THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0063 OF 2019

OWEMBABAZI ENID …… PLAINTIFF

VERSUS

1. GUARANTEE TRUST BANK LIMITED }
2. ASIIMWE ZADDOCK T/a PAAS STRICT } …… DEFENDANTS
AUCTIONEERS COURT BAILIFFS }
3. KASTA HUSSEIN }

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a. The plaintiff's claim;

The Plaintiff's claim against the defendants jointly and severally is for recovery of general and special damages for trespass to land, declaration that; she is the rightful owner of a *kibajnja* situated on land comprised in Kyadondo Block 82 plot 324 at Kungu village in Wakiso District, that her developments thereon were illegally demolished, that the 3rd defendant fraudulently mortgaged the land to the 1st defendant and therefore the resultant mortgage is null and void, a permanent injunction restraining the 1st defendant from any further dealings in the land without her consent, and the costs of the suit.

Her claim is that she purchased approximately two acres of *kibanja* now in issue, on 3rd January, 2009 from a one Kassim Kibirige, one of the beneficiaries of the estate of the late Stephen Hannington Kabuye, the deceased proprietor of Kyadondo Block 82 plot 324. She immediately took possession, constructed a poultry house and established gardens thereon. Without her knowledge and consent, the 3rd defendant sometime during the year 2010 mortgaged the and to the 1st defendant. When the 3rd defendant defaulted on the loan, the 1st defendant filed a suit against him that culminated in a judgment and decree in favour of the 1st defendant. A warrant for execution of that decree by way of "eviction, attachment and sale of immoveable property" was

issued to the 2nd defendant who on or about 7th November, 2018 proceeded to demolish the plaintiff's residential and poultry houses on the land, destroyed her crops, chicken and poultry feeds and products, thereby causing her loss and anguish. The plaintiff contends that all this was the consequence of the defendants' fraudulent and malicious acts against her.

b. The defence to the claim;

The second and third defendants did not file defences to the suit. In its written statement of defence, the 1st defendant denied the plaintiff's claim. It contended that it entered into a mortgage agreement with the 3rd defendant after conducting due diligence and ascertaining that the land was free from any encumbrances or claims by third parties. The 2nd defendant was instructed by court and executed the warrant lawfully. The 1st defendant is not responsible for the 2nd defendant's actions if at all the latter acted unlawfully.

c. The issues to be decided;

The suit proceeded *ex-parte* against the 2nd and 3rd defendants. In the parties' joint memorandum of scheduling, the following were framed as the issues to be decided by court.

1. Whether the plaintiff owns a *kibanja* on the suit land.
2. If so, whether the 1st defendant had notice of the plaintiff's interest in the land at the time of registration of the mortgage.
3. Whether the 1st defendant lawfully registered a mortgage on the land.
4. Whether the 2nd defendant lawfully executed the warrant issued in respect of the land.
5. Whether the 1st defendant is liable for the actions of the 2nd defendant.
6. Whether the plaintiff is entitled to the reliefs sought against the defendants.
7. What remedies are available to the parties?

d. The submissions of counsel for the plaintiff;

Counsel for the plaintiff did not present any final submissions.

e. The submissions of counsel for the 1st defendant;

Counsel for the 1st defendant, M/s Ortus Advocates, submitted that before the 1st defendant took the title deed for land comprised in Kyadondo Block 82 plot 324 as security for a loan of shs. 65,000,000/= borrowed by the 3rd defendant, it undertook a physical inspection and valuation of the land. There were no third party claims or interests in the land at the time. When the 3rd defendant defaulted on the loan, the 1st defendant filed a suit for the recovery of shs. 35,000,000/= then outstanding, in respect of which a consent judgment was entered. The 3rd defendant having defaulted on its terms as well, the court issued a warrant of eviction attachment and sale of the mortgaged land (exhibit P. Ex.5). The 2nd defendant was authorised by court to execute that warrant.

f. The decision;

For reasons of convenience and the fact that they are intertwined, the first three issues will be considered concurrently, namely;

1st issue whether the plaintiff owns a *kibanja* on the suit land.

2nd issue if so, whether the 1st defendant had notice of the plaintiff's interest in the land at the time of registration of the mortgage.

3rd issue whether the 1st defendant lawfully registered a mortgage on the land.

A *kibanja* is a form of land holding or tenancy that is subject to the customs and traditions of the *Baganda*, characterised by user rights and ownership of developments on land in perpetuity, subject to payment of an annual rent (*busuulu*) and correct social behaviour, distinct and separate from ownership of the land on which the developments are made and in respect of which the user and occupancy rights exist. *Kibanja* refers not only to the piece of land, but also to the tenant's rights. Consequently, a *kibanja* holder has conditional perpetual occupancy and user rights in the land. Historically, a *kibajnja* holder was only required to pay an annual tax (*busuulu*) or provide labour to chiefs (*batongole*) to hold their land in perpetuity.

Kibanja occupancy existed in Buganda before colonialism as peasant (*bakopi*) rights to land. Peasants had occupation and cultivation rights to small portions of land owned by chiefs which they paid for by offering labour to the chiefs. The nature of the peasant rights was more or less as it is today. They included: (i) the right of undisturbed occupation dependent on correct social and political behaviour, (ii) grazing rights, water rights and rights to trees and firewood; and (iii) the right to remain in possession on succession. In return, the peasant gave tribute of beer and food crops (*envujjo* now commuted to money dues) and free labour to his chief or clan head, and military service. The 1900 agreement between the colonial government and the Kabaka of the Buganda formalised these relations. These relations were regulated further by *The Busuulu and Envujjo Law, 1928.*

Under Section 8 (1) of *The Busuulu and Envujjo Law, 1928* a right of residence was conferred upon a *kibanja* holder on *mailo* land which only extended to the wife and child of the *kibanja* holder, and the successor to the *kibanja* holder in accordance with native customs of the *kibanja* holder. Under section 8 (1) (a) and (b) thereof, any other person who wished to reside upon a *kibanja* recognised by the *mailo* owner had to first obtain consent of the *mailo* owner. Under Section 8 (2) thereof, a *kibanja* holder had no right to transfer or sublet the *kibanja* to any other person without the consent of the *mailo* owner. The relationship of *mailo* holder and *kibanja* holder is that *kibanja* holder's right of occupancy occurs for indeterminate period and is inherited by his heir and successors implying that a *mailo* owner cannot evict a *kibanja* holder from his land save for the causes provided by the law (see *Lukwago v. Bawa Singh and another [1959] EA 282 at 284*).

In section 29 (1) (a) (i) of *The Land Act*, the rights of *bibanja* holders are preserved by defining "a lawful occupant" to include one who occupies land by virtue of the repealed *Busuulu and Envujjo Law of 1928*; thus, a *kibanja* holder is a lawful occupant. A person claiming to be a lawful occupant by reason of being a *kibanja* holder, therefore has the burden of proving acquisition of the necessary rights either as a child of the *kibanja* holder, a customary successor, or that he or she had the consent of the *mailo* holder to reside on the suit land (see *Hosea Sonko and eleven others v. D. K. Banoba, H. C. Civil Appeal No. 71 of 2014*). The customary practice of introduction and

giving a *Kanzu* was for the purpose of soliciting such consent (see *Tifu Lukwago v. Samwiri Mudde Kizza and another, S. C. Civil Appeal No. 13 of 1996*).

An agreement purporting to sell and transfer a *Kibanja* holding is not sufficient proof of acquisition of a lawful *Kibanja* holding in the absence of proof of the essential fact that would constitute creation of the *Kibanja* holding, namely consent of the *mailo* owner (see *Muluta Joseph v. Katama Sylvano S.C. Civil Appeal No. 11 of 1999*). The procedure for obtaining that consent was explained in *Tifu Lukwago v. Samwiri Mudde Kizza and another, S. C. Civil Appeal No. 13 of 1996* as follows;

> Whenever a *Kibanja* is sold, the seller introduces the buyer to the owner of the *Mailo* land on which the *Kibanja* is. If the owner had an agent who looks after that land the buyer is introduced to the agent, who in turn introduces him to the owner. In either case, the buyer upon being so introduced gives to the *Mailo* land owner or to the agent as the case may be, a gift called a *Kanzu*. Thereupon the buyer is recognised by the owner as the new *Kibanja* holder.

The plaintiff has not adduced evidence that proves compliance with the requirements of the customary acquisition of a *kibanja*. She instead claims to have purchased two acres of land from a one Kassim Kibirige, one of the beneficiaries of the estate of the late Stephen Hannington Kabuye. Testifying as P.W.2 Kassim Kibirige stated that by the date of sale to the plaintiff, he had not yet obtained a grant of letters of administration to the estate of the deceased. Prima facie he lacked the capacity at the time to deal with the estate. According to section 25 of *The Succession Act* all property in an intestate estate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property. Section 191 thereof then emphasises that no right to any part of the property of a person who has died intestate may be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction.

Whereas section 192 of *The Succession Act*, provides that Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his or her death, life cannot be given by ratification to prohibited transactions (see *Bedford Insurance co. ltd. v. Instituto de Resseguros do Brasil [1985] Q.B. 966*). Although ratification is not confined to lawful acts, an act, which is simply void in law, cannot be validated by ratification. In other words, only lawful acts can be ratified. Moreover, ratification

may not be recognised if it will affect proprietary rights in ether real or personal property which have arisen in favour of the third party or others claiming through him or her.

At the time of the transaction, P.W.2 Kassim Kibirige had no transferable right to any part of the estate of the deceased. This is because upon the death of a holder of land, individual shares in the estate property are only "vested in interest," which is a present right to a future possession and use of, or interest in, the property. That interest crystallises and hence that share of the property becomes alienable privately by the beneficiary, only after a distribution. Before distribution of the estate of the deceased by the legal representative of the deceased, the beneficiary has only a proprietary interest in equity, in the estate property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

Those that hold equitable interests in land cannot enforce against later interest holders where those holders are: (i) genuinely unaware of the existence of earlier interest and bona fide. This means the later interest holders must not have known about the pre-existing equitable interests before the transaction was complete. Where they are aware or should have been aware of the equitable interest beforehand, they are then bound by the interest; and (ii) the later interest holders paid valuable consideration for their rights [thus volunteers will not be protected against prior equitable interest]; and (iii) acquired legal interest. The later interest holder must have acquired a legal estate (i.e., the freehold, a legal lease or charge by way of legal mortgage), rather than an equitable interest in the land. If they haven't obtained this, then they are subject to the earlier interest or the earlier interest may prevail.

Later interest holders are deemed to know of interests that they would have discovered if they had asked the usual questions about the property, and are bound by them. The rule is that a later interest holder must be diligent and act in a reasonable manner, making all those investigations that an acquirer of an interest in land is normally expected to make. Then, he or she will be affected only by actual notice of the fraud. If he or she omits to make the usual investigations, then, he or she lays himself or herself open to be affected by constructive notice. Notice has long been implied

when a later interest holder omits to investigate the vendor's title properly, or to make reasonable enquiries as to deeds or facts which come to his or her knowledge. The later interest holder will be deemed to have notice of anything which he or she has failed to discover because he or she did not investigate the title properly or if he or she did not inquire for deeds or inspect them. The equitable doctrine of notice provides that a later interest holder is bound by any right which he or she would have discovered if he or she had made the ordinary investigations of deeds, births, deaths, marriages, and other facts which affect the ownership of land.

An equitable interest is valid against the entire world, except for the bona fide later interest holder of a legal estate for value without notice actual, constructive or imputed. The onus is on the later interest holder to establish himself or herself as such; and it is a heavy burden to discharge (see *Pilcher v. Rawlins (1872) 7 Ch. App. 259*). The later interest holder must show that his or her absence of notice was "genuine and honest" (see *Midland Bank Trust Co Ltd v. Green (No.1) [1981] A.C. 513*). The court examines the facts against the backdrop the nature of the estate and the various co-existing interests vested therein.

A legal estate may subsist concurrently with or be subject to any other legal or equitable estate in the same land. The only estates in land which are capable of subsisting or of being conveyed or created at law are; (a) an estate in fee simple absolute in possession, and (b) a term of years absolute. The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law or subsist concurrently with the legal estate, are; (i) an easement, right of entry, or privilege; (ii) a charge by way of legal mortgage; (iii) land tax, or any other similar charge on land which is not created by an instrument; and (iv) tenants by occupancy (bona fide or lawful occupancy). All other estates, interests, and charges in or over land take effect as equitable interests. Any interest in land, whether created by a statute or other instrument or implied by law, not being a power vested in a legal mortgagee or an estate owner in right of his estate and exercisable by him or by another person in his name and on his behalf, operates only in equity.

In terms of ranking, interests of persons in actual occupation of the land may override a subsequent registered disposition of the land. Occupiers' interests may be capable of overriding registered dispositions (such as mortgage charges) if the occupation is obvious on a reasonably careful

inspection of the land or the buyer / mortgagee knows about the interest (see *Mortgage Express v. Lambert [2016] 3 WLR 1582; [2017] Ch 93*). Overriding interests are interests which are binding on land even though they are not shown on the register. They bind both the registered proprietor and any person who acquires an interest in the land. On a registered disposition, an interest belonging at the time of the disposition to a person in actual occupation will override a registered disposition subject to exceptions. The exceptions are: (i) an interest belonging to a person of whom enquiry was made before the disposition and who failed to disclose the interest when they could reasonably be expected to do so; and (ii) an interest which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition.

According to section 64 of *The Registration of Titles Act*, except in the case of fraud, the proprietor of any estate or interest in registered land holds the estate or interest in land subject to such encumbrances as are notified on the folium of the Register Book constituted by the certificate of title, but absolutely free from all other encumbrances, save any rights subsisting under any adverse possession of the land. An interest in land is a right (or a "bundle" of rights) that someone has in, against, under or over, or with respect to, a parcel of land. An interest in land is to be contrasted with a "mere" contractual right existing between the holder of the right and another party who grants the right in relation to the holder of the right's land. While an interest in the land will continue to exist indefinitely, notwithstanding multiple changes in the ownership thereof (rights *in rem*), mere contractual rights exists between the holder of the right and another party, but are not capable of being enforced by that party against a subsequent owner of the land (rights *in personam*). On the other hand, an encumbrance is a claim in respect of land by a party that is not the owner, which has the effect of restricting free use of the land until it is lifted.

Rights that entitle the holder to own, possess, occupy, pass over or upon land or to take or remove something therefrom, or to restrict / prohibit the use of land, or to sell land to recoup debt claims, in other words, rights that give the holder a direct, physical "connection" to the land, are interests in land. Hence a mortgage, by virtue of being a transfer of an interest in land (or the equivalent) from the owner to the mortgagee, on the condition that this interest will be returned to the owner

when the terms of the mortgage have been satisfied or performed, is an interest in land. The lender, generally a bank, retains an interest in the title to land until the mortgage is paid off.

The general rule in registered conveyancing is that all interests and rights over a piece of land must appear on the register. Overriding interests are the exception to that rule, however, and may bind a successor in title despite not being registered. Consequently, by virtue of section 64 (2) of *The Registration of Titles Act*, a mortgage creates a charge over land subject to the existing interests of tenants by occupancy (bona fide or lawful occupants, whose rights are both interests in the land and an encumbrance thereon). Otherwise a mortgagee holds the interest in land subject only to such encumbrances as are notified on the folium of the Register Book constituted by the certificate of title, but absolutely free from all other encumbrances. The object of section 64 (2) of *The Registration of Titles Act*, is "to protect a person in actual occupation of land from having his rights lost in the welter of registration ... No one can buy the land over his head and thereby take away or diminish his rights" per Lord Denning MR in *Strand Securities Ltd v. Caswell [1965] Ch 958, 979*). The person claiming the overriding interest must have been in actual occupation at the time of completion of the impugned transaction (see *Abbey National Building Society v. Cann [1991] 1 AC 56*).

For purposes of section 64 (2) of *The Registration of Titles Act*, adverse possession means actual occupation which requires a degree of physical presence (not necessarily possession) and is assessed by reference to the nature of the land in question. Whether someone is in actual occupation is a question of fact depending on all the circumstances. The factors to be considered include the degree of permanence and continuity of presence of the person concerned, the intentions and wishes of that person, the length of absence from the property and the reason for it and the nature of the property and personal circumstances of the person, among other relevant factors (see Mummery LJ in *Link Lending Ltd v. Bustard [2010] EWCA Civ 424*). A "mere fleeting presence" or acts preparatory to the assumption of actual occupation will not suffice. There must be a sufficient degree of continuity and permanence of occupation, or of involuntary residence elsewhere, which is satisfactorily explained by objective reasons, and of a persistent intention to return home when possible, as manifested by regular visits to the land.

In the incant case, the plaintiff claims to have bought the *kibanj*a on 3rd January, 2009. She however testified that during the year 2009 she was still a university student ordinarily resident at a student hostel in Kampala, and she never lived on the land. Her first structure she constructed on the land was at the end of the year 2014. Indeed when inspection of the land was undertaken on 6th December, 2010 as a precursor to the valuation of the land or purposes of the mortgage, the land was reported to have been vacant at the time (exhibit D. Ex.7). The land was devoid of developments save for barbed wire on eucalyptus trees along parts of the boundary. This report gave way to the creation of the charge on the title effected on 23rd December, 2010.

In conclusion therefore, the plaintiff not having been a *kibanja* holder and not having been in actual occupation at the time of completion of the impugned transaction. The first two issues are answered in the negative; the plaintiff did not and does not own a *kibanja* on the suit land and accordingly the 1st defendant did not and could not have had notice of the plaintiff's claim of interest in the land at the time of registration of the mortgage. The third issue is answered in the affirmative; the 1st defendant lawfully registered a mortgage on the land.

4th issue. Whether the 2nd defendant lawfully executed the warrant issued in respect of the land.

5th issue. Whether the 1st defendant is liable for the actions of the 2nd defendant.

For reasons of convenience and the fact that they are intertwined, the next two issues stated above will be considered concurrently. The issues arise from the fact that the 3rd defendant as mortgagor defaulted on the terms of the loan. This prompted the 1st defendant to sue the 3rd defendant under High Court Civil Suit No. 295 of 658 of 2014. Pursuant to the successful mediation of that suit, a consent judgment was entered on 7th July, 2015 obliging the 3rd defendant to pay a sum of shs. 35,000,000/= within five months. The 3rd defendant defaulted on those terms as well prompting the 1st defendant on 12th September, 2018 to apply for execution of the decree by recovery of a sum of shs. 67,498,219 and of issuance of an "eviction order" against the 3rd defendant. The court on 29th September, 2018 issued a "Warrant of Eviction, Attachment and Sale of Immovable Property." Although no date of return is indicated in the body of the warrant, the record of

proceedings shows it was returnable on 26th October, 2018 yet it was executed on 7th November, 2018 by the 2nd defendant.

It is during the execution of that warrant that the plaintiff's poultry buildings on the land were demolished, her poultry, poultry feeds and poultry products were destroyed, as well as her crops growing in the gardens. She contends that not only were the actions unlawful in so far as the warrant had expired, but they constituted acts of trespass to her land and chattels. Moreover, the warrant did not authorise the bailiff to demolish anything. The plaintiff contends that the 1st defendant is vicariously liable for the actions of the 2nd defendant in the execution of tat decree.

There are three key players in the process of execution; the court, the judgment creditor, and the bailiff, and each has a distinct role. A warrant of execution can only be issued by the court at the judgment creditor's request. The role of the judgment creditor thus is mainly to initiate the process of execution in accordance with Order 22 rule 7 of *The Civil Procedure Rules,* which enables the judgment creditor to apply for execution of the decree. The application must specify one or a combination of the modes of execution specified by section 38 of *The Civil Procedure Act* and Order 22 of *The Civil Procedure Rules*. Order 22 rule 10 of *The Civil Procedure Rules*, provides as follows;

> Where an application is made for the attachment of any immovable property belonging to a judgment debtor, it shall contain at the foot—
>
> (a) a description of the property sufficient to identify it, and, in case the property can be identified by boundaries, or numbers in Government records or surveys, a specification of those boundaries or numbers; and
>
> (b) a specification of the judgment debtor's share or interest in the property to the best of the belief of the applicant, and so far as he or she has been able to ascertain the share or interest.

All that information is supplied by the applicant (as judgment creditor) or at his or her instance. It is the judgment debtor to describe, identify and point out property to be attached, or the place where the execution is to take place. The Court must be satisfied with the information in the application for execution before the Court bailiff is ordered to carry out the execution. It is also important to ensure that the correct type of warrant is obtained for the purpose intended.

It is the duty of the court before issuing a warrant to ensure that the warrant meets all requirements as to form; this can be attained by confirming that the specimens provided in Appendix "D" to *The Civil Procedure Rules* are appropriately modified to suit the circumstances of each case. The court should also ensure that there exists a valid decree to be executed in light of section 35 (1) (a) of *The Civil Procedure Act* and section 3 (3) of *The Limitation Act* which forbid the bringing of any action upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable. The court must also ensure that the mode of execution sought is consistent with the orders made in the decree and with section 38 of *The Civil Procedure Act* and Order 22 of *The Civil Procedure Rules*. Where the mode sought involves attachment of property, that there are reasonable grounds to believe that it is saleable property, movable or immovable, belonging to the judgment debtor, or over which or the profits of which he or she has a disposing power, which is not exempted by section 44 of *The Civil Procedure Act.*

The warrant must articulate with sufficient particularity the specific items that can be seized, and a specific place(s) where the warrant is to be executed. This ideally should be stated in an inventory attached to or at the foot of the warrant. Inventories serve the purpose of; (i) informing the judgment debtor exactly what should be attached and what should not be disposed of or removed should he wish to challenge this; (ii) if goods not included on the inventory were later to be removed, it enables the judgment debtor to take court action; (iii) shows the items against which the debt is now secured; it guides a bailiff later sent to remove what goods may lawfully be removed; (iv) it enables third party claimants to seized goods to initiate objector proceedings; and (vi) notifies other bailiffs the goods cannot be attached again (see *Davies v. Property & Reversionary Investments Co Ltd [1929] 2 KB 222*). That said, a warrant is not invalidated by the inclusion of an error which was not calculated to mislead and which does not in fact mislead, and which does not relate to any statutory condition or requirement relating to the power to issue the warrant.

Neither the Statutes nor the rules of civil procedure specify the validity period of a warrant issued in execution of a decree. The specimen warrants provided in the Appendix "D" to *The Civil Procedure rules* though have common to them the phrase; "you are further commanded to return this warrant on or before the ……day of ……., with an endorsement certifying the manner in

which it has been executed, or the reason why it has not been executed." There is no doubt then that a warrant is live, valid and enforceable from the date of issue until the stipulated date of return. The court can extend the time if asked to do so by the judgment creditor. A re-issued warrant's time runs from the date it was originally issued, not the date it was re-issued. It is the duty of the issuing Registrar thereafter to ascertain if the return has been made, and if there was none, should summon the bailiff to whom the warrant was issued and require him to explain why no return was made. If the return has been made, the Registrar judge should see to it that an accurate and true inventory of the property seized or explanation of the manner in which it was otherwise executed, duly verified by the bailiff, is attached to the return and filed with the court.

Lastly, the bailiff executes the warrant. Bailiffs have the duty to take ordinary care and to exercise ordinary prudence. The bailiff must take reasonable steps to check that the information provided in the warrant is accurate, recent and is not misleading. The bailiff has to be careful and follow the strict letter of the law between seizure and sale (see *Gusii Mwalimu Investment Co. Ltd and another v. Mwalimu Hotel Kisii Ltd [1995–1998] 2 EA 100 at p. 113*). If the bailiffs attach the wrong goods, they do so at their peril (see *Atogo v. Agricultural Finance Corporation and another [1990–1994] 1 EA 31 at p.35*). A bailiff is not legally entitled to take any items from a property that do not belong to the debtor. For that reason the bailiff should ascertain as specifically as is possible in the circumstances the nature of the articles or persons concerned and their location. The bailiff must also make reasonable enquiries to establish what, if anything, is known about the occupier of the premises and the nature of the premises themselves, and to obtain any other information relevant to the warrant.

A bailiff is otherwise not ordinarily responsible for the accuracy of the information contained either in the application for execution or the resultant warrant. *The Execution of Sheriffs' Warrants* (2nd edn, 1996), at pp.22-23. Chapter 3 deals with *The Writ of Fieri Facias* and contains the following passage:

> "The Address"
> If the Sheriff is given inaccurate information by the creditor or by his solicitor, the party instructing him may be liable for any trespass (*Morris v. Salberg (1899) 22 QB 614; Rowles v. Senior (1846) 8 QB 677*). In practice, the Officer should only attend at the address given and should not attend at an address of his own discovery until

> instructed to do so by the creditor. To ensure fullest protection for the Officer, such instructions should be in writing. In any event, the location of the address should be checked in advance; the Sheriff may not levy outside his shrievalty. His authority ends at his boundary.

However, it is now more or less an established practice that both the application for execution and the proposed warrant are prepared by and filed by bailiffs, the parties and counsel thereby only being required to append their respective signatures. It turns out that there are a number of anomalies with the warrant in the instant case, key among which are the fact that; it is clearly not a skilfully modified specimen guided by Forms 7, 23 or 26 of Appendix "D" to *The Civil Procedure Rules;* it has no provision for a date of return and it authorises an eviction when no such order was made in the decree sought to be executed (the decree was for recovery of money only). Although the evidence is not entirely clear on the attribution of responsibility for these omissions, the mistake apparently remained undiscovered until after the execution. It is uncontested though that the bailiff executed the warrant based on his mistaken belief that it was a valid warrant.

A bailiff who types up an application and proposed warrant, and then obtains a Registrar's approval naturally assumes that he or she has filled out the application and typed out the warrant correctly. Even if the bailiff checks over the warrant, he or she may very well miss a mistake. We all tend toward myopia when looking for our own errors. Every advocate and every judge can recite examples of documents that they wrote, checked, and double-checked, but that still contained glaring errors. Bailiffs are no different. It would be better if the bailiff recognises the error, of course. It would be better still if he does not make the mistake in the first place. In the context of an otherwise proper warrant, however, a bailiff's failure to recognise his clerical error on a warrant can be a reasonable mistake. There is need to allow some latitude for honest mistakes that are made by bailiffs in the dangerous and difficult process of executing warrants.

Our qualified immunity doctrine under section 46 (2) of *The Judicature Act* applies regardless of whether the bailiff's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact, provided it was an honest and reasonable mistake. The test as to whether the belief was honestly held is a subjective test. The test as to whether the belief was reasonable in the circumstances is an objective test. To assess what is "reasonable," the court will ask whether

an ordinary bailiff in the same circumstances would have held the same belief or acted in the same way. A bailiff executing a warrant is entitled to qualified immunity if a reasonable bailiff could have believed that the execution was lawful in light of clearly established law and the information the bailiff possessed.

It is trite that a court bailiff when executing a decree or warrant of court is not an agent of the judgment creditor. The court bailiff is the agent of the Registrar of the High Court who authorises him by a warrant to, inter alia, attach the property or perform any other act authorised by the decree or warrant (see *Registrar, Trustees, Kampala Archdiocese and another v. Harriet Namakula and others (1997 – 2001) UCLR 365* and *Jimmy Tumwine v. Frank Nkurunziza, t/a Ferry & Marks Services Court Bailiffs and Auctioneers and another, H. C. Civil Suit No. 479 of 2002*). The general principle of law that a court bailiff is an agent of the court who enjoys immunity in the performance of his execution proceedings does not apply though where the court bailiff acts unlawfully (see *Registrar, Trustees, Kampala Archdiocese and another v. Harriet Namakula and others (1997 – 2001) UCLR 365*).To that end section 46 (2) of *The Judicature Act* provides that;

> An officer of the court or other person bonded to execute any order or warrant of any judge or person referred to in subsection (1) acting judicially, shall not be liable to be sued in any civil court in respect of any lawful or authorised act done in the execution of any such order or warrant.

In view of the facts that he is appointed by a judge or the registrar; that his charges are fixed by statutory rules made by the Rules Committee; that his charges can, like the fees payable to advocates by their clients, be taxed by the Registrar; and that his license can be cancelled by a Judge; the bailiff is an officer of the court in regard to the manner in which he serves his clients (see *Hassanali Rahemtulla Walji Hirji v. Jamal Pirbhai and Sons [1965] 1 EA 671*). Bailiffs are protected if they were executing court process by virtue of section 46 (2) of *The Judicature Act*. The reason of that degree of protection is that the bailiff is bound to execute a Court order. He or she has no option but to do so. Therefore, he or she has to have protection.

A bailiff executing a warrant is entitled to qualified immunity if a reasonable bailiff could have believed that the warrant was lawful. A bailiff does not incur liability for executing a warrant

which appears to be duly issued but fails to comply with a statutory requirement. Of course, a bailiff cannot purport to execute a warrant that has patently expired, for then he or she acts without authority. However, the protection under section 46 (2) of *The Judicature Act* does not apply, to the same extent where the attachment is a voluntary one (see *Atogo v. Agricultural Finance Corporation and another [1990–1994] 1 EA 31 at p.35*). The protection is available only when the bailiff acts lawfully (see *Maria Onyango Ochola v. W. Hannington Wasswa [1988-1999] HCB 102* and *Bifabusha v. Turyazooka [2000] 2 EA 330*).

A bailiff derives no protection under the common law for any private distress unlawfully levied by him (see *Souza Figueiredo & Co Ltd v. George Panagopaulos and others [1959] 1 EA 756*). A bailiff is not protected if he carries out his execution in contravention of the law (see *Wampwewo Service Station v. Italian Garage (Pizzandi) Ltd [1963] 1 EA 455 at 460*). When execution is illegal it is the bailiff who is primarily liable and the judgment creditor is only liable if he can be shown to have sanctioned or ratified the bailiff's wrongful act (see *Kanji Naran Patel v. Noor Essa and another [1965] 1 EA 484*).

The bailiff is only allowed to seize undisputed property belonging to the judgment debtor. Bailiffs can consider at first sight "prima facie" any goods are the property of the debtor and the burden of proof who owns seized goods lies with the debtor or the owner (see *Observer Ltd v. Gordon [1983] 2 ALL ER 945 at 949*). When ownership is disputed, then it reasonable for the bailiff cross-check. If the judgment debtor is not in possession of the land subject to attachment, the bailiff must make inquiries of the person in possession or otherwise the property attached will be subject to that person's right of possession or other equitable interest.

Consequently, the bailiff is liable for any unlawful damage caused to property even if it was accidental (see *Huntress Search Ltd v. Canapeum Ltd & Anor [2010] EWHC 1270*). A bailiff is liable for "insolent or oppressive conduct in excess of his duty," resulting in a "real and substantial grievance" (see *Neumann v. Bakeaway Ltd [1983] 1 WLR 1016*). The court bailiff is an agent of the judgment creditor in the event of excessive or wrongful attachment of the judgment debtor's property, where there is evidence of excess attachment or wrongful attachment at his behest, or where both the decree-holder and the bailiff are jointly involved in the attachment (see *Simiyu v.*

Sinion [1982-88] 1 KAR 6304 and *Micah v. Walakira [1995–1998] 2 EA 191*). It is the bailiff who is primarily liable and the judgment creditor is only liable, if he can be shown to have sanctioned or ratified the bailiff's wrongful act (see *Patel v. Essa and another [1965] EA 484*).

It is settled law that a person who claims title, right or interest in the property through the Judgment Debtor or under colour of interest through Judgment Debtor, is also bound by the decree. Like the Judgment Debtor such a person cannot be an impediment to delivery of vacant possession to the Decree holder, by the Bailiff while executing a warrant for the delivery of vacant possession in a execution of a decree passed for declaration of title or recovery of possession. A Court executing a decree for vacant possession of land is certainly empowered to pass specific directions to its Bailiff to execute the warrant after demolishing the structures, if any, or to remove any obstructions of construction or superstructure made *pendenti lite* i.e., either prior to or after filing of the suit, existing on the land and hand over vacant possession of the land.

In the instant case though, the decree sought to be executed was not made in a suit for vacant possession of land. It was thus erroneous of the Registrar to have issued a warrant for vacant possession rather than one for attachment and sale of immoveable property, in accordance with Order 22 rule 51 and specimen Form 23 of Appendix "D" to *The Civil Procedure Rules.* The error that resulted in the demolition of the plaintiff's property thus is attributable to the Registrar rather than the bailiff, yet the Registrar is protected by absolute immunity under section 46 (1) of *The Judicature Act.* This leaves the plaintiff without a remedy.

On the other hand the plaintiff has not provided proof that the 2nd defendant in executing the erroneous warrant, did not do so under an honest and reasonable belief that it was a valid warrant. There is no evidence to show that in executing that decree, the bailiff was acting at the behest of the 1st defendant, or that both the 1st defendant as decree-holder and the bailiff were jointly involved in the execution. The 1st defendant has not been shown to have sanctioned or ratified any wrongful act of the bailiff. In conclusion, the fourth issue is answered in the affirmative while the fifth issue is answered in the negative; the 2nd defendant lawfully executed the warrant issued in respect of the land and the 1st defendant is not liable for the actions of the 2nd defendant.

6th issue. whether the plaintiff is entitled to the reliefs sought against the defendants.

7th issue. what remedies are available to the parties?

Having come to the conclusion that the plaintiff is not a *kibanja* holder and that she was not in actual occupation at the time of completion of the impugned transaction; that the 1st defendant did not and could not have had notice of the plaintiff's claim of interest in the land at the time of registration of the mortgage; that the 1st defendant lawfully registered a mortgage on the land; that the 2nd defendant lawfully executed the warrant issued in respect of the land and that the 1st defendant is not liable for the actions of the 2nd defendant, these two final issues must be answered in the negative. The plaintiff is not entitled to any of the remedies sought. Accordingly the suit is dismissed with costs to the 1st defendant.

Dated at Kampala this 22nd day of April, 2021

……...
Stephen Mubiru
Judge,
22nd April, 2021.