

IN THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

EXECUTION AND BAILIFFS DIVISION

MA NO. 670 OF 2019

(ARISING FROM EMA NO. 1850 OF 2018)

(ARISING FROM LAND DIVISION CS NO. 735 OF 2014)

JOHN KAFEERO SSENTONGO.....APPLICANT

V

1. MUGENYI FRANCIS

2. KIGOZI DIRISA.....RESPONDENTS

BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO

RULING

Introduction

1. By notice of motion filed on April 11, 2019, the Applicant John Kafeero Ssentongo moved court under section 34 of the Civil Procedure Act for the following orders:
 - a) The execution and attachment and sale of the Applicant's land comprised Buddu Block 323 Plot 213, Kairikiti, Masaka Municipality be set aside.
 - b) The 2nd Respondent be ordered to vacate the Applicant's land.
 - c) Further execution against kibanja land situate at Nalukolongo, Kajumbi zone be stayed pending determination of the application.
2. The motion was supported by affidavit of the Applicant while the 1st Respondent Mugenyi *Francis* filed two affidavits. He also relied on affidavit in reply of Dr. Ochwo Ochieng Ojomok. The 2nd Respondent Kigozi Dirisa relied on his affidavit in reply.

Background

3. By a decree dated July 26, 2018 in CS No. 735 of 2014, it was ordered as follows:
 - a. The Defendant (Kafeero) shall pay the Plaintiff(Mugenyi) a sum of 260,000,000/ being the full and final settlement of the Plaintiff's claim.

- b. The said sum be paid within a period of four months from the date of endorsement of the consent judgment.
- c. The Plaintiff retains the certificate of title for land comprised in Buddu Block 232, Plot 213 Masaka and shall only surrender it to the Defendant upon receipt of the full sum.
- d. The Plaintiff surrenders possession of the Nalukolongo property to the Defendant upon receipt of the full sum.
- e. At the execution of the consent judgment, the Plaintiff wrote a letter of no objection to the Defendant processing a certificate of title from KCCA.
- f. On execution of the consent judgment, the Plaintiff erases the writing on the walls of the property at Nalukolongo indicating the property is subject of the court.
- g. In the event the Defendant fails to pay the agreed sum in full within the stipulated time, the Plaintiff shall be at liberty to resort to execution.

EMA NO. 1850 OF 2018

- 4. According to para. b above, time began running from the date of endorsement of the consent judgment which is March 20, 2018. The fact that the execution process commenced on August 22, 2018 when EMA No. 1850 of 2018 was registered, means the four months' time limit for the Applicant to pay the decretal sum had lapsed.
- 5. The judgment creditor Mugenyi applied to execute the decree by attachment and sale of Land comprised in Buddu Kairikiti Block 323 Plot 213 Masaka. After several appearances by both parties before the deputy registrar on a notice to show cause, execution was cleared on October 15, 2018 and on October 18, 2018, the deputy registrar issued a warrant of attachment and sale to bailiff Mugume for Block 323 Plot 213 at Masaka. The warrant was to be returned by November 19, 2018. Bailiff Mugume of Watts Business Associates then advertised the warrant in the Daily Monitor newspaper of October 22, 2018 with a notice the sale would take place unless the judgment debtor pays the decretal sum within 30 days thereof.
- 6. Meanwhile a valuation report of the attached property was submitted by Dr. Ochwo Ochieng Ojomoko on November 13, 2018 with a forced sale value of 130,000,000/-. On November 14, 2018, the deputy registrar authorised sale by public auction to the highest bidder and not below the approved sale value recommended by the valuer in the valuation report. on November 22, 2018, Dirisa Kigozi submitted his bid for the property to bailiff Mugume with an offer of 130,000,000/ and on November 23, 2018, a sale agreement was concluded at a price of 130,000,000/.

This application

7. On March 11, 2020, Mr. Wacha appeared for the Applicant while Ms Namuswe Veronica appeared for the 1st Respondent. The 2nd Respondent Edirisa was absent and I was informed by counsel Wacha that he had been served by substituted service. Upon this submission, I ordered hearing of the application to proceed. The record shows that the 2nd Respondent was served through monitor newspaper dated August 19, 2020. On the basis of proof of service, I shall proceed to adjudicate this dispute.

8. Section 34 of the CPA permits parties to a decree who have any question relating to the execution, discharge or satisfaction of the decree to seek redress from the court that executed the decree.
I have carefully considered submissions of both counsel and read the authorities they have availed me. The gist of the Applicant's complaint is three fold.
 - a. That the attachment and sale was done contrary to the law.
 - b. The valuation of the property was done by a person who did not possess a practicing certificate to practice as a surveyor.
 - c. The property was under- valued.

Whether the attachment and sale was done contrary to the law.

- 10 Rather than canvass the questions as framed, counsel for the Applicant addressed one broad question that he framed as follows: whether the execution, attachment and sale of the Applicant's property can be declared null and void?

- 11 Counsel for the Applicant dwelt on the qualifications of Dr. Ochwo that he then linked to a claim of under-valuation as a basis for possible impeachment of the sale. Relying on the affidavit evidence of the Applicant, counsel submitted that Dr. Ochwo does not appear on the Roll of Registered Surveyors and has never been issued with a practicing certificate and neither was he licenced.

- 12 Counsel for the 1st Respondent relied on the supplementary affidavit of Dr. Ochwa that shows he is a registered member of the Institute of Surveyors of Uganda since June 18, 1982 Registration NO. 72 and holds a diploma in valuation issued by the Lands and Surveys departmental examination board, Entebbe on March 23, 1989. Although Dr. Ochwo deposed that has a practicing certificate, it was not attached to his affidavit. He further availed the constitution of the Institution of surveyors as proof he is regulated by the

Institution and a recommendation by Rebecca Kasule, Duty officer Institution of Surveyors, dated September 9, 2014 that he is member of the institution.

13 Counsel for the Applicant cited section 19(1) of the Surveyors Registration Act Cap. 275 that stipulates that the

- a. The Registrar shall issue a practicing certificate to every surveyor whose name is on the register and who applies for the certificate in the prescribed form.
- b. A practicing certificate shall remain valid for one year and renewable annually.
- c. No person shall engage in surveying unless a holder of a valid practicing certificate.

14 A close look at the Surveyors Registration Act Cap. 275 reveals that registration and licencing under the Act is voluntary with no sanctions for non-registration. Section 1(2) of the Surveyors Registration Act makes a reference to the Survey Act. It is stipulated therein that the Act shall be read and construed as one with the Survey Act so that provisions of the Survey Act relating to the establishment, functioning and management of the surveyors licensing board and to the registration, licensing and disciplining of land surveyors shall be superseded by the corresponding provisions of the Surveyors Registration Act.

15 Apart from the fact that Dr. Ochwo is not registered under the regulatory law, Dr. Ochwo did not get a current recommendation from the Institution of Surveyors but preferred to rely on a 2014 recommendation. While registration under Cap. 275 is not mandatory, it is the only means of ensuring quality valuation of property and accountability should a valuer make negligent statements on which parties rely but later suffer loss.

16 Dr. Ochwo deposed that he works with OSI International Consultants with no known physical address. The valuation report gives the address as 'P.O. Box 9480, Kampala' which makes it untraceable. Neither is the firm's specialty given. '*Consultancy*' is too wide to identify the firm as specialists in valuation and surveying.

17 Furthermore, he deposed that he holds a diploma in Valuation which is potentially sufficient academic qualifications for registration under Cap.

275 but he has chosen not register. Experts who appear before courts must be certified by the relevant regulatory bodies as possessed of the necessary competencies in the relevant discipline. It is irrelevant that registration is voluntary because the court shall recognise only those who are licensed under the law and any expert who ignores to get the necessary accreditation does so at his or her own peril while parties who engage those who ignore the law do so at their own risk.

18 Section 15 thereof prescribes qualifications for registration –

a. If he or she is a fellow of the Association of Surveyors of Uganda or a corporate member of any other institution of surveyors, by whatever name called, recognised for the time being by the board as furnishing sufficient guarantee of academic knowledge of, and practical experience in surveying;

b. He or she is a holder of a degree, diploma or certificate awarded by a university or school of surveying or photogrammetry recognised for the time being by the board and has had not less than three years' practical experience of such nature as to satisfy the board as to his or her competence to practice as a professionally qualified surveyor.

19 The import of section 18 is that Dr. Ochwo who is a member of the institution of surveyors, qualifies to be registered but he chose not to. This means this court cannot casually recognise the Institution of Surveyors in the absence of proof of such recognition by the Surveyors Registration Board. Moreover, a copy of the Constitution availed to me is not certified, does not seem to have any provision for discipline of members and is incomplete.

20 For the reasons given above, namely, that the description of the consultancy firm OSI under which Dr. Ochwo operates is silent on expertise in valuation of properties; the diploma certificate availed to court is not certified; the constitution of the Institution of Surveyors is incomplete and not certified; and the omission by Dr. Ochwo to register under the Surveyors registration Act makes it more probable than not that Dr, Ochwo is not qualified to carry out valuation of properties. Although the diploma and constitution bear a stamp by a commissioner of oaths, the person commissioning the oath is not identified by name.

21 Counsel for the Applicant submitted that lack of qualification by the expert was an illegality in law within the precedent of Makula International but I

disagree with this analysis and instead find that lack of qualifications means there was no valuation of the property in law.

22 Counsel for the 1st Respondent submitted that the registrar of the Execution Division approved the valuation and therefore the subsequent sale is valid. Obviously, since Dr. Ochwo was not qualified to carry out valuation of property, the approval by the deputy registrar was and is immaterial at this point. Indeed, a letter by deputy registrar Musse Musimbi dated September 13, 2016 is an indictment of Dr. Ochwo's credentials as the registrar observed he is not licenced under the Act.

23 Furthermore, for purposes of triggering reforms in the registry, it is always prudent for a registrar to appoint a valuer and not to leave this task to the bailiff because the execution function is the responsibility of the registrar and not the bailiff. The appointment of valuers should be complimented by a list of valuers accredited by the Surveyors board from which the registrar selects. The issue raised by the Applicant is therefore more fundamental than meets the eye.

24 Regarding the value recommended by Dr. Ochwo, 124,110,000/ as forced value and 206,850,000/ as the market value. Counsel for the Applicant submitted a valuation of the property in 2012 where East African Consulting Surveyors and Valuers gave forced sale value at 240,000,000/ and market price value at 310,000,000/. The difference in value is quite substantial and given my finding that Dr. Ochwo was not qualified and that there was no valuation in law, I need say no more about these figures.

25 I want to recommend that in future, the registrar must serve the judgment debtor the Order of sale so as to give an opportunity to the debtor to challenge the valuation under Order 50 rule 8 of the Civil Procedure Rules. The current position where the debtor only knows of the value after the sale needs reform to pre-empt post execution litigation.

Whether the sale to the 2nd Respondent can be set aside

26 Counsel for the 1st Respondent /judgment creditor submitted that the sale ought not be set aside because it was conducted with full knowledge of the Applicant. Paras. 5 and 11 of the affidavit in reply of Mugenyi were cited in support. I have examined a letter from Magna Advocates for the Respondent dated March 29, 2016 addressed to KGN Advocates and a second letter from KGN Advocates dated same date of March 29, 2019 both of which make reference to the Masaka property and Nalukolongo property. Apart from the fact this is privileged communication on behalf of

their clients and therefore inadmissible in evidence under section 125 of the Evidence Act, the letters are insufficient evidence of the Applicant's consent to the impugned valuation of Plot 213 Block 323, Masaka by Dr. Ochwo.

27 I rely on the Supreme Court precedent of **Lawrence Muwanga v Stephen Kyeyune Civil Appeal No. 12 of 2001** where the court cited with approval **Chitaly & Rao code of Civil Procedure** that

a judicial sale, unlike a private one, is not complete immediately it takes place. It is liable to be set aside on appropriate proceedings'

28 Counsel for the 1st Respondent cited MA No. 172 of 2015 arising from **EMA NO. 2052 of 2014 Green Pastures ltd v Cooperative Bank** where Madrama J as he then was declined to set aside a sale after attachment. The facts of this Green pastures case are distinguishable from the present one where the valuation was done by a person not qualified in accordance with the law.

29 Having found that that the property comprised in Plot 213 Block 323 Masaka was not valued by a qualified valuer, the sale shall be set aside.

Whether the execution of kibanja situate at Nalukolongo, Kajumbi Zone along River road, Kampala ought to be set aside.

30 There is merit in this prayer because the application for execution in EMA NO. 1850 of 2018 was for attachment of Plot 213 Block 323, Nyendo, Masaka only. In the absence of an application to attach the Nalukolongo property, the current attempts to sell it in execution are without legal basis as no application has been made for its attachment and nor has a warrant of attachment been issued.

Remedies

31 Having set aside the sale of Plot 213 Block 323, in giving remedies, I shall bear in mind that a third party had already paid 130m for it to the judgment creditor. This means that the judgment creditor shall refund the 2nd Respondent Kigozi Edirisa his money. The 1st Respondent is at liberty to commence execution proceedings afresh since the initial application has been extinguished by this Ruling.

32 Regarding the prayer for the 2nd respondent to vacate the land, the Applicant shall seek redress by summary procedure.

Orders

- a. The sale of plot 213 Block 323, Nyendo, Masaka is set aside.
- b. The judgment creditor Mugenyi Francis shall refund the 2nd Respondent Kigozi Edirisa 130,000,000/ he paid as purchase price under the invalidated sale.
- c. The 1st Respondent is at liberty to commence execution proceedings afresh to recover the judgment debt since the initial application has been extinguished by this Ruling.
- d. I decline to order vacant possession for Plot 213 Block 323 as it is the responsibility of the Applicant to invoke the prescribed procedure to secure possession.
- e. A declaration shall issue that the Nalukolongo property is not currently under attachment.
- f. Costs of this application assessed at 3,000,000/ to be paid by the 1st Respondent to the Applicant.

DATED AT KAMPALA THIS 4TH DAY OF SEPTEMBER 2020

HON. LADY JUSTICE HENRIETTA WOLAYO

Legal representation

KGN Advocates for the Applicant

Magna Advocates for the 1st Respondent