**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**HOLDEN AT MBALE**

**HCT-04-CV-CA-0158 OF 2012**

**WALIMBWA JAMES :::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**NAMWOKO ERISA :::::::::::::::::::::::::::: RESPONDENT**

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

**JUDGMENT**

This is an appeal from the Ruling and orders of Her Warship Rachael Nakyanzi Magistrate Grade 1 Bududa dated N0.2012.

The background to the appeal is that the respondent sued the appellant for a declaration of ownership and a permanent injunction for the suit land situate at Bumboi village, Bukibino Parish in Bududa District. The parties agreed before trial by consent that appellant pays 4,500,000/= and the respondent vacates the suit land, then the suit be withdrawn and there be no case filed in respect of the dispute. The appellant paid 2,000,000/=, and didn't pay the balance as agreed. Respondent then obtained a warrant of attachment to the suit land. Being dissatisfied, the appellants filed this appeal.

Appellant raised two grounds of appeal

1. That the Learned Trial Magistrate erred in law and fact in ordering the attachment and sale of the suit land.
2. That the orders of the learned trial Magistrate occasioned a miscarriage of justice.

In submissions appellant stated that under order 21 rule 6(1) a decree must conform to the judgment.

The judgment in the case is composed of the terms of the consent on which the trial Magistrate based her decision. Counsel argued that it was not in the consent by the parties that the suit land should be sold. The spirit of the judgment and the alternative Dispute Resolution was to preserve the suit land and for the respondent to get his money, so as to put an end to litigation.
He argued that the order for sale was *ultra vires* the judgment and the decree and prays that the same be set aside with costs.

Respondent's counsel on the other hand called upon the court as a first appellate court to review the entire evidence, subjecting it to a fresh scrutiny and draw its own conclusion as held in *PANDYA V.R (1957) EA 336.*

Counsel argued that the moment the consent was cancelled the land became the property of the appellant and he owed the respondent the unpaid money. He argued that Order 21 rule 6(1) was not applicable since the appellant had totally breached the consent and continued to abuse court for his own benefits. He argued that the learned trial Magistrate was right to order for attachment of the suit land.

According to the record, the parties appeared in court on 24.10.2012 and agreed that matter be solved by Alternative Dispute Resolution, where defendant was to pay 4.5 million to the plaintiff in settlement and the plaintiff vacates the land upon receipt of the said sum. On 21.11.2012, the defendant paid 2 millions and prayed for time to pay the balance. The plaintiff refused to have extension of payment and court issued a warrant of attachment of the land.

The above facts are very unusual. The terms of this consent were clearly worded. The consent was conditional. The defendant was not in occupation of the land. It was plaintiff. Plaintiff was to receive shs 4.500, 000/= and then give vacant possession to the defendant. The defendant paid him 2,000,000/= which he received and retained. The fact that plaintiff was still in possession of the suit land, and had received only part of the agreed 4.500, 000/= meant that title to the land had not yet passed from plaintiff to defendant. The condition of the consent was that “upon receipt of the 4.500, 000/= the plaintiff vacates the suit land”.

It is wrong for the plaintiff to eat his own cake and have it at the same time. How could he execute the land for which he had not passed on title to recover the balance of the money meant to finalise a deposit for the same land? What value would the defendant have obtained to part with 2.500, 000/= to deposit on land which the occupant thereof pockets and again sales to gain the balance of 2,000,000/= un paid to him for what?

I do not find sense in the arguments advanced by counsel for respondents in this case. The entire procedure adopted by court in granting the orders for execution offends all known procedures and rules of natural justice.

On the other hand I agree with the appellant that Order 21 rule 6(1) comes into play and it is true that the order for sale was *ultra vires* the judgment and the decree.

In the case of *Sheikh Lubowa v Kitara Enterprises (1887) HCB 43* the case which had a different set of facts but analogous to this one, it was held that;

> "*failure to meet full consideration price for the sale of land amounted to no sale, since the purported agreement was merely an attempt to regularize the illegal occupation on the part of the respondent. It was the case of a trespasser trying to obtain title under an agreement which failed for want of consideration*."

Similarly, in our case, the consent was premised on the fulfillment of the consideration of 4.500,000/= before actual possession happened. This execution was therefore an illegal attempt by respondent to gain unfair advantage over the appellant, with the help of court. This illegality cannot be allowed to stand. In *Makula International V His Eminence cardinal Nsubuga & or( 1982) HCB 11*, whenever court discovers illegality in proceedings, court can interfere- illegality overrides all questions of pleadings including admissions thereon. In this case it has been observed from the lower court record that the learned trial Magistrate erred in law and fact in ordering the attachment and sale of the suit land. Ground 1 of the appeal therefore succeeds.

It has been said that a miscarriage of justice occurs whenever the court's decision results into injustice to any of the parties. The decision of the learned trial

Magistrate in this matter has resulted into injustice to the appellant and for that reason is held to have perpetuated a miscarriage of justice. This ground succeeds, as well.

For the above reasons, the appeal is granted. The judgment and orders of the lower court are hereby set aside and replaced with an order for retrial before another competent Magistrate. The shs 2.500,000/= paid should be refunded to the appellant by respondent. Costs of the suit to the appellant.

**Henry I. Kawesa**

**Judge**

**11.11.2014**