THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA CIVIL SUIT NO. 47 OF 1996

HARRIET NAMAKULA:: PLAINTIFF

— Versus —

REGISTRAR TRUSTEES K'LA ARCHDIOCESE::::::::::::::::::::::::::::DEFENDANT

BEFORE: — HON. THE PRINCIPAL JUDGE - MR. JUSTICE J.H. NTABGOBA

RULING

Before me for hearing on 24/9/98 were two applications by notices of motion. The first application was Civil Application N. 1024 of *1997* brought by the Registered Trustees of Kampala Archdiocese and Dan Mpungu (as first and second applicants, respectively). They brought the application against 4 respondents, namely, Harriet Namakula (first respondent), Richard Mugaba (trading as Bamu Partners & Auctioneers - as second respondent), Kaggwa Nantamu Mike (third respondent) and G. Wakulyaka (fourth respondent).

The applications describe the parties as follows:-

1. First applicant as the judgment creditor who was decreed to recover a total sum of UG. Shs. 13,648,700= (hereinafter to be referred to as the decretal

sum).

2. Second respondent as auctioneer Court bailiff authorised under an attachment warrant issued by the Registrar of the High Court of Uganda on 22/10/97 to sell the first respondent's motor vehicles mentioned in the warrant of attachment and sale.

The 3rd respondent and the 4th respondent are said to be the purchasers of two of the 5 motor vehicles of the applicants pursuant to the warrant aforementioned.

Application No. 1024/97 was brought pursuant to Sections 31(1) and 101 of the Civil Procedure Act, Section 35 of the Judicature Statute as well as order 48 of the Civil Procedure Rules.

S.35 (l) of the CPA provides that:-
"All questions arising between the parties to the suit in which the decree passed, or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit".

S. 35 of the Judicature Statute 1996, provides:-

"The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Statute or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible, all matters in controversy between the parties maybe completely and finally determined, and all multiplicities of legal proceedings concerning any of those matters avoided".

S. 101 of the Civil Procedure Act is an important provision in that it restates the limitless "inherent power of this Court to make such orders as may be necessary for the ends of justice

or to prevent abuse of the process of the Court.

Order 48 rule I of the Civil Procedure Rules is an omnibus provision as to the procedure to be adopted where, as in the present applications, no specific provision is made by which the application should be made. In such situation Order 48 Rule I provides:-

> "All applications to the Court save where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open Court".

As I will have occasion presently to show subsection (2) of S.35 of the Civil Procedure Act is a deliberate provision made to assist the court in its compliance with subsection (1) of the Section and S.35 of the Judicature Statute, if the Court must, as is the intention of the two provisions, avoid a multiplicity of actions by determining all the matters arising out of the execution of the decrees.

Application No. 1025/97 on the other hand, was brought under Order 37 rules 7 and 9 and Order 48 rule (1), of the Civil Procedure Rules. Order 37 which I may term a pre-emptive measure order presupposes that there is a suit pending between the parties to the pre-emptive application. This must be the reason why application No. 1024/97 was filed to create a suit that would be pending when application No. 1025/97 would be filed.
This must be so bearing in mind that the parent suit No.47/97 was completed and that there was no appeal or review application filed to keep it extant.

Application No.1025/97 seeks orders:-

(a) "That this Honourable Court be pleased to order the detention and preservation of motor vehicles Reg. Nos. UXW 649, Land Cruiser and UPL *957* Corolla which are the subject matter of the above Notice of Motion pending the determination of an application to set aside the sale.

(b) That all the money stated to have been realised from the sale be deposited in Court.

(c) That costs of this application be provided for.

The 3rd and 4th respondents who are said to have purchased the two motor vehicles from the Court bailiff (2nd respondent), although served, have decided to keep out of the case whatever their reasons. It is on record that after failure to serve them with a hearing notice physically, this Court granted an application for them to be served through both the New Vision newspaper (see copy of 10.9.98 at p.27) and Bukkede of 11.9.98 (see p.8). On the failure of respondents 3 and 4, therefore, to appear at the hearing, Mr. Babigumira, learned Counsel for the applicants, applied for judgment against the two. Since prayer (a) of the application is of no concern to the 1st and 2nd respondents, judgment should be entered in respect of prayer (a) against respondents *3* and 4 except that it would serve no purpose since the Application to set aside is to be determined simultaneously as agreed.

Regarding prayer (b) however, Mr. Nangwala learned Counsel for the 1st and 2nd respondents, had a lot to say. The prayer was for an order "that all the money stated to have been realised from the sale of the motor vehicles be deposited in Court".

Mr. Babigumira, speaking from the Bar, informed Court that he had paid all the decretal amount and the consequent Costs to M/S. Nangwala & Co, the advocates of respondents I and 2. Mr. Nangwala additionally agreed that his second client (respondent number 2), as Court bailiff, had paid the proceeds of the sale of the motor vehicles in question to M/S. Nangwala & Co, Advocates, after he (bailiff) had deducted Shs. 477,0001= being parking charges and valuation report fees. But Mr. Nangwala denied having received the whole balance between sale proceeds of Shs.4, 575,000/= and the parking and valuation report charges of Shs.477, 000/= as alleged in the Court bailiff's report to the Registrar (Annexture "F"). Mr. Nangwala undertook to pay what he had received from the bailiff, but Mr. Babigumira made what I think was a valid point. The application was against the parties (respondents 1, 2, 3 and 4) and not against N/S. Nangwala & Co, Advocates. Counsel Babigumira made another valid point. Court Bailiffs are not supposed to pay themselves or

anybody else from the proceeds of the sale in execution. A Court bailiff must remit all the proceeds of sale and put in his bill to the Registrar for settlement.

A lot more was also argued as to who should pay the proceeds of sale. My opinion is that it is neither the judgment creditor, nor the purchasers but the Court bailiff. This is because, as I will presently show, the court bailiff, in selling the motor vehicle was no agent of the judgment creditor and, certainly, not of the purchasers. The Court bailiff was the agent of the Registrar of the High Court who authorised him by a warrant to, inter alia, sell the attached property.

I will defer my decision as to whether or not the bailiff should surrender the sale proceeds and not only part of them.

I now come to application number 1024/97 which seeks Orders: -

(a) That the purported sale of motor vehicles Reg. Nos. UXW 649 and UPL 957 be set aside and both vehicles released.

(b) That, IN THE ALTERNATIVE but without prejudice to the foregoing the two motor vehicles be valued by an independent and competent valuer and the value thereof be paid by the respondents or any of them.

(c) That the money stated to have been realised from the sale be deposited in Court, and

(d) That costs of this application be provided for.

In my opinion it does not make sense for the Court to grant judgment in this application against the 3rd and 4th respondents on the ground that they failed, refused and or neglected to

turn up for the hearing. The facts not disputed are that the sale of the motor vehicles was made by the 2nd respondent in execution of the Court's warrant of attachment and sale. It is also quite clear that the sale proceeds, which the applicants appear to challenge by saying that the vehicles were undersold, were paid to the advocates of the judgment creditor, the 1st respondent. It would be inequitable and most unreasonable to order the 3rd and 4th respondents to pay the money to Court. As to who is liable to deposit it, if at all, will presently also be decided.

It would appear at this juncture that there are two issues arising out of both application Nos. 1024/97 and 1025/97.

They are:-

(a) Whether the sale of the motor vehicles should be set aside, and/or

(b) Whether the said vehicles should be revalued by an independent valuer and the consequent value be paid to the 1st applicant.

During the course of the hearing, Mr. Nangwala raised what I consider to be pertinent questions. This is whether the orders sought are maintainable against his clients, namely, respondents I and 2. The learned Counsel argued that during the execution of the judgment and decree in HCCS. No. 47/97, which are the subject of the complaints, the Court bailiff was acting as agent whose principal was the Registrar who empowered the bailiff with the warrant of attachment and sale.
Categorically, Mr. Nangwala wants his client number 1, the judgment creditor not to be involved in the proceedings, since he never instructed the Court bailiff nor did the two act in concert. With regard to the Court bailiff, I think, Counsel would argue that since the Registrar is immune from proceedings against him, his agent, the bailiff would be equally immune. I will handle the two respondents, separately as it is my own only convenient way.

I start with respondent No.1 the judgment creditor.

When arguing whether or not the judgment creditor should be held blame worthy, Mr. Babigumira cited the Supreme Court decision in the case of Francis Nansio -vs- Nuwa Walakira, where somewhere, in the judgment, Tsekooko J.S.C. decided that it is not always true to argue that a Court bailiff is the agent of the Registrar who issues him with the attachment and sale warrant and cannot be joined with the judgment creditor at all. His Lordship was considering a case in which the complaint against the respondent was brought under S.35(1) of the CPA alleging that the judgment creditor was responsible for attaching the wrong property and that it was excessive attachment. At page 13 of his unreported Judgment, Tsekooko, J.S.C. stated simply:-

> "The learned Judge struck out the motion on the ground that the Court Bailiff should have been sued by a separate suit. I don't know why he could not decide the objection in respect of each respondent separately, because, although the reasoning for striking out Court Bailiff is tenable, the same is not true in respect of the present respondent. The gist of the argument before the learned Judge against the motion boiled down to this that investigations into the misconduct of the Court Bailiff regarding execution proceedings cannot be regarded as questions arising between parties to the suit because the Court bailiff qua Court Bailiff was not a party to the suit out of which the execution proceedings emanated. Despite this Court's decision in Wasswa's case (infra) in some instances this argument is not valid all the time".

"Wasswa's case (infra)" that Justice Tsekooko was referring to was the other Supreme Court case (Civil Appeal No. 22/93)

(1) Hannington Wasswa & (2) Semukutu & Co, Ltd –vs- (1) Maria Onyango Ochola (2) Charles Ochola (3) Martin Ondowa & (4) Francis X Malawa.

In that case Platt, J.S.C. stated the general principle of law, namely, that a Court bailiff is an agent of the Court who enjoys immunity in the performance of his execution proceedings. No occasion arose in the case for His Lordship to state that that rule is subject to some exceptions.

In Francis Nansio Micah –vs- Nuwa Walakira, such occasion arose, and I would say, after reading both authorities, that they are not at all contradictory, and I think that both Counsel Babigumira and Nangwala agree with me in that proposition.

Whereas Hannington Wasswa -vs- Maria Onyango Ochola stated the general rule, Tsekooko, J.S.C. in Francis Nansio Micah -vs- Nuwa Walakira, recognised the Rule but added that there are exceptions. I do agree entirely. The general rule does apply in a case in which the bailiff lawfully executes the Court Order without involving parties. In that case the bailiff is as immune as his principal, the Registrar. Where, however, the execution is unlawful the Registrar and the bailiff cannot enjoy that immunity. This is where Justice Platt was saying, at p.8 of his unreported Judgment that:-

> "The Court Broker or Court Bailiff has consequently been declared by the Courts in Uganda as an agent of the Court and not of the parties' and that: -
>
> "A court Bailiff has had immunity under S.46 of the Judicature Act so long as he acts lawfully. (See S.45 of the Judicature Statute, 1996).
>
> This means that where a Court bailiff acts unlawfully in the execution of his duties, he is not allowed the immunity.

What then is the distinction that Justice Tsekooko was making when he stated: - "Despite this Court's decision in Wasswa's case (infra) in some instances this argument is not valid all the time" I think that in cases where the bailiff has acted unlawfully, they do not enjoy immunity, nor can you simply dismiss an application like the instant one because there has been joinder of the judgment creditor and the bailiff.

As far as I can understand the law, where in an execution a party to the case assists, connives or colludes with the bailiff, resulting in unlawful execution, then neither the party nor the bailiff can escape liability and the Court then should invoke S.35 (2) of the C.P.A. to avoid a multiplicity of suits so as to settle the matter within the same procedure. Examples are not far to find. They include a situation in which the judgment creditor identifies the wrong property to the bailiff for attachment, where the bailiff is privy to the truth. It also involves a situation in which the bailiff colludes with the judgment creditor to undervalue for sale the attached property. But where the bailiff, without the participation or active involvement of the judgment creditor, under values the property and sales it at the undervalue, unless he can prove that the act was not willful, then he cannot appeal for the immunity.

With the above observations of the law, it is now pertinent to consider the application under discussion. The complaint in these two applications was not about the attachment. It was about the sale by the bailiff. I have read the affidavit of Mr. Makumbi Peter sworn or 14th November 1997. He depones, among other things, that the High Court made an interim order on 29.10.97 suspending the sale of the two motor vehicles. He does not say that he was present in Court.

But he must have learnt of the order since he is an interested party (Estates Officer of the first applicant). And he depones that after learning of the order, he kept checking on the motor vehicles where they were being kept. He says be had already complained about the over attachment and the order of the Registrar to the bailiff not to over attach. He depones at paragraph 5 of his affidavit that on the day the interim order was made, he informed the bailiff about it. He does not say that he served the order on the bailiff. He also says that “on the day of the purported sale’ the 2nd respondent (i.e. bailiff) telephoned Makumbi to go and witness the sale but that again Makumbi reminded the bailiff about the interim order. But he (Makumbi) does not say that be served on the bailiff that interim order.

Mr. Alex Resida, in reply, swore an affidavit on 1st December 1997, in which he confirms that neither Makumbi nor the Court bailiff was in Court when the interim order was granted. Mr. Resida raises a question which nobody answered. Was the Court bailiff served with the interim order, leave alone, a sealed one and leave alone the fact that his firm was not

contacted to consent to the draft order before it was issued by the Court?

Mr. Richard Mugaba, the Court bailiff, also swore an affidavit on 1st December 1997, in which he concedes being told of the interim order only on 10th November 1997 at l1.l7a.m.

This is what Mugaba depones in respect therewith: -

> "6.That on the 10th day of November 1997 at about 10.00a.m which was after the expiry of 14 days mentioned in the advertisement for sale, we proceeded and sold two motor vehicles Land Cruiser UXW 649 and Corolla 957 to the 4th and 3rd respondents above mentioned, respectively and duly made our returns to this Hon. Court".

The sale agreements are annexed to the Court Bailiff's affidavit in reply and they indicate they were executed on 10.11.97 (see Annexture RMV and RMVI).

In paragraph 7 of his affidavit in reply, the bailiff depones: -

> "That on the same day at 11.17 a.m. we were taken a back on being served by the applicant's lawyer's clerk with an interim order of this Honourable Court stopping the sale of the attached motor vehicles until the Ruling was delivered. Until then I had no knowledge whatsoever of an interim order staying the sale".

To strengthen the bailiff's averment in paragraph 7 of his affidavit, Mr. Alex Resida deponed in his affidavit in reply, in paragraph 8 as follows:-

> "THAT I never got in touch with Richard Mugaba of Bamu Partners & Auctioneers or anyone (of them) from that firm and so they were not informed about the interim order staying the sale from Counsel for the plaintiff".

I have weighed the evidence contained in the affidavits and the affidavits in reply. I am satisfied that the Court bailiff was not in Court when on 29/10/97 this Court issued or granted the interim order staying the sale of the two vehicles or any of them. I am satisfied, upon the affidavits in reply, of Alex Resida and Richard Mugaba that the bailiff was not served with the interim order until after the sale of the motor vehicles, even though the sale was on the same day as the service of the order upon the bailiff. This is because nobody has sworn to contradict Richard Mugaba's affidavit (in paragraphs 6 & 7) that he sold the vehicles before 11.17 a.m on 10.11.98 when he received the service of the restraining order. In the circumstances, I find that the vehicles were sold before the bailiff had received the restraining order. It is no use arguing that because Mr. Resida was in Court, and even if the first respondent was, when the restraining order was granted, the bailiff was informed of that order. I say that because nobody has proved that the bailiff received the order before he sold the vehicles, and of course, it is already decided, and was decided in Wasswa –vs- Maria Onyango Ochola & Others (supra) and Micah –vs- Nuwa Walakira (supra) that where execution is lawfully done then the executor is an agent of the Court and not of the parties. Mr. Resida who, it is admitted was in Court when the order was made was then not representing the bailiff and he cannot be presumed to have had a duty to inform the said bailiff.

He was representing the judgment creditor, who, it is not proved any where that, she took part in the sale of the vehicles.

In the result, on prayer (a), the application will not be set aside since the sale was not unlawful.

Now I come to the second prayer (b) that all the money stated to have been realised from the sale be deposited in Court.

It transpired at the hearing that truly the proceeds of the sale should not be in the pockets of the bailiff or of the judgment creditor or of their advocates. It was noted that the decretal amount with costs were paid to and accepted by Counsel for the two respondents. It is

therefore inconceivable that also the proceeds of the sale should be in the hands of M/S. Nangwala & Co, Advocates! And I have already stated, and there seems to be no argument about it, that all the entire proceeds of the sale would or should have been remitted to the Registrar by the bailiff his agent, and that the bailiff should have submitted to the Registrar his (bailiffs) bill for settlement. That is what it should always be.

It appears to me that if I were to grant a default judgment against the 3rd and 4th respondents, holding that the vehicles they purchased should be detained and preserved, I would now be contradicting myself since I have already decided that the sale to them by the bailiff of the vehicles was lawful.

The order to impound and preserve the vehicles would have been called for if application No. 1024/97 were pending. Now that I have also disposed of it, that order would be meaningless. The application stands overtaken by events. If I have decided that the sale was lawful, it appears to me that I cannot order that the vehicles be resold and the proceeds be paid to the judgment debtors. It appears to me therefore that the applicants can only settle for the proceeds of the sale - I am, aware, however that, they allege that the vehicles were sold at a less price than their value. That was a mere allegation not borne out by evidence. After all, the Court bailiff challenged the allegation in his affidavit in reply, in paragraph 5 that:-

> "before the date of sale pursuant to His Worship David Wangutusi's advise we commissioned Mr. C.B. Kibumbi t/a SURVEY GROUP AND ASSOCIATES, a qualified and professional valuer, to carry out a valuation of the said attached motor vehicles for purposes of determining the then open market value of the said vehicles'.

The authority of Mr. Wangutusi and the valuation Report of C.B. Kibumbi were attached to the bailiff's affidavit in reply. No evidence has been adduced to say that Mr. Wangutusi never authorised expert valuation or that the valuer so authorised was neither expert nor independent, or that his report was flawed, and if so, where.

I would in the circumstances dismiss the alternative prayer for revaluing and payment of the new value of the motor vehicles to the 1st applicant. I Order that the proceeds of the sale be

paid to the applicant by the Court bailiff.

With regard to costs, the issue is a little complicated. If the 1st applicant had obeyed the Court order and paid the decretal amount before its vehicles were attached, it would have settled for appeal. In fact all that would have been done would have been to apply for stay of execution, complied with the provisions of Order 39 rule 4(3) of the Civil Procedure Rules rather than plunge into all these litigations which were uncalled for. In the circumstances, I have no alternative but to order that the costs of dismissing these applications will be paid by the applicants, but they will have to pay 50% of the costs, the other fifty percent being paid by respondents numbers 3 and 4 for their failure to appear when summoned as parties.

J.H.NTABGOBA

PRINCIPAL JUDGE

5th JUNE 1997