THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(EXECUTION DIVISION)

MISCELLANEOUS APPLICATION No. 1520 OF 2013

(Arising from EMA No. 2575 of 2012; arising from Misc. Applica. No. 1427 of 2013, arising from H. C. (Fam. Div.) Civ. Suit No. 119 of 2007)

MARY ENGWAU ACANIT…..... DEFENDANT/APPLICANT

VERSUS

MUWANGA JACKSON *t/a Kitavujja General Auctioneers* **..... BAILIFF/RESPONDENT**

VERSUS

1. AISU ENGWAU PATRICK
2. OKIRIA EMMANUEL :: PLAINTIFFS
3. ARUTO FLORENCE
4. ATAI SARAH

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

RULING

The facts of this application are that the Applicant and the Plaintiffs, as beneficiaries of the estate of her late husband and father respectively, consented in Court, to have property comprised in LRV 2515 Folio 12 Plot 40 Lumumba Road, Kampala (herein the suit property) sold under execution; and the benefit shared out amongst them. For this, Court appointed the Bailiff/Respondent to carry out the execution; which he did, through an advert. He then made returns indicating that he had disposed of the suit property for U. Shs. 2,000,000,000/= (Two billion only). However, the Applicant came across a suspicious payment of another sum of U. Shs. 400,000,000,/= (Four hundred million only) to a third party, over the suit property. Thus, the Applicant seeks an order of Court directing the Bailiff/Respondent to pay that extra sum of money over to the estate.

I find that the application is properly before me, in the light of the provisions of section 34 of the Civil Procedure Act, which is that: –

"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."

In the case of ***Francis Micah vs Nuwa Walakira [1995] KALR 361*** at p. 373, Mulenga JSC, reproduced with approval a passage from Rao's All India Reporter Commentaries on the Indian Code of Civil Procedure (10th Edn.) Vol.1 at 583, which with regard to a section of the Code similar to our (now) section 34 of the Civil Procedure Act, commented as follows: –

> *"This section has been enacted for the purpose of checking needless litigation and with a view to enable parties to obtain adjudication of questions relating to execution without unnecessary expenses or delay, which a fresh trial may entail. ... ... In other words, where there is an executable judgment, no suit lies for the enforcement thereof, or for determination of the questions specified in the section. The object of the section being to save unnecessary expense and delay and to afford relief to parties finally, cheaply and speedily without the necessity of a fresh suit, it must be construed as liberally as the language would reasonably admit of. It embraces all matters connected with the execution of an existing decree, between the parties or their representatives, and covers all questions relating to the execution, discharge, or satisfaction of the decree. It does not matter whether such questions arise before or after the decree has been executed; and the fact that an alternative remedy by suit is provided in certain circumstances, or that the application was made under another provision of the Code, does not prevent the section from being applied for the decision of the questions falling within its scope."*

In the matter before me, the Applicant contends that the U. Shs. 400,000,000/= (Four hundred million only) paid to Mwase Stephen Ntalo, a business partner of Muwanga Jackson (the bailiff), was in fact part of the proceeds from the sale of the suit property; hence, this was money which the bailiff deliberately chose not to declare. She also contends that since the Bailiff/Respondent was nominated by the Plaintiffs' Counsel, the Plaintiffs should be held liable for the fraudulent under declaration of the proceeds of the sale by the bailiff. The parties made affidavit depositions, replete with documentary evidence, in support of their respective cases.

When the matter came up for hearing, and upon hearing Counsels for the parties hereto, I realised that there was need to investigate the issue of the alleged payment of U. Shs. 400,000,000/= (Four hundred million only) to Mwase Stephen Ntalo. Accordingly, to enable

Court arrive at a just decision, I directed the Registrar Execution, to carry out an investigation into the matter in the following terms: –

> *"This seems to me to be raising a purely administrative matter for the Registrar who issued the warrant to resolve. If indeed the bailiff declared a figure less than what he received, it is a matter of evidence, which should be adduced before the Registrar. Upon his resolution of the complaint, if there is still a matter which requires the intervention of a judge, then it can be placed before a judge for that purpose. Accordingly, the file is sent back to the Registrar to conduct the inquiry as to the truth or otherwise of the complaint by giving the parties a hearing and make a report to this Court."*

The Court record shows that the learned Registrar issued witness summons to the people affected by the claim of the Applicant; and, as well, to the Manager for Bank of Africa, Equatoria Branch, ordering for the production of all details pertaining to Account No. 2097810004 opened in the names of Muwanga Jackson and Ntale Stephen Mwase. Indeed the learned Registrar carried out the investigation I had directed should be done; and Counsels then filed written submissions in support of the respective parties' case. The learned Registrar made a finding that the purchase price of the suit property was U. Shs. 2,000,000,000/= (Two billion only); and that this was the amount of money the bailiff was paid, which he duly declared.

I however find the Registrar's report on her investigation seriously flawed; as she ignores crucial evidence on record. First, although Muwanga Jackson deponed that he does not know Ntale Jackson Mwase, the evidence adduced by Bank of Africa, on Court orders, is clear that both Muwanga Jackson and Ntale Stephen Mwase were very well known to each other at the time of the sale of the suit premises in execution. They were both introduced to the Bank of Africa, Equatoria Branch, by the Chairperson LC1 of Kitooro village as residents of that village. This enabled them to open and jointly operate an account with the bank, in the business name of Kitavujja General Agencies; where both are shown as partners. Notably, Court had issued the warrant for execution, to Muwanga Jackson t/a Kitavujja General Agencies.

Second, the evidence from the bank also shows that money totaling U. Shs. 2,000,000,000/= (Two billion only) was remitted to this joint account from an account operated by M/s St. Catherine's Clinic; and this money was then remitted to the Counsel for the Applicant, as the purchase money, on the instructions of Muwanga Jackson and Ntale Stephen Mwase. Again notably, M/s St. Catherine's Clinic was not the declared buyer of the suit property in the sale by

execution; as the declared buyers of the suit property are Patricia Kalende and Joanita Nakiwala. Third, when the parties appeared before the Registrar Execution, where they agreed on the sale of the suit property by execution, the Defendant/Applicant explicitly named a reserve price of US$ 1,000,000 (US Dollars One Million only) for the sale.

Accordingly, it was incumbent on Muwanga Jackson as the business partner of Ntale Stephen Mwase in Kitavujja General Agencies (the executing firm) to explain to Court why, on the day after the aforesaid sale under execution, his partner Ntale Stephen Mwase and Dr. Eva Kajumba Muganga of St. Catherine's Clinic executed the otherwise inexplicable 'Memorandum of Understanding' by which Dr. Eva Kajumba Muganga undertook to pay Ntale Stephen Mwase U. Shs. 400,000,000/= (Four hundred million only), purportedly for his *'role and handling of the sale of'* the suit property; and for which part payment of U. Shs. 200,000,000/= (Two hundred million only) was made at the execution of the memorandum.

This is a matter that Muwanga Jackson and Ntale Stephen Mwase as partners in Kitavujja General Agencies were best placed to explain to Court; and for which Muwanga Jackson had a special burden to discharge owing to the provision of section 106 of the Evidence Act, (Cap. 6, Laws of Uganda 2000 Edn.) which states as follows: –

"106. Burden of proving, in civil proceedings, fact especially within knowledge.

In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person."

On the evidence shown above, no one could be fooled into believing that Dr. Eva Kajumba Muganga paid such a huge amount of money to Ntale Stephen Mwase merely to protect her interest, even if it were accepted that she was the real purchaser of the suit property; and the ostensible purchasers were merely fronted by her. To the contrary, it is my finding, from the evidence above, and Counsels' respective submissions thereon, that Muwanga Jackson (the bailiff herein) and Ntale Stephen Mwase acted in concert; at least for the purpose of the sale of the suit property. They were both complicit in the evil scheme to falsify the declaration of the purchase price of the suit property. This was for no other purpose than to defraud the beneficiaries of the estate of what was due to them under the sale by execution.

I am convinced on a balance of probability, and I do find that Muwanga Jackson t/a Kitavujja General Agencies sold the suit property at the price of U. shs. 2,400,000,000/= (Two billion four

hundred million only); and not the U. Shs. 2,000,000,000/= (Two billion only), which he falsely declared and remitted to Counsel for the Applicant herein. This was of course an abuse of the trust placed in him by the Registrar Execution to conduct the sale on behalf of Court. Accordingly then, since Court has laid bare this falsehood, Muwanga Jackson must account for the outstanding balance of U. Shs. 400,000,000/= (Four hundred million only) from the proceeds of the sale by execution he was entrusted with, for it to be distributed to the beneficiaries in the manner they had agreed to.

The Applicant contends that the Bailiff/Respondent was an agent of the Plaintiffs in the execution process since the Plaintiffs' Counsels nominated him to Court to carry out the execution. I do not agree. While it is a wrong practice for litigants to nominate to Court their preferred bailiffs to carry out execution; nevertheless, in carrying out the execution entrusted to him or her by Court, a bailiff remains an agent of the Court, and not of the beneficiaries of the execution. However, this is so, only as long as the bailiff does not exceed the powers issued to him or her by Court. In ***Harriet Namakula vs Registered Trustees Kampala Archdiocese, Misc. Application No. 1025 of 1997,*** arising from ***HCCS No. 47 of 1996***, Ntabgoba PJ., made it clear that: –

> *"A lot more was also argued as to who should pay the proceeds of sale. My opinion is that it is neither the judgment creditor, nor the purchaser but the Court bailiff. This is because ... the Court bailiff, in selling the motor vehicle, was no agent of the judgment creditor and, certainly, not of the purchasers. The Court bailiff was the agent of the the Registrar of the High Court who authorised him by a warrant to, inter alia, sell the attached property. ...* [W]*here the bailiff, without the participation or active involvement of the judgment creditor, undervalues the property and sells it at the undervalue, unless he can prove that the act was not willful, then he cannot appeal for immunity."*

I do not find any evidence in the case before me that any of the parties to the suit from which the consent decree arose colluded with the appointed bailiff in carrying out the execution, or fraudulent under declaration of the proceeds of the sale of the suit property. To the contrary, the Plaintiffs are as much victims of the bailiff as the Defendant/Applicant is. I therefore hold the bailiff alone responsible for the loss occasioned to the parties hereto by his under declaration of the purchase price of the suit property.

In the event, I make the following findings and orders: –

(i) The Bailiff/Respondent herein sold the suit property in execution for the sum of U. shs. 2,400,000,000/= (Two billion four hundred million only); and therefore, the U. Shs. 2,000,000,000/= (Two billion only) he declared both to Court and the beneficiaries as the purchase price was a false and a fraudulent under declaration.

(ii) The Bailiff/Respondent must henceforth account to Court, for the benefit of the suit estate, for the outstanding balance of the sum of U. Shs. 400,000,000/= (Four hundred million only) out of the sale by execution.

(iii) The Bailiff/Respondent shall pay the Defendant/Applicant and the Plaintiffs, the costs of this application.

Alfonse Chigamoy Owiny – Dollo
JUDGE

14 – 10 – 2015