

The facts leading to this application are as follows;

The Applicant on or about the 20th February 2004 obtained a loan from M/s Victoria Finance Company Ltd. in the sum of Ushs.20,000,000/= and pledged his certificate of title for Block 216 Plot 2729 being land at Buye in Kampala. The Applicant defaulted on the repayment of the loan leading to a summary Civil Suit No. 1003 of 2004 by M/s Victoria Finance Co. Ltd. being filed against him. The Applicant filed M.A. 200 of 2005 for leave to defend the summary suit. The Applicant did not deny the loan but sought to contest the interest charged. Conditional leave to defend the summary suit was granted on the Applicant depositing the sum of Ushs.12,000,000/= or its equivalent security in court within 30 days. The Applicant did file a written statement of defence but failed to effect the payment into court within the prescribed time. The Registrar then entered judgment against the Applicant on the 24th May 2005 and a decree was extracted on the 1st June 2005.

The Applicant then filed M.A. 477 of 2005 to set aside the judgment entered by the Registrar and for orders that the main suit proceed. When the application came up for hearing the parties agreed to enter a consent judgment whereby the judgment sum be paid within three months. The consent judgment was not honoured and the Respondents proceeded to execute against the Applicant. The Applicant then again filed M.A 844 of 2005 to stay the attachment and sale of the said property on the grounds that a temporary injunction had issued against the sale in a lower tribunal namely The Kampala Land Tribunal. When this court inquired into the matter on the 1st March 2006 it was established that the said

property had already been sold at Shs.51,000,000/= to one Moses Lubega and the said application was withdrawn.

This application was then filed whereby the court bailiff was added as a Respondent as well. The case for the Applicant now is that the execution was carried out in a manner to defraud the Applicant in that it was carried out without regard to the law and so is null and void.

Mr. Ojambo appeared for the Applicant and Mr. Olaki appeared for the Respondent.

Mr. Ojambo submitted that the execution of the warrant on the 20th February 2006 was null and void as the said certificate of title of the land (in particular for Block 216, Plot 2732) was not in court at the time. Mr. Ojambo said his client was in possession of the said title and not court.

He argued that this was legal requirement under S.48 of The Civil Procedure Act, which is mandatory. Mr. Ojambo further argued that any failure to follow the law was an illegality which court could not condone and referred me to the case of **Makula International Vs Cardinal Nsubuga [1982] HCB 11**

and

Prof. Haq Vs Islamic University (CA) Civil Appeal 47 of 1995 as authority for his contention. He further argued that the mere advertisement in the newspaper was not sufficient and in any event the advert was put in an obscure Luganda paper namely Bukedde which the Applicant did not understand. Mr. Ojambo submitted that his clients property which was valued at Ushs.300,000,000/= was

sold below its market price at Ushs.50,000,000/=. This was not withstanding the Applicant claiming that he had obtained a buyer who gave him a cheque of Ushs.35,000,000/= which the bailiff ignored.

Mr. Olaki in reply submitted that the Applicant did not contest the decree passed by court. He further submitted that if there was a flaw in the procedure of execution then it did not prejudice the Applicant. He told court that the Applicant's property which was in a single enclosure was on two land titles. One of the land titles was in court while the second was known to be in the Bank of Baroda on mortgage. According to the affidavit dated 15th August 2006 in reply of Mr. Moses Kirunda the Bailiff, he first obtained a warrant of attachment and sale of Block 216, Plot 2729 on the 31st October 2006. The property was then subsequently sold to one Moses Lubega, the highest bidder. On the 30th December 2005 the Applicant was evicted from the premises. However, the Applicant then lodged a complaint with the police for criminal trespass.

It was at this time that Mr. Kirunda the Bailiff realized that the enclosed property actually had 2 land titles which meant that the sale did not in reality cover the whole property that was enclosed. On finding this out the successful bidder Mr. Lubega who had bought it at Ushs.51,000,000/= pulled out of the purchase and demanded a refund of the money paid. Mr. Kirunda then applied for a fresh warrant now to cover both plots namely 2729 and 2732 on the 13th January 2006. The property was then sold to M/s Good Rest Ltd for Ushs.50,000,000/=. As to the existence of another

buyer secured by the Applicant of part of the property, Mr. Kirunda denies any knowledge of the said buyer.

I have perused the application and the affidavits for and against it. I have also considered the submission of both counsel.

This application is brought under Section 34 of the Civil Procedure Act for court to determine questions regarding the execution of its decree. The application was not specifically grounded in any of the subsections of Section 34 and court will assume given the hearing that it was intended to be grounded in Section 34 subsection (i) which reads

“All questions arising between the parties to the suit in which the decree was passed, on their representatives, and relating to the executing, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit”

Reading the application as filed, it is not expressly clear what the question for determination by this court is. However, the application in para(b) states that it is for orders that:-

“The purported transfer of title arising from the said execution and ownership arising therefrom or thereafter is void...”

The grounds further state in para(i) that:-

“The aforestated execution was carried out in a manner intended to and whose effect was to defraud the Applicant...”

The court therefore takes it that the question for determination is whether or not the execution was void and or tainted with fraud.

Counsel for the Applicant made a spirited submission that Section 48 of the Civil Procedure Act was not followed by the Respondents and therefore the whole execution was an illegality. He submitted that his client had a copy of the title for Plot 2723 in his possession and so it was not in court at the time of execution. Section 48 of the Civil Procedure Act reads

“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 subsection 4 ”

Indeed the law sets stringent procedures for the sale of immovable property in that it *“shall not proceed... with the sale”*, if the said title has not been deposited in court. I agree with counsel for the Applicant that this is a mandatory requirement of law. The question however for court to inquire into is what actually happened in this case. Accordingly to the supplementary affidavit of the bailiff Mr. Moses Kirunda dated 26th September, 2006 he at first assumed that the whole property was part of the title comprised in Block 216, Plot 2729 but this was not the case; as it included a second Plot 2732 under a separate title. He then depones as follows

- “5. That I further established that the title to Plot 2732 was charged with two mortgages (sic) to Uganda Commercial Bank (now Stanbic (U) Ltd) of the 27th day of August 1992 and 9th July 1996 respectively.
9. That I advised M/s Victoria Finance Company to lodge a caveat on the property while awaiting the title from the bank which was accordingly done on the 4th of January 2006 (copy of the caveat is annex A).
10. That pending the handing over of the title to plot 2732, I also continued receiving bids from the prospective buyers of the property who I had assured the original duplicate certificate of title was in the bank pending a release of a mortgage and would be available by the conclusion of the sale of the property...
11. That on the morning of 20th February 2006, I met the manager of securities who informed me that the title could not be traced and he advised that a special certificate of title would have to be applied for...
15. That the certificate of title to Plot 2729 was already in court and the absence of the title to Plot 2732 should not fault the sale to a willing and innocent buyer which sale did not prejudice the Applicant at all...”

It appears to me that clearly one of the two titles to the property was not in court at the time of the sale. Of course the title to Block 216, Plot 2729 was in court because the Applicant had given it to the first

Respondent (lender) as security. Furthermore the property is more complicated than just the two titles themselves as it is in one enclosure.

The valuation report in court dated 13th February 2006 described the property thus

“The property which comprises 2 plots of land measuring a total of approximately 0.2 hectares is developed with a main house, an outbuilding, a boys quarter block and a pit latrine. Its compound is relatively spacious and is covered with lawn grass and mature shade trees. The entire property is fenced with “barbed wires on timber posts” in cedar trees. Entrance to the property is through a double leaf metal sheets gate set onto concrete columns”

It further appears to me that property in question is actually a single property (not vacant undeveloped land) comprising two titles. This is confirmed by the affidavit of the applicant dated 11th May 2006 where he depones at para 2

“That until recently I was the registered proprietor of the property comprised in Block 216, Plot 2729 and Block 216, Plot 2732 BUYE – Ntinda...”

I find that on the evidence before me that it was the intention of the Applicant to use this property as security for the money he borrowed but he deliberately gave the lender only one of the two titles that comprised this clearly single developed property. How did the Applicant hope to divide this developed single property between the

two titles? I am not surprised that the initial bidder Mr. Moses Lubega abandoned the purchase as he clearly originally believed that he was buying a single developed property.

No where in his affidavits does the Applicant make a case for the existence of two separate properties on two separate titles but rather one property sold below market value (see para 36 of the affidavit dated 11th May 2006 and para 3 of the affidavit dated 26th October 2006). In fact reading the aforementioned affidavits together I am unable to believe the Applicant that his property on the two titles is worth Ushs.300,000,000/= when at best he too also seeks to rely on the same valuation report on court file which puts the value at Ushs.100,000,000/= with a forced sale value of Ushs.50,000,000/=. The two offers obtained by the bailiff were Ushs.51,000,000/= and Ushs.50,000,000/= both within the amount approved by court of Ushs.50,000,000/=. Even the cheque that the Applicant got from a buyer he claims to have sourced himself is for Ushs.35,000,000/=. That cheque was written in the Applicant's names and from evidence before court it appears for whatever reason, not to have been banked. This is not the sort of property you accept a cheque of Ushs.35,000,000/= when your property is up for sale by court and yet you claim it is worth about ten times more i.e. Ushs.300,000,000/=. The warrant was for Ushs.37,230,130/= the Applicant should have just banked the cheque and paid the judgment creditor and saved his property. Court is empowered under Section 33 of the Judicature Act to legally and equitably completely and finally determine all matters in controversy between parties and to avoid a multiplicity of proceedings.

I accordingly find that since one of two titles to a single developed property was in court that Section 48 was not in substance violated. I am unable to see evidence of fraud on the part of the court bailiff. At worst the bailiff can be faulted for sloppy work in not properly tracing the whereabouts of the second title to plot 2732 to complete the deposit in court but for reasons given above I do not find this fatal to the execution. On the other hand, I find that the Applicant dishonestly played these two titles to the same property with lenders by not making a full disclosure of the situation on the ground. Instead of the Applicant squarely dealing with his indebtedness, he has engaged in all manner of multiplicities of legal proceedings (four Miscellaneous Applications) to unreasonably stall the court process.

I accordingly therefore dismiss this application with costs. I further make the auxiliary order that the Applicant deliver up the duplicate certificate of title to Block 216, Plot 2732 within his possession to court within 14 days of this ruling failing which he shall be deemed to be willfully withholding the said certificate in which case after that period court under Section 48(4) orders that the Registrar of Titles to issue a special certificate of title for the said property.

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Geoffrey Kiryabwire

JUDGE

Date: 16/01/08

16/01/08

9:30pm

Ruling read and signed in Court in the presence of;

- **Ojambo for Applicant**
- **Applicant present**
- **Rose Emeru – Court Clerk**

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Geoffrey Kiryabwire

JUDGE

16/01/08

R U L I N G