

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0381-2008
(Arising out of HCT-00-CC-CS-0847-2007)

NYAKATO JOSEPHINE..... 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. The Applicant, Nyakato Josephine is seeking Order that:-

1. A residential house located in Kijura North LCI Masindi is not liable to attachment and should be released from attachment.

2. The sale of the residential house located in Kajura North be stayed pending investigations of the claim.
3. The costs of the application be provided for.

The brief background to this application is that the Respondent, Uganda Ecumenical Church Loan Fund Ltd, on 27th November, 2007 filed HCT-00-CC-CS-0847-2007 against Byarugaba Benjamin, Arinaitwe Fred, Kasaga R. Chris, and Kirakwa Monica 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 Organisation for Micro Enterprise Development (SOMED). A consent judgment was on 28th January 2008 entered against the four defendants in favour of the Respondent. The judgment debtors having failed to satisfy the consent judgment a warrant of attachment and sale of immovable property was issued on 30th June 2008. Among the properties to be attached was a Residential house located in Kajura North LC1 Masindi Municipal Council.

This application is supported by an affidavit deposed to by the Applicant. She avers therein that on 15th July 2007 she found a warrant of attachment and sale of her house affixed on the front door of her house. In light of the date of filing this suit which was 27th November, 2007 and the date of issue of the warrant which was 30th June 2008, the deponent must have intended 17th July 2008 as the date when she found the warrant fixed on her door.

The grounds for this application are briefly that:

1. The Applicant acquired the house on 12th April 2006 when she bought it from Binangaijo Apuuli.
2. The Applicant took immediate possession thereof and has continued in possession thereof to date and executed several improvements thereto.
3. The Applicant has never had any dealing, agreement or contract with the Respondent.
4. Of the parties to Civil Suit No 847 of 2007 the Applicant only knows Byarugaba Benjamin who used to be her friend.

5. The Applicant has never had any dealing with the said Byarugaba Benjamin in respect of the house or land where the house is located.
6. The Applicant was not a party to the suit and will suffer irreparable loss and damage if her house is attached and sold.

The law and tests to be applied in the investigation to be conducted in an application of this nature is contained in rules 55 – 58 of Order 22 of the Civil Procedure Rules. Rule 55 (I) requires an application of this nature not to be designedly delayed. The court record shows that the warrant was issued on 30th June 2008. In her affidavit the Applicant avers that she became aware of the warrant on 17th July 2008 when she woke up to find it affixed on the house. She filed this application on 22nd July 2008. In the circumstances I find that the application was filed without delay.

Rule 56 requires the Objector to adduce evidence to show that at the time of attachment she 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/Applicant, so held on her own account. Therefore, the prime issues for investigation is that of the Objector's interest and possession of the property. In the Supreme Court case of David Muhenda & Others Vs Margaret Kamuje SCCA No. 9 of 1999 the principles and procedure governing objector proceeding was summarized as follows:-

- “(i) Where 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 attachment court shall proceed to investigate the objection with the like power as regards examination of the objector and in all other aspects as if he was a party to the suit .
- (ii) The Objector shall adduce evidence to show that at the date of the attachment he had some interest in the property attached.

- (iii) The question to be decided is, whether on the date of the attachment the Judgment 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 sole question to be investigated is, thus, one of possession of and some interest in the property.
- (iv) 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.”

See also Herilal & Co VS Buganda Industries Ltd (1960) EA 318; Betty Namugenyi Vs Daisen Co Ltd & Anor and Forward International Co Ltd (Objector) H.C. Comm Division Misc. Appl No 522 of 2005. Richard Sendaula Vs Haji Ali Lubega & May Senyonyi Nakawa H.C. Misc App No. 85 of 2004

In her affidavit the Applicant avers:-

“5. THAT I acquired the said land with an incomplete house thereon on the 12th day of April 2006 when I bought the same land from Binaganjo Apuuli of Masindi. A photocopy of the Sale Agreement is hereto attached ----.

(6) Upon my purchase of the said land and house,

the seller Banagaijo Apuuli handed over to me vacant possession of the said land and previous original agreements over the plot land and house to me and I took immediate quite possession and occupation of the same to date.

(7) The sale of the land to me was witnessed by many people including Charles Bahemuka among others.

(8) ----

(9) THAT of the alleged parties to Civil Suit No. 847 of 2007, I only know one Byarugaba Benjamin who used to be my friend.

(10) THAT I have never dealt with the said Byarugaba Benjamin in any way in respect to my land and / or house.”

The Respondent filed an affidavit in reply deposed to by Fred Bwanika, the court bailiff issued with the warrant. He therein states that on 16th June 2008 he was issued with a warrant of arrest against Benjamin Byarugaba. While looking for Benjamin Byarugaba for arrest, the LCI Chairman of Kijura North told him that Byarugaba could be at his house within Kijura North where he had a wife called Nyakato Josephine. That the chairman led him and the Police personnel to the house where they were told by the tenants, one of them being Caroline Birungi, that their landlord was Benjamin Byarugaba and his wife was Nyakato. That on 30th June 2008 a warrant of attachment of the house was issued. Armed with the warrant he went back to the house affixed a copy on the door of Caroline Birungi a tenant therein and left a copy with her to deliver to her landlord.

That Caroline Birungi signed on the warrant. Annexure R4 to Bwanika’s affidavit is a photocopy of the warrant whereon it is endorsed:-

“I Caroline Birungi have today 18th July 2008 received a copy of attachment warrant on behalf of Mr. Benjamin Byarugaba to deliver it to him ---“

The Objector/ Applicant filed an affidavit in Rejoinder dated 20th October 2008 wherein she denies ever having been married to Byarugaba Benjamin. She however admits that Caroline Birungi has once been her tenant between April and June 2008.

Mr. Muhwezi, Counsel for the Respondent, submitted that the Objector had failed to prove possession. He argued that the Objector was not present when the attachment was executed. In both her affidavits in support, and in rejoinder the Applicant/Objector shows that at the time of attachment and at all material times she was in possession of the land and house. Being in possession does not necessarily mean being present or in actual occupation at the time of attachment. It refers to being in control of the property. In cross-examination the Applicant testified that she occupied a portion of the house while the other portion was occupied by tenants. Her testimony in this regard is corroborated by Fred Bwanika in his affidavit deposed in reply. He avers that the LCI Chairman Kijura North told him that the judgment –debtor and his wife, the Objector, were residing at the property and led him there. He also stated that Caroline Birungi was a tenant at the house at the time of attachment and that she had informed him that the judgment-debtor and his wife, the Objector, lived in the same house. That on the date of attachment the said Caroline Birungi informed him that the Objector had gone for shopping in Masindi town.

Still in cross-examination the Objector admitted that Carolyne Birungi was a tenant in the house between May and July 2008. To show that the house was in her control she produced a receipt book, exhibit D, which showed that she was collecting rent from tenants, among whom had been Carolyne to whom she had issued receipt No. 409 dated 1st June 2008. Mr. Muhwezi submitted that the receipt book was not genuine as it was used for collection of rent as well as collection of fees. The Objector when cross-examined about this dual use of the receipt book she explained that the Receipt Book was being used for collection of school fees for her Hope Care Nursery School and also for rent for the house. The receipts for house rent are signed by the Objector.

I have carefully considered the evidence adduced by both parties and I am satisfied that the Objector was in possession of the house. The issue is whether she held the house on her own account or in trust for the judgment debtor, Byarugaba Benjamin. In her affidavit in support the Objector states that she bought the land and house thereon on 12th April 2006 from Binangaijo Apuuli of Masindi. She tendered in Court an agreement which shows what she had purchased the property from one Binangaijo Apuuli at a consideration of shs5,500,000/=. The agreement shows that she paid shs 3,300,000/= upon the execution of the agreement and the balance was payable on 28th April 2006. She, in cross-examination, stated that she had paid the balance in three installments. The payment installments are endorsed on the agreement as follows:-

- Shs 500,000/= paid on 28th May 2006
- Shs 300,000/= paid on 29th May 2006
- Shs 1,500,000/= paid on the 7th July 2006 and described as final payment.

The sale agreement and the acknowledgement of the last installment indicate Josephine Nyakato as purchaser of the property. The judgment-debtor Benjamin Byarugaba does not appear anywhere on the agreement as a party or as a witness. On the basis of this agreement it is the Objector's contention that she has interest in the property as purchaser and as such owner thereof.

The Respondent on the other hand contends that Benjamin Byarugaba is the Objector's husband and the owner of the property in issue. The Respondent relied on the affidavit of the Court Bailiff Fred Bwanika. Bwanika avers that he strongly believes that the house belongs to the judgment debtor, Benjamin Byarugaba. His grounds for the belief are that firstly the Kijura North LCI Chairman had led him to the suit property as the house where Benjamin Byarugaba and his wife Nyakato Josephine could be found. Secondly that the tenants, one of them called Carolyn Birungi, informed him that their landlord was Benjamin Byarugaba and that he and his wife Nyakato also lived there. Thirdly, that while going to the house to execute the warrant of attachment he was accompanied by the LCI Secretary for Defence of the area, Jimmy Angodia.

The objector denied that Benjamin Byarugaba was her husband. She described him as a friend. She, however, admits that she has two children with him one aged 12 years and the other 13 years. She also admits that the judgment debtor used to stay with her at the same property but contends that she had last seen him in April 2008. I must comment that a woman staying with a man and having children with that man does not necessarily mean that there exists a husband and wife relationship between such man and woman. Further even spouses can own property in their individual capabilities. In cross-examination the Objector/Applicant denied that the judgment – debtor has ever contributed or in anyway assisted her to acquire the suit property. She has produced an agreement to show that she had personally bought the property from one Binangajo Apuuli. The judgment debtor is not a party to the agreement.

Counsel for the Respondent challenged the agreement on the ground that the Objector did not call the evidence of the seller or any witness to the agreement. But the Applicant's statement on oath that she bought the property from Binangajo Apuuli was not rebutted by any evidence to the contrary. Neither did the said Carolyne Birungi nor the LCI Chairman and LCI Defence Secretary swear any affidavit to verify the information relied upon by Fred Bwanika.

Considering all the above I find that the Respondent has adduced no evidence to show that the Applicant held the property in trust for the judgment –debtor, Benjamin Byarugaba. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. See section 101- 103 of the Evidence Act. The Respondent has failed to discharge that burden.

All in all the Applicant/Objector has satisfied this court that she has interest in the land and house and that at the time of the attachment she had possession of the property on her own account. The application is therefore allowed and the said property is removed from attachment. The Applicant is awarded costs of this application. I so order.

Hon. Mr. Justice Lameck N. Mukasa

Judge

Commercial Court Division

16th February, 2009