

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

**MISCELLANEOUS APPLICATION NO. 733 OF 2005  
(Arising out of H.C.C.S. No. 1018 of 2004)**

**ROSEMARY ELEANOR KARAMAGI ::::: APPLICANT/DEFENDANT**

**VERSUS**

**ANGOLIGA MALIMOUD :::::::::::::::::::: RESPONDENT/PLAINTIFF**

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

**RULING**

This is an application by Notice of Motion under Section 34 and 98 of the Civil Procedure Act and order 42 rule 1 and order 48 rules 1 and 3 of the Civil Procedure Rules (All under the old ed 1964). It seeks orders that

*“(a) The sale of the Applicant/Defendant’s immoveable property comprised in and known as Kyadondo Block 229, Plot No. 119 at Kireka be nullified and set aside.*

*(b) Provisions be made as to costs hereon “*

The grounds for the application are that the sale was conducted by the court bailiff in breach of the law. In particular it is alleged that the duplicate certificate of title or a special certificate thereof was not lodged in court before the sale was conducted.

Furthermore no effective advertisement of the sale as required by the law was carried out.

It is also alleged that

*“...(c) The sale took place after the applicant/defendant had deposited the decretal sum and or part thereof with the court bailiff Mr. Sam. Mutabazi...”*

The application was supported by the affidavits of the Applicant and one Patrick Kagurusi.

Mr. Kwarisiima appeared for the applicant and Mr. Oging appeared for the Respondent and purchaser of the property.

The case for the Applicant is that on the 9<sup>th</sup> January 2005 the Applicant and the Defendant entered into a consent judgment in H.C.C.S No. 1018 of 2004. By the consent judgment the current Applicant agreed to pay the present Respondent the sum of Shs.6,923,000/= in three monthly installments which were to end on or about the 30<sup>th</sup> June 2005. A look at the consent order at para 4 shows

*“...That in the event of default by the defendant on the above installments the whole amount shall become due and owing and execution shall issue in respect thereof... ”*

The Applicant only paid Shs.1,000,000/= and defaulted on the other payments. A warrant to execute (returnable on the 23<sup>rd</sup> June 2005) was issued to one Sam Mutabazi T/a Mighty Agencies Ltd. The property in question in which the Applicant resides was attached for sale and advertised in the newspapers on 2<sup>nd</sup> June 2005.

The Applicant at para 9 of her affidavit depones that she entered into an oral agreement with the bailiff not to sell her property while she looked for money to pay. At para 10 of her affidavit the Applicant depones

*...10) That under the oral arrangement I paid to Sam Mutabazi court bailiff a total of Shs.4,000,000/= as follows:-*

- (a) On 1<sup>st</sup> July 2005 I paid Shs.450,000/=*
- (b) On 2<sup>nd</sup> July 2005 I paid Shs.1,600,000/=*
- (c) On 4<sup>th</sup> July 2005 I paid Shs.2,000,000/= ”*

She further depones that in all cases when she paid she was not issued with receipts. Counsel for the Appellant in his submission computed that the Applicant had paid Shs.4,000,000/= leaving a balance of Shs.1,900,000/=. The Applicant was therefore surprised when on the 26<sup>th</sup> August 2005 the same bailiff issued her notice to vacate on the grounds that the house was sold to one William Malavu by public auction on 2<sup>nd</sup> July, 2005 within the very period of the oral arrangement. On learning this the Applicant placed a caveat on the property.

Counsel for the Applicant faulted the procedure used in effecting the sale. He points to failure to deposit a duplicate or special certificate in court contrary to S.49 of the Civil Procedure Rules (old Rev ed 1964). He referred me to the cases of

**Habre International V Ibrahim Alara Khia HCCS No. 191/92**

and

**James Kabatarana V Charles Oudo & Ors HCCS No. 177/94**

as authority for this.

Counsel also submitted that the warrant on which the execution was done had expired on the 1<sup>st</sup> August 2005 but in his view was improperly renewed for another 15 days. Counsel for the Applicant argued that the correct procedure would have been to apply for a new warrant and then readvertise the property.

As a result of these errors counsel for the Applicant submitted that court should reverse the sale and restore the property.

Counsel for the Respondent submitted that at the time of the auction the Applicant still owed the Respondent money and so the execution had to proceed. Counsel for the Respondent further submitted that it was normal for court to extend warrants and in such a case there would be no need to readvertise the property. He argues that purchaser Mr. William Malavu paid for the property without any notice of any irregularity.

I have perused the Notice of Motion and the affidavits in support and against it. I have also heard the submission of learned counsel for each party. To my mind the objection is premised on the following particular grounds

- 1- The sale was done without a certificate of title or in its absence a special certificate being lodged in court.
- 2- The sale was done after the warrant had expired.
- 3- The sale was done after the Applicant had deposited the decretal sum or part thereof.

Section 44 of the Civil Procedure Act (Cap 71 Law of Uganda Rev 2000 ed) provides that properties such as lands, houses and other buildings are liable to attachment and sale.

However Section 48 provides

- “1. The court may order, but shall proceed no further with the sale of any immoveable 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) (subsection 4 refers to a situation where the certificate of title has been lost or destroyed)”*
- 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 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 or her to prison for a period not exceeding thirty days..." (emphasis mine).*

It is clear that the law sets out an elaborate procedure for the sale of immovable property. It would appear to me that the basic procedure where property has been ordered for sale would be for the Registrar of court to order the duplicate certificate to be delivered up to court. This order would have to be put in writing. Where such a certificate is lost or destroyed the Registrar of court can order the Registrar of Titles to issue a special certificate.

Where the judgment debtor has the duplicate certificate of title and willfully refuses to surrender it, then after a notice to show cause has been issued the judgment debtor, can be committed to prison for a period not exceeding 30 days. I am unable to see from the record that this was done. I do understand the difficulty of getting judgment debtors to surrender their land titles but the law has provided for such an eventuality. So this part of the execution was irregular.

As to the validity of the warrant it is clear that the sale should have been done by 1<sup>st</sup> August 2005. It was then renewed for a period of 15 days.

In the case of

**Maria Anyango Ochola & Other V Hannington Wasswa & Another**  
**[1988 – 1990] HCB 102**

A property was attached and advertised for sale. The warrant expired on the 30<sup>th</sup> September 1972. The sale failed because the payment cheque bounced. The bailiff proceeded to make a further advertisement on the 14<sup>th</sup> December 1972 but effected a sale immediately before the 30 days period in the advert.

Justice Mukanza inter alia held referring to order 19 rules 1 & 2 (now order 22 rules 65(1) & (2) 2000 Rev ed) where a sale is adjourned for more than 7 days a fresh public notice is to be given unless the judgment debtor consents to waive the giving of such a notice. Where there is no proof that the judgment debtor waived the need for public notice no such sale could be valid. Order 22 rule 65 (1) is equally applicable to the court (normally the Registrar) and the officer conducting the sale (the bailiff).

It would therefore appear to me that any extension and or adjournment of the warrant however called beyond 7 days would require advertisement unless the judgment debtor waived the requirement. There is no evidence of waiver in this particular case.

The Applicant also claims that she had paid the debt she owed. In her affidavit the Applicant deponed that she had entered into an oral agreement with the bailiff not to sell her property for the adjudged sum of Shs.5,923,000/=. She then paid the bailiff a total of Shs.4,000,000/= for which she got no receipts leaving a balance of Shs.2,000,000/=. She further depones that she paid this remaining Shs.2,000,000/= to one Peace Tamale on the instructions of the bailiff.

The bailiff Mr. Mutabazi denied giving this instruction. He however does depone that 2 days after the auction on the 4<sup>th</sup> July 2005 one Peace Tamale did tell him that the Applicant had left Shs.2,000,000/= with her to pass over to him. Mr. Mutabazi depones that he declined to receive the money because the sale had been conducted and he saw no reason why the money had not been brought to his office by the Applicant.

According to Mr. Mutabazi's affidavit of 5<sup>th</sup> December 2005 his version of how payments were made is quite different. He states he did not receive any money from the Applicant before the sale of the property as alleged. He depones that on the 2<sup>nd</sup> July 2005 the warrant was executed and the property sold to one William Malavu at Shs.34,000,000/= as the highest bidder.

He then took Shs.11,671,000/= of that money and paid Housing Finance Bank to access the Applicant's title there because it had been mortgaged to the bank. He then handed the title to Mr. Malavu with the transfer forms signed. He then remitted Shs.15,810,000/=

to the court after deducting the Shs.5,923,000/= the decretal sum. The decretal sum was then passed over to the lawyers of the plaintiff. Having done his work he had his bill of costs taxed and his fees were paid. He does not state who paid his fees but the court record show that his fees were taxed and allowed by court on the 4<sup>th</sup> August 2005 at Shs.1,887,000/=.

A review of the figures deponed by the bailiff Mr. Mutabazi do not add up. I find that if the bailiff paid the bank Shs.11,671,000/= out of the proceeds of Shs.34,000,000/= that would leave a balance of Shs.22,329,000/=. He then deposited into court Shs.15,810,000/= (on the 15<sup>th</sup> July 2005) that would leave a balance of Shs.6,519,000/=. Of this amount he paid the lawyers of the judgment creditor Shs.5,923,000/= that would leave a balance of Shs.596,000/= which is unaccounted for.

He states his fees of Shs.1,887,000/= were settled separately. The bailiff filed an undated return with court, but which is stamped by court on 6<sup>th</sup> July 2005 which reads

*“Your Worship*

*As per warrant issued on 2<sup>nd</sup> June 2005, I hereby remit returns to court have auctioned the property at Shs.34,000,000/= to the highest bid (sic) Mr. Malavu William on the 2<sup>nd</sup> day of July 2005 and have paid the judgment creditor the decretal sum and costs of the suit.*

*I am in the process of clearing with the Bank where the title deed is mortgaged and undertake to remit the balance to this hounourable court as soon as I clear with Housing Finance Bank.*

*In the due course therefore, I pray to tax my Bill of Costs ex-parte*

*Most obliged.*

*Sam Mutabazi “*

I think bailiffs should avoid giving such generalised returns and should strictly account for all the proceeds that they get within the meaning of rule 13 of the Court Bailiff Rules 1987.

Be that as it may it is difficult to tell who is stating the truth. However given that the dates when the Applicant claims to have paid the bailiff consides with the date of the auction it is difficult to see how the bailiff would accept money from the Applicant and proceed with the sale. The onus is on the Applicant to prove this and she has no receipts or acknowledgements to back up her claims and allegations of payment save for the admitted figure of Shs.2,000,000/= paid to one Peace Tamale 2 days after the sale.

In the case of

**James Kabaterine V Charles Oundo & Another HCCS 177/94**

Justice Mpagi – Bahegeine (as she then was) held

*“...an execution has been held to be irregular when any of the requirements of the rules of court or parties for the time being have not been complied with. When execution has been irregularly executed the court is enjoined to make an order of restoration...”*

In this case there is evidence of an irregular execution as rules of court were not followed. I accordingly nullify and set aside the sale. This being a sale by court and not ordinary sale the rules of court must be followed and where this as not done there is total failure of consideration.

In such a situation the purported buyer of the suit property shall be entitled to the refund of his money as per Justice Y. Bamwine in

**Eldreda Muchope V Diamond Trust Bank (U) Ltd & Anor MA 070 of 2006 (ruling No.2)**

and therefore should seek the appropriate remedies.

Since the Applicant did not comply with her own consent judgment with regard to the judgment debt I order each party bear their own costs.

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**Geoffrey Kiryabwire**

**JUDGE**

**26/10/06**

**26/10/06**

**12:10pm**

**Ruling read and signed in Court in the presence of;**

- **Kwarisiima for Applicant**
- **Bwambale David h/b for Oging Joseph for the Respondent**
- **Applicant present**

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**Geoffrey Kiryabwire**

**JUDGE**

**26/10/06**

R U L I N G