**Bifabusha v Turyazooka**

**Division:** Court of Appeal of Uganda at Kampala

**Date of judgment:** 17 October 2000

**Case Number:** 3/00

**Before:** Kato, Okello and Kitumba JJA

**Sourced by:** B Tusasirwe

**Summarised by:** M Kibanga

*[1] Practice and procedure – Court bailiff – Bailiff instructed to sell immovable property – Bailiff selling*

*movable property also – Whether bailiff acted in excess of his power – Whether bailiff entitled to*

*protection under section48 of the Judicature Act.*

*[2] Practice and procedure – Summary dismissal of suit – Order 7, Rule 11(*a*) and (*b*) – Civil Procedure*

*Rules – Appellant filing suit against court bailiff for illegal sale – Court bailiff alleging protection of law*

*– Section 48 – Judicature statute – Whether matter suitable for dismissal under Order 7, Rule 11(*a*) and*

*(*b*) – Civil Procedure Rules.*

**Judgment**

**KITUMBA JA:** This is an appeal from the ruling and order of Katutsi J dated 29 September 1999 whereby he rejected the Appellant’s plaint as disclosing no cause of action and ordered him to pay costs to the Respondent.

The facts giving rise to this appeal are as follows. The Appellant was a registered co-owner of the property located at plot 5 Kazooba Road, Kabale Municipality, Kabale District. The Appellant was successfully sued by his co-owner in the Chief Magistrate’s court. An order was made to sell off the property. The Respondent, who was a court broker, was given an attachment warrant to attach and to sell off the immovable property. He attached the immovable property and duly sold it off. The Appellant thereafter successfully challenged the decision of the lower court in the High Court. The High Court ordered that the Appellant re-enters the property. On re-entering the property, the Appellant found that all his movable properties had been sold, stolen or vandalized.

The Appellant sued the Respondent for general and special damages. In his pleadings, the Appellant contended that by selling the movable property, the Respondent exceeded the power given to him by the warrant of attachment and his conduct amounted to conversion. At the beginning of the trial, counsel for the Respondent raised a preliminary objection that the plaint disclosed no cause of action on the grounds that the Respondent acted lawfully and as a court broker he was protected by section 48 of the Judicature

Statute. Counsel prayed that the plaint be dismissed under Order 7, Rule 11(*a*) and (*b*) of the Civil

Procedure Rules for non-disclosure of cause of action and that the plaint was frivolous and vexatious.

The objection was upheld by the learned trial Judge.

The Appellant being aggrieved by this decision appealed to this Court. There are three grounds of appeal, namely:

“1 That the Learned trial Judge erred in law and fact to hold that the plaint disclosed no cause of action.

2 That the trial Judge erred in law in rejecting of the plaint when there was a serious and important question of law that should have been determined by trial on pleadings.

3 The trial Judge erred in law when he held that the Defendant followed the law and that he was therefore protected by section 48(2) of the Judicature Statute as an officer of Court”.

Mr Michael *Akampurira*, learned counsel for the Appellant, submitted on all the grounds together. I shall follow the same order.

Mr *Akampurira* contended that the Appellant had a cause of action and had shown that in his pleadings. Counsel submitted that the Appellant had the right to his property. This right was violated.

The Respondent was responsible because during execution he exceeded what was authorized on the warrant. The warrant of attachment which was attached to the plaint as Annexture “A” only authorized and limited the Respondent to attach and sell immovable property at Plot 5 Kazooba Road, Kabale

Municipality. As the Respondent exceeded his power in executing the warrant he was not protected by section 48 of the Judicature Statute. In support of this submission he relied on *Francis Micah v Nuwa*

*Walakira Supreme Court* civil appeal number 21 of 1994 (UR)*.*

Learned counsel criticized the learned trial Judge for rejecting the plaint that it disclosed no cause of action whereas in paragraph 3(c) of the plaint it was averred that the Respondent exceeded the authority in the warrant of execution. In paragraph 5 of the plaint it was averred that the Respondent’s disposing off the Appellant’s movable property amounted to conversion. This disposal of movable property in counsel’s view, necessitated the court’s taking of evidence in order to determine whether the Respondent exceeded his authority. Counsel submitted that the matter should have been dealt with in Order 13, Rule

2 of the Civil Procedure Rules. He relied on Wycliffe Kiggundu v Attorney-General Supreme Court civil appeal number 3 of 1993 (UR) and Katikiro of Buganda v AG of Uganda [1958] EA 765. He prayed that the appeal be allowed, the case be reinstated and costs of the suit.

In reply Mr Bernard Tibesigwa, learned counsel for the Respondent, agreed with Mr Akampurira as to what constitutes a cause of action. However he submitted that if any of the three elements is missing, then there is no cause of action. In support of his argument he relied on Auto Garage and another v Motokov [1971] EA 514.

He submitted that as the Respondent was protected by section 48 of the Judicature Act he was not liable. There was therefore no cause of action. Mr Tibesigwa conceded that if the Respondent exceeded the power of execution in the warrant he would be liable. He submitted that in this case the Respondent did not exceed his powers. The Appellant does not dispute the return of execution, Annexture B to the plaint. He denied that there were important points of law for determination and for those reasons Wycliffe Kigundu v Attorney-General (supra) and Katikiro of Buganda v Attorney-General (supra) were not applicable.

In his ruling the learned trial Judge held that the Respondent lawfully executed the warrant of attachment. The Appellant did not dispute the genuineness of the warrant of attachment and the return which was filed after execution. The Learned trial Judge stated:

“It would appear to me therefore that there are no necessary allegations which must be proved to entitle Plaintiff to a decree of this Court in the matter. Put differently I find no particular act on the part of the Defendant which give the Defendant cause to complain. Defendant followed the law”.

With due respect to the Learned trial Judge the Appellant complained that the Respondent acted outside the law. In paragraph 3(c) of the plaint, the Appellant averred as follows: “[I]n contravention of the law and the said order the Defendant sold the suit premises and all the Plaintiff’s property therein on the 23

December 1996. A copy of the return is attached hereto and marked Annexture ‘B’”. In paragraph 5 of the plaint the Appellant stated: “The Plaintiff contends that the Defendant’s action in disposing of the Plaintiff’s movable property was contrary to the order of court and amounted to conversion”. The law is that in an objection to the plaint under Order 7, Rule 11(*a*) of the Civil Procedure Rules the judge has to observe and construe the plaint carefully and see whether there is an inherent defect in the plaint. As was held in *Wycliffe Kigundu v The Attorney-General* (*supra*):

“A distinction must be drawn between an application to reject a plaint, and one when a matter of law is set down for argument as a preliminary point. That distinction was very clearly explained in *Nurdin Ali Dewii and others v Maghji and others* [1953] 20 EACA 132. The distinction is that under Order 7, Rule 11(*a*) of the Rules, an inherent defect in the plaint must be shown, rather than that the suit was not maintainable in law. In the latter case a preliminary point should be set down for hearing on a matter of law. (In Tanganyika at that time Order 14, Rule 2 would have been relevant. In Uganda the relevant rule is to be found in Order XIII, Rule 2 of the Rules)”.

Section 48(2) of the Judicature Statute provides:

“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) of this section 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”.

A court bailiff is only protected when he/she acts lawfully. See *Maria Onvango Ochola v W Hannington*

*Wasswa* [1988–1999] HCB 102.

It was the contention of the Appellant that the Respondent sold the movable property which the attachment warrant did not authorize him to do. There was need to find out by way of evidence whether the Respondent did so. Then the issue of the protection of section 48(2) of the Judicature Statute would come in. Issues of law and questions of facts were abundant in this case. If the Respondent had a preliminary point of law to object to the plaint the matter should have been dealt with according to Order 13, Rule 2 of the Civil Procedure Rules. All the grounds would therefore succeed.

I would allow the appeal and set aside the ruling of the High Court. I would order that the Appellant’s record be remitted to the High Court for trial by another judge. I would award the costs of this appeal and in the court below to the Appellant.

(Okello and Kato JJA concurred in the judgment of Kitumba JA.)

For the Applicant:

*Information not available*

For the Respondent:

*Information not available*