.
3. The ruling dated 4.2.2016 setting aside the ex parte judgment still stands.

4. The defendant Nasuna will apply for third party notices to issue against the third parties who acquired interest in the property sold under the ex parte judgement that has ceased to be on record.

5. Costs of the application to the applicant.

5 **DATED AT KAMPALA THIS 12TH DAY OF APRIL 2019**

HON. LADY JUSTICE H. WOLAYO

Legal Representation

Bbaale & Partners advocates and Legal Consultants for the applicant

10 Mwebesa Kakooza, Advocates for the respondent