

THE REPUBLIC OF UGANDA

IN THE REPUBLIC OF UGANDA HOLDEN AT KAMPALA

[CIVIL DIVISION]

MISCELLANEOUS APPLICATION NO. 30 OF 2021

(ARISING FROM THE RULING DELIVERED BY THE CHIEF MAGISTRATE OF KAMPALA AT LDC)

(ARISING FROM MISC. APPLICATION NO.309 OF 2020)

THE VELVET DINNER APPLICANT

VERSUS

MUTAMBUZI SAM T/A FRAUD ALERT BAILIFFS ACTING ON

BEHALF OF FATIMA KALAN RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

This application was brought under Section 83 and 98 of the Civil Procedure Act Cap. 71, Section 33 of the Judicature Act Cap.13, and Order 52 rules 1 and 3 of the Civil Procedure rules seeking revision of the ruling of the Chief Magistrates Court of Kampala at LDC in Miscellaneous Application 309 of 2020. The ruling is dated and was delivered on 18th December 2020.

The Applicant herein filed an application seeking;

1. A declaration that Her Worship Najjuuko Evelyn the Grade 1 Magistrate in the Chief Magistrate Court of Kampala at LDC, in hearing the determining Miscellaneous Application No. 309 of 2020 between the parties herein, exercised its jurisdiction with material irregularity and injustice to the Applicant.
2. An order quashing the decision of Her Worship Najjuuko Evelyn the Grade 1 Magistrate in the Chief Magistrate Court of Kampala at LDC on the points of law raised and ruled upon in Miscellaneous Application No.309 of 2020.
3. A consequential order that the Respondents release unto the Applicant all its properly unlawfully detained.
4. An order that the Applicant be awarded costs of this Application and in the court below.

5. An order that the Respondents pay the costs of this application.

On 1st January 2019 the Applicant entered into a tenancy agreement with Fatima Kalan for Shop No. C-07 on the building called the “The Prism at plot 71/73 Kampala Road, Uganda. A few months into the tenancy, the Applicant struggled to meet the rental obligations on time for the months of September and October 2019. On 19th October 2019, the landlord acting through her property manager Mr. Asim Morvi, re-entered the premises rented by the Applicant and also detained the assets of the Applicant. The applicant ceased to operate its business and has never been into the property.

In an attempt to secure the release of its business assets, the Applicant made several payments to make good its rental debt for September 2019, October 2019 and also made further payments for November 2019 in the hope that the tenancy could be re-established, however it remained terminated. On 13th July 2020, the Respondent Mutambuza Sam trading in the style and name of Fraud Alert Bailiffs, filed Miscellaneous Application 309 of 2020 before the Chief Magistrates Court of Kampala at LDC, apparently acting on behalf of the Fatima Kalan, seeking a special certificate to levy distress for rent against the applicant.

When the matter came up for hearing before the Learned Grade 1 Magistrate Her Worship Evelyn Najjuko, the Applicant was heard on an objection to application on a point of law and submitted that the application was incompetent, bad in law and misconceived as the landlord – tenant relationship had ceased on the 19th October 2019. The learned trial Magistrate on 18th December 2020, delivered the ruling stating;

“I have listened to arguments of all the parties and do note that there are substantial issues that require ample investigation of court in a civil suit. I have also taken due note of the concerns of the parties that the property of the Respondent has been kept in the premises of the applicant for over a year. In order to enable the parties, arrive at a just conclusion I shall order that the property of the respondent be kept at a storage facility as the parties argue at what point the landlord tenant relationship lapsed given that there is no contention that it existed at some point and what liabilities accrued. This in my opinion would be just and also curtail further issues of accruals or proper arena to arrive at the decision justly. It is then that the fate of the property shall be determined.”

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the applicant, but generally and briefly state that;

1. That the learned Trial Magistrate in hearing and determining Miscellaneous Application No. 039 of 2020 between the parties herein, exercised her jurisdiction with material irregularity and injustice to the Applicant particularly;

- i) The learned Trial Magistrate refused and/or failed to make a determination on the point of law raised by counsel for the Applicant which was duly raised and submitted upon by both counsel.
 - ii) The learned Trial Magistrate failed to make a decision on an application for distress for Rent and instead substituted for it her decisions for the indefinite detention of the Applicants property until when the Respondent institutes a proper suit in an appropriate court.
2. That the Trial Magistrate acted in the exercise of her jurisdiction irregularly and illegally when she ordered that the instant Applicant's property be removed from the premises she had since ceased renting pending determination by another court of when the parties landlord/tenant relationship ended thereby occasioning miscarriage of justice to the instant Applicant.
 3. That it is in the interest of justice that decision of Her Worship Najuko Evelyn, the trial Magistrate, Kampala LDC dated 18th December, 2020 in MA 039 of 2020 be set aside.
 4. That the Application has been presented in a timely and expeditious manner.
 5. That this is a proper case where this Honorable Court should exercise its inherent powers and wide discretion to call for the record of Miscellaneous Application No. 039 of 2020 and address all the injustice, material irregularities and illegalities occasioned to the Applicant by the Trial Magistrate

Three issues were raised for court' determination;

- 1. *Whether there is disclosed on the record of the lower Court a material irregularity and injustice to the Applicant?***
- 2. *Whether learned Trial Magistrate in MA 309 of 2020 was vested with jurisdiction to issue orders for the indefinite detention of the Applicants property pending the filing and determination of a prospective suit?***
- 3. *Whether the learned Trial Magistrate exceeded her jurisdiction in an application for a special certificate to levy distress for rent under Section 2 of the Bailiffs Act Cap. 76?***

The Applicants in this application were represented by *Enock Barata* while the Respondent was represented by *Warren Byamukama*.

The applicant's counsel raised two preliminary points of law that;

- a) The respondent had no standing before the Court below and has no standing before this court.
- b) The respondent relied on a false affidavit in the court below as the same was never sworn by Fatima Kalan as represented.

Whether the applicant had locus standi to institute this matter in court?

The applicant's counsel submitted that the respondent had no standing to commence the action before the Chief magistrates' court. The action could only be commenced by the Landlord or a duly appointed attorney of the landlord. The respondent did not plead and did not present any instrument of authority to permit him commence the action. Even if he had, the action would still have to be commenced in the name of the landlord.

The respondent's counsel in his submission conceded that it was indeed wrong and improper for the respondent to file the application for distress in his own names because the same should have been filed in the names of the principal.

Analysis

Section 2 of the Distress for Rent (Bailiffs) Act Cap 76 provides ; The landlord either levy distress directly in the capacity of the land lord, or applies for a special certificate to be issued to the bailiff.

No person can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some injury or damage in law. In addition, the litigant was required to show some legal right or recognized interest was at stake. Therefore, the applicant/plaintiff is both the victim of the harm and the beneficiary of the relief. See ***Auto garage & Anor v Motokov (No. 3) [1971] EA 514***

The respondent in this matter commenced proceedings in his name as a bailiff and yet he was not the owner. An agent cannot bring an action in their names even if he possesses authority to commence action but rather in the names of the landlord or the principal. An Attorney has no capacity to sue or be sued. See ***Boutique Shizam Ltd v Norattam Bhatia & Hemantin Bhatia CACA No. 36 of 2007***

A donee of powers of Attorney has no cause of action since he does not enjoy any right and could not institute a suit in his own name and could only sue in the name of the principal. This therefore means that the application for distress was filed in error or illegally in the names of the respondent who never had a cause of action. See ***M/s Ayigihugu & Co Advocates v Munyankindi Muteeri [1990-1992] KALR 180***

This application would therefore succeed on this point of law and the entire application for distress is dismissed with costs to the applicant herein. However, for completeness the court shall proceed to determine the other issue.

Whether there is disclosed on the record of the lower Court a material irregularity and injustice to the Applicant?

Counsel for the Applicant submitted that the Trial Magistrate having recognized that the matter ought not to be before the Magistrates court in the manner that it is, she ruled that, "I have listened to arguments of all the parties and do note that there substantial are issues that require ample investigation of court in a civil suit...the parties are advised to handle the issues in the proper arena..." therefore, having observed that the matter was not for a special certificate to levy distress for rent rather one for determination of rights and obligations in a civil suit, acted irregularly and with grave injustice to the Applicant herein when she failed to dismiss the application and instead substituted an application for a special certificate to levy distress with an order in for the detention of the Applicants property.

Analysis

Revision powers of this court are derived from **section 83 of The Civil Procedure Act**. Under that law, the this court may revise a case and make such order in it if the trial court appears to have;

- Exercised a jurisdiction not vested in it in law;
- Failed to exercise a jurisdiction so vested; or
- Acted in exercise of its jurisdiction illegally or with material irregularity or injustice.

This entails a re-examination or careful review, for correction or improvement, of a decision of a magistrate's court after satisfying oneself as to the correctness, legality or propriety of any finding, order or any other decision and the regularity of any proceedings of a magistrate's court.

It is a wide power exercisable in any proceedings in which it appears that an error material to the merits of the case or involving a miscarriage of justice occurred, but after the parties have first been given the opportunity of being heard and only if from lapse of time or other cause, the exercise of that power would not involve serious hardship to any person.

The High Court can use its wide powers in any proceedings in which it appeared that an error material to the merits of the case or involving a miscarriage of justice had occurred (*see; Munoba Muhammed v Uganda Muslim Supreme Council CR No.1 of 2006*). This court therefore has wide discretionary powers under section 83 of the CPR to revise decisions from the magistrates' courts.

The common law principle is that distress for rent is only applicable where there subsists a relationship of landlord and tenant between the parties; notwithstanding that the former tenant is still in possession. **Halsbury's Laws of England, Third Edition, vol. 38, states at p. 741, paragraph 1207** as follows: - *"If a tenancy determines by effluxion of time or otherwise, and former tenant remains in possession against the will of the rightful owner the former tenant is, apart from statutory protection, a trespasser from the date of the determination of the tenancy"*

This principle is applied in our jurisdiction; see **Souza Figueiredo & Co. Ltd. v. George & Others (1959) E.A. 756**, which states that for a landlord to exercise to levy for distress for rent, a landlord/tenant relationship must subsist between the two. This authority was cited by the Supreme Court of Uganda, with approval and restatement of the proposition of law therein, in **Joy Tumushabe & Anor vs M/s Anglo Africa Ltd & Anor SCCA No. 7 of 1999** where in Kanyeihamba JSC stated as follows:

"In any event, distress for rent is only permissible if the relationship of tenant and landlord exists between the parties: but as I have shown, that relationship had had ceased to exist as a result of the appellant's acts and conduct. In the result, distress for rent in this case was affected against trespassers and it could not have been possible for the persons who effected the alleged distress for rent to do so under the Act."

As at the facts, the underlying basis of this application is the existence of a tenancy agreement. It is not in dispute that there existed a tenancy agreement from September and October 2019, until the Applicant defaulted on rent. The relationship came to an end when the landlord, rented the said premises to another party even after the Applicant showing interest of re-entering, when he paid off his rent arrears but also paid a one month in advance.

The act of the landlord renting the premises to another party, showed that the relationship of landlord and tenant had long since ceased to exist between the parties.

The Applicant has succeeded that there was no relationship existing, and thus no point for an application of distress for rent.

The learned trial Magistrate exercised her jurisdiction with material irregularity when she entertained the matter before her without establishing whether the respondent indeed had *locus standi* to file the application in his names. Secondly, she further exercised jurisdiction with material irregularity when she entertained a matter for distress for rent and yet the landlord and tenant relationship had since ended.

This application succeeds and the following orders are granted:

1. A declaration that Her Worship Najuuko Evelyn the Grade 1 Magistrate in the Chief Magistrate Court of Kampala at LDC, in hearing the determining Miscellaneous

Application No. 309 of 2020 between the parties herein, exercised its jurisdiction with material irregularity and injustice to the Applicant.

2. An order quashing the decision of Her Worship Najuuko Evelyn the Grade 1 Magistrate in the Chief Magistrate Court of Kampala at LDC on the points of law raised and ruled upon in Miscellaneous Application No.309 of 2020
3. A consequential order that the Respondents release unto the Applicant all its property unlawfully detained.
4. An order that the Applicant be awarded costs of this Application and in the court below
5. An order that the Respondents pay the costs of this application.

I so order.

SSEKAANA MUSA

JUDGE

13th August 2021