

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)**

**CIVIL SUIT NO. 248 OF 2011**

<b>1. KIZZA WALUSIMBI BRAZIO 2. ST. NOA JUNIOR BOARDING SCHOOL 3. ST. NOA GIRLS SECONDARY SCHOOL</b>	} :::::	<b>PLAINTIFFS</b>
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**VERSUS**

<b>1. SENYIMBA CHARLES t/a Charleston General Auctioneers 2. SSEBAGALA RICHARD 3. ROBERT SSEKIDDE 4. MARGARET SSEKIDDE</b>	} :::::	<b>DEFENDANTS</b>
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**JUDGMENT BY HON. MR. JUSTICE JOSEPH MURANGIRA**

**1. Introduction**

- 1.1 The plaintiff through their lawyers M/s Katende, Ssempebwa & Co. Advocates, Solicitors & Legal consultants brought this suit jointly or/and severally against the four (4) defendants jointly and/or severally.
- 1.2 The 1<sup>st</sup> and 2<sup>nd</sup> defendants through their lawyers M/s Kabenga, Bogezi & Bukenya Advocates; and the 3<sup>rd</sup> and 4<sup>th</sup> defendants through their lawyers M/s Kampala Associated Advocates filed their respective defences to the plaintiff's suit.
- 1.3 On 27<sup>th</sup> March, 2012 when the suit came up for scheduling, counsel for the defendants jointly raised the following preliminary objections on points of law:-
  - (a) That the plaintiff's suit is barred by law.
  - (b) That the plaintiffs do not have a cause of action against the defendants.

Upon that development, the parties were directed by Court to file written submission which they gracefully did in record time.

**2. Facts of the case**

The plaintiff filed this suit against the defendants jointly and/or severally for:

- (a) A declaration that the attachment and sale of Block 265 plots 1217 and 1218 land a Bunamwanya was fraudulent;
- (b) An order for the cancellation of the sale and purchase of the suit property dated 24<sup>th</sup> of September, 2010 on which the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are situate which were illegally and /or fraudulently sold by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> , 3<sup>rd</sup> and 4<sup>th</sup> defendants.
- (c) A permanent injunction to restrain the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, their servants, agents from evicting the plaintiffs from Block 265 plots 1217 and 1218 (measuring approximately 5 1/2 acres) located at Bunamwaya in Makindye Division.
- (d) General damages
- (e) Special damages
- (f) Costs of the suit
- (g) Any other remedy that this Honourable court deems fit.

The background to the suit is that the land comprised in Block 265 plots 1217 and 1218 was attached and sold by the 1<sup>st</sup> defendant who is a bailiff of Court to the 2<sup>nd</sup> defendant who in turn sold it to the 3<sup>rd</sup> and 4<sup>th</sup> defendants.

The attachment and sale were pursuant to a decree and orders of the High court of Uganda (Commercial Division ) in **HCCS No.81 of 2010: Anita Busudde vs Kizza Walusimbi Brazio, St. Noa Junior Boarding School & St. Noa Girls Secondary School**. The said suit was resolved by way of a consent judgment between the plaintiff and the defendants who are also the plaintiffs in the current suit.

The plaintiffs felt aggrieved by the attachment and sale of the suit land hence instituted the current suit against the current defendants jointly and severally seeking mainly to challenge the attachment and sale of the suit land carried out in **HCCS No. 81 of 2010: Anita Basudde vs Kizza Walusimbi Brazio, St. Noa Junior Boarding School & St. Noa Girls Secondary School**.

### 3. Issues framed by the parties

From the two preliminary objections on points of law raised by the defendants, the parties framed the following issues:-

- (a) Whether the suit is barred by law and whether it is maintainable against the defendants jointly or/and severally.
- (b) Whether the plaint discloses a cause of action against the defendants jointly and severally.

#### **4. Resolution of the issues by Court:**

##### **4.1 Issue no. 1: Whether the suit is barred by law and whether it is maintainable against the defendants jointly or/and severally.**

Counsel for the defendants submitted that the plaintiffs' suit against the defendants is barred by law and that it is not maintainable against each defendant. In reply counsel for the plaintiffs in a nutshell submitted that:-

- (1) The 1<sup>st</sup> defendant, the court bailiff lost immunity accorded by law, that as his actions were unlawful. They narrated in their submissions the alleged unlawful actions that were committed by the 1<sup>st</sup> defendant.
- (2) The sale of the suit property proceeded from an illegal valuation of unregistered surveyor and that hence it is illegal.

Counsel for the defendants submitted that Cs No 248 of 2011 is barred by the law and hence is not maintainable against the defendants jointly and severally. The suit is barred by the provisions of the Judicature Act Cap. 13 and the Civil Procedure Act, Cap 71 in as far as:-

The 1<sup>st</sup> defendant as a bailiff of the Court enjoys immunity from Civil Proceedings against him arising out his acts carried out in execution of the orders of the Court pursuant to Section 46 (1) and (2) of the Judicature Act, which stipulates as follows:

- “(1) A judge or commission or other person acting judicially shall not be liable to be sued in any civil court for any act done or ordered to be done by that person in the discharge of his or her or its judicial functions whether or not within the limits of his or her or its jurisdiction.**
- (2) An officer of the court or other person bonded to execute any other or warrant of any judge, person referred to in subsection (1) acting judicially shall not be liable to be sued in any civil Court in respect of**

**any lawful or authorized act done in the execution of any such order or warrant.”**

The effect of the above provisions of the Judicature Act is that the 1<sup>st</sup> defendant has immunity for his acts carried out pursuant to a decree and warrant of attachment that was issued by His Lordship Justice Lameck Mukasa and the registrar of the Commercial Court in HCCS No. 81 of 2010: Anita Basudde vs Kizza Walusimbi Brazio, St. Noa Junior Boarding School & St. Noa Girls Secondary School. It follows, therefore, that the 1<sup>st</sup> defendant has immunity against the present suit which seeks to challenge his acts of attachment and sale carried out pursuant to the orders of the court in that suit. The 1<sup>st</sup> defendant was under the orders of Court to sale the suit property.

In **Joyce Kinyankwanzi vs Hezekia K. Ndugga & anor [1974] HCB 287 Justice Allen** (as he then was) held that:

**“ a court broker, when in the process of attaching and selling property and lawfully acting upon the lawful warrant or order of the Court was an officer of the court and consequently he was protected by Section 46 (2) of the Judicature Act 1967, which was applicable in this case. Therefore an order would be made that the plaint be rejected as disclosing no cause of action against the defendants with costs to the defendants”.**

The above decision of Allen J. in the above case was re-affirmed by My senior brother Judge, Hon. Mr. Justice Musoke \_Kibuuka, J. in the case of **Regina Bagada vs The Cooperative Bank Limited [2000] KALR 737** whereby he held that:-

**“2. A court broker is not expected to look into the validity of a court’s order or warrant. The bailiff is only expected to see that the order or warrant, is signed by the Judge or Magistrate or Registrar and that it bears the seal of Court. Once the bailiff is executing a warrant of court his acts cannot be called unlawful unless the broker attached property in excess of the warrant or outside the warrant, which would turn the broker into a trespasser**

- 4. Any action to contest the propriety of execution must be by notice of motion to the Court that issued the judgment and order of execution as per the provision of S.35 Civil Procedure Act. A separate suit as it was done herein is untenable.”**

**And Ssekandi, J in the case of Kabwengure vs Charles Kanjabi [1977] HCB 89, held that:-**

**“1. The appellant could not sue any of the officers or persons present who carried out the execution of the decree as these are protected under Section 46 of the Judicature Act. They were acting in pursuant of a decree of a court of law which had to be given full faith and credit unless suspended or set aside by the Court that issued it or any higher court.**

**2. All questions relating to execution including discharging the execution of the decree have to be determined by the Court executing the decree and not by a separate suit (S. 35 (1) of the Civil Procedure Act) and therefore the appeal against the dismissal of the suit was dismissed with costs.”**

The plaintiffs themselves in their plaint concede to the fact that the suit land was attached and sold by the 1<sup>st</sup> defendant pursuant to an order of the High Court. The plaintiffs outlined in paragraph 9 (a) to 9 (p) of the plaint both inclusive the process that **HCCS No. 81 of 2010: Anita Basudde vs Kizza Walusimbi Brazio, St. Noa Junior Boarding School & St. Noa Girls Secondary School**, went through up to eventual sale of the suit property by the 1<sup>st</sup> defendant.

The 1<sup>st</sup> defendant attached the suit property pursuant to a decree and warrant of the Court and there is nothing unlawful about that fact. The plaintiffs’ only complaint is that the 1<sup>st</sup> defendant sold the suit property at an under value which value was approved by the Court.

The acts of the 1<sup>st</sup> defendant were within the ambit of the law and the 1<sup>st</sup> defendant is as such protect by the provision of Section 46 (2) of the Judicature Act and the current suit as against the 1<sup>st</sup> defendant is not maintainable.

Similarly, the suit is not maintainable as against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants who bought the suit property from the 1<sup>st</sup> defendant pursuant to order and warrant issued by the High Court of Uganda (Commercial Division).

Secondly, from the submissions by both parties the current suit is barred by the provisions of the Section 34 (1) of the **civil procedure Act. Section 34 (1) of the Civil Procedure Act** stipulates:

**“All questions arising between the parties to the suit in which the decree was 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”.**

Whereas the above provision refers to parties the provision has been interpreted to mean that any person who wishes to contest the process of attachment of his/her properties must proceed under the provisions of Section 34 (1) of the Civil Procedure Act by way of an inquiry by Notice of Motion in the Court which issued the execution and not commence a fresh suit as the plaintiffs did in the current suit. My proposition is supported by the decision of the Supreme Court of Uganda in **Francis Micah vs Nuwa Walakira SCCA 24 of 1994 reported [1995] KALR 360** whereby it was held:-

**“Section 35 (1) (now Section 34 (1)) Civil procedure Act requires that all matters relating to execution be determined by the court executing the decree and not by a separate suit. The case of *Hannington Wasswa & anor vs Maria Onyango OChola & 3 others SCCA 22/93* which stated that the court bailiff should be sued separately, should be distinguished from S. 35 (1) CPA because the case of *Wasswa* dealt with a prayer for damages for fraud against the Court bailiff. The application complaining of excess attachment was rightfully under Section 35 (1) in this instant case by motion.”**

The above decision was followed by **my senior brother Judge Musoke –Kibuuka J in Regina Bagada vs The Cooperative Bank Ltd [2000] KALR 737**. This very decision is relevant to the present suit.

Accordingly, the current suit is not sustainable in light of the provisions of Section 34 (1) of the Civil Procedure Act. The plaintiffs ought to have challenged the execution by way of Miscellaneous Application by Notice of Motion in the Court that carried out the execution of the decree and sale of the suit property and under the suit in which execution was levied. The rationale of this is not difficult to discern, how can this Honorable Court ascertain and discern what went on during the execution when it never executed those orders? Secondly the interest of justice demand that there should be an end to litigation and a successful party should be able to enjoy the fruits of his/her and its judgment.

In the result and for the reasons given hereinabove, the 1<sup>st</sup> preliminary objection is upheld in favour of the defendants.

#### **4.2 Issue no 2: Whether the plaint discloses a cause of action against the defendants jointly and severally.**

Counsel for the defendants submitted that the plaintiffs jointly or/and severally have no cause of action against each of the defendants. Counsel for the plaintiffs does not agree. They submitted that the sale of the suit property was tainted with illegalities. And that the 3<sup>rd</sup> and 4<sup>th</sup> defendants are threatening to evict them unlawfully from the suit land. Both parties relied on a number of authorities to justify each party's case.

A cause of action was defined in the case of **Auto Garage & others Ltd vs Motokov (No. 3 [1971] E.A 514)**, where it was held that for the plaint to disclose a cause of action must demonstrate that: the plaintiff enjoyed a right, the right was violated and it is the defendant liable. In **Jeraj Sharif vs Chotai Fancy [1960] EA 374 at 375 Windham J.A**, held that:

**“The question whether a plaint discloses a cause of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true”.**

The decision in the above case was quoted with approval by **Justice Yorokam Bamwine (as he then was) in HCCS no. 349 of 2007: Dr. Arinaitwe & 37 ors vs Inspectorate General of Government (unreported)**; and continued to make a finding that:-

**“ It is in my view settled law that the question or not a plaint discloses a cause of action must be determined upon perusal of the plaint alone, together with anything attached to form part of it, and upon the assumption that any express or implied allegations of fact in it are true”.**

Counsel for the defendants submitted that a review of the plaint and its annexures clearly reveals that no cause of action is disclosed against the defendants jointly and /or severally. This is due to the following:

- (a) Based on the provisions of Section 46 (2) of the Judicature Act and Section 34 (1) of the Civil Procedure Act and the authorities cited and reasons advanced above

the suit does not disclose a cause of action. Reference is made to my findings on issue no.1 hereinabove.

- (b) The provisions of Section 176 of the Registration of Titles Act clearly demonstrate that it is only an owner who has been deprived of land through fraud who can bring a suit to recover land from a registered proprietor. A review of the plaint and its annexures demonstrates that the 3<sup>rd</sup> and 4<sup>th</sup> defendants are registered proprietors of the suit property and as their registration can only be challenged by a person who has been deprived of ownership of the suit land by fraud.

The 3<sup>rd</sup> and 4<sup>th</sup> defendants lawfully bought the suit property from the 2<sup>nd</sup> defendant who had also lawfully bought from the 1<sup>st</sup> defendant who was executing a lawful Court order. There is nothing like fraud in the said sale transactions between the defendants. The sale of the suit land was done by the 1<sup>st</sup> defendant pursuant to a valid Court order.

A review of the plaint reveals that block 265 plot 1218 was before being sold by the 1<sup>st</sup> defendant registered in the names of the 2<sup>nd</sup> plaintiff while block 265 plot 1217 was registered in the names of Anita Basudde.

This is clear from paragraph 9 (w) of the plaint and part of annexure K to the plaint which is a certificate of the title for block 265 plot 1218. This is also clear from annexure B of the 3<sup>rd</sup> and 4<sup>th</sup> defendants' written statement of defence.

Accordingly, it is clear that the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs have no and have never had any interest in the suit property. In fact even in the plaint they do not allege to have had any interest in the suit property. I hereby say that due to the provisions of Section 176 of the Registrations of Titles Act, the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs do not have a cause of action against the defendants.

Even in respect of the 2<sup>nd</sup> plaintiff, its claim would have been only restricted to the land comprised in block 265 plot 1218 that was previously registered in its names and to that extent any claim by the 2<sup>nd</sup> defendant in respect of block 265 plot 1217 is untenable.

Wherefore, the 2<sup>nd</sup> preliminary objection is upheld in the affirmative.

## **5. Conclusion**



**5.1** In the result and for the reasons given hereinabove in this judgment, I hold that the plaintiffs' suit has no merit. The plaintiffs' suit is barred by law; and that the plaintiffs have no cause of action against the defendants. Accordingly, therefore, the plaintiffs' plaint ought to be rejected by Court under Order 7 rule 11 of the Civil Procedure Rules. It is dismissed with costs to the defendants pursuant to Order 6 rules 28 and 29 of the Civil Procedure Rules.

**5.2** The 3<sup>rd</sup> and 4<sup>th</sup> defendants are bonafide purchasers of the suit property/lands for value and without any notice of fraud. They are accordingly entitled to vacant possession of the suit land as soon as practicable but not later than thirty (30) days from the date of this judgment.

Dated at Kampala this 15<sup>th</sup> day of February, 2013.

**sgd**  
**Murangira Joseph**  
**Judge**