THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(EXECUTION DIVISION)

MISC. APPLICATION No. 2262 OF 2013

(Arising from H.C. – Land Div. – C.S. No. 600 of 2012)

MUGOYA KYAWA GASTER..... APPLICANT

VERSUS

1. GLOBAL TRUST BANK LTD.
2. SILVER SPOON LTD. :: RESPONDENTS

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

RULING

The Applicant herein was the Plaintiff in H.C.C.S No. 600 of 2012 (the head–suit herein), in which the 1st Respondent herein was the Defendant. The Plaintiff had pleaded with Court to restrain the Defendant from selling off properties comprised in Kyadondo Block 244 Plots 4506 and 4507 (herein the suit properties), which he (Plaintiff) had mortgaged to the Defendant as security for a loan; but however, upon his default to service the loan, the Defendant subjected to foreclosure by putting them up for sale. The parties however reached a negotiated settlement of the head–suit; and the Court entered a consent judgment obliging the Plaintiff to settle the loan amount owing to the Defendant, and to pay costs of the suit.

The Plaintiff (as Judgment/Debtor) defaulted in his obligation to settle the decretal amount, and so the Defendant (as Judgment Creditor) commenced execution proceedings. The period for the execution process however elapsed before the Court Bailiff had concluded any sale. The Applicant has deponed that after failing to execute the warrant of sale of the suit properties, the Court Bailiff allowed the 1st Respondent to sell off the suit properties to the 2nd Respondent by private treaty. It is this sale, which the Applicant vehemently impugns herein, contending that it was carried out in contravention of the law as it was done when the warrant of execution had expired; hence, Court should make a declaration to that effect and set the sale aside.

The Respondents both raised preliminary points of law. First, is that the Applicant has no *locus standi* to challenge the sale of the suit properties, since by his admission he is not the registered

proprietor of the suit premises. Second, is that there was no Court order forbidding the sale, as an administrative communication by the Registrar to that effect did not amount to a Court order. Third, is that this impugned sale was not carried out by the Court Bailiff; but instead it was done by the 1st Respondent as a mortgagee. Further, the sale was effected pursuant to the provision in the mortgage deed permitting such sale without recourse to Court; accordingly, any objection to the sale should be brought not under the rules regarding execution, as this one is; but rather through a fresh suit.

On the issue of locus, a party to a suit may protest the manner a decree has been executed, if the contention is that such execution although targeting the judgment debtor, has been done contrary to law. On the other hand, a party may object to a process of execution contending that the property attached is not subject to execution as such party is not the judgment debtor in the suit from which the decree arises; and yet the property attached belongs to the objector. Had the sale taken place pursuant to the warrant of execution, and before the expiry of the warrant of execution, the issue for determination would simply have been whether the sale was conducted in breach of any rule regarding execution of Court decrees.

The Applicant (the judgment debtor) is not the owner of the suit properties. It is Kibuli Girls High School, (the registered proprietor thereof), which is; and has the locus to challenge the execution through an objector application. However, from the evidence, Kibuli Girls High School granted the Applicant power of attorney to mortgage the suit properties to the 1st Respondent for a credit facility. The Donor also, therein, assumed the status of a surety/guarantor for the intended credit facility. Furthermore, the Donor mandated the Donee to protect the Donor's interests in the suit properties. Therefore, the Applicant, just like the Donor of the power of attorney, has locus to challenge any execution process that is conducted contrary to law, and would imperil the interest of the Donor in the suit properties.

On the contention that an administrative communication by the Registrar, forbidding the sale, did not amount to a Court order, it is true that a warrant is an order of Court for execution. As such, there must be an order of Court to stay or set it aside. Indeed, as between the Bailiff and the Court, it is always prudent to accord due respect to an administrative directive from Court staying execution. Where a Bailiff receives such directive, but nevertheless proceeds to conduct the execution, such Bailiff runs the risk of facing disciplinary action. Similarly, where a purchaser of property sold under execution had prior notice of an administrative directive

restraining the Bailiff from proceeding with the sale of the property, and the sale is challenged in Court, the purchaser would be considered by Court to have come to it with unclean hands.

It is the duty of a purchaser of property under execution to, first, be satisfied about the validity of the execution process regarding the property under sale. Where such property is sold in non–compliance with the warrant of execution, such as for instance after the warrant has already expired, or at a ridiculously low price not reflecting the value of the property because there was no prior valuation of the property, such sale cannot be valid; and must be set aside. However, in the instant case, the Respondents contend that the impugned sale was not carried out in execution of the decree from the suit between the Applicant and the 1st Respondent; but, rather, on the authority of the mortgage contract between the two. Indeed, they have produced evidence in support of this contention.

There is however conflicting evidence in this regard. The Court Bailiff is on record as having filed return purporting that he had carried out the execution, while on the other hand he states that the sale to the 2nd Respondent was carried out by the 1st Respondent. The Respondents' case, as evidenced by the sale agreement on record, is that the impugned sale was carried out by the 1st Respondent, under private treaty, pursuant to the mortgage contract. In this, the Court Bailiff does not feature anywhere. Since the warrant of execution issued to the Bailiff had expired, and it was not renewed, sale of the properties by the Bailiff on the authority of Court warrant would be invalid. If on the other hand the sale, whether or not it was done by the Bailiff, was truly carried out outside the authority of Court, then there must be evidence that such sale was permissible; and it is this I now have to turn to.

To begin with, there is a provision in the power of attorney granted to the Applicant, that the credit facility would be principally for the benefit of the Donor (Kibuli Girls High School), which intended there from *'to benefit from the proceeds of use of the loan by the Donee'* (the Applicant). The Donor provided in Clause 5 of the power of attorney as follows: –

"5. I hereby confirm that as the principal beneficiary or beneficiaries of the loan/credit facility advanced, I have no objection to the above mentioned properties being realized in the event that there is a default in the re–payment back of any installment or arrears on the loan/credit facility or the fact the loan/credit facility has been recalled for full re–payment by Global Trust Bank and re–payment has not been effected within the notice period."

The Applicant entered into a mortgage agreement and secured the credit facility from the 1st Respondent pursuant to the provision in the power of attorney; and indeed, in the mortgage deed, the role of the Donor of the power of attorney as guarantor was clearly spelt out. Furthermore, Clause 8 of the mortgage agreement provided that the parties to the mortgage agreement had agreed and declared: –

"8. That the mortgage debt and interest hereby secured shall immediately become payable with or without demand in writing or rectification of a default and non compliance with a demand for payment or failure to rectify default within the provided period, shall entitle the Mortgagee to to the statutory ***power of sale by the Mortgagee of the mortgaged property*** *or any other remedy available or by law without any further or other notice to the Mortgagor."*

Clause 10 of the mortgage agreement provided for the Mortgagee's power of sale arising out of default in payment. It is clear from it that upon the Mortgagor's default in payment, and after the expiry of the time provided for rectification of the default, if the default has not been rectified, the Mortgagee may in addition to any statutory powers conferred on the Mortgagee by the Registration of Titles Act, and the Mortgage Act, or under any general law, and without any further notice to the Mortgagor and/or Donor/Surety, exercise the power of sale of the mortgaged property. This it can do ***'by private treaty or public auction without recourse to a court of law'***; and it is further provided that the Mortgagor ***'hereby irrevocably consents to the carrying out of any such sale by private treaty or public auction and without recourse to a court of law'***.

There is no dispute that the Applicant defaulted in servicing the credit facility, which the 1st Respondent extended to him for his benefit and that of the Donor as was stipulated in the power of attorney; and the 1st Respondent commenced foreclosure process without recourse to Court pursuant to the provision in the mortgage agreement. Most remarkably here, it was not the 1st Respondent which initiated Court action following the default by the Applicant. Rather, it was the Applicant who instituted the suit seeking to restrain the 1st Respondent from continuing with the process of foreclosure. The negotiated settlement, by which the suit was resolved, had no provision either terminating the mortgage contract, or waiving the 1st Respondent's right to proceed under the mortgage contract.

That being so, the 1st Respondent had two options to choose from to realize what the Applicant owed it, under the mortgage contract. It could either proceed by way of execution of the Court

decree, or in the alternative realize what the Applicant owed it pursuant to the provisions of the mortgage contract, which was still extant. The 1st Respondent began off by way of execution of the Court decree from the suit which the Applicant had forced onto it. The execution was however inconclusive as the warrant expired before any sale was effected. From the evidence, the 1st Respondent chose not to renew the warrant of execution, but instead proceeded under the mortgage contract to realize what was owing from the Applicant. The evidence is that, after the expiry of the warrant, the 1st Respondent sold the suit properties off by private treaty twice; the second sale being to the 2nd Respondent, after the first purchaser had defaulted in his obligation to honour the terms of that sale.

The Applicant's own evidence, in support of the application, is that the Court Bailiff *'allowed the 1st Respondent to sell off the suit properties to the 2nd Respondent by private treaty'*. Accordingly then, the impugned sale was not conducted by the Court Bailiff or under authority of Court. In the light of the provisions of Clause 5 of the power of attorney, and Clauses 8 and 10 of the mortgage deed**,** as shown above, the 1st Respondent could not be faulted for proceeding under the mortgage contract to realize what was owing to it from the Applicant. Since, on the evidence, this sale was carried out not pursuant to the Court decree but rather pursuant to the provisions of the mortgage contract between the Applicant and the 1st Respondent, entered into of their free will and volition, I am unable to disturb it.

True, the Bailiff has made returns purporting to have carried out the sale and has had his bill taxed on that basis. However, the evidence on record is to the contrary; and, he himself retracts this claim. Whatever role he played in the sale of then suit properties after the expiry of the Court warrant, could only have been as an agent of the 1st Respondent; and it is the 1st Respondent which is liable to him for whatever claim he might have for services rendered to it outside of Court authority. Accordingly, I disentitle the debt collection fees award to the Bailiff by Court, as having been fraudulently claimed and so wrongfully given. Similarly, the process of obtaining vacant possession of the suit properties, which the Bailiff has sought to effect purportedly based on the expired warrant, had no basis in law.

Any move for delivery of vacant possession of the suit premises must therefore proceed on the basis of foreclosure and sale pursuant to the mortgage contract between the Applicant and the 1st Respondent. In the result, this application must fail. I disallow it as having no merit. The Applicant is plainly in perpetual default of the contract he entered into freely. Courts of law

should guard against any endeavour by any party that has the effect of making them complicit in perpetuating default in honouring the terms of a contract. I award costs of the application to the Respondents.

Alfonse Chigamoy Owiny – Dollo
JUDGE

08 – 07 – 2014