THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION, MADRAMA AND MULYAGONJA, JJA)

CIVIL APPEAL NO 229 OF 2021

(Arising from High Court Land Division Miscellaneous Application No. 958 of 2016) All arising from High Court Land Division Miscellaneous Application No. 1054 of 2015)

MRS SHIFA LOVEWOOD} ..... APPELLANT

VERSUS

1. LUYIMA GODFREY}
2. NAMAZZI EVA} .....RESPONDENTS

(*Appeal against the Ruling and Order of the Land Division of the High Court of Uganda delivered by the Keitirima J on 18th September 2020 in Miscellaneous Application No. 958 of 2016*)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

This appeal arises from the ruling of the High Court in which the High Court struck out the affidavit in reply of the respondent who is now the appellant in this appeal and thereby allowed the application in Miscellaneous Application No 958 of 2016 as unopposed.

The background to the appeal is that the respondents filed Miscellaneous Application No 958 of 2016 seeking for orders that the court reviews and sets aside the decision of the Nakawa High Court of setting aside the sale of the suit property in Miscellaneous Application No 1054/2015. Secondly, they sought an order for the Commissioner of land registration to implement an effective vesting order issued by the High Court Execution and Bailiffs Division and for the costs of the application to be provided for.

For purposes of determination of this appeal, the grounds of that application are not material. What is material is that the applicants in Miscellaneous Application No 958 of 2016 (who are now the respondents to this appeal, objected to the affidavit in reply filed on behalf of Mrs Shifa Love Wood and the learned trial judge considered the preliminary objection. The preliminary objection was that Priscilla Kagwera who deposed to the affidavit was not a party to the suit and had no express authority from the respondent authorising her to deposed to the affidavit.

The learned trial judge ruled that the deponent did not state in what capacity she swore the supportive affidavit. She was not a party to the application and could only appear if she was an unauthorised agent under Order 3 rules 1 & 2 of the Civil Procedure Rules. He found that the other alternative was if she applied to be joined as a party and a stranger to a suit cannot impose himself or herself to the suit. There was nothing to show that the respondent authorised the deponent to swear the affidavit in reply and she was therefore an imposter to the application and her affidavit was struck out.

Following the striking out of the affidavit in reply, the learned trial judge found that the application was unopposed and he made the following orders:

1. The decision of the Nakawa High Court vide Miscellaneous Application No 1054 of 2015 arising from Civil Suit No 84 of 2013 Mrs Shifa Love Wood versus Kabyetsiza Rita Redemptor and others is hereby set aside.
2. The Commissioner Land Registration is to implement an effective vesting order issued by the High Court Execution and Bailiffs Division.
3. The respondent is to pay the costs of this application.

The respondent was aggrieved and appealed to this court on four grounds of appeal that:

1. The learned trial judge erred in law when he struck out the affidavit in reply on grounds that the deponent had no written authorisation from the appellant to depose the same.

2. The learned trial judge erred in law when he ruled that the respondent's application for review was uncontested;
3. the learned trial judge erred in law when he failed to consider the appellant submissions in reply opposing the application for review;
4. the learned trial judge erred in law when he issued orders determining Miscellaneous Application No 1054 of 2015 sought to be reviewed without rehearing the application.

The appellant prays that the appeal is allowed and the orders of the learned trial judge set aside and Miscellaneous Application No 1054 of 2015 be dismissed. In the alternative that Miscellaneous Application No 1054 of 2015 be heard and determined on its merits.

At the hearing of this appeal the appellant was represented by learned counsel Ms Irene Nyafwono while the respondent was represented by learned counsel Mr. Joseph Luzige. With the leave of court, the court was addressed in written submissions for and against the appeal. The appellant filed written submissions on 22 July 2022 while the respondent filed submissions in reply on 1 August 2022.

Instead of arguing the grounds of appeal, the appellant's counsel in his written arguments reduced the grounds of appeal into issues namely:

1. Whether Priscilla Kagwera needed written authorisation from the appellant to deposed to the affidavit in reply?
2. Whether the respondent's application for review was uncontested;
3. Whether the learned trial judge erred in law when he failed to consider the appellant submissions in reply opposing the application for review
4. whether the learned trial judge erred in law when he made order that in effect determined in Miscellaneous Application No 1054 of 2015; Kabyetsiza Rita Redemptor & 06 Others v Mukubira Sowedi and 02 Others without hearing the parties.
5. Whether Miscellaneous Application No 958 of 2016 should be dismissed.

Whether the deponent Priscilla Kagwera needed written authorisation from the appellant to depose to the affidavit in reply.

The appellant's counsel invited the court to consider the affidavit of the deponent which shows that the suit property comprised in Mawokota Block 14 Plot Number 27 was purchased for her by her daughter Mrs Shifa Lovewood and she took possession of the same, renovated and begun residing in it in July 2015. Further that on 30 September 2015 the respondent evicted her from the suit property. The learned trial judge found that the deponent was an imposter on the ground that there was nothing to show that the respondent authorised her to depose to the affidavit in reply. On that basis he struck out the affidavit in reply.

The appellant's counsel submitted that the law governing affidavits is Order 19 of the Civil Procedure Rules which in rule 1 (1) provides that "affidavit shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications on which statements of his or her believe may be admitted provided that the grounds thereof are stated". She submitted that the general rule on affidavits is that they ought to be based on the deponent's knowledge.

The appellant's counsel submitted that the deponent's affidavit was based on her knowledge and therefore fulfilled the requirements of Order 19 Rule 3 of the Civil Procedure Rules. Further in making his decision, the learned trial judge relied heavily on the provisions of Order 3 rules 1 & 2 of the Civil Procedure Rules which requires applications or appearances to be made or done by the party in person or by his or her recognised agents or advocates and such agents include persons holding powers of attorney.

The appellant's counsel submitted that the learned trial judge misconstrued the provisions of Order 3 rule 1 of the Civil Procedure Rules as the rule contains an important exception that the learned trial judge omitted to analyse. She submitted that under rule 1, it is provided that: "Any application to or appearance or act in any Court required or authorised by the law to be made or done by a party in such court may *except where otherwise*

expressly provided by any law for the time being in force...". She submitted that Order 19 rule 3 expressly requiring that affidavits be confined to such facts as the deponents able of their own knowledge to prove, affidavits are one of the exceptions envisaged under Order 3 rule 1 since a party may not have direct knowledge of the things in contention, in a case and must rely on the witness who does. She contended that order 19 rule two (1) of the Civil Procedure Rules recognises that affidavits are evidence because it provides that: "upon any application evidence may be given by affidavit...". Further section 117 of the Evidence Act deems all persons competent witnesses unless court is of the opinion that they are prevented from understanding the questions put to them. There was no finding by the learned trial judge that Priscilla Kagwera was not able to understand questions put to her. Further, she did not require a written authority to give evidence by way of affidavit on matters which were within her knowledge and the learned trial judge erred when it struck out in her affidavit in reply.

The appellant's counsel invited the court to consider the decision of Hon Justice Stephen Mubiru of the High Court in the **Miscellaneous Application No 645 of 2020 Bankone Ltd v Simbamanyo Estates Ltd** where there was an objection to the affidavit in reply on the ground that the deponent did not have express authorisation to swear the affidavit on behalf of the applicant. Mubiru J found that the common web of legal provisions relating to affidavit evidence was the fact that it had to be based on the knowledge or belief of the deponent. Further that affidavits are the means of producing sworn, written evidence and must be used in applications where sworn evidence is required by the court. It followed that the validity of the affidavit is subject to the same rule governing oral evidence under section 117 of the Evidence Act to the effect that all persons are competent to swear affidavits. Mubiru J further reviewed several decisions for the proposition that a person is not to swear an affidavit in a representative capacity unless he or she is an advocate or holder of a power of attorney or duly authorised. They are to the effect that where there is no written authority to swear an affidavit on behalf of others, the affidavit is defective. He however found no basis for

the principle in the rules of evidence nor those of procedure to support the proposition of law.

The appellant's counsel invited the court to agree with the opinion of honourable justice Stephen Mubiru in the above cited decision. She prayed that ground one of the appeal is answered in the affirmative.

On the 2nd issue the question is whether the learned trial judge erred in law when he held that the respondent's application for review was uncontested. This considered together with the issue 3 of whether the learned trial judge erred in law when he failed to consider the appellant's submissions in opposing the application for review.

The appellant's counsel submitted that the learned trial judge erred to find that the application was not contested. He submitted that the respondent had filed, through her counsel, the written arguments in defence. He further submitted that a party who has not filed an affidavit in reply is not a stopped from defending the application on points of law. Such a party may be deemed to have admitted the facts in the application but shall not be denied the opportunity to defend the application on points of law.

In further support of the argument that the written submissions proved that the application was contested, the appellant's counsel relied on the decision of Honourable Justice Opio - Aweri in **Kamsiime K. Andrew vs Himalaya Traders & 05 Others; Supreme Court Miscellaneous Application No 60 of 2021** deal with a situation where there was no affidavit in reply but written submissions in reply had been filed in defence to the application. The written submissions were taken into account in the award of costs. Counsel prayed that grounds two and three are answered in the affirmative.

As far as ground four of the appeal is concerned, the issue framed was whether the learned trial judge erred in law when he made final orders determining Miscellaneous Application No 1054 of 2015 without hearing the parties.

As far as this appeal is concerned, I do not need to consider ground 4 of the appeal without first having determined the previous grounds which were referred to as issues. I would therefore consider the submissions of the respondents counsel in reply to those I have set out above.

In reply the respondents counsel submitted that the notice of appeal had not been served on the respondent within seven days in breach of rule 78 (1) of the Judicature (Court of Appeal Rules) Directions. He submitted that an essential step in pursuance of the appeal was not taken by the appellant which warrants striking out the notice of appeal and the appeal itself.

As far as the merits of the appeal is concerned, he submitted in reply to the legal arguments of the appellant on issues framed as numbers 1, 2 and 3.

In response, the respondents counsel submitted that the preliminary objection was on the issue of whether Priscilla rightfully deposed to an affidavit in opposition to the application. He contended that the issue was on appearance in court and the mandate of the said Priscilla to enter appearance on behalf of the respondent who is now the appellant in this appeal. The right to appear behalf of a party is governed by Order 3 of the Civil Procedure Rules. The main reason the court struck out the respondents affidavit in reply was that the affidavit did not comply with the provisions of Order 3 of the Civil Procedure Rules. The respondent's counsel relied on Ordered 3 rule 2 of the CPR which defines who recognised agents are and include inter alia persons holding powers of attorney.

The respondent's counsel submitted that the said Priscilla Kagwera swore the only affidavit in reply opposing the application but she was neither a party to the application nor did she state the capacity in which she deposed to the contents of the affidavit in opposing the application. She did not even annex any document to show that she actually had authority from the respondent, who is the appellant, indicating that she had instructed her or authorised her to oppose the application on her behalf. He contended that it is a cardinal principle of law that whoever wishes to rely on a document

in an application or a matter or cause has to attach it to the pleadings for the inspection of court.

Further the respondent's counsel submitted that it is true that under Order 19 rule 3 (1) of the Civil Procedure Rules, any person may depose to an affidavit provided the matters to which the affidavit is confined are within the knowledge of the deponent. However, the authority to file an application or to oppose an application is the preserve of a party to the application except in instances provided for under the law such as in suits by minors or persons of unsound mind. Counsel conceded that the adducing of evidence by way of affidavit or oral testimony is governed by the evidentiary principles of relevance and admissibility of evidence and the mandate to file an application or to oppose an application has the aspects of locus standi. He submitted that no authority of the principal was attached to the affidavit in reply. He relied on **Mugoya Construction and Engineering Ltd versus Central Electricals International Ltd; High Court Miscellaneous Application No 699 of 2011** where the applicant's lawyers filed the application and swore the affidavit in support without attaching the authority in the affidavit in support.

Counsel submitted that the draftsman of the Civil Procedure Rules deemed it important to include Order 3 of the Rules in order to safeguard litigants who may find themselves prosecuting cases in court against persons purporting to be acting on behalf of the actual parties. He contended that, that is the main reason why the law required such persons to first obtain authority/powers of attorney authorising them to act on behalf of the actual parties to the matters/suits before the court.

He contended that the obvious result of any application or suit in court is that one party has to be successful and the other party has to lose. Where the parties proceeding against another in an application or suit in the court, and the application or suit is opposed or defended by another person, the applicant or plaintiff runs the risk of prosecuting the case against an impostor who may not be in a position to satisfy the decree or order if any passed by the court. The applicant will then be left in a vacuum as to how

and from whom to obtain the fruits of his or her successful litigation. He contended that it is the correct wisdom why the appellant now thought it important to issue/grant the requisite powers of attorney dated 29th September 2020 to the said Priscilla Kagwera, to prosecute Miscellaneous Application No 958 of 2016 from which the appeal arose. He contended that the grant could not rectify the anomalies caused by the absence of such powers at the time of hearing of the application.

Further, the powers of attorney were issued by the appellant on 29th of September 2020 authorising her to represent the appellant in Miscellaneous Application No 958 of 2016 from which the appeal arose when the application had already been concluded in a ruling dated 18th of September 2020. In the premises, the respondents counsel submitted that this court upholds the decision of the trial court and orders issued thereunder.

Further with regard to issues number 2 and 3, the respondent's counsel supported the decision of the judge that the application was not opposed. He contended that after striking out the incurably defective affidavit, the application remained unchallenged and the appellant could not at the same time expect the trial court to consider her submissions where the application itself was not challenged.

Consideration of the appeal

I have carefully considered the appeal against the ruling of the learned trial judge striking out an affidavit in opposition to an application for review and also proceeding to determine the application on the basis that it was unopposed.

The respondents had filed an application by notice of motion under the provisions of Order 46 rule (1) & (8) of the Civil Procedure Rules and section 98 of the Civil Procedure Act, as well as section 33 of the Judicature Act for orders that the court reviews and sets aside the decision/judgement of Nakawa High Court which had set aside the sale of the suit property in its decision in Miscellaneous Application No 1054 of 2015. Secondly, they

sought an order that the Commissioner land registration implements and effects the vesting order issued by the High Court Execution and Bailiffs Division and costs of the applications to be provided for.

The grounds of the application were that the applicant duly purchased the property comprised in Block 14, 27 at Maduuma after a due execution process. Secondly the applicants took possession and developed the property. Thirdly the respondent in a fraudulent manner and misrepresenting to the Nakawa court in Miscellaneous Application No 1054 of 2015 at Nakawa, never added the applicants as parties neither did she serve the applicants with due process of court. Fourthly the sale was ordered by the execution and bailiffs division of the High Court which the very court that ought to have entertained the objector proceedings. Nakawa court subsequently nullified the sale without giving the applicants a chance to be heard based on misrepresented facts. On the sixth ground the applicant's purchase of the suit property was in court and before the alleged respondent's purchase from the judgement debtor. Lastly that it is in the interest of justice that the application be granted and the applicants had.

Clearly this was a matter that arose in execution in that the sale of the suit property was set aside in the Miscellaneous Application No 1054 of 2015.

In opposition to the application Priscilla Kagwera, stated that she opposed the affidavit in support of the application on the ground that the property the subject matter of the suit was purchased for her by her daughter (the appellant) from one Mukubira Sowedi in an agreement dated 16th June 2015 which she attached as annexure "A". Thereafter after her daughter paid for the property in full, she took possession of the same and renovated it and began living in it in July 2015. On 30th of September 2015 the applicants evicted her from the suit property based on a warrant to give vacant possession issued by the Execution and Bailiffs Division of the High Court in the Miscellaneous Application No 20167 of 2015. The warrant for vacant possession was issued in an application between the respondents of this appeal and one Mukubira Sowedi and dated 10th of September 2015. In paragraph 6 she deposed that her daughter Shifa Lovewood successfully

challenged her eviction and the purported attachment of the suit property in Nakawa High Court Miscellaneous Application No 1054th 2015 and she also attached the ruling in that regard. In that application and ruling, the property was released from attachment upon finding that the attachment and sale of the property was illegal and the sale of the property was cancelled.

The affidavit was deposed to by the deponent in her capacity and to the best of her knowledge.

I have carefully considered the matter before the court particularly with regard to the striking out of the affidavit in reply to the application to review another decision in another application before a different judge in which the sale of property in execution was set aside. It is my conclusion that the proceedings before the court arose from execution proceedings. The fact that it was handled by different divisions of the High Court does not prejudice the fact that they arise from the same proceedings. Further and generally applications for review are filed before the judge who made the decision sought to be reviewed under Order 46 rule 2 of the Civil Procedure Rules on any grounds for review other than the ground of discovery of new and important matter or evidence.

The law envisages that execution process may be levied against persons who are not parties to the proceedings before the court. The deponent whose affidavit was struck out, deposed that she was in possession of the suit property and that she had been evicted through execution process. Order 22 rule 84 of the Civil Procedure Rules provides that where the holder of a decree for the possession of immovable property or the purchase of any such property sold in execution of a degree is resisted or obstructed by any person in obtaining possession of the property, he or she may make an application to the court complaining of the resistance or obstruction. Particularly Order 22 rule 84 (2) provides as follows:

> (2) The court shall fix a day for investigating the matter and shall someone the party against whom the application is made to appear and answer it.

The rule illustrates that a person in possession of property does not have to be a party to the proceedings to be heard by the court. It was sufficient for the person to be in possession of the suit property. This is further followed by rule 85 of Order 22 which provides that:

> 85. Detention of the judgement debtor for resistance or obstruction to possession of immovable property.
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> Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgement debtor, or by some other person at his or her instigation, it shall direct that the applicant be put into possession of the property, and, where the applicant is still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment debtor, or any person acting at his or her instigation, to be detained in a civil prison for a term which may extend to 30 days.

Clearly the powers of the court are wide enough to hear and to even imprison third parties in the process of execution. In addition, where the court is satisfied that the resistance or obstruction was occasioned by any person claiming in good faith in possession of the property on his or her own account the court may make such order as it may deem fit in terms of rule 86 of Order 22 of the Civil Procedure Rules.

I have carefully considered the ruling of the learned trial judge before striking out the affidavit in reply to the application. The learned trial judge relied on Order 3 rule 1 of the Civil Procedure Rules which provides that any application to appearance or act in any court required or authorised by the law to be made or done by a party in such a court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his or her recognised agent. Recognised agents are further defined by Order 3 rule 2 of the Civil Procedure Rules to include, *inter alia* persons holding powers of attorney authorising them to make such appearances and applications and to make such acts on behalf of the parties.

The concern of the learned trial judge is that the deponent did not indicate the capacity in which she made the sworn affidavit. He found that she was not a party to the application and could only appear if she fell within the ambit of Order 3 rules 1 & 2 of the Civil Procedure Rules.

Clearly in execution matters, a person in possession of immovable property can be examined and can appear in his or her own right. The deponent claimed the property as a beneficiary and a person in possession. She did not have to be a party to any proceedings before claiming a right to be heard. Adding her to the title of the suit as a party would be a formal requirement and not substantive as she stated her interest and capacity in which she deposed to the affidavit. She stated that she was the beneficiary to the impugned sale agreement and was in possession of the property. In any case, she claimed that she derived her right from the respondent who bought the property on her behalf and she was in possession of the property. As a matter arising from execution proceedings, she could be heard because she had a right of audience and it was erroneous to strike out her affidavit in reply. The question as to whether her claim was a bona fide claim is a matter that could be addressed on the merits. The rules give any person in possession a right to be heard before the matter touching on the right to remain on the land can be determined. In my judgment, the fact that the sale of the suit property to the appellant was in the names of the appellant is a detail that can be investigated. In the circumstances, particularly in light of the fact that the deponent claimed that she was in possession and had been evicted under a warrant of court in execution proceedings, it was erroneous to strike out the affidavit on the ground that she was not a party or that she was a stranger to the proceedings.

The above finding is sufficient in allowing grounds 1, 2 and 3 of the appeal. Further, the deponent had the requisite knowledge and filed evidence before the court. Her evidence was material and relevant. I would in the circumstances, allow the appeal and set aside the order striking out the affidavit in reply of Priscilla Kagwera who claimed to be in possession and a beneficiary of a sale agreement, a matter in which she was directly

interested and which was the subject matter of the application as well as execution proceedings. In the same vein, the orders which proceeded on the basis that the application was unopposed cannot stand and I would set them aside on the ground that they violate the right to a fair hearing under article 28 (1) of the Constitution in that the directly affected party in execution proceedings was not heard. I would further make an order that the application be remitted back to the High Court and fixed before another judge of the High Court for hearing on the merits after hearing the respondent to the application. The appeal succeeds with costs.

Dated at Kampala the 16th day of Sept 202

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Cheborion Barishaki, Christopher Madrama & Irene Mulyagonja)

CIVIL APPEAL NO.229 OF 2021

MRS SHIFA LOVEWOOD:::APPELLANT

VERSUS

1. **LUYIMA GODFREY**
2. **NAMAZZI EVA:::RESPONDENTS**

(Appeal against the Ruling and Order of the Land Division of the High Court of Uganda delivered by Keitirima, J on 18th September, 2020 in Miscellaneous Application No.958 of 2016)

JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment of my learned brother Christopher Madrama, JA and I agree with him that this appeal should succeed with costs.

Since Mulyagonja, JA also agrees, the appeal is allowed with the following orders;

1. The ruling and orders of the High Court in Miscellaneous Application No.958 of 2016 are set aside.

2. Civil Application No.958 of 2016 is remitted back to the High Court for hearing before another Judge.

3. The respondent shall pay the costs of the Appeal in this Court.

It is so ordered.

Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Cheborion Barishaki, Madrama and Mulyagonja, JJA)

CIVIL APPEAL NO 229 OF 2021

(Arising from High Court Land Division Miscellaneous Application No. 958 of 2016; All arising from High Court Land Division Miscellaneous Application No. 1054 of 2015)

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VERSUS

1. LUYIMA GODFREY
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JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my brother, Christopher Madrama, JA. I agree with the decision that this appeal should succeed and with the orders that he has proposed.

Dated at Kampala this 16th Day of Sept 2022.

Irene Mulyagonja

JUSTICE OF APPEAL