

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**MISCELLANEOUS CAUSE NO 185 OF 2013  
(ARISING FROM CIVIL SUIT NO 196 OF 2008)**

**NAMUSISI TALISUNA ROBINAH}..... APPLICANT**

**VERSUS**

**KENROY INVESTMENTS}..... RESPONDENT/JUDGMENT CREDITOR**

**AND**

**TALISUNA ELIAB} .....RESPONDENT/JUDGMENT DEBTOR**

**BEFORE HON JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant commenced this application by notice of motion under order 22 rules 55, 56 and 57 and orders 52 rules 1, 2, and 3 of the Civil Procedure Rules objecting to the attachment of land comprised in Kyadondo block 223 plot 1493 at Nabwojo Numugongo herein after referred to as the suit property, which property was attached pursuant to a consent decree obtained against the second respondent in civil suit number 198 of 2008 and seeking an order for the suit property to be released from attachment. The application is also for orders that the first respondent/judgement creditor releases the certificate of title of the suit property to the applicant. Finally the applicant seeks for orders that the judgement creditor pays the applicant's costs.

The grounds of the application are that the land belongs to the applicant and the judgement debtor as joint tenants without distinction of interest. Secondly that the judgement debtor has no distinct interest in the said land and the applicant is not the judgement debtor in the suit. Thirdly in so far as ownership of the land is subject to the doctrine of *jus accrescendi*, in law and equity, the purported attachment of the suit property is illegal, null and void. Finally that it is just and equitable that the land is discharged from execution of the decree in the above suit in so far as the applicant is entitled to the full title as well as full possession of the land as a joint tenant. The application is supported by the affidavit of the applicant and additionally avers the following facts. The applicant is the wife/spouse of the judgement debtor and has been staying in the house constructed on the suit property. On 13 October 2008 the judgement creditor and the applicant's spouse executed a consent decree for the applicant's spouse to pay to the judgement creditor Uganda shillings 125,000,000/= in six equal monthly instalments. Following the execution of the

decree the judgement creditor attached the suit property in execution of the decree. Thereafter the judgement creditor embarked on trying to sell the land and has also been trying to evict the applicant and her family from the suit land. She relies on a valuation report and a letter to the Registrar of Titles to approve the valuation report, advertisement of the land for sale, and eviction notice all attached to the affidavit in support of the application. A copy of the certificate of title on the suit property was also attached. The applicant and her family are currently in possession of the land on account of the joint tenancy and joint ownership with the judgement debtor. She contends that as far as the land is a joint tenancy, it is not liable to attachment to satisfy the personal debts of the judgement debtor and the purported attachment in execution of the consent decree against the judgement debtor is illegal, null and void.

In reply the managing director of the respondent/judgement creditor Mr Manzi Tumubweine deposed to an affidavit after discussion of the case with his lawyers. In his affidavit he asserts that the attachment and sale of the land has been completed. The property had been advertised in the Monitor Newspaper of Tuesday 18th of December 2012 and renewed in Monitor dated 9th of February 2013 at page 21. Sale was concluded on 11 March 2013 without any objection and pursuant to a renewed warrant issued on 7 March 2013.

He asserts that the applicant was present during negotiations for the loan together with the respondent/judgement creditor and gave her informed consent to the deposit of the certificate of title as security for the money that gave rise to the suit claim and even signed transfer forms together with the respondent/judgement creditor, her husband.

The judgement creditor approved a loan to the judgement debtor, one for Uganda shillings 15,700,000/= and another for Uganda shillings 105,000,000/= and the suit property title was deposited as security. The applicant personally signed the loan agreement and represented herself as a joint borrower. The applicant also signed on the transfer form and personally gave her passport photograph to help in the transfer of the certificate of title. Additionally two sons of the applicant and the judgement debtor namely Joseph Talisuna and Edger signed on the loan agreement for Uganda shillings 105,000,000/= and also deposited their passport photographs with the judgement creditor. The applicant also signed on the mortgage deed together with her children. The judgement debtor did not register the mortgage deed but opted to register a caveat which it did on 17 October 2007.

The application has been overtaken by events because if the applicant wished to file an application for objection to attachment, she should have done so in the year 2009 when she was served with eviction notice and warrant of attachment dated 10th of December 2012. Because the applicant and her husband wilfully deposited the certificate of title in question as security for the payment of loan, and the claim has not been paid and as such the property has been sold subject to the warrant of court after successful litigation. By the applicant signing all the relevant documents she consented to the mortgage and sale and ceded her rights over the land to enable her husband obtain the money in question and in the event of default had given her implied

consent to have the land sold for the judgement creditor to recover its money. The respondents managing director prays for a court order for immediate transfer of land into the names of Rubondo Solomon.

In rejoinder the applicant avers that it is not true that she did not object when the suit land was attached in execution because she was not aware that the land had been attached and until in early 2010 because the respondent had chosen to execute the decree by arrest and detention of the judgement debtor. After the consent decree the respondent chose to have the judgement debtor arrested and detained in civil prison. Because of her suspicion she lodged a caveat on the title around July or August 2009 to prevent any dealings in the property including attachment.

She further asserts that she never participated in negotiations for the alleged loan between the judgement creditor and the judgement debtor nor did she consent to the deposit of title on the suit land or sign any transfer in respect of the same regarding the loans. In November 2005 the judgement debtor, herself in the presence of the children borrowed from the respondent Uganda shillings 3,000,000/= on the security of the land to facilitate the judgement debtor's travel to the United Kingdom. At the time of borrowing the loan the respondent was made to sign a loan agreement duly witnessed by her two children a copy of which the respondent kept and transfer forms as well depositing her passport photos in accompaniment to the said transfer. On February 2006 the loan and its accumulated interest was duly repaid but the judgement creditor did not return the title by claiming that it was in the safe custody of the bank. She alleges that she became aware of the alleged loan of Uganda shillings 15,700,000/= and Uganda shillings 105,000,000/= when she saw from a husband a copy of the plaint filed against him for recovery of the sums. The respondent forged the loan agreement by removing the last page of the previous loan agreement which he had signed together with the judgement debtor and her two children as witnesses in borrowing Uganda shillings 3,000,000/= and attaching it to the new document. She reported a case of forgery of her signature against the respondent in Central Police Station Kampala in September 2009 under reference CRB No. 54/10/09/09.

She claims that she was never served with a warrant of execution and eviction by the respondent or any person because she was not a party to the suit and only learnt about the same through the judgement debtor immediately after lodging a caveat on the suit land. Nothing has been overtaken by events and the sale being sanctioned by court order can also be discharged by another court order in so far as the court cannot intend that the property not belonging to a judgement debtor should be sold in satisfaction of the judgement debtor's personal debts. She did not file the application earlier because she had been advised by the judgement debtor's previous lawyer that the land was jointly owned and could not be attached in execution of the decree. She has further been advised by her current lawyers Messieurs Balondemu, Candia and Wandera Advocates that property owned as joint tenants cannot be attached in execution of a decree against one of the joint tenants, though the property remains formally attached until released by another order of the court.

The application came for hearing on 3 April 2013 and the applicant was represented by counsel Candia Alex while the respondent represented by Evans Tusiime.

Counsel Candia submitted for the objector. The issue to determine in the applicants case is based on Order 22 rules 55, 56 and 57 of the Civil procedure Rules and the case of Co-op bank ltd in Liquidation vs. Muganwa Sajjabi Michael TA as Muganwa Enterprises and Another High Court Commercial Division Miscellaneous Application No. 0716 of 2003 where the following principles were laid down by Justice Bamwine namely:

1. Whether at the time of attachment the applicant had interest in the suit property.
2. Whether the applicant was in possession of the suit property
3. Lastly whether the possession was on the applicants own account or on account of judgment debtor.

The applicant is a joint tenant according to annexure "G", a fact which is not denied by the respondent. Consequently she has proved that she had interest in the suit land at the time of the attachment. The applicant by paragraphs 2 and 8 of her affidavit in support proves that she has been staying on this land with her family and this is not denied by the respondent in reply. Lastly annexure "G" which is the certificate of title proves that the applicant is a registered joint tenant. The applicant's Counsel submitted that at common law and equity a joint tenant is entitled to full possession of land without exclusion by the joint owner. Secondly the joint tenant/applicant has a right of survivorship. The applicant's possession is on her own right as such and in such an application what is most important is possession. Having being in possession and at the time of attachment has proved that the suit property was not liable to attachment. Joint tenancy cannot be severed according to the case of **Re Foley (deceased) Public Trustee vs. Foley and Another (1955) NZLR page 702**. Furthermore under the principles of Land Law in Uganda by John Mugambwa 145, 146 and 150 discusses joint tenancy and tenancy in common. Finally the applicant's counsel submitted that at this stage the court is not required to look beyond possession and interest of the objector. He prayed that the application is allowed.

In reply the respondents counsel Evans Tusiime opposed the application. He relied on the affidavit of Manzi Tumubweine filed on 2<sup>nd</sup> of April 2013. His submission is that under order 22 rules 55 (1) of the Civil Procedure Rules, application for objection to attachment must not be designedly delayed. In this case the attachment of property has been concluded by way of sale of property. The objector in annexure "E" and "F" attaches documents of April 2009 and up to March this year when no application filed. Paragraph 3 of affidavit in reply avers that the property was sold on 11 March 2013 to Absalom Rubondo and the sale agreement is annexure "B". The sale took place after advertisement in Monitor Newspaper of 18<sup>th</sup> December 2012 and 9<sup>th</sup> February 2013. The remedy of release from attachment is not available because the property has been sold. Annexure "B" is a warrant of court dated 10<sup>th</sup> December 2012. He submitted that the court finds that attachment has been concluded. What remains is giving vacant possession or the remedy of challenging the sale.

Objector's interest in property is true at the time but she however consented with her husband and family for the property to be used as security for a debt. She signed the loan agreement annexure "E" to the affidavit in reply. She signed transfer forms together with her husband transferring the property and even attached her passport photograph. She presented two of her sons namely Talisuna Joseph and Musede Edgar who signed as witnesses and gave passport photographs to the judgment creditor. She wilfully gave up the property to secure the debt which gave rise to the case before court. By signing transfer forms she intended the property to be transferred upon default.

Counsel submitted that as far as the affidavits in rejoinder of the applicant and her allegations of forgery are concerned, the allegations can form the basis of a fresh suit for determination of that fact. Consequently the respondent's counsel prayed that the application is dismissed with costs to respondent.

In rejoinder counsel Candia submitted for the applicant that the affidavit in rejoinder and paragraphs 6, (j) and (k) shows that she was advised by previous lawyer that the property cannot be attached. Secondly, the attachment is null and void. Current lawyer's state that mistakes of counsel should not be visited on lawyer.

The assertion that the property has been sold is not true because the annexure "D" to reply shows that out of the purchase price of 140 million there is a balance of 13 million. A sale is not complete until full purchase price has been paid. This was a judicial sale and is not complete immediately it takes place. (See **Lawrence Mwanga vs. Steven Kyeyune CA 12 of 2001**). A sale is liable to be set aside in appropriate proceedings and if no such proceedings are taken, or if taken and not successful, the sale will then be made absolute.

Thirdly on the assertion that there was consent, those allegations go beyond the inquiry. The Respondent can proceed under order 22 rules 60 to determine the issues as between respondent and applicant. Investigation should be limited to possession and interest in the suit property and other inquiries left for another proceeding. Counsel reiterated previous prayers.

### Ruling

The applicant's application was commenced under order 22 rules 55, 56 and 57 of the Civil Procedure Rules. Rule 55 is concerned with investigations of the claim to and objections to attachment. The subject of inquiry of the court under rule 55 is to establish whether at the time of the attachment the claimant had some interest in the property attached. The interest referred to in rules 55 and 56 is qualified by rule 57. Such an interest must be capable of legal protection by the court. The court protects such interest in the property from attachment and sale. The interest is established on a prima facie basis. Property is released from attachment under rule 57 which provides as follows:

"57. Release of property from attachment

*Where upon the investigation under rule 55 of this order the court is satisfied that for the reasons stated in the claim or objection the property was not, when attached, in the possession of the judgement debtor or some person in trust for him or her, or in the occupancy of a tenant or some other person paying rent to him or her, or that, being in the possession of the judgement debtor at that time, it was not in his or her possession on his or her own account or as his or her own property, but on account of or in trust for some other person, or partly on his or her own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.”*

The court has established that the property was partly held on account of the judgment debtor as a joint tenant and partially on account of the Applicant as the other joint tenant. Consequently the property was not liable to attachment in the manner it was done. The Registration of Titles Act defines a joint tenancy under section 56 thereof as follows:

“56. Joint tenants and tenants in common

Two or more persons who are registered as joint proprietors of land shall be deemed to be entitled to the land as joint tenants; and in all cases where two or more persons are entitled as tenants in common to undivided shares of or in any land, those persons shall in the absence of any evidence to the contrary be presumed to hold that land in equal shares.

Each of the joint tenants holds the property in trust for the other tenant. Moreover the property is indivisible as contradistinguished from a tenancy in common which includes a definite and severable interest for each tenant. According to John T Mugambwa in the **Sourcebook of Uganda's Land Law** at page 259 a joint tenancy has two essential features these are the four unities and secondly the right of survivorship. The four unities are the unity of possession, time, title, and interest. In the case of **AG Securities versus Vaughan and others [1988] 2 All ER 173** Sir George Waller considered the essential ingredients of a joint tenancy and held that first of all there must be unity of interest. Secondly there has to be unity of title i.e. it is conferred by the same document or the same act. Thirdly there is the unity of time. The interest of the tenants must commence or vest at the same time. Fourthly there has to be unity of possession of the whole property. A joint tenancy is defined by **Osborn's Concise Law Dictionary 11th edition Sweet and Maxwell at page 235** as a form of ownership in which two or more persons are regarded as being wholly entitled to the whole property. On the death of one of the joint owners, the property remains vested in the survivors by a right of survivorship (*jus accrescendi*). It is further stated that:

*"A joint tenancy only exists if the four unities are present. These are the unities of:*

- 1. time – each co-owner must acquire the right at the same time;*
- 2. title – each must acquire by virtue of the same act or document;*
- 3. interest – each must acquire the same interest;*

4. *possession – each must be entitled to possession of the whole property."*

The evidence is clear that Mengo Kyadondo block 223 plot 1493 is registered in the names of the second respondent/the husband of the applicant and the applicant. The registration was effected on 29 March 2001 under the same instrument number. The consent decree which gave rise to execution proceedings is in civil suit number 198 of 2008 between the first respondent Kenroy Investments Ltd against Talisuna Eliab, the second respondent to the application. It is for payment of Uganda shillings 125,000,000/= payable in six equal monthly instalments. Annexure "B" is the first warrant of attachment that is dated 2008 wherein it is ordered that the second respondent/judgement debtor was ordered to pay Uganda shillings 125,000,000/=. The warrant of attachment in execution attaches the judgement debtor's land comprised in Kyadondo block 223 plot 493 unless the judgement debtor pays Uganda shillings 125,000,000/=. Apparently the execution was never successful. In a letter dated 21st of May 2009 the Commissioner for land registration indicates that the property was registered in the names of the applicant and the second respondent. On 5 September 2007 the first respondent lodged a caveat on the suit property. The managing director of the first respondent indicated that the joint tenants of the suit property had executed a mortgage deed for the property. This is annexure "H" to the affidavits of the managing director of the first respondent. The mortgage deed was neither endorsed by the first respondent nor even witnessed. It is consequently understandable that it could not be relied upon. The loan agreement annexure "C" is dated 27th of July 2006 and on the first page it has Mr Talisuna Eliab as the only borrower. This proves that the applicant was not the borrower. However on the last page there are two signatures of the applicant and the second respondent as "borrower" in the singular.

The applicant in the affidavit in rejoinder claims that the document and particularly the signature page was attached from another previous loan agreement for Uganda shillings 3,000,000/=. Lastly paragraph 14 of the affidavit of the managing director Mr Manzi Tumubweine avers that the property was sold to one Mr Solomon Rubondo subject to him paying the balance of the purchase price of Uganda shillings 13,000,000/=. The applicants counsel submitted that the sale was not absolute and could be set aside.

I have carefully considered the warrant of attachment of immovable property in execution annexure "B" to the affidavit of the managing director and dated 10th of December 2012. The subsequent warrant of attachment is of great concern in the resolution of this dispute. It is a warrant to attach the judgement debtor's land comprised in Kyadondo block 223 plot 493 (the suit property) registered in the names of the judgement debtor and the applicant. It goes on to show that the applicant had consented to the loan. There is no evidence of proceedings between the first respondent/plaintiff and the applicant. The question of whether the applicant had consented to the loan cannot be assumed or based on the mortgage documents which in any case were not duly executed. Moreover the judgment debtor is Talisuna Eliab and not the Applicant. The applicant was equally entitled as a joint tenant to the property. Even if the property of the judgement debtor in the joint tenancy can be attached, a proposition which has its own problems,

it cannot extend to interfere with the rights of the other joint tenant/applicant to this application. She was not a party to the suit and was equally entitled to the entire plot as much as the judgement debtor. At worst, the attachment only relates to the rights of her husband/judgement debtor. Secondly the question of consent to mortgage family land was not in issue. There was a judgement against the judgement debtor/second respondent. The question of whether the property to be attached should be the suit property only arose in execution. As indicated above, the mortgage deed was inoperative because it was not duly executed. Consent to the said property cannot be considered at the stage of execution but at the time of mortgaging, pledging or selling the property by a member of the family under the provisions of section 39 of the Land Act as amended by the Land Act (Amendment) Act 2004. In those circumstances the honourable Registrar Execution was not entitled to indicate in the warrant of attachment in execution that the applicant had consented to the loan. The question before the honourable Registrar Execution Division was whether the property was liable for attachment. The least he could have done was to purport to attach the interest of the judgement debtor only. In such case, it may be assumed for purposes of legalities that the joint tenant may have his title cancelled and registered in the names of someone else without affecting the other joint tenant. Because of the unity of interests, it is doubtful whether the interest of the judgment debtor could be severed without the consent of the applicant.

In those circumstances, the attachment was irregular insofar as it purports to attach in express terms the interest of the applicant as notified in the certificate of title. As far as the law is concerned, in terms of order 22 rules 57 of the Civil Procedure Rules, the property was at the time of attachment in the possession of the applicant in her own right in as much as it was in possession of the judgement debtor as well. I must emphasise that the property was not sold on the basis of the mortgage and therefore the question of consent to mortgage the property does not arise. It was purportedly sold in execution of the consent decree which does not mention the property at all and therefore sold in execution of a decree. In other words the execution division were looking for any property of the judgement debtor to satisfy the judgement debt. As far as the title of the purchaser is concerned, it is apparent under section 49 of the Civil Procedure Act that his title is not absolute in accordance with paragraph 14 of the affidavit of Manzi Tumubweine in opposition to the applicant's application. In that affidavit he clearly indicates that the purchaser of the suit property Mr Solomon Rubondo is yet to pay Uganda shillings 13,000,000/=. Section 49 provides as follows:

*"Subject to any law relating to the registration of titles to land, where immovable property is sold in execution of the decree, the sale shall become absolute on the payment of the full purchase price to the court, or to the officer appointed by the court to conduct the sale."*

By reading it in the negative, because the full purchase price has not been paid, the sale has not had become absolute and the title of the purchaser can be impeached at this stage. Before dealing



with the title of the purchaser and the attachment the law on release from attachment needs to be set out.

The question of whether to release the property from attachment or not upon investigation of the claim is a preliminary inquiry and upon establishment of the facts the orders of the court are dictated by either order 22 rules 57 to release the property or disallow the claim under order 22 rules 58 of the Civil procedure Rules. The power of the court is limited to establishing the facts of the applicant's interest in the property to determine whether the property is liable to attachment or not. Where it is established that the applicant had an interest the following rule commands that the property is released from attachment. An aggrieved party has a right to have the matter finally determined in an ordinary suit subsequent to the release from attachment. Authorities hold that investigation of the claim is a preliminary investigation and not conclusive. In **Harilal & Company versus Buganda Industries Ltd [1960] 1 EA 318**, Lewis J held on the scope of order 19 rule 55 and subsequent rules that the investigation is preliminary. The same position can be found in **John Verjee and Another versus Simon Kalenzi, Court of Appeal Civil Appeal NO 71 of 2000**; and **C. Baguma v Highland Agricultural Export Ltd High Court Miscellaneous Application No. 655 of 2001**. The rules provide for a summary procedure for releasing the property from attachment or disallowing the claim and any aggrieved party may sue for a final determination of the question of ownership or possession under order 22 rules 60 of the Civil Procedure Rules. As far as immovable property is concerned, under order 22 rules 77, 78 and 79, failure to pay the purchase balance within the statutory period operates to cancel the sale and the property will be resold.

On dilatory conduct the argument fails because the attachment was based on a renewed warrant of attachment after December 2012 and the application was filed soon thereafter. Last but not least I have considered the allegations of the applicant in her affidavit in rejoinder that her signature had been forged or to be precise, a document which she had signed had been used to attach her signature from a different document to the contested loan agreement. I cannot make much comment about the allegation because it is an order of the court by consent of the parties ordering the judgement debtor to pay amounts of money under the loan agreement. The liability of the judgement debtor has been established and the foundations of that liability are documents to which the applicant is a signatory. The documents however do not attach her interest. The fact that she signed blank transfer forms is irrelevant in the process of execution. In those circumstances, the sale of the property to Mr Solomon Rubondo cannot stand according to the operation of law under order 22 rules 77, 78 and 79 of the Civil Procedure Rules. In the very least, the property is supposed to be resold. For the avoidance of doubt, the sale of the suit property to Mr Solomon Rubondo cannot stand in law for failure to pay the balance of the purchase price and is set aside. He is entitled to claim a refund of his money.

The applicant has established that she has an interest in the property at the time of attachment. Consequently the attachment is set aside. Any questions as to her participation in the loan agreement can only be the subject of a separate trial and cannot be dealt with in execution

proceedings. Those questions may deal with whether she ceded her right to the suit property. In those circumstances, the applicant's application succeeds with costs.

Ruling delivered in open court on the 31<sup>st</sup> of May 2013

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Waniala Alan holding brief for Candia Alex for the Applicant,

Applicant in court

Manzi Tumubweine Managing Director of the first respondent in court

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**31<sup>st</sup> of May 2013**