THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 01 OF 2015

(Arising from High Court Miscellaneous Application No. 1689 of 2013)

MAKUBUYA ENOCK WILLIAM :::::::::::::::::::::::::: APPELLANTS

VERSUS

1. BULAIMU MUWANGA KIBIRIGE
T/A KOWLOON GARMENT INDUSTRY
2. MOSES KIRUNDA :::::::::::::::::::: RESPONDENTS

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA
HON. JUSTICE STEPHEN MUSOTA, JA
HON. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

This appeal arises out of the ruling and orders of the High Court in Miscellaneous Application No. 1689 of 2013.

Background

The 1st respondent sued the appellant in High Court Civil Suit No. 37 of 2013 Bulayimu Muwanga Kibirige T/A Kawoolon Garmet Industry Vs Makubuya Enock William T/A Polla Plast and the first respondent obtained judgment in default against the appellant. The 1st respondent was awarded a decretal sum of UGX 112,000,000/=. The

1st respondent applied for execution vide Execution Miscellaneous Application No. 366 of 2013 at the High Court Execution Division at Kampala wherein the 2nd respondent was to execute the Decree in Civil Suit No. 37 of 2013. The appellant's plant machinery at Ntinda known as Polla Plast was attached in the execution and all machines therein where attached, dismantled and sold. The appellant challenged the execution as being illegal, marred with material irregularities and excessive vide Miscellaneous Application No. 1698 of 2013 which application was dismissed.

The appellant was dissatisfied with the decision of the High Court filed this appeal on the following grounds:

1. The learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence on record thereby coming to a wrong conclusion and thus causing a miscarriage of justice as well as an injustice to the appellant.
2. The learned trial Judge erred in law and in fact in finding that the schedule to the warrant of attachment was exhaustive and not defective.
3. The learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence on record thereby reaching a wrong decision that the Executing Court Bailiff did not act *ultra vires* the powers conferred upon him by the Warrant of Execution issued to him.
4. The learned trial Judge erred in law and in fact when he held that there was no indication that the machines valued were

located at the suit premises which would have linked them to the attached items thereby occasioning grave injustice to the appellant.

5. The learned trial Judge erred in law and in fact when he found that the machines valued by Meys Consulting Engineers and Valuers Limited for Polla Plast were not the ones attached in execution thereby occasioning grave injustice to the appellant.
6. The learned trial Judge erred in law and in fact when he relied on the inventory attached to the 2nd respondent's affidavit in reply thereby reaching a wrong conclusion that there was no excessive attachment.
7. The learned trial Judge erred in law and in fact by holding that the items attached were not grossly undervalued.
8. The learned trial Judge erred in law and in fact in finding that the appellant's objection to the attachment was delayed and barred by law hence reaching a wrong inference that the challenge to the attachment came as an afterthought.

Appearance

At the hearing of the appeal, Mr. Segona and Mr. Sekanjako appeared for the appellant while Mr. Okello Oryem appeared for the 2nd respondent.

Appellant's submissions

Counsel for the appellant argued ground two first and submitted that the impugned warrant of attachment together with its schedule was left open which led to the attachment and dismantling of the

appellant's entire factory/ plant machinery. That the use of the word ETC while describing the properties in the warrant of execution cannot be held to have been an accurate and reasonable description of property within the meaning of Order 22 Rule 9 of the Civil Procedure Rules. Counsel submitted that an execution warrant must specify the item or property to be attached to avoid a situation where the court bailiff may attach property not included in the execution warrant. Counsel submitted further that the learned trial Judge erred in relying and applying the *ejusdem generis* rule to construction of a warrant of attachment thereby validating the warrant whose schedule did not specify the items attached in execution.

Counsel further argued that an execution warrant cannot be left open with the term ETC as was the case in the present case were there was excessive attachment of the appellant's entire machinery factory independently valued at 2 billion shillings. The learned trial Judge considered the respondent's evidence in isolation of the appellant's evidence. He relied on the Supreme Court decision in **Bogere Moses vs Uganda S.C.C.A No. 1 of 1997** in which it was held that while evaluating evidence, it is incumbent upon court to evaluate both versions judicially and give reasons why one version and not the other is accepted.

Counsel went on to submit that the learned trial Judge made an unfounded finding that the appellant's officials witnessed the attachment and appended their signatures on the inventory document, but the particulars of the said officials were not stated in

the document. Further, that the inventory that was relied upon did not list the attached properties each with its approximate value in accordance with the provisions of the law. There is undisputed evidence availed to court that the issue of excessive attachment was proved by the appellant. The court bailiff attached items not listed in the warrant and ended up dismantling the entire plant machinery at Ntinda as opposed to the items listed in the execution warrant. The issue of excessive attachment was administratively handled by the Registrar High Court in his communication to the Deputy Registrar Execution Division.

In regard to grounds 4, 5 and 7, counsel for the appellant submitted that the valuation report should have restricted itself to the items that were listed and mentioned in the schedule to the warrant of attachment. That Polla Plast was not a company but a business name of the appellant, which had no capacity to own property in law and as such, there was no reason to reject the appellant's valuation report. The trial Judge made a wrong finding that the valuation made by Meys Consult, Consulting Engineers belonged to Polla Plast, which, according to him, was a limited liability company. There was no evidence adduced to prove the existence of a company by the name Polla Plast Ltd.

Counsel submitted further that the said valuation report relied on by the appellant was an independent report made on the instructions of Bank of Africa since the appellant was desirous of obtaining a loan from the said bank, which bank embarked on the process of

ascertaining the value of the appellant plant machinery as security for the loan. The valuation report relied on by the appellant was credible and independent and was owned by Bank of Africa.

1st Respondent's submissions

In reply, counsel for the 1st respondent raised a preliminary point of law that the appellant was ordered to pay security for taxed costs of High Court Miscellaneous Application No. 1689 of 2013 from which the present appeal arises, which he has not paid. Counsel argued that Civil Appeal No. 122 of 2013 is similar to the present appeal and ought to be consolidated.

Counsel submitted that none of the issues raised by the appellant in the present appeal specifically relate to him, but rather to the conduct of the 2nd respondent during execution. Counsel submitted that the learned trial Judge properly found that the schedule to the warrant of attachment was not defective. Under Order 22 Rule 9 of the Civil Procedure Rules, a warrant should specify the items liable for attachment in execution and the property does not have to be described in absolute terms but in a reasonably accurate manner. Counsel argued that a warrant of attachment is borne of statutory provisions and rules of statutory interpretation apply.

Counsel relied on the case of **Darlington Sakwa and another Vs the Electoral Commission and 44 others Constitutional Petition No. 8 of 2006** in which it was held that matters of interpretation or construction of statutory provisions and rules of statutory interpretation apply to their construction. Counsel submitted that

the learned trial Judge properly found that the court bailiff acted within the powers conferred upon him by the warrant of execution and the sale of the property in execution was validly conducted. There was no excessive attachment of the appellant's property because the court bailiff executed per the warrant of execution. The appellant challenged the attachment long after the attachment and sale of the items had taken place.

2nd respondent's submissions

Counsel for the 2nd respondent submitted that the schedule to the warrant of attachment was not defective and was done according to the items in the inventory. The court bailiff acted within the powers conferred upon him by the warrant of execution. The machines valued by Meys Consulting Engineers and Valuers in June 2013 were not the ones attached in execution in April 2013. Counsel submitted that several officials witnessed the appellant's eviction from the suit premises plus attachment of the items.

Appellant's rejoinder

The appellant argued in regard to the preliminary point on security for costs that Miscellaneous Application No. 342 of 2014 is an application for further security for costs which arises out of Civil Appeal No. 122 of 2013, which has nothing to do with the present appeal.

Counsel further reiterated several arguments in regard to the grounds of appeal which I do not find necessary to repeat.

Consideration of the appeal

This is a first appeal and as such, the law enjoins this court to review and re-evaluate the evidence as a whole, closely scrutinize it, draw its own inferences, and come to its conclusion on the matter. This duty is recognized in **Rule 30 (i) (a)** of the Rules of this Court.

> *30. Power to reappraise evidence and to take additional evidence.*
>
> *(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—*
>
> *(a) reappraise the evidence and draw inferences of fact; and*
>
> *(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.*

The cases of **Pandya v R [1957] EA 336** and **Kifamunte Henry v Uganda SCCA No. 10 of 1997** have also succinctly re-stated this principle. I have borne these principles in mind in resolving this appeal.

The appellant argued some of the grounds jointly and others independently. I will resolve the grounds of appeal in the following way;

Grounds 1, 2, and 6

Before I delve into the merits of these grounds of appeal, I find it crucial to first address the preliminary point as raised by the 1st appellant. I note that the appellant has different appeals and a number of applications pending in this court filed separately. This appeal arises out of the execution process of a warrant of attachment against the appellant and has no nexus with Civil Appeal No. 122 of 2013, which is also pending determination before this court. This preliminary point is therefore void of merit.

The warrant of attachment of sale of property appears at page 140–141 of the record of appeal listed the property for attachment and sale. The schedule to the warrant reads: -

"SCHEDULE

By way of attachment and sale of immovable property to wit:-

PROPERTY FOR SALE

Plastic Manufacturing Machines and Equipment's including;

- *Colour Printers*	*2*	- *Plastic Rolls*	
- *Excluders*	*9*	- *Shopping bags*	
- *Compressor*	*1*	- *Hangers*	
- *Agrometors*	*2*	- *Basins*	
- *Grinders*	*1*	- *Plates*	
- *Punching machines*	*2*	- *Dryers*	*1*
- *Cutting and Sealing machines*	*2*	- *Grinders*	*2*
- *Injection machines*			

- *Weighing scales 2*
- *Recycling Machines*
- *Electric panel & installations*
- *Jerrycans molders of -20lts, 10lts, 5lts*
- *ETC*

All estimated at Ug. Shs. 100,000,000/="

The appellant's contention is that by listing the items for attachment and then adding the word 'ETC' in the schedule, left the warrant open which led to attachment and dismantling of the appellant's entire factory/ plant machinery.

Order 22 Rule 9 *of the* ***Civil Procedure Rules*** *provides:-*

> *9. Application for attachment of movable property not in judgment debtor's possession.*
>
> *Where an application is made for the attachment of any movable property belonging to a judgment debtor, but not in his or her possession, the decree holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the property.* (Emphasis mine)

The property for attachment as described in the schedule to the warrant of attachment and sale of property was properly listed in detail. However, the word 'ETC' was used at the end of the property list, which is ideally used at the end of a list to indicate that further, similar items are included. The use of the word 'ETC' would not, in my opinion, amount to an accurate description of the property as

required under O. 22 r 9 of the Civil Procedure Rules. It would mean that the property listed in the schedule should be attached and any other property similar to that included in the list. The schedule to the warrant of attachments was in all respects, defective. The schedule to the warrant was ambiguous and as such led to attachment of property not listed in the schedule. I find for the appellant in regard to grounds 1, 2 and 6 of the Memorandum of Appeal.

Grounds 3, 4, 5 and 7

Grounds 3, 4, 5 and 7 fault the learned trial Judge for finding that the court bailiff did not act *ultra vires* the powers conferred upon him by the warrant of execution issued to him. In addition, that the valuation of the machines was not an under valuation.

Having found that the schedule to the warrant of attachment was ambiguously drafted and ambiguous, I cannot fault the court bailiff for executing the warrant as it is. The bailiff on 20th May 2013 made a return of the warrant to court explaining how the execution was carried out. The bailiff mentioned the plastic and manufacturing machines and equipment, as items he sold to the highest bidder in a public auction.

The appellant and the respondents each relied on separate valuation reports. The respondents relied on a valuation report by M/S Systems Engineers which indicated that the properties valued were plant and machinery categorized into plastic, recycling, polythene bag making section and other equipment. The appellant relied on a valuation report by M/s Meys Consult Consulting Engineers &

Valuers which was made one year before the impugned attachment took place. The report by M/s Meys Consult Consulting Engineers & Valuers was stated to have been carried out for Polaplast Limited.

The learned trial Judge held that the alleged valuation was done for Polaplast Limited and the applicant (now appellant) was not proved to be a shareholder in Polaplast Limited, which, being a limited liability company is different from the appellant. This valuation was done one year before the attachment and sale and I agree with the learned trial Judge's finding that there was no evidence that the valuation done by M/s Meys Consult Consulting Engineers & Valuers was an independent valuation as alleged by the appellant. The valuation by M/s Systems Engineers after the attachment of the items in execution placed their open market value at Ug. Shs. 191.250.000/= and the forced sale value at 95.625.000/=. Whereas some of the machineries and equipment attached in execution had been acquired from the 1st respondent in 2008 at 374.000.000/=, the impugned attachment took place after a period of five years.

It was rightly held by the learned trial Judge that owing to the depreciation and wear of the machinery, the open market value of 191.250.000/= given by M/s Systems Engineers was reasonable. I find no reason to interfere with the learned trial Judge's finding that the items attached were not undervalued.

Ground 8

Ground 8 faults the learned trial Judge for finding that the applicant's application objecting to the attachment was delayed and

barred by law. The application for execution of the decree was dated 20th March 2013 and the execution warrants dated 30th April 2013. The machines were attached on 22nd March 2013 and sold on 6th May 2013. The appellant's application at the High Court vide Miscellaneous Application No. 1698 of 2013 was filed on 5th September 2013, which was three months from the date of the sale of the machines.

The learned trial Judge rooted his finding under **Order 22 rule 55** of the **Civil Procedure Rules** which states: -

> *55. Investigation of claims to, and objections to attachment of, attached property.*
>
> *(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that the property is not liable to the attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he or she was a party to the suit; except that no such investigation shall be made where the court considers that the claim or objection was designedly delayed.*
>
> *(2) Where the property to which the claim or objection applies has been advertised for sale, the court ordering the sale may postpone it pending the investigation of the claim or objection.*

The above provision envisages that an applicant ought to file an objection to court before the actual sale of the property is carried out. In this case, the appellant filed the application three months after the sale of the property by public auction. Whereas the law does not provide for a specific limitation time within which to file an application for objection to attachment and sale of property, it would be prudent to file such application before actual sale of the property. In such a case, various remedies would be available to both parties before the sale is concluded. In the case of **Goodlock vs. Cousins [1897] 1 Q. B CA 558**, it was held by Lord Esher M. R that where the claimant had an opportunity of preventing a sale under the section by making a deposit with the bailiff but failed to do so and the goods are sold and proceeds paid into court, the purchaser acquires a good title to the goods.

The learned trial Judge held that;

> *"Finally, the present case is akin to a situation where a claim is preferred or objection is made to the attachment of property that it is not liable to attachment, but the claim or objection is brought late. O.22, r.55 of the Civil Procedure Rules, bars any investigation into such a situation, where the Court considers that the claim or objection was designedly delayed. If the 2nd respondent had truly attached items in excess of what was listed in the warrant, the applicant should have challenged such excess attachment within reasonable time and averted the sale. Instead, the Applicant challenged the attachment long after the sale of the*

items had taken place. This compels me to make the reasonable inference that the challenge came as an afterthought."

I find no reason to fault the learned trial Judge on this finding. Section 50 of the Civil Procedure Act bars a suit against the purchaser of publically auctioned property is not maintainable on the ground that the property was sold irregularly on behalf of the plaintiff. It provides;

50. Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.

(1) No suit shall be maintained against any person claiming title under a purchase of immovable property sold under a decree of execution on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of that third person against the real owner.

The suit could not be brought against the 1st respondent as a purchaser of the property. Likewise, an application for objection

should have been brought before the sale of the property is concluded. Ground 8 therefore fails.

All in all, this appeal succeeds in part. The schedule to the warrant of attachment was not properly drawn. However, the attachment and sale took place in 2013 and an order that the sale be reversed, as prayed for by the appellant, would be made in futility. An order of compensation for the properties wrongly attached would require the appellant to adduce sufficient evidence on which exact properties were attached in excess and their market value, which was not done. In addition, the 2nd respondent executed the warrant of attachment and sale as was drawn and cannot be punished for having carried out a sale according to the warrant and schedule. I take cognizance of the fact that the 1st respondent is now deceased.

This appeal therefore succeeds in part. I order that each party bears its own costs.

Dated at Kampala this 10th of March 2022

Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION, MUSOTA AND MADRAMA, JJA)

CIVIL APPEAL NO 01 OF 2015

1. MAKUBUYA ENOCK WILLIAM} ..... APPELLANT

VERSUS

1. BUMAIMUMUWANGA KIBIRIGE}
   T/A KOWLOON GARMENT INDUSTRY
2. MOSES KIRUNDA} ..... RESPONDENTS

(Appeal from the Ruling of the High Court of Uganda at Kampala in High Court Miscellaneous Application No 1689 of 2013)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Stephen Musota, JA.

I agree with him that the appeal should only partially succeed with the orders he has proposed. I however dot not agree that the appellants having succeeded in grounds 1, 2 and 6 of the appeal, should go without a remedy of compensation for properties wrongly attached on the ground that the appellant he did not adduce sufficient evidence of particulars of the property wrongly attached and their market value to enable court award compensation.

In my judgment that means that the appellant appeal would be in vain when he partially succeeded. What does he carry home? The appellant did not bring the appeal in vain and the court ought to find that he is in the least entitled to a declaratory judgment of a right to compensation.

A declaratory judgment of right may be given whether consequential relief is claimed or not as provided for under Order 2 rule 9 of the Civil Procedure Rules. Order 2 rule 9 of the Civil Procedure Rules provides that:

> **9. Declaratory judgment**
>
> No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought by the suit, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.

The above rule was interpreted in **Ellis vs. Duke of Bedford (1899) 1 Ch. 494 by Lindley MR at pages 514-515** in interpreting Order 25 rule 5 of the UK which is in *pari materia* with the Ugandan order 2 rule 9 of the Civil Procedure Rules when Lindley M.R. held that:

> Moreover, now, under the judicature act, actions can be brought merely to declare rights, and this is an innovation of a very important kind. I am referring to Order XXV rule 5 which says "No *action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."* Having regard to that rule, it appears to me impossible now to say that one grower could not maintain such an action as this, on behalf himself and all other growers of fruit and vegetables, to assert preferential rights to which he says the whole class of growers are entitled (Italics supplied).

The rule confers a right to file an action whether consequential relief could be obtained or not and there is no restriction in the rule as to whether the plaintiff should first have a cause of action or not as held in **Guaranty Trust Company of New York vs Hannay and Company Limited; [1915] 2 KB 536 at 562.** In the above cause Pickford LJ held:

> The next contention is that, even if there is no necessity for a cause of action, the declaration can only be made at the instance of the person claiming the right and intending to assert it if it should become necessary. I can find no such limitation in the words of the rule, and I can see no reason why it should be imposed if it is once established that a declaration can be made where no consequential relief can be given. ... *I think the effect of the rule is to give general power to make a declaration whether there be a cause of action or not, and at the instance of any*

party who is interested in the subject matter of the declaration. It does not extend to enable a stranger to the transaction to go and ask the court to express an opinion in order to help him in other transactions.

The import of the rule is spelt out in **Halsbury's laws of England 3rd Edition Volume 22** at paragraph 1610 pages 746 – 747 that:

> It is however sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without reference to their enforcement. Such merely declaratory judgments may now be given and the court is authorised to make binding declarations of right whether any consequential relief is or could be claimed or not ...

Last but not least, the court issuing the judgment has jurisdiction to grant consequential relief as held in **Guaranty Trust Company of New York vs Hannay and Company Limited** (supra) at page 562 per Pickford LJ who held that a declaration of right could be made even where no consequential relief can be given. Further, Bankes L.J. held at page 568 that the rule:

> enables the court to make the declaration irrespective of whether consequential relief could be claimed or not...

Bankes L.J. further defined a "declaration of right" at page 571 to mean:

> Declaration of right in that rule must be read in the sense in which it has always previously borne, that is to say, a declaration of some right which the plaintiff maintains that he has against the person or persons whom he has made parties to his suit ...

In the circumstances of this appeal, having allowed the appellant's grounds 1, 2 and 6 relating to the attachment of any other property, and to avoid shutting the appellant out from any other remedy, inclusive of the statute of limitations, I would in addition to the orders issued by my learned brother Hon. Justice Stephen Musota, JA, issue a declaration of right to compensation and declare that:

1. The appellant is entitled to compensation for any properties of his properties wrongly attached.

2. Further the appellant is entitled to bring an action to prove the particulars of such property and their value for purposes of compensation.

In the premises, I agree with the judgment and orders of my learned brother Hon. Mr. Justice Stephen Musota, JA save that I have added orders 1 and 2 above.

Dated at Kampala the 10th day of March 2022

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 01 OF 2015

CORAM: *Cheborion Barishaki, Stephen Musota, Christopher Madrama, JJA.*

MAKUBUYA ENOCK WILLIAM:: APPELLANT

VERSUS

1. **BUMAIMUMUWANGA KIBIRIGE T/A KOWLOON GARMENT INDUSTRY**
2. **MOSES KIRUNDA:: RESPONDENTS**

(Appeal from the Ruling of the High Court of Uganda Holden at Kampala Miscellaneous Application No. 1689 of 2013)

JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment of my brother Hon. Justice Musota, JA.

I agree with the analysis, conclusion, and orders he has proposed that;

1. The schedule to the warrant was ambiguous and as such led to attachment of property not listed in the schedule.
2. That owing to the depreciation and wear of the machinery, the open market value of UGX. 191.250.000/= given by M/s Systems Engineers was reasonable.
3. The suit could not be brought against the 1st respondent as a purchaser of the property.
4. An application for objection should have been brought before the sale of the property is concluded.
5. The 2nd respondent executed the warrant of attachment and sale as was drawn and cannot be punished for having carried out a sale according to the warrant and schedule.
6. An order of compensation for the properties wrongly attached would require the appellant to adduce sufficient evidence in which exact

properties were attached in excess and their market value, which was not done.

Since Madrama JA also agrees in part, this appeal succeeds in part on the terms set down herein. Each party shall bear its own with costs.

It is so ordered.

Dated at Kampala this.....10th.....day of.March.....2022.

Cheborion Barishaki

Justice of Appeal