

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 397 OF 2016

GRACE NAKIYEMBA NAKATE
(Suing through her lawful Attorney Nyandoi Philo).....PLAINTIFF

VERSUS

- 1. SSEMUGENYI GODFREY**
(Defending/Prosecuting his defence through his lawful Attorney Kiiza Simon)
- 2. SONKO RICHARD**
- 3. MUTAGEJJA JOSEPH MUKASA**
- 4. PINNACLE INVESTMENTS LIMITED**
- 5. COMMISSIONER LAND REGISTRATION.....DEFENDANTS**

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

The Plaintiff brought this suit against the Defendants jointly and severally for reliefs of damages for fraud and trespass; a declaration that the Plaintiff is the lawful owner of the land comprised in Busiro Block 405 Plot 786 at Wamala (*hereinafter the suit property*); a declaration that the memorandum of understanding dated 29th November , 2012 and the subsequent sale of the suit land are *null* and *void* for fraud; an order directing the 5th Defendant to cancel the entry of the names of the 1st Defendant from the certificate of title for the suit land and reinstate the Plaintiff's name thereon and directing the 5th Defendant to recall the special certificate of title issued in the names of the 1st Defendant; a permanent injunction, general damages; interest and cost of the suit.

In their defence, the 1st and 3rd Defendant intimated that they shall raise a preliminary objection at the earliest opportunity on grounds that the suit: contravenes statutory provisions, is barred by law, barren, *frivolous*, *vexatious*, and unsustainable in law, failed to disclose a cause of action against the Defendants and is an abuse of Court process. When scheduling was completed,

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(RULING)**

Counsel for the 1st and 2nd Defendant raised this preliminary objection. Both parties were directed to file written submissions pending a ruling on notice.

The facts for the Plaintiffs' claim as pleaded are that she is the lawful owner of the suit land having acquired it from her mother in 2009 and immediately possessed it, through her caretakers, despite being a resident in the U.K. That she was surprised on realizing from a search at the Land Registry that the suit land had been transferred to the 3rd following execution proceedings vide **HCT EMA NO.558 of 2014(Pinnacle Investments Ltd vs Grace Nakiyemba Nakate)**. The same land was later sold to the 1st Defendant by the 3rd Defendant. The execution resulted from Civil Suit No. 667 of 2013 at the High Court Commercial Division between the Plaintiff and the 4th Defendant to which the 4th Defendant had summarily sued the Plaintiff for a sum of 115,500,000/= (Ug.shs *One hundred fifteen million, five hundred thousand only*). This amount accrued from a memorandum of understanding (attached as Annexure GN4 on her plaint), for the supply, on credit, of construction material to the Plaintiff for construction of her residential. The Memorandum, to which the Plaintiff denies being a party, is signed also by the 2nd Defendant as Director for the 4th Defendant. The Plaintiff also denies any service of summons in the suit before the Commercial Court. It is from this background that Counsel for 1st and the 2nd Defendant's contentions are premised.

His first contention is that the Plaintiff is before Court trying to challenge the Judgment and Decree of the Commercial Division before the same are appealed against, amended or set aside. He adds that this Court cannot determine the validity of a Decree and an order from another Court of co-ordinate jurisdiction. Counsel relied on the **Court of Appeals' decision in Kahumba versus National Bank [2003] 2 EA 475.**

Counsel thus submitted that the right Court to entertain matters relating to execution is the High Court Execution and Bailiffs Division, and that that for challenging the Decree is the High Court Commercial Division. Counsel relied on Section 34(1) of the Civil Procedure Act Cap 71 and, Order 36 R.4 Civil Procedure Rules respectively. Additionally, Counsel relied on the **Supreme Court** decision of **Sinba (K) Ltd and Others versus UBC SCCA NO.03 of 2014.**

Counsel further argued that the 1st and 3rd Defendants being transferees of the suit land under a judicial sale are covered by **Section 34(1) of the** Civil Procedure Act. To support his view,

Counsel relied on the Court of Appeal's decision in **Francoise Mukyo versus Rebecca Mawanda and Another CACA No. 15 of 2008**. He also submitted while relying on Section 34(3) Civil Procedure Act that even in cases where it is questionable whether a person is a representative of a party to the suit, the Court executing the Decree empowered to determine such a question.

I am in agreement with the submissions of the Counsel for the 1st and 3rd Defendants. Since the previous suit had been finally determined by the High Court Commercial Division, the appropriate course available to the Plaintiff was to apply to that Court for reliefs against the Decree.

Counsel for the Plaintiff seems to be in agreement with this position too. He, however, contends that the case before this Court is founded on fraud as a cause of action. The gist of Counsel's contention is in paragraph 5 of the Plaintiff's plaint. Counsel, thus, submitted that although the reliefs sought in that paragraph may affect the previous Judgment and Decree, the case before this Court is purely distinct from the case that was before the Commercial Division. He relied on Section 7 Civil Procedure Act, the case of **Semakula versus Magala and Others [1979] HCB 90, and Kamunye and Others versus The Pioneer General Assurance Society Ltd [1971] EA 263**.

Counsel maintained that the Plaintiff is entitled to bring this suit in order to challenge the fraudulent actions of the Defendants. Counsel relied on the decision of **Court of Appeal, Kenya, of Jeraj Shariff and Co vs Chotal Fancy Store [1960] EA 374, Jonesco versus Beard (3), [1930] AC 298, and Florence versus Babirye Florence and 3 others Civil Suit No. 22/ 2014**. He thus prayed that the 1st and 3rd Defendants' preliminary objection be dismissed because the Plaintiff is before the right Court and, that her suit is not frivolous and vexatious so as to amount to an abuse of Court process.

Counsel for the 1st and 3rd Defendants did not dispute the case of **Mugisha Florence versus Babirye Florence and 3 Others (supra)**. He, however, argued that the case requires clear evidence of fraud and that what is pleaded by the Plaintiff are mere allegations. Ultimately, Counsel also prayed that the Plaintiff's suit be dismissed.

The authorities cited by Counsel for the 1st and 3rd Defendants, as above, dictate that the Court that passed the Decree has exclusive jurisdiction to determine matters relating to execution of a Decree between parties to the suit, or their representatives. Section 34(1) Civil Procedure Act in particular states:

“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”.

On that note, the Supreme Court decision of **Sinba (K) Ltd and Others versus UBC SCCA NO.03 of 2014** has concluded that “Section 34 is the correct procedure for determining issues arising out of execution of Decrees between parties to a suit”. The Executing Court in this respect would be the High Court Commercial Division or, the High Court Execution and Bailiffs Division.

Meanwhile, the wording “parties to the suit...or their representative” in the Section has been interpreted in **Francoise Mukyo versus Rebecca Mawanda and Another CACA 15 of 2008** to include transferees under a judicial sale who in this case are the 1st and 3rd Defendants. In addition to this, Section 34(4) Civil Procedure Act empowers the executing Court to determine any questions of whether other persons are representatives of the parties to the suit. In this respect, that Court would determine whether the 2nd Defendant is a representative of the 4th Defendant.

On the other hand, Counsel for the Plaintiff contends that the Plaint is founded on fraud by the Defendants and, that this goes beyond matters relating to execution. According to the authority of **A.V. Papayya Sastry and others v Government of A. P and Others Case No: Appeal Civil 5097-5099 of 2004 (Supreme Court India)**, as adopted by Her Ladyship in **Mugisha Florence vs Babirye Florence and Others (supra)**, it is stated thus;

“It is thus a settled proposition of law that a Judgment, Decree or order obtained by 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”.

Court in that case quoted the **Dutchess of Kingstone, Smith’s Leading Cases, 13th Edn., p.644** for the proposition that;

“...though a Judgment would be res judicata and non 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’. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a Judgment cannot be brought on the ground that it has been decided wrongly, namely, that on its merits, the decision is one which should not have been rendered, but it can be set aside, if the Court was imposed upon or tricked into giving the Judgment. It has been said; Fraud and justice never dwell together....”

I wish to observe that from the above authorities, it would appear as though one cannot challenge a Court order or Decree by way of a fresh suit before another Court. However such a Decree could be, challenged before the executing Court by way of an application. This meant, therefore, that the Plaintiff had the option to apply to the High Court Commercial Division either to set it aside for non-service or other good cause under Order 36 Rule 11 Civil Procedure Rules or, apply for other reliefs such as review under Order 43 Rule 1 and 2 Civil Procedure Rules.

This notwithstanding, other authorities, as above, also suggest that, exceptionally, one can impeach a Decree of Court by a fresh suit, if it can be established that the Judgment on it was obtained by fraud.

The case of **Jonesco vs Beard (3), [1930] AC 298, at p.300**, as adopted by this Court by **Her Ladyship Eva K. Luswata** in the case of **Mugisha Florence versus Babirye Florence and 3 Others Civil Suit No. 22 of 2014**, is accordingly instructive on this. It suggests that:

“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”.

Suffice to note that fraud has been defined by the Supreme Court in *Fredrick J.K. Zaabwe versus Orient Bank Ltd and 5 Others SCCA No. 4/2005* to include:

“means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprised, trick, cunning, dissembling, and any unfair way by which another is cheated...”

It is pertinent, therefore, to determine whether the Plaintiff’s pleadings raise issues of acts amounting to fraud committed on Court and, not mere allegations of fraud.

The root of the Plaintiff’s claim of fraud is that, the Plaintiff denies the existence of the alleged memorandum of understanding between her and the 4th Defendant. According to her pleadings, she states that the 2nd and 4th Defendant duped Court into believing that she was indebted to the 4th Defendant by presenting a false memorandum of understanding. She adds, in her reply to the 1st and 3rd Defendants’ written statement of defence, that the 2nd Defendant has never been a Director of the 4th Defendant by attaching a search statement from the Companies Registry. However, the said memorandum bears the signature of the 2nd Defendant signing as Director for and on behalf of the 4th Defendant. Further; the Plaintiff avers that the 2nd and 3rd Defendants connived with the 1st, 2nd, and 5th Defendants in order to defeat her interest in the suit land. She further pleaded that she was never served with any Court process yet the 2nd Defendant filed in Court an affidavit of service.

I do find that though the existence of the memorandum of understanding is contested by the Plaintiff, despite the same bearing a signature, purported to be hers; I am not inclined to believe that this raises issues of fraud. I hold this view basing on the fact that this case raises out of Court proceedings which, save for fraud, cannot be impeached.

I am not satisfied with the allegations of fraud alluded to by the Plaintiff regarding this Court process.

In conclusion therefore, I do not find this to be one such case where the exception would be invoked so as to annul the findings of the Commercial Court and the exception divisions. I am also not convinced by the allegation of the fact that there was non-service of summons as akin to fraud on Court so as to justify bringing a fresh suit. The remedy available to a party affected in such a case would be to apply to the Court that passed the Decree for setting it aside on the ground of non-service, as per Order 36 Rule 11 Civil Procedure Rules.

Counsel for the 1st and 3rd Defendant also contended that the Plaintiff's suit should be dismissed for failure to serve summons within 21 days of issuance. Counsel submitted that neither did the Plaintiff apply for extension of time within 15 days after the lapse of the 21 days. He relied on Order 5 Rule 2 and 3 Civil Procedure Rules. In reply to the 1st and 3rd Defendants' contention, Counsel for the Plaintiff wondered how the 1st and 3rd Defendants noticed of the matter so as to enter appearance. He argued that the 1st and 3rd Defendants were served but they refused to acknowledge receipt of the summons. Counsel also doubted whether this was a point of law within the meaning of the case of ***Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd [1969] EA 696.***

In his rejoinder, Counsel for the 1st and 3rd Defendants contended that the word SHALL in Order 5 Rule 1 (2) Civil Procedure Rules makes it mandatory to serve summons within 21 days. Counsel also relied on the case of ***Kanyabwera vs Tumwebaze (2005) 2 EA 86 at 93 and Rashida Abdul Karim and Another vs Suleiman Adrisi HCMA 09 of 2017.***

The position of the law, according to Order 5 Rule (2) Civil Procedure Rules, is that summons must be served within 21 days of issuance except; that time may be extended on application made within 15 days after expiration of the 21 days. According to the Supreme Court decision of ***Kanyabwera versus Tumwebaze (2005) 2 EA 86 at 93***, as rightly cited by Counsel for the 1st and 3rd Defendants, this provision is mandatory as non-compliance invalidates all summons which are not served with 21 days.

It has been rightly held that issuance and service of summons goes to the jurisdiction of the Court: ***Rashida Abdul Karim and Another versus Suleiman Adrisi HCMA 09 of 2017***. I wish to observe, contrary to the Plaintiff's Counsel, therefore, that issuance and service of summons is a point of law.

In the instant case the 1st and 3rd Defendant contend that they were served out of time despite there being no application for extension of time within which to serve. According to the authorities above, any purported service by the Plaintiff after 21 days was ineffective. That notwithstanding, Counsel for the Plaintiff's contention is that 1st and 3rd Defendants were served but they refused to acknowledge service. I wish to observe that this claim is unsubstantiated by any evidence.

I have perused the Court record for evidence of an affidavit of service but there is none. Perhaps the right course Counsel for the Plaintiff is to swear an affidavit showing the circumstances under which service was effected, as provided for under Order 5 Rule 16 Civil Procedure Rules. Unfortunately, this was never done. The only averment on the Court record that the 1st and 2nd Defendants were served but refused to accept service is by Counsel. This in my view amounts to giving evidence on the bar disguised as submissions.

I concur on this point with Counsel for the Defendants that the submissions by Counsel for the Plaintiff insinuate reliance on Article 128(2)(e) of the Constitution. This rule for service of summons is however mandatory as it gives Courts the root upon which litigation is ordered. This position is the one rightly cited by the Defendant's Counsel in rejoinder, under the decision in ***Rushinda Abdul Karim and Anor versus Suleiman Adris*** (*supra*), confirming the requirement is mandatory. This is because service of summons is not a mere technicality, but is rather the foundation/premise of the right to be heard, for its through this process that a party is given notice of the suit and called upon to defend himself/herself.

I am also in agreement with Counsel for the 1st and 2nd Defendant's argument that in this case, this fatality is demonstrable in the fact that as a result of non-service of summons, the 4th and 5th Defendants have never appeared and hence the proceedings continued without their input, which

is prejudicial to them. The Law is that the Court can never sanction what is illegal. See ***Makula International versus His Eminence Cardinal Nsubuga (1982) HCB 11.***

The failure to serve summons is one such illegality. The law under O.5 r3 (b) of the Civil Procedure Rules is that;

“Where summons have been issued under this rule and there is no application for extension of time..... the suit shall be dismissed”.

This is mandatory and I find that summons were not issued in accordance with the law. This suit cannot stand. It is dismissed with costs.

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Henry I. Kawesa

JUDGE

10/05/2018

10/05/2018

Kyeyune Albert for Plaintiff

Plaintiff absent.

Sebowa Francis Kabali for 1st, 2nd and 3rd Defendant

Lawful Attorney of the 1st Defendant Kiiza

3rd Defendant – Tagejja Joseph

Kyeyune: Matter for Ruling.

Court: Ruling delivered to the parties above.

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Henry I. Kawesa

JUDGE

10/05/2018

Court:

Right of Appeal explained.

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Henry I. Kawesa

JUDGE

10/05/2018