

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

HCT-00-CC-MA-0425-OF 2006  
(ARISING FROM CIVIL SUIT NO 762 OF 2005)

1. BAGAMBE GEOFFREY )
  2. KUTESA HERBERT ).....
- OBJECTORS/APPLICANTS

VERSUS

ECUMENICAL CHURCH LOAN FUND (U) (ECLOF) ..... RESPONDENT/  
PLAINTIFF

And

1. SSERUMAGA EDDIE
2. SSESANGA LIVINGSTONE
3. LAMECK LUMU
4. KAKANDE MOSES
5. KASULE S.

ALL T/A BWISHIKATWA MIXED  
FARM) .....JUDGMENT DEBTORS/ DEFENDANTS

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

## RULING:

These objector proceedings were brought by Notice of Motion under Order 19 (now 22) rules 55- 62, Order 48 (now 52) rule 1 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act. It is seeking orders that land comprised in LRV 1814 folio 12 Block 349 – 351 Plot 4 Gomba Mpigi District be released from attachment and sale and that costs of this application be provided for.

The application is supported by an affidavit deponed to by the 1<sup>st</sup> Applicant Bagambe Geoffrey. The objector's case, as gathered from the affidavit and annexures thereto is that the objectors are the registered proprietors of the land which is the subject matter. Bagambe Geoffrey the 1<sup>st</sup> applicant, as Administrator of the estate of the late Edward Kusasira under High Court Administration Cause No. 562 of 2001 granted on 21<sup>st</sup> December 2004 and Herbert Kutesa, 2<sup>nd</sup> Applicant as Administrator of the estate of the late Christopher Ntalatambi under High Court Administration Cause No. 513 granted on 7<sup>th</sup> September 2001. The suit land is their family land where they have their own homes and their predecessor's homes and where they graze their cattle. They are not parties to the suit which gave rise to the attachment of the property. The suit was filed in December 2005 against Edward Kusasira, Christopher Ntalatambi, Sserumaga Eddie, Ssesanga Livingstone, Lameck Lumu Kakande Moses, and Kasule S, all stated to be trading as Bwishikatwa Mixed Farm. Bagambe Geoffrey states in his affidavit that the said Edward Kusasira and Christopher Ntalatambi died before the year 2001, thus before the filing of this suit. That the said Edward Kusasira and Christopher Ntalatambi were the only registered partners in M/S Bwishikatwa of Mixed Farm, which firm or business never owned the attached property. It is further averred that Serumaga Eddie, Ssesanga Livingstone, Lameck Lumu, Kakande Moses and Kasule who were the borrowers under the loan agreement dated 19<sup>th</sup> May 1999 and which gave rise to the main suit have never been members or partners in Bwishikatwa Mixed Farm.

The Respondent M/S Ecumenical Church Loan Fund (U) (ECOLOF) was on record as represented by M/S Rwakafuzi & Co Advocates. Though duly served through its said lawyers as per the affidavit of service dated 28<sup>th</sup> August 2006 the Respondent did not file an affidavit in reply. Neither its counsel nor its representative appeared at the hearing and hearing proceeded in their absence. In the circumstances the facts outlined above and deponed to by the 1<sup>st</sup> applicant in his affidavit in support were neither rebutted nor denied by the Respondent. The presumption is that averments on oath which are neither denied nor rebutted by the respondent are admitted as the true facts See Masa Vs Achen (1978) HCB 297.

The law and tests to be applied in an investigation to be conducted in applications of this nature is contained in rules 56, 57 and 58 of Order 22 of the Civil Procedure Rules. They were summed up in the case of Harilal & Co Vs Buganda Industries Ltd (1960) EA 318 as follows:

“—The question to be decided is whether on the date of attachment the judgment debtor or the objector was in possession or where the Court is satisfied that the property was in the possession of the objector, it must be found whether he held it on his own account or in trust for the judgment debtor. The sole question to be investigated is thus one of possession. Questions of legal right and title are not relevant except so far as they may affect the decision as to account of or in trust for the judgment debtor or some other person. To that extent the title may be part of the inquiry. But ultimate questions of the trust or complicated question like the benami nature of a transaction are not within the scope of the inquiry and were not intended to be gone into”

In Uganda Mineral Waters Ltd Vs Ami Pirain & Anor (1994-5) HCB 87 Musoke Kibuuka Ag Judge (as he then was) stated:-

“The scope of the investigation to be carried out under 019 (now 22) 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 the title to the property as the order made under the rules is only provisional. The Court must answer the question whether 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.”

Therefore the sole question to be investigated by Court is one of the possession, that is whether at the time of attachment it was the judgment debtor or the Objector who was in possession. Questions of legal right or title are irrelevant except where they may affect the decision as to whether the possession was on account or in trust for the judgment debtor or some other person.

The evidence as contained in paragraph 8 of the affidavit of the 1<sup>st</sup> Objector is that the attached property was the objectors’ family land where they have their own homes and those of their predecessor’s and where they were grazing their cattle. This is evidence of occupation by the objectors. This evidence was neither denied nor rebutted by the Respondent. Therefore I find that when the property was attached it was in the possession of the objectors.

The next issue is whether the Objectors were in possession of the land in trust for the judgment debtors or any of them. The Certificate Title annexure A” – shows that the Objectors are the registered proprietors of the and which is the subject matter of these proceedings, the 1<sup>st</sup> objector as administrator of the estate of the 2<sup>nd</sup> Judgment debtor and the 2<sup>nd</sup> objector as administrator of the estate the 1<sup>st</sup> judgment debtor. I have

already indicated that for the purposes of this investigation the question of legal right and title are irrelevant, except so far as they may affect the decision as to account of or in trust for the judgment debtor.

An administrator of an estate is not necessarily the owner of such property, unless he/she is the sole beneficiary of the estate. An administrator holds such property in trust for the benefit of the beneficiaries to the estate. Section 25 of the Succession Act provides:-

“All property in an intestate estate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property under this Act”

In paragraph 10 of his affidavit Bagambe Geoffrey states:

“ That the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the main suit died before the year 2001 and are therefore not capable of being sued, and could not have been served with summons on the 20<sup>th</sup> December 2005 as deponed in the affidavit of service by Nester Mushabe.”

This averment of the death of the 1<sup>st</sup> and 2<sup>nd</sup> Judgment Debtors prior to the institution of the main suit was neither denied nor rebutted. The main suit was filed on 20<sup>th</sup> December 2005. Therefore the presumption is that it is the truth. This is strengthened by the fact that Letters of Administration to the said Judgment Debtors estates were respectively granted to the objectors without any objection. Therefore the objectors cannot be said to be in possession of the land in trust for the 1<sup>st</sup> and or the 2<sup>nd</sup> Judgment Debtors because they had ceased to exist, they were deceased.

The objectors as such administrators can only be said to be in possession of the land in trust for the beneficiaries of the estates of the late Edward Kusasira and the late Christopher Ntalatambi. The 1<sup>st</sup> and 2<sup>nd</sup> Judgment Debtors were the deceased

themselves thus could not be beneficiaries. There is no evidence to show that any of the other judgment debtors, namely Serumaga Eddie, Ssesanga Livingstone, Lameck Lumu, Kakande Moses and Kasule S, are beneficiaries to any of the estates of the two deceased persons.

Therefore I find that there is no evidence to show that the Objectors were in possession of the land in trust for the judgment debtors or any of them. This application is accordingly allowed. The land comprised in LRV 1814 Folio 12 Block 349 – 351 Plot 4 Gomba, Mpigi District be released from attached and sale in execution of the judgment in High Court Civil Suit No. 762 of 2005. The Objectors are awarded costs of these proceedings.

I so order.

Hon Mr. Lameck N. Mukasa

Judge

22<sup>nd</sup> September 2006