

UGANDA / JUDGMENT

Masiko v Imaniraguha & 2 Ors

(Miscellaneous Application No. 1481 of 2016) [2017] UGHCLD 46 (27 April 2017)

[2017] UGHCLD 46

COURT

HC: Land Division (Uganda)

BEFORE

Bashaija, J

CASE / FILE NUMBER

Miscellaneous Application No. 1481 of 2016

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 1481 OF 2016

(ARISING OUT OF CIVIL SUIT NO. 0125 OF 2005)

ERASMUS MASIKO ::::::::::::::: APPLICANT

VERSUS

1. JOHN IMANIRAGUHA
2. CHRISTOPHER MULENGA
3. COMMISSIONER FOR

LAND REGISTRATION ::::::::::::::: RESPONDENTS

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

RULING

Erasmus Masiko *(hereinafter referred to as the “Applicant”)* brought this application under Article 126 (2) (a) (b) & (c), 128(2) & (3), 28 (12), 23(1) of the Constitution; Section 33 of the Judicature Act Cap 13; Section 34, 98 of the Civil Procedure Act Cap 71; against John Imaniraguha, Christopher Mulenga, and the Commissioner for Land Registration *(hereinafter referred to as the “1st”, “2nd” and “3rd” Respondent respectively)* seeking orders that;

1. ***The 1st and 2nd Respondents be committed to civil prison for contempt of court.***
2. ***An order of sequestration doth issue attaching the property of the 1st and 2nd Respondents until they have purged themselves of the contempt of court orders.***
3. ***An order doth issue directing the 1st and 2nd Respondents to pay damages to the Applicant to the tune of Shs.500,000,000/=.***
4. ***An order doth issue directing the 3rd Respondent to cancel the name of the 2nd Respondent from the certificates of title for LRV 3218, Folio 20 Plot 16 Ngorogoza Road, Kabale Municipality (the “suit property”) and replace it with the name of the Applicant as proprietor.***
5. ***Costs of this application be provided for.***

The grounds of the application are briefly that;

1. ***On 21/3/2005 the Registrar of this Honourable Court issued an order of attachment and sale for Plot16 Ngorogoza Road, Kabale in execution of the decree in HCCS No. 463 of 1999 against the 2nd Respondent.***
2. ***The order of attachment and sale was assigned to Pastori Mukwatanise, a Court Bailiff to execute.***
3. ***On 25/4/2005 the Applicant bought the suit property at a public auction presided over by the Court Bailiff, Pastori Mukwatanise.***
4. ***In an act of contempt of this Court’s order, the 2nd Respondent blocked the Applicant and the Court Bailiff from accessing the property using armed security men who they deployed on the suit property.***
5. ***Deploying armed security men to deny the Applicant and Court Bailiff access to vacant possession and with impunity denying vacant possession to suit property is inexcusable act of contempt of the Court order which should not go unpunished and the Respondents should suffer the consequences of their illegal actions.***
6. ***In further contempt of Court to prevent the Applicant from taking possession of the suit property, on 21/3/2005 the 2nd Respondent caused transfer of the suit property to be made to the 1st Respondent, before transferring the property back to himself on 6/5/2008.***
7. ***Furthermore, in contempt of Court and in order to frustrate the Applicant’s effort to take possession of the suit property, the 2nd Respondent on 19/05/2008 mortgaged the suit property to Stanbic Bank (U) Ltd; and on 07/10/2008 he obtained another charge in favour of Stanbic Bank (U) Ltd.***
8. ***The 1st and 2nd Respondents have unlawfully and in contempt of Court order conspired to frustrate the Applicant from taking possession of the suit property which he lawfully purchased at an auction for more than ten years.***

9. ***It is in the interest of justice, fair and equitable that orders issued by courts are obeyed and complied with to the full and that the Applicant be granted the orders prayed for.***

The grounds of the application are amplified in the supporting affidavit of the Applicant, Erasmus Masiko. He states that following an advertisement published in the **Daily Monitor** newspaper of 24/3/2005, he purchased the suit property on 25/4/2005 from one Mukwatanise Pastori a Court Bailiff, who was selling in execution court order in **HCCS No. 463 of 1999.** The two signed an agreement of sale dated 25/04/2005 for a total consideration of Shs. 20,000,000/=. The Applicant paid Shs. 2,300,000/= in cash and the balance by DFCU Bank Cheque No. 4324180.

That, however, the Applicant ever since failed to take possession or even access the suit property as he was prevented by the 1st and 2nd Respondents. That at the time he purchased, the suit property was registered in the names of the 2nd Respondent who deployed armed security men with guns who, on several occasions, prevented the Applicant and Court Bailiff from accessing the property and even chased them away.

That in order to further defeat the execution process, on 23/6/2005 the 2nd Respondent transferred the suit property to the 1st Respondent who now as the new registered proprietor sued the Applicant vide **HCCS No. 125 of 2005**. That the 1st Respondent never served the Applicant with the summons and hence proceeded and obtained a default judgment basing on false affidavit of service. The Applicant, nevertheless, later successfully had the default judgment set aside and he filed a written statement of defence and filed a counterclaim.

That on 8/5/2008, the 1st Respondent again transferred the suit property back to the 2nd Respondent. This was in spite of the pendency of **HCCS No. 125 of 2005** which the very 1st Respondent had instituted against the Applicant. That the 2nd Respondent obtained the title to the suit property on 03/04/2004 and transferred it to the 1st Respondent on 02/06/2005. That when the property was again registered in the name of the 2nd Respondent on 06/08/2008, the 1st Respondent was simply returning the same property to 2nd Respondent.

That immediately the suit property was transferred back to the 2nd Respondent, he used it as security to obtain a loan from Stanbic Bank (U) Ltd and mortgage was registered on 19/05/2008 and a further charge on 07/10/2008. That in order to protect his interest in the suit property the Applicant lodged a caveat which is still subsisting.

The Applicant contends that the acts of the Respondents were calculated to frustrate his efforts to take possession of the property which he purchased under a court order, and as such that the Respondents are in contempt of court. He prayed that court grants him the remedies sought.

The Court Bailiff Pastori Mukwatanise, also stated that in 2005 he was assigned by court to execute a warrant against the 2nd Respondent in **HCCS No. 463 of 1999;** where the 2nd Respondent was a guarantor and had pledged the suit property in National Bank of Commerce (NBC). At the said bank the Court Bailiff obtained documentation showing that the suit property was mortgaged before it was titled. The 2nd Respondent had instead pledged a lease offer to bank instead. That the NBC handed to the Court Bailiff the lease offer and it is the very documentation

which he used to execute the warrant when he sold the mortgaged property described as LRV 3218 Folio 20 Plot 16 Ngorogoza Road Kabale Municipality to the Applicant. That before selling he advertised the sale of suit property in *Daily Monitor* newspaper of 24/3/2005.

That unknown to the Court Bailiff or the NBC or the Applicant, the 2nd Respondent had just obtained a title for the suit property at the time of selling it. That in execution, the Court Bailiff used a lease offer which we obtained from NBC because the bank did not have a certificate of title in its possession at that time.

The Court Bailiff further stated that he sold the suit property to the Applicant who as the highest bidder on 25/4/2005. That after selling, the Court Bailiff failed to give vacant possession to the Applicant because upon reaching the suit property, he along with the Applicant found that the 2nd Respondent had deployed armed security men who made the handover exercise impossible and chased them away whenever they attempted to access the property. The Court Bailiff filed returns as required by law.

The Court Bailiff also states that the act of the 2nd Respondent transferring the suit property to 1st Respondent on 24/6/2005 and all transactions thereafter were done in contempt of court as the suit property had already been sold to the Applicant under a court warrant.

The 2nd Respondent opposed the application. He filed an affidavit and stated that it is not true that the suit property has ever been attached by court or sold by public auction. That the purported sale of the suit property was illegal, null and void and passed no title to the purported purchaser.

He further denied having deployed armed security men, other than the usual security, to chase the Applicant from accessing suit property. He also denied that he failed to pay back the loan of NBC. He denied that the Applicant has ever attempted or tried to take possession of the suit property. The 2nd Respondent further stated that he is the registered proprietor of the suit property and as such had every right to deal with it as he wished and the same would not amount to contempt of court.

Also, that until the filing and service of summons in this *HCCS No. 125 of 2005*, he was not aware of *HCCS No. 463 of 1999* in which he was allegedly a party. Also, that he did not file his defence to take part in that suit as he was not served with any service of court in *HCCS No. 463 of 1999* from which the purported execution purportedly arose. That as such he is not in contempt of court as alleged by the Applicant, and that the purported sale of the property was fraudulently done.

The 1st Respondent also filed an affidavit and denied being aware of *HCCS No. 463 of 1999* or having been served with an attachment warrant, or having seen any advertisement. He also maintained that the suit property has never been under any attachment since its registration and issuance of the certificate of title in 2005. Also, that the 2nd Respondent gave him an offer to purchase suit property. That he did a search in the Lands office which confirmed that it was free of any incumbrance and he purchased the same. That in 2008, he also sold the suit property to

the 2nd Respondent, who offered him the best price. That at no time has the Applicant ever purchased the suit property or been a registered proprietor. The 1st Respondent also denied that the suit property has ever been attached or judicially sold to the Applicant as claimed in as far as it has never been attached as envisaged by law and fact.

The 3rd Respondent also filed an affidavit in reply. However, at the hearing of the application, the Applicant withdrew the application wholly against the 3rd Applicant and maintained it only against the 1st and 2nd Respondents. It is thus not necessary to reproduce the content of the affidavit.

Mr. Henry Rwaganika represented the Applicant; Mr. Martin Mbanza represented the 1st Respondent. Mr. Kandebe Ntambirweki jointly with Adoch Lumu represented the 2nd Respondent. Counsels' submissions are on court record and I will refer to them when resolving issues posed by this application.

Mr. Rwaganika submitted that the act of denying the Applicant and the Court Bailiff access and vacant possession; which was being done in execution of a lawful court order which was in force amounted to contempt of court. Further, that the act of the 2nd Respondent on 23/06/2005 transferring the suit property to the 1st Respondent was yet another attempt to defeat the execution process which they were aware of.

Mr. Rwaganika pointed out that the 1st Respondent instituted *HCCS No. 125 of 2005* against the Applicant, but deliberately never served the Applicant with summons to file a defence and he proceeded and obtained a default judgment using a false affidavit of service. That the Applicant, however, successfully challenged the default judgment and filed a defence and a counterclaim. Mr. Rwaganika relied on the cases of ***Mega Industries (U) Ltd vs. Comform (U) Ltd.*** ***HCT-MC-0021-2014***, and ***Housing Finance Bank Ltd & Another vs. Edward Musisi CAMA No. 158 of 2010*** to support the view that the actions of the Respondents amounted to contempt of court.

In reply Mr. Kandebe Ntambirweki counsel for the 2nd Respondent opposed the application. He argued that the Applicant essentially makes the same argument in the instant application as in the main suit in *HCCS No.125 of 2005.* That as such the application is frivolous and vexatious just like the main suit and both should be dismissed with costs.

Mr. Kandebe primarily premised his argument on what he perceived as the non-compliance with the law and procedure of attachment and sale. He cited section 48 of the Civil Procedure Act (CPA) that before property is considered as having been attached, the duplicate certificate of title of the immovable property must be lodged in a court before sale. That in this case the Applicant and the Court Bailiff never lodged such a certificate. That where a judgment debtor does not lodge the duplicate certificate then a special certificate has to be obtained from the Registrar of Titles; which also was never obtained.

Mr. Kandeerbe further cited Order 22, r.51 CPR, under which an order is made prohibiting the judgment debtor from transferring or charging the property. That under sub-rule (2) a copy of the order is served by affixing it on a conspicuous part of the property or served on a judgment debtor and further advertised as a court may direct; except that the court may further direct that if an order cannot be served as aforesaid, it shall be served by affixing a copy of it on some conspicuous place in the court or part of the house.

Mr. Kandeerbe argued that the Court Bailiff does not state anywhere in his affidavit that he followed that above procedure. That as such there has never been attachment of the suit property as alleged by the Applicant and a Court Bailiff.

Mr. Kandeerbe further cited section 135 RTA to the effect that no decree of execution shall in itself bind, charge, or affect any land, a lease or mortgage, but the Registrar on being served with a copy of any decree of execution issued out of any court, accompanied by a statement signed by any party interested or his or her advocate or agent, specifying the land, lease or mortgage sought to be affected by the decree shall, after marking upon the copy the time of the service, enter the decree in the register book; and after any land, lease, mortgage so specified has been sold, then the Registrar shall receive a transfer in such form as in the 14th Schedule as the case requires enter the purchaser .

Mr. Kandeerbe argued that from the certified copy provided by the Registrar of Title, the office of the Registrar of Titles has never to-date been furnished with a decree or warrant of attachment affecting the suit property for registration for noting in the Register and on the encumbrance page of the title of the suit land and as such, under section 135 RTA (supra) the execution did not in itself bind the 1st or the 2nd Respondents not to deal in their land as they wished. That as such it was not contempt of court when the 2nd Respondent transferred or mortgaged the suit property or when the 1st Respondent also sold it or transferred it. Mr. Kandeerbe vehemently argued that since the procedure for attachment and sale was not complied with, there was no contempt of court order by the Respondents as no such lawful order existed due to the non-compliance by the Applicant of the law and procedure for attachment of immovable property. He cited the case of ***Rosemary Erina Karamagi vs. Angoliga Marmood, HCMA No.733 of 2005,*** to the effect that once section 48 RTA is not complied with, there cannot be an attachment or sale or execution, and it has to be nullified. Further, that where there is evidence of an irregular execution and rules of court are not followed, then court would nullify and set aside the same and may only order that the purported purchaser recovers his money. Counsel submitted that the application be dismissed with costs.

Mr. Mbanza counsel for the 2nd Respondent associated himself with submissions of Mr. Kandeerbe on the facts and the law.

Opinion:

The term “contempt of court” has no specific statutory definition in Uganda even though certain legislations, such as the Penal Code Act, including the Constitution apply the term. It is essentially a common law concept that has variously been adopted and applied in our jurisprudence by virtue of section 14(3) of the Judicature Act Cap 13, which, inter alia, enjoins the application of common law principles. It states as follows;

“The applied law, the common law and the doctrines of equity shall be in force only insofar as the circumstances of Uganda and of its peoples permit, and subject to such qualifications as circumstances may render necessary.”*

Contempt of court often referred to simply as “contempt” is the offence of being disobedient or disrespectful towards a court of law and its officers. Black’s law Dictionary (7th Ed) at page 313, defines the term in generally to refer to a form of behavior that opposes or defies judicial authority and the dignity of the court. It is a deliberate disobedience or disregard of the laws, regulations or the decisions of a court of law.

In ***The* *Proctor & Gamble Co. vs. Kyole James Mutisho & 2 Ors, HC Misc. Application No. 135 of 2012*** citing with approval the case of ***Jennison vs. Baker (1972) 1 ALL ER 997*** (at pages 1001 -1002) per Salmon LJ*, it was held that there are many forms of contempt but which may be broadly classified as criminal or civil contempt. Civil contempt generally involves the failure to perform an act that is ordered by court as a means to enforce the rights of an individual or to secure remedies for parties in a civil action. A civil contempt is usually a violation of the rights of one person. Courts use civil contempt as a coercive power; wielding it only to ask the contemnor comply with court orders.

In the case of ***Hon. Sitenda Sebalu vs. Secretary General of the East African Community Ref No. 8 of 2012*** the East African Court of Justice (First Instance Division) extensively considered the issue of contempt of court and held that;

“...it is a civil contempt to refuse or neglect to do an act required by a judgment or order of the court within the time specified in that judgment, or to disobey a judgment or order requiring a person to abstain from doing a specific act.”*

The court further clarified that it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until it is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. See: ***Hadkinson v Hadkinson [1952] All ER 567***.

In ***Chuck vs. Cremer (1 Corp Jemp 342)*** which was cited with approval by the Court of Appeal in the case of ***Housing Finance Bank Ltd & Another vs. Edward Musiisi, CAC Appl. No 158 of 2010,** it was held, inter alia, that a party who knows of an order, regardless of whether, in the view of that party, the order is null or valid, regular or irregular, cannot be permitted to disobey it, by reason of what that party regards the order to be. That it would be dangerous to hold that the suitors or their solicitors, could themselves judge whether an order was null or valid, whether it

was regular or irregular. That the course of a party knowing of an order which is null or irregular and who might be affected by it is plain. He should apply to the court that it might be discharged. As long as it exists, it must be obeyed. It is not for that party to choose whether or not to comply with such an order. The order must be complied with in totality, in all circumstances by the party concerned subject to that party's right to challenge the order in issue in such a lawful way as the law permits. This may be by revision, review or by appeal.

Flowing from the above authorities, the first clear and unambiguous position of the law is that as long as a court order is not discharged, it is valid and since it is valid, it must be obeyed. That being the case, the only way in which a litigant can obtain reprieve from obeying a court order before its discharge is by applying for and obtaining a stay. As long as the order is not stayed, and is not yet discharged, then a litigant who elects to disobey it does so at the risk and pain of committing contempt of court.

It is now settled that for one to be held in contempt of court four essential ingredients have to be demonstrated. These are the existence of a lawful court order; the potential contemnor's knowledge of the order; the potential contemnor's ability to comply; and the potential contemnor's failure to comply. The standard of proof in contempt is higher than proof on the balance of probabilities, and almost, but not exactly, beyond reasonable doubt. The jurisdiction to commit a potential contemnor for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor to comply.

On the whether there exists a court order in the instant case, the court record shows that the Registrar of this court on 21/03/2005 issued an order of attachment and sale of the suit property in execution of a decree arising from *HCCS No.463 of 1999.* The record shows the 2nd Respondent herein was a party as 3rd defendant in that case having guaranteed a loan from now defunct NBC using the suit property as security. The mortgagor defaulted and guarantors' property was attached and sold in execution of the court order. These facts are attested to by the Applicant and Mukwatanise Pastori the Court Bailiff to whom the execution process was assigned.

Therefore, as far as *HCCS No.463 of 1999* is concerned, there is no doubt that there existed a lawful court order issued by court with competent jurisdiction in a set judicial process. The relevant contents of the court order state as follows;

“...IT IS HEREBY ORDERED that the interest of the judgment debtors in the lands comprised in the schedule on the reverse hereof is hereby attached and the judgment debtors are prohibited from transferring or charging such property in any way and all persons from taking any benefit from such transfer or charge(AND IT IS HEREBY FURTHER ORDERED that the interest of the judgment debtor in the said lands sols in execution of the decree in the above mentioned suit) AND IT IS ALSO HEREBY FURTHER ORDERED that the said judgment debtors deliver to this court immediately the Duplicate Certificate of Title...”

In addition, the suit property belonged to the 2nd Respondent and was registered in his name as at the time of the issuance of the court order. Further, the suit property was the specific subject of attachment and sale.

The second essential ingredient is that the potential contemnor is aware of the court order. Evidence led by the Applicant shows that Respondents, particularly the 2nd Respondent, were acutely alive to the existence of the court order. As noted above the 2nd Respondent was a party in *HCC No.463 of 1999* as 3rd defendant. He was sued as a party having guaranteed a loan with the NBC to the other parties therein using his property as collateral. All these facts were well within his knowledge and information.

The 2nd Respondent claimed that until the filing and service of summons in this *HCCS No. 125 of 2005,* he was not aware of *HCCS No. 463 of 1999* in which he was a party. That he was never served with any service of court in that case from which the execution arose. That he never filed a defence to take part in that suit. That as such, he is not in contempt of court as alleged by the Applicant as the purported attachment and sale of the suit property was fraudulently done.

The settled position of the law was stated in the case of ***Bashaija Kazoora John vs. Bitekyerezo Medard & Another, HCEP No. HCT – 05 – CV – EP – 004 – 2004.*** A court order is an order *in rem*. It is an order against the all the world. Once issued, a court order binds all the parties and everyone in respect of the subject matter under litigation. It is, therefore, not enough for the 2nd Respondent or anyone to claim, in respect of the subject matter of the suit, that they were not aware of the court order.

In addition, the Respondents, particularly the 2nd Respondent, by necessary implication concede that they were aware of the court order. The 2nd Respondent claims that he was not served with summons in *HCCS No.463 of 1999* and did not file a defence. This claim does not hold any weight at all. Even assuming he was not served as he claims; orders arising out of ex parte hearings are as lawful orders as any other order unless the affected party successfully challenges them in a set judicial process.

Clearly, the 2nd Respondent never took any steps open to him to challenge the sale in any lawful manner. He cannot now be heard in this application to say that he was not aware of the court order because even after he became aware he did nothing. In the instant application, court is not called upon to evaluate or review the merits as to why the 2nd Respondent did not comply with the court order, but whether he actually complied. He did not according to the finding of this court.

The other clear indication that the Respondents were well aware of the order is that they primarily challenge the execution; not so much because they were not aware of it, but because they think that it was not done in accordance with the prescribed law and set procedure for execution. That is apparent in the depositions in their respective affidavits.

Mr. Kandebe in his submissions also strenuously attempted to fault the Applicant and the Court Bailiff for having allegedly not followed the procedure for attachment and sale in *HCCS No 463 of 1999*. This, inter alia, clearly indicates the Respondents' knowledge of the court order. They only had misgivings with the process of its execution. Having misgivings is beside the point that the Respondents were aware of the order. The clear fact and finding of this court is that they were aware of the court order.

The third ingredient is the potential contemnor's ability to comply with the court order. The 2nd Respondent who was a party as 3rd defendant in *HCCS No.463 of 1999* was the party specifically targeted by the court order and intended by it to comply with it. He did not comply with the order because of what he considered it to be – non adherence to the law and procedure of execution.

As the law in the decided cases stands, the Respondents, like all other parties in any litigation, cannot be permitted to disobey a court order merely because of what they think that court order to be. In the case of ***Housing Finance Bank Ltd & Another vs. Edward Musiisi*** (supra) it was held that a party who knows of an order, regardless of whether, in the view of that party, the order is null or valid, regular or irregular, cannot be permitted to disobey it, by reason of what that party regards the order to be. It is not for that party to choose whether or not to comply with such an order. The order must be complied with in totality, in all circumstances by the party concerned subject to that party's right to challenge the order in issue in such a lawful way as the law permits.

It is apparently clear that despite being required to comply with the court order which they were undoubtedly aware of, the Respondents did not; merely because of what they considered to be error or procedural irregularities in its execution. As already stated this was not up to them to determine. They were required to comply with the order in its totality subject challenging it in such a lawful way as the law permits. Simply barring access to the suit property which is the subject of attachment and sale by order of court by stationing armed security guards to chase away a Court Bailiff duly executing a court order, does not amount to challenging the court order in a lawful way. If anything, it amounts to use of brute and raw force to thwart a lawful process. That is impunity which cannot be condoned by any reasonable court of law.

Therefore, Mr. Kandebe is wrong on the law and facts to argue that there was no court order. There was indeed a court order in existence. Counsel is also wrong in his argument that the warrant was null and void for failure, by the Applicant and Court Bailiff, to follow the law and procedure of attachment. It was not up to the 2nd Respondent to determine that issue. It was not within his mandate to do so. He had to comply with the order subject challenging it in such a lawful way. He neither complied nor challenged the order in any lawful way. That conduct amounts to nothing short of contempt of the court order.

For emphasis, the Applicant purchased the suit property from court as it was sold pursuant to a decree in *HCCS No.463 of 1999*. In strict legal sense this was a judicial sale. The Supreme Court in the case of ***Muwanga vs. Stephen Kyeyune (Legal Representative of Christine Kisamba (deceased) SCCA No. 2 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.

In the instant case, no proceedings were taken by the Respondents to challenge the attachment and sale in execution of a decree in *HCCS No.463 of 1999*. The Respondents' failure to take such steps rendered the attachment and sale complete and absolute. Having thus failed, the Respondents were required to hand over vacant possession of the suit property to the Applicant who had bought pursuant to a judicial sale. Merely resisting the execution in the manner they did amounted to the Respondents subverting the course of justice.

Therefore, there is no merit in the argument that the attachment and sale was null and void on account of failure to follow the procedure of attachment. The informality if any; would not in itself render the court order null and void unless the court which issued the order was moved and set it aside or the Respondents successfully appealed against the order. As long as the order still stands, it must be complied with in totality by the Respondents.

The primary concern of this application is not to validate the sale and attachment in *HCCS No 463 Of 1999*. The Respondents cannot be heard to challenge the execution in this particular application. Equally, this court cannot pronounce itself on the legality, validity or propriety of the process of the attachment and sale that arose from *HCCS No.463 of 1999* in this application. The scope of this application is to determine the issue whether the Respondents complied with the court order in *HCCS No.463 of 1999*. As found, the Respondents did not comply and continue to be in contempt of the court order in issue.

Worthy of note also is that at the time when the court order was issued, the suit property was registered in the name of the 2nd Respondent. It was advertised in the *Daily Monitor* newspaper of 24/03/2005. This was a public notice and therefore a notice to the whole world. Well aware of the court order, the 2nd Respondent on 23/06/2005 transferred the suit property to the 1st Respondent. In an obvious attempt to further alienate the property, the 1st Respondent instituted *HCCS No.125 of 2005* against the Applicant in respect of the same suit property. Worse still, while this suit which he had himself filed was still pending in court, the 1st Respondent on 08/05/2008 transferred the suit property back to the 2nd Respondent. This was hardly three years after it had been transferred from the 2nd Respondent. It was hence just a movement back and forth of registered ownership to defeat the Applicant taking possession.

Again well aware that the suit property was a subject of a court case, in which the 1st Respondent was party, the 2nd Respondent used the suit property to obtain a loan from Stanbic Bank (U) Ltd, which registered its mortgage on 19/05/2008, and a further charge on 07/10/2008. The argument of the Respondents is that nothing stopped them from dealing with the property as they wished.

That argument is wrong. Firstly, at the time the court issued the order of attachment and sale the property was registered in the name of the 2nd Respondent, and it should never have been transferred to the 1st Respondent in the first place. Secondly, the information which was in the knowledge of the Respondents is that the suit property was a subject of a pending court case in

HCCS No.125 of 2005 instituted by the 1st Respondent himself against the Applicant. This was sufficient reason for the Respondents not to have transferred ownership of the suit property back and forth between themselves.

The totality of the act of both Respondents changing ownership of the suit property between themselves leaves no doubt that it was calculated to frustrate the Applicant taking possession of the property he had bought pursuant to a lawful court order. This is not to mention the stationing of armed security guards on the suit property to prevent access to the suit property. The Respondents' combined actions are an exhibition of blatant impunity and disregard of a lawful court order and it amounts to contempt of court.

I wish to restate the time tested principle of the law that the whole purpose of litigation as a process of judicial administration is lost if orders issued by court through a set judicial process, in the normal functioning of the courts, are not complied with in full by those targeted and or called upon to give due compliance. A court of law never acts in vain and as such, issues concerning contempt of court take precedence over any other cases of invocation of the jurisdiction of the court. See: ***Wildlife Lodges Ltd. vs. County Council of Narok & Another, [2005] 2 EA 344 (HCK).*** I can only add that matters of contempt of court also take precedence over issues of procedure such as were argued by Counsel for the Respondents and stated in the Respondents' respective affidavits.

Issue No.2: What remedies are available to the parties?

Owing to the nature of the contempt in this case by the Respondents, the appropriate remedy would have been to require them to completely purge themselves by promptly complying with orders in *HCCS No. 463 of 1999* and handing over vacant possession of the suit property to the Applicant. However, it has emerged on facts of the case that the suit property was mortgaged to Stanbic Bank (U) Ltd, which registered a mortgage and a further charge. The suit property is invariably no longer available to be taken possession of by the Applicant.

The 2nd Respondent in cohorts with the 1st Respondent were all bent on denying the Applicant taking possession of the suit property, and seem to have succeeded in their mischievous manoeuvres. The 2nd Respondent, however, cannot be permitted to retain the suit property and at the same time keep the Applicant out of the money paid in lieu of the now botched purchase transaction. As it were, the 2nd Respondent "cannot eat his cake and have it". The 2nd Respondent shall therefore pay back Shs. 20 million the purchase price of the suit property to the Applicant. This shall attract interest at a rate of 8% per annum from 25/04/2005 the date of the sale to the Applicant until payment in full.

In addition, buying and selling of the suit property is considered typically a commercial transaction. The courts of law are enjoined to protect and enforce commercial transactions of parties. In a situation where the Applicant bought the suit property pursuant to a judicial sale in April, 2005, and he has been kept out for about 12 years now, he should be entitled to a measure of recompense by way of damages that will fairly put him back in the same position as if he had not suffered the loss.

The Applicant gave a figure of Shs. 500million. In view of the circumstances of this particular case where the suit property is no longer available to the Applicant, taking into account other factors such as the “time value of money”, the time it has taken to secure a remedy, the location of the subject matter; which is within the Kabale Municipality, Shs.500 million is fair and adequate recompense and court awards the same amount as general damages against the 2nd Respondent for the contempt of the court order. The amount shall attract interest at a rate of 23% per annum from the date of this decision until payment in full.

In the event of failure to comply with the above orders by the Respondents, the Applicant is at liberty to promptly move court for orders that the contemnors to be arrested and be committed to civil prison. The Applicant is awarded costs of this application.

BASHAIJA K. ANDREW

JUDGE

27/04/2017

Mr. Henry Rwaganika Counsel for the Applicant present.

Mr. Mbanza Martin Counsel for the 1st Respondent present.

Mr. Adoch Lumu Counsel for the 2nd Respondent present.

Mr. Godfrey Tumwilirize Court Clerk present.

Court: Ruling read in open Court.

BASHAIJA K. ANDREW

JUDGE

27/04/2017

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