

IN THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

EXECUTION DIVISION

MA NO. 639 OF 2019

ARISING FROM EMA NO. 1349 OF 2015

ARISING FROM CIVIL APPEAL NO. 47 OF 2011

ARISING FROM MAKINDYE CIVIL SUIT NO. 237 OF 2008

DR. SIMON SENTUMBWE.....APPLICANT/OBJECTOR

V

NICHOLAS GOLOOBA..... RESPONDENT/JUDGMENT CREDITOR

BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO

RULING

Introduction

1. On June 10, 2019, the Applicant moved court by notice of motion for two main orders that:
 - a. The land comprised in Kyadondo Block 253 Plot 1544 at Lukuli is not liable to attachment.
 - b. The structure on the said land be released from demolition.
2. The Applicant relied on his affidavit evidence while the Respondent relied on affidavits in reply of Emmanuel Kimbugwe filed on July 23, 2019 and February 21 2020 respectively.

Hearing process

3. Both parties appeared before me on March 10, 2020 at which counsel for the Applicant Mohammed Goloba and counsel for the Respondent Monica Namuli made oral submissions that I have carefully considered.

Background

4. Gulooba sued Patrick Sentongo vide Makindye Civil Suit No. 237 of 2008 for trespass upon a road reserve and encroachment on his property comprised in Kyadondo Block 23 Plot 777 at Lukuli. The court in that case determined that Patrick Sentongo had encroached on the road reserve and ordered him to compensate Golooba for the trespass that had shifted the road to pass in Golooba's land. On appeal to the High Court by Golooba vide Civil Appeal No. 47 of 2011, the court allowed the appeal and ordered Sentongo to remove the offending structure from the road reserve and to restore the affected land.

5. There was an attempt by KCCA to restore the land but this aborted after the directorate of Physical Planning by letter dated October 11, 2017 to the parties ceased any further action with respect to the road reserve.
6. In the meantime, Dr. Sentumbwe, the current Applicant had commenced another civil suit in the Civil Division, CS No. 694 of 2016 against Golooba and KCCA but which suit was dismissed for want of prosecution on October 1, 2018.

The current dispute

7. In this application, the Applicant claims he purchased land comprised in Kyadondo Block 253 plot 1544 and owns the wall fence which the Respondent Golooba seeks to demolish. The Applicant avers that he bought the land from Patrick Sentongo.

Preliminary issues

- 10 Counsel for the Respondent raised a preliminary issue in her submissions that must be disposed of before I go into the merits of the case. Counsel submitted that order 22 rule 55 is wrongly cited by the Applicant because there was no attachment or sale by the Respondent and the correct procedure is by suit as prescribed by order 22 rule 86 of the CPR. In response, counsel for the Applicant submitted that the critical law is section 98 of the CPA that confers inherent powers on the court.
- 11 Counsel for the Respondent further submitted that the decree in CA 47 of 2011 renders the current dispute res judicata because the status of the wall fence was determined as between Patrick Sentongo the person from whom Dr. Sentumbwe derives title, and Golooba, the current Respondent. Counsel Namuli further submitted that decrees are executed in rem and that an assignee is bound by the decree. She cited **Chothy Theyyethan v John Thomas** in support.

Resolution of the preliminary issues.

- 12 Regarding counsel Namuli's objection to the procedure by which the Applicant has brought his objection to the demolition of the wall, I agree with counsel that order 22 rule 55 applies only where there has been an attachment of property or a threatened attachment which is not the case in the current dispute where Dr. Sentumbwe seeks order of release from demolition of a structure. I am aware he also prayed for release from attachment but this is superfluous because no such attachment is contemplated by the decree in CA 47 of 2011. For ease of reference I reproduce the relevant orders in that decree below.

- a. *An order issue against the Respondent to remove his structure from the road reserve.*
- b. *The Respondent restores the land on which the development was made to its original position.*

13 For the reason no attachment was contemplated by the decree, order 22 rule 55 is not the right procedure to seek relief. Regarding applicability of order 22 rules 86, I reproduce it below for emphasis.

Where the court is satisfied that resistance or obstruction was occasioned by any person (other than the judgment debtor) claiming in good faith to be in possession of the property on his or her own account or on account of someone other than the judgment debtor, the court shall make such order as it deems fit.

14 While the Applicant could have moved court under rule 87, the catch is he is disqualified by rule 88 which excludes a person to whom the property was transferred during pendency of litigation. In other words, his resistance to execution is not in good faith because he is a transferee of title lite pendete. Although a copy of the title deed tendered in court is illegible in as far as date when the Kyadondo Block 253 Plot 1544 was transferred to him by Sentongo who was litigant in CA NO. 47 of 2011 and CS No. 237 of 2008, his advocate Golooba submitted that the transfer was before the decree in appeal.

15 The Applicant is in the shoes of Patrick Sentongo who sold him the property during pendency of a suit and he is bound by the order in CA 47 of 2011. In **Chothy Theyyathen v John Thomas and others (January 28, 1997) Kerali High Court, India¹**, the court held that where the decree restrains a judgment debtor from doing something on his own land to the detriment of the decree holder, the decree is not just personal but it also binds the assignees or representative of the judgment debtor and the decree is enforced in rem. The court in that case reasoned that to require the decree holder to commence litigation afresh against an assignee (as in this case Dr. Sentumbwe the transferee of Plot 1544), would be to upend the doctrine that litigation must come to an end.

16 I agree with this decision even if it is of persuasive authority only, and wish to add that the doctrine of res judicata applies with full force in this case which was litigated conclusively as regards removal of the wall fence and Dr. Sentumbwe is bound by the decree in CA 47 of 2011. For him to bring an objector application is a form of obstruction to execution and can potentially be construed as contempt of court or obstruction of justice.

¹ Indiakanoon.org

17 For the reasons that the Applicant is bound by the decree in CA 47 of 2011; that the application was wrongly brought under order 22 rule 55; that the issue of whether the wall fence was an encroachment on the decree holder's land was conclusively determined and therefore it is now res judicata; the preliminary objections are upheld and the application is struck off the court record. The interim stay of execution granted by the registrar is hereby vacated. The Applicant shall pay the Respondent. costs of the application assessed at 3,000,000/.

DATED AT KAMPALA THIS 1ST DAY OF SEPTEMBER 2020.

HON. LADY JUSTICE HENRIETTA WOLAYO

Legal representation

Kavuma, Kabenge & Co. Advocates for the Applicant

Nsubuga & Co. Advocates for the Respondent