

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA

AT KAMPALA

LAND DIVISION

MISCELLANEOUS APPEAL NO. 04 OF 2011

ARISING FROM CIVIL SUIT NO. 191 OF 2006

MUKASA LUBANGA.....APPELLANT

VERSUS

MUSAMALI STEPHENRESPONDENT

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

JUDGEMENT

This was an appeal filed by notice of motion under Order 50 rule 8 of the Civil Procedure Rules for orders that the appeal be allowed; the orders of the learned deputy registrar, Land Division refusing to grant execution of the decree of this court be set aside and varied or replaced with an order of execution of the decree; and the order that the matter be put before the trial Judge for a vesting order be set aside.

The background to the appeal is that the appellant filed civil suit no. 191/2006 against the respondent seeking orders that the respondent be evicted from his property comprised in Kibuga Block 10 Plot 173 land at Namirembe. When the case came up for hearing on 14/07/2006 the respondent pleaded for a two months grace period to enable him vacate the house. A consent judgement to that effect was recorded before the trial Judge and a decree was extracted. The respondent failed or refused to vacate the house whereby the appellant applied for execution of the decree. A warrant to give vacant possession was issued by this court but the same could not be executed allegedly because the respondent frustrated it. The appellant applied for renewal of the warrant and a notice to show cause why execution should not issue was served upon the respondent who appeared in court on 14/07/2011. The learned registrar declined to grant execution in the matter on grounds that the appellant had been convicted by Buganda Road Court for obtaining registration on land by false pretences, that the High Court had upheld the conviction and sentence on appeal and that the appellant had not shown court that he had filed a second appeal before or after serving the sentence, and that he had no valid title to the land. The learned deputy registrar also ordered that the file be put before the Judge for a vesting order to restore the land into the hands of the administrators of the estate of the late Dioni Diosi Bwete.

The appellant, being dissatisfied with the decision, filed this appeal on grounds that:-

1. The learned registrar erred in law and in fact as he has no powers to refuse execution of a decree against the respondent which has not been complied with.

2. The learned registrar erred in law by ignoring the fact that there is an appeal in the Court of Appeal with regard to the case of obtaining registration by false pretences which the registrar ignored.
3. The learned registrar erred in law in placing the file before the Judge for a vesting order by the administrators/beneficiaries of Dioni Diosi Bwete and they are not party to civil suit no. 191/2006.
4. It is just and equitable that this appeal be allowed.

The appeal is supported by the appellant's affidavit, and is opposed by the respondent who filed an affidavit in reply. The respondent represented himself at the hearing of this appeal. The appellant was represented by Counsel Gilbert Niwagaba. The respondent and the appellant's counsel were given time schedules within which to file written submissions. A date for judgement was given by this court. When the file was brought to me for judgement writing however, there was correspondence from the respondent that the appellant's counsel had not served him with his submissions by 13/05/2013 yet court had given him a deadline of 08/05/2013. In his correspondence the respondent prayed the registrar's ruling to be upheld and the applicant to be condemned in costs.

On perusal of the record I found that the appellant's counsel filed submissions on 13/05/2013, which was five days after the deadline set by this court. The record also indicated that the respondent filed his submissions in reply on 07/06/2013. In the spirit of article 126(2)(e) of the Constitution, since all submissions were in court by the time I started writing the judgement, I exercised discretion and addressed the appeal on the merits without due regard to technicalities of late filing of submissions. This takes me to the merits of the appeal.

Ground 1: The learned registrar erred in law and in fact as he has no powers to refuse execution of a decree against the respondent which has not been complied with.

The appellant's counsel referred to the appellant's affidavit in support of the appeal. He submitted that the factors of there being in existence a consent judgement entered into by the appellant and the respondent; there being no appeal against the said judgement/decree; and the existence of a decree ordering the respondent to vacate the property are not disputed by the respondent. He referred to paragraphs 4 and 5 of the appellant's supporting affidavit and submitted that though the appellant applied for and was granted a warrant against the respondent to give vacant possession, the respondent resorted to threatening the bailiffs that he would shoot them with his gun. He contended that the respondent had not disputed the appellant's averments in his affidavit in reply; that the execution could not be carried out due to fear; and that when the appellant applied for a renewal of the same, the registrar issued a notice to show cause why a warrant to give vacant possession should not issue.

He also submitted that the refusal by the learned deputy registrar to grant execution was disobedience of the decree of this court which was explicit in its terms. He argued that he had no liberty to consider other grounds and if he was in doubt he ought to have referred the matter to the High Court under Order 50 rule 7 of the Civil Procedure Rules. He argued that the decree was couched in mandatory terms which the registrar could not alter but only had to put into effect.

The respondent submitted in reply that the appellant was basing on a consent judgement he (the respondent) signed in 2006 without disclosing to court what transpired later. He submitted that the

learned deputy registrar based his findings on evidence that he the respondent adduced before him in the course of hearing the application to show cause why execution should not issue against him. This evidence was to the effect that the premises the appellant wanted to evict the respondent from were subject to administration by the Administrator General as per letters of administration dated 24/08/2006; that the appellant had been convicted of obtaining registration of the property he seeks to evict the respondent from by false pretences and sentenced to one year's imprisonment by Buganda Road Court; that he served the sentence; that his appeal against the conviction and sentence was dismissed by the High Court in HCT – 00 – CR – CN – 0083 – 2008; and that there was no appeal in the Court of Appeal against the judgement. He argued that if the court were to sanction the eviction sought it would have facilitated the appellant to enjoy what he acquired fraudulently and illegally. He cited **Makula International Ltd V Cardinal Nsubuga & Another [1982] HCB 11** to support his position.

I have carefully perused the entire court record on this application. The learned deputy registrar in his ruling indicated that Mr. Musamali (respondent in this appeal) had shown cause why he should not be prosecuted for contempt of court or be thrown out of the suit premises. He ruled that the applicant (appellant in this case) had been convicted of obtaining registration of the land title by false pretences and the High court had upheld the conviction and sentence on appeal, and that the respondent had not shown court that he had filed a second appeal before or after serving the sentence.

A certified true copy of the proceedings held before the learned deputy registrar, which is on the court record, shows that the judgement of the convicting magistrate in criminal case no. 0128/ 2006 and the judgement of the appellate High Court Judge in appeal no. HCT – 00 – CR – CN 083/2008 were tendered in court as exhibits. The exhibits were not challenged by the applicant's (now appellant's) counsel. It is apparent from the registrar's ruling that he based his findings on evidence that he the respondent adduced before him in the course of hearing the application to show cause why execution should not issue against him. The respondent attached certified true copies of the same judgements exhibited before the deputy registrar as annexures **F** and **G** to his affidavit in reply to this appeal.

The appellant did not address these matters in his application and supporting affidavit nor did he dispute them by way of reply when they were brought out in the respondent's affidavit in reply. His counsel argued that the deputy registrar had no liberty to consider other grounds, and that if he was in doubt he ought to have referred the matter to the High Court under Order 50 rule 7 of the Civil Procedure Rules. He also argued that the decree was couched in mandatory terms which the registrar could not alter but only had to put into effect.

With respect, I do not agree with the arguments of the appellant's counsel. The application at hand was for the respondent to show cause why execution should not issue against him. The respondent did show cause by adducing evidence that the consent he signed in 2006 agreeing to such execution being issued against him had been overtaken by events. These were that the applicant/appellant's title to the property from which he wanted the respondent evicted has since been found by competent courts to have been acquired by him by false pretences. The respondent's position was substantiated by well documented and well authenticated evidence in terms of the two judgements which were tendered in evidence without being challenged by the applicant before the trial deputy registrar.

It was held in **Makula International Ltd V Cardinal Nsubuga & Another [1982] HCB 11** that court cannot sanction what is illegal and that an illegality once brought to the attention of court overrides all

other pleadings therein including admissions. This court cannot therefore turn a blind eye to the developments which in essence reveal that the appellant has since been convicted of obtaining registration of the property he seeks to evict the respondent from by false pretences, and that this is yet to be appealed against. If this court sanctioned the eviction sought it would have facilitated the appellant to enjoy what he acquired fraudulently and illegally.

Ground 1 of the appeal fails.

Ground 2: The learned registrar erred in law by ignoring the fact that there is an appeal in the Court of Appeal with regard to the case of obtaining registration by false pretences which the registrar ignored.

The appellant's counsel referred to annexures **D**, **E** and **F** to the appellant's affidavit in support of the appeal. He submitted that the appellant wrote to the learned deputy registrar about the appeal and the notice and memorandum of appeal are proof of the existence of the appeal. He submitted that the learned deputy registrar's premising his decision on the fact that there is no appeal was erroneous.

The respondent submitted in reply that the appellant's memorandum of appeal no. 166/2011 arising from criminal appeal no. 083/2008 was filed out of time since there is no court record to show that the appellant filed an application to appeal out of time. He contended that the appellant cannot use the invalid appeal as a basis to challenge the ruling of the deputy registrar.

I have looked at annexures **D**, **E** and **F** to the appellant's affidavit in support of the appeal. Annexure **D** is a copy of a letter by the plaintiff's counsel requesting the deputy registrar to issue a Notice To Show Cause Why execution should not issue against the defendant. The second annexure **D** is a copy of a letter by the same counsel stating that the registrar's ruling in the matter has nothing to do with the judgement of the criminal court where the registrar was seeking clarification as to whether the plaintiff was charged with obtaining registration by false pretences. In the same letter counsel contended that plaintiff/judgement debtor is supposed to comply with the decree of court and prayed the deputy registrar to grant the eviction order. Annexure **E** is a copy of a notice of appeal from the decision of the High Court Judge upholding the conviction and sentence of the appellant. Annexure **F** is a copy of the purported appellant's memorandum of appeal no. 166/2011 arising from criminal appeal no. 083/2008.

I do not agree with the submissions of the appellant's counsel that the notice and memorandum of appeal are proof of the existence of the appeal. Annexure **E** (notice of appeal) was purportedly lodged in the registry of the Court of Appeal on 28th July 2011 while Annexure **F** (memorandum of appeal) was purportedly lodged in the same registry on 11th August 2011. This was clearly an appeal out of time, considering that the judgement from which the appeal lay was delivered on 17th December 2010, well beyond the time within which an appeal should be lodged. There is nothing on the court record to show that the appellant filed an application to appeal out of time, neither did the appellant or his lawyer indicate that they indeed filed such application. Secondly, annexures **E** and **F** are not certified true copies of the documents they purport to be. This renders their authenticity to be highly questioned as they lack the endorsement of the relevant officials supposed to certify them as true copies.

For the foregoing reasons, I would agree with the respondent that the appellant cannot use the invalid appeal as a basis to challenge the ruling of the deputy registrar. The learned deputy registrar's premising his decision on the fact that there is no appeal was therefore not erroneous.

Ground 2 of the appeal fails.

Ground 3: The learned registrar erred in law in placing the file before the Judge for a vesting order by the administrators/beneficiaries of Dioni Diosi Bwete and they are not party to civil suit no. 191/2006.

The appellant's counsel submitted that the matter before the learned registrar was clearly a notice to show cause why a decree should not be executed; that the parties to the application were the appellant/applicant and the respondent; and that the respondent is neither the administrator nor a relative of the family of Dion Dios Bwete to purport to represent their issues to avoid eviction. He contended that the registrar was therefore in error to place the file before a Judge to make a vesting order in favour of persons that were not before court.

The respondent submitted in reply that the ground of appeal was not worth considering as it is not material to the subject matter, but that the registrar was in effect opening the eyes of the responsible persons to pursue the removal of the appellant's names from the title to the rightful owners.

The record indicates that in addition to declining to grant any execution, the learned deputy registrar ordered the matter to be put before the trial Judge for a vesting order. Annexure **F** to the respondent's affidavit in reply reveals on pages 6 and 7 that the learned trial magistrate in Buganda Road criminal case no. 0128/2006, while sentencing the appellant (after convicting him of obtaining registration of land by false pretences) did not make any order that registration of land be cancelled, though the prosecution requested for it after judgement was delivered. Annexure **G** to the same affidavit, the appeal judgement, other than upholding the magistrate's conviction and sentence of the appellant, did not also order for cancellation of his title. The criminal courts did not issue any orders that the land be restored to any person.

I have failed to appreciate the basis on which the learned deputy registrar ordered the file to be put before a trial judge for a vesting order. The section relied on for issuance of consequential orders is section 177 of the Registration of Titles Act. It provides for consequential orders directing the registrar to cancel a certificate of title or entry or a memorial in the register book. Such an order should follow a successful action and proceedings to recover land from the person registered as proprietor.

It is my opinion that criminal proceedings against a person registered as proprietor of land do not amount to an action to recover land for purposes of section 177 of the Registration of Titles Act. In the criminal case the remedy of recovery of land or cancellation of the appellant's title was not considered or granted. There was no order for recovery of land. The learned deputy registrar therefore had no basis to order the placing of the file before the trial Judge for a vesting order. A vesting order can only be appropriately granted after a successful civil suit for recovery of land against the registered proprietor. The judgement in the criminal case can be used by the applicant to prove fraud in a civil suit to recover land against the registered proprietor. Also see **Ronald Katende V Registrar of Titles Miscellaneous Application No. 08/2005, Mukiibi J.**

Ground 3 of the appeal is allowed.

Ground 4: It is just and equitable that this appeal be allowed.

The appellant's Counsel prayed court to allow the appeal; that the orders of the learned deputy registrar be set aside, varied or replaced with an execution of the decree; that the order to put the matter before the trial Judge for a vesting order be set aside, and for costs of the appeal since the respondent had enjoyed occupation of the property for the last two years since the decree was issued against him. The respondent submitted in reply that the appeal should be dismissed with costs.

All in all this appeal substantially fails, save for ground no. 3 which is allowed. The decisions of the learned deputy registrar not to grant execution are upheld. However, the registrar's order to put the matter before the trial Judge for a vesting order is set aside. Three quarters of the costs of the appeal are awarded to the respondent.

Dated this 4th day of July 2013.

Percy Night Tuhaise

JUDGE.