

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISCELLANEOUS APPLICATION NO. 195 OF 2018

ARISING FROM MISCELLENOUS APPLICATION NO. 155 OF 2017)

IGNATIUS KAYIGA:..... APPLICANT

VERSUS

1. MUTYABA CHARLES

2. NAMUSISI JUSTINE

3. BBBOSA SYLVIA

4. HANE H. LUGOLOBI

**5. TRUST MASTERS COURT BAILLIFS AND AUCTIONEERS
LTD:.....RESPONDENTS**

RULING

BEFORE: HER LORDSHIP HON. JUSTICE EVA K. LUSWATA

Introduction and brief facts

1] The applicant proceeded by motion under section 33 Judicature Act, Section 98 of CPA and O. 52 rr 1 and 3 CPR to seek an order for nullifying the execution proceedings and setting aside the execution of the decree in Civil Suit No. 84/2010 and Civil Suit No. 82/2011 (hereinafter collectively referred to as the consolidated suits), an order declaring the execution of the decrees as illegal and irregular and an order restoring the applicant onto land known as Block 530 Plot 83, LRV 3844 Folio 1 (hereinafter referred to as the suit property) in accordance with the consent order made in Miscellaneous Application No 155/2017 (hereinafter referred to as the main application), and costs of the application.

2] **The grounds of the application can be summarized as follows**

- i. The applicant filed the main application to stay execution of the decree of the consolidated suits pending determination of his appeal in the Court of Appeal. Filing of the appeal was delayed for reasons outside his control.
- ii. The parties entered into a consent in the main application to stay execution of the decree
- iii. That in disregard of the consent decree and without an order to vary or set it aside, the respondents executed the decree of the consolidated suits and evicted the applicant from the suit property. At the time of the eviction, the warrant to give vacant possession held by the 5th respondent had expired making the entire execution proceedings illegal and irregular.
- iv. The 1st and 5th respondents have also served the applicant with their bill of costs, which indicates further execution of the decree.
- v. The applicant has moved both this Court and the Court of Appeal for extension of time within which to file a memorandum and record of appeal

3] The applicant was represented by M/s Nalunga-Birimumaaso & Co., Advocates while the respondents were represented by the Legal Aid Project of the Uganda Law Society respectively. Both counsel filed written submissions which I will put into consideration in this decision.

4] Ignatious Kayiga filed an affidavit in support, and in rejoinder of the application giving more detail to his claim. I will not repeat them *verbatim* but suffice to note, a notice of appeal contesting the decision in the consolidated suits and a letter requesting for certified copies of proceedings was filed on 3/5/17 and 25/5/17 respectively and served upon the respondents. That when the main application came up for hearing on 4/7/2017, the applicant and 1st respondent entered into a consent before the trial Judge and agreed to stay execution of the decree pending appeal. That it was a term of that consent order that the applicant retains occupation, management and utilization of **part** of the suit property, a result of which the applicant handed over management of the property to his lawyers M/s Kaggwa Owesigire & Co., Advocates.

- 5] The above notwithstanding, on 23/3/2018, the applicant was evicted from the suit property allegedly in execution of the decree. He denied being served or present at the hearing before the Registrar of 22/12/2018 at which his eviction was ordered. That his efforts to obtain the record of proceedings in order to pursue the appeal have so far been frustrated by the Court staff. That when a copy of the proceedings was eventually availed, it showed that his former lawyers M/s Kaggwa Owesigire & Co., Advocates had previously received the record on 11/8/17, a fact not in his knowledge. He has now instructed a new firm of lawyers who have managed to file an application for extension of time to appeal in the Court of appeal on his behalf.
- 6] Kayiga further stated that his eviction was unlawful because it was carried out under a warrant that had expired; he is therefore entitled to be reinstated back into the suit land. That both the 1st and 5th respondents have already served him with notices to tax their bills of costs, an indication of execution of the residue of the decree.
- 7] In his affidavit in reply to the application, the 1st respondent stated that the application has been overtaken by events and there being no pending appeal, it is misconceived and an abuse of court process. He admitted that a consent judgment was reached in the main application but argued that the agreement was that execution be stayed pending determination of the appeal. That at the time it was signed, the applicant who had not yet filed his appeal was within statutory time to do so. That when the applicant failed to show diligence in filing his appeal, and time for him to file run out, the respondents moved the Court for a renewal of the warrant to give vacant possession which was granted. That as a result, a Notice to show cause against execution was issued by the Registrar for 22/12/17, received but ignored by the applicant. Execution proceedings followed and the 1st applicant received possession of the relevant part of the suit land which he demolished and thus the prayer for reinstatement of the applicant is now mute. That the consent order was overtaken by events since the same was for stay of execution pending appeal which appeal is not existing on the court record to date.
- 8] The 1st respondent continued that his lawyers have also filed an application to strike out the notice of appeal filed by the applicant for failing to file a memorandum of appeal and

the appeal has minimal chances of success. That no good reason has been advanced for the prayer to stay execution.

- 9] On their part, the 2nd, 3rd and 4th respondents through Namusisi Justine, stated that they have no interest in the suit property and were not party to either the main application or execution proceedings leading to the applicant's eviction from the suit property. Therefore that, they were wrongly added to this application. In his submissions, their counsel raised issue with their inclusion in these proceedings and raised a preliminary objection, which I will attend to first.
- 10] On their part, the 5th respondent through Agaba Michael Alex, a director stated that the applicant violated part of the consent order (in particular clause 4 thereof). That following a complaint by the 1st respondent, the trial Judge ordered that the applicant be issued with a notice to show cause why execution should not issue against him. That the Registrar followed the directive of the Judge by issuing the notice and the proceedings were heard interparty on 22/12/2017. That following the Registrar's order for vacant possession, (with respect to the tenants contemplated in paragraph 4 of the consent order) they acted in the execution of the decree in the consolidated suit as officers of Court by executing the warrant on 23/3/18. They summarized that in the event the application is granted, the applicant should be ordered to pay security for costs, especially with regard to their bill of costs in the sum of Shs. 25,000,000 that is pending execution.

The preliminary objection raised for the 2nd, 3rd and 4th respondents.

- 11] It was argued for the 2nd, 3rd and 4th respondents that they were neither party to the consent judgment nor the execution proceedings which resulted into the eviction of the applicant by the 5th respondent in favour of the 1st respondent. They are not mentioned in the application and as such, there is no cause of action against them.
- 12] The applicant responded that those respondents were not added in error because they had been party to all previous proceedings including the consolidated suits and main application

- 13] For one to show a cause of action, they must show in their pleadings that, they enjoyed a right, the right has been violated, and that the defendant/respondent is responsible for the violation. See **Auto Garage Vrs Motocov (1973) EA 314**. A claim can be sustained only if all the above essential elements are present.
- 14] The applicant's claim in this application is that some of the terms of the consent judgment in the main application were violated and an illegal execution carried out. It was argued for the 2nd, 3rd and 4th respondents, and not refuted, that they had no interest in the suit property and as a result, did not participate in the proceedings leading to the consent order and where not party to it. The eviction was carried out by the 5th respondent on the instructions of the 1st respondent and for his benefit. It follows that the applicant had no claim against the 2nd, 3rd and 4th respondents and therefore he did not enjoy any right that they violated. The decision in **Cooke Vrs Gill LR 8 EP 116 and Read Vs Bow 22 QBD 31** is instructive. A cause of action is defined as every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment. No order has been sought against the 2nd, 3rd and 4th respondents in this application
- 15] The fact that those particular respondents were party to the previous proceedings does not *per-se* make them party to the consent order and no evidence was adduced to show that they were in violation thereof. I would thus agree with their counsel that there is no cause of action against the 2nd, 3rd and 4th respondents and the preliminary objection accordingly succeeds.

The law

- 16] The general principle is that where an unsuccessful party is exercising their unrestricted right to appeal, it is the duty of the Court to make such order for staying proceedings in the judgment appealed from as will prevent the appeal from being rendered nugatory. See **Wilson Vrs Church (1879) Vol. 12 CH D 454** followed in **Global Capital Save 2004 Ltd & Another Vrs Alice Okiror & Another HCMA No. 485/2012**,
- 17] In **Lawrence Musiitwa Kyazze Vs. Eunice Busingye SCCA N0. 18 of 1990 (1992) IV KALR 55**, it was held that an application for stay of execution pending appeal is designed

to preserve the subject matter in dispute so that the right of the appellant who is exercising his/her undoubted rights of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

- 18] There are no specific provisions in our civil laws for setting aside a done and closed execution. The aggrieved party would thus have recourse to the general law empowering the High Court to grant any type of remedies to any aggrieved party, presenting one bonafide.

My decision

- 19] The existence of the consent judgment between the two named parties is not contested. 1st respondent's counsel argued that their understanding of the consent was that it was made at a time when no appeal had been filed but the applicant was still within the statutory period to file his appeal in the Court of Appeal. That he did not act with reasonable diligence in filing the appeal even after he was served with the record of appeal, and the period lapsed without him doing so. That the eviction was carried out only after a formal complaint was lodged with the Judge, which prompted the Registrar to issue a notice to show cause, which was prosecuted. That in his wise judgment, the Registrar ordered vacant possession in favour of the 1st respondent and issued a warrant to that effect. The 5th respondent offered that it was the Judge who infact directed the Registrar to issue the notice to show cause and the eviction was ordered because the 1st applicant was in violation of clause No. 4 of the consent judgment, and it was only for that reason (and specifically to address the 1st applicant's shortcomings in that regard), that the warrant was issued.
- 20] The main application was settled by a consent order dated 4/7/17 endorsed by the applicant, 1st respondent and their respective legal representatives. It had six clauses but the gist of the agreement was that **".... execution of a decree arising out of Civil Suit No. 84 of 2010 and 82/2011 be stayed pending appeal and the suit property be jointly managed by the applicant and 1st respondent until the determination of the pending appeal arising from Civil Suit No. 84 of 2010 and 82/2011"** (the consolidated

suits). The order then specified the portions of the suit property that would be managed by either party.

- 21] I would agree with applicant's counsel that the consent order constituted an order of the Court that had to be obeyed by all parties concerned. Their quotation from the Uganda Civil Justice Bench Book at Page 143 would be very apt in the circumstances.
- 22] There is authority to the effect that consent judgments are to be treated as final agreements only to be interfered with on limited grounds. See for example **Attorney General & Anor Vs James Mark Kanya & Anor C/A 8/2004** and **Goodman Agencies Ltd Vs AG & Anor Constitutional Petition No. 3/2008**. I would add that this being a consent order, the parties were bound to follow it, up and until all or either one of the a parties felt aggrieved by its terms because circumstances had changed, its terms were agreed upon through duress or fraud or without full knowledge of important intervening factors, or its terms were now illegal or no longer enforceable, etc. Whichever of the above or other circumstances had come to pass, the correct procedure would have been for the aggrieved party to approach the concerned judicial officer who, after hearing both parties, would have considered varying its terms or setting it aside altogether. See for example **Ken Group of Companies Ltd Vrs Standard Chartered Bank (U) Ltd HCCS No, 486/2007 (Commercial Court)**,
- 23] Respondent's counsel must have been fully conscious of the above legal position for on 30/10/17 and 6/12/17 they wrote first to the Registrar of the Court and then the Judge, highlighting their predicament. They claimed that after obtaining the consent, the applicant reneged on his obligation to file the appeal even after they had (with instructions of the 1st respondent), taken the trouble to obtain certified copies of the record of the consolidated suits and served it upon his advocates. That it was a clear indication that the applicant was using the consent to delay the 1st respondent's rights to execution.
- 24] There is nothing to show that the response of the Judge was to direct the Registrar of the Court to re-open execution proceedings by issuing a notice to show cause. I do take much exception by the statement of Agaba Alex in paragraph 11 of his affidavit that the Judge

made a directive for the issue of the notice. Indeed Annexure C to his affidavit, the purported letter of the Judge to that effect, was not attached to his affidavit, because no such directive was ever made or existed. The attempts by the Registrar to conduct the proceedings of 22/12/17, would not cure the defect that a consent judgment existed between the two parties, with terms binding upon them until otherwise ordered by the Judge after an agreed variation.

- 25] The 1st respondent and his lawyer were alive to the fact that consent order was signed at a time when no formal appeal was in place. None the less, they agreed to sign it probably because the applicant's notice of appeal was in place as an indication of his intentions to appeal. 1st respondent's counsel argued that the time for filing an appeal lapsed and the applicant exhibited dilatory conduct and time to file the appeal run out.
- 26] The applicant disagreed. In his affidavit he showed that he was diligent in pursuing the appeal but his attempts to obtain the record were frustrated by the court staff to the level that he made two complaints to the Inspector of Courts, calling for her intervention. He explained that he was unaware that a copy of the record had been served upon his former lawyers, and he provided evidence of the fact that after the lawyer in personal conduct of the matter had left that law firm, no other person could vouch for having received the certified proceedings
- 27] I was equally baffled by Mr. Agaba's arguments that they executed against the applicant with respect to clause 4 of the consent order which he had violated. I note that according to clause 2 and 3 of the consent order, each party was given the portion of the suit land they were to occupy and manage. In clause 4, the applicant was under obligation to notify the tenants occupying space to which the 1st respondent was entitled, of the change in management and for them to vacate. Nothing was put forward to show that the applicant had not fulfilled that term or indeed any other terms of the consent judgment. Infact, it was specifically agreed in clause 5 that the terms of the consent order were to take effect on 1/8/17 and remain in force unless the parties agreed otherwise in respect of the main appeal. There was never an agreement that in violation of any terms of the order, execution against the applicant would ensue. Resort to moving the Registrar to issue a notice to show cause was thus premature and uncalled for.

- 28] It is not contested that a warrant to give vacant possession with respect to the suit land was issued by the Registrar on 22/12/17 to Mr. Agaba as the 5th respondent's representative. He was under directive (*inter alia*) to remove the applicant or his successors in titles and assignees from the suit land, and to report back to the Registrar by 28/2/18. I see no return of the warrant on record but by Agaba's own admission, the 5th respondent only managed to carry out the execution on 23/3/2018. The applicant would be correct to say that the execution was achieved with a warrant that had expired. Such an execution would no doubt be null and void with no force of law.
- 29] It has been shown that the 1st and 5th applicant are still pursuing further execution of the decree. They both filed proof of their bill of costs which are pending taxation. Ordinarily the next step would be to prosecute the taxation and then apply for further execution. In view of what I have stated above, the consent order halted any execution arising from the decree of the consolidated suits. I have found that the execution ordered on 22/12/18 was invalid and the execution itself although stemming from a court order, was void. The applicant would accordingly be entitled to the remedies sought in particular with regard to the execution proceedings and the execution itself.
- 30] In addition to attacking the execution, the applicant sought for an order for his restoration into the suit property in accordance with the consent order. There seems to be no contest that he was evicted on 23/3/2018. However, the respondents argue that his restoration is now overtaken by events, since he was not only evicted but the entire property razed down and no longer in existence. Those facts were never rebutted by the applicant in his affidavit in rejoinder which would confirm their truth. There would be nothing for the applicant to return to and ordering his restoration would unfortunately, be mute.
- 31] It was also argued for the 5th respondent that in the event the application was allowed, the applicant should be directed to deposit in court, security for costs and/or their fees. That may be so but as I have previously held in

V.G. Keshwala & Sons Ltd Vs Ronald Musisi M/A 14/2013, prevailing decisions and the statutory provisions should not fetter the discretion of the Judge to allow a stay of execution with conditions that suit the circumstances of each case.

32] It has been shown to my satisfaction that the respondents violated terms of a consent judgment of which they had full knowledge. They initiated and benefited from irregular execution proceedings and an illegal execution resulting into the eviction of the applicant and loss of property which he may end up being granted on appeal. The 5th respondent's affidavit contained flagrant falsehoods and that of the 1st respondent was rife with statements meant to avert clear legal provisions. No Court ought to reward such conduct with protection by issuing an order for security of costs. The consent judgment had altered all attempts at an execution and none should have taken place until it was set aside or varied, or the appeal heard and determined.

33] I accordingly allow the application, and make the following orders:-.

- i. The applicant has no cause of action against the 2nd, 3rd and 4th respondents in this application. The application is dismissed only with reference to those respondents with costs of the dismissal in their favour.
- ii. Execution of the decree in Civil Suit No. 84 of 2010 and Civil Suit No. 82 of 2011 is stayed and there shall be no further execution of that decree
- iii. The execution proceedings held on 22/12/18 before the Registrar, and the resultant order for vacant possession in Civil Suit No. 84 of 2010 and Civil Suit No. 82 of 2011 are nullified and set aside
- iv. The actions and conduct of the 1st and 5th respondents in evicting the applicant from the suit property are declared to have been irregular and illegal.
- v. The costs of this application are awarded to the applicant and against the 1st and 5th respondents.

I so Order

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EVA K. LUSWATA

JUDGE

21/5/2019