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Mohamed Basiba V Coop Bank- HCT-00-CC- 0708-2006-[2007] UGCommC- 3 (12 January 2007)

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA  
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0708-2006  
(ARISING FROM HCT-00-CC-MA-0273 -2006 &D M.A 691 & 690 OF 2006)

MUHAMMED BASIBA .....APPLICANT/OBJECTOR

VERSUS

COOPERATIVE BANK (IN LIQUIDATION).....RESPONDENT

**12<sup>th</sup> January 2007**

BEFORE: HON. JUSTICE LAMECK N. MUKASA

RULING

These objector proceedings were brought by Notice of Motion under Order 22 rules 55 and 57 and Order 52 rule 1 of the Civil Procedure Rules and section 98 of the Civil Procedure act for orders that the property comprised in plot 29 LRV 2252 folio 13 situate on Adams Road Kamuli Town be released from attachment and that costs for this application be provided for.

The grounds for this application are that:-

1. The objector claims interest in the attached property as owner/proprietor having acquired the same on the 18<sup>th</sup> day of October 2001.
2. The judgment Debtor in the above suit has no interest whether legal or equitable in attached property.
3. There is a likelihood of the attached property being sold anytime by public auction and the objector will suffer irreparable loss if the property is not released from attachment.
4. The objector has not inordinately delayed in preparing his claim.

The application is supported by an affidavit deposed to by the objector, Mohammed Basiba date 5<sup>th</sup> October 2006. He therein claims ownership of the property which is the subject matter. He avers that he is a bona fide purchase of the property comprised in plot 29 LRV 2252 folio 13 situate on Adams Road Kamuli Town all the developments thereon. That he bought the property in an auction conducted by M/s Bogere Court Bailiff and Auctioneer on the 18<sup>th</sup> day of October 2001 in execution of judgement against one Mutesa Fred in H.C.C.S No. 32 of 1997. Annexed the affidavit and marked "B" is an agreement of sale of the land between M/s Bogere Court Bailiff & Advocates and the objector dated 18<sup>th</sup> October 2001, marked "A" is a Application for consent to Transfer of Public Land wherein on 19<sup>th</sup> November 2001 the Town clerk Kamuli Town Council consented to the transfer of the land from Mutesa Fred to the objector, marked "C" advertisement of sale of the

land in the Bukedde Newspaper of 18<sup>th</sup> September 2001 and marked "D" are receipts issued by Kamuli Town Council to the objector for the transfer of objector for the transfer of the land.

The brief background to this application is that on 15<sup>th</sup> May 2006 the Respondent, M/s Co-operative Bank (in liquidation), filed HCCS No. 273 of 2006 against Nippor Enterprises (the judgment debtor) wherein the Respondent sought to recover Shs. 48,303,792/= being a loan plus interest granted to the judgment-debtor by the Respondent. As security for the said loan the judgment-debtor had deposit with the Respondent the Certificate of Title in respect of the land which is the subject-matter of this application and registered under the proprietorship of Mutesa Fred. The Mutesa Fred happens to be the judgment debtor in HCCS No. 32 of 1997. On 20th June 2006 judgment and decree was entered against M/s Nippor Enterprises in HCCS No. 273 of 2006. A warrant of attachment and sale of the land was issued on 5<sup>th</sup> September 2006. The objector, in his affidavit in support avers that he has never been a party to the above suit and that the judgment debtor has no interest whether legal or equitable in the property.

The Respondent filed an affidavit in reply deponed to by Benedict Sekabira, the liquidator of the Respondent Bank. He therein avers that the original land title of the land is in the possession of the Respondent have been deposited with them on the 10<sup>th</sup> December 1996 as security for a loan granted by the Respondent to Fred Mutesa and Iskida Yoshini t/a Nippor Enterprises, the judgment debtor. That on 8<sup>th</sup> May 2000 a caveat was lodged on the property to protect the Respondent's interest. The Respondent opposed the objectors' application for release of the land from attachment.

The law and tests to be applied in an investigation to be conducted in an application of this nature is contained in rules 55, 56, 57 and 58 of Order 22 of the Civil Procedure Rules. Rule 55(1) requires the application not be designedly delayed. The Court record shows that the warrant of attachment and sale of the property was issued on 5<sup>th</sup> September 2006. By letter dated 7<sup>th</sup> September 2006 the occupants of the property were warned of the attachment and the impending sale of the property in an auction to be conducted on 7<sup>th</sup> October 2006. The objector filed this application on 5<sup>th</sup> October 2006. In the circumstances I find that the objector had filed this application without any delay.

Rule 56 of the Order requires the objector to adduce evidence to show that at the time of the attachment he had some interest in the property attached. Annexures A, B and D to the objector's affidavit in support of this application show that the objector had some interest in the property as purchaser thereof in an auction conducted by M/s Bogere Court Bailiff and Auctioneer in execution of a judgment against Mutesa Fred in HCCS No. 32 of 1997.

The scope of investigation is set out in rules 57 and 58 of the Order and was summarised in **Hirilal & Co. v/s Buganda Industries Ltd [1960] EA 318** as follows:-

*"the question to be decided is whether at the date of the attachment the judgement debtor or the objector was in possession or where the court is satisfied that the property was in possession of the objector, it must be found whether he held it on his own account or in trust for the judgment debtor. The sale question to be investigated is thus one of possession. The questions of legal right and title are not relevant except as far as they may affect the decision as to whether the possession is on account of or in trust from the judgment debtor or some other person. To that extent the title may be part of the inquiry but ultimate questions of the trust on complicated question like the behaviour nature of the transaction are not within the scope of the inquiry and are not intended to be gone into."*

In paragraph 11 of the affidavit in support the objector avers that at the time the attachment order

was made/issued he was in possession and active contract of the property. The above averment was neither denied nor rebutted the Respondent's affidavit in reply. On the authority of *Massa vs. Achen [1978] HCB 297* the prescription is that it is admitted as a true fact. I therefore find that the objector was in possession of the land at the date of the attachment.

The next question is whether the objector held the land on his own account or in trust for the judgment debtor. The objector has adduced evidence to show that the land was advertised for sale by auction in execution of judgment against the registered proprietor thereof Mutesa Fred in HCCS No. 32 of 1997 in the Bukedde Newspaper of 18<sup>th</sup> September 2001. By an agreement dated 18<sup>th</sup> October 2001 the land was sold by the Court Bailiff to the objector. The objector paid fees to the controlling authority Kamuli Town Council for the consent to transfer the land from the said Mutesa Fred to the Objector vide Nos. 8851 and 0962 dated 24<sup>th</sup> October 2001 and 15<sup>th</sup> November 2001 the Town Clerk Kamuli Town Council endorsed the councils consent to the transfer of the land from Mutesa Fred to the objector. The objectors' only problem is that the transfer has never been effected in the Land Registry. No explanation has been offered.

However the reason can be derived from the Respondents affidavit in reply. Benedict Skabira in his affidavit avers that he conducted a search in the Land Registry and found that the land was still registered in the names of Fred Mutesa. He also avers that the original land title is still in possession of the Respondent to which it has been deposited as security and which had lodged a caveat on 8<sup>th</sup> May 2000. By the time of the sale in execution of the judgment in H.C.C.S No. 32 of 1997 on 18<sup>th</sup> October 2001 there was a caveat on the land. Therefore no transfer could be registered until the caveat has been removed or cancelled.

The objector avers that he is a bona fide purchase of the land and that when he fully paid the consideration for the land the judgment debtor ceased to have interest in the land. However in its affidavit in reply the Respondent contends that the alleged sale in execution of the judgment in H.C.C.S No. 32 of 1997 on the 18<sup>th</sup> September 2001 could never have taken place when there was a caveat lodged on the land on the 8<sup>th</sup> May 2000. Further that the objector has no legal or equitable interest in the land as it has never been transferred and/or registered in his names. Mr Andrew Lumonya, Counsel for the Respondent, also submitted that there is no evidence that the Registrar of Titles was given notice of the attachment in H.C.C.S No. 32 of 1997 as required by the Registration of Title Acts.

Section 135 of the Registration of Titles Act provides that decree of execution shall in itself bind charge or affect any land, lease or mortgage, but the Registrar being served with a copy of the decree of execution, accompanied by a statement signed by any interested party shall enter the decree in the Register Book and after the sale of the land under the decree, the Registrar shall on receiving a transfer thereof register the transfer. True there was no evidence of such notice having been given to the Registrar and there was no registration of the transfer pursuant to the sale in execution of the judgment in H.C.C.S No. 32 of 1997.

Under section 59 of the Registration of Titles Act a Certificate of Titles is conclusive evidence that the person named therein has an interest in the land discounted therein. However all the above go to the legality of the sale conducted in execution of the judgment in H.C.C.S No. 32 of 1997 and the legal title to the Land. The prescription of ownership provided for under section 135 of the Registration Titles Act cannot always be conclusive evidence of ownership.

It is reputable. Rule 20 of Order 22 clearly states:-

*"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 or she claims to the property in dispute, but subject to the result of the suit, if any the order shall be conclusive."*

In **Uganda Mineral Waters Ltd v/s Ami Pirain & Anr [1994 -95] HCB 87** Musoke Kibuka Ag. Judge (as he then was) stated:-

*"The scope of the investigation to be carried out under 0.19 (now 22) rules 55, 56 and 57 is not for deterring 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.*

*----- 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."*

In the instant case the objection has on a balance of probabilities adduced evidence to show that he held possession of the land on his own account as purchaser thereof in a sale conducted in execution of the judgment in H.C.C.S No. 32 of 1997, and not in trust for the judgment debtor or the said sale passed a legal right or title to the object is irrelevant for the investigation before me..

In the final result this application is allowed. The land comprised in plot 29 LRV 2252 folio 13 Adams Road Kamuli Town be released from attachment and sale in execution of the judgment in H.C.C.S No. 273 of 2006. The objector is awarded costs of there proceedings.

I so order.

Lameck N. Mukasa  
JUDGE  
12/01/07