

The Republic of Uganda

In the High Court of Uganda at Soroti

Miscellaneous Application No. 0016 of 2023

(Arising from Execution Miscellaneous Application No. 0022 of 2022)

(Arising from Civil Suit No. 0018 of 2014)

Komuhendo Bertha Akiiki: Appellant

Versus

Aisu Isaac Godwin Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

Ruling

This is an application brought by Notice of motion under section 98 of the Civil Procedure Act and Order 50 rule 8 of the Civil Procedure Rules for an order setting aside the Ruling and Orders passed by the Learned Assistant Registrar of this Honourable Court Her Worship Chemeri Jessica delivered in Execution Miscellaneous Application No. 22 of 2022 and provision of costs.

The grounds of this application as set out in the application and detailed in the applicant's affidavit in support are that;

25 1. The Learned Trial Assistant Registrar erred in law when she over turned the orders of the Judge by dismissing EMA No. 22 of 2022 in total disregard of the timeline for payment of the security for due performance of the decree that was set by this Honourable court on 24th November 2021 to



5 the effect that the respondent was supposed to pay security for due performance of the decree within 30 days from the date of the Ruling in MA No. 179 of 2020.

2. That it is just, fair and equitable that this honourable court sets aside the arbitrary orders and ruling passed by the Learned Trial Assistant Registrar
10 of this Honourable court, Her Worship Chemeri Jessica in EMA No. 22 of 2022.

The respondent in his affidavit in reply stated that he deposited the security for due performance of the decree within the 30-day timeline and the Registrar was justified to dismiss the appellant's application for execution. That the learned
15 Registrar only dealt with matters of execution and did not tamper with the judge's ruling.

The appellant in rejoinder stated that the time within which to pay the security for due performance of the decree and costs started running from the 24th day of November 2021 in tandem with the court order. That the payment later made
20 was done out of time and the dismissal of her application for execution was illegal.

Representation.

The applicant was represented by M/s Isabirye & Co. Advocates while the respondent was represented by M/s Signature Advocates. Both parties filed their
25 written submissions which I have duly considered.

Determination.

Before I determine this application on its merits I will first determine the preliminary objections raised by the appellant.

5 The first objection is that the respondent's affidavit in reply was filed without a statement of summary of evidence, list of documents, list of witnesses and list of authorities which contravenes order 6 rule 2 of the Civil Procedure Rules. Counsel relied on ***Matovu & Anor v Patel [2013] UGHCCD 79.***

10 Counsel for the respondent in reply submitted that this objection is moot as an affidavit does not qualify as a pleading within the meaning of section 2(p) of the Civil Procedure Act.

Counsel further submitted that an affidavit by its nature is a summary of evidence to be relied upon and already availed to the opposite party, the witness is the deponent to the affidavit and the documents are normally annexed to the
15 affidavit.

Counsel additionally submitted that this appeal was filed by way of notice of motion under Order 50 rule 8 of the Civil Procedure Rules and as such is governed by specific provisions while order 6 is a general provision.

20 That the specific provision governing Motions is Order 52 of the Civil Procedure Rules which under rule 3 provides that every notice of motion shall state in general terms the grounds of the application, and, where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.

Counsel relying on ***Sule Pharmacy Ltd Vs Registered Trustees of Khoja Shia Jenali H.C.M.A No. 147 of 1999*** finally submitted that the rules of statutory
25 interpretation are that where there is a specific legislative provision and a general provision on a particular matter or procedure, the specific provision takes precedence over the general provision.

5 Order 6 rule 2 of the Civil Procedure Rules provides that every pleading shall be accompanied by a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on; except that an additional list of authorities may be provided later with the leave of court.

Section 2(p) of the Civil Procedure Act provides that a "**pleading**" includes any
10 petition or summons, and also includes the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant to them, and the reply of the plaintiff to any defence or counterclaim of a defendant.

An affidavit is defined by the Black's Law Dictionary 9th ed. as a voluntary declaration of facts written down and sworn to by the declarant before an officer
15 authorized to administer oaths.

Affidavits are used as evidence of the persons that author them and as such I find that the respondents affidavit in reply being evidence on its own need not be accompanied by a statement of summary evidence, lists of witnesses, authorities and documents. Furthermore, the absence of this summary does not in any way
20 prejudice the applicants claim. In my considered view, the act of accompanying pleadings by a statement of summary evidence, lists of witnesses, authorities and documents is procedural and which is to enable the avoidance of trial by ambush but it is not fatal to one's case especially where there is affidavit evidence on record which details the claim of the opposite party to which the other party can
25 ably glean what the other party's grievances are. That being the case this objection is accordingly overruled.

The second objection was that the respondent's affidavit in reply does not distinguish paragraphs based on knowledge, information and belief. Counsel prayed that entire affidavit be struck out.

5 Counsel for the respondent submitted in reply that the respondent's affidavit was in conformity with order 19 rule 3 of the Civil Procedure Rules.

The perusal of the respondent's affidavit shows that it conforms with Order 19 rule 3 (1) of the Civil Procedure Rules. which requires that affidavits be confined to such facts as the deponent is able of his or her own knowledge to prove, except
10 on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.

I find that the applicant herein in each paragraph gives information based on his knowledge except for paragraphs 12,13 and 14 where he gives information based on his lawyer's advice. This objection is thus not meritorious and is accordingly
15 overruled.

I will now turn to the merits of this appeal. The appellant raised one ground of appeal;

*That the Learned Trial Assistant Registrar erred in law when she over turned the orders of the Judge by dismissing EMA No. 22 of 2022 in total disregard
20 of the timeline for payment of the security for due performance of the decree that was set by this Honourable court on 24th November 2021 to the effect that the respondent was supposed to pay security for due performance of the decree within 30 days from the date of the Ruling in MA no. 179 of 2020.*

Counsel for the appellant submitted that under paragraphs 4 and 7 of the
25 affidavit in support and paragraph 7 of the Rejoinder the appellant led evidence that this court decreed in the ruling by Hon. Tadeo Asiimwe on the 24th November 2021 that the judgment and decree in Civil Suit No. 18 of 2014 stood conditionally stayed upon the payment of security for due performance of the decree and costs

- 5 within 30 days from the date of the ruling, failure of which rendered the orders thereof vacated.

That these days expired on the 24th day of December 2021 and the security for due performance of the decree was paid on the 10th of June 2022 which was out of time by 169 days without leave of court.

- 10 Counsel further submitted that an order of court remains in force, save for when varied, set aside or vacated by the court.

That it was not for the respondent to comply with the court order at his own convenience and pace and so his subsequent payment made out of time was illegal.

- 15 That basing on the then the ruling by the Assistant Registrar on the 5th day December 2022 dismissing the appellant's application for execution was an illegality which overturned Hon. Justice Tadeo's conditional 30 days' order.

- Counsel further additionally submitted that even if one was to argue that the 30 days suffered a setback when the respondent filed his application for review the
20 time had virtually run for 29 days.

That the general principle of law is that the filing of an application neither acts as a stay of execution nor stops the time decreed by court from running.

Counsel finally prayed that this court be pleased to set aside the ruling and orders of the learned Assistant Registrar which were delivered *per-incuriam*.

- 25 Counsel for the respondent in reply submitted that it is an agreed fact that after delivery of the ruling staying execution and an order to deposit security for costs in Application No. 0179 of 2020, the respondent filed an application for review before the expiry of the 30 days ordered by his Lordship Justice Tadeo Asimwe. Counsel argued that when the respondent filed HCMA No. 191 of 2021 for review

- 5 the clock was automatically re-winded and time within which to deposit the security for costs abided the outcome of that application.

That the ruling in the application for review was on the 11th May 2022 and the 30 days' period only started running then with the respondent then depositing the security for costs on the 10th day of June, 2022 before the expiry of the 30 days.

- 10 Counsel further submitted that the application for execution and Notice to show cause were filed and issued on the 15th July 2022 when the Respondent had already deposited the security, more so when the notice to show cause came up for hearing the respondent informed court that he had already deposited security for costs and he was tasked to avail proof which he did.
- 15 Counsel additionally submitted that the matter at stake is family property and the right to property is protected by the Constitution and if it must be taken away, it must be done after due process.

- That the ends of justice require a case to be determined on merit so that the rightful owner of the property is determined in a fair trial. Counsel continued to
- 20 submit that the upon perusal of the record and circumstances surrounding this appeal, upon the respondent's application for review being dismissed he made payments of the security of Shs. 12,000,000/= and it would be absurd if the court declares that the respondent's deposit was paid in vain and goes ahead to order execution to issue.

- 25 That the respondent deponed in his affidavit that he has taken active steps to have his appeal heard and submissions have been filed.

Counsel then prayed that this court finds that the Assistant Registrar rightly found that the timeline could not be followed given the then pending application for review.

5 Counsel further prayed that this court finds that the learned Assistant Registrar exercised due diligence before making a ruling and her ruling does not amount to overturning the judge's orders.

In making findings in regard to this appeal from the decision of the learned registrar of this court, I note that the appellant herein was the successful party in
10 HCCS No. 0018 of 2014 and the respondent herein filed an appeal in the Court of Appeal and also filed HCMA No 0179 of 2020 seeking stay of execution.

The application in HCMA No 0179 of 2020 was granted by Hon. Justice Tadeo Asiimwe on the 24th November 2021 with the 2nd order stating thus;

15 ***"The applicant shall pay security for due performance of the decree and costs equivalent to Ugx. 12,000,000/= (Twelve million only) within 30 days from the date of this order. Failure to pay the security above in 30 days shall render the orders herein vacated automatically"***

Nearly one month thereafter, the respondent then filed HCMA No. 0191 of 2021 on the 23rd of December 2021 seeking that the ruling in HCMA No. 0179 of 2020
20 requiring the applicant to deposit Ugx. 12,000,000/= as security be reviewed.

HCMA No. 0191 of 2021 of 23rd of December 2021 was heard and dismissed with this court under its 3rd order stating thus;

25 ***"The decision of this honourable court in Miscellaneous Application No. 0179 of 2020 requiring the applicant to deposit Ugx. 12,000,000/= (Uganda Shillings Twelve Million) as security of costs is maintained."***

From the parties' pleadings and submissions, it is clear that the main issue for determination is whether the 30 days' period within which the respondent was required to pay the security for due performance of the decree and costs in HCMA No 0179 of 2020 which was granted by Hon. Justice Taddeo Asiimwe on

5 the 24th November 2021 had expired by the time the applicant did so on the 10.06.2022.

In my considered view, the fact that the applicant sought for and was granted an opportunity by this court to file and have argued a subsequent application, that is, HCMA No. 0191 of 2021 of 23rd of December 2021, is justifiable under the rules
10 of natural justice to show that the order made on the 24th of November 2021 in HCMA No 0179 of 2020 granted by Hon. Justice Taddeo Asimwe was automatically stayed by pending the respondent's application for review on the 23rd day of December 2021 as that application was made before the lapse of 30 days. Had the application for review been filed after the 30 days had lapsed then
15 one might argue that the time period which had earlier been ordered had indeed lapsed which would have rendered the order for payment of security of costs for due performance of the decree and costs no longer available to the respondent.

However, this court heard and dismissed HCMA No. 0191 of 2021 of 23rd of December 2021 which was the application for review on 11th May 2022. In my
20 considered view the justice of the matter then would necessitate that the 30 days earlier ordered can only begin running afresh from the date of the later ruling was made for doing otherwise would defeat logic and proper administration of justice where one files an application for review of an order and at the same time while such an application is being processed then the very filing of such an
25 application by its nature could not stop an order which is being sought reviewed. If that was the case, then there would be no requirement in law for a party to seek for review of an order they are comfortable with and such an application for review would be rendered nugatory from the very beginning because it would then imply that the application for review was rendered nugatory even before it
30 was even filed and heard on its merits.



- 5 But since the rules of procedures are but maidens of justice and a court must always exercise mercy, I am of the considered and firm view that since the applicant filed the application for review of the very order of this court, then the 30-day period early ordered can only start running only after the determination of the application for review.
- 10 Furthermore, I note the application for review was limited to the sum ordered by this court as security for due performance and costs. It then would follow that after determination of the application any order made thereafter became effective as on the date of that ruling of the application, which in this case was the 11th May 2022.
- 15 Consequently, I would find that the payment of security for due performance of the decree and costs made on the 10th June, 2022 as proven by the general receipt (E-2) and verification letters (E-1,3 & 4) attached to this application, was well within time.
- As a result, I would find that the order made by the Assistant Registrar dismissing
20 the application for execution filed by the applicant was lawful and in order for once the respondent had paid security for due performance of the decree as ordered by this court as a condition for stay of execution, it would be unjust for the Registrar to hear an application for execution especially when this application was filed on the 13th July 2022 after the respondent had already paid the security.
- 25 I thus find that the learned Registrar did not overturn the orders of the Judge when she dismissed the applicant's application for execution because as seen above, the timeline for payment started running afresh on the 11th May 2022 when a ruling dismissing the application for review and upholding this court's earlier order for payment of security was made. There was no *per incuriam*
30 decision made by the learned registrar of this court as learned counsel for the

- 5 appellant would want this court to believe as **Black's Law Dictionary 9th Ed.** defines per incuriam as a judicial decision wrongly decided, usually because the judge or judges were ill-informed about the applicable law. This is not the case in the instant matter as the Registrar rightfully dismissed the application for execution based on the clear facts before her that the security had been deposited and as
- 10 such execution could not proceed so as to enable the pending appeal before the Court of Appeal to proceed unhinged. It was just, fair and equitable that she made the orders which she did which orders are found to have been based on the interest of the justice of the matter and the facts as obtaining before the court and thus was not arbitrary.
- 15 The above being so, I find that this appeal was not properly thought out for the very reasons above and as such lacks merit and is accordingly dismissed with costs to the respondent.

I so order.



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Adonyo, J

11th July, 2023