

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

HCT-00-CC- MA-0202 OF 2005
(Arising out of HCT-00-CC-CS-0768-2004)

SHINEPAY (U) LTD : PLAINIFF/JUDGMENT
CREDITOR

VERSUS

TUMWESIGA IGNATIUS : DEFENDANT/JUDGMENT
DEBTOR

AND

1. SARAH MUYIGWA
2. ISAAC K. BAMOOTI AND
FOUR OTHERS :
OBJECTORS/APPLICANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU
BAMWINE

R U L I N G:

This application by Notice of Motion brought under 0.19 rr 55 (1), 56 and 57 and 0.48 rr 1 and 3 of the Civil Procedure Rules is for orders that:

- (a). Land and house comprised in KIBUGA BLOCK 1 plot 1057 situate at Rubaga attached for sale in execution of the Court's decree is not liable

for such attachment as it is the property of the objectors herein and not of the judgment debtor.

- (b). The objectors' property be released from attachment and sale.
- (c). Costs of this application be provided.

The application is based briefly on the averments of Sarah Muyigwa in her affidavit in support of the Notice of Motion. These are that:

1. The objectors are the registered proprietors and owners of the attached property.
2. The property was at the time of attachment and all other material time in control and possession of the objectors and not any other person.
3. The objectors were and are not party to the above suit nor are they indebted to the judgment creditor or at all.
4. The judgment debtor has no legal or equitable proprietary or possessory interest or claim in KIBUGA BLOCK 1 PLOT 1057 at Rubaga which was attached for sale.

According to the affidavit of service of one OWERE FRANCO ROBINSON, service was effected on the Plaintiff/judgment creditor's lawyers, M/S Nyote & Co. Advocates, on 15/03/2005. At the hearing, neither the Plaintiff/judgment creditor, the Defendant/judgment debtor nor their counsel turned up. On the strength of the evidence of service on record, I allowed the objectors to proceed *ex parte*.

The facts from which this application arises are not convoluted. Between May – August 2004, Shinepay (U) Ltd, stated to be in the business of money lending, is said to have lent money to one Tumwesiga Ignatius in the sum of US \$42.000 with interest at the rate of 15% per month. The loan was secured by property offered by one Jack Kyalimpa Amooti said to be both the equitable and legal proprietor of property in Plot 958 Block 1 Vol. 2074 Folio 24 Rubaga, Kampala. Tumwesiga defaulted in paying off the loan. Shinepay (U) Ltd filed a suit, HCCS No. 768/2004 against Tumwesiga for recovery of the principal sum, interest and costs. The suit passed undefended and judgment was entered against Tumwesiga as prayed on 13/01/2005. In March 2005, an order of attachment and sale was issued in respect of the Defendant's house purportedly comprised in Block 1 Plot 1057 at Rubaga. These objector proceedings relate to that order of attachment.

According to the affidavit of Sarah Muyigwa, herself and the other objectors became proprietors of the suit property on 9/8/2002 vide INSTRUMENT NO. KLA 239580 by virtue of a transfer from the original proprietor J. Kyalimpa Bamooti. She has attached the duplicate certificate of title indicating so. Of the six objectors, only Sarah Muyigwa and Isaac K. Bamooti are adults. The rest are minors. She depones in para 3 of her affidavit that she got to know of the intended sale in March 2005 when one of the tenants in the house drew to her attention the notices for the sale which had been served on the

tenants. She objects to the sale because the property under attachment has never belonged to the judgment debtor, Tumwesiga.

From the records, in October 2004, the objectors brought to the attention of the Commissioner for Land Registration the fact that people were making attempts to forge their certificate of title. Their fears were based on an advertisement that appeared in the New Vision newspaper of 30/9/2004 which was a notice to sell the suit property. From the records also, Kibuga Block 1 plot 1057 was formerly plot 958.

On 28/10/2004 the said Commissioner for Land Registration issued a notice to Jack Kyalimpa Amooti and Shinepay (U) Ltd as follows:

“1. KIBUGA BLOCK 1 PLOT 1057 (OUT OF PLOT 958) AT RUBAGA

2. LEASE HOLD REGISTER VOL 2074 FOLIO 24

In accordance with section 92 Act, you are hereby given notice that I intend to take the following action:-

- Cancel a caveat purportedly entered on the Register Book on 16/6/2004 under Instr. 343913 in favour of Shinepay (U) Ltd.

Investigations have revealed that the “land title” bearing reference LRV 2074 Folio 24 and the names of Jack Kyalimpa Amooti on which the caveat has been endorsed was forged. The volume and folio referred to above relate to a property which is different from a property known as Kibuga Block 1 plot 1057 (out

of plot 958). Jack Kyalimpa Amooti purportedly leased Kibuga Block 958 from Tereza Nankya Kiryowa who has never owned the plot. Instrument No. 154875 cum KLA 154875 under which a lease was purportedly registered in favour of the said Kyalimpa relates to a different property.

You are required to let me know if there is any objection to the proposed action. You should respond to this notice within 21 days from the date of service on you hereof.

Dated at Kampala this 28th day of October, 2004.

Jonathan N. Tibisasa

COMMISSIONER FOR LAND REGISTRATION"

It is not indicated whether any objection to the proposed action was made or whether any action was taken as proposed. At the hearing, there was evidence from the Bar that after donating land to the objectors herein, Kyalimpa now lives abroad. I have not been told about the whereabouts of Tumwesiga Ignatius.

In these proceedings, however, the Court is required to investigate the objectors' claim and ascertain whether at the time of attachment they were in possession and control.

From the records, they got Legal Title in 2002 from one Kyalimpa Bamooti. They have exhibited evidence of the said property being let out to an NGO, Munazzmat - Dawah Al Islamiyya Uganda Mission under a tenancy agreement dated 20/8/2003 for a period of 5 years. I have of course not grasped the reason for citing Plot 958 in the Tenancy agreement if by that date it had already become 1057. Nevertheless, they have also attached evidence of an acknowledgment of rent by the objectors from the said NGO. It is from Shs.4,200,000- to last them up to end of this very month, 30/4/2005. These documents, the veracity of which has not been challenged, show that the Applicants hold legal title and that they were in possession and control of the property through their tenants, at the time the order of attachment was issued.

I have been referred to a decision of the Supreme Court in Lawrence Muwanga -Vs- Stephen Kyeyune, Civil Appeal No. 12/2001, un reported, in which one Kisamba had donated land to wife and children before his death. After his death, the land became the subject of attachment by creditors. The wife filed an application similar to the instant one in which she argued that herself and children were in possession and control of the property when the

order of attachment was made. The Supreme Court agreed with the two Courts below it and held that since at the time of attachment the property no longer belonged to the judgment debtor, it was not subject of attachment.

I agree with counsel for the objectors, Mr. Yassin Nyanzi, that the issues in that case are relevant to the issues herein. In the instant case, I'm satisfied, on the basis of the affidavit of Sarah Muyiga and the accompanying documents that the suit property vested in the Applicants on 9/8/2002 by virtue of the transfer to them. The loan transactions between Shinepay (U) Ltd and Tumwesiga to which Applicants are not party were entered into much later, i.e between May - August 2004. The property did not belong to Tumwesiga by then or at all and it did not belong to the purported donor of the power of attorney, Jack K. Amooti. I have not seen the purported power of attorney to ascertain from it as to when it was made. In the absence of any evidence that the transfer to them of the suit property in 2002 was a concoction or forgery, I accept the view advanced by Mr. Nyanzi that the order of attachment should not be allowed to stand. In the premises, the application would succeed and it does so.

The objectors' property shall be released from attachment and sale. I order so.

As regards costs, considering the position of Shinepay (U) Ltd vis - a - vis that of the objectors, particularly the circumstances under which the property came to be subject of the attachment order, I would order that each party bears its own costs. I so order.

Yorokamu Bamwine

J U D G E

18/04/2005