

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL COURT DIVISION)**

**HCT - 00 - CC - MA - 0224 – 2005  
(Arising from HCCS No. 028 of 2004)**

**MONICA KICONCO BAKENZANA ..... APPLICANT**

**VERSUS**

**1. NILE BANK LIMITED }  
2. KAMUNYU DEUS } ..... RESPONDENT**

**BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.**

**R U L I N G:**

This is an application under Section 98 of the Civil Procedure Act CPA and orders 48 rules 1,2 and 3 of the Civil Procedure Rules (CPR). The application seeks that this Court exercises its inherent powers to order that;

- " a) That the first Respondent's sale of the land comprised in Leasehold Register Volume 1239 folio 21 Rwampara Block 49 Plot 2 to the second Respondent be set aside for being effected in utter disregard of the consent order dated 23<sup>rd</sup> day of November, 2004.*

- b) *The sale and transfer of the said land by the first respondent to the second respondent be declared null and void for contravening the Land Act.*
- c) *The Applicant be allowed to pay the sum of Shs.14,235,501/= to any of the respondents in respect of the said land as Court may direct.*
- d) *The registration of the second Respondent as the proprietor of the said land be cancelled and the Applicant, her children and her husband be jointly registered thereon as proprietors thereof.*
- e) *Costs of this application be provided for.* "

The application is supported by the affidavit of Mrs. Monica Kiconco Bakenzana who describes herself as wife to one Sam Bakenzana (the registered proprietor of the land in question) and shareholder Director in Kashojwa Farmers Ltd (which took out the loan with the first Respondent Bank using the said land as security).

The grounds for the application are seven namely;

- 1) That the first Respondent Bank prematurely sold the land before the due date in the consent order dated 23<sup>rd</sup> November 2004.
- 2) That the sale was irregular and contravened the Mortgage Act.
- 3) That the sale was null and void because it was in violation of the provisions of the Land Act in relation to family land.

- 4) That the applicant as Director of Kashojwa Farmers Ltd the mortgagor was able to pay off the Shs.14,235,501/= due to the bank but was denied the opportunity to do so by its premature and clandestine sale by the first Respondent to the second Respondent.
- 5) That the applicant is ready to pay the Shs.14,235,501/= to whom ever Court may direct.
- 6) That as family land the applicant as spouse of the farmer registered owner is entitled to have the said land vested in her and her children.
- 7) That it is just and equitable that the orders sought be granted.

Mr. W. Nuwagaba appeared for the Applicant, Mr. G. Zziwa for the 1<sup>st</sup> Respondent Bank and Mr. D. Muhimbura for the 2<sup>nd</sup> Respondent purchaser.

The 1<sup>st</sup> Respondent Bank opposed the application and filed an affidavit in reply by Daniel Babonereire. Mr. Babonereire deponed that on or about 15 March 1991 M/s Kashojwa Farmers Ltd obtained an overdraft facility of Shs.2,200,000/= and secured the said land in the names of the applicant's husband Mr. Sam Bakenzana as security for the overdraft facility. The borrowers defaulted on the facility and by October 2001 over 10 years later the loan now stood at Shs.14,000,000/=. The 1<sup>st</sup> Respondent Bank then got an offer from the 2<sup>nd</sup> Respondent to buy the land after it had been

advertised for sale. The land had actually been advertised on two separate occasions without getting a buyer.

The 2<sup>nd</sup> Respondent then acquired the land but was unable to transfer it into his names because Sam Bakenzana had lodged a caveat on the land.

The 1<sup>st</sup> Respondent Bank then filed miscellaneous Application No. 71 of 2003 to remove the caveat.

The application was heard by Justice V.Z. Musoke – Kibuuka. Justice Kibuuka ruled on the 12<sup>th</sup> March 2004 that no notice was given to mortgagor before the said sale and therefore the sale had to be re-transacted.

A fresh notice was then given to Sam Bakenzana requesting him to pay Shs.14,235.501/= on the 3<sup>rd</sup> May 2004. The said notice expired without the debt being settled where upon the property was re-advertised for sale. M/s Kashojwa Farmers then filed a Miscellaneous Application No. 811 of 2004 for a temporary injunction under Civil Suit No. (O.S) 28 of 2004. I heard the Miscellaneous Application No. 811 of 2004. The said application resulted into a Consent Order dated 23<sup>rd</sup> November, 2004 where the parties agreed;

1. *That the Applicant undertakes to pay the debt of Shs. 14,235,501/= within 4 months from 1<sup>st</sup> December, 2004.*
2. *That the caveat lodged on the certificate of title No. LRV 1239 folio 21 Rwampara Block 49 Plot 2 by Mr. Sam Bakenzana, the Managing Director of the Applicant is hereby vacated.*

3. *That if the Applicant fails to pay the said sum of Shs.14,235,501/= within the time stipulated the Respondent shall be free to sell the mortgaged land and recover the said debt. "*

Mr. Babonereire in his affidavit further depones in para 14 (forward) that Mr. Bakenzana and Kashojwa farmers did not pay the said facility. Mr. Babonereire instead depones that Mr. Bakenzana waived the period and states:-

*"14...and eventually waived the 4 months period agreed in the Consent Order by giving the 2<sup>nd</sup> Respondent a go ahead to be registered as proprietor of the suit land by signing a notice of withdrawal of caveat...marked H..."*

After this the 2<sup>nd</sup> Respondent was registered as the owner of the said land. The 2<sup>nd</sup> Respondent (now registered owner of the land) sworn an affidavit in reply as well. His evidence is very much the same as Mr. Babonereire but adds at para 10 as follows;

*"10. That same time in February 2005, one of the Directors of Kashojwa Farmers Ltd and the caveator thereof, Sam Bakenzana approached me and informed me that since they had failed to raise the money to pay off the debt, he would withdraw the caveat and recognize the previous sale to me so I could transfer the land into my name. A copy of the withdrawal of caveat is hereto annexed "D" . "*

Perhaps the most surprising evidence by affidavit came from Mr. Sam Bakenzana himself. In effect Mr. Bakenzana swore his affidavit in support of the Respondents and against that of the applicant his wife. The affidavit has the following depositions

- "2 ...that the Applicant's affidavit is riddled with falsifies, it cannot be relied on and must accordingly be struck out.*
- 6. That I contested the sale which was set aside by the Court for lack of notice.*
- 7. That a proper notice was then sent to us but we still defaulted and the 1<sup>st</sup> Respondent re advertised the suit property for sale.*
- 8. That Kashojwa Farmers Ltd then filed... for a temporary injunction against the 1<sup>st</sup> Respondents sale.*
- 9. That consent was entered whereby the company agreed to pay... the 1<sup>st</sup> Respondent within 4 months from the 1<sup>st</sup> December.*
- 10. That it was coming to the second month and Kashojwa Farmers Ltd still had not hopes of raising the money to pay off the debt... pursuant to the consent in MA 811 of 2004, I and the Applicant agreed that I vacate the caveat on the suit land, thereby recognizing the previous sale to the 2<sup>nd</sup> Respondent and authorizing him to transfer the suit land into his names.*

14. *That it is not true that the said land is our family home as our family home was and has been in Kanungu.*
  
15. *That further, we have never been in occupation of the suit land and that the applicant, I and all our children have been residing in Kabale where all the said children were born. "*

Counsel for the Applicant argued that the Consent Order had a validity period up to 31<sup>st</sup> March 2005 so the applicant was still within time to pay off the facility but was denied to do so by the Respondent Bank. He argued that the land title shows it was transferred around the 4<sup>th</sup> February 2005 well before the deadline.

Counsel for the Applicant argued that the original sale had been nullified so the applicant's husband could not legitimize the original sale. A fresh advert had to be made and not a sale by private treaty.

Counsel for the Applicant argued that the applicant under company law could bring an action for minority protection where the act done by the company was illegal. He further argued that though S.39 of the Land Act would not apply to the mortgage which was done before the Act came into force but it would apply to the sale of the said land effected after the Act was made. He argued that the order of Court by consent had provided for the caveat to be vacated and so there was no need for the withdrawal of the caveat.

Counsel for the Respondent Bank strongly argued that the application was an abuse of Court process. He argued that Counsel for the Applicant had largely departed from his pleadings during the submissions. Counsel for the Respondent Bank observed that the Applicants main argument was that her matrimonial home was sold without her consent. He argued that the provisions of the Land Act (which came into force in 1998) could not work retrospectively with respect to a mortgage of 1991. Counsel for Respondent Bank also argued that the same person who placed the caveat and got an extra 4 months is the same person who chose to remove the caveat and forfeit the remaining period and so the Consent Order in his view was not violated.

Counsel for the 2<sup>nd</sup> Respondent however while largely agreeing with Counsel for the Bank also submitted that the Applicant had no locus standi. She was not the borrower and did not show that she had authority from the company to bring the application. He argued that the Applicant was not part of the previous proceedings nor the said Consent Order.

I have read the pleadings and heard the submissions of both Counsel on the matter.

This application is brought under Section 98 of the Civil Procedure Act which provides

*"...nothing in this Act shall be deemed to limit or otherwise after the inherent power of the Court to make such orders as may be necessary for the ends of Justice or to prevent abuse of the process of the Court. "*

This provision is a double edged sword in this application. The Applicant seeks the use of the Courts inherent powers to meet the ends of Justice while the Respondents seek the opposite that the application is an abuse of Justice. Which way then shall the sword fall?

The first test to be established is when the Court can invoke or have its inherent powers invoked.

Counsel for both parties did not address me on this important point and probably assumed that an application of this nature could be used to invoke the Courts inherent jurisdiction.

A review of the case law on this point however makes some interesting findings. In discussing an "inherent power" the exercise of which is the "inherent jurisdiction" of the High Court Lord Diplock in the case of **Bremer V South Indian Shipping Corporation Ltd [1981] 2 W.L.R 141 H.L.** noted as follows

*"...it would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the Court of acts which it must have power to do in order to maintain its character as a Court of Justice..."*

In that case Lord Diplock cited the power of the High Court to dismiss a pending action for want of prosecution as an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice.

The learned author Mulla in his book ***“The Code of Civil Procedure” 17 ed Butter worths 2001*** while discussing Section 151 of the Indian Civil Procedure Code which is the same as Section 98 of the Uganda Civil Procedure Act made the following observations at Plaintiff 1422.

*“...the power, under this section, relates to matters of procedure. If the ordinary rules of procedure result in injustice and there is no other remedy, they can be broken to achieve the ends of justice. The law cannot make provision against all inconveniences such that their dispositions express all the cases that may possibly be covered. It is therefore the duty of a Judge to apply them, not only to what appears to be regulated by their express provisions, but also to all cases to which they can be justifiably applied, and which appear to be comprehended, either within the express provisions of the law or within the consequences that may be gathered from it...”*

The learned author at Plaintiff 1423 then goes on to observe that the power is a discretion vested in the Court and is dependent upon various circumstances which the Court has to consider. As a result there is no limitation for its application under the section. He then goes on to show that the inherent powers of Court; should not be exercised when prohibited or excluded by the Code (Act in our case) or other statutes; should not be exercised when there are specific provisions in the code and are to be used only to meet the ends of justice.

It would then appear to me that the inherent power that Court has is to remedy procedural matters that may not meet the ends of justice. It is a discretionary power given to Court and like all discretionary powers it is to be exercised judiciously on a case by case basis.

This is **borne** out in a review of cases in Uganda where the Court has used its inherent powers like

**Baxi V Bank of India [1966] EA 130** to strike out a counter claim as being re judicata.

**Iron & Steel wares Ltd V C.W. Martyr & Co. [1956] EACA 175** to order a stay of execution

and

**Re Epicure Ltd [1960] EA 308** to set aside a judgment irregularly obtained.

This application is in substance to set aside a sale of land. Several reasons have been advanced for this. One would have to see if these reasons meet the tests outlined above. The first reason is that the sale was made in disregard of the Consent Order. I find that Court could be asked to use its inherent powers to look into a violation of a Consent Order as I am not aware of a specific rule on the matter. The Consent Order as I understood it was to give the applicant in M.A. NO. 811 of 2001 that is Kashojwa Farmers Ltd one final chance to clear this old debt of Shs.14,235,501/= failing which the suit land would be sold. The deadline as correctly put by Counsel for the Applicant would be 31<sup>st</sup> March 2005.

Kashojwa Farmers Limited and in particular its Director and registered proprietor Mr. Sam Bakenzana had halted the sale by the 1<sup>st</sup> Respondent Bank to the 2<sup>nd</sup> Respondent Mr. Deus Kamunyu on the legal technicality of notice. Of course this did not resolve the underlying debt question, this still had to be resolved as Justice Kibuuka clearly put it in M.A. NO. 71 of 2003 **Nile Bank V Sam Bakenzana**

*"...in the instant application, there is no doubt that the principal debtor defaulted in repaying the debt to the Applicant..."*

It would appear to me that having bought himself time Mr. Bakenzana later decided to abandon his advantage and allow the earlier transaction involving Deus Kamunyu to go ahead rather than wait out what ever other time that he had. I find that the actions of Mr. Bakenzana in this regard amounted to a waiver and consequently settled the underlying dispute between Kashojwa Farmers Ltd and Nile Bank. Mr. Bakenzana's affidavit also bears this out.

Counsel for the Applicant seems to suggest that the signing of the caveat withdrawal by Mr. Bakenzana was a redundant act as the Consent Order had already vacated it. Technically that is a correct analysis however that Mr. Bakenzana still signed the withdrawal of the caveat despite the Consent Order is only further evidence of his act of waiver. I do not see how by Court reversing this, that the ends of justice can be served.

That Mrs. Bakenzana was subsequently able to find the money and then files this application for the benefit of herself, her husband and children (see the Notice of

Motion prayer (d) of the requested orders) in my view comes 13 years too late, given the date of the original facility by the bank.

I also find it strange that she brings this application also for the benefit of her husband, who instead files an affidavit against her. This surely cannot help her case and probably points to another problem altogether whatever that maybe.

I also find prayer (c) in the motion that Court direct who of the 2 Respondents should be paid the Shs.14,235,501/= by the Applicant at this late stage clearly an attempt to abuse the Courts powers.

I can understand her desire to reclaim this land but clearly the Applicant knows who she should pay if she wants the land to be retrieved and that is by negotiating with the 2<sup>nd</sup> Respondent. She does not need a Court direction to that effect.

I accordingly decline to set aside the sale of the land on the ground that it was in utter disregard of the Consent Order.

The other reason given for Court to set aside the sale is that it contravenes the Land Act. Clearly this is not a good instance for Court to exercise its inherent powers. This would require a full trial for Court to judiciously apply its mind.

It is not sufficient in my view for the Applicant to produce hand written letters from LC1 Chairman and the District Probation Officer that the land in question is family land when those two could have sworn affidavits to support her claim. In any event

the affidavit of her husband contradicts hers as to where the family home is. Given the history of this dispute this appears to be an after thought only being raised now for the first time.

Be that as it may Court will not use its inherent powers nullify this sale for contravening the Land Act without a proper trial.

Counsel for the Applicant also raised issues relating to a minority action by the Applicant against the company. I agree with Counsel for the Respondent Bank that this was not pleaded in the motion and indeed did not give raise to any prayer. Still Court would not use its inherent powers to make summary declarations on a minority action without a trial.

Court is enjoined by Section 33 of the Judicature Act to completely and finally determine all matters in controversy and avoid a multiplicity of legal proceedings. I find that it would not serve the ends of justice to allow the dispute regarding this loan to proceed any further. The application is accordingly dismissed.

Since the original Consent Order was without costs I order each party to bear its own costs.

**Geoffrey Kiryabwire**

**JUDGE**

**Date: 16/08/06**