THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO. 22 OF 2014

MUGISHA FLORENCE……

PLAINTIFF

VERSUS

1. **BABIRYE FLORENCE**
2. **ERNEST KIZZA…….DEFENDANTS**
3. **KAHERU JULIUS T/A MUGISHA GENERAL AGENCIES**
4. **MUGISHA FRANK**

RULING

BEFORE LADY JUSTICE EVA K. LUSWATA

The plaintiff bought this suit jointly and severally against the defendants seeking for orders inter alia for a permanent injunction restraining the defendants and their agents, from further trespass or dealing in land comprised in Kibuga Block 17 Plot 596 at Lubaga (hereinafter called the suit land), a declaration that the registration of a mortgage on the suit land by the 1st defendant and cancellation of the plaintiff's names from the Register Book and Certificate of Title under order of court premised on false misrepresentation and fraud and, that all transactions or dealings subsequent thereto to 3rd parties if at all, are wrongful, illegal, null and void abinitio.

In his written statement of defence filed on 12/2/14, the 2nd defendant raised a preliminary objection that the suit is bad in law, frivolous and vexatious and applied for the same to be struck off the court record as it attempts to offset the proceedings and orders of another court which were never challenged by the plaintiff by way of either appeal, review or otherwise. Both parties filed written submissions in respect of the preliminary objection.

The facts of the plaintiff's claim can be discerned from her plaint and numerous attachments to it. It is stated that as the registered proprietor of the suit land, she obtained a loan of 44,000,000/= from the 1st defendant in 2012. She failed to pay the debt and as a result, the 1st defendant instituted a summary suit in the Chief Magistrates Court of Mengo vide CS No. 1808 of 2012 (hereinafter called the original suit). Service of the summons was through substituted means in the New Vision Newspaper. She failed to appear and defend the suit and summary judgment was entered against her on 1/11/12 and a decree extracted on 3/12/12. The judgment creditor attempted but failed to execute against the person of the plaintiff, and upon application, on 1/11/13 a warrant of attachment and sale of the suit property was issued and duly satisfied on 25/11/13, when the 3rd defendant in their communication of 25/11/13, filed their return of attachment and sale, indicating that the suit land was sold to the 2nd defendant as the sole bidder. By order of court dated 28/11/13, a directive was issued against the Commissioner Land Registration, to register the 2nd defendant as owner of the suit land and for the issuance of a special certificate of title in his favour.

It is clear therefore that the original suit was heard and disposed of by the Chief Magistrate. It was contended for the 2nd defendant that unless the decree and proceedings of that court are set aside either on appeal or otherwise, a litigant cannot institute proceedings in another court to challenge an existing decree. Counsel relied on the case of **Jeraj Shariff & Co. Vs. Chotai Fancy Stores [1960] EA 374 (CAK).**

Counsel also contended that the 2nd defendant having acquired the suit properly after due process of court, cannot be sued in another court by any party who never successfully challenged an existing court order. In his view, that the suit bore a defect that cannot be cured by way of amendment and was liable to be dismissed. In this he relied on **Kayondo Vs. the Attorney General [1989-1990] HCB 127.**

I would agree entirely with the above view. The claim in the original suit premised on a summary suit and was fully determined. Therefore under Order 36 r. 11, it was only open to the plaintiff to seek an order setting aside the *exparte* decree and execution order for sound reason including non service of summons. If such application, succeeded, the court would have on its

discretion with or without conditions, granted her leave to file her defence. It appears even the option of appeal was not open to her without leave. The second option could have been to seek an order of review, again, only if the conditions given in Order 43 r 1 & 2 CPR were satisfied. Both applications had to be presented before the Magistrate who passed the decree in the original suit.

It is clear that the plaintiff did not take the above two options and instead, filed the present suit. Her counsel argued however that a litigant can actually file a fresh suit to challenge the fraudulent actions of the defendants in the High Court of inherent competent jurisdiction. In this he relied on **Sections 14 & 33 Judicature Act Cap 13, Section 98 CPA Cap 71, and Article 126 (2) (e) of the Constitution.** He clarified that the decision in **Jeraj Shariff & Co. vs. Chotai Fancy Stores (supra)** has now been distinguished in many other decisions e.g. that of **A.V. Papayya Sastry & Others Vs. Government of A.P & Ors Case No: Appeal (Civil) 5097-5099 of 2004 (Supreme Court of India),** and **Livingstone Sewanyana Vs. Martin Aliker SCCA No. 4 of 1991** and **Hannington Wasswa & Anor Vs. Maria Onyango Ochola & 3 Ors SCCA No. 22 of 1993** in which it was held that a judgment, decree or order obtained by playing fraud on a court is a nullity and can be challenged in any court at any time on appeal, revision or even in collateral proceedings.

Counsel for the 2nd defendant in rejoinder did not disagree, but argued that in the present case, the plaintiff sought to prove an issue that has not been litigated upon in the lower court on facts which indicate that such litigant who although aware of the proceedings, chose to ignore all attempts to be heard although all along she was aware of those proceedings. In his view, the present suit is a veiled attempt to resist the execution of lawful orders of court. He also contended that the current proceedings are illegal in as far as they attempt to challenge an otherwise lawful order of court that was never challenged by the plaintiff. He deemed the suit bad in law, frivolous and vexatious and a mere travesty of justice.

The basis of the claim in this suit is that the order of court in the original suit was based on fraud and false misrepresentation and therefore all decisions, orders, transactions or dealings in the suit land subsequent to that decree are wrongful, illegal, null and void *abinitio*.

My understanding of the authorities relied on by the plaintiff is that fraud if raised cannot and should not be ignored by any court. This would include the court that passed the order or that superior or collateral to it. This was well enunciated in the quotation from **A. Vs Papayya Sastry & Others Vs Government of A.P & Sons (supra).**

"*It is thus a settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order by the final court has to be treated as nullity by every court, superior or inferior. It can be challenged in any court any time, in appeal, revision, writ or even in collateral proceedings*". (Emphasis by this court).

That court further went on to explain that although a judgment would be *res judicata* and thus not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was mistaken, it might be shown that it was 'misled'.

It is clear from the above authority that the plaintiff cannot in fresh proceedings challenge the merits on which the original suit was decided but only that the court was imposed upon or duped into giving the judgment. She may only attempt to interfere with such judgment in fresh proceedings such as these, if clear evidence is advanced that there was fraud in procuring such judgment. The court in ***Jonesco Vs. Beard (3), [1930] A.C. 298, at p.300*** *on that point has this to say:-*

> *"The correct way to challenge an existing decision of the Court on the basis of fraud was by a new substantive action. The defendant should not lose his favorable judgment without clear evidence of fraud. He should not lose it merely on account of a plausible allegation of fraud. The interest in finality of litigation should hold sway unless and until the judgment is shown to have been obtained by fraud. (Emphasis of this court).*

I have noted the emphasis in the above quotation that before a party can rely on fraud to challenge a standing decision, her pleadings should bear clear evidence of fraud but not mere allegations of it.

In her the plaint, the plaintiff enunciates what she believes was fraud on part of the defendants. In summary she argues that the manner in which the mortgage was executed and the suit land sold, failure to take into account the interests of the other church members in the suit land, selling the suit land on two different occasions to the 2nd defendant, making a false representation of the value of the suit land before sale and selling below market value of the suit land all pointed to fraudulent acts of the defendants. She further argued that the original suit was filed before a court without jurisdiction and the order was issued following misrepresentation that she had knowledge of that suit. In addition, that the 1st defendant held out a loan agreement to be a mortgage and failed to register the same, which all pointed to further acts of fraud and misrepresentation by the defendants.

I am unable to see instances of fraud in the proceedings leading to the summary judgment and decree of the original court. As I have already found, it was open for the plaintiff to have moved the court to set aside the decree and proceedings after which it would have been open to her to challenge the legality of the mortgage and the manner in which it was realized. She did not do so and cannot re-open the proceedings of the suit itself and the execution *per se* on that account. I would on that account agree with counsel for the 2nd defendant and move to expunge any facts and prayers in the plaint that attempt to question and challenge the decision of the lower court with respect to the non appearance of the plaintiff, the judgment and decree as presented by that court, and the application and grant of execution warrants against the plaintiff.

The above notwithstanding, although the plaintiff is precluded from challenging the order of execution, she is not necessarily precluded to contest any other orders emanating from the final decree especially if issues of fraud and misrepresentation are apparent. In this, the authority of **Kibuuka Nelson & Anor vs. Yusuf Zziwa (HCCS No. 81/07)** would be instructive. The court in that case set aside an *exparte* judgment on the well settled reason that the applicants had not

been duly served. It then allowed an investigation into whether a sale following an execution was done legally. The court was of the view that where an execution by attachment has been regularly carried out but the resultant sale found to be riddled with fraud or illegality, the court is empowered to make an order of restoration.

I hold the same view and opine that any facts relating to an irregular, fraudulent or illegal execution would be valid questions to be put before this court by way of an original suit. I am indeed aware that Order 36 R 11 permits an application to set aside execution as well, but it is doubtful that one who wishes to rely on fraud in execution proceedings can fully enunciate their claim in such an application judging that the law dictates that fraud, must be strictly pleaded and proved. Affidavit evidence would not be sufficient to bring out facts of fraud.

The above notwithstanding, I hasten to add that, the annexure to the plaint indicate that the regular procedures preceeding an attachment by sale were followed and the warrants of execution first by arrest and then by sale had no fault. I note that the plaintiff protested the sale on grounds that the suit land was grossly undervalued and sold at a paltry sum of Shs. 50 million only. However, she did not present clear evidence in the form of a valuation report to counter the valuation report presented by the 3rd defendant that indicated a four market value of Shs.126 million and a forced sale value of Shs. 50 million. It was on that basis that the Learned Magistrate allowed the 3rd defendant to sell the suit property at the forced sale value which would in my view exonerate the 3rd defendant from fraud in the sale transaction.

Again, if there was any irregularity in this sale, which I have not found, the plaintiff's subsequent agreement with the 2nd defendant appears to have eradicated it. On 13/12/13 well after the return of execution had been filed, the plaintiff signed a memorandum of understanding (MOU) in which she consented to vacate the suit land. It is very clear in that MOU that the plaintiff was well aware of the fact that the 2nd defendant had acquired an unregistered interest in the suit land as a result of execution of the decree in the head suit. By then, she was still the registered proprietor of the suit land but in exchange for Shs. 11 million, agreed to remove all encumbrances, effect all transfers, remove all her property and determine all her interests in the suit land. All this was done in the presence of the 4th defendant whom she claims was in cohorts with the 2nd defendant to defraud her. Further, he claims to have been coerced and cajoled into signing that MOU but no particulars of such coercion were indicated in her plaint which would

offend the provisions of Order 6 Rule 3 CPR. Therefore, I would find no merit in her objections that the MOU was fictitious or obtained through coercion.

There was also an objection that the suit property was sold to the 2nd defendant on two occasions. The record bears witness that there was an initial sale by the 4th defendant to the 2nd defendant on 25/9/11 and a subsequent sale by court order in execution between the 3rd and 2nd defendant on 25/11/13 after which a return of attachment was filed on 28/11/13. I note that the first sale was by itself of no legal effect in that the 4th defendant who was not the owner of the suit land and had no authority from the plaintiff to sell it, had no power to transact with the 2nd defendant. In any case, it is not clear in the plaint how that sale was connected to or infringed on the rights of the plaintiff *vis a vis* the execution proceedings that were already in place against her. I thus also find no merit in that objection.

In conclusion, I find that the plaintiff has not in her new pleadings raised issues of fraud or illegality that would merit a new suit to revisit or vary the decree and orders of the Learned Magistrate that were properly passed and executed. The evidence she presented in her claim points to the fact that she did not take the step to contest the *exparte* proceedings and even when she discovered the existence of the execution proceedings and sale of the suit property, she was prepared to "deal" with the 2nd and 4th defendants with the result that she relinquished all her claims to the suit land.

I would therefore find merit in the preliminary objection and hold that the suit as it stands is without any legal foundation and cannot possibly succeed. The plaint lacked seriousness and raises no cause of action against any one of the defendants. Relying on the authorities of **Mpaka Road Development Ltd Vs Kana (2004) EA 161** and **Motocov Vs Auto Garage Ltd & Ors (1971) EA 514**, I can only conclude that it is a frivolous and vexatious plaint and l move to dismiss it under Order 7 Rules 11(a) and (e) CPR with costs to the 2nd defendant.

I so order.

EVA K. LUSWATA

JUGE

7/7/2015