THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

HCT-00-CV-MA-0072-2008 AND

HCT-00-CV-MA-0225-2008

(ARISING OUT OF HCT-00-CV-CS-0081-2007)

1. KIBUUKA NELSON
2. LWANGA NICHOLAS } **::::::::::::::::::APPLICANTS/DEFENDANTS**

VERSUS

YUSUF ZZIWA ::::::::::::::::::::::::::::::::RESPONDENT/PLAINTIFF

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This ruling arises out of two applications: ***HCT-00-CV-MA-0072-2008 Kibuuka Nelson and Another Vs Lwanga Nicholas and HCT-00-CV-MA-0225-2008 Kibuuka Nelson*** and ***Another vs Yusuf Zziwa***. When the two applications came up for hearing on 25-08-2008, the two applications were consolidated by consent of the parties. The parties also agreed that:

1. There is an ex parte judgment against applicants in both applications in favour of the respondents.
2. The judgment was entered pursuant to service by substituted means.

3. The first warrant of attachment was issued on 11-12-2007 and it was for attachment and sale of the suit property.

4. The property was advertised for sale in the New Vision Newspaper of 21-12-07.

5. The advertisement was preceded by a Notice to show cause why execution should not issue that appeared in the New Vision Newspaper of 13-11-2007.

6. The warrant of 11-12-2007 expired before sale of the suit property.

7. Another warrant was issued on 15-02-2008 and it was returnable on 10-03-2008.

8. On 18-02-08, HCT-00-CV-MA-0072-2008 was filed seeking setting aside of the ex parte judgment. It was fixed for hearing on 23-04-2008 but the hearing failed to take off on account of the Trial Judge's absence.

9. During the pendency of the application, the suit property was protected by an interim order which expired on 23-04-08, the date the application was due for hearing.

10. On 25-04-2008, Counsel for the respondent applied for renewal of the warrant of attachment and sale.

11. Pursuant to that application, a warrant was issued on 25-04-2008, returnable on 25-05-2008. The warrant was addressed to

Jackson Mwesigye t/a Push Recovery Trust Associates and Bailiffs.

12. On 28-04-08 a return was made on the warrant by Push Recovery Trust Associates & Court Bailiffs indicating that the attached property had been sold in execution on 26-04-08.

Issues:

1. Whether there was a legal sale.
2. Whether the ex parte judgment and decree can be set aside.
3. Reliefs.

Counsel:

Mr. Mohammed Mbabazi for the applicants

Mr. Balyejjusa for the respondent.

From the records in **HCT-00-CV-CS-0081-2007, Yusuf Zziwa vs Kibuuka Nelson & Another**, the plaintiff alleges that the defendants are indebted to him in the sum of Shs. 100,000,000/= which they have failed/refused to pay despite several demands. I will comment on the efficacy of service of summons to file a defence later in this ruling. I now turn to the issues.

Issue No. 1: **Whether there was a legal sale**

This issue arises out of HCT-00-CV-MA-0225-2008 in which the applicants seek an order:

> ***"recalling the warrant of attachment in execution of decree of attachment and sale issued on the 25th April, 2008 vide HCCS No. 81 of 2007, release of property in attachment and nullification of the illegal sale vide sale agreement dated 26th April, 2008 by Push Recovery Trust Associates."***

The long and short of the grounds upon which the order is sought is that a warrant was issued to one Jackson Mwesigye, a court bailiff t/a Push Recovery Trust Associates on 25-04-2008 for the attachment and sale of the suit property; that on 28-04-2008 a return in execution was filed by Push Recovery Trust Associates declaring completion of the execution of the decree through sale of the suit property on 26-04-2008. The applicants contend that there was no valid sale, if at all any sale was attempted, and that the purported sale was illegal, void and/or a nullity in as far as it:

(i). was carried out without advertising and before the expiry of the prescribed period of 20 days set out under O.22 r.64; and

(ii). contravened Section 48 of the Civil Procedure Act.

From the records, the return in execution is dated 28-04-2008. It is shown therein that a sale was made on 26-04-2008, a day after the warrant of execution was issued.

Learned Counsel for the respondent has argued that a warrant of attachment and sale of the suit property was issued in December 2007 and that the property was advertised for sale in the New Vision Newspaper of December 21, 2007. Hence the argument that the sale was properly done. Court takes the view that for the sale to be valid, it has to comply with the law as laid down in O.22 rr.62, 63, 64 and 65 of the Civil Procedure Rules.

Under O.22 r.62;

> ***"Except as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the court or by such other person as the court may appoint for this purpose, and shall be made by public auction in the prescribed manner."***

In the instant case, the warrant of attachment was issued to one Jackson Mwesigye. In his affidavit of 27th May, 2008, the said Mwesigye denies conducting the sale and completely disassociate

himself from any execution process of any warrant issued in HCCS No. 81 of 2007. There was an argument at the hearing that since the affidavit was not sworn in support of any of the instant applications, it could not be relied upon. The argument lacks merits. It is trite that an affidavit made in one proceeding is admissible in evidence in a subsequent proceeding as proof of the fact stated therein, against the party who made such affidavit or against the party on whose behalf it was made, on it being shown that he knowingly made use of it.

See: **Halisbury's Laws of England, Third Edition Vol. 15 at p. 397.**

Also: HCT-00-CC-CS-0523-2006 Panyahululu Co. Ltd vs New Ocean Transporters Co. Ltd and Others, (un reported).

In the Instant case, Jackson Mwesigye swore an affidavit in **HCT-00-CV-MA-0236-2008 Kibuuka Nelson & Another vs Yusuf Zziwa** distancing himself from the impugned execution. On the basis of that affidavit, this court granted an interim order sought in that application. He has not retracted that affidavit. In these circumstances, I don't see how court can simply over look it. The records before me show that the execution of the warrant was by one MUTASA RONALD and not Jackson Mwesigye. This evidence has not been challenged. I therefore

take it as the truth. The execution of the warrant by a person other than the addressee contravened rule 62.

I so find.

As regards advertisement, the law under rules 63 and 64 is that a sale of immovable property can only take place at least 30 days calculated from the date on which the public notice of sale has been advertised. If the sale is adjourned for a longer period than a calendar week, a fresh public notice ought to be given unless the judgment debtor consents to waive such notice. In the instant case, the property was advertised in December 2007. The sale did not take place under that advert. On 25-04-2008, court issued another warrant of attachment returnable on 26th May, 2008. However, the property was sold on 26-04-2008. I agree with the argument of learned counsel for the applicants that whether the warrant was renewed as the respondent argues or a fresh one was issued, there had to be a fresh public notice of sale. The sale could not be effected pursuant to the advert of December 21, 2007 as it had under the law expired. Accordingly, there was no notification of sale as the law requires nor was there the 30 days between the advert and the sale.

As regards the alleged non-compliance with Section 48 of the Civil Procedure Act, it is not disputed that the certificates of title for the suit property are in possession of the applicants.

S.48 of the Act requires that duplicate certificate of title to immovable property be lodged with court before the sale. It states:

> ***"(1). The court may order, but shall not proceed further with the sale of any immovable property under a decree of execution until there has been lodged with the court the duplicate certificate of title to the property or the special certificate of title mentioned in sub-section (4).***
>
> ***(2). The court ordering such sale shall have power to order the judgment debtor to deliver up the duplicate certificate of title to the property to be sold or to appear and show cause why the certificate of title should not be delivered up.***

(3). Where the court is satisfied that a judgment debtor has willfully refused or neglected to deliver up such certificate when ordered to do so, the court may commit him/her to prison for a period not exceeding thirty days.

(4). If the court is satisfied that such duplicate certificate of title has been lost or destroyed or that the judgment debtor cannot be served with an order under this section or is willfully withholding such certificate, the court shall call upon the registrar of titles to issue a special certificate as prescribed by the Registration of Titles Act."

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The section is couched in mandatory terms. It sets out the procedure of selling immovable property in execution of a court decree. The court has the power to order the sale by issuing a warrant of attachment but it cannot proceed to sell the property unless and until the duplicate certificate of title is delivered in court by the judgment debtor. In the instant case, what ought to have been done was for the court to first order the judgment debtors to deliver up the certificate of

title or alternatively to procure a special certificate of title. This was not done.

Applying the law to the facts herein, it is clear to me that there was no valid sale in the instant case or at all. Any purported act of sale was contrary to law, illegal, void and a nullity on account of non-compliance with the rules which I have reproduced above.

Now assuming that a sale has already taken place, as one side to this dispute appears to suggest, is it a correct position of law that it cannot be set aside? The answer is a resounding No. The position of the law as laid down in a number of authorities, including **James Kabateraine vs Charles Oundo and Another HCCS No. 177/94** reproduced in [1996] 1 KALR 134 is that no property can be declared to have been validly attached and sold in execution unless, first, the order of attachment has been issued, and secondly, in execution of that order other things prescribed by the rules in the relevant statutes have been complied with. For as long as it is still within the power of the court to declare a sale invalid, for instance, when any of the requirements in the rules of court or Parties for the time being in force have not been complied with, the transaction cannot be said to be 100% safe or at all. Put differently, if it is proved that an execution has been irregularly

carried out, the court is empowered to make an order of restoration. A wrong execution is in the eyes of the law a trespass.

See: **HCT-00-CC-MA-0070-2006 Eldreda Muchope vs Diamond Trust Bank Uganda Ltd and Another** (un reported).

With regard to issue No. 1, the answer shall be in the negative. I so hold.

Issue No. 2: **Whether the ex parte judgment and decree can be set aside**

This issue is drawn from HCT-00-CV-MA-0072-2008 wherein it is sought, under paragraph (a) for an order that the ex parte judgment and decree issued by the Honourable court in HCCS No. 81 of 2007 on the 16th day of October, 2007 against the applicants be set aside. The thrust of the grounds upon which the prayer is based is that the applicants were at the time of the purported service of the summons living and resident in South Africa and accordingly no service of the summons was duly effected on them. The applicants contend that the purported service was ineffectual and/or ineffective. Additionally, they contend that they have a prima facie case with all the probability of

success as they do not owe any money to the respondent and the agreement relied on by the respondent was signed under duress.

The general position of the law is that if the court finds that there was an error and that the same was under a mistake of fact and that the earlier judgment would not have been passed but for an erroneous assumption which in fact did not exist and its perpetration has resulted in a miscarriage of justice, nothing would stop the court from rectifying the error. An illegality once pointed out to court cannot be swept under the proverbial carpet.

From the record, **HCCS NO.81 of 2007** was filed here on 08-02-2007. Summons to file a defence were issued on 15-02-2007. There are indications that as far back as 31-03-2007 the plaintiff is on record as applying for default judgment. None was granted. In June 2007, there was another attempt at service and still court declined to allow an application for default judgment. Finally following another summons dated 6th September, 2007, judgment was entered on 11-10-2007. Curiously this application was granted on a letter from M/S Balyejjusa & Co. Advocates dated 31st March, 2007 but received at High Court on 06-06-2007. I have failed to understand how the Registrar could have sanctioned such an application. Be that as it may, the judgment was based on the affidavit on one Lawrence Oboth dated 10-10-2007 in

which he deponed that on 18-09-2007 he got copies of summons to file a defence for service upon the defendants; that the service was to be by affixing a copy of the summons in a conspicuous place on the building the defendants were known to have last resided following an order for substituted service; and, that he proceeded to the defendants' last known place of residence along Kampala – Entebbe Road. He then affixed a copy of the summons to file a defence on the black garage door located on the front part of the house and left it there. The applicants deny receipt of the said service.

The issue is whether service by substituted service was effective as to warrant court to enter a default judgment against the applicants. The assertion by the applicants that at the material time they were staying and resident in South Africa has not been challenged by the respondent. The case cited to me by learned Counsel for the applicants, **Nicholas Roussos vs Gulem Hussein habib Virani & Another HCCS No. 360 of 1982** (un reported) does in my view dispose of this issue. Justice J. P. Barko held, and I agree, that O.5 r.19 of the Civil Procedure Rules (as it then was) is designed for service within the jurisdiction. Once it is proved, as was done herein, that the defendants were staying and resident in South Africa, this rendered service by substituted service in the manner it was done herein ineffective and nullity. The defendants/applicants were simply not duly

served. The default judgment was based on defective service which was ineffectual and a judgment based on such service cannot be valid in law. It can therefore be set aside.

Accordingly, with regard to issue No.2, the answer shall be in the affirmative.

Issue No.3. Reliefs.

The applicants have proved to the satisfaction of the court that the purported sale was no sale in law but a nullity. They have also proved that the default judgment was a nullity. The effect of a nullity was stated in **Macfay vs United Africa Co. Ltd [1961] 3 All E. R 1169 thus:**

> ***"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."***

I agree.

Applying the same principle to the facts herein, the applicants have sought protection from this court, first in **HCT-00-CV-MA-0072-2008** and later in **HCT-00-CV-MA-0225-2008**. There is a judgment against them that is a nullity followed by a purported enforcement of the same through a purported sale which too is a nullity. They are ex-debito justitige entitled to relief against the two nullities. They ought for the avoidance of the doubt to be set aside. I do so. The purported purchaser of the suit property shall have his money refunded by who ever has it or else proceed to seek recovery thereof as by law established.

To avoid multiplicity of proceedings and in the spirit of Section 98 of the Civil Procedure Act, the defendants in **HCT-00-CV-CS-0081-2007** shall file a defence within fourteen (14) days from the date of this ruling to allow determination of the suit on merits.

Costs herein shall abide the out-come of the main suit.

Orders accordingly.

Yorokamu Bamwine

JUDGE

29-9-2008

29-09-2008

Bogazi Ronald for applicant

Respondent absent.

Court:

Ruling delivered.

Yorokamu Bamwine

JUDGE

29-09-2008