

UGANDA / JUDGMENT

Kiwanuka v Malkit Singh Sondh (M.A No. 163 of 2004) [2012] UGHC 266 (30 November 2012) [2012] UGHC 266

COURT

High Court of Uganda

BEFORE

Bashaija, J

CASE / FILE NUMBER

M.A No. 163 of 2004

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

Miscellaneous Application No. 163 of 2004

(Arising from H. C. C. S. No. 0070 OF 2004)

FENEKANSI KIWANUKA :::::::::::::::::::::::::::::: APPLICANT

VERSUS

MALKIT SINGH SONDH :::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE BASHAIJA . K. ANDREW

RULING.

This application is brought under *O.33 r 11, O.48 r 1, and O.9 r 9 CPR, Section 98 of the Civil Procedure Act.* *Fenekasi Kiwanuka* *(hereinafter referred to as the “Applicant”)* seeks orders of this court that:

1. *The exparte judgment and decree passed against the Applicant/Defendant in the above main suit dated 17.11.2004 be set aside.*
2. *Unconditional leave to appear and defend the suit on merits be granted to the Applicant/defendant.*
3. *The execution process in the above main suit be set aside and/or stayed and the Applicant’s movable property already attached be released from attachment; and the Applicant be allowed sometime in the premises pending relocation.*

4. ***Costs of this application be provided for.***

The grounds of the application are set out in the affidavit of the Applicant supporting the application but briefly are:

1. ***That applicant herein has never been served with any court summons let alone the plaint as alleged in the affidavit of Batalagaine Elijah.***
2. ***That the Applicant is not in any way indebted to the respondent in the sum of Ug. Shs. 16,500,000/- as rent arrears for property comprised in plot 44 Mvule Crescent as the said premises were rented by the Ministry of Defence and not the Applicant as alleged.***
3. ***The Applicant is no doubt likely to suffer irreparable damage and loss if the execution process already in motion is not set aside and/or stayed as his valuable property is going to be disposed off by way of sale.***
4. ***That due to dearth of accommodation in Jinja, it would serve the ends of Justice that the Applicant be allowed at least about 2 months to stay in the said premises within which time he can relocate his family.***

Malikit Singh Sondh (herein after referred to as the “Respondent”)* filed an affidavit in reply dated 19.8.2008, deposing that the application is a waste of time and lacks merits and that it should be dismissed. The Applicant is represented by ***M/s. Habakurama & Co. Advocates***, while the Respondent is represented by ***M/s Okalang Law Chambers***, who filed written submissions to argue the application.

It is called for to give a back ground to this application before proceeding to give the position of the law and decision of this court as they relate to the entire case.

Background.

The Applicant, who is a military man, was staying in property on ***Plot 44 Mvule Crescent, Jinja Municipality*** as a rent – paying tenant. The rent was being paid by the Government of Uganda through the Ministry of Defence where the Applicant worked. On 17. 08. 1993, the property which was all along being managed by the ***Departed Asians’ Property Custodian Board (D. A. P. C. B)*** was reposed by its former owner, one ***Bhagat Singh Suri***, on whose behalf the current Respondent ***Malikit Singh Sondh*** purported to manage the property.

On 10. 05. 2004, the Minister of Finance, Planning and Economic Development wrote a letter addressed to ***Bhagat Sigh Suri***, from whom the Respondent claimed to derive power/authority to manage the property, and the relevant part of the letter states as follows:

“It has been brought to my attention that although you repossessed the above-mentioned property on 17th August 1993, you have neither taken physical possession of the property nor managed it in anyway. You also failed to respond to the notice that was communicated to you, through your address and in the newspaper.

Repossession Certificate No. 1534 dated 17th August 1993 that was issued to you is accordingly hereby cancelled, under the provisions of the section 8 (1) (d) of the Expropriated Properties Act 1982.

The Departed Asians' Property Custodian Board is instructed to immediately take over management of the property and to have it offered for sale in accordance with the law.

Subsequent to the above letter, on 16.8.2004, the Respondent instituted a "Summary Suit" vide ***H. C Civil Suit No. 0070/2004*** against the Applicant seeking for orders of vacant possession, and payment of Shs. 16,500,000/= being rent arrears up to August 2004, and such other rent as would be due between and after August, 2004, and costs of the suit. An **ex parte** judgment was entered after the Applicant did not seek leave to file his defence in time stipulated by law. Execution proceedings ensued by way of eviction and attachment of the Applicant's household property on 24.11.2004.

However, the Applicant filed ***H. C. Misc. Application No. 168 of 2004,*** in which he successfully secured an interim order stopping the disposal of the attached house hold property, pending the hearing of the instant application, but no order stopping or reversing the eviction was issued. This has been the **status quo** until this matter was fixed for hearing of the main application above.

Submissions.

Pleadings by way of affidavits in support, and reply and rejoinder have been made, in as much as very comprehensive arguments were submitted by the respective Counsel for the parties, but I need not reproduce them for brevity of the ruling. Their main thrust, however, is that there was non – service of the summons on the Applicant; for which he seeks unconditional leave to file a defence, while the Respondent maintain that service was duly effected on the Applicant.

Resolution.

On careful perusal of the entire record, it is clear that all parties were all along labouring under a mistake that a suit existed; for which filing a defence was necessary, hence this application. However, the unequivocal contents of ***"Annexure B 1" and "B2"*** to the affidavit of the Applicant in rejoinder, in my view, effectively dispose of the instant application as well as the main suit at the same time.

"Annexure B 1" whose contents have fully been reproduced above, in no uncertain terms cancelled the **Repossession Certificate** under which the former owner, ***Bhagat Singh Suri,*** had repossessed the said property, which was being occupied by the Applicant as a tenant. ***"Annexure B2"*** dated 22.09. 2004, a **New Vision** news paper advert listed the said property among others that had reverted to D. A. P. C. B, and were being dealt with by the Minister in accordance with the provisions of the **Expropriated Properties Act, 1982**.

The critical factor in the whole case is that both ***Annexure “A” and “B”*** pre-date the filing of the “Summary Suit” vide ***H. C Civil Suit No. 0070/2004*** on 16.08.2004, and the subsequent execution proceedings which culminated into the present application. Logically, it would follow that the Respondent, who filed the suit claiming to be acting on behalf of the owner of the property, had no **locus standi**. Ownership by the principal for whom he claimed to be acting had been duly cancelled. This rendered the Respondent powerless to demand for rentals accruing from the property.

Similarly, the Respondent could not initiate any claim against the Applicant, or any other party, where the property had reverted to the D. A. P. C. B. I have not found any evidence on record to suggest that the Respondent had any such authority as to act for, or on behalf of the principal owner of the property.

One of the basic considerations which underpin the principle of **locus standi** is that court’s time should not be wasted over hypothetical and abstract issues, or at the instance of a mere busy bodies that have no genuine grievances. The intended effect of the principle of **locus standi** in any legal proceeding is to exclude certain parties from obtaining assistance in courts in declaring and enforcing the law in circumstances when others could obtain assistance. **Locus standi** thus determines who should have access to justice.

In instant case, the Respondent acted as an agent of the owner; proof of which is lacking on record. Even then, the suit would still be untenable for the reason that as an agent, the Respondent could not sue in his own name on behalf of the principal without the principal’s authority. This position was emphasized in the cases of ***Oriental Insurance Brokers Ltd. v. Transocean (U) Ltd, H. C. Civ. Suit No. 250 of 1993; Ayigihugu & Co Advocates v. Mary Munyankindi [1988 – 90] HCB 161.***

After due consideration of all facts, it is evident that the Respondent was well aware, or ought to have been aware when he instituted the suit that he lacked the **locus standi**, and that the Repossession Certificate under which he purported to derive authority to deal with the property in issue had long been cancelled. ***“Annexure B2”*** is a public notice to everyone, and the Respondent was deemed to have had constructive notice and aware of it. Similarly ***“Annexure B1”*** was addressed to the “principal owner” of the property, who also had constructive notice that the same had been cancelled, and the property had hence reverted.

It follows that by instituting the suit against the Applicant, the Respondent acted not only illegally but in bad faith too. Not only did he not have the **locus standi** but would also have no remedy under the law. Once an illegality, such as was committed by the Respondent, is brought to the attention of court, it supersedes all other issues, including the pleadings and/ or admissions, and cannot be left to stand. See ***Makula International Ltd. v. His Eminence Cardinal Nsubuga [1982] HCB 11.***

The net effect of this application is constituted in the following orders, which effectively dispose of the main suit and this application at the same time.

1. ***All house hold property of the Applicant which was illegally and wrongfully attached be released back to him with immediate effect by the Respondent.***
2. ***The proceedings in H. C. C. S. No. 0070 of 2004 are nullified.***
3. ***The Respondent pays costs of this application, and the main suit*.**

BASHAIJA . K. ANDREW

JUDGE

30.11.12

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