

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.233 OF 2023

5 ***(Arising out of Execution Miscellaneous Application No.264 of 2022)***

(Arising out of Miscellaneous Application No.19 of 2018)

(Arising out of Civil Appeal No.23 of 2012)

(All arising from Civil Suit No.27 of 2008)

BIGYEMANO YAFEESI:::APPLICANT

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VERSUS

JOHNSON KARUGABA:::RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

15 This application brought by way of notice of motion under the provisions of
***Section 33 of the Judicature Act cap.13, Section 98 of the Civil
Procedure Act cap.71, and Order 52 rules 1 & 3 of the Civil Procedure
Rules SI 71-1*** seeks the following orders;

- 20
- 1. That the order issued in Miscellaneous Application No.19 of 2018
be revised;***
 - 2. That the decree in Civil Appeal No.23 of 2012 and the orders in
Miscellaneous Application be reconciled;***
 - 3. That the taxed bill of costs vide Land Division Taxation
Application No.87 of 2019 against the applicant be set aside;***

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 - 4. That the costs of the suit be provided for.***



Grounds of the application.

The grounds upon which this application is premised are contained in the affidavit in support thereof deponed by Mr. Bigyemano Yafeesi, the applicant wherein he stated *inter alia* that while the respondent sued him and a one
5 Edward Biraro for trespass in the **Chief Magistrates Court of Kiboga Civil Suit No.27 of 2008**, the court found that the applicant herein and Edward Biraro had indeed trespassed onto the respondent's kibanja.

That being dissatisfied with the said judgment, the applicant as well as Edward Biraro appealed against the same in **Civil Appeal No.23 of 2012**,
10 which was heard by **Hon. Lady Justice Eva K. Luswata** who in her judgement held that the appeal had succeeded in part, and the orders of the lower court were set aside.

That upon failing to execute the judgment because it had no orders as to vacant possession, the respondent filed an application for review in regards
15 to the order of vacant possession which was granted by this court.

However that the said orders of review seemed to overturn the decision on appeal because it directed vacant possession against the applicant herein who had been exonerated by the appellate decision which was never appealed against.

20 That the respondent has since filed **Execution Miscellaneous Application No.264 of 2022** in a bid to evict the applicant from his land yet on appeal, it was held that he was rightfully on the land. The respondent also taxed a bill against the applicant herein vide **Land Division Taxation Application No.87 of 2019** yet the applicant was partly awarded costs in the suit.

25 That the decision in **Miscellaneous Application No.19 of 2018** be revised to reflect the decree in **Civil Appeal No.23 of 2012** since the two directives are in conflict, and the taxed bill of costs against the applicant vide **Land Division Taxation Application No.87 of 2019** be set aside.

The applicant also filed a supplementary affidavit in support of the application
30 wherein he stated that the orders issued by this court in **Miscellaneous**



Application No.19 of 2018 were against him yet he was not a party to the proceedings since he had been exonerated by his appeal vide **Civil Appeal No.23 of 2012** which he filed against the decision of the trial court in **the Chief Magistrates Court of Kibaga Civil Suit No.27 of 2008**.

- 5 That because the judgment on appeal which found that the suit land belonged to the applicant, and that he was not a trespasser thereon was never challenged by the respondent, the application for review in regards to the orders of vacant possession could not set the same aside.

In addition, that the only way the respondent herein could have challenged
10 the decision on appeal was by way of appealing against the decision in the Court of Appeal, or by applying for review of the judgment by showing that there was an error apparent in the issuance of the judgment on appeal which was not done and that while no appeal was filed, the application for review that was filed was for insertion and issuance of an order of vacant possession
15 against the party that was found culpable on appeal, to wit Edward Biraro, and not the applicant herein.

Further, that the applicant's non derogable right to be heard which is guaranteed under the Constitution was violated when the said application for review was entertained without him being a party thereto and the orders
20 issued against him are prejudicing his right to a fair trial and threatening loss of his property.

Respondent's reply.

The respondent opposed the application through his affidavit in reply wherein he objected to the application on grounds that it is not only frivolous, but also
25 misconceived and wanting of merit.

He stated that the applicant herein is a successor in title to the mailo land, which he bought from Edward Biraro, and on which it was decreed that the respondent's *kibanja* sits thereon.

In addition, that while the respondent has no pending bill of costs against the
30 applicant, there is also none that has ever been taxed against him.



The applicant did not file an affidavit in rejoinder to the averments set out in the respondent's affidavit in reply.

Representation.

5 The applicant was represented by **M/s Agaba & Co. Advocates** while the respondent was represented by **M/s Nyote & Co. Advocates**. Both counsel filed written submissions in support of their respective clients' cases, as directed by this court.

Resolution by court.

10 I have carefully read and taken into account the submissions of both counsel in resolving this matter, which in the opinion of this court is concerned with the question of reconciling the judgment and orders of this court in **Civil Appeal No.23 of 2012** and the ruling of this court in **Miscellaneous Application No.19 of 2018**.

15 By way of brief background, the respondent sued the applicant and Mr. Edward Biraro for trespass by the respondent in the Chief Magistrates Court of Kiboga vide **Civil Suit No.27 of 2008**.

20 In that suit, the respondent sought a declaration that he owned the *kibanja* on the applicant's and Edward Biraro's land comprised in **Singo Block 550 Dwaniro Sub-county Kiboga District** having purchased the same from a one Kadali in 1997. He also sought general damages for trespass, special damages for destroyed property, as well as costs of the suit.

25 In their defence, the applicant and Edward Biraro claimed that the respondent herein was not one of the squatters on the land when the applicant bought the land, and that they had settled all the squatters that were on the land. They also denied ever destroying the plaintiff's/respondent's crops, houses and cows.

One of the issues that was framed for consideration in the trial court was whether or not the defendants (the applicant herein and Biraro Edward) trespassed on the suit *kibanja*. The trial Magistrate in her judgment found



that the defendants had indeed trespassed on the *kibanja* on the 1st appellant's (Edward Biraro) land.

The appeal was heard by court presided over by Lady Justice Eva K. Luswata who having confirmed that the respondent owned a *kibanja* also noted found
5 that the respondent herein only owned a *kibanja* on Edward Biraro's land, and not on the applicant's land.

Thus there was no trespass committed by the applicant herein who court proceeded to award half the costs in this court and in the lower court, while the respondent was awarded costs against Edward Biraro.

10 The respondent herein then filed ***Miscellaneous Application No.19 of 2018*** seeking to review the judgement of this court to include an order of vacant possession against Edward Biraro who was the respondent as well as his agents and successors in title in respect of his portion of land comprised in ***Singo Block 550 Dwaniro Sub-county Kiboga District.***

15 In its ruling dated 13th November 2018, this court noted that upon declaring that the respondent in that case had trespassed on the applicant's (respondent herein) land, court ought to have granted an order of vacant possession. This court then granted the orders sought by the respondent herein against the said Edward Biraro.

20 For the avoidance of doubt, this court stated that;

'Accordingly, an order of vacant possession issues against the respondent and his agents and successors in title, in respect of the applicant's portion of land comprised in Singo Block 550 Dwaniro Sub-county Kiboga District.'

25 The respondent, Mr. Karugaba was also awarded the costs of the application, and punitive damages of ***Ug. Shs. 2,000,000/= (Uganda shillings two million only).***

The applicant in the instant case avers that the orders of this court in ***Miscellaneous Application No.19 of 2018*** seemed to overturn the
30 judgement of this court in ***Civil Appeal No.23 of 2012.***



On the contrary, the ruling of this court only supplemented the judgment of this court on appeal. It is evident from the wording of the orders of this court that the order of vacant possession is only applicable to the portion of land belonging to Edward Biraro which was found to harbour the respondent's
5 *kibanja*, and not the portion of land that belongs to the applicant herein.

This court had already declared in its judgment that the respondent herein was not a *kibanja* holder on the part of land that the applicant purchased from Edward Biraro.

Indeed nothing in the ruling of this court in **Miscellaneous Application**
10 **No.19 of 2018** suggests that the *kibanja* was extended to the cover the applicant's portion of land that he bought from Edward Biraro since

It is therefore irregular and misleading for the respondent herein to attempt to evict the applicant herein based on the orders of this court in **Miscellaneous Application No.19 of 2018** since the said order was made
15 in respect of only part of the land that at the time of the judgement in **Civil Appeal No23 of 2012** belonged to Edward Biraro and not the portion of land that the applicant herein owned.

Additionally, according to **Annexure 'D'** of the affidavit in support of the application which is a copy of a notice to show cause why execution should
20 not issue in **Execution Miscellaneous Application No.264 of 2022**, although the same was filed against Edward Biraro, the same was addressed to the applicant herein.

The said notice to show cause indicates that the applicant was summoned as successor in title and is a clear indicator that the respondent herein in error,
25 intends to enforce the order of vacant possession against the applicant herein based on the orders of this court in **Miscellaneous Application No.19 of 2018**.

It is the order of this court that any execution made in respect of the same is irregular since this court restricted itself on the order of vacant possession in
30 respect of the part of land owned by Edward Biraro on whose land the



respondent herein owns a *kibanja*. It follows therefore that any such eviction against the applicant herein would amount to an abuse of court process.

Further, according to the **Annexure 'F'** of the applicant's affidavit in support of the application, the bill of costs in **Land Division Taxation Application No.87 of 2019** makes reference to both the applicant herein and Edward Biraro.

Similarly, the suggestion that the taxation was in respect of both appellants in **Civil Appeal No.23 of 2012** whereas the same ought to have been only in respect of Edward Biraro, the first appellant.

I am therefore inclined to agree with the applicant that the said bill of costs was taxed contrary to the decree and orders of this court in **Civil Appeal No.23 of 2012** under which the applicant herein had been awarded costs.

In the circumstances, this application succeeds and is hereby granted in the following terms;

1. The order of vacant possession issued by this court in Miscellaneous Application No.19 of 2018 was in respect of the land belonging to Edward Biraro on which this court under Civil Appeal No.23 of 2012 found that the respondent herein has a kibanja interest but not the applicant's portion of land;

2. A boundary opening exercise shall be conducted by a court appointed surveyor within a period of 60 days to establish the extent of the respondent's kibanja on part of the land belonging to Edward Biraro;

3. The taxation of the bill of costs in Taxation Application No.87 of 2019 is hereby set aside and should be taxed afresh in respect of Edward Biraro and not the applicant herein;

4. Each party to bear its own costs.



Miscellaneous Application No.234 of 2023 for an *ex-parte* order staying the execution, and **Miscellaneous Application No.235 of 2023** for stay of execution of the orders of this court in **Miscellaneous Application No.19 of 2018** are overtaken by events.

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I so order.

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10 **Alexandra Nkonge Rugadya**

Judge

18th April, 2023

Delivered by e-mail

18/4/2023