THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)
HCT-00-CC-MA-0716 OF 2005
(Arising out of HCT-00-CC-0S-05 of 2003)

THE COOPERATIVE BANK LTD
(IN LIQUIDATION) :::::::::::: PLAINTIFF/JUDGMENT CREDITOR

VERSUS

MUGANWA SAJJABI MICHEAL
t/a MUGANWA ENTERPRISES
:::::::::::::: RESPONDENT/JUDGMENT DEBTOR

AND

GEOFREY KIGOZI & ORS :::::::::::: APPLICANTS/OBJECTORS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

This is an application by some 8 Objectors brought by a notice of motion under 0.19 rr 55 (1) and 57 and 0.48 rr 1 and 3 of the Civil Procedure Rules (CPR). The application is supported by the affidavit of one of them, Geofrey Kigozi.

The undisputed facts as may be gathered from available records are that one Muganwa Sajjabi Michael by a power of Attorney dated 18/11/97 from a one Deziranta Kabanaku Sekabira obtained credit facilities from Co-operative Bank Ltd, now in liquidation. The title deed in respect of property comprised in LRV 1137 Folio 17 plot 840 Block 203 Kyadondo was offered as security for the loan. All reference to suit property herein shall be reference to the above described property.

On 18/4/2000, Bank of Uganda in its capacity as liquidator of the said Co-operative Bank Ltd registered a caveat against the said title. Muganwa Sajjabi Michael failed to pay the debt. In February 2003, the mortgagee moved Court under Civil Suit No. O.S 5 of 2003 for an order that the mortgagor's interest in the suit property be sold in execution of that order. At the end of the day, Court granted the order, upon which the property was advertised for sale. On seeing the advertisement, the Applicants objected to the sale and hence this Ruling.

Judging from the above account, it is very clear that the Objectors were not party to the proceedings in which Court ordered that the suit property be sold in execution. For a while, the parties were given opportunity to determine the way forward as regards the suit property. They failed to do so. The substance of Ms Cherotich's argument in support of the application is that the Objectors are genuine owners of the suit property in that they

inherited it from their late father, one Sekabira. As I have already stated above, it is the widow of the late Sekabira and therefore the presumed mother of the Applicants who donated a power of Attorney to Sajjabi upon which the property was conveyed to the mortgagee. Counsel contends that the Applicants have been at all material time in control and possession of the suit property. In short, counsel's argument is that the Applicants were not party to C.S. O/S No. 5/2003 and they are not indebted to the Judgment Creditor, the mortgagee. In any case, so continues the argument, the Judgment Debtor did not have any legal or proprietory interest in the property against which the warrant of attachment and sale was issued in the sense that Deziranta Sekabira was a mere administrator of the estate with no power or authority to convey the estate under her administration to third parties.

Her colleague, Mr. Moses Adriko representing the mortgagee does not agree. He argues that under S.134 of the Registration of Titles Act, RTA, an administrator of an estate is deemed to be the proprietor of the estate. That once an administrator deals with an estate in that capacity, unless the party impugning the transaction alleges fraud, he/she cannot succeed. In short, Mr. Adriko's argument is that nothing short of an allegation of fraud can stand in the mortgagee's right to enforce its rights under the mortgage.

I have addressed my mind to the able arguments of both counsel. I think they are serious legal arguments.

0.19 r 55 under which the application is brought provides that 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 such property is not liable to such 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 was a party to the suit.

An under rule 56, the Claimant or Objector shall adduce evidence to show that on the date of the attachment he had some interest in the property attached.

Then under rule 57, where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the Judgment-Debtor or of some person in trust for him, ... the Court shall make an order releasing the property, wholly or to such an extent as it thinks fit, from attachment.

From the above, it is clear to me that when the Court is invited to investigate the issue of the attached property under the provisions of 0.19 r 55, it is

more concerned with the possession of the property rather than as to who has title over the property. Some three authorities: Chotabhai M. Patel –Vs- Chotabhai M. Patel & Anor 1958 EA 743; Harilal & Co. –Vs- Buganda Industries [1960] EA 318; and Uganda Mineral Waters Ltd -Vs- Piran and Another [1994-95] HCB 87, are very clear on this point.

In all the above cases, the issue of possession was emphasized. What is crucial in terms of rule 56 is the requirement that the Objector shows that he has an interest in the property other than possession. Therefore, in the conduct of the investigation before me, I find it pertinent to decide:

1. Whether the Applicants/Objectors have adduced evidence to show that at the time of the attachment they had some interest in the suit property.
2. Whether they have adduced evidence to show that at the time of attachment, they were in possession.
3. Whether the Applicants were or are in possession on their own account or on account of the Judgment Debtor, Sajjabi.

In short, the sole question to be investigated is one of possession. Questions of legal right, equitable right and/or title are irrelevant, except when they may affect the decision as to whether the possession is on account of or in trust of the Judgment Debtor or some other person.

The evidence on which I must base the decision on those questions is by way of affidavits filed by both the Applicants and the Respondent together with any documents annexed to the respective affidavits.

The Applicants have adduced evidence that the suit property has been advertised for sale. This is not disputed by the Respondent. It is therefore an admitted fact. The Applicants have also adduced evidence to show that at the time of attachment, and even as I deliver this Ruling, they are in possession of the suit property. This is contained in the affidavit of Kigozi and it has not been challenged by way of another affidavit showing a contrary position. In an application proceeding by evidence supplied by affidavit, where there is no opposing affidavit, the application stands unchallenged: Makerere University –Vs- St. Mark Education Institute Ltd & Others HCCS No. 378/93 reproduced in [1994] V KALR 26.

True the unchallenged evidence must intrinsically be tenable on its own. The Applicants have in the instant case said that they are children of the late Sekabira whose widow, upon getting letters of administration donated a Power of Attorney to Sajjabi who in turn obtained a loan from the bank on the strength of that power. It was argued by Mr. Adriko that they have not adduced birth certificates to show that they are children of late Sekabira. I think this was not necessary for purposes of this application. They were never asked to do so nor did the Respondent at any stage of these

proceedings bring the issue of their parentage in issue. Whether they are children of late Sekabira, biological or otherwise, are matters of fact which can be investigated and remedied after Court has upheld their right to be heard in the matter. For purposes of this application, the Applicants have shown to the satisfaction of Court the fact of being in actual possession and having interest in the suit property. The nature of the application is such that at this point in time, Court is not being asked to make any declaration concerning rights of the parties. What Court is being requested to decide is whether on the facts put before it the Respondent is entitled to go ahead and sell the suit property in accordance with the Court order. My understanding of the law is that such issues of rights should only be dealt with after the decision of this Court has been made known as regards the application. Such issues of rights can be determined under the provisions of rule 60. It provides:

> *"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of the suit, if any, the order shall be conclusive."*

In other words, the order made under rules 55, 56 and 57 is of an interlocutory nature, subject to another anticipated action by an aggrieved party for final determination of the rights of the parties under rule 60.

This in my view is a fair enough procedure that admits of no controversy. Accordingly, whether Deziranta Sekabira had power to act as she did or whether as between the Applicants and the Respondent the Respondent has a better title to the suit property than the Applicants or whether the provisions of the Succession Act can oust those of the RTA are all matters that cannot be resolved herein but in a suit filed in accordance with 0.19 r 60, if any party aggrieved by a decision such as the one herein so wishes.

When all is said and done, Court finds that the Applicants have established to the satisfaction of Court that at the time of the attachment, they had legally protectable interest in the suit property. The application is accordingly allowed with costs to the Applicants. The suit property is to be wholly released from attachment subject to any other course the Respondent may wish to pursue as by law established.

I so order.

Yorokamu Bamwine

J U D G E

08/05/2006