

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 1404 OF 2021
(ARISING FROM CIVIL SUIT NO. 359 OF 2019)

NAGUYO AMOS::: APPLICANT

VERSUS

OLIVIA BIRUNGI::: RESPONDENT

BEFORE: HON JUSTICE JOHN EUDES KEITIRIMA

RULING

This is an application brought by Notice of Motion under *Order 52 Rule 1 and 3 of the Civil Procedure Rules SI-71-1 as amended*.


The Applicant is seeking for the following orders;

- (a) That the Orders for Execution against the Applicant be set aside.
- (b) That the schedule of payment in the Consent Judgment be varied.
- (c) In the alternative and without prejudice to the foregoing, the consent judgment be set aside and the suit be set for hearing on its merits.
- (d) Costs of this Application be provided for.

The application is supported by the Affidavit of **Naguyo Amos** the Applicant in this matter who deposes inter alia;

1. That the applicant is a shareholder and Director of a company called NASCO General Contractors Limited.

2. That the said company on the 27th day of May, 2011 through its directors issued powers of attorney to the applicant to act on its behalf.


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3. That on or about November 2014, the applicant obtained a loan from the Respondent to the tune of **UGX 7,000,000(seven million shillings)** to invest in the business of the said company where he is a shareholder.


4. That acting on behalf of the Company he pledged the suit property viz **Kyandondo Block 194 Plot 593 land at Kungu** registered in his names and a postdated cheque of Centenary Bank Limited vide Cheque no.000129 in the names of NASCO General Contractors Limited.

5. That the suit land and the cheque were to be held as security by the Respondent for the payment of the principal on the loan along with interest totaling to **Uganda Shillings eleven million two hundred thousand shillings (11,200,000/=)**.

6. That when he did not pay the full sum within the agreed time, the Respondent banked the cheque on the 28th day of August 2014 which payment was dishonored due to insufficient funds on the company account.

7. That the Respondent later agreed to terms of payment of the loan and when he was ready to pay the principal sum and interest, the respondent evaded him.

8. That to his surprise, the Respondent transferred the suit property into her names alleging that he sold the same to her.


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9. That on the 4th day of June 2014, the Respondent then issued a notice of eviction against him requiring him to vacate the premises within 14 days to allow people view the suit premises without interruption or else he would be forcefully evicted.


10. That he later filed **Civil Suit No.316 of 2015 Naguyo Amos vs Birugyi** before the High Court of Uganda, Land Division, which was dismissed for want of prosecution since they were pursuing talks amicably to resolve the dispute.

11. That the Respondent having received payments of **two million Uganda shillings (2,000,000/=)**, she later filed Civil Suit against him vide *Olivia Birungi versus Naguyo Amos Civil suit No. 359 of 2019* before this Court.

12. That he was never served with copies of the Complaint nor summons in the said suit.

13. That he only got to know about this suit when the Respondent brought draft copies of the Consent Judgment wherein they had negotiated reasonable terms along with my Advocates and hers and executed the consent judgment.

14. That the consent judgment was later filed on 8th of February, 2021 and he was required under the Consent Judgment to pay **five million shillings (5,000,000/=)** by the 30th March, 2020.


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15. That owing to the Covid 19 pandemic, the country was sent into a lockdown restrictions which spanned from the 19th March, 2020 and which hampered his ability to meet his obligations in accordance with the Consent Judgment.


16. That by mutual agreement with the respondent, he later resumed payment of the 1st instalment of **Five million shillings (5,000,000/=)** on the 8th day of February 2021 and later **one million shillings (1,000,000/=)** which totaled **six million shillings (6,000,000/=)**.

17. That he has never been served with a Notice to Show Cause why execution should not be issued nor has he ever been served with any application for execution.

18. That the respondent is aware that he was represented by M/S Tropical Law Advocates and did not take the courtesy to serve him through the said firm.

19. That to his surprise he received a message from the respondent threatening him to leave the suit land and yet he was meeting part of his financial obligations in accordance with the consent judgment.

20. That the message prompted him to instruct his lawyers to check on what was on the court file and it was found that the respondent was secretly making an application for attachment.


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21. That he deposes this affidavit in support of the application for setting aside the order of execution against him as he was never served with a Notice to Show Cause why execution should not issue.

There was an additional affidavit in support of the application deposed by **Racheal Nasirumbi of C/O M/S Wrok Valuation Consultants Limited** who deposed inter alia:

1. That she was instructed by the applicant on the 12th day of August 2021 to independently value property comprised in **Kyadondo Block 194 Plot 593, Kungu Wakiso District.**
2. That she visited the site and she saw a semi-permanent structure on the land of which she took pictures and valued the same.
3. That she found that the Market value of the said property was **sixty million shillings (60,000,000/=)** and the forced sale value was **forty million shillings (40,000,000/=).**

The applicant filed an additional affidavit in support of the application where he deposes inter alia:

- i. That the respondent fraudulently transferred the suit land into her names. The respondent listed the particulars of fraud as follows:
 - a) The respondent alleging that he had sold the suit land to her when he had borrowed money from her to the tune of seven million shillings (7,000,000/=).
 - b) That the respondent caused him to execute transfer deeds in her favour before granting him the loan which he did where she assured him that it was for security of the loan and not a sale.


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c) That when he defaulted on the payment of the loan, the respondent transferred the suit property into her names.

d) That when executing the transfer, the respondent falsely declared that there were no developments on the land.

2. That he is informed by his lawyers that the false declaration of this nature is fraud and has the effect of depriving the Government of taxes as the property would attract less stamp duty compared to when it was declared to possess a structure.


3. That the respondent did not serve him with a copy of the plaint and when he decided to check the Court record he found out that the respondent's case was founded on falsehoods which can only be addressed when given an opportunity to be heard.

4. That he is advised by his lawyers that for him to be adequately heard, the consent judgment should be set aside and he should be given an opportunity to file a defence.

5. That the suit property was undervalued before it was purportedly sold to a one Nakigoye Dorothy.

6. That he commissioned an independent valuer to value the suit property which she valued at a market value of sixty million shillings (60,000,000/=) and a forced sale value at forty million shillings (40,000,000/=).

7. That it is fair and reasonable and in the interest of justice that the orders sought and any relief granted by court in his favour meets the aims of justice to be granted.


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In opposition to the Application, the Respondent also filed an affidavit in reply where she deposed inter alia:

That the Applicant Amos Naguyo has never acted on behalf of any company as alleged in the affidavit in support of the application.

That the respondent fully purchased the suit land from the Applicant without the company involvement on the 4th day of April, 2013 at a consideration of **twenty million shillings (UGX 20,000,000/=)** which was fully paid.


That after the execution of the agreement, the respondent fully executed the transfer forms and handed them to the respondent to transfer her names on the title.

That the respondent went ahead and transferred the said title into her names.

That the Applicant has never paid the respondent two million shillings (Ugx 2,000,000) as he alleges.

That the Respondent filed **Civil Suit no. 359 of 2019** which was sent for mediation and a consent judgment was entered by the parties where it was agreed that the Applicant was to pay the full amount by 30th November 2020 which he has never done.

That the respondent started the process of execution upon failure of the applicant to fulfill the terms of the consent judgment and the applicant was duly served.


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That all the process for execution was duly followed up to the order of sale.

Counsel for the applicant and counsel for the respondent filed written submissions the details of which are on record and which I have considered in determining this application.

The respondent raised two preliminary objections in the matter as follows;


1. That the Application raises matters of fraud and evaluation which cannot be heard in affidavit evidence.
2. The Application is an abuse of court process.

Preliminary objection one.

That the Application raises matters of fraud and evaluation which cannot be heard in affidavit evidence.

Submissions by the respondent on Preliminary objection one

Counsel for the respondent submitted that complaints regarding transfer of property to the respondent and evaluation cannot be handled in proceedings of this nature because they are contentious matters which must be brought by way of ordinary suit under Order 6 and 7 of the Civil Procedure Rules SI 71-1. Counsel for the respondent contended that it was trite law that matters of fraud can only be handled in an ordinary suit and upon giving particulars and where all parties are heard and cross examined. Counsel for the respondent cited the cases of *Hilda Namusoke and three others versus Owallas Home Investment (E.A) Limited – S.C.C.A No. 15 of 2017* and *Yahaya Walusimbi versus Nakakanzi and four others-Court of Appeal Civil Application No. 386 of 2018* to buttress his submissions.


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Counsel for the respondent submitted that since the applicant is not seeking for review of the said consent judgment, then the consent remains binding between the parties herein.

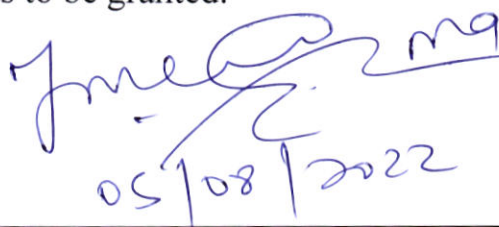
With regard to the evaluation of the suit property, counsel submitted that the alleged valuation can only be relied upon after being tested under cross-examination.

Preliminary Objection two-Application is an abuse of Court Process

Counsel for the respondent submitted that in the applicant's submissions, he alleges that the application is brought under the provisions of **Section 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act Cap 13 and Order 52 Rules 1 and 3 of the Civil Procedure Rules**. That the said submissions were misleading because the Notice of Motion filed on the 13th August 2021 did not cite the said provisions of the law and hence the submissions should be rejected as they are misleading. That the applicant cannot amend his pleadings through submissions. That there was no enabling law under which the application was brought and hence the application was an abuse of court process.

The applicant never replied to the preliminary objections raised and hence it is implied that he conceded to them. It was held in the case of *Behangana Damaro and another versus The Attorney General – Constitutional Petition No. 53 of 2010* that evidence unchallenged should be accepted.

In his supportive affidavit, the applicant stated that the suit property had been sold to a one **Nakigoye Dorothy**. **Nakigoye Dorothy** is not a party to this application and yet she may be adversely affected by the outcome of the application if it was to be granted.

A handwritten signature in blue ink, followed by the date '05/08/2022' written vertically below it.

Article 44 (c) of the Constitution provides that there shall be no derogation from the enjoyment of the right to a fair hearing.

This application may have the effect of depriving the said **Nakigoye Dorothy** the suit property which she purchased through a court process and yet she is not a party to these proceedings. Her constitutional right would therefore be grossly violated if she was to be condemned unheard.

The applications also raises allegations of fraud in the whole execution process and it is on that basis that the applicant would wish it to be set aside. It was held in the case of *Hilda Wilson Namusoke and others versus Owalla's Home Investment Trust (E.A) LTD and others-C.A .C.A No. 15 of 2017* an allegation of fraud requires the rigors of a full trial where fraud had to be proved. This would involve calling evidence including cross examination of the witnesses alleging fraud. Therefore an application of this nature that relies on affidavit evidence would not to prove an allegation of fraud. This is coupled with the possibility of affecting other parties' interests in the suit land who have not been given an opportunity to be heard.

The Preliminary objections are therefore sustained since they were not opposed and this application is equally incompetent since in would affect third party interests (like the one who purchased the suit property) and yet she is not a party to this application.

The application will therefore be dismissed with costs to the respondent.



Hon. Justice John Eudes Keitirima

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