

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)**

5 **MISCELLANEOUS APPLICATION NO. 1738 OF 2016
(ARISING FROM EMA NO. 0777 OF 2014)
(ARISING FROM CIVIL SUIT NO. 733 OF 2009)**

KEZIA NAKIBUUKA KITYO ----- APPLICANT/DEFENDANT

10 **VS.**

FLORENCE NALULE ----- RESPONDENT/PLAINTIFF

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

15 This is an application that was made under S.98 CPA, 0.22 rr 23 (1) and 26(1), 0.52 rr 1 and 3 of the C.P.R.

The Applicant seeks the following orders:-

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- 1) Stay of execution of the judgment and decree in Civil Suit 733/2009.
 - 2) Proper valuation of the property/subject matter be made with the knowledge of both parties.
 - 25 3) Costs of the application abide the determination of the matter.

The grounds of the application are that:-

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- a) The Applicant was never served with any court process save for the notice to show cause why execution should not issue dated 07.06.16.
 - b) The Applicant was never notified of any valuation of the property in issue and hence believes that no proper valuation was done.
 - 35 c) If execution is not stayed, the Applicant will suffer injustice and substantial loss because of the under valuation of the property.
 - 40 d) It is just and equitable that a proper valuation of the property be made and a stay of execution be granted.

The application is supported by the affidavit of the Applicant Kezia Nakibuuka Kityo.

There is an affidavit in reply deposed by Rita S. Nsubuga an Advocate. She contends that the application has been overtaken by events and contravenes the rules of natural justice.

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That parties entered into a consent judgment 15.10.12, in HCCS No. 733/2009.

Following the signing of the consent judgment, the Applicant refused to surrender the duplicate certificate of title and chased away potential buyers who would go to view the land for sale under the terms of the consent judgment – Annexure A.

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Eventually, the Respondent applied for execution of the judgment and decree obtained in the suit vide Miscellenous Application 0777/2014.

Following the application and orders of this court, the land comprised in LRV 1346 Folio 12 Plot 522, Najjanakumbi was advertised and successfully sold to Kwizera Bycyama Paul – Annexures “B” and “C” respectively.

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Therefore that, the orders sought in this application have been overtaken by events, as execution was concluded and a return filed.

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The proceeds of the sale were applied in accordance with the consent judgment and decree in the suit.

The Applicant refused to collect her share and the money could not be deposited on Bank accounts of the court that were no longer operational. The Respondent and her Counsel were advised to hold on to the money until they were advised of new Bank Accounts.

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It is not true that Applicant was never served with court process as she was at all times served, through her lawyers Lumwen & Co. Advocates, until instructions were withdrawn from the said firm on 12.07.16.

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The property was sold to the highest bidder as the Applicant had frustrated all willing buyers.

There is no affidavit in rejoinder.

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The application was heard on 30.11.16.

Counsel for the Applicant went through the provisions of the law under which the application was made, the grounds of the application and the supporting affidavit.

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It was emphasized that the Applicant is dissatisfied with the sale value of Shs. 87,000,000/- yet from the earlier communication of the Respondents’ Advocate, the property was valued at Shs. 300,000,000/- - Annexure B dated 23.10.16.

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Secondly, a certified valuer was to be jointly procured by the parties to give the true value of the property.

The Applicant contends that the Respondent acted contrary to the said communication and the Applicant feels cheated and believes there was connivance to reach the value stated.

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That if execution is not stayed, having regard to the colossal sums involved, great injustice will ensue.

5 Court was prayed to direct another valuation and grant costs of the application.

In reply, Counsel for the Respondent submitted that the application is a non-starter referring to 0.22 r 23 (1) and 0.22 r 26 (1) C.P.R – he stated that the rules presuppose that there is a pending suit, and that the stay of execution is intended to benefit the pending suit.

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However that, the Applicant in the present matter has not indicated any pending suit or application of any nature to justify stay of execution. And there is no indication of any intention to file a suit of any nature. And that the application is therefore fatally defective.

15 Also that the Applicant in paragraph 6 of the supporting affidavit admits that the property was sold to someone yet the buyer is not a party to this application thereby denying him the right to be heard.

20 But most importantly that, the application has been overtaken by events. The Respondent indicates that she reached out to the Applicant for them to jointly do the valuation, however that, the Applicant frustrated the process- paragraph 6 – Applicant would chase away the potential buyers.

25 Having failed to get the Applicant's cooperation, the Respondent applied to have the property sold in execution, almost two years after the signing of the consent judgment.

30 Court issued the orders for valuation, advertisement and sale of the property. The property was sold and return of warrant filed. - Annexure B and C. Since execution was completed, there is nothing to stay.

The proper application would have been to set aside the sale.

35 The proceeds of the sale were applied in accordance with the decree but the Applicant refused to collect her share. The money is available, Counsel asserted, and will be deposited on any account the Respondent is advised of.

40 Denying the allegation of lack of proper notification of process to the Applicant, it was stated that the Applicant was always served through her lawyer until 2016, when notice of change of Advocates was filed.

The letter proposing value of Shs. 300,000,000/- was without prejudice and nowhere does it indicate that valuation had been done then. It gave a layman's estimate.

45 The Applicant, it was argued, did not produce any report to indicate that property was worth 300,000,000/-.

It was prayed that application be dismissed with costs to the Respondent.

Whether this is a proper case to stay execution of the judgment and decree.

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Upon giving the application, supporting affidavits and the affidavits against the application together with the submissions of both Counsel, the best consideration I can in the circumstances, I am inclined to agree with the submissions of Counsel for the Respondent.

5 It is not disputed that the parties entered into a consent judgment on 15.10.12 in HCCCS 733/2009.

10 It can be discerned from the affidavits against the application that, the Applicant failed to live up to the terms of the consent, hereby forcing the Respondent to apply for execution in Miscellaneous Application 0777/2014, by attachment and way of sale of property comprised in LRV 1346 Folio 12 Plot 522 at Najjanakumbi.

The property was advertised for sale.

15 The Applicant admits that she was served with notice to show cause why execution should not issue. The notice is dated 07.06.16.

20 Court allowed execution to go ahead and the property was sold on 21.06.16 as indicated by the memorandum of sale filed in court on 22.06.16.

This application was filed in court on 16.08.16.

It is therefore apparent that this application for stay of the sale has been overtaken by events.

25 While the Applicant has grievances about the amount for which the property was allegedly sold, contending that a higher value had been estimated; and refused to collect her share of the proceedings, to set aside the sale when the buyer is not party to the proceedings, would be an abuse of court process. It would amount to condemning the buyer without giving him a chance to be heard- which would be contrary to the provisions of the Constitution: - Article
30 28.

As matters stand now, there is nothing to stay.

35 The only remedy open to the Applicant is to sue the Respondent and buyer and seek the remedy of proper valuation of the subject matter, as it stood at the time of the sale. She can place a caveat on the property in the meantime.

The Respondent is willing to deposit the share of the Applicant from the sale in court and that can be done.

40 The application is disallowed for all those reasons.

The Respondent is directed to deposit the share of the money for the Applicant in the court within one week from the date of this ruling.

45 The Applicant is free to seek any other appropriate remedy as already indicated in this ruling.

Each party to bear its own costs.

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FLAVIA SENOGA ANGLIN
JUDGE
08.06.17

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