

UGANDA / JUDGMENT

Lamminta Commercial (U) Ltd v Kiconco & Another (Miscellaneous Cause 136 of 2020) [2023] UGHCLD 437 (16 June 2023)

[2023] UGHCLD 437**COURT**

HC: Land Division (Uganda)

BEFORE

Busingye, J

CASE / FILE NUMBER

Miscellaneous Cause 136 of 2020

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA LAND DIVISION MISC CAUSE NO. 136 OF 2020 ARISING OUT OF EMA NO 1319 OF 2019 ALSO ARISING OUT OF EMA NO 200 OF 2018 ALL ARISING OUT OF CIVIL SUIT NO. 495 OF 2012 LAMMINTA COMMERCIAL (U) LTD ::::::::::::::::::::::::::::::

VERSUS**1. KICONCO EDWIN** $\$25$

2. THE COMMISSIONER OF LAND REGISTRATION :::::::::::::::::::::::::::::: 15
BEFORE: HON. LADY JUSTICE IMMACULATE BUSINGYE BYARUHANGA RULING

This application was brought by way of notice of motion under Section 177 of the Registration of Titles Act, Section 33 of the Judicature Act, Section 98 of the Civil Procedure Act and Order 52 rule 1 and 3 of the Civil Procedure Rules seeking the following orders;

- a. An order directing the Commissioner for Land Registration to cancel the registration of Kiconco Edwin in respect of land at Kyadondo Block 216 plot 4800 & 4801 (formerly Kyadondo Block 216 plot 795)
- b. An order directing the Commissioner for Land Registration to substitute the \$25\$ cancelled registration of Kiconco Edwin with Lamminta Commercials (U) Ltd as proprietor of the same.
- c. That costs be provided for.

This application is supported with an affidavit deponed by Masaba Robert Mofaht on 17th November 2020. The grounds of the application are laid out in the affidavit in support 30 of the application. On the other hand, the 1st respondent filed an affidavit in reply wherein he strongly opposed this application.

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Representation

During the hearing of the application, the applicant was represented by Counsel Kafeero Alexander while the 1st respondent was represented by Counsel Bazira Anthony.

Counsels' submissions

- Counsel for the applicant submitted that this application was brought to effect the ruling 10 of the court in EMA No. 1319 of 2018. Counsel further submitted that, in accordance with Section 34 of the Civil Procedure Act, the correct procedure for challenging an execution is to bring a suit within a suit and not a fresh suit and such an application can be treated as a suit.
- Counsel for the applicant went on to submit that the Hon. Justice Duncan Gaswaga set 15 aside the Consent Judgment of Civil Suit 495 of 2012 in EMA No. 1319 of 2018 on the ground that it was improper and illegal for the applicant's property to be attached and sold in a case that the applicant was never party to and by the applicant's director who was not authorized by the applicant to attach it's land.
- Counsel also went ahead to state that several transfers in ownership of the suit land by 20 the 1st respondent and his predecessors were done during the subsistence of temporary injunction which had restrained any transfers on the suit land and during the subsistence of execution proceedings in EMA 1319 of 2018. Counsel further argued that had the 1st respondent conducted due diligence, he would have established that there was a subsisting caveat on the suit land lodged by the applicant's director Masaba Robert Mofaht 25 and on-going execution proceedings in EMA No 1319 of 2018 and as such, the 1st respondent acquired the suit land illegally.

In reply, Counsel for the 1st respondent submitted that the instant application for consequential orders is strongly opposed because a consequential order must flow from a judgment or ruling granted by court, however, in the instant application, there is no 30 such order wherein the court declared the 1st respondent's certificate of title to be illegal.

Alexandre

Furthermore, counsel for the 1st respondent argued that in order to apply for \$ S consequential orders under Section 177 of the RTA, there must be a valid recovery of the suit land and the said recovery should be pursuant to an action or proceedings. Counsel went on to submit that, there have never been such proceedings between the parties since EMA 1319 of 2018 was an application to set aside the consent judgment in CS 495 of 2012 and not a claim for recovery of the suit land. 10

In addition to the above, Counsel submitted that the 1st respondent was never a party to CS 495 of 2012 or EMA No 1319 of 2018. Furthermore, it is counsel's argument that when the consent judgment was set aside, CS 495 of 2012 ought to have proceeded and be heard on its merits. According to Counsel, cancelling the 1st respondent's title in the instant application without affording him a right to a fair hearing and allowing the court 15 to make a decision on who the rightful owner of the suit land is, would be a derogation of the 1st respondent's rights. Counsel submitted that the 1st respondent's title can only be impeached by this court through an ordinary suit.

Decision

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I have read both counsels' submissions and the cited authorities and thoroughly perused 20 the pleadings and documents on record and I will refer to them where necessary. Both Counsel agreed on one issue to aid court in the resolution of this application and I shall adopt the same.

Whether this application satisfies the conditions for grant of consequential orders

Section 34 of the Civil Procedure Act gives court the power to determine questions arising out of execution of decrees. As properly put by Counsel for the applicant, the proceedings under this section cannot be handled by a separate suit but rather by a court handling the execution proceedings.

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The issue for determination in this case is whether the instant application qualifies as one \$ S that is determining questions relating to execution of the decree arising out of Civil Suit No 495 of 2012 or not.

According to the record of court, Ugafin Ltd, Kantunsimbi Investments and Muganzi Peter entered into a consent judgment vide EMA 200 of 2013 on 6th August 2013 and the same was endorsed by His Worship Henry Twinomuhwezi. Subsequently, the above mentioned compromise/ consent judgement and its consequential orders were reviewed and set aside by Honourable Justice Duncan Gaswaga on 5th June 2019.

This means that the court that challenged the execution of the decree in CS 495 of 2012 was EMA 1319 of 2018 arising out of a consent judgment and not the instant application as put by counsel for the applicant.

Moving on to the consequential orders, Section 177 of the Registration of Titles Act provides as follows;

Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order. (emphasis on the underlined part)

I am persuaded by the definition of the term "consequential order" in the case of *Kalibaala Vincent and anor versus Attorney General HCMA No. 70 of 2015* as cited by Counsel for the respondent wherein the court stated ;

"... the term consequential order denotes an order of court giving effect to the judgment or decision to which it is consequential or resultant there from. Such an order is normally directly traceable to or flowing from the Judgment of decision duly prayed for or granted by court. "

"... what this means is that the consequential orders are applied for where the court hands out a judgment but the implementation of the judgment is impossible except with further orders of court...".

The wording of Section 177 (supra) is very clear as to the elements that must be satisfied before the High Court can order for cancellation of a certificate of title and these include;

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a. There must be a valid order for recovery of land by the applicant and, b. The said recovery must be as a result of proceedings that are permissible under the Registration of Titles Act.

In lay terms, there must be a suit for recovery of land decided by a court with competent jurisdiction and the same must have been decided in the applicant's favour.

As earlier stated, EMA 1319 of 2018 was an application for review and setting aside of the consent judgment in CS 495 of 2012. The said application was between the applicant, Ugafin Limited, Katunsimbi Investments (U) Ltd, Mugansi Peter, Daka Henry and Mbirimu Peter. The Honorable Justice Duncan Gaswaga set aside the said judgment and the consequential orders arising therein.

I have thoroughly read and understood the above mentioned ruling of Hon. Justice Gaswaga, and I shall quote paragraphs 4 and 5 for context and emphasis.

- 4) "From the above discourse, it is improper and illegal for the applicant's property to be attached and sold in a case that it was never party to in the first instance. The applicant was not sued in CS 495-2012. Besides as evident from the certificate of title which is on record, the applicant owned the suit property in its own right, independent of its directors and shareholders. Moreover, the 4th respondent signed the compromise judgment in his names and not on behalf of the applicant company or as its director as he lacked the relevant authority i.e. powers of attorney or company resolution. Clearly this was unjust, illegal and a mistake which this court cannot overlook. Such illegality cannot be left to stand and would constitute sufficient reason for this court to set aside

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the impugned judgment. Had the 5th respondent carried out due diligence, I am sure he would not have purchased the suit property from the respondents without establishing and doing more.

5) In the premises I find that this application is meritorious and should be allowed. Consequently, the impugned "consent judgment" and its consequential orders are hereby set aside."

It is very clear from paragraphs 4 and 5 of Justice Gaswaga's ruling that the 5th respondent Mbirimu Micheal (the 1st respondent's 2nd predecessor in title)'s ownership of suit land was called into question and the same was declared illegal.

- However, it is important to note that Crimson Investment whom the 1st respondent 15 bought the suit land from was never a party and neither was the 1st respondent in this case. The Honourable Judge did not mention or even examine how Crimson Investment or the 1st respondent came to acquire the suit land.
- According, to paragraph 9 (a c) of the affidavit in reply, the 1st respondent purchased the suit land from Crimson Investment. This means that neither the 1st respondent nor 20\$ their predecessor Crimson Investment were party to Civil Suit 495 of 2012 or EMA 1319 of 2018. Crimson Investment bought the suit land from Mbirimu Micheal (the 5th respondent in EMA 1319 of 2018).

Counsel for the applicant submits that proceedings in EMA 1319 of 2018 were brought

- against the 1^{st} respondent's predecessors in title who were all found liable and as such Mbirimu Micheal could not have passed good title to Crimson Investment and subsequently the 1^{st} respondent. This argument can only be made and sustained through the former suit where the applicant and the 1^{st} respondent are parties and they are allowed to defend their claim of ownership of the suit land.
- Section 176 of the Registration of Titles Act prohibits proceedings for recovery of land against a registered proprietor save for in certain exceptional circumstances. The

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above arguments of counsel for the applicant introduce the issue of fraud. It is trite that $\$$ fraud must be specifically pleaded and proved.

As previously stated the 1^{st} respondent was never a party to EMA 1319 of 2018 and Civil Suit No. 495 of 2012 and neither was his predecessor in title. However, the 1^{st} respondent is the current registered proprietor of the suit land and in possession. The applicant has not produced any evidence to prove that Crimson Investment (the 1^{st} respondent's predecessor) in title or the 1^{st} respondent were aware of the Mbirimu Micheal's illegalities.

Furthermore, this is not the right avenue to bring the said evidence procedurally as the same can only be proved through a hearing in an ordinary suit and not an application for consequential orders.

15 In the case of **Park Royal Ltd versus Uganda Land Commission & ors HCMA No. 46 of 2014**, Court relying on the authority of RE Ivan Mutaka (1981) HCB 27 at page 28 held that, "in order to rely on the provisions of Section 185 (now 177 of the RTA), an applicant must satisfy the court that he or she has recovered the land by any proceedings from the person already registered as the proprietor."... it is my considered view that an application under Section 177 that 20 necessitates the cancellation of a registered proprietor's certificate of title

would be governed by the provisions of Section 176 read together with Section 177 of the RTA"

I agree with Counsel for the 1^{st} respondent that the cancellation of the 1^{st} respondent's title without affording him a right to be heard would be an infringement of the 1^{st} respondent's right to a fair hearing and a right to own property contrary to **Article 28** and 26 of the 1995 Constitution of the Republic of Uganda. It is also important to note that both the applicant and the 1^{st} respondent claim an interest to the suit land and the issue of ownership can only be settled through an ordinary suit wherein the veracity of both parties' evidence can be subjected to examination and cross examination 30 of witnesses.

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Furthermore, it is trite that once a consent judgment is set aside, the suit returns back to S the position it was before the consent was entered. In the instant case, once the consent judgment in Civil Suit 495 of 2012 was set aside by EMA 1319 of 2018, CS 495 of 2012 was resurrected and the same should have been set down for hearing.

This in turn means that, there has never been an action for recovery of the suit land involving the applicant and the 1^{st} respondent. The Ruling of the Hon. Justice Duncan Gaswaga was silent on the issue of cancellation of title of the 1^{st} respondent since he was not a party and as such this application for consequential orders cannot be sustained since there is no decision of court from which the order prayed for flows.

The circumstances of this application warrant a formal examination and determination of the contentious issues between the applicant, the 1^{st} respondent and the 1^{st} respondent's 15 predecessors in title so as to establish the true ownership of the suit land before cancellation of title can be ordered.

Therefore, I find that this application for consequential orders is untenable and I order as follows;

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- a. This application is dismissed
- b. Civil Suit No. 495 of 2012 is reinstated.
- c. Civil Suit No 495 of 2012 and its pleadings be amended to add the applicant and the 1^{st} respondent as parties and accommodate the parties' claims.
- d. Costs shall be in the cause
- \$25 I so order

Ruling delivered at High Court, Land Division this 16th day of June, 2023.

Immaculate Busingye Byaruhanga

30 Judge

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Prepared on 14 October 2026 · Esheria