THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(EXECUTION DIVISION)

CIVIL REFERENCE APPEAL No. 404 OF 2014

(Arising from the decision of the Assistant Registrar – Execution Division, in H.C. EMA No. 436 of 2012; arising out of H.C. Civ. Div. Suit No. 119 of 1999)

JACKSON MUSOKE KIKAYIRA } ..... APPELLANT

VERSUS

ROSEMARY NALUBEGA } ..... RESPONDENT

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

RULING

This appeal is brought under the provisions of section 98 of the Civil Procedure Act, 0. 50 r. 8 and 0. 52 rr. 1, 2, and 3, of the Civil Procedure Rules. It seeks an order of this Court setting aside the order of the learned Registrar Execution in EMA No. 436 of 2012, and making provisions for costs of the appeal. It also seeks orders with regard to the execution of certain parts of the decree in H.C.C.S. No. 119 of 1999; namely that: –

(i). The Plaintiff and his siblings (i.e. the estate of the late Erisa Musoke are bona fide occupants of land comprised in KLA Instrument 201909; and not 201910 as stated in the decree since this was an accidental/clerical slip).

(ii). The 1st Defendant as administrator of the estate of the late Tito Lukanika to satisfy the interests of the estate of the late Erisa Musoke in accordance with the caveat lodged in 1932, in accordance with section 288 of the Succession Act.

The appeal is supported by an affidavit sworn by the Appellant; which, the Respondent has rebutted in an affidavit sworn in response thereto. Following Court's directive, Counsels for the parties herein filed written submissions. The background to the appeal is that the Appellant's predecessor administrator of the estate of the late Erisa Musoke had, in the head–suit herein, sued and obtained judgment against the Respondent herein. The decree of the Court stated as follows: –

(a) The Plaintiffs and his siblings are bona fide occupants of the land comprised in KLA Instrument 201910.

(b) The original land comprised in BLOCK 5 PLOT 584 be restored to the register.

(c) Its sub division into PLOTS 1120 and 1121 is hereby cancelled.

(d) The 1st Defendant as administrator of the estate of the late Tito Lukanika to satisfy the interest of the estate of the late Erisa Musoke in accordance with the caveat lodged in 1932; in accordance with S. 288 Succession Act.

(e) Instruments 21006 of 22nd December 1932, KLA 189917 of 1st August 1997, and 190472 of 16th September 1997, signifying caveats by Erisa Musoke, Levi Luyombya, Namisango and the Plaintiff, be restored on the register.

(f) The 2nd Defendant is not a bona fide purchaser for value of PLOT 1120 and his title is hereby cancelled.

(g) The Defendants are permanently restrained from disturbing the Plaintiff's occupation of the land unless they follow the law.

(h) The Defendants shall pay the costs of this suit to the Plaintiff.

The Respondent appealed against that judgment; but the Court of Appeal dismissed the appeal, and upheld the findings and decision of the trial Court. Parts of the decree in the head–suit have been satisfied. However, the Appellant contends that clauses (a), (d), and (g), thereof, have not. These are, respectively that: –

(a) The Plaintiff and his siblings are bona fide occupants of the land comprised in KLA Instrument 201910.

(d) The 1st Defendant as administrator of the estate of the late Tito Lukanika to satisfy the interest of the estate of the late Erisa Musoke in accordance with the caveat lodged in 1932; in accordance with S. 288 Succession Act.

(g) The Defendants are permanently restrained from disturbing the Plaintiff's occupation of the land unless they follow the law.

The decree holder (Appellant herein) applied vide EMA No. 436 of 2012 for the arrest of the Judgment Debtor (Respondent herein) for failure to satisfy the decree by handing over the

Duplicate/Owner's Certificate of title or title deed for land comprised in Kibuga – Block 5, Plot 584 and land situate at Mulago (Kalerwe). The application referred to an accompanying table with its annextures, reflecting the action sought against the Respondent. The Registrar Execution issued a notice to the Respondent to *'show cause as to why you should not be arrested and committed to civil prison for contempt of or disobeying lawful Court orders by way of enforcing the said decree'*. The Respondent challenged the notice; and it is the ruling thereon, by the Registrar Execution, which the Appellant is aggrieved with.

Counsel for the Appellant raised five grounds (which however he refers to as issues) for determination in this appeal; and these are that: –

1. The learned Registrar erred in law when she made a ruling, which was at variance with the decree in the head–suit.

2. The learned Registrar misconceived the meaning of the term bona fide occupants as expressed in the decree in the head–suit.

3. The learned Registrar failed to appreciate who was in possession of the land in *kibanja* Block 5 Plot 584 land at Kalerwe.

4. The learned Registrar failed to appreciate the Appellant's interest as defined and decided in the head–suit.

5. The learned Registrar misinterpreted the decree in the head–suit, on what specific area the Appellant is entitled to.

Ground 1: The learned Registrar erred in law when she made a ruling, which was at variance with the decree in the head–suit.

I need not be–labour the point that a Registrar charged with the strict execution of a decree as it is. I need reproduce here the point I made in ***Civil Reference No. 0327 of 2014 – Bonney Mwebesa Katatumba & Anor vs Shumuk Springs Development Ltd. & Anor.***; (unreported) namely that: –

> *"Section 2 of the Civil Procedure Act would seem to suggest that a warrant issued to the Bailiff for execution is not an order but rather an administrative action pursuant to the decree or order already made and embodied in a decree or order sought to be executed. This is because the Registrar Execution neither makes a judgment or ruling in the issuance*

of the warrant; but merely gives effect to the earlier decree or order made. Section 2 of the Civil Procedure Act would seem to suggest that a warrant issued to the Bailiff for execution is not an order but rather an administrative action pursuant to the decree or order already made and embodied in a decree or order sought to be executed. This is because the Registrar Execution neither makes a judgment or ruling in the issuance of the warrant; but merely gives effect to the earlier decree or order made."

Where there is ambiguity in the decree in issue, or any doubt as to what the decree means, it is inadvisable for the Registrar Execution to proceed with the execution of the decree; but should refer it back to the trial Court for clarification. In the alternative, the Registrar Execution may refer the matter to a judge under the provision of 0.50 r.8 of the CPR and seek guidance. The Registrar Execution must first understand the judgment from which the formal decree arises, since the extracted or formal decree does not supplant the judgment; but is, instead, meant to give effect to it. Furthermore, the law is that, in any case, even an appeal is preferred against the judgment or reasoned order of the Court; and not the extracted or formal decree which merely summarises the judgment or ruling of Court.

Authorities for this abound, in the recent decisions of both the Court of Appeal, and High Court ***– (****see for instance* ***– Banco Drabe Espanol vs. Bank of Uganda – C.A. Civ. Appeal No. 42 of 1998***, ***Kibuuka Musoke William & Anor. vs. Dr. Apollo Kaggwa – C.A. Civ. Appeal No. 46 of 1997***, ***Mbakana Mumbere vs. Maimuna Mbabazi - H.C. Civ. Appeal No. 3 of 2003***, ***Tumuhairwe Lucy vs. The Electoral Commission & Anor. (Mbarara - H.C. Civ. Appeal No. 2 of 2011***, ***John Byekwaso & Anor. vs. Yudaya Ndagire)***.

With regard to the instant matter before me, the Assistant Registrar Execution rightly ruled that she was under duty to *"execute the decision of the High Court in Civil Suit No. 119/1999 as confirmed by the Court of Appeal."* Pursuant to this, she declined to order the Respondent herein to deliver the certificate of title for Block 5 Plot 584 to be cancelled, pointing out that such order did not exist in the judgment and orders of the trial Court. I find no reason to fault the learned Registrar Execution on this matter. Whatever order the trial Court made with regard to actions to be taken on the title to the suit land were not for the Registrar Execution; but for the Registrar of Titles in the appropriate Land Registry. It is the Registrar of Titles to summon whoever has been decreed against, to deposit such certificate of title with the Registrar of Titles for action pursuant to the order of Court. I therefore disallow Ground No. 1 herein.

The other grounds raised herein are somewhat interlinked; and so, I will deal with them together. The learned Registrar Execution rightly pointed out that both the judgment and the decree in the head–suit recognised the Applicants and his siblings as the bona fide occupants of the suit land. She then emphatically stated that she was under duty to enforce the decree in that regard. She however then made a finding that the decree does not state the specific area or boundary occupied by the Applicants. She even accepted the claim by the Respondent (judgment debtor) that she was in occupation; and expressed that she was helpless as there was no affidavit by the Applicants *'to explain what exact part they occupied. How or when.'* She then concluded that *'basing on the above, I am unable to grant the injunction.'*

First, the executing Court has no powers to issue an injunction. That is the remit of the trial Court. Accordingly, the issue of issuance of injunction by the Registrar Execution ought not to have arisen in the first place. Second, the issue of possession is quite evident from the judgment of the trial Court as was upheld by the Court of Appeal. At pages 12 to 13 of the judgment in the head–suit, Bossa J., (as she then was), stated as follows: –

> *"There was evidence both agreed and tendered that the late Erisa Musoke bought land from late Tito Lukanika. Both parties agreed at the Scheduling Conference that the acreage of 6.55 acres bought by Erisa Musoke affected Plot 584, which was later subdivided into plots 1120 and 1121. It also affected Plots 777, 585, and 25. In other words, the 6.55 acres encompassed all the above plots. To confirm this sale, the plaintiff tendered a sale agreement as Ex. P2. It was a certified copy issued by the Commissioner of Land Registration. ... I can only state that the record speaks for itself. Moreover, this fact has been sufficiently proved to the required degree by the plaintiff's witnesses".*

The judge then reproduced the written agreement of sale, in which the vendor stated inter alia that what he sold to Erisa Musoke was the remainder of a bigger piece of land, parts of which he had earlier sold to other persons he named therein. The sale to Erisa Musoke completed the sale of the whole of the entire piece of land. At page 28 of the judgment, the learned trial judge made a finding of fact that the 1st Defendant (Respondent herein) had acted with dishonesty regarding the suit land – this was the purported sale of the land to a third party – as she was aware of the beneficiaries of Erisa Musoke being in possession. On appeal, the Court of Appeal as a first appellate Court per Okello J.A., before upholding the decision of the trial judge, restated the facts of the case, at page 3 of his lead judgment, as follows: –

"The late Erisa Musoke had by an agreement of sale, Exh P2, in 1932 bought a piece of land measuring 6.33 acres from the late Tito Lukanika. The land is situate at Kalerwe, Gayaza Road. It was curved out of Plot 584. After executing the sale agreement, no transfer was effected in the names of the buyer, the late Erisa Musoke, and he lodged a caveat on the title of the late Tito Lukanika on 22/12/1932 in order to protect his interest. The caveat prohibited any dealing with the land before the interest of the late Erisa Musoke was satisfied."

On the issue of bona fide occupancy, the learned Justice of Appeal stated at the penultimate paragraph of his lead judgment as follows: –

"I think that the trial judge was justified to make the orders she made. There is evidence that the interest of the estate of the late Erisa Musoke had not been satisfied. There is also evidence showing that after purchasing the land, the late Erisa Musoke took possession of it. He and his children made some development thereon. The evidence of their occupation of the land after purchase supports the trial judge's findings that the respondent and his siblings were bona–fide occupants of the land."

The passages quoted above in extenso speak for themselves. It is therefore quite surprising and inexplicable that the learned Registrar Execution could be in doubt as to the specific land in dispute. The acreage of the land is well spelt out in the judgment. Similarly, the interest of the Applicants in the suit land, protected by the caveat lodged on the title way back in 1938 is quite clear. It is also quite clear from the judgment that at the time of the trial and delivery of judgment, the Defendant (judgment debtor who is the Respondent herein) was not in possession at all. Had it been otherwise, the decree would not have been an order of injunction against, but one of eviction of, the Defendant. Accordingly, there was no need for an affidavit to explain possession as the learned Registrar Execution lamented about.

Since the Respondent herein claims to be in possession, such possession can only have been after the judgment of the Court in the head–suit herein. Unless such possession was effected in accordance with the clear terms of the decree, it would otherwise have been effected in defiance of the unmistakable terms of the decree prohibiting it; and for this, the Respondent risks being held in contempt of a Court order, should an application be brought in this regard. In the result, save for the first ground which has failed, I find that this reference appeal is well grounded and is allowed. For this reason, I make the following orders: –

(i) It is clear from the judgment in the head suit that the Applicants alone are entitled to possession of the suit land. Any adverse possession by the defendant (judgment debtor) in contravention of the injunction by the trial Court is unlawful, and constitutes an act of contempt of Court.

(ii) The judgment in the head–suit has unmistakably described the location and acreage of the suit land.

(iii) The orders in the decree, pertaining to the certificate of title to the suit land are not for the Registrar Execution to give effect to; but are the statutory duty of the Registrar of Titles to give effect thereto.

(iv) The Respondent shall meet the costs of this reference appeal, and that of the application before the Registrar Execution.

Alfonse Chigamoy Owiny – Dollo

JUDGE

15 – 01 – 2015