THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(EXECUTION AND BAILIFFS DIVISION)

MISCELLEANOUS APPLICATION NO. 652 OF 2016

(ARSING FROM EMA 407 OF 2016)

(ARISING FROM CIVIL APPEAL 92 OF 2010 HCRT NAKAWA)

JOYCE NAMBI

KIWANUKA SAMUEL …….. OBJECTORS / APPLICANTS

VERSUS

JESSICA MPUNGU …… JUDGMENT CREDITOR / RESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This application was made under S.98 CPA and 0.22 r 55 C.P.R. The Applicants seek orders to the effect that the land comprising of their Customary Tenement (Kibanja) at Bwebajja be released from attachment and the Objectors should not be evicted there from.

The grounds for the application are supported by the affidavit of the First Objector.

Briefly, the grounds are that the Applicants and their families are the customary owners and occupants of the disputed land on which they have resided as customary tenants from time immemorial.

The Applicants have always used the property as their Kibanja and their ancestors are buried on the land.

The said Rachael Naluwooza has never been in occupation of the suit property, although she is a distant relative who shares the same ancestry with the Applicants.

The Respondent has all along been aware that Rachael Naluwooza has never been the owner of the land in dispute and that she has never resided in the area or ever been in occupation of the land and therefore could never be a subject of eviction, yet they have made an application purportedly intending to evict her, but the application is intended to evict the Applicants.

The Applicants have been embroiled in a legal case with the Respondent since 2014, in civil suit 291/2014, where they challenge the Respondent's right to the suit land, and any action intended to evict them at the moment shall occasion great injustice and irreparable damage as the suit is pending determination.

It is just and equitable that the application be allowed.

There is an affidavit in reply sworn by Christine Birabwa Nsubuga, the Attorney of the Judgment Creditor / Respondent.

The application was called for hearing on 26.06.16.

Counsel for the Applicant vented the provisions of the law under which the application was made and went through the grounds in the motion and the supporting affidavit, emphasizing that, the Applicants are the true customary occupants and owners of the land in issue, the issue of ownership is pending determination in High Court.

The case of **Eleter Ejalu vs. Uganda Railways Workers Union SCCS 08/95** was relied upon to support the submission.

It was held in that case that "***in cases of this nature, the issue of ownership is paramount but court has to look at who is in possession. If the Objector is in possession and there are pending issues as to ownership of the property, the court has to inquire into the rights of the objector."***

Counsel argued that since there are pending issues between the Applicant and the Respondent as to ownership of the property, then the eviction order cannot issue against the Applicants until the issues have been determined by court.

It was prayed that the application be allowed with costs to the Objector who are the Plaintiffs in the suit where ownership is contested.

In reply, Counsel for the respondent contended that the Respondent / Judgment Creditor is effecting the eviction order made by the judge in C.A 92/10. And that since this is an eviction and not an attachment, 0.22 r 55 C.P.R relied upon by the Applicants does not apply, and the application has no basis in law.

Referring to the affidavit in reply paragraphs 5 and 10, Counsel argued that the judgment relied upon by the Respondent has not been set aside. That the Applicants / Objectors were also witnesses of the Judgment Debtor in C.A 92/10 and therefore cannot claim ignorance of the case and together with their Counsel, claimed that the Judgment Debtor was the owner of the land, yet Counsel now claims that the Judgment Debtor has never owned the land.

Counsel for the Respondent then asserted that, it was regrettable that the same Counsel is now stating that the Judgment Debtor never owned the land, yet he represented her as owner and she lost.

Court was referred to Annexture B to the application, explaining that it was the same evidence considered in CA 92/10 and rejected by court.

Further that the Applicants are relatives of the Judgment Debtor and derive their claim from the beneficiaries of the Judgment Debtor in C.A 92/10. And that therefore, the suit referred to at Nakawa Court C.S 219/14 amounts to a multiplicity of suits and it is just intended to defeat the Judgment Creditor.

Contending that there is no house on the disputed land or burial site, but only a potato garden, it was emphasized that court should note that the Applicants were witnesses of the Judgment Debtor whom they claimed was the owner of the land.

Court was urged to disregard the evidence of the LC Chairperson in Annexture A to the affidavit in support and the letter of the General Secretary of 22.03.16, Annexture C for being contradictory. In Annexture A, the Chairman gave evidence of ownership of the Applicants and yet in Annexture C the same Chairperson witnessed the agreement where the Judgment Debtor in C.A. 92/10 illegally sold the land. And yet the same Chairperson told court the debtor resided in the suit land.

Counsel concluded stating that it was only in the interests of justice that the application be dismissed so that the Judgment Creditor / Respondent can enjoy the fruits of her judgment. Costs were also applied for.

In rejoinder, Counsel for the Applicant denied representing the Judgment Debtor in the lower court; when the record of appeal indicates the Counsel who represented the Judgment Debtor and they are the ones who filed the case in the lower court.

Insisting that the Applicants reside on the land and have a house there, Counsel maintained his earlier prayer. Adding that under 0.22 r 55 C.P.R, the wording clearly spells out the intent and purpose of the law makers. And that therefore the application is properly before court because the purpose of the eviction is to get possession of the land.

Whether the Applicants should not be evicted from the suit land is no issue to be determined by this court.

I heard the submissions of both Counsel and I have given them the best consideration that I can in the circumstances. It is apparent that this application arises out of eviction proceedings commenced as a result of the judgment court in Civil Appeal No. 92 / 2010, it is not attachment proceedings as contended by the Applicants.

And as pointed out by Counsel for the Respondent and rightly so, the orders issued by judge in the aforesaid civil appeal cannot be revisited in this manner. If the Applicants or anyone else were not satisfied with the orders of the Hon. Judge, they ought to have appealed. The judgment and decree or appeal have not been set aside.

As the matters stand now, the Applicants were not part of the suit and the attendant appeal, out of which the order they want stayed was issued.

However, the decree of the Civil Appeal clearly indicates that ***"a permanent injunction was issued retraining the Defendant / Respondent and or her agents, servants or successors from further trespass."*** The Applicants claim title from the relatives of the Judgment Debtor who was declared trespasser on appeal.

While the Applicants may be in possession, which is denied by the Respondent, the issue of ownership was resolved by the Appeal already referred to in this ruling.

The Civil Suit 291/2014, the Applicants claim is pending before the Nakawa Court is in my view Res judicata as the issue of ownership was heard and finally decided by the High Court on Appeal.

It is on record and not disputed by the Applicants that they were witnesses of the Defendant / Respondent in the lower court, where they claimed that she was the owner of the suit land. It is intriguing that they now claim that the Defendant has never been owner of the land.

Counsel for the Applicants' argument that the Respondent are trying to attach the property cannot be sustained for reasons I have already given; although I hasten to add that bringing of an application under the wrong law is not fatal to an application. But 0.22 r 55 C.P.R is not applicable to the circumstances of the present case.

While court has inherent powers under S.98 C.P.R to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of court, it cannot be heard to be said that enforcement of the orders given in C.A 92/2010, where there is no appeal will amount to an injustice or abuse of the process of court.

The application accordingly fails for all the reasons set out herein and is dismissed with costs to the Respondent.

Flavia Senoga Anglin

Judge

11.07.16