

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 625 OF 1986

NUWA

WALAKIRA:.....:PLAINTIFF

VERSUS

FRANCIS NANSIO

MICAH:.....:DEFENDANT

BEFORE: THE HON. MR. JUSTICE G.M. OKELLO

RULING:

This ruling is in respect of a preliminary objection which was raised at the commencement of the hearing of this application. The application was brought by Notice of Motion under section 35 (1) and 101 of the civil procedure Act and 048 r 1 of the civil procedure Rules for orders:-

- (1) That the respondents return the Applicant's property fraudulently and/or wrongfully attached. Alternatively that the respondents be ordered to pay the applicant the current value of the said property.
- (2) That the respondents pay special and general damages to the applicant for wrongful attachment of the said property and trespass.
- (3) That the respondents pay costs of this application.

The application was based on the grounds:-

- (1) That the warrant by this Honourable court on 10th of July 1990 required the second respondent to attach the Applicant's residential house with two rooms on plot 99 Kasubi but that instead the 2nd Respondent.
 - (a) Attached the applicant's other houses consisting of 12 rooms whereupon the applicant lost revenue.
 - (b) Attached moveable property mentioned in the schedule hereto, with property has never been accounted for to date.
 - (c) Locked nine goats inside one of the rooms and they later died of starvation.
 - (d) Demanded cash payment of shs. 40,000/=
- (2) That the said sections of the second respondent were tainted with fraud.
- (3) That the said property save for the house with two rooms was attached contrary to the Directives of this Honourable Court.

The above grounds were supported by evidence contained in the affidavit of the applicant Francis Nansio Micah sworn on 25th August 1992.

As pointed out earlier at the commencement of the hearing of the application, counsel for the 1st Respondent raised a preliminary objection to the application. He contended that the application was misconceived. He argued that section 35 (1) of the civil procedure Act under which the application was brought cover only questions arising between the parties to the suit in which the decree was passed or their representatives. He submitted that in the instant case, there was no question arising between the Applicant and Nuwa Walakira who were parties to the suit. That the 2nd Respondent J.B Kiiza t/a Victoria General Auctioneers was never a party to the suit. That such a question cannot be entertained under section 35 (1) of the GPA but in a separate suit. He cited Fenekasi Semakula vs Musoke and 2 other (1981) HCB 46 as authority for that proposition.

Counsel further contended that since the application was wrongly instituted, the court cannot even be moved to invoke its inherent power under section 101 of C.P.A He thus prayed that the application be dismissed with cost.

Mr. Lubega for the 2nd Respondent associated himself with the above submission. He added that no question could arise between the applicant and the 2nd Respondent within the meaning of section 35 (1) of the C.P.A. He cited civil Appeal No. 22/94 (Supreme Court of Uganda) Hannington Wasswa and Anor. Vs. Maria Ochola and 3 others (Unreported) as his authority for that proposition.

In his response, Mr. Babigumira for the Applicant conceded that the application was brought under section 35 (1) of the CPA. He argued that for all intents and purposes the proceedings was taken as a suit. He attacked the affidavit in Reply sworn by Womutuba as being defective for having been deponed to by an advocate conducting the case yet the affidavit was sworn on contentious matters. He submitted that it was trite law that an advocated conducting a case can not also act as a witness on contentious matters in the same case. He cited Francis Babumba and 2 others v Erusa Banju (1988-90) HCB 119 as his authority for that proposition. He contended that the last Respondent Nuwa Walakira was properly included. That the applicant would lead evidence to show that Walakira was properly included.

From the above arguments, I am of the view that the crucial point of dispute here is whether the term “between the parties to the suit in which the decree was passed or their representatives” in section 35 (1) of the civil procedure Act would cover court bailiffs as well. In other words whether the disputes in this application regarding the execution by the court bailiff were properly brought to court under section 35

(1) of the CPA justice plait on page 13 of his judgment in Hannington Wasswa and Another above said that,

“the purpose of section 35 is to save time and expense. If a suit is drawn out of the proceedings under section 35.

(2) of the civil procedure Act, it is difficult to see why time and expense are saved. The practice as Dr. Byamugisha has stated from the Bar and as we have observed in several suits reaching this court on appeal is to sue the court Bailiff in suit in a suit outside section 35 and that practice has proved satisfactory and should continue”.

From the above passage, treating the proceedings under section 35 of the civil procedure Act as a suit within section 35 (2) of the Act did not prove helpful because time and expense were not saved. More evidence would have to be called besides the affidavit that was filed in support of the motion and in Reply in order to prove the issues between the parties. In that case the intended suppose of the section to save time and expense was thereby defeated.

Mr. Babigumira argued that they would call evidence to show that the 1st Respondent (Nuwa Walakira) was properly included.

That argument only goes to confirm that treating the proceedings under section 35 of the civil procedure Act as a suit undermines the intended purpose of the section. It does not save time and expense. This reaffirms the propriety of the established practice as regards court bailiffs to file a separate suit. For the reasons given above, the preliminary objection is upheld and the application is struck out.

G.M. OKELLO

JUDGE

15/7/94

Court: Ruling delivered in the presence of Mr. Womutuba for the Respondent.

Mr. Babigumira for the Applicant (Absent).

Mr. Komakech Court Interpreter

G.M. OKELLO

JUDGE