

**THE REPUBLIC OF UGANDA.  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(EXECUTION DIVISION).  
MA. NO. 208 OF 2020.  
(ARISING FROM EMA NO. 390 OF 2016).  
(ARISING FROM HCCS NO. 289 OF 2014).**

- 1. FORMULA FEEDS LIMITED  
2. GICHOHI NGARI:..... APPLICANTS  
VERSUS  
1. KCB BANK UGANDA LIMITED  
2. SWIFT AUCTIONEERS & COURT BAILIFFS  
3. SOUTHGATE PROPERTIES (U) LIMITED:..... RESPONDENTS**

**RULING OF HON LADY JUSTICE MARGARET MUTONYI.JHC**

**RULING.**

1. Formula feeds limited and Gichohi Ngari herein after referred to as the Applicants brought this application by way of Notice of motion against KCB Bank Uganda Ltd herein after referred to as the 1<sup>st</sup> Respondent, Swift Auctioneers as Court Bailiffs herein after referred to as the 2<sup>nd</sup> Respondent and South Gate Properties (U) LTD herein after referred to as the 3<sup>rd</sup> Respondent all together referred to as Respondents seeking the following orders;

- (a) That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' purported sale of the 1<sup>st</sup> Applicant's lands comprised in Kyadondo Block 101 Plots 190, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270 & 275 at Watuba and in Kyadondo Block 90 Plots 397, 459 & 460 at Katalemwa to the 3<sup>rd</sup> Respondent was illegal and the same ought to be set aside.
- (b) The execution of the Decree dated 10<sup>th</sup> February 2016 vide HCCS No. 289 of 2014 be set aside.
- (c) The 2<sup>nd</sup> Respondent's taxation of costs be and set aside.
- (d) A permanent injunctive order doth issue restraining the Respondents, their servants and or agents from transferring, dealing with and or evicting the Applicants from the lands comprised in Kyadondo Block 101 Plots 190, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270 & 275 at Watuba and in Kyadondo Block 90 Plots 397, 459 & 460 at Katalemwa.

- (e) IN THE ALTERNATIVE THAT the execution of the/Decree of the court dated 16<sup>th</sup> September 2016 vide HCCS No. 289 of 2014 be stayed pending the determination of the Appeal preferred by the Applicants.
- (f) Costs of this application be provided for

2. The application was brought ***Under Section 33 of the Judicature Act, Cap. 13, Section 98 Civil Procedure Act, Cap. 71 and Order 22 Rules 23 and 26 of the Civil Procedure Rules S.I. No. 71-1.***

3. The grounds for the application are contained in the Notice of Motion and detailed affidavit of **Gichohi Ngari** the 2<sup>nd</sup> Respondent, dated 9<sup>th</sup> April 2020 and briefly are as follows:

- (a) (a) The Applicants filed High Court (Commercial Division) Civil Suit No. 289 of 2014 against the 1<sup>st</sup> Respondent which was determined by court.
- (b) The Applicants were dissatisfied with the decision of the High Court (Commercial Division) vide Civil Suit No. 289 of 2014 delivered on 10<sup>th</sup> February 2016 and filed CACA No. 76 of 2016.
- (c) The Applicants were dissatisfied with the decision of the Court of Appeal in CACA No. 76 of 2016 and filed a Notice of Appeal and also requested for a record of proceedings.
- (d) On 15<sup>th</sup> March 2016, the 1<sup>st</sup> Respondent filed HCEMA No. 390 for execution of the decree in High Court (Commercial Division) Civil Suit No. 289 of 2014 whereupon the said application was only allowed in part on condition that the 1<sup>st</sup> Respondent disposes off only part of the Suit Land to realize the equivalent of **Ug Shs. 2,159,000,000 (Uganda Shillings Two Billion One Hundred Fifty-Nine Million)** and this Honorable Court further ordered that no execution should be made beyond the stated sum.
- (e) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents unlawfully and wrongfully sold the Applicant's land to the 3<sup>rd</sup> Respondent on 6<sup>th</sup> March 2017, the same day the warrant of attachment was issued without advertising the sale and at a grossly undervalued sum.
- (f) The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's purported sale of the 1<sup>st</sup> Applicant's properties to the 3<sup>rd</sup> Respondent was illegal, unlawful and wrongful.

- (g) That the Respondents have threatened to evict the Applicants from the properties which are still registered in the name of the 1<sup>st</sup> Applicant.
- (h) The Applicants obtained an order of stay of execution against the 1<sup>st</sup> Respondent but the Respondents went ahead to unlawfully and wrongfully sold off the said properties.
- (i) The Applicants shall suffer substantial loss if this application is not granted.
- (j) This Application has been made without unreasonable delay.
- (k) The Applicant is ready to provide security for due performance of the Decree in this matter.
- (l) It is in the interests of justice that this application is granted.

4. All the Respondents opposed this application and accordingly filed affidavits in reply to the Application;

- i) **The 1<sup>st</sup> Respondent KCB Bank Ltd** filed an affidavit in reply deposed by one Nassif Mubiru on 19<sup>th</sup> June 2020 in his capacity as legal manager of the 1<sup>st</sup> Respondent. Briefly
  - a) He contended that the Applicants' suit was an abuse of court process because HCCS No. 289 of 2014 found the Applicants who are not nationals to be incapable of having interest in the suit properties which are mailo land which finding was never the subject of the Civil Appeal No.76 of 2016 and that as such, the Applicants have no locus to file this Application.
  - b) Furthermore, that having filed a notice of Appeal to the Supreme Court, it is the appropriate forum to address the issues raised by the Applicants in the present Application to avoid a multiplicity of suits.
  - c) That this court is functus officio with regards to staying execution, that power having been exercised by Justice Muhanguzi as he then was in execution of EMA No. 445 of 2016.
  - d) That this court has no jurisdiction to stay execution of an appeal that has been concluded in the court of Appeal and which is pending in the Supreme Court.
  - e) This application is incompetently before court for want of authority on part of the 2<sup>nd</sup> respondent.

- ii) For the **2<sup>nd</sup> Respondent (Swift Auctioneers and Court Bailiffs)**, an affidavit in Reply was deposed by Joseph Yamurebire a licensed court Bailiff trading under Swift Auctioneers and Court Bailiffs being the Bailiff who carried out the execution which is the subject of this Application.  
His contention is that the Applicants are wrong to sue M/S Swift Auctioneers and Court Bailiffs and make it a party to the proceedings before court because license for court Bailiffs is issued to individuals and not business names. And  
That the sale of the attached properties was lawful and not illegal as deposed to by the Applicants.
- iii) For the **3<sup>rd</sup> Respondent (Southgate Properties (U)LTD)**, Richard Munanyeza the 3<sup>rd</sup> Respondent's Managing Director deposed an affidavit opposing the Application dated 22<sup>nd</sup> June 2020 wherein he noted that;  
The Application before court contains falsehoods, lacks merit and amounts to an abuse of court process and ought to be dismissed with costs.

## **6. Background of the case.**

This case is premised on a decree accruing from **HCCS No. 289 of 2014** filed by the Applicants herein against KCB Bank (U) Ltd the 1<sup>st</sup> Respondent wherein Justice David.K. Wangutusi on 10<sup>th</sup> February 2016 held among others that;

- 1. The mortgage deed challenged by the plaintiffs is a nullity and is hereby declared so.***
- 2. The plaintiffs have not proved any breach that would impose liability on the defendant.***
- 3. The Debenture deed is unenforceable.***
- 4. The personal guarantees executed by the counter-defendants Gichohi Ngari, Samson Gichohi Ngari and Anne Wangui Gichohi are legal and enforceable.***
- 5. The plaintiffs are liable to pay the defendant the sum of 4,272,740,118/= [Uganda Shillings Four billion two hundred seventy-two million seven hundred forty thousand one hundred and eighteen].***

Prior to this decree, the parties in the suit had entered a partial consent before Justice David Wangutusi on the 1<sup>st</sup> April 2015 where in the plaintiffs admitted liability to the defendant to a tune of **2, 159,000,000/= [Two billion one hundred fifty-nine million shillings]**. This was in the presence of both the parties and Counsel

David Kaggwa for the Plaintiffs while Counsel Terrence Kavuma and Siraj Ali represented the Defendant. Therein, it was ordered that; Partial judgment on admission in the sum of **2, 159,000,000/= [Two billion one hundred fifty-nine million shillings]** is hereby entered against the 1<sup>st</sup> plaintiff on the counter-claim.

It was upon the strength of the above decrees that the defendant Bank embarked on the execution process by filing EMA No.390 of 2016 in execution of the Decree/Order vide HCCS No.289 of 2014 against Formula Feeds Uganda LTD and Gichohi Ngari for an undisputed decretal sum of Uganda shillings **2, 159,000,000/= [Two billion one hundred fifty nine million shillings]** by way of attachment and sale of the plaintiffs'/Applicants Immoveable properties to wit; **Kyadondo Block 101 Plots 190, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270 & 275 at Watuba and in Kyadondo Block 90 Plots 397, 459 & 460 at Katalemwa**

Following the above Application, the Plaintiffs in the main suit filed and obtained an order of stay vide **MA No. 792 of 2016** arising from **EMA No. 390 of 2016** on 16<sup>th</sup> May 2016 before H/W Muse Musimbi wherein it was ordered that the status quo on properties comprised in **Kyadondo Block 101 Plots 190, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270 & 275 at Watuba and in Kyadondo Block 90 Plots 397, 459 & 460 at Katalemwa** be maintained for 3 months to enable the parties market and jointly sell the properties.

The parties in MA No. 792 of 2016 failed to execute a joint sell and it was upon this background that the defendant Bank/Judgment Creditor employed the services of the 2<sup>nd</sup> Respondent a court Bailiff to follow through with the process of Execution.

On 21<sup>st</sup> September 2016 another order of court was issued vide MA No.445 of 2016 before Justice E.K Muhanguzi wherein it was ordered that;

- a) The Application is allowed in part, on condition that the Respondent is allowed to dispose of some of the titled properties forming securities in the Respondent's custody to realize the equivalent of undisputed amount of **UGX 2, 159,000,000/= [Two billion one hundred fifty-nine million shillings]** due and owing to the Respondent Bank.
- b) Beyond recovery of that disputed amount there shall be no further execution until disposal of the Appeal in the court of Appeal between the parties relating to the rest of the awards in HCCS No. 289 of 2014.
- c) No order as to costs.

The 2<sup>nd</sup> Respondent was then issued with a warrant of attachment Vide EMA No.390 of 2016 issued on the 31<sup>st</sup> Jan 2017 and valid till 1<sup>st</sup> March 2017, the 2<sup>nd</sup> Respondent went on to run an advert in the daily Monitor Newspaper as required by law at page 52 on 3<sup>rd</sup> February 2017 which process was eventually concluded by an auction under a forced sale on 6<sup>th</sup> March 2017 at the 2<sup>nd</sup> Respondents Premises, where the 3<sup>rd</sup> Respondent was purported to be the highest bidder and thus purchaser of the suit land at a valuable consideration of **3,598,000,000/= [Three billion five hundred ninety eight thousand shillings only]**.

By consent of Both parties and their counsel, the court of Appeal presided over by Justice Kenneth Kakuru in the presence of Odokel Opolot for the Applicants and Terrence Kavuma for the Respondent Vide **Civil Application No. 56 of 2017** Formula Feeds Ltd and 4 Ors Vs. KCB Bank Ltd on 27<sup>th</sup> March 2018 issued the following orders;

- I) An order to stay the execution of decree passed in Civil Suit No. 289 Of 2014 and an order for preserving the status quo pending the determination of the Appeal No. 76 of 2016
- II) An order restraining the Respondent and his agents from disposing of or in any way dealing with properties comprised in Plots 190, 259,260, 2611, 262, 263, 264, 265, 266,267,268,269,270, 259 of Block 101 and Plot 397, 459,460 of Block 90 in a manner that defeats the Applicants interest until the hearing of Civil Appeal No. 76 of 2016 which is fixed on 10<sup>th</sup> May 2018 at 9:30 am.

The Applicants were surprised to receive a letter dated 4<sup>th</sup> March 2020 by the Commandant Land Protection Police Unit and addressed to the Commander,

Kampala Metropolitan Police, forwarding copies of court orders authorizing the sale of the 1<sup>st</sup> Applicant's properties comprised in Kyadondo Block 101 Plots 190, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270 & 275 at Watuba and in Kyadondo Block 90 Plots 397, 459 & 460 at Katalamwa and vesting the Suit Land in the 3<sup>rd</sup> Respondent; directing the Registrar of Titles to transfer ownership in the Suit Land to the 3<sup>rd</sup> Respondent; and authorizing the 2<sup>nd</sup> Respondent to remove the Applicants from the Suit Land. Hence this Application whose main objective is to set aside the said transaction which the Applicants deem illegal and unlawful.

Important to note is the fact that on 8<sup>th</sup> July 2019, **CA No. 0076 of 2016** was concluded before The Hon Justices Kenneth Kakuru, Geoffrey Kiryabwire and Christopher Madrama. The Appellants therein being dissatisfied with the decision therein filed a Notice of Appeal to the Supreme Court before the Court of Appeal on 12<sup>th</sup> July 2020 and it was received on the same date.

#### ***7. Submissions.***

All Counsel involved filed written submissions which are on record. I don't have to reproduce them herein in since submissions are not evidence but I have put them into consideration while writing the ruling.

#### ***8. Issues.***

The Applicants framed 2 (two issues) for resolution in this Application;

1. **Whether there is sufficient cause to merit the grant of this Application.**
2. **Whether the Applicants are entitled to the Reliefs sought.**

#### ***9. Preliminary objections.***

Before resolving the issues above, the Respondents herein raised Several Preliminary Objections. It is therefore incumbent upon this court to resolve these preliminary objections before handling the main application as they point to an illegality which may have the effect of disposing of the entire Application. I will accordingly proceed to resolve the Preliminary Objections as raised and discussed by the Parties.

The 1<sup>st</sup> Respondent filed an affidavit sworn by one Nassif Mubiru its Legal manager on 19<sup>th</sup> June 2020 wherein five preliminary objections were raised to wit;

- a) He contended that the Applicants' suit was an abuse of court process because HCCS No. 289 of 2014 found the Applicants who are not nationals to be incapable of having interest in the suit properties which are mailo land which finding was never the subject of the Civil Appeal No.76 of 2016 and that as such, the Applicants have no locus to file this Application.
- b) Furthermore, that having filed a notice of Appeal to the Supreme Court, it is the appropriate forum to address the issues raised by the Applicants in the present Application to avoid a multiplicity of suits.
- c) That this court is functus officio with regards to staying execution, that power having been exercised by Justice Muhanguzi as he then was in execution of EMA No. 445 of 2016.
- d) That this court has no jurisdiction to stay execution of an appeal that has been concluded in the court of Appeal and which is pending in the Supreme Court.
- e) This application is incompetently before court for want of authority on part of the 2<sup>nd</sup> respondent.

#### **10. Resolution of preliminary objections.**

With Regards to preliminary objection (a) above; which points to an illegal objective on the part of the Applicants; the 2<sup>nd</sup> Respondent submitted that this **Application is designed to achieve illegal objective:** Counsel referred to the decision of Hon. Justice Stephen Mubiru in **Civil Appeal 16 of 2016 Dima Dominic Poro v Inyani Godfrey** where ***Locus Standi*** was discussed and court emphasized that for one to institute a suit, they ought to have had sufficient interest in the suit land and that *the interest must not be too far removed (or remote); **the interest must be actual, not abstract or academic; and the interest must be current, not hypothetical.***

That since the evidence before the Court shows that the suit properties are mailo properties and the **High Court in HCCS 289 of 2014** found that the Applicants do not have any interest in the same, the Applicants accordingly have no locus standi to file the present application for recovery of the properties.

Whereas the 1<sup>st</sup> Respondent acknowledges that the court of Appeal guided the parties on what ought to be done before dealing in the contentious properties, they go ahead to water down the same as mere '*obita dicta*' which did not form part of the *ratio decidendi* in that decision. They prayed that the Court finds the Applicant's purported interest in the suit properties a legal absurdity and dismisses the application for want of locus standi.



The 2<sup>nd</sup> Respondent's counsel further submitted that; ***In order to enable the 1<sup>st</sup> Respondent to recover some of the funds advanced to the Applicants the Execution Court in Misc. Application 445 of 2016 ordered the sale of the Applicants properties- that is what justice is about, otherwise the 1<sup>st</sup> Respondent would be left with moot judgment.*** The Order of Justice Muhanguzi, (as he then was) was never appealed and subsisted to the time of sale and it is the legal basis for the execution.

To this, the Applicants responded that this argument is in effect self-defeating since if the Applicants have no interest in the suit properties, then the properties were not available to the Respondents for attachment and sale as the Respondents could not lawfully attach and execute against properties that did not belong to the judgment debtors, the Applicants herein. That on this account alone, the sale is null and void.

It is trite law as recognized by my brother Justice David Wangutusi in the main suit HCCS 289 OF 2014 from which all these applications arose, that Non- Citizens **SHALL NOT** acquire or hold mailo/freehold land. ***Section 40(4) of the Land Act refers;***

This provision of the law is mandatory and therefore **must** be complied with.

My finding on this preliminary objection is that, it is undisputable that the Applicants herein and the Plaintiffs in the main suit executed a mortgage and created a debenture over the properties that are the subject of this questioned attachment and sale. The registration of the properties in the non-citizen's names which is Mailo Land was illegal and could not be sanctioned by court hence the declaration that the mortgage deed created on the titles were a nullity.

The 1<sup>st</sup> Respondent sold the said properties through the second Respondent in an execution process to the 3<sup>rd</sup> Respondent purportedly to fulfill a decree against the Applicants. In my view this gives the Applicants a legal right to file this application and it cannot be said that they acted with an illegal motive. The first Preliminary objection is therefore over ruled.

I will combine Pre-liminary Objections **(b and c)** raising the issue of functus officio and jurisdiction because they are related.

Loosely put, Functus Officio means one whose duty or authority has come to an end.

In regard to legal proceedings, it applies to situations where a judicial officer has pronounced himself or herself on the legal issue.

In the instant case counsel for the respondents submitted that judge Muhanguzi as he then was decided on the issue of execution and as such this court is functus officio.

I have looked at the ruling of Justice E.K Muhanguzi then dated 21/9/2016.

It did not mention anything about illegality of the execution process. This court is therefore not functus officio as the issues before it is different.

Regarding the mandate of this court, I recently gave a detailed narrative in **EMA No.0978/2019.MONICA MUTABARURA V HOPE TUMWEBAZE**, to quote;

“The Division is required to determine questions relating to the execution, discharge or satisfaction of the decree. **Section 34(1) of the CPA refers.** That is to say; the **Division deals with questions that arise from the execution process relating to the limitation period in regard to execution, whether or not the property is available for attachment, whether there is an over attachment, or the proper procedure has been followed in the process of attachment and sale, control and direction of the court bailiffs that are involved in the execution process and any other issues that are incidental to the execution process.**”

The above holding clothes this court with the jurisdiction to handle all matters pertaining to execution after a warrant has been issued and this mandate covers the process during and after the execution process even after the warrant has been returned. The judgment debtor has a right and is at liberty to challenge the process if he or she feels the process was flawed provided the dissatisfaction is raised promptly. Under valuation, over attachment or attaching properties that are not legally attachable are pertinent issues an executing court has the mandate to investigate.

In addition, the Applicants cited the case of ***The Law Development Centre v Daniel Serufusa Wasswa & another HCMA No. 162 of 2017*** at page 9, wherein, Justice Bashaija while overruling a similar objection, held that; **Section 34(1) of the Civil Procedure Act is a known exception to the functus officio rule.**

I completely associate myself with the above decision.

In conclusion therefore this Application is rightfully before this court which has the mandate to handle all matters pertaining to the Execution process.

The second and third preliminary objections are therefore over ruled.

The fourth preliminary Objection was on the issue of this court having no jurisdiction to stay the decision of the court of Appeal and that the application should be before the Supreme Court.

The Applicant is not challenging the decision of the Court of Appeal before this court much as it has appealed to the Supreme Court. The applicant is challenging the execution process issued by this court. It is common practice which I find ridiculous that counsel for Applicants in seeking for remedies throw all sorts of issues at court. In my view, counsel should concentrate on the main issues. In the instant case the main ground is not applying for stay pending hearing of the appeal. The main area of contention is the execution process which they want court to investigate.

I find the pre-liminary objection without merit.

Lastly the objection was on lack of authority over the 2<sup>nd</sup> respondent.

That it is the wrong party sued because bailiffs work as individuals. **O.30 rule 10 of The Civil Procedure Rules SI 71-1** permits suing any person carrying on business in a name or style other than his or her name as if it were a firm name. The second Respondent Joseph Yamurebire in his affidavit in reply paragraph 1 clearly stated, ***“That I am male adult Ugandan citizen of sound mind, working as a licensed Court Bailiff under the names of Swift Auctioneers & Court Bailiffs who carried out execution in the case above and depose to this affidavit in that capacity’.***

The second respondent’s own affidavit evidence puts him within the ambit of **O.30 rule 10** of the CPR and at the center of this application. With due respect to counsel who raised this pre-liminary objection, either he acted in ignorance of the law or merely wanted to test court’s apprehension of the law.

***In sum total all the preliminary objections are over ruled.***

I shall now proceed to the Issues raised by the Applicant for this court’s determination.

#### **11. ISSUE1; WHETHER THERE IS SUFFICIENT CAUSE TO MERIT THE GRANT OF THIS APPLICATION**

**A cause in law refers to a reason for an action or a ground for legal action.**

**I have carefully perused the pleadings and all the attachments on both sides. As an executing court, it was important to read the execution file, the judgment and decree of both the court of first instance and Appellate court from which such Applications arise. As a court of justice, and a court of record, it is imperative that the law is followed strictly to avoid causing a miscarriage of justice, and misleading parties.**

**The expression “execution” simply means the process for enforcing or giving effect to the judgment of the court. The principles governing execution of decrees and orders in Uganda are dealt with under sections 29 to 50 of The Civil Procedure Act Chapter 71, Laws of Uganda and Order 22 of the Civil Procedure Rules.**

**To arrive at a just and fair decision, it’s important to high light some of the Applicants and respondents evidence.**

**In his affidavit dated 9/4/2020 Gichohi Ngari the 2<sup>nd</sup> Applicant and director in the 1<sup>st</sup> Applicant stated inter alia as follows:**

**Paragraph 2; “that on the 20<sup>th</sup> day of December 2012, this honorable court pronounced judgment against the applicant in High Court (Commercial Division) CS. NO.289 of 2014 against the 1<sup>st</sup> Applicant. (Court however observed that the date of 20<sup>th</sup> December 2012 was erroneous because the suit was filed in 2014 and has treated this paragraph as a typing error in the interest of justice.)**

**Paragraph 3; “That applicants were dissatisfied with the decision of the court in High Court (Commercial Division) CS NO.289 of 2014 delivered on 10<sup>th</sup> February 2016 and filed CACA No.76 of 2016.**

**Paragraph 4; “That CACA NO.76 of 2016 was dismissed and the Applicants being dissatisfied with the decision filed a notice of appeal against the decision and applied for a typed copy of the record of proceedings.**

**Paragraph 5; “That on 25<sup>th</sup> March 2020, I received a letter written by the commandant land protection police unit, and addressed to the commander Kampala Metropolitan Police, forwarding copies of court orders authorizing the sale of first applicants properties comprised in Kyadondo Block 101 Plots 190, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270 and 275 at Watuba and in Kyadondo Block 90 Plots 397,459 and 460 at Katalemwa (hereinafter collectively referred to as the suit land) : vesting the suit land in the third respondent, directing the registrar of titles to transfer ownership in the suit**

land to the third respondent and authorizing the second respondent to remove the applicants from the suit land. (copies of the police letter, warrant of attachment dated 6<sup>th</sup> March, order of authorization to sell dated 6<sup>th</sup> March 2017, vesting order and order for delivery of the suit land to the third respondent attached hereto and marked B, C, D, E respectively.

**paragraph 7** “That on the 15<sup>th</sup> March 2016 the 1<sup>st</sup> Respondent filed HCT-EMA No. 390 of 2016 seeking to execute the decree of the court in High Court (Commercial Division) CS. No.289 of 2014 against the Applicants. (A copy of the application of execution is attached hereto and marked F)

Paragraph 8; “That on 21<sup>st</sup> September 2016, the said application was only allowed in part on condition that the 1<sup>st</sup> Respondent disposes of only part of the suit land to realize the equivalent of **Ug.Shs. 2,159,000,000 (Uganda Shillings Two Billion One Hundred Fifty-Nine Million)** and this Honorable Court further ordered that no execution should be made beyond the stated sum. (A copy of the court order dated 21<sup>st</sup> September 2016 is attached hereto and marked G)

Paragraph 9; “That contrary to the orders of this honorable court on 6<sup>th</sup> March 2017, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents illegally and wrongfully purported to sale the entire suit land to the 3<sup>rd</sup> Respondent.

paragraph 10; “That the first and second respondents illegally sold the suit land on 6<sup>th</sup> March 2017, the same day the warrant of attachment was issued without advertising the sale for 30 days as ordered by this Honorable Court. (A copy of the sale agreement dated 6<sup>th</sup> March 2017 between the 2<sup>nd</sup> respondent and the 3<sup>rd</sup> respondent is attached hereto and marked H)

Paragraph 11; “That the 1<sup>st</sup> and 2<sup>nd</sup> respondents unlawfully and wrongfully purported to sell the suit land to the 3<sup>rd</sup> respondent at an unacceptably fraudulent sum of Uganda Shillings (Three billion, five hundred ninety-eight million.)”

Paragraph 12; “That I have been advised by my lawyers Gem Advocates and Ambrose Tebyasa and Co. Advocates whose advise I verily believe to be true and correct that the sale of the suit land on 6<sup>th</sup> March 2017, the same day the warrant of attachment was issued, without advertising the suit land for sale, at a grossly fraudulent purchase price was illegal and wrongful.”

Paragraph 14; “That on 4<sup>th</sup> February 2020, the 2<sup>nd</sup> Respondent filed a bailiff’s bill of cost which was illegally and wrongfully taxed and allowed at a sum of Uganda

Shs. 234,725,000 (**Two hundred thirty-four million, seven hundred twenty-five million Uganda shillings**, in the absence of the applicants who were neither served with the Bill nor were informed of the hearing date of the taxation of the Bill.” (A copy of the 2<sup>nd</sup> Respondents Bill of Costs is attached hereto and marked k)

Paragraph 15; “That the applicant only came to learn about the illegal sale and taxation of the 2<sup>nd</sup> respondent’s costs on 25<sup>th</sup> March 2020 when the Respondents threatened to evict the applicants from the suit land.”

Paragraph 23; “That this application has been made without unreasonable delay.”

Court discovered that the Certificates of Titles were registered in the names of Formula Feeds Ltd the 1<sup>st</sup> applicant and Gichohi Ngari with encumbrances registered by KCB Bank Uganda Ltd and caveated by the applicants and are now registered in the names of the 3<sup>rd</sup> Respondent.

On the other hand, the first Respondent Bank in its affidavit in reply, through Nassif Mubiru, the 1<sup>st</sup> Respondent’s legal manager who is well conversant with the facts giving rise to the application deponed under paragraph 3(a) as follows ***“The suit properties are mailo land which the High Court in HCCS No. 289 of 2014 found the applicants who are Kenyan Nationals, to be incapable of having interest in the same. That finding was never a subject of CA NO. 76 of 2016, the applicants therefore have no locus to file the present application in respect of the same properties.*”**

Paragraph 4; “That following inability to pay its loan obligations, the applicant sued the 1<sup>st</sup> Respondent Bank seeking to invalidate mortgages on the secured mortgage properties on account of the fact that the applicants were Kenyans and couldn’t own or mortgage mailo land.

Paragraph 5; “That on the 24<sup>th</sup> day of July 2015 by consent of the parties, the 1<sup>st</sup> Respondent obtained a partial judgment on admission in the sum of **Two billion, one hundred fifty-nine million Uganda Shilling** against the applicants in High Court CS 289 OF 2014. (A copy of the order and record of proceedings is attached hereto and marked A1 and A2)

paragraph 6; “That subsequently judgment in the above suit was entered in favour of the 1st respondent in the sum of **Four billion, two hundred seventy-two million, seven hundred forty thousand, one hundred and eighteen** with interest of 21% from date of judgment 10<sup>th</sup> February 2016. (A copy of the decree and judgment is attached hereto and marked B1 and B2)

The 2<sup>nd</sup> respondent in its affidavit in reply deponed by Joseph Yamurebire who uses the 2<sup>nd</sup> respondent as a business name, stated that he is the one who carried out execution in the above case, under paragraph 1 of his affidavit. The relevant part of his affidavit evidence is contained under paragraphs 4,6,7,8,9,10 and 18.

In summary, he confirmed that the decree he executed was in HCCS No.289 of 2014. He also stated that by consent order in MA No. 445 of 2016 which was marked as annexure B, the parties agreed to sell part of the properties to enable the 1st Respondent recover **Ug Shs. 2,159,000,000/= (Two billion, One hundred and fifty-nine million.)** (A copy of the order was attached and marked as B)

That on 27<sup>th</sup> December 2017 the lawyers for the judgment creditor (1<sup>st</sup> Respondent) made an application for execution under EMA No. 390 of 2016 whereby they applied for the attachment of the properties mentioned in the application for recovery of **Ug Shs. 2,159,000,000/= (Two billion, One hundred and fifty-nine million.)** That the court issued to him a warrant of attachment dated 31<sup>st</sup> of January 2017 expiring on 1<sup>st</sup> March 2017. (A copy of the warrant was attached and marked as D)

“That the properties mentioned in the warrant were attached and advertised in monitor newspaper of Friday February 23<sup>rd</sup> 2017 at Pg. 52 and notice was that the properties would be sold after 30 days and that the 30 days expired on the weekend of 4<sup>th</sup>-5<sup>th</sup> March 2017 and by 6<sup>th</sup> March 2017, there was no order stopping me from the sale of the attached properties.”

“That the attached properties were sold on the 6<sup>th</sup> March 2017 to the 3<sup>rd</sup> Respondent as the highest bidder at the auction sale at our offices on Plot 28/30 teachers house Bombo Rd. 3<sup>rd</sup> Floor at 10 am and I sold after an order of sale issued by court and approving the valuation the copy was attached and marked as F”

“That because the warrant of attachment issued on 31<sup>st</sup> January 2017 had expired on 3<sup>rd</sup> March 2017 a fresh warrant was issued on 6<sup>th</sup> March 2017 to make sure that by the time of the sale after the advertisement of 30 days, there was a valid warrant. (A Copy of the sale agreement to the highest bidder hereto attached as annexure G and warrant dated 6<sup>th</sup> March marked as annexure H)”

That on behalf of the 3<sup>rd</sup> Respondent, Richard Munyaneza deponed that pursuant to an advertisement in the Daily Monitor Newspaper of 3<sup>rd</sup> February 2017 in which the suit property was advertised for sale, the 3<sup>rd</sup> Respondent expressed interest in purchasing the said suit property.

That the 3<sup>rd</sup> Respondent, as a matter of prudence, employed the services of its stated Advocates to carry out a due diligence prior to formerly communicating its expression of interest in buying the suit property.

That on behalf of the 3<sup>rd</sup> Respondent, I personally participated in the entire process of sale of the suit property by public auction.

That prior to the purchase, I was informed by the 3<sup>rd</sup> Respondent's stated Advocates, which information I not only believe to be true but separately confirmed, that Court had sanctioned the sale of the suit property in satisfaction of a decree arising from the instant case.

That following the payment of the purchase price amounting to **UgShs.3, 598,000,000/=** to the 2<sup>nd</sup> Respondent by the 3<sup>rd</sup> Respondent, the suit property save for one title, was transferred into the name of the 3<sup>rd</sup> Respondent.

That the 3<sup>rd</sup> Respondent is currently the registered proprietor of the suit property

***Submissions:***

It is the Applicants' submission that the Respondents did not comply with the mandatory provisions of the Law in conducting the execution and as such the entire process was a nullity. They pointed out specific incidences to wit;

- a) failed to comply with **Section 48(1) of the Civil Procedure Act** by first depositing the duplicate certificates of title of the suit land in court before conducting the sale;
- b) grossly undervalued the suit land;
- c) sold the suit land without advertising for 30 days;
- d) refused to comply with the court orders on sale of only "SOME" of the properties forming the suit land; and
- e) The 2<sup>nd</sup> Respondent's taxation of costs was illegal and irregular.

The respondent's submissions in general is to the effect that the attachment and sale by public auction was legal.

***Evaluation of evidence***



From the affidavit evidence and attachments, it is apparent that the main area of contention is the attachment and sale by public auction of the securities that were deposited by the applicants with the 1<sup>st</sup> respondent bank which was the main subject in **HCCS No. 289 of 2014**. The civil suit was disposed of on the 10<sup>th</sup> February 2014 before His lordship honorable Justice Mr. David K. Wangutusi.

The decree that was extracted after the judgment which was signed and approved by counsel of both parties was to the effect that the mortgage deed challenged by the plaintiff is a nullity and is hereby declared so. It was further decreed under paragraph 3 of the decree that the debenture deed is unenforceable.

I got the opportunity to read the judgment of my learned brother his Lordship Justice David Wangutusi. He held as follows from the last paragraph of page 4 to page 5

***“That the legal position on ownership of land by non-citizen is well settled in The Constitution and the Land Act. Article 237(2) (c) of The Constitution of 1995 provides that non-citizens may acquire leases in land in accordance with the laws prescribed by Parliament, and the laws so prescribed shall define a non-citizen for the purposes of this paragraph. This position is reiterated by section 40 (1) of the Land Act cap 227. A non-citizen is defined by section 40 (7) (b) and (c) of The Land Act as a person who is not a citizen of Uganda and in the case of a corporate body, one in which the controlling interests lies with the non-citizens. These descriptions aptly describe the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff.***

***That the 2<sup>nd</sup> plaintiff is a Kenyan with controlling interest in the 1<sup>st</sup> plaintiff is not also in dispute. The properties comprised in Kyadondo block 101 plots 190, 259-265, 266-270 and Kyadondo block 90 plots 397, 459, and 460 land at Katalemwa and Kyadondo block 101 plots 258 and 275 land at Watuba exhibits P5-20 are described as private mailo land.***

***Section 40 (4) of the Land Act provides that; “subject to the other provisions of this section, a non-citizen shall not acquire or hold mailo or freehold land.***

***The import of this section is that the plaintiffs who are foreigners cannot acquire any interest in mailo land as they purportedly did in the instant case”.***

He went on to rely on the Privy Council decision in the case of **Mac Foy v United Africa co. ltd (1961) 3 ALL.E. R 1169** which distinguished between a nullity and irregularity and addresses the question, when should court hold a particular

instrument to be void “(null) and not voidable “(irregular)”. He went on to state; ***“that the relevant passage in the judgment of lord Denning is that if an act is void then it’s a nullity, the essence of this passage is that where an instrument is only voidable, then it is to be treated as regular all the time, until the court considers it, finds it irregular, and quashes it, but where an instrument is a nullity it is void ab initio, and strictly speaking it cannot be the basis of any valid process at any time”.***

After analyzing the evidence, he held that;

***“The conclusion to be drawn from the foregoing analysis is that the mortgage deed being challenged by the plaintiffs is a nullity and is hereby declared so.”***

The learned judge further held in respect of the securities that were deposited by the plaintiffs/applicants herein that;

***“This court is unable to make a declaration on foreclosure as that would be a remedy arising from the impugned mortgage deed that has been found to be illegal ad unenforceable. The court is also unable to instruct the Registrar of Titles to convert the suit properties as she was not added as a party to the counterclaim, therefore such orders would be ultra vires.”***

***The judge in the commercial court further decreed that the personal guarantees executed by the Counter Defendants GICHOHI NGARI, SAMSON GICHOHI NGARI, AND ANNE WANGUI GICHOHI are legal and enforceable.***

***When a successful party applies for execution, the court that executes, whether it is a transferred decree from another court, or the court that passed the decree, follows the contents of the decree which is the summary of the trial court’s finding and or orders.***

The executing court then issues a warrant of execution based on the mode of execution applied for. In case the mode of execution is by way of attachment of immoveable property, like in the instant case, the property must be legally attachable.

**In the instant case, execution was by way of attachment and sale of property that had been illegally acquired and mortgage deeds declared null. The Applicants who are foreigners could not acquire any interest in mailo land since**

**it is illegal under section 40(4) of the Land Act. It therefore had no legal interest to pass on.**

The purported order to attach and sell part of the impugned mortgages relied upon by the respondents signed by Justice Muhanguzi as he then was therefore illegal because it was authorizing an illegality which is conceded to by the 1<sup>st</sup> Respondent bank.

Furthermore, the order dated 21<sup>st</sup> September 2016 that was attached to the 2<sup>nd</sup> respondent's affidavit in reply and marked as Annexure B was to the effect that the application is allowed in part, on condition that the Respondent is allowed to dispose of some of the titled property forming securities in the respondents' custody to realize the equivalent of an undisputed amount of 2,159,000,000/= due and owing to the respondent bank.

**The Decree the execution and Bailiffs Division was executing attached as annexure J was very clear that the mortgage deed was a nullity and debenture deeds unenforceable. The securities the respondent Bank had in custody were illegal under the law in the state they were and could not be subject of attachment in satisfaction of the sums owing to the 1<sup>ST</sup> Respondent Bank.**

In the locus classicus case of **Makula International Ltd. versus H. E. Cardinal Nsubuga & Anor (1982) HCB II** it was held that;

***"Court cannot sanction what is illegal and an illegality once brought to the attention of the Court overrides all questions of pleadings including admissions made thereon."***

It is also trite law that an illegality can be raised at any point of the trial and once such illegality is brought to the attention of court, the same cannot be sanctioned. See **National Social Security Fund & Anor versus Alcon International Ltd. SCCS No.15/2009**

***Basing on the two authorities, it is apparent that the execution of the decree following the application for execution of the decree by way of attachment and sale of the immoveable properties listed there by Kabayinza Kavuma Mugerwa and Ali Advocates dated 26<sup>th</sup> September 2016 attached as Annexure F to the 1<sup>st</sup>***

***Respondents affidavit in reply was in total breach of the judgment and orders of the trial court which declared the registration of the applicants illegal.***

***The 1<sup>ST</sup> Respondent can only recover the sums owing using any other legal means but not by attaching and selling properties that were transferred into the Applicant's names and mortgaged illegally.***

I also had the opportunity to read the judgment of the Court of Appeal in Civil Appeal No 0076/2016 where the Applicants together with Anne Wangui Gichohi and Samson Gichohi Ngari appealed against the decision of Hon Justice Mr. David.K. Wangutusi.

As the executing court, the main interest in this application is pertaining to the execution process.

Court of Appeal in its wisdom held on page 25 paragraph 15 that:

***"The trial Judge having found the fact of default and further having found that the mortgages were illegal correctly still found that the guarantees remained a separate and valid security to the main credit facility against which the respondents had the right to recover".***

Their Lordships went on to hold on page 27 from paragraph 15 as follows:

***"We agree with the finding of the trial Judge. The only challenge remains the mortgage which was illegal because the underlying Mailo land Titles held in the names of non-Ugandans which is prohibited by the law. Such a non-Ugandan can only hold a lease under the said titles. So a lease not MAILO TITLE should have been issued to the first Appellant since it paid valuable consideration for land. This would avoid an absurdity in this transaction. This is clearly an error /illegality made at the time of registration. .... There can therefore be no enforcement under the mortgage as it stands ..."***

It cannot therefore be argued that the Applicants lost the Appeal and therefore execution by attaching the questioned Suitland was lawful.

Both parties to this case did not consider this important issue of illegality yet they all concede that the mortgages and debenture are unenforceable.

***The finding of the Court of Appeal shows that the Applicants in this case are indebted but the debt cannot be realized by attachment and sale of the illegally obtained securities which are the subject of this application.***

Both the High court and the Appellate court, found that the executed mortgages were null and void ab initio having accrued from an unlawful/illegal registration right from the certificates of title and could not therefore be the basis of a successful execution in the current state.

It is therefore surprising that despite court's outright decline to order any enforcement accruing from the void certificates of title, Defendant's counsel went ahead to initiate execution proceedings vide EMA No.390 of 2016 wherein they sought to attach and sale the properties vested in the void certificates of title.

In view of my finding above, the learned registrar of court erred in law and in fact when he issued execution of attachment and sale of the securities whose registration was illegal and mortgages over them declared null.

***This finding entirely disposes of the application.***

However, this application also raises ***the issue of attachment and sale process which this court is obliged to address to guide on the execution process.***

It was the contention of the Applicant that the 2<sup>ND</sup> Respondent did not follow the law during the impugned execution by way of attachment and sale as stipulated under ***Section 48 (1) of the Civil Procedure Act*** which provides that:

***"The Court may order, but shall not proceed further with the sale of any immovable property under a decree of execution until there has been lodged with the court the duplicate certificate of title to the property or the special certificate of title."***

This provision of the law is mandatory and fatal if not complied with. There is a plethora of cases on the same where courts have been hesitant to endorse execution processes where this vital step was omitted.

Applicants' counsel relied on the famous case of **Sinba (K) Ltd & Others v UBC SCCA No. 3 of 2014 at page 41-43** wherein, *the Supreme Court held that;*

***"I therefore agree with the findings of the Justices of Appeal that the property could not be the subject of a lawful execution. It was still in the names of the judgment Creditor and the title deeds were in possession of the Assignor. The***

***certificate of title should have been deposited in court. The execution was therefore contrary to section 48 of the CPA ... at page 43 I find that the justices of Appeal had ample evidence before them from the record of appeal on which they based their findings. They could not ignore or condone an illegality that was glaring from the record before them."***

This averment was not disputed by the Respondents who only attempted to water it down by stating that it was not fatal to the execution process which averment I disagree with. It is trite law that whenever court issues attachment and sell of immoveable property, the certificates of title should be deposited in court.

This helps court to verify the particulars on the certificate of title visa viz the court order and decree. It also eases the process of transfer to the successful bidder.

***The registrar of court and or the Magistrate is therefore required to write to the person who has custody of the certificate of titles to deposit them in court before issuing the warrant of attachment and sale whether it is the registered proprietor /judgment debtor or creditor.***

***Where they fail to comply, due process of the law can be unleashed for contempt of court OR if the certificate (s) of title cannot be found, a special certificate of title can be obtained.***

I have already ruled that the whole execution process was a nullity because it did not follow the decree which clearly declared the mortgages null.

The law pertaining to sale of immoveable property was also flawed.

The second and third respondents claimed the property was sold by public Auction on 6<sup>th</sup> March 2017. In the case of ***Pitchfork Ranch Co Versus Bar TL 615 P.2d 541; PUBLIC AUTION*** was defined as ***a public sale of property to the highest bidder by one licensed and authorized to do so and the goal is to obtain the best financial return for the seller by free and fair competition among bidders. Court further emphasized that competitive bidding is an essential element of an auction sale. An auctioneer must always act in good faith during the whole exercise.***

From the above definition elements of a public auction are the following:

- 1) Property must be sold to the highest bidder.

- 2) Sale conducted by a licensed bailiff.
- 3) The goal or aim of auction is to get the best financial return.
- 4) There must be free and fair competition by bidders/ (competitive) bidding.
- 5) The auctioneer must act in good faith (in the interest of both parties in case of recovery of a debt.)

The above elements imply that there must be more than one bidder, and the auctioneer's aim is to get the best financial return from the sale and not to sell it for any price to complete the process and file a return.

In case the auction is to satisfy a debt like in the instant case (supposing it was legal) and the property auctioned is valuable, the bailiff /auctioneer is expected to realize the price that will cover the decretal debt, costs of the execution and balance for the judgment debtor if any.

***The valuation report should therefore be honest and where possible conducted by an independent valuer who will not over value or under value the subject matter to defeat the execution process. Valuation should not therefore be at the instance of the auctioneer which in my view amounts to conflict of interest but at the instance of court.***

***The Auctioneer's role should be to simply realize the best financial return using his expertise in conducting public auctions.***

The Applicant claimed the property was undervalued. According to the Applicants' affidavit, the property is valued at 7,560,000,000 yet the 2<sup>ND</sup> Respondent accepted and used a valuation report of 3.400, 000,000/=. This was gross under valuation of the property.

I perused the Auctioneers Act of 2000 but did not come across any rules pertaining to the process of conducting an Auction.

It is however important that like any other public auction, the bailiff in his/her return must prove the following.

1. That there was an advertisement of the public sale and Auction.
2. List of people who submitted their bids. (competitive bidding)
3. The bidding documentation.
4. The Judgment debtor and creditor or his/her appointed representative should be invited to attend the auction to ensure it is a public auction.
5. The LC1 Chairperson of the area should be informed of the process.

6. Where the Judgment Debtor has a different valuation report from that of the court Bailiff, a government valuer may be involved.
7. Notices of public Auction should be placed on the suit property and served on the judgment debtor as some may not read the newspapers.
8. Viewing of the property by interested bidders should be documented.
9. The auction should be public unless it is ordered by court that it should be by private treaty.
10. The law pertaining to time lines should be observed.
11. Where a reasonable value is not realized, the auction should be postponed.

***In the instant case, despite a keen look at the execution file EMA No. 360 of 2016, I did not find any semblance of a public auction carried out by the 2<sup>nd</sup> Respondent. There is no evidence of the same anywhere on the file.***

For instance, there is no record of how many people participated in the auction and whether the 3<sup>rd</sup> Respondent bided with other people and turned out as the highest bidder.

It is also interesting to note that the sale agreement does not mention anywhere that the sale was by public Auction.

Much as the court bailiff tried to justify why the agreement was dated on the same day with the warrant of attachment and sale, where the warrant expires, it must be renewed and a fresh process followed. Failure to do that added on the illegalities surrounding this execution.

Another area that attracted my attention was custody of the proceedings of sale.

It is trite that when a bailiff collects money from a warrant, this money should be deposited with the court within seven days of the execution and thereafter submit his or her bill of costs for taxation and finally determination of disbursement and the warrant returned to the court within 30 days from the date of execution of the sale.

In the instant case, whereas the Warrant of attachment and sale that was issued and endorsed by H/W Muse Musimbi on 1/01/2017 explicitly commanded the holder thereof to return the warrant to court by 1/03/2017, no sale was conducted before 1/3/2017. The Advocate Kavuma Terrence from Kabayizi Kavuma and Mugerwa Advocates wrote a letter in his own handwriting dated 2/3/2017 requesting for a fresh Warrant because the one issued expired before the sale.



Yamurebire Joseph the 2<sup>nd</sup> Applicant also wrote a letter on that same day attaching the expired warrant requesting for renewal as the warrant expired ***before the sale*** date. The sale date was 2/3/2017 since the advert was run on 2/3/2017. The court issued a fresh warrant dated 6/3/2017 which was to be returned by 6/4/2017 and the 2<sup>nd</sup> Respondent purports to have sold the property on that same day in public auction according to the sale agreement dated 6/3/2017 ***which was irregular and illegal.***

***Perusal of EMA 290/2016 revealed a letter dated 6<sup>th</sup> February 2020 where counsel for the 1<sup>st</sup> Respondent wrote to the registrar of the Execution and Bailiffs division which letter read in part as follows:***

***“The respondents (Formula Feeds) appealed the decision of the high court to the court of Appeal. However, pending the hearing of the appeal, the Applicant through Yamurebire Joseph attached properties belonging to the judgment debtor in execution of a partial decree. The properties were sold at 3,590,000,000/= (Uganda shillings three Billion five hundred ninety million) to Southgate properties limited.***

***Yamurebire Joseph has paid to the Applicant the sum of shillings 2,159,000,000/= (Two Billion one hundred fifty-nine million Uganda shillings).***

***We request that court directs Yamurebire Joseph to pay the sum of 1,439,000,000/= (one Billion four hundred thirty-nine million Uganda Shillings) to the Applicant in satisfaction of the final decree, less the taxed costs of the bailiff Yamurebire Joseph.***

***For the record the Respondents Appeal in the court of Appeal was dismissed. Attached hereto is a copy of the decree.”***

The import of the above quotation is to show that the court bailiff, the 2<sup>nd</sup> Respondent never deposited the proceeds of the purported sale with the court, but he took over the disbursement role of court by depositing directly to the judgment creditor and kept the balance to himself in total breach of the rules governing bailiffs.

A letter from the judgment creditor, the 1<sup>st</sup> respondent dated 3/2/2020 to the 2<sup>nd</sup> Respondent signed by Sylvia Twikirize the Corporate Recovery Manager and Solomon Malinga, Credit Recoveries Manager attached to the letter dated 4/2/2020 by the 2<sup>nd</sup> Respondent to the Deputy Registrar of Court shows that the

1<sup>ST</sup> Respondent was paid 2,159,000,000/= (Two Billion one hundred fifty-nine million) on **3/2/2020** close to three years after the purported sale.

This was in breach of **Rule 15(1)**, I quote;

**“A court bailiff shall deposit in court all proceeds of his or her execution within seven days of the execution and thereafter submit his/her bill of costs including his or her fees and disbursements for taxation”**

The wording of this Rule is in Mandatory terms.

The 2<sup>nd</sup> Respondent in his own letter to the Deputy Registrar dated 4/2/2020 wrote and I quote:

***“...I therefore write to inform you that I have already received shs. 3,598.000, 000/ (Three Billion, five hundred ninety-eight million) as the full settlement of the purchase price. Your worship, out of the shs. 3,598,000,000/= I had already paid or credited M/S KCB(U)Ltd with Uganda shillings, 2,159,000,000/= as a face value of the warrant of attachment issued to me on 6<sup>th</sup> March 2017. The balance of Ug Shs. 1.439,000,000/= is on my account pending taxation of the bailiff's bill of costs and then thereafter, offset taxed amount and deposit the balance in court for determination. I pray that my bill be taxed and allowed as presented and pray for an order of delivery to be issued to enable me complete the process of execution,”***

***It was signed by Joseph Yamurebire.”***

The registrar who issued a warrant His Worship Muse Musimbi Issued a vesting order without jurisdiction on 16<sup>th</sup> March 2017 to have the properties transferred to the names of the 3<sup>rd</sup> Respondent on 16<sup>th</sup> March 2017 before the 3<sup>rd</sup> Respondent completed payment and upon payment of only shs 719,600,000/= which payment was not deposited in court. This court does not understand the motivation behind the illegalities in this transaction. The 3<sup>rd</sup> Respondent got registered on the properties on 7/8/2019 before any return of completion of payment was made.

On the issue of the bill of costs being taxed exparte and awarding a lot of money, The Judicature (Court Bailiffs) Rules, SI 13-16, Rule 17 provides that remuneration of the court bailiff shall be in accordance with the scale of fees specified in the second schedule to the rules. This schedule which governs the taxation of the bailiff's bill of cost must be complied with by the taxing master.

On 4<sup>th</sup> February 2020 he filed his bill of costs totaling 272,415,000/= and it was taxed on 6<sup>th</sup> February without giving any notice to the Applicants and allowed at 234,725,000/= and a certificate of taxation was issued on the same day to that effect. Notably on this bill was instruction fees of 179,900,000 /= which was allowed as claimed with no legal basis.

Without questioning this fraudulent conduct of the court Bailiff and the blatant breach of Rule 15 above, the registrar of court issued an order for delivery of the property to the purchaser on 26/2/2020 despite knowing that no money had ever been deposited with court. The 2<sup>nd</sup> Respondent managed the whole process at his convenience ignoring the rules that govern the bailiffs between 2017 and 2019.

Any taxation of the bailiff's bill of costs which is made outside the provisions of the law is unlawful and cannot be allowed to stand.

I would go on to comment on each item but it is not worth it because the first item alone is very illegal as it is against the provisions of rule 17 of the Bailiffs rules supra and schedule 2 thereof.

In my humble opinion this is fraud and white collar robbery committed by the bailiff in connivance with the taxing master and should not be allowed to stand.

It should be noted that after the request by counsel for the 1<sup>st</sup> respondent to court to direct the 2<sup>nd</sup> respondent for more money, that is when the 2<sup>nd</sup> Respondent woke up to file a return on 4/2/2020, three years later.

All the above elaborate scenarios make the entire auctioning process suspect because it is not known how many people attended the auction. Going by the record of the execution file, it is only the 3<sup>rd</sup> respondent who attended the auction because no other bidders are mentioned anywhere making it irregular and illegal and it ceases to be a sale by public auction.

In Execution proceedings, the Registrar of Court or Magistrate who issues the warrant of execution is expected to do the following;

- i) Apply the law pertaining to the execution proceedings.
- ii) Follow the process judiciously to avoid a miscarriage of justice at this very last stage of litigation.
- iii) Before issuing any warrant in execution, he must look at the decree and ensure that what is appearing in the warrant is in satisfaction of what the trial Court decreed.

- iv) Ensure that the Bailiff is licensed/qualified to carry out the execution.
- v) Indicate on the file and have it brought up on the day the warrant is supposed to be returned.
- vi) In case the warrant is not returned, he/she is under a duty or obligation to summon him as to why he has not returned the warrant.
- vii) In case it is returned on the due date, depending on the outcome of the execution, whether it was successful or not;
  - a) He may renew the warrant if there are sufficient reasons for failure of the bailiff.
  - b) Demand the deposit of the proceeds if he was successful in the recovery.
- viii) In case of attachment of immoveable property like in the instant case, the Registrar/Magistrate should ensure that;
  - a) The Certificate of Title is deposited in court
  - b) Ensure that there is proper valuation of the property to be auctioned.
  - c) Ensure that on the date of the auction, the process is not flawed.
  - d) And where necessary, the court should set a reserve value so that Auctioneers don't allow any bidder to take the property at a ridiculous price to the detriment of the judgment debtor.
  - e) After the Bailiff has executed the warrant and proceeds deposited in court, the Bailiff should then file his Bill of costs and the Registrar or Magistrate taxes the Bill within the ambit of the law pertaining to the Remuneration of Court Bailiffs.
  - f) The Registrar/Magistrate then disburses the funds in accordance with the law.
  - g) The Registrar/Magistrate should then apply the law to ensure effective transfer of the auctioned or sold property to the successful bidder who has paid the amount within the prescribed time and within the confines of the law.

If the above procedure is followed strictly, it will bring to an end the litigation process, because, that is the essence of execution.

It is apparent that the bill of costs was carried out without following the provisions of the law cited above and leaving it to stand would set a very bad precedent. It is therefore necessary to set it aside.

Everything points to the fact that the whole execution process was null and void ab initio because the execution was without any decree to that effect. The properties were not legally attachable.

The respondents have refused to see any other form of recovery other than the illegal securities.

There was nothing lawful to attach, sale and transfer to the 3<sup>rd</sup> defendant and this was well within the knowledge of the 1<sup>st</sup> Respondent Bank, the decree holder.

The third Respondent therefore bought hot air and fails in its own game with the Co Respondents.

In view of the above, the first issue is resolved in favour of the Applicants.

***Issue2; Whether the Applicants are entitled to the reliefs sought and what remedies are available to the parties.***

The reliefs sought by the Applicants are to set aside the execution conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by way of an illegal sale of the suit land to the 3<sup>rd</sup> Respondent, setting aside the 2<sup>nd</sup> Respondent's taxation of costs; and a permanent order to issue against the Respondents, their servants and or agents from transferring, dealing with and or evicting the Applicants from the suit land.

The effect of an illegality in a transaction renders it void ab initio and it cannot be enforceable and neither can anything enforceable stem from it.

In **Broadways Construction Company v Musa Kasule and Others (Civil Appeal No. 39 of 1971)** court held that; ***"The contract and the entering into possession of the said mailo land before the consent was given were prohibited by law and the contract was therefore void ab initio, and nothing that was done subsequently (that is, the granting of the consent by the Minister) had the effect of rendering it an enforceable contract, particularly in view of section 4(1) of Cap.202. (Emphasis mine).***

Applicants' counsel cited **Lawrence Muwanga V Stephen Kyeyune (Legal representative of Christine Kisamba, deceased) SCCA No. 12 of 2001** where in Justice Tsekooko JSC held that a ***judicial sale, unlike a private one, is not complete immediately it takes place. It is liable to be set aside on appropriate proceedings by a person challenging it.***

Applying the above authorities to the facts of this application the execution proceedings stemming from HCCSS No.289 of 2014 leading to the attachment and sale of the Applicants' impugned properties are a nullity because the properties were obtained by the Applicant in breach of the law. Even if the third applicant is already registered on the certificates titles that were illegally registered in the names of the Applicants, the Supreme Court case of **Lawrence Muwanga** supra allows this court to set the sale aside and order cancellation of the transfer of the impugned certificates of titles in the names of the 3<sup>rd</sup> Respondent.

**The duty of court during the execution process is to ensure that it is lawful and the properties attached are legally attachable and legally belong to the judgment debtor. The properties attached and purportedly sold were not decreed to be attached and sold. The 1<sup>st</sup> respondent can only proceed against the guarantors as of now.**

This being a court of justice, it cannot permit the respondents to benefit from the glaring illegalities herein.

In the result the Applicants are entitled to the reliefs sought and the application is allowed with the following orders and declarations:

- 1) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' purported sale of the lands comprised in **Kyadondo Block 101 Plots 190, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270 & 275 at Watuba and in Kyadondo Block 90 Plots 397, 459 & 460 at Katalemwa** to the 3<sup>rd</sup> Respondent is declared illegal and is hereby set aside.
- 2) The execution of the decree dated 10<sup>th</sup> February vide HCCS 289 OF 2014 by the 2<sup>nd</sup> Respondent is illegal and hereby set aside.
- 3) The Bill of costs taxed and allowed at shillings 234,725,000 out of the illegal execution and taxation certificate is hereby declared illegal and set aside.
- 4) The second respondent is directed to refund all the money he received from the 3<sup>rd</sup> respondent as execution costs.
- 5) A permanent injunction order doth issue restraining the Respondents from dealing in any way with the suit lands mentioned in (1) above and from evicting the Applicants therefrom.

- 6) The first Respondent is directed to refund the 3<sup>rd</sup> Respondent's money it paid in an illegal transaction as there is no decree authorizing sale of the illegally acquired suit property.
- 7) The 3<sup>rd</sup> Respondent is directed to deliver up all the certificates of title from the impugned sale to this Court for safe custody and submission to the Registrar of titles to cancel the illegal registration of the 3<sup>rd</sup> Respondent's entry on the certificate of titles and Register Book and return the same to the Applicants for rectification as their current registration as Mailo Owners is illegal under the law.
- 8) The 2<sup>nd</sup> Respondent is referred to Police under rule 20 of the Judicature (Bailiffs) Rules supra for acting in breach of the rules by flouting the execution procedure by failing to file a return within the stipulated time, failing to conduct an auction in accordance with the law and keeping execution money that does not belong to him for close to three years.

It is trite law that costs of the suit follow the event. I find all the three respondents culpable in the fraudulent execution process. I consequently award costs to the Applicant as against all the respondents.

**DATED IN KAMPALA THIS 26<sup>TH</sup> DAY OF AUGUST 2020.**

**MARGARET MUTONYI, JHC**

**EXECUTION AND BAILIFFS DIVISION.**