

UGANDA / JUDGMENT

Kasukali v Kiiza (HCT-01-CV-CS-LD 37 of 2019) [2025] UGHC 135 (28 February 2025)

[2025] UGHC 135

COURT

High Court of Uganda

BEFORE

Wagona, J

CASE / FILE NUMBER

HCT-01-CV-CS-LD 37 of 2019

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CV-CS-LD NO. 037 OF 2019

KASUKALI SARAH ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. KIIZA LABAN
2. AKUGIZIBWE PATRICK
3. AKUGIZIBWE ISAIAH T/A FORT PORTAL

ASSOCIATED BAILIFFS & AUCTIONEERS

1. DR. OCHWO OCHENG OJAMOKO::::::::::::::::::::::::: DEFENDANTS

**BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGEMENT**

Introduction:

The Plaintiff's cause of action is pegged on trespass, fraud and recovery of unregistered land situate at Fort Portal Road, Kyenjojo Town Council, Kyenjojo District (suit land) which she alleges was wrongly sold by the 3rd Defendant to the 1st Defendant in execution of the decree in **Court of Appeal Civil Appeal No. 73 of 2010** and that she was consequently evicted from the suit land and her developments thereon demolished by the Defendants. The said decree was between one *Joweria Kabajungu* (Plaintiff's mother) and the 2nd Defendant. The Plaintiff seeks the following reliefs:

1. A declaration that the unregistered land situate at Fort Portal Kampala Road, Kyenjojo Town Council, Kyenjojo District known as Plot 13 (the suit land) which was purportedly sold by the 3rd Defendant to the 1st Defendant in execution of the decree between on Joweria Kabajungu and the 2nd Defendant, actually belonged to the Plaintiff;
2. A declaration that the said land was wrongfully sold and that the said purported sale was null and void;
3. A declaration that the subsequent eviction of the Plaintiff from the said land and the demolition of her housing units thereon amounted to trespass and were wrongful, unlawful and void;
4. An order to the Defendants to give the Plaintiff vacant possession of the said land;
5. A permanent injunction to restrain the Defendants from trespassing on the suit land;
6. Special damages in the sum of Ug. Shs. 397,730,305/=;
7. General damages;
8. Interest on special damages at the rate of 20% per annum from the date of filing, and on general damages at court rate from the date of judgment, till payment in full;
9. Mesne profits in the sum of Ug. Shs. 1,870,000/= per month from July 2019 till restoration of the demolished units;
10. An order that the sum claimed to have been deposited in court by the 3rd Defendant be paid over to the Plaintiff in partial settlement of the damages hereinabove claimed; and
11. Costs of the suit.

The case of the Plaintiff:

The Plaintiff contends in her Complaint that the suit land was part of a sizeable parcel of unregistered land originally owned by her late Father, *Mr. Karungi Muhammed Mistiri*, where he lived with his wife, *Kabajungu Joweria*, the Plaintiff's mother, the Plaintiff herself and her eight other siblings. That before his death, *Mistiri* distributed most of the said land among his children, including the Plaintiff and gave another portion to the Muslim community for construction of a mosque, leaving a residual portion for himself and his said wife. That later, on the directions of the local/urban authorities of Kyenjojo Trading centre, the entire land was surveyed and split into regular Plots measuring 50ft x100ft for planning purposes, and as a result of the said survey, the portion that had remained the property of *Joweria Kabajungu* became **Plots 15 and 17** while that allocated to the Plaintiff became **Plot 13**. On **Plot 13**, the Plaintiff set up a four-bedroom residential house, a shop building with three shop rooms and three living rooms at the back, a residential tenants' building with six semi-detached units each consisting of a sitting room and a bedroom, a pit-latrine block with six pit latrine stances and two bathrooms. That the property had a perimeter fence with a metallic gate, and gardens. The Plaintiff lived in the residential/main house while the tenants in the shop and residential tenements occupied the same under

agreement.

In the due course, the Plaintiff learnt that without informing or seeking the advice of the Plaintiff and her other children or other members of the family, *Joweria Kabajungu* had in 2001 sold part of her own land to the 2nd Defendant and that the 2nd Defendant was also claiming that he had bought another portion of *Kabajungu's* land from *Iddi Banage*. The dealings between *Joweria Kabajungu* and the 2nd Defendant resulted in a protracted Court dispute which started from Kyenjojo District Land Tribunal, to the High Court and later the Court of Appeal and in all these court processes, all reference was to Plots 15 and 17, the property *of Joweria Kabajungu*, and the dispute had nothing to do with Plot 13, which was owned, developed and occupied by the Plaintiff and her rent-paying tenants.

However, unknown to the Plaintiff, who was not a party to the court matters between *Joweria Kabajungu* and the 2nd Defendant, the 2nd Defendant taxed a Bill of Costs against *Joweria Kabajungu* in respect of the appeal, and sought to enforce recovery of the taxed costs by attachment and sale of Plot 13 claiming the same to be the property of *Joweria Kabajungu* without any legal or factual basis for doing so. On 12th July 2019, the 3rd Defendant, a court bailiff, with the help of police and a gang of brutes stormed the Plaintiff's compound, threw her movable property, family and tenants out of the premises on Plot 13 and erected iron sheets around it, and on the next day, they completely razed the Plaintiff's structures to the ground. The property was then sold in execution to the 1st Defendant at a ridiculously low price of Ug. Shs. 45,000,000/= as valued by the 4th Defendant who was not a qualified valuer.

The case of the Defendants:

Through a joint Written Statement of Defence, the Defendants contended that they were wrongly sued, there is no cause of action against them and that the 1st Defendant is the lawful owner of the suit land having purchased it from the 3rd Defendant on 21st November 2017 through court execution in **Civil Appeal No. 52 of 2005**. The suit land belonged to *Kabajungu Joweria* which court attached to realize the judgment debt in *Civil Appeal No. 52 of 2005, Akugizibwe Patrick vs. Kabajungu Joweria*. After the sale, the 1st Defendant was given vacant possession by court and he is rightfully in possession of the same. The Defendants are not guilty of any fraud or illegalities as alleged, they are not trespassers and the suit land does not belong to the Plaintiff.

Issues:

When the matter came up for scheduling on 1st March 2021, the following issues were framed for determination:

1. **Whether the suit land belongs to the Plaintiff.**
2. **Whether the suit land was wrongly sold to the 1st Defendant.**
3. **Whether the eviction and occupation by the 1st Defendant amounts to trespass.**
4. **What remedies are available to the parties?**

Representation and hearing:

Mr. Benson Tusasirwe appeared for the Plaintiff while *Mr. Richard Bwiruka* appeared for the Defendants.

The Plaintiff led evidence of 5 witnesses and she testified as ***PW1; Kyomuhendo Nathan (PW2); Racheal Nasirumbi (PW3); Jonathan Batange (PW4);*** and ***Baseka Karim (PW5)*** and also relied on Plaintiff's exhibits 1 to 23 which were tendered in at the commencement of trial. The Defendant relied on 8 witnesses, to wit; ***Kiiza Laban (DW1); Akugizibwe Patrick (DW2); Akugizibwe Isaiah (DW3); Tugume John Bosco (DW4); IddiBanage (DW5); Kabasinguzi Teddy (DW6); SwalehSande (DW7);*** and ***Dr. Ochwo Ochieng Ojomoko (DW8)*** and also relied on Defendant's exhibits 1 to 21. The court also visited locus on 6th September 2024 and received evidence from both parties. The parties filed written submissions which I have considered.

Burden of Proof and Standard of proof:

The plaintiff bears the burden to prove her claim on the balance of probabilities.

Section 101 of the Evidence Act is to the effect that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts

which he or she asserts must prove that those facts exist. (See also **Kamo EnterprisesLtd Vs. Krytalline Salt Limited, SCCA No. 8 of 2018**). The evidential burden per section 102 and 103 of the Evidence Act keeps shifting depending on facts as alleged by a given party to prove the existence of such facts.

Evidence of the Plaintiff:

PW1 (Kasukali Sarah) stated that she is a biological daughter of ***Mr. Karungi Muhammed Mistiri*** and ***Mrs. Kabajungu Joweria***. That her father owned a sizeable unregistered parcel of land at Kyenjojo, along Fort Portal – Kampala road where he lived with his wife, the Plaintiff and her eight other siblings. In or about 1973 prior to his death, the Plaintiff's father distributed most of his land among his children, including the Plaintiff, and gave another portion to the Muslim community for construction of a mosque, leaving a residential portion for himself and his wife, ***Joweria***. Later, the land was surveyed and split in regular plots measuring 50ft by 100ft and the property that had remained the property of ***Kabajungu Joweria*** became Plots 15 and 17 while that allocated to the Plaintiff became Plot 13. On Plot 13, the Plaintiff at her own expense, constructed a 4 bedroom main residential house, a shop building with 3 shop rooms and 3 living rooms at the back, a residential tenants building with 6 semi-detached units each consisting of a sitting room and a bedroom, a pit latrine block with six pit latrine stances and 2 bathrooms, as well as a perimeter fence, gate and gardens. All the tenants in the 3 shop rooms and the 6 semi-detached residential units were under agreement and they paid rent solely and exclusively to the Plaintiff. However, in 2001, the Plaintiff's mother sold part of her land (not Plot 13) to the 2nd defendant without the Plaintiff's knowledge or advice nor that of the family. The dealings between the plaintiff's mother and the 2nd Defendant resulted in a protracted court dispute in

respect of Plots 15 and 17 for which the Plaintiff was not a party. However, unknown to the Plaintiff, the 2nd Defendant was successful in the court matters against *Joweria* and he instead illegally and fraudulently levied execution against the Plaintiffs property comprised in Plot 13 worth about 500,000,000/=. In cross-examination, PW1 stated that she is a retired Police Officer who retired at the rank of Inspector of Police and that she was born on the suit land which originally belonged to her late Father who never left a will but distributed it among his family members when he was still alive. The distribution was made in writing but the document got stolen with the things in her house. Her complaint is that when they attached her mother's 2 Plots of land in execution which measured 100ft x 50ft each, they also included her land comprised in Plot 13 measuring 100ft x 50ft which touched Kampala Road up to the mosque. That the sale agreement between the 2nd Defendant and *Kabajungu Joweria* does not show the boundaries of what was sold, however that *Joweria* informed her that she had sold only Plot 17 to the 2nd Defendant and that Plot 17 does not share boundaries with Plot 13.

PW2 (**Kyomuhendo Nathan**) testified that he is the LC1 Chairperson of Nyakabara Cell, where the suit land is located, that he has held the position since 1986 and has known the Plaintiff since childhood. That the Plaintiff's father originally owned the suit land and that he distributed it among his children, including the Plaintiff, before his death. After Kyenjojo was curved out of Kabarole District, the land was surveyed and divided into Plots and the Plaintiff got her own portion. In 1994, the Plaintiff constructed a shop room house consisting of 3 shop rooms, between 2006 and 2008 or thereabout, the plaintiff constructed a residential house, a tenant's residential house and a fence with a metallic gate on the land. She started living in her residential house in 2016 until when she was evicted and the house razed down in 2019. In cross-examination, he stated that he was not present when the Plaintiff's father distributed the land, but that he was informed so by the Plaintiff's mother and that he saw a document to the effect that the Plaintiff's father had given land to his wife, children and a part to Kyenjojo Mosque. That he did not participate in the litigation between the Plaintiff's mother and the 2nd Defendant and that he was not informed and was not around when the Plaintiff was evicted by the court bailiff from the suit land.

PW3 (**Racheal Nasirumbi**), testified that she is a registered valuation surveyor since 2007 working with *Wrok Valuation Consultants Limited* and a member of the Institute of Surveyors of Uganda. That on the Plaintiff's instructions, she carried out valuation of the property using the sales comparison method and the replacement cost method to determine the equivalent market value of the buildings that were destroyed. That it was determined as at 18th March 2011, the valuation date, that the fair value of the properties was in the region of Ug. Shs. 260,000,000/=; representing the value of the land (Ug. Shs. 50,000,000/=), the destroyed buildings (Ug. Shs. 150,000,000/=) and the allowable disturbance (Ug. Shs. 60,000,000/=). PW3 further stated that the valuation of the buildings was done when they had already been demolished but that she estimated the value by looking at the satellite image of the area before the demolition and that the approved plan of the area provided by the Plaintiff tallied with the satellite images.

PW4 (Jonathan Batange), stated that he is a quantity surveyor by profession duly registered with the Surveyors Registration Board practicing with K & K Survey Associates. That he was approached by the Plaintiff with a Bill of Quantities for putting up the demolished structures prepared by SEKA Associates and he found that there were missing key items such as preliminaries, consultancy fees, contingent and Value Added Tax and that as such, they did not provide a true estimate of the cost of replacement of the demolished buildings. That he prepared a supplementary Bill of Quantities based on the approved architectural drawings and the size of the plot of the land, to the effect that the accurate cost of putting up the demolished structures was 525,794,681/=.

PW5 (Baseka Karim), testified that he is a builder and that in 1994, on the Plaintiff's instructions, he and his colleagues constructed a shop house on the Plaintiff's land which they measured and found it to be 50ft by 100ft. the shop house had 3 shop rooms and 3 living rooms at the back. That between 2006 and 2008, he also constructed a residential house on the suit land consisting of 4 bedrooms, sitting room, dining room, kitchen store, a shade, a pit latrine block with 6 stances and 2 bathrooms and a fence with a metallic gate. In cross-examination, PW5 stated that it was the Plaintiff who paid him and instructed him to construct but that **Kabajungu Joweria** who was staying a distance away used to come and inspect the site and showed them where to build. In re-examination, PW5 stated that **Kabajungu Joweria** never claimed to be the owner of the land and that she told PW5 that the land belonged to the Plaintiff.

Evidence of the Defendants:

DW1 (Kiiza Laban), testified that on 20th October 2017, he saw an advert in the Red Pepper Newspaper to the effect that **Kabajungu Joweria's** Plot at Kyenjojo Town Council on Fort Portal – Kampala Road was on sale and that he then contacted the 3rd Defendant on the telephone number which was reflected on the advert and thereafter went to Kyenjojo Town Council where he saw the Plot with its developments and he got interested in the property. That on 21st November 2017, his bid of Ug. Shs. 45,000,000/= was the highest bid for the property whereupon he entered into an agreement of sale with the 3rd Defendant and paid the said sum in cash. That he filed **Miscellaneous Cause No. HCT-01-CV-LD-MA-020 of 2018** against **Kabajungu Joweria** seeking vacant possession of the land and this application was allowed on 12th July 2018. On 27th June 2019, the court issued a warrant to give vacant possession to **Twikirize Isaac**, a court Bailiff who evicted **Kabajungu Joweria** and her agents from the land. He took possession of the land on 12th July, 2019 and he is still in possession of the property. In cross-examination, **DW1** stated that the land he bought is approximately **70ft by 120ft** and that before purchase, he made inquiries strictly from the 3rd Defendant and established that the land belonged to **Kabajungu Joweria.** That he made no further inquiries beyond the 3rd Defendant. That he never carried out any valuation of the land before purchase because he never found it necessary to do so. That the old houses on the land were demolished at the 3rd Defendant's expense while the land was graded at his expense.

DW2 (**Akugizibwe Patrick**), testified that he is resident of Katooke B Zone Town Council in Kyenjojo District and that he knows the Plaintiff as a daughter of *Kabajungu Joweria* and that, on 2nd August 2001, *Kabajungu Joweria* sold to him a Plot on Kampala Road measuring 50ft by 100ft bordering *Asiimwe Richard* on one side and *Kabajungu Joweria* on the other side. That when he carried out the measurements of the land, he found a foundation constructed on the land by *Iddi Banage* and that *Kabajungu Joweria* confirmed to him that *Iddi Banage* owned the portion measuring 25ft by 50ft which he later purchased from *Iddi Banage*. That consequently, his Plot measured **75ft in width and 100ft in length** and he took over the land and developed it with a petrol station. Subsequently, *Kabajungu Joweria* successfully sued him in the Kyenjojo District Land Tribunal Claim No. 32 of 2003 for trespass. He successfully appealed against the Tribunal's decision in High Court Civil Appeal No. HCT-01-CV-CA-052 of 2005. *Kabajungu Joweria's* appeal to the Court of Appeal vide Civil Appeal No. 73 of 2010 was dismissed on 3rd November 2015. Earlier, on 4th November 2010, in High Court Civil Appeal No. HCT-01-CV-CA-052 of 2005, DW2 applied and the Court issued a warrant of attachment and sale of *Kabajungu Joweria's* remaining Plot of land but the land was not attached because there were no bidders. DW2 made another application for attachment and sale which was granted on 17th December 2015, and the same was effectively executed by the 3rd Defendant. In cross-examination, DW2 stated that the Town Council has never given Plot numbers and that the area is not divided into Plots and that he is not aware that the Plot he bought from *Kabajungu Joweria* is Plot 17. That he currently has a title to the property which shows a different Plot number.

DW3 (**Akugizibwe Isaiah**), stated that he is a Bailiff practicing under M/s Fort Portal Associated Bailiffs and Auctioneers and that on 9th November 2010 he was given a warrant of attachment and sale of immovable property against *Kabajungu Joweria* in High Court Civil Appeal No. 52 of 2005 for a Plot at Kyenjojo Town Council in Kyenjojo District but the same wasn't executed due to absence of bidders but on 10th May 2017, the same warrant was again issued to him, and he; served it on the judgment debtor; attached the property on 22nd May 2017; had the property valued and submitted a valuation report to court on 27th June 2017; tried to sell the property by public auction on 29th June 2019 but did not get satisfactory offers; re-advertised the property on 20th October 2017 in the Red Pepper Newspaper; sold the property on 21st November 2017 to the 1st Defendant who was the highest bidder at the forced sale value of Ug. Shs. 45,000,000/=; and on the same day, he made a report to court confirming the sale. During cross-examination, DW3 stated that he inspected the property by walking around it, met the tenants and viewed the property but that he never went inside. The property was in square shape and had very clear boundaries of *"oburamura"* trees which could be seen, it was entirely built-up with both residential and commercial buildings and rental rooms for tenants. Based on his observation, the property was a normal plot of 50 by 100 ft and that he identified the owner of the property by asking the neighbors and by asking *Kabajungu Joweria* who was also indentified by the court proceedings. He did not know whether the land was registered or bore Plot numbers and in his advert in the newspapers, he described the property as, "Plot of land located along Kampala – Fort Portal Highway, in the centre of Kyenjojo Town Council."

DW4 (Tugume John Bosco), stated that between 2005 and 2019, he had a carpentry workshop and timber selling business on the suit land in Kyenjojo Town Council and that *Joweria Kabajungu* was his landlady and that as such, the Plaintiff is not the owner of the land.

DW5 (Iddi Banange), stated that in 1985, he purchased a Plot of land along Fort Portal – Kampala Road from Mzee Kimbugwe John and that on 9th September 2001, he sold the same to the 2nd Defendant and that at that time, *Joweria Kabajungu* had built a house on the suit land and she had a restaurant thereon and some tenants.

DW6 (Kabasinguzi Teddy), stated that from the year 2000 to 2011, she was a town agent employed by Kyenjojo Town Council and that in the course of her duties of collecting revenue from residents, she became aware that *Joweria Kabajungu* had a commercial house on the suit land where she was operating an eating house and that in 2004, *Joweria Kabajungu* paid for a plan adjustment for a commercial structure on the suit property where she was paying for a trading license in respect of an eating house.

DW7 (Swaleh Sande), stated that he is a resident of Kyenjojo Central Zone, Kasiina Ward, Kyenjojo Town Council, Kyenjojo District and he knows that *Joweria Kabajungu* owned Plots of land on Fort Portal – Kampala Road and that she had a house thereon which she started constructing in 1992 and started occupying in 1994. That she operated an eating house on the land with her daughter *Nakaizi Zaam* and that she was also selling firewood thereon.

DW8 (Dr. Ochwo Ochieng Ojomoko), stated that he is a valuation surveyor and that on 29th May 2017, he was instructed by the 3rd Defendant to carry out a valuation of the suit land and that he accordingly carried out the valuation professionally and made a report. During cross-examination, he stated that he was instructed by the 2nd Defendant to carry out the valuation and that the 2nd Defendant showed him the land and that he carried out a valuation of what the 2nd Defendant showed him.

Locus visit:

On 6th September 2024, the Court conducted a locus visit on the suit land. It was visible that the land was barely empty with two containers on each side of the land with an open space between them and the upper part was freshly graded. The land which was situated along Kampala – Fort Portal road was between Tin Petrol Station on the left side and a road leading to the mosque on the right side. **PW1, DW1, DW2 and DW3** gave further testimony and they were cross-examined by opposing Counsel during the locus visit.

Submissions:

The case proceeded by way of written submissions and Counsel for the Plaintiff submitted that the Plaintiff is the owner of the suit land, that the Defendant's witnesses only confirmed the Plaintiff's claim to be the owner of the suit land and that the Defendant knowingly transacted in land they knew did not belong to the judgment debtor. All the Four Defendants were fraudulent in causing the enforcement of a decree against a judgment debtor's relative and yet execution can

only be made against the judgment debtor herself. That the 1st Defendant acted fraudulently when he never made any basic inquiries to verify the ownership of the land before purchase, and that the 2nd and 3rd Defendants acted fraudulently when they advertised the property and sold the same without verifying its true ownership. That the 4th Defendant carried out a valuation of the property when he did not have the qualifications to do so and consequently made an undervaluation of the property. Learned Counsel for the Plaintiff argued that where an execution is wrongfully effected, the victim of the wrongful execution is entitled to file a suit against both the court bailiff and the decree holder/beneficiary and that a court bailiff who acts unlawfully ceases to enjoy immunity under **Section 51 (2)** of the Judicature Act. He referred me to the Judgment of *Justice Platt* (as he then was) in the case of **Hannington Wasswa & Anor vs. Maria Onyango Ochola & Ors**, SCCA No. 22 of 1993 for that proposition. Counsel further argued that the 3rd Defendant's invasion of the Plaintiff's land on the morning of 12th July 2019 in the company of strong-arm men who were under his command, in purported execution of a court order, the chasing out of the occupants of the property, which he then handed over to the 1st Defendant, was unjustified and amount to trespass.

On the other hand, learned Counsel for the Defendants argued that the Plaintiff did not adduce any evidence to prove that her Father gave her the suit land as a gift inter vivos and the suit land in fact belonged to *Joweria Kabajungu*. That the plans relied upon by the Plaintiff do not show the Plot number and there is no proof that they were for the suit land. Learned Counsel further argued that whereas the case revolved around *Joweria Kabajungu* who is alive, the Plaintiff did not call her as a witness in the matter since her evidence would be adverse to her case and he referred me the case of **J. K. Patel vs. Spear Motors Ltd**, SCCA No. 4 of 1991 for the proposition that an adverse reference should be drawn against a party who fails to bring a key witness in a case. He submitted that the sale of the suit land to the 1st Defendant was properly done, the eviction was lawful and that the 1st Defendant is not a trespasser on the suit land.

CONSIDERATION BY COURT:

I will resolve the first, second and third issues concurrently.

Issue 1: Whether the suit land belongs to the Plaintiff;

Issue 2: Whether the suit land was wrongly sold to the 1st Defendant; and

Issue 3: Whether the eviction and occupation by the 1st Defendant amounts to trespass.

A judicial sale is defined by the **Black's Law Dictionary, Revised 4th Edition, Page 1505**, as one made under the process of a court having competent authority to order it, by an officer duly appointed and commissioned to sell, as distinguished from a sale by an owner by virtue of his right of property.

In the instant case, the 1st Defendant purchased the suit property pursuant to execution of the decree in *High Court Civil Appeal No. 52 of 2015* and in strict legal sense this was a judicial sale. The Supreme Court in the case of ***Lawrence Muwanga vs. Stephen Kyeyune (Legal Representative of Christine Kisamba (deceased))** SCCA No. 12 of 2001*, citing ***Chitaley and Rao's**

Code of Civil Procedure*, guided that a judicial sale, unlike a private one, is not complete immediately it takes place but until the person challenging it has taken appropriate proceedings. If no such proceedings are taken or they are taken and are not successful, the sale will then be complete and made absolute. Therefore, upon application of an aggrieved party, the court has discretion to set aside a judicial sale where fraud, mistake, exploitive overreaching, misconduct, irregularity or collusion casts suspicion on the fairness of the sale. An aggrieved party would in that context be anyone with justifiable proprietary interest in the sold property who is adversely affected by the judicial sale. In the case of **Altshuler Shaham Provident Funds, Ltd. vs. GML Tower LLC**, 129 A. D.3d 1439, 1442 (4th Dep't 2015), the Appellate Division of the Supreme Court of New York, stated that; -

*“*Even after a judicial sale to a good faith purchaser, a court can exercise its inherent power over a sale made pursuant to its judgment or decree to ensure that it is not made the instrument of injustice*.”*

However, such power to set aside a judicial sale power must be exercised sparingly and with great caution to avoid a miscarriage of justice since different parties with different rights and obligations are involved in a judicial sale, to wit; a judgment creditor, a judgment debtor, a court bailiff, a purchaser, and in rare circumstances, a person aggrieved by such judicial sale. A judgment creditor is entitled to enjoy the fruits of the litigation by enforcing the decree of court against a judgment debtor, and a court bailiff on the other hand is under obligation to lawfully execute the orders of Court.

A court bailiff is under **Section 51 (2) of the Judicature Act, Cap 16** protected from a suit for any lawful or authorized act done in

execution of a warrant but the protection is available only when the court bailiff acts lawfully. (**See Maria Onyango Ochola and others v. Hannington Wasswa and another [1988-1999] HCB 102**).

Rule 16 (10) of the Judicature (Court Bailiffs) Rules provides for the process of attachment as follows;-

“(10) The process of attachment shall be as follows—**

1. **a warrant of attachment shall be served upon the debtor and a return shall be filed in court before the sale is ordered;**
2. **where the judgment debtor declines or evades service, the court bailiff shall serve the warrant upon the local council of the area and the area police station shall post a notice at the premises, the subject of execution;**
3. **the court bailiff shall make an inventory of the attached property in triplicate stating the appropriate value of each item which shall be signed by him or her and the debtor if possible, and witnessed by a member of the local council; and**

4. *the court bailiff shall send the original copy of the inventory to the court that issued the attachment warrant and retain the duplicate for himself or herself and the triplicate for the debtor.”*

However, before proceeding with a judicial sale, the court bailiff must verify the ownership of the property in question to avoid the wrongful attachment of property belonging to innocent third parties. In **Kiboko Enterprises Ltd vs. Uganda Revenue Authority [2006] HCB 30**, it was established that properties must be clearly identified as belonging to the judgment debtor before any sale can occur and in **Muwanga vs. Kiggundu [2010] UGCA 11**, it was emphasized that due diligence must be exercised in confirming ownership prior to executing a sale order. This is all aimed at protecting the rights of innocent third parties and averting the potential wrongful attachment of property belonging to such persons.

In the instant case, the Plaintiff asserted that she is the owner of the property which was attached by the 3rd Defendant in execution of the decree in *High Court Civil Appeal No. 52 of 2015* and sold to the 1st Defendant by public auction and yet she was not a party to the said legal dispute. She described the suit land as Plot 13 measuring 50ft x 100ft and she relied on **Exhibit PE1** which she described as the area schedule to show that her property was distinct from that of *Joweria Kabajungu*, the judgment debtor in High Court Civil Appeal No. 52 of 2015. She stated that the land was originally owned by her late Father, *Mr. Karungi Muhammad Mistiri*, who died around 1973 after having distributed his land among his children including the Plaintiff, and the Plaintiff relied on **Exhibit PE7**, an inventory filed in the registry of this Court on 12th June 2019 by the Plaintiff's sister, *Nakabulwa Nuuru* in HCT-FD-AC-0042 of 2018 in respect of the estate of the late *Karungi Muhammad Mistiri* to which she is an administrator. Under bullet 4 (a) of the inventory, *NakabulwaNuuru* stated that; -

“The first plot developed by Kasukali Sarah was given out to her as plot and its building.”

Learned Counsel for the Plaintiff submitted that this inventory confirms *Karungi Muhammad Mistiri's* allocation of the land to each family member and that this is evidence that the Plaintiff is the rightful owner of the land that was attached and sold in execution by the 3rd Defendant.

I have however observed a number of unsatisfactory features in the case and evidence of the plaintiff as follows:

Whereas in the inventory (**Plaintiff's Exhibit PE7**) it is stated that the Plaintiff was given the Plot and its building, implying that the Plaintiff took over a developed Plot of land, on the contrary, the Plaintiff led evidence to the effect that it was her who developed the suit property between 1994 and 2008, with a residential house, a shopping building, a residential tenant's building, a pit latrine block and a perimeter wall fence. Paragraph 7 (i) of the Defendant's **Exhibit DE18** which is the Petition for letters of administration in respect of the estate of the late *Karungi Muhammad Mistiri* (Plaintiff's Father) vide HCT-FD-AC-0042 of 2018, stated that the deceased left seven Plots in Kyenjojo Town Council, and in the inventory, the estates' administrator shows how these were distributed and that one of the Plots which had been developed by the Plaintiff was given to her as her beneficial share of the estate of her late Father. I therefore disagree with Learned Counsel

for the Plaintiff's submission that the inventory confirms the allocation of the property to each family member. Instead, the inventory confirms that the late *Karungi Muhammad Mistiri* died intestate and that his property, including the suit land, were only distributed by *Nakubulwa Nuuru* when she became the administrator to the estate of the deceased in 2018, long after the purchase of the suit land by the 1st Defendant. This is contrary to the Plaintiff's assertion that she came into ownership of the land in 1973, when her father distributed his land to his 8 children, including herself. Upon scrutiny of the inventory, it is evident that the deceased's children, including the Plaintiff, only got a share of their late Father's estate under HCT-FD-AC-0042 of 2018.

Additionally, it is a trite law that for a gift *inter vivos* to take irrevocable roots, the donor must intend to give the gift, the donor must deliver the gift and the donee

must accept the gift (See: ****Sajjabi John vs. Zziwa Charles, Civil Appeal**

No.50 of 2012**). Upon thorough scrutiny of the evidence on record, my conclusion is that there is no gift deed purporting to distribute the properties of the late

Karungi Muhammad Mistiri as gifts *inter vivos*.

In the **Plaint**, the Plaintiff stated that the cost of putting up the demolished structures is **Ug. Shs. 397,730,305/=** and that the value of the unbuilt Plot is **Ug. Shs. 80,000,000/=**. At trial, **PW1** in contradiction of her pleadings testified that the value of the property was around **Ug. Shs. 500,000,000/=**, while **PW3**, a valuation surveyor, testified that the fair value of the properties was in the region of **Ug. Shs. 260,000,000/=** only, representing the value of the land which is **Ug. Shs. 50,000,000/=**, the destroyed buildings valued at **Ug. Shs. 150,000,000/=** and the allowable disturbance of **Ug. Shs. 60,000,000/=** and yet **PW4**, a quantity surveyor, testified that the accurate cost of putting up the demolished structures is **Ug. Shs. 525,794,681/=**. It is my finding that these inconsistencies and contradictions in the Plaintiff's evidence in regard to the value of the property point to the fact that the Plaintiff is not well conversant with the property in issue. These inconsistencies and contradictions render the plaintiff's evidence unbelievable in this regard.

This case was occasioned by an execution that was conducted against the Plaintiff's mother*, **Kabajungu Joweria***, in **High Court Civil Appeal No. HCT-01-CV-CA-052 of 2005** and the key issues in the case revolved mostly around her. The Plaintiff's said mother is alive, and was present when the Court visited locus on 6th September 2024. However, the Plaintiff did not call her as a witness in the matter and yet her testimony would have been material in clarifying the ownership of the land. In **Nazmudin Gulam Hussein Viram vs. Nicholas Roussos SCCA No. 001 of 2006** and **J K Patel vs. Spear Motors SCCA No. 004 of 1991**, the Supreme Court held that where a party does not call a material witness to testify, the Court ought to draw an adverse inference that the evidence of that witness would have tended to be averse to that party's case. I am therefore entitled to

draw an adverse inference against the Plaintiff for failure to call her mother as a witness in this case since that, in my view, is a clear indication that her evidence could not favour the plaintiff's case.

On the other hand the evidence of the defendants was consistent, more convincing, and more believable. The evidence of the defendants established that **DW1 (Kiiza Laban)**, bought a plot measuring **70ft by 120ft** through a court process that resulted in the eviction of **Kabajungu Joweria** before he took possession. **DW2 (Akugizibwe Patrick)** bought a plot measuring 50ft by 100ft from **Kabajungu Joweria** and bought another adjacent plot measuring 25ft by 50ft from **Iddi Banage** and consequently, his Plot measured **75ft in width and 100ft in length** and he developed it with a petrol station which was seen during the locus visit. Between 2005 and 2019, **DW4 (Tugume John Bosco)** had a carpentry workshop and timber selling business on the suit land and **Joweria Kabajungu** was his landlady. According to **DW5 (Iddi Banange)**, **Joweria Kabajungu** had built a house on the suit land and she had a restaurant thereon and some tenants. According to **DW6 (Kabasinguzi Teddy)** who worked as a town agent employed by Kyenjojo Town Council, **Joweria Kabajungu** had a commercial house on the suit land where she was operating an eating house and in 2004, **Joweria Kabajungu** paid for a plan adjustment for a commercial structure on the suit property where she was paying for a trading license in respect of an eating house. According to **DW7 (Swaleh Sande)**, **Joweria Kabajungu** had a house on the suit land which she started constructing in 1992 and started occupying in 1994 and she operated an eating house on the land with her daughter **Nakaizi Zaam** and she was also selling firewood thereon.

Based on the above analysis, I find that the plaintiff has on a balance of probabilities failed to prove that the suit land belonged to her. I thus resolve the first issue in the negative and since the resolution of the 2nd and 3rd Issues depend on the positive resolution of the 1st issue, by necessary implication it therefore follows that, as with the first issue, I also resolve the second and third issues, in the negative.

Issue No. 4: Remedies available to the parties.

The plaintiff having failed to prove her case, this suit is hereby dismissed and she is not entitled to any of the remedies sought.

Regarding costs, **Section 27** of the Civil Procedure Act provides that costs follow the event. See also the case of **James Mbabazi & Another vs. Matco Stores Ltd & Anor**, CA Civil Reference No. 15/2004. In **Kiska Limited V. Vittorio Angelis** [1968] EACA 7, it was held that a successful defendant can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the suit has led to litigation which but for his own conduct might have been averted. In this case the Defendants are not guilty of any such conduct and as such, the Defendants are granted costs of this suit since court has found no good cause to order otherwise.

Judgment is accordingly entered for the Defendants in the following terms; -

1. **The suit by the plaintiff fails and it is hereby dismissed.**
2. **The costs of the suit are awarded to the defendants.**

It is so ordered

Dated at Fort Portal this 28th day of February 2025

Vincent Wagona

High Court Judge

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