

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE**

**HCT-04-CV-MC-0014-2013**

**1. ADAM YACOB MUHAMMED**  
**2. BARCLAYS BANK OF UGANDA.....APPLICANTS**  
**VERSUS**  
**MADAYA ROGERS.....RESPONDENT**

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

**RULING**

The applicant brought this application seeking for an eviction order to be issued against the Respondents or occupants on land comprised in LRV. 2698 Folio 7 Plot 7 Budama Lane, land at Mbale.

The grounds were that the 2<sup>nd</sup> Applicant and Respondent entered into a loan agreement in which the applicant lent money to a one **Kamugisha Betram**. The said **Kamugisha** failed to honour his obligations. The applicant recalled the loan facility and advertised them for sale. 1<sup>st</sup> Applicant bought them and is the current registered proprietor. The Respondent is occupying the property.

The applicant swore an affidavit in support sworn by Nicholas Muhwezi of C/o Munganwa Nanteza & Co. Advocates reiterating the above grounds.

The Respondent filed an affidavit in reply sworn by **Madaya Rogers** (Respondent) in which he depones that there is no pending suit between him and applicants. He also deponed that he is in possession of a restraining court order from eviction and also he filed a caveat forbidding the transfer of the title into anybody's names without his consent. He contended that the alleged purchase was illegal, null and void. He thus opposed the application.

During the hearing Counsel for the Applicant submitted that the property was mortgaged to the 2<sup>nd</sup> Applicant by **Kamugisha**. When **Kamugisha** defaulted, 2<sup>nd</sup> Applicant sold it to 1<sup>st</sup> applicant who now holds title thereto. He referred to the affidavit in support showing further that under paragraph 10, the first applicant has sued the bank and hence can bring this suit/application for an eviction order, since Respondent no longer has any legitimate claims to the property and cannot keep on the premises.

He relied on *Barclays Bank Uganda Ltd v. James Kanyerezi and 4 Others Land Div. 45/20* where in similar circumstances court granted an eviction order. They prayed for an order of eviction with costs.

In response counsel for respondent argued that the application was not properly before court, because Section 33 Judicature Act stipulates matters which can be before High Court. He referred to the affidavit in support to argue that there are issues for determination raised under paragraph 8 and 9 bordering on the rights of a bonafide purchaser which must be proved by leading evidence in court not by affidavit. He raised arguments regarding the authenticity of the acquired title, the pending suit 27/2007, the caveat, and court injunction against eviction as deponed to in the affidavit in reply and proposed that issues raised cannot be proved by affidavits. He also pointed at the issue of fraud that is embodied in the pleadings and argued that the procedure adopted cannot sufficiently address “fraud” which needs proof by proper “trial.”

Referring to *Zalwango Elivason v. Dorothy Walusimbi & Henry Bijjumuko 3/2013*. He argued that Notice of Motion is a procedure for simple none contentious matters.

Also *Kampala Bottlers v. Daminico S/C.18/22*, holding that allegations of fraud cannot be decided on the strength of imagination (by affidavit).

They argued that the sale was null and void, and the transactions were illegal. The respondent prayed for dismissal of the application with costs.

Responding to the above applicants maintained their prayers and argued court to find for applicants.

I have reviewed the whole pleadings above, and the arguments on record. I am persuaded that this application raises points of law which must be determined before divulging into the application itself. These are;

1. **Whether the application offends section 33 of the Judicature Act (whether the procedure adopted is proper).**
2. **Whether applicants are stopped from bringing this action on grounds of the court injunction, caveat, and existence of CS.27/2007.**
3. **Whether “fraud” must be specifically in an application of this nature for it to be considered as relevant to the matters in contention.**
4. **Whether the application can be maintained against the respondent in absence of a main suit between him and applicants.**
5. **Whether this application can be granted as prayed.**

I resolve the issues above as follows:

1. **Whether application offends section 33 of the Judicature Act.**

Section 33 states: “The High Court shall in the exercise of the jurisdiction vested in it by the Constitution all such remedies....equitable claim properly brought before it....”

Was this application properly brought before this court?

The application is according to the Notice of motion brought under S.64 and 98 of the Civil Procedure Act, section 33 of the Judicature Act, and O.52 of the Civil Procedure Rules.

The above provisions are all general provisions that refer to the powers of the High Court to invoke its inherent power to hear and grant remedies to parties. The procedure for doing so, according to the applicant appears to be derived from O.52 of the Civil Procedure Rules. The applicant is very vague in his pleadings. O.52 is a general order, with various rules. Applicant did not indicate under which rules he was proceeding. Reading the pleadings generally however shows that applicants were avoiding to take the long course of trial by plaint and opted to shortcut the process by resorting to trial by affidavit evidence. However section 33 of the

Judicature Act requires that any pleadings before High Court must be properly filed before it. A notice of motion which bears no Rule under which it is premises, which has no mother suit from which it originates, and which seeks for final determination of very contentious matters as those pleaded in this application cannot in my view be brought under section 64 of the Civil Procedure Act, Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act. Why not proceed by ordinary plaint?

As rightly argued by the Respondents, the matters in contention have a bearing to civil suit 27/2007. These are matters of evidence which need proof in court by the calling of evidence as deponed to by respondent in the affidavit in reply. There are issues to do with illegalities in obtaining the title, fraud, injunctions which a blanket notice of motion supported by affidavit evidence cannot sufficiently prove. The applicant's resort to the use of section 33 of the Judicature Act to appear as though the application is properly before this court is unsustainable.

In considering whether to proceed by originating summons, or by ordinary suit the High Court in Kulusumbai v. Abdul Hussein (1975) EA. 708, held that the procedure by originating summons was intended to enable simple matters to be settled by the court without the expenses of bringing an action the usual way. Nakabugo v. Serungogi (1981) HCB 58 held that it is trite law that when disputed facts are complex and involve a considerable amount of oral evidence, an originating summons is not the proper procedure to take.

The import of all this to the proceedings before me is that where a matter is contentious, and involves a considerable need to call oral evidence to prove further the facts in controversy, then the procedure of proceeding by affidavit evidence either by originating summons or other motions as in this case becomes improper. This was the conclusion reached by **Hon. J. Namundi** in Zalwango Elivason and Nakalema Mariam v. Dorothy Walusimbi and Henry Bijjumuko Or. Sum..3/2013.

I have looked at the case of Esther Barbara & Ors. Vrs. James Kayerezi & 4 Ors Land Division Cause 45 of 2012, by **Hon J. Bossa**. This authority is distinguishable as in that case, the

respondents sat back and did nothing to redeem. However in this case there are pending civil suits filed by the Respondents and also an order of injunction. The case is therefore not applicable to our circumstances.

For the reasons above I find it improper for the applicants to seek for final orders of eviction against the respondent using a procedure which in my view was meant for non contentious and simple matters. Indeed a reading of section 64 of the Civil Procedure Act is for “supplemental proceedings.”

Section 98 of the Civil Procedure Act, aims at “preventing abuse of the process of court” while section 33 of the Judicature Act, carters for “matters properly before the court” while order 52 addresses “motions and other applications.” The above laws and Rules cannot be invoked as a standalone, where specific provisions of the law are available and applicable.

I am in agreement with the Respondents in their argument that in bringing this application under the sections quoted the pleadings are not proper in view of the pending issues between the parties.

The pleadings do not show:

1. The Rule under which the motion is brought, under O.55 of the Civil Procedure Rules.
2. The Court process likely to be abused under section 98 of the Civil Procedure Act.
3. The ends of justice likely to be defeated to warrant a resort to section 64 of the Civil Procedure Act.

The pleadings are to that extent improper before this court, and a violation of section 33 Judicature Act which envisages the absence of such impropriety before the section is invoked.

2. **Whether applicants can bring this application when there are issues unresolved as pleaded by respondents, regarding a court injunction, filed caveat and a pending civil suit 27/2007.**

I have found that the existence of triable issues as above which require oral evidence renders the attempt to proceed using the procedure of affidavit evidence improper. I find that this issue terminates in the affirmative.

**3. Whether ‘fraud’ must be specifically pleaded in order to sustain a reference to the same by the respondents.**

I am persuaded by the Supreme Court decision in *Kampala Bottlers Ltd v. Damnico Ltd Civil Appeal 22/92*, that “fraud is a very serious allegation to make and it is always wise to abide by the Civil Procedure Rules O.6 rule 2 and plead the fraud properly giving particulars of fraud alleged. Respondent claimed he filed HCCS No. 27/2007 which is still pending.

(See paragraph 5 of affidavit in reply). Counsel argued that the issue of fraud would be addressed in that civil suit. He argued that granting the current application would terminate civil suit 27/2007.

I am in agreement with counsel that as earlier found the issues raised including fraud need hearing of oral evidence and cannot be terminated by affidavit evidence. I sustain this issue by stating that fraud cannot be glossed over. The fact that Respondent has raised it is sufficient to require the court to address it as pleaded.

And paragraphs 7, 8 and 9 of the affidavit in reply show that there are elements of fraud that the respondent refers e.g. the fact that there was a caveat, but transfer went ahead without his knowledge or consent, the alleged transaction of mortgage which was illegally done (paragraph8). This issue is therefore terminated positively.

**4. Whether the application is maintainable in absence of a main suit**

The finding in issue 1 covers this issue. The procedure adopted has been found improper. This issue is therefore answered positively.

**5. Whether the application can be granted.**

The sum total of my findings above is that this application must fail for reasons that:

- i) It is not properly before court.
- ii) There is a pending court injunction against eviction and a pending civil suit 27/2007 which would be rendered nugatory if this application is granted.
- iii) There are issues for determination which the application raises that cannot be sufficiently handled by affidavit evidence.

The application is accordingly dismissed with costs.

**Henry I. Kawesa**

**JUDGE**

**06.08.2015**