

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)**

**HCT - 00 - CC - CA - 0234 - 2005
(Arising from HCCS No. 029 of 2004)**

**HAIDER SOMANI :::::::::::::::::::::::::::::::::::::: JUDGMENT
CREDITOR**

VERSUS

**NAJIBU MUBIRU :::::::::::::::::::::::::::::::::::::: JUDGMENT
DEBTOR**

AND

**JOICE LUBEKA
KASULAKWEGYA :::::::::::::::::::::::::::::::::::::: OBJECTOR**

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G:

This is an application brought by the Objector by way of Notice of Motion under orders 19 rules 55, 57, 85 and 89 of the Civil Procedure Rules (CPR) and Section 65 and 98 of the Civil Procedure Act. It is for orders generally that the warrant to give vacant possession issued by this Court directing the removal of the occupants or persons in possession of Block 208 Plot 2179 at Kawempe be released from the said warrant.

It further seeks orders that Block 208 Plot 1098 at Kawampe which is the property of and is occupied by the objector is not liable to attachment under the decree issued in HCCS No. 29 of 2004. The objector states that the bailiff has been threatening to evict her from the said Block 208 Plot 1098 at Kawampe.

The case for the objector is that she has been in continuous possession and occupation of Block 208, Plot 1098 at Kawampe in her own right as beneficiary thereof under the estate of her father the late Kulanima Musoke. She further states that the warrant of vacant possession is in respect of Plot 2179 and not her property being Plot 1098 so she does not see why she is being threatened with eviction.

She says she has never mortgaged and caused her land to be mortgaged. The Application is supported by the affidavit of the Objector. The Objector in her affidavit states that her late father the late Kulanima Musoke was the proprietor of the lands comprised in Kyadondo Block 208 Plot 366 (approx. 1.2 acres) at Kawampe. On his death the Objector was entitled to 0.61 acres out of the said land. The land on application of her brother one Apollo Nyomyo Matovu was then partitioned into 3 plots namely Plot No. 1096 of 0.03 acres, Plot 1097 of 0.29 acres and Plot 1098 of 0.61 acres. The applicant then avers that Plot 1096 was registered in the names of Apollo Nyomyo Matovu, Plot 1097 in the names of her other brother Yosua

Wakabibi Ssalongo and Plot 1098 was for the Applicant though her brother as heir refused to register it into her names. She further avers;

“6 That Plot No. 1096 was subsequently partitioned on the instructions of Apollo Nyomyo Matovu into Plot 2179 approx. 0.08 acres and Plot 2180 approx. 0.12 acres ...and transferred by the said ... Matovu to his daughter Namatovu Robinah Nantandwe as evidenced by attached certificate of title marked J04.

7 That the houses which I occupy and live in and have lived in for a considerable time are located and situated on Plot 1098 which is mine... and I do not hold or occupy the same as trustee for Najibu Mubiru or Robinah Namatovu Nantandwe or any other person...

8 That on Friday March 18, 2005 I was surprised and shocked to be served with an eviction letter ... marked JL5 to give vacant possession of the property I occupy ... to Spider Links Auctioneers and Court Bailiffs on behalf of Halider Somani...”

In reply the Judgment Creditor filed 2 affidavits being that of himself and David Bamulambe a licenced Court Bailiff. Mr. Bamulambe avers that he obtained the warrant from Court to evict all the occupants on Bloct 208, Plot 2179. He further averred that with the help of a surveyor one Sali Male he opened up the boundaries of Plot 2179. He then evicted all the persons

on Plot 2179 and at not time attempted to evict the objector from her Plot No. 1098. He said that the evictions were witnessed by local council officials. Mr. Bamulambe avers that the Objector is just misleading Court and trying to delay justice. The affidavit of the Judgment Debtor Mr. Haider Somani states much the same thing.

In determining this matter I advised Counsel for the Objector and Judgment Creditor to have a neutral surveyor open up the boundaries to see whether there was any mix up on the plots. The parties agreed to this. Counsel for the Objector then proposed to Counsel for the Judgment Creditor by letter dated 18th May 2005 (copied to Court) that his client proposed Mr. Daniel Muwonge to do the survey. Counsel for the Objector further wrote;

“...You (Counsel for the Judgment Creditor) indicated on phone that your client would wish to have Mr. Ssali Male, also a surveyor, to be present and endorse Mr. Muwonge’s report. Our client has no objection to that.

Kindly therefore approve the proposal and file the letter in Court as our agreement.”

Counsel for the Judgment Creditor approved this letter on the 18th May 2005 and it was filed in Court on the same day.

However when the case came up for mention Counsel for the Judgment Creditor complained that two meetings were set up for the parties to open boundaries but that the Objector and her Counsel did not show up.

Counsel for the Judgment Creditor raised this complaint to Counsel for the Objector in a letter dated 20th June 2005 which was copied to Court. Instead Counsel for the Judgment Creditor went ahead to open boundaries unilaterally using S.K.K. Bukenya a registered land surveyor. The main report shows 3 separate buildings encroaching on the Plot 2179. The report is silent as to whether any of the buildings have anything to do with the Objector.

Counsel for the Objector did not explain why the direction of this Court to open boundaries which was made with the consent of both parties was not followed. This is unfortunate because if the application was as a result of a mix up on the plots due to their proximity this would have been clarified by the independent survey. He only informed Court that his client had given to him a new letter from the office of the Administration General that very morning which could shed light on the issue. The letter unfortunately does not help them much. It talks of a complaint by the Objector that she was having a hard time obtaining a title for her portion of the land because a survey map showed a road going through her land of which she was not aware and claimed should not be there. The letter does not mention any plot number.

It became clear that the direction of Court had not assisted the parties because the Objector did not participate. It was then agreed by the parties that this application be determined on the available evidence.

Counsel for both parties ably stated the law and tests to be applied in applications of this nature.

I was referred to the case of **Uganda Mineral Waters Ltd V Amin Pirain & Anor [1994-5] HCB 87** where Musoke Kibuuka Ag. Judge (as he then was) stated that

“ The scope of the investigation to be carried out under 019 rules 55, 56 and 57 is not for determining ownership being threatened by attachment. At the end of the Objector proceedings one of the parties must sue in order to determine the issue of title to the property as the order made under the rule is only provisional. The Court must answer the question whether on the date of attachment, the Judgment Debtor or the Objector was in possession of the property.

If the Court finds that it was the Judgment Debtor who was in possession, then the inquiry will proceed no further. Secondly the Court must determine whether the Objector held the property on his own account or in trust for the Judgment Debtor or some other person...”

The same proposition in Law is set out in the cases of **Harilal & Co. V Buganda Industries Ltd [1960] 318** and **Kasozi Ddamba V M/S Male Construction Service [1981] HCB 26.**

The first test is whether at the time of attachment it was the Judgment Debtor or the Objector who was in possession.

The evidence on record is quite clear as quoted above in the affidavit of the Objector in particular Para 7. The Objector is in possession of Plot No. 1098 and not Plot 2179 the subject of this application. Court cannot place much weight on the unilateral survey of Mr. Bukenya on behalf of the Judgment Creditor as it does not conform to agreement of the parties dated 18th May 2005. However both Counsel in their submission suggest on the basis of the said report that there could be “encroachment” by the Objector on to Plot 2179 from her Plot 1098. The actual report of unilateral surveyor however does not say this nor indicate if Objector has “encroached” and if so by how much.

The affidavit of the Bailiff is to the effect that all those persons who were on Plot 2179 were evicted without affecting the Objector.

The letter of eviction which is exhibit JL5 to the affidavit of the Objector is addressed to;

“ Mr. Najib Mubiru
Namatovu Robinah
Nantandwe
Or
Any Occupant ”

It is not addressed to the Objector. It is not clear how she got a copy of the said letter, as this could have been an error.

I accordingly find that on the date of the attachment the Objector was not in possession of Plot 2179 and therefore was not part of the persons evicted. Indeed there seems to be agreement that Plot 1098 which belongs to the Objector cannot be part of the warrant to give vacant possession and I find that it is not.

Issues as to possible “encroachment” should be settled in another suit as these raise ownership questions.

As to the orders sought in the application I now find and order as follows.

First as to the prayer that

“...the removal of the occupants or persons in possession of Block 208 Plot 2179 at Kawempe be stayed pending the determination of these Objector proceedings”

I vacate the interim order that put in place the stay.

Secondly, as to orders that Block 208 Plot 1098 at Kawempe is not liable for attachment, this is obvious to all and accordingly so find that it is not liable to attachment.

Thirdly, that the property be released from execution. I also order that Block 208 Plot 2179 is not released from execution but that Block 208 Plot 1098 Kawempe should not be interfered with.

As to costs the Objector is to pay $\frac{2}{3}$ of the costs of this application.

Geoffrey Kiryabwire

JUDGE