

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO 202 OF 2004
(ARISING FROM CASE NO HCT-00-CV-CS-156 OF 2004)

EVARISTO MUGABI PLAINTIFF

VERSUS

HOUSING FINANCE CO. LTD. & ANOR DEFENDANT

14th December, 2004

BEFORE: HON. MR. JUSTICE J.B.A. KATUTSI:

RULING:

This is an application by way of notice of motion brought under the provisions of O.48 r.1 and O.37 r.1 (a) and (b) of the Civil Procedure Rules seeking orders to facilitate presentation of the suit property.

The application is supported by an affidavit sworn by the applicant the relevant paragraphs of which run as follows:

- “2. That I was the registered owner of Mailo Land comprised in Kibuga Block 29 plot 110 until 30/10/2003 when the same was transferred by first respondent under dubious circumstances.
3. That the second respondent attempted to grab my same house last year using a fraudulent repossession certificate through his company property service Ltd until this court issued an interim Preservation order in M.A. 791/02.

4. That on 12/11/2003 one IGGY RWABUKUKU informed me that the said land had been sold by the first respondent to the second one and that he was instructed by first respondent to evict me from my flat WITHOUT any prior notice.
5. That on 15/11/2003 he came to my flat with about 20 thugs and threw my family and property out of the flat. It is the LC1 Chairman who handed me a copy of the documents he had received from the auctioneers.
6. That my family and I have nowhere to stay and our constitutional right to shelter was violated by the respondents and their agent the auctioneer.
7. That the first respondent sold my land to the second respondent secretly without having advertised the same for sale as is required under the Mortgage Decree. The second respondent does not qualify to own mailo land here in Uganda.
8. That the respondents General Manager informed me on 12/11/2002 that he had sold my house to the respondents for shs.125million when in fact he had insured the same for shs.225million as its replacement value, in 1997. He also informed me that I owed shs.96,477,228.34 under the mortgage. To date he has not paid me the balance on the sale price.
9. That the sale by first respondents to the second respondent was unlawful, wrong, defective and a deliberate UNDER SELLIN of my property to benefit the people who were involved in the whole transaction.
10. That I have now filed H.C.C.S NO.156 of 2004 against respondents to set aside the said sale and the same is now pending in this court”.

There is an affidavit in reply sworn by the second respondent the relevant paragraphs of which are:

1. That I am an adult male Ugandan businessman of sound mind and holder of passport No. B0355548 and the second respondent in this application and as such affirm this affidavit in that capacity
2. That being a citizen of Uganda, I was at all material times capable and competent to lawfully purchase and own property.
3. That I purchased the suit property for value pursuant to an express power of sale conferred on the first respondent as a mortgagee and after being satisfied that the applicant had consented to the mode by which the property was sold to me.
4. THAT I purchased from the first defendant the suit property for value which title was subsequently transferred in my names.
5. THAT I conferred 3rd party rights through my agent property services Ltd which executed Tenancy Agreements with four different tenants who are now in occupation of the said property”.

There is no affidavit sworn in rebuttal.

Order.37 r 7 (a) under which the application is taken runs as follows:

“The court may, on the application of any party to a suit, and on such terms as it thinks fit-

- a) Make an order for the detention, preservation, or inspection of any property which is the subject matter of such suit, or to which the question may arise therein”.

The question for discussion here is whether upon the facts as stated the applicant has as against the respondents a right to a preservation order. It is not sufficient for the applicant to merely say he wants a preservation order and then as a matter of fact, is entitled to the order of preservation. If the court sees, however, that there is a fair ground for issuing the order, then it

appears to me the court ought to grant it, but not otherwise. After all the grant under O.37 r.7 (a) is discretionary.

From the affidavit in reply it is made clear that the second respondent is the registered proprietor of the suit premises. This claim is not rebutted. The second respondent swears that: “I purchased the suit property for value pursuant to an express power of sale conferred on the first respondent as mortgagee and after being satisfied that the applicant had consented to the mode by which the property was sold to me”. (emphasis mine) This clear, hold statement is not controverted. I am aware that upon the application of this nature, the court is not to go into the claim and decide finally whether the applicant’s claim is well founded or not.

To this end the submission of Learned Counsel for respondents on the doctrine of approbation and reprobation appear to me to be premature at this stage. Suffice it to say that I see nothing in this application to compel me to exercise my discretionary powers under O.37 r.7 (a) and accordingly dismiss this application with costs.

J.B.A. Katutsi

JUDGE

14/12/2004

Kamigisha A. for respondent.

Applicant absent.

Nabatanzi clerk.

Ruling read.

J.B.A. Katutsi