

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

**HCT-04-CV-MA-0122/2012
(ARISING FROM HCMA NO. 16/2009)
(ARISING FROM CIVIL SUIT NO. 30/1999)**

1. WABWIRE PETER

2. KADIMA ERIFASI.....APPELLANTS

VERSUS

MAYENDE IDDI TOMMY.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Appellants moved this Honourable Court by Notice of Motion under O.44 r. 1(1), O.50 rr 3, 6, and 8 and O.52 r.3 of the Civil Procedure Rules and S.17-1 for orders that the Ruling and Orders of the learned Assistant Registrar **Lilian C.N. Mwandha** issued in Misc. App. 16/2009 of 25th September 2012 be asset aside, reversed and/or be vacated with costs. The motion set forth 17 grounds of appeal, supported by the affidavit of **Peter Wabwire Musumba** the 1st appellant.

The Respondent **Mayende Iddi Tommy** filed an affidavit in reply in rebuttal.

This matter is before me as a first appellate court, wherefore, I have a duty to re-evaluate the evidence and give it a fresh scrutiny, and come up with fresh conclusions thereon.

The background to this appeal is summarized as herebelow from the court record:

Respondent sued appellants under Civil Suit. 30/1999 which was dismissed under O.9 r.19 of the Civil Procedure Rules for want of prosecution. Appellant's bill of costs was taxed and allowed

at shs. 2,940,000/= . Parties entered a consent for payment of the taxed bill of costs. The consent was formerly reduced into an order of court signed by **H. Wolayo** (Deputy Registrar Mbale) on the 21st September 2000.

Arising from that court order, the appellant's counsel on October 23rd 2000 wrote to the DPC-Busia for assistance to have the Respondent and his occupants evicted from "muzigo" on plot 6 Customs Road Busia Building to enable them collect rent therefrom in satisfaction of their taxed costs on behalf of the Judgment Creditors (their clients). The matter again resurfaced in court when the appellant applied to the High Court for a warrant to give vacant possession to the same property that is "a muzigo" house/room at the rear end of the Namuwaya building along Customs road Busia (alias Plot 6 Customs Road Busia, Busia Town Council, Busia District)." The warrant was issued on 17th June 2009; by the Deputy Registrar of the High Court.

Upon receipt of the warrant, the Respondent filed Misc. App. 16/2009, seeking an order for a notice to show cause to the appellants why payment/adjustments made to them should not be recorded as certification of the decree issued to them in the main suit and balance thereof amounting to Ushs. 11 million be reimbursed back to the Respondent before this Honourable Court. The matter was heard and the Assistant Registrar found the appellants liable as prayed. Appellants being dissatisfied made this appeal against the ruling and orders.

This matter had a very lengthy history with lots of correspondences, explaining the delay to have it sorted out. However in my view, it was a very simple matter that revolved around enforcement of the consent order by the Assistant Registrar dated 17th June, 2009.

I will therefore not reproduce the lengthy documents, affidavits and submissions that do exist on record to explain the genesis of the current appeal. I will straight away go to the resolution of the issues/grounds of appeal as argued/presented. They were argued by the appellant under grounds 14, 15, 16 and 17 of his Notice of Motion.

Ground 14: "The learned Assistant Registrar erred in law and fact by ordering a notice to show cause to issue....."

Appellants argue that the Respondent never complied with the terms of the Consent Order (Annex 'B') which directed them to give vacant possession of the "Muziigo" at Plot 6 Customs Road Busia to Counsel for judgment creditor to collect rent at shs. 50,000/= per month till payment in full.

Counsel Nagemi argued that Respondents remained in occupation of the "muzigo" until 17th June 2009, when a warrant of execution was issued by court for their eviction, and were effectively evicted by the Bailiffs on 30th June 2009 (Annex 'H').

Counsel therefore argued that the Respondent was only evicted in 2009, and the Assistant Registrar was wrong to find that the Respondents had earlier on been evicted in 2000.

Counsel further argued that had the order been followed then they would have needed 59 months (4 years 9 months) to cover rentals amounting to 2,940,000/= (meant 2000-2004), hence Misc. Application 16 would not arise. He argued that since execution was done in 2009, the Registrar was in error since time had just began to run.

Counsel Mutembuli for Respondent however opposed that stand. He referred to the Consent order and agreed with the interpretation by the Registrar that the order required that after collecting the 2,900,000/= the defendants/appellants would give back the muzigo to the Respondents. He argued that on 23.Oct.2000 Counsel Nagemi wrote to the DPC Busia to oversee the eviction of the occupants, and evidence under DX.2 showed that eviction was done. Therefore by 2000, the applicants had taken possession of the Muziigo and collected rent therefrom. That on 30th January 2009 when Respondent wrote to applicants to vacate the muziigo and pay the excess of rent collected of 11,000,000/= they instead ran to court and applied for a second warrant of execution 9 years later. The above resulted into complaints by the Respondents and the filing of Misc. Application 16/2009, the subject of this appeal. Referring to paragraph 3, 5, 6, 7 and 10 of the Affidavit in reply, Counsel concluded that appellants effectively took possession in 2000 and began collecting rent but in 2009, went to court as an afterthought. Counsel agreed with the Registrar that the appellants were liable to remit the excess of rent collected from the muziigo to the Respondent, from 2000 to date.

My analysis of the genesis of the above submissions and a careful look and evaluation of the record and pleadings leads me to the conclusion that, the intention of the consent order signed by the Registrar on 21st September 2000 is in very clear terms that:

“The Judgment debtor will give vacant possession of a ‘muziigo’ located on plot 6 Customs Road, Busia to Counsel for the Judgment Creditor to collect rent at a rate of shs. 50,000/= per month till payment in full. Possession is to be delivered on 21.10.2000 at 9:00a.m. The Judgment debtor may pay the Judgment Creditor before then and he may also pay the Judgment Creditor after handing over possession. In the event of which he will get back his muziigo.

In default of the successful delivery of vacant possession of the muziigo on 21.10.2000, execution will issue without any further notice.”

The above order was intended to have a sane method of ensuring payment by monthly rentals till realization of the decretal amount of 2,900,000/=. Default on 21.10.2000 meant that the Judgment Creditor would conduct execution and gain access to the muziigo, so that he starts getting the 50,000/= till he pays off the 2,90,000/= then gives back the muziigo to the judgment debtor. The record shows that on October 23,2000 the lawyer to whom the order is addressed (**Nagemi**) wrote to the DPC to enable the execution happen. (this is supported by paragraphs 3, 4, 5,) of affidavit in reply).

Also court record contains similar documents attached under Misc. 16/2009 as attachments to a complaint by **Mayende Iddi Tommy**. Similar documentation is referred to by the learned Registrar in her Ruling at page 12. I am in agreement with the findings of the Registrar that, in writing to the DPC, and even having a record of properties inside the “muziigo” written down and handed over, the appellant’s counsel was conducting an execution and hence enforced “vacant possession” to himself of this property as per the court order. Counsel cannot therefore turn around in 2009, and claim that what he did with Police in 2000, amounted to nothing. The record is clear on this, and I agree with the Registrar, that execution was conducted on 24.10.2000.

The effect of that action therefore is that appellants effectively began collecting rent from the muziigo effectively from 2000.

Even if Counsel **Nagemi**'s argument that they needed 4 years and 9 months to collect rentals at shs. 600,000/= annually is believed, it means that in order to cover the decretal amount, that amount from 2000, would be completed by the year 2005. The period between 2005 to date therefore would be rentals collected in violation of the court order. The Respondent was therefore justified to write the demand notes for excess of rentals collected to be reimbursed. It is also surprising that the Respondent waited until the appellant wrote the demand note in 2009, for him to run to court and apply for execution again!

I do not quite find any reasonable explanation on record for the court actions that gave rise to the issuance of that warrant but the matter was thoroughly investigated by the Assistant Registrar following the complaint which gave rise to the hearing of Misc. App. 16/2009. I do find for a fact that it was proper and judicious for the Assistant Registrar to grant the Notice "*to show cause*".

I therefore find no merit in this ground of appeal, and it fails.

Ground 15: "The learned Registrar erred in fact by ordering Appellants to remit to the Respondents the excess of shs. 11,000,000/= collected from Respondent's muziigo before filing the application a decision which occasioned a miscarriage of justice."

Having found under ground 14 that the learned Registrar was right to issue the Notice, then principally this ground, can only succeed in as far as the fact that there was "no proof that what was collected in excess amount to 11,000,000/= (Eleven Millions)."

It is true that the appellant is liable to refund to the Respondents all rentals collected in excess of the 4 years 9 months period which he was entitled to possess the muziigo from the date of the exercise of execution. This court has found that appellant got access to the muziigo on 24. Oct. 2000 or thereabout. To date he still occupies the same and is collecting rentals therefrom. The court order the basis of his occupation was worded to give him "*possession till payment in full at rate of 50,000/= per month.*"

I therefore will agree with **Counsel Nagemi** that the formula used to reach 11 millions as the excess rent is not clear. I therefore will make a finding that the order to pay 11 millions, was irregular, and will be set aside, and be replaced with an order that appellant shall pay back to the respondent all excess rent received at the monthly rate of 50,000/=. This amount is deemed to run from the date of the decree which is deemed satisfied by October 2004.

All the period between October 2004, to date, is rent due and owing to the Respondent. He therefore has a right to recover the same from the appellant, and I do agree with findings of the Registrar on this, save, in the amounts as explained above. This ground succeeds in part as stated above.

Ground 16. “That the learned Registrar erred to order immediate vacant possession of the muziigo to Respondent.”

Counsel’s argument on this ground was premised on his insistence that execution happened in 2009, and therefore his client was entitled to collect rent amounts of shs. 600,000/= annually which necessitated 4 years and 9 months and this would run on until October 2014. He faulted the Assistant Registrar whose argument was premised on a finding that time began running in 2000. (When counsel obtained his access to the premises vide his execution through the DPC Busia). **Counsel Mutembuli** agreed with the reasoning of the Assistant Registrar, arguing that this was the spirit of the “**Wolayo** Order of 2000.

I have already agreed with the Assistant Registrar’s position that the execution effectively happened in the year 2000. I do not agree with **Counsel Nagemi**’s attempt in rejoinder to offer evidence across the bar by explaining issues relating to appellant’s claim of right to this property, outside the facts as presented in Misc. Application 16/2009 to Court. The issues of the deceased’s estate were not in issue and cannot be resorted to in this appeal.

I will not therefore refer to them. I will refer to the order of the High Court of 21st September 2000, which specifically provides that after payment of the Judgment Creditor by the Judgment Debtor, “*he will get back his muziigo.*”

This court has already found that having executed in October 2000, the judgment creditor has paid himself rents since then to the tune of 2,940,000/= by the close of October 2004. The Judgment Creditor was therefore entitled to immediate vacant possession of his muziigo.

The learned Registrar was therefore right to order so. This ground also fails.

All in all, having found as above I do not find any merit in this appeal. It fails on all grounds save ground 15 which is amended in terms discussed above. This appeal is accordingly dismissed with costs as prayed.

I order.

Henry I. Kawesa

JUDGE

21.10.2015

Right of Appeal explained.

Henry I. Kawesa

JUDGE

21.10.2015