

UGANDA / JUDGMENT

Lubega v Lubega & 5 Others

(Miscellaneous Application 748 of 2022)

[2022] UGCommC 192 (15 July 2022)

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COURT

Commercial Court of Uganda

BEFORE

Cornelia Kakooza Sabiiti, J

CASE / FILE NUMBER

Miscellaneous Application 748 of 2022

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT UGANDA AT KAMPALA****(COMMERCIAL DIVISION)****Miscellaneous Application No. 748 of 2022****(Arising from Miscellaneous App No. 665 of 2022)****(Arising from Miscellaneous No. 677 of 2019)****(Arising Out of H. C. C. S No. 875 of 2014)****DRAKE LUBEGA:..... APPLICANT****VERSUS**

1. **LUBEGA ROBERT**
2. **MEGAN JOAN NAMUTEBI**
3. **JOSEPHINE NASSALI**
4. **EMMA NDUGWA**
5. **MUSA NDAULA**
6. **ALEX BWANIKA:.....RESPONDENTS**

BEFORE: HON. LADY JUSTICE CORNELIA KAKOOZA SABIITI

RULING

This application was brought under **Section 82 & 98 Civil Procedure Act and Order 46 rule 1, Order 52 rules 1&2 Civil Procedure Rules** seeking orders that;

1. The Decree Nisi and Decree Absolute in Miscellaneous Application No. 665 of 2022 attaching and paying out the applicant's credits/monies in Equity Bank be reviewed and set aside.
2. That the applicant's account in Equity Bank be immediately released from execution/attachment.
3. Costs of this application be provided for.

The application was supported by an affidavit of **Lubega Drake** the applicant who deposed that; the applicant was the unsuccessful party in Civil Suit No. 875 of 2014. That the applicant preferred an appeal has been heard and is pending. That the applicant filed Misc. App. No. 677 of 2019 for stay of execution both main and interim. That in the interim, the applicant applied and obtained an interim of stay of execution pending the determination of the main application for stay of execution which is still force to date. That despite the existence of the interim order, the learned Registrar proceeded to issue execution against the applicant's accounts in Equity Bank vide Miscellaneous Application No. 655 of 2022. That there are three fundamental errors apparent on the face of record. That there is a serious threat of execution against the applicant by way of attaching his accounts in equity bank. The applicant will suffer substantial loss if the order in Miscellaneous Application No. 655 of 2022 is not reviewed, set aside and recalled. The application has been made without unreasonable delay. It is in the interest of justice that this application is granted.

In reply to this application, the first respondent **Lubega Robert** deposed an affidavit in reply on his behalf and on behalf of the other respondents, he states that; he filed a Notice to show cause why execution should not issue against the applicant in High Court Execution Division EMA No. 169 of 2019, the same was heard and court ruled that execution against the applicant is to await the outcome of Misc. App. No. 677 of 2019 for stay of execution. That the application for stay was allocated and fixed for hearing on 17th October 2019 and it has been 2 years and 7 months since that application was filed and the applicant or his lawyers never followed up. That Misc. App. No. 677 of 2019 has been abated and over taken by events. That the garnishee order was legally obtained as there has never been any interim stay of execution as alleged by the applicant.

That the there is no error apparent on face of a record, the applicant had no locus to be heard in garnishee proceedings and there is no law that garnishee proceedings be made absolute before the mandatory seven days. That no order of stay has ever been issued by this court. That an appeal does not act as an automatic stay of execution thus the respondents had powers to execute the decree and realize the fruits of judgment. That the application should be dismissed with costs.

The affidavit in rejoinder was deposed by **Sebatindira Fahmy**, an advocate with the applicant's firm, he states that Misc. App. No. 677 of 2019 was duly served on the respondents on 18/06/2019, to date they have never filed a reply to the said application. That the application was never fixed because the Execution Division of the High Court was in transition at the time and was subsequently closed. That when the file was returned to Commercial Division, it was archived without it being validated on the court system and it was never allocated to a Judge. That MA No. 677 of 2019 has never abated as there is no order of abatement. That the orders of court staying execution which the 1st respondent conceded to are still in force. That they were informed by the learned registrar that the applicant has no locus in the garnishee proceedings. That the said proceedings were issued in error as at that time, there was a valid interim order of stay of execution till determination of MA No. 677 of 2019.

Representation.

The applicant was represented by **M/S Kirumira & Co. Advocates** and the respondents were represented by **M/S Galac Advocates**. Both parties endeavoured to file their written submissions, which I have taken regard of.

Resolution.

Applicant counsel raised three issues for determination;

1. Whether the issuance of garnishee despite existence of an interim order of stay of execution constituted an error apparent on the face of the record.
2. Whether the hearing of the decree nissi and making it absolute before the mandatory Seven 7 days period constitutes an error apparent on the face of the record.
3. Whether denying the applicant the right to be heard during the hearing of the application for making the decree Nissi absolute also constitutes an error apparent on the face of the record.

Issue 1: Whether the issuance of garnishee proceedings despite existence of an interim order of stay of execution constitutes an error apparent on face of the record?

The applicant counsel submitted that the applicant applied for an application for stay of execution under Misc. App. No. 677 of 2019 and applied for an interim stay. The applicant testified that during the proceedings before His Worship Nizeyimana Deo on the 19th day of June 2019 counsel for the respondents conceded to the interim application by the applicants, to which the 1st respondent concedes. That Misc. Application No. 677 of 2019 which is the main application for stay of execution has never been determined to-date therefore the interim order for stay of execution is still in force till the determination of Misc. Application 677 of 2019. That the said application for stay was duly served on the respondents on 18th June 2019 and to date they have never filed a reply, leaving the application unchallenged. Counsel cited the case of **Bukenya Usaama Ahmed & 2 others Vs Smart Protus Magara HCMA No. 392 of 2019**. That the learned Registrar in hearing the garnishee proceedings despite the existence of a subsisting

order for interim stay of execution was an error apparent on the face of record.

On the other hand, counsel for the respondents strongly opposed the above averments. Counsel argued that the applicant filed Misc. Application No. 677 of 2019 for stay of execution and never followed up for 2 years and 7 months and the same abated under Order 17 rule 6(1) of the CPR. That the applicant filed the application for stay of execution with intent to delay and frustrate the judgment creditors from enjoying the fruits of the judgment in HCCS No. 875 of 2014. Counsel asserted that there is no interim order of stay granted by court in this matter nor an order of stay of execution. That the statement of court on record “execution against the judgment debtor is to await the outcome of HCMA No. 677 of 2019” should not be interpreted to mean an interim order of stay of execution. That what counsel for the respondent conceded to was for HCMA No. 677 of 2019 to be fixed for hearing, which date court fixed but the applicant refused to comply with court’s directions. Counsel cited the case of **Mugume Ben Anor Vs Akankwasa Edward HCMA No. 04 of 2008 HCB** where court held that a person who defies court orders cannot at the same time seek court’s protection.

Counsel for the applicant in his submissions in rejoinder contended that; Misc. App. No. 677 of 2019 never abated and the respondents have never filed a reply to the said application despite the fact that they were served with the same over two years. That the application has never been determined, the interim order for stay of execution is still subsisting and therefore execution proceedings were an error apparent on the face of the record.

I have had a careful regard of the above arguments by counsel. I must state that on the reading of the issues and facts, this matter would have best be handled in an appeal, I have however noted that since the applicant was not privy to the garnishee proceedings the only available procedure was through a review application.

The provision for an application for review of court orders is **Section 82 CPA** which provides as follows; *Any person considering himself or herself aggrieved by decree or order of court from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is allowed may apply for a review of judgment to the court that passes the decree or made the order.*

Conditions under which Section 82 is applied are further buttressed in **Order 46;**

* (1) Any person considering himself or herself aggrieved; (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the Court which passed the decree or made the order.*

In this case, the applicant is an aggrieved party who contends that the registrar's issuance of garnishee proceedings despite the existence of an interim order of stay of execution, the decree nisi making it an absolute before the mandatory 7 days and denying the applicant a right to be heard constituted an error on face of the record. In the Supreme court in the case of **Edison Kanyabwera Vs Pastori Tumwebaze(supra)** elaborated on the meaning of error on the face of the record to the effect that; "...*in order that an error may be a ground of review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifested and clear that no court would permit such an error to remain on the record. The error may be one of fact but is not limited to matters of fact, and included also an error of law."*

From the onset, a reading of the three issues indicates that they cannot fall under the ground of error on face of the record. It is my view that these are circumstances in which review could be granted on the ground of "any other sufficient reason". In **Mulla, the Code of Civil Procedure 18th Edition** at page 3672; it is noted that the expression "any other sufficient reason" means that the reason must be one sufficient to the court to which the application for review is made and cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or an error apparent on the record.* I will therefore consider these issues on the basis and ground of sufficient reason rather than error on face of the record as presented by the applicant counsel.

Briefly, the respondents sued the applicant and two others in HCCS No. 705 and 875 of 2014 in which Judgment was entered against the applicant and 2 others on the 24th January 2019. The respondents filed EMA No. 169 of 2019 a notice to show cause why execution should not issue. The applicant also filed on 18th June 2019, an Misc. App. No. 677 of 2019 for stay of execution. On the 19th June 2019, when the parties appeared before court for the hearing of EMA No. 169 of 2019, counsel for the applicant proceeded as follows;

".....the matter they seek to execute is a subject of appeal. When we received the Notice to show cause, we filed in this court Misc. Application No. 677/2019 for stay of execution. The said application was fixed on 17.10.2019 at 09:30. We served counsel with the said application. In light of the foregoing, we pray that court be pleased to find that the judgment debtor has shown sufficient cause why execution should not issue. Pray that Misc. Application No. 677/2019 be heard."

Counsel for the judgment debtors replied;

"We concede to the application of the 3rd judgment debtor. However, in light of the 2nd judgment debtor, we pray that execution issues as no appeal has been preferred and there is no application for execution."

Court held that;

“Execution against the 3rd judgment debtor is to await the outcome of Misc. App. No. 677 of 2019. As for the 2nd judgment debtor since no cause has been shown a warrant of arrest in execution is issued.”

According to the **Blacks Law Dictionary, the 7th Edition at page 819**, the word interim is defined as *“done, made or occurring for an intervening time; temporary or provisional.”* At page 1123, it defines an interim order *“as a temporary court decree that takes effect until something else occurs”*. I disagree with respondent’s counsel’s argument that the court order did not amount to an interim order of stay, in its true definition the above court order was an interim order pending the determination of the main stay of execution. There is no evidence on record that the interim order was ever vacated by court or set aside.

It has been argued by the respondent that the applicant never followed up on MA No. 677 of 2019 for 2 years and 7 months and the same abated. It is stated for the applicant the said application was never heard on the date fixed because the High Court Execution Division was in transition at the time and when the file was returned to Commercial Division, it was put in the archive. I find the applicant culpable in these circumstances since he failed prosecute his matter with diligence, after obtaining an interim stay, he sat back and relaxed, two years and 7 months which is quite a long time. On record, the application for stay was fixed on 17/10/2019, when transferred to Commercial Division, it was allocated to Justice Elizabeth Kabanda on the 4/6/2020 but from then, there is no evidence that the applicant ever followed up in the bid to prosecute this matter or ever tried to fix the application.

I should emphasise that interim orders are temporary orders that are meant to last a short period of time. The order in issue was an open ended one, it did not specify how long the interim was to last. However, notwithstanding the fact that 2 years and 7 months is too long for an interim order, there is no order of court setting aside the said order. Court had to pronounce itself and vacate the interim order of stay of execution before it would issue any orders regarding execution of the decree. In addition to that, there was a pending application for stay of execution on record. There is no order of court stating its abatement and the same had never been heard. The Registrar should instead have allocated the same and referred it to a Judge for determination or closure before handling the garnishee proceedings.

I therefore find that for sufficient reasons, the Registrar’s decision should be reviewed for these procedural irregularities.

Issue 2: Whether the hearing of the decree nisi and making it absolute before the mandatory Seven days period constitutes an error apparent on the face of the record?

Counsel for the applicant argued that **Order 23 rule 1(3) of the Civil Procedure Rules** states that *At least Seven days before the day of hearing the order nisi shall be served on the garnishee and unless otherwise ordered, on the judgment debtor*. Counsel asserts that the order for garnishee Nisi was signed by the learned registrar on the 21st day of June 2019 and the hearing of the absolute was fixed on 24th June 2019 after 2 days as opposed to the mandatory Seven days under Order 23 rule 1(3).

Counsel relied on the case of *KCB Bank Vs Lagoon Trading Ltd HCMA No. 2317 of 2013*, where his lordship Justice Alfonse Chigamoy Owiny-Dollo as he then was held that; *‘‘I should point out here that the period of at least seven days, provided for in the rules, for service upon the garnishee, could not have been arbitrarily determined. It envisages sufficient time accorded to a party, within which to take the necessary steps to respond to the issues stated in the summons....the three-day period stated in the summons for appearance in court did not conform to law; and so, it was unlawful’’*. Counsel averred that the summons for hearing of Order Nisi to make it absolute were in complete violation of Order 23 rule 1(3) as they did not conform with the 7 days mandatory days.

On the contrary, respondent counsel submitted on the provisions of Order 23 rule 1(3) of the Civil Procedure rules that the correct interpretation is that the garnishee order nisi must have been served on the garnishee at least seven days before the hearing. That the purpose of the law is serving onto the garnishee which was done in this case and there was a response from the garnishee who filed an affidavit in reply and even attended court. Counsel relied on cases like *KCCA & Anor Vs Johnson Mugisha & 3 Ors HCC Appeal No. 290 of 2012* and *Patience Akon Etim Akpan Vs Hon. Commissioner for Land and Housing & Ors No. 86 of 2010*.

Counsel asserted that in garnishee proceedings, there must be a decree, the decree is not satisfied and the garnishee is indebted to the judgment debtor, once the requirements are fulfilled, the garnishee order nisi has to be made absolute which was in this case.

In rejoinder, applicant counsel emphasised that the 3 days accorded to the garnishee were a complete violation of Order 23 rule 1(3) and amounted to an error on face of the record and should be reviewed by this court.

I have carefully considered the above arguments, for the avoidance of doubt, I shall reproduce the relevant provisions of **O.23 of the Civil Procedure Rules**.

‘‘O23. R (I) A court may upon the ex-parte application of a decree holder, and either before or after oral examination of the judgment debtor, and upon affidavit by the decree holder or his or her advocate, stating that a decree has been issued and that it still unsatisfied and to what amount and that another person is indebted to the judgement debtor and is within the jurisdiction, order that all debts owing or accruing from the third person (herein after called the garnishee) to the judgment debtor shall be attached to answer the decree together with the costs of the garnishee proceedings.

(2) by the same or any subsequent order, the court may order that the garnishee shall appear before the court to show cause why he or she should not pay to the decree holder the debt due from him or her to the judgment debtor or so much of the debt as may be sufficient to satisfy the decree together with the costs aforesaid.

(3) *at least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered on the judgment debtor.*

Garnishee proceedings are conducted through two stages. The first garnishee order nisi which is an order of attachment of the debts of the judgment debtor in the hands of the garnishee operates as an injunction to restrain the garnishee from paying money out of the attached funds until the judgment debtor is discharged or the garnishee order nisi is set aside. At this point if the court is satisfied that there is a legitimate reason for not paying the judgment debt out of the attached debt, the court would halt the execution process by not issuing the garnishee order absolute. The second stage is the garnishee order absolute, which is an order to pay the judgment debt from the judgment debtor's debt under the garnishee. This ends the execution*. As held in the cases of **Unique Holdings Ltd versus Business Skills Trust Limited High Court (Commercial Division) Miscellaneous Application No. 402 of 2012** and **Administrator General Vs Kakooza Umuro & Stanbic Bank Misc. App. No. 11 of 2017**.

At the point of the garnishee order nisi, the law provides that at least seven days before the day of hearing, the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the judgment debtor. In this particular case, the exparte motion was heard and a decree nisi was granted on 21st June 2022 and on 24th June 2022 after 3 days the Registrar heard and granted the decree absolute. The law is very clear about the timelines, a minimum of 7 days, the 3 days accorded to the parties was not in conformity with the law and procedure. Despite the fact that in this case the garnishee appeared and replied to the application, provisions of the law ought to be followed and implemented by courts. In the case of **Uganda Revenue Authority vs Uganda Consolidated Properties Ltd. – C. A. Civ. Appeal No. 31 of 2000**, Twinomujuni J. A. held that: –
"Time limits set by statutes are matters of substantive law and not mere technicalities; and must be strictly complied with."

I find that the garnishee order issued by the Registrar contravened clear provisions of the law.

Issue 3: Whether denying the applicant the right to be heard during the hearing of the application for making the decree nisi absolute also constitutes an error apparent on the face of the record?

Counsel for the applicant averred that the applicant was named in the heading of the garnishee application yet court did not allow him to respond to the application which is violation of his right to a fair hearing as enshrined in **Article 28(1) of the 1995 Constitution**. Counsel relied on the case of **Ssejemba Israel Vs Attorney General Constitutional Petition No. 37 of 2014** on principles of natural justice. Counsel also cited Order 23 rule 1 of the Civil Procedure Rules and strongly argued that the fact that the judgment debtor was never accorded an opportunity to be heard by the learned Registrar before or after issuing of the garnishee nisi and the decree was

made absolute. That the applicant and his lawyers despite being present in court, they were denied audience on grounds that they had no locus or right to be heard in garnishee proceedings.

Counsel further argued that the under Order 23 rule 3, the law provides for service of a garnishee nisi on the judgment debtor before the decree is made absolute unless otherwise ordered. Case of **Uganda Nurses & Midwives Council Vs Ram Engineering & Anor HCMA No. 138 of 2022**, court stated that; Although Garnishee proceedings under Order 23 of the Civil Procedure Rules are by ex parte application, service on the garnishee and judgment debtor is mandatory unless court orders otherwise. Counsel asserted that the respondents did not serve any proceedings in execution of Misc. App. No. 124 of 22 from which the garnishee proceedings arose and neither were the said proceedings served on the applicant as stipulated in Order 23 rule 3.

Conversely, respondent counsel submitted citing Order 23 rule 1(3) of the CPR and Order 23 rule 1(4) CPR that from these provisions, it is not mandatory to serve the judgment debtor/applicant since garnishee proceedings are between the judgment creditor and the garnishee bank. Counsel cited the case of **KCCA & Anor Vs Johnson Mugisha & 3 Ors Supra**. Also relied on the case of **Cottfield East Africa (U) Ltd Vs DHL Global Forwarding (U) Ltd & Anor Civil Appeal No. 10 of 2016**, where Lady Justice Flavia Senoga held that Court has the discretion to serve the garnishee orders on the judgment debtor as the rules clearly state “may” otherwise the garnishee proceedings are essentially between the judgment creditor and the garnishee bank.

Counsel further stated that the applicant’s rights were never violated during the hearing of the decree Nisi proceedings since he was not a party to the same and had no locus despite their presence at the hearing. Counsel concluded that there are no errors on face of the record that warrant the intervention of this court.

In rejoinder, applicant counsel submitted that the provision under Order 23 rule 1(3) implies that for service on the judgment debtor, there must be an order of court on the application of the judgment creditor showing cause why the judgment debtor should not be served and no such application is on record. That failure to serve the garnishee nisi on the applicant in the absence of an order against service was a violation of the principles of natural justice and a clear error on face of the record which warrant a review of her decision in the garnishee proceedings.

Order 23 rule 1(3) is to the effect that; *at least seven days before the day of hearing, the order nisi shall be served on the garnishee, and unless otherwise ordered, on the judgement debtor.* My understanding of this provision is that the judgement debtor should be served with the decree nisi unless court orders otherwise. In my view, the above provision envisaged scenarios were; the judgment debtor could apply for stay of execution or could have already satisfied the decree of court or the money claimed could be higher than the decreed sum. Nonetheless the judgment debtor is not privy to those proceedings.

In the case of **Kampala City Council & 2 Ors Vs Mugisha and 3 ors Misc. Application No. 290 of 2012**, **Hon. Justice Elizabeth Musoke**, held that *garnishee proceedings are separate proceedings between the judgment creditor and the Garnishee, regardless of the fact that the judgment debtor may be examined before or after the making of an order for attachment of debts. I consider the

authority of Mrs Patience Akon Etim Akpan Versus Honourable Commissioner for Lands and Housing & ors Suit No. HU/MISC 86/ 2010, persuasive in this regard. It was stated; It has been held that a garnishee proceeding is basically between the judgment creditor and the garnishee... the garnishee was the one required to show cause why the order nisi should not be made absolute.”*

In this case, despite the fact that the judgement debtor claims to have not been served, according to the evidence adduced, himself and his lawyer attended the hearing of the decree nisi, therefore the purpose of service as provided for under Order 23(1)(3), was achieved. Since the applicant was not privy to the garnishee proceedings, he cannot claim infringement on his right to fair hearing. The discretion is upon court to entertain him on record or deny the same.

On a whole, this application is allowed due to the procedural irregularities in granting the decree absolute. The decree absolute in Miscellaneous Application No. 655 of 2022 is hereby reviewed and set aside. The applicant’s account in Equity bank is released with immediate effect. Each party to bear its own costs.

The application for stay of execution Misc. Application No. 677 of 2019 is fixed for hearing on 5th September 2022 at 10.00am.

It is so ordered.

CORNELIA KAKOOZA SABIITI

JUDGE

Date: 15th July 2022

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