

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0386-2008
(Arising out of HCT-00-CC-CS-847-2007)

KIYEGGA HENRY APPLICANT

VERSUS

ECUMENICAL CHURCH LOAN FUND LTD.....RESPONDENT

BEFORE: HON. JUSTICE LAMECK N. MUKASA

RULING:

This is an objector application brought by Notice of Motion under Order 22 rules 55 , 56, 57 and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules whereby the Applicant, Kiyegga Henry seeks for an order for cancellation of the attachment and sale of land comprised in Mailo Register Kibuga Block 21 Plot 679 together with the houses thereon at Busega Kigwanya Zone, Lubaga Division Kampala.

The grounds for the application are that:-

1. The Applicant/Objector is the lawful owner of the land and all the developments thereon comprised in Mailo Registrar Kibuga Block 21 Plot 679, Busega, Kigwanya Zone, Lubaga Division Kampala.
2. The Applicant/Objector bought the said land from Byarugaba Benjamin, the first defendant on the 3rd day of August 2007.
3. The Applicant/Objector paid the said Byarugaba Benjamin a sum of shs28,000,000 being part payment of the agreed consideration of shs30,000,000/= and he was supposed to pay the balance of Shs2,000,000 within a period of six months.
4. The Applicant/Objector took procession of the said land with immediate effect upon buying the same from Byarugaba Benjamin and that at the time he brought the said land it had houses which were in a dilapidated state.
5. The Applicant/Objector renovated the said houses and also constructed other houses thereon which are all currently occupied by tenants and it is the Applicant who is collecting rental fees from the said tenants.
6. On 30th June 2008 this Honourable Court issued a warrant of attachment and sale of the said land.
7. On 16th July 2008 a Court Bailiff called Fred Bwanika issued a letter addressed to the first defendant Benjamin Byarugaba where he requested the people occupying the said land to vacate the same within 14 days.
8. The Applicant/Objector has all along been willing to pay the first defendant the balance of Shs2,000,000/= out of the said consideration but the first defendant told him that the duplicate title deed had got lost in the land office at Kampala and that he was looking for it.

9. The Applicant/Objector could not pay the first defendant the balance of the shs2,000,000/= in absence of the duplicate title.
10. The first defendant went out of the country for further studies before he had got the title deed which got lost in the land office and he called the Applicant/Objector while abroad in South Africa and he told him that he should be patient until he comes back in the country.
11. The Applicant shall suffer irreparable damage if the attachment and sale of the said land and the houses thereon is not cancelled.
12. It is in the interest of justice that the attachment and sale of the said land and the houses thereon be cancelled.

The background to this application is briefly that the Respondent, Uganda Ecumenical Church Loan Fund Ltd, on 27th November 2007 filed HCT-00-CC-CS-0847-2007 against Byarugaba Benjamin and three others seeking to recover against them jointly and severally a sum of Shs90,875,000 with interest at 14% p.a. as guarantors to a loan advanced by the Respondent to Support Organization for Micro Enterprises Development (SOMED). A consent judgment was on 28th January 2008 entered against the four defendants in favour of the Respondent. The judgment-debtors failed to satisfy the consent judgment and a warrant of attachment and sale of immovable property was issued on 30th June 2008. Among the properties to be attached were small tenants' houses located in Kigwanyi LCI Busega Parish Rubaga Division Kampala, Annexure "D" to the affidavit in support of the application is the warrant. In paragraph 8 of the affidavit the Applicant states that on 16th July 2008, the court Bailiff called Fred Bwanika of Fremkila General Agencies to whom the said warrant was issued wrote a letter addressed to the first defendant and therein requested the tenants occupying the land and houses at Mailo Register Kibuga Block 21 Plot 679 Busega, Kigwanyi zone, Lubaga Division to vacate the premises.

This application is made under Order 22 rules 55-57 of the Civil Procedure Rules. Rule 55 (I) requires an objector application not to be designedly delayed. The warrant was issued on 30th June 2008 and the Court Bailiff's letter of attachment issued on 16th July, 2008. In the premises this application was on 25th July 2008 filed without delay.

Rule 56 requires the Objector to adduce evidence to show that at the time of attachment he had interest in the property. While rules 57 and 58 require proof that the property was at the time of attachment in possession of the Objector, so held on his own account. The issues for courts investigation are basically that of possession coupled with interest that the Objector has in the property. The questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the judgment debtor or some other person. To that extent the title may be part of inquiry. See Herilal & Co Vs Buganda Industries Ltd (1960) EA 318, David Muhenda & Others Vs Margaret Kamunye S.C.C. Appeal No. 9 of 1999.

In his affidavit, the Applicant states that he bought the property from the judgment debtor on 3rd August 2007 at an agreed consideration of Shs30,000,000/= of which he paid shs28,000,000/= and had an out standing balance of Shs2,000,000/= Annexure "A" to the affidavit is the agreement by which the judgment debtor sold the property to the Objector. The Objector further states that he took immediate possession of the land upon buying it and undertook renovations to the dilapidated buildings then thereon and constructed thereon other houses. That all the houses are occupied by his tenants from whom he collects rent. Annexure B to the Affidavit are copies of rental receipts issued to various tenants dating from 3rd October 2007 to 29th June 2008. Mr. Lutakome, Counsel for the Applicant submitted that the Applicant had adduced evidence to prove that by the time court issued the warrant he had acquired interest in the property as per the sale agreement as purchaser thereof and had already taken possession of the property. Counsel submitted that rules 56 and 57, respectively emphasizes interest and possession.

The Respondent filed an affidavit in reply deposed to by Fred Bwanika, the Court Bailiff to whom the warrant was issued. He avers therein that when he investigated in the Land

Registration Office he found that the land was registered in Benjamin's names with his caveat registered on 15th June 2007. He contends that the agreement of purchase looked suspicious as the date on which the lawyer witnessed it looked tempered with, the Objector did not have a duplicate certificate title or transfer deed executed in his favour by the seller/judgment debtor and he had not lodged a caveat on the title to protect his interest. In his view the sale agreement may be a forgery by Benjamin Byarugaba to hide the property in a fabricated sale agreement and in the meantime he went into hiding, not to study abroad as claimed.

The Respondent thereby raises issues concerning ownership and of title to the property. He also raises the question of validity of the agreement, collusion between the judgment-debtor and the Objector to defeat the judgment-creditors right of attachment of the property and even forgery. However, Order 22 rules 56 – 57 CPR only call on the objector to show that at the time of attachment he had some interest in the property and that he was in possession of the property on his own account but not on account of some other person. Court is clearly excluded from investigating the issues raised by the Respondent.

In Harilal & Co Vs Buganda Industries Ltd (1960) EA 313 at page 319 Lewis J quoted Chitaley and Rao's Code of Civil Procedure 6th Ed. Page 1880 where what is to be decided is stated thus:-

“What is to be investigated is indicated in the next three following rules ----- . 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 whether the possession is on 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 trust, or complicated questions like the benami nature of a

transaction, are not within the scope of the inquiry and are not intended to be gone into”

The above decision was upheld by Wambuzi CJ in TransAfrican Assurance Company Ltd Vs NSSF SCCA No. 1 of the 1999.

As to the fact that the land was still registered in the names of the Judgment Debtor Justice Mukasa – Kikonyogo in the NSSF case (above) held that :-

“—the fact that the disputed property was still registered in the name of the judgment debtor was not detrimental to the objector’s claim or conclusive evidence of ownership by the judgment debtor.”

Justice Sadavisa Ayvar in Ramaswani Chetty Vs Mollapa, also quoted in the Harilal case (Supra) stated:

“---The court is bound to order the release of the attached property if it finds possession in the claimant on his own account, even if there is title and disposing power remaining in the judgment debtor.”

See also Crescent Baguma Vs Highlight Agriculture Export Ltd Misc app (Commercial Division) No. 655 of 2001 (unreported)

Section 59 of the Registration of Titles Act provides that a Certificate of title is conclusive evidence that the person named there has an interest in the land described therein. However, this presumption of interest cannot be conclusive evidence of ownership. It is rebuttable and Order 22 rule 60 CPR is very clear on this. It 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 Mineral Water Ltd Vs Amin Pirain & Anor (1994 – 95) HCB 87 Musoke-Kibuuka Ag J. (as he then was) stated that at the end of the objector proceedings one of the parties must sue in order to determine the issue of the title of the property as the order made under the rules is only provisional.

The Applicant/Objector avers in his affidavit that he still owed the judgment –debtor a sum of Shs2,000,000/= as balance on the agreed consideration of Shs30,000,000/= . Paragraph 5 of the sale Agreement provides:

“The Vendor shall handover to the Purchaser the duplicate title deed in respect of the said land and also sign a transfer instrument in favour of the Purchaser upon payment of all the said agreed consideration.”

The judgment – debtor still had an interest in the land worth Shs 2,000,000/= and this explains his caveat lodged on the land. The Applicant in paragraphs 10 to 12 explains why he had not paid the balance of shs2,000,000/= within the agreed period of six months. He states that the judgment debtor had informed him that he had lost the duplicate certificate of the title and requested him to be patient until his return from South Africa. I agree with Mr. Erick Muhwezi , counsel for the Respondent, that the Applicant has not shown interest in the land by his failure to protect the same by lodgment of a caveat on the land title. However such laxity on the part of the Objector cannot be interpreted to extinguish his interest in the land.

Mr. Muhwezi doubted the Agreement of sale of the land due to what appeared like an ink drop beside the month of purchase in the Advocate’s stamp witnessing the agreement. However,

what is clear from the Agreement is that the transaction was in 2007 while the warrant was issued on 30th June 2008. The Agreement is stated made on 3rd August 2007.

Considering all the above I find that by the date of attachment the Objector had an interest in the land as purchaser thereof.

As evidence of possession the Objector attached rental receipts. The receipts are headed and signed for “Henry Kiyegga Housing Estate” In paragraph 9 of the Respondent’s affidavit in reply, Faisal Bwanika states that the above businessname is not registered in the Registry of Businessnames. He therefore contends that the name is fictitious. Mr. Muhwezi for the Respondent argued that there was no connection between the Objector and Henry Kiyegga Housing Estate.

With due respect to counsel, section 2 of the Business Names Registration Act only requires to be registered a firm carrying on business under a name which does not consist of the true Christian names of the partners. In his affidavit the Objector states that he is “Kiyegga Henry”. His identity is not disputed. In the circumstances the Objector was under no obligation to register his trade name of “Henry Kiyegga Housing Estate”

Fred Bwanika stated in his affidavit that an informant had told him that the judgment –debtor had land with small commercial houses at Busega, Rubaga Division, Kampala and had shown him the suit houses as the houses. The above averment was based on information from an undisclosed source and as such not admissible - See Order 19 rule 3 (I) of the Civil Procedure Rules.

In paragraph 6 Fred Bwanika states that on attachment of the land he found one Nalongo Jennifer who told him that she was a tenant of the Judgment Debtor, Benjamin Byaruhanga, and that she also oversees the house for the tenants in the judgment –debtor’s absence and that she received the letter giving notice of attachment which she undertook to deliver to the judgment debtor. In paragraph 5 he states that he was assured by the area LC1 Chairman one L Mukasa on Mobile telephone No. 0752-896826 that the houses indeed belonged to the judgment debtor. Both the

said Nalongo Jennifer and L Mukasa did not swear any affidavit to verify the information attributed to them. Further there was no evidence adduced to show that Nalongo Jennifer was caretaking the houses on behalf of the Judgment Debtor.

I am satisfied by the evidence adduced by the Objector that he was in possession of the property on his own account by the time of the attachment.

It is accordingly ordered that the land and the development comprised in Mailo Register Kibuga Block 21 Plot 697 Buunga, Kigwanya Zone, Lubaga Division Kampala is hereby released from attachment and sale. The Objector is awarded costs of this application.

Hon Mr. Justice Lameck N. Mukasa

Judge

Commercial Court Division

16th February 2009

