

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)**

MISCELLANEOUS APPLICATION NO. 212 OF 2017

**(ARISING OUT OF EMA NO. 827 OF 2016)
(ARISING FROM CIVIL SUIT NO. 461 OF 2013)**

**1) THE REGISTERED TRUSTEES OF ENTEBBE INSTITUTE
2) DEO MUKIIBI
3) KASANGAKI APPLICANTS/OBJECTORS**

VERSUS

**ROCKSHIELD INTERNATIONAL LTD RESPONDNET/ JUDGMNET
CREDITOR**

AND

**1) BUKESA JAMES
2) AKUGIZIBWE JUDITH
3) KATWESIGYE CHRISTINE CO-RESPONDNETS/JUDGMENT
DEBTORS**

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This application was made under 0.22 rr 55, 56 and 57 and 0.52 rr1, 2 and 3 C.P.R and S.98 CPA.

The Objectors are seeking the following orders:-

- 1) The property comprised in Plot 33-43 LRV 4482 Folio 14 Portal Road, Entebbe, Wakiso and all developments located at Entebbe Municipality known as Entebbe Club are not liable to attachment in execution and giving vacant possession in respect of any order or decree issued under C.S 461/2013.
- 2) The said property be released from execution.
- 3) The execution and attachment arising from the decree in C.S 12/2008 be set aside as against Plot 33-43 Portal Road, Entebbe.
- 4) Costs of the Application be provided for.

The grounds for the application are that:-

a) The property under attachment is occupied by the Applicants who are owners in possession in their own right, whose right to renew the expired lease was fraudulently hijacked by the Co- Respondents/Judgment Debtors.

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b) The Objectors are neither parties to the suit between the Respondents nor indebted to the decree holder.

10 c) The decree in C.S. 461/2013 seeks to recover money from the Co-Respondents arising from breach of contract for the sale of the same land to the Respondent/Judgment Creditor.

d) The attachment and sale of Plot 33-43, LRV 4482, Folio 14 would affect the interests of the Objectors, who were not party to the suit, by subjecting them to eviction.

15 e) The Objectors shall suffer irreparable loss if the order to attach the subject property in execution of the decree is not stayed /set aside.

f) The objection is not designed to delay as the Objectors only learnt of the attachment recently.

20 g) It is only in the interests of justice that this application be granted.

There is an affidavit in support of the application deponed by the Second Applicant/Objector.

25 There is also another affidavit in support deponed by Francis Xavier Yiga, Chair of the Executive Committee of the First Applicant.

There is an affidavit in reply by the First Co-Respondent James Bukesa. He contends that the Applicants' interest in the lease expired as it was subject to effusion of time.

30 The Applicants/Objectors have no interest at all in the land and are strangers to the suit and land in issue. Therefore that the application ought to be dismissed with costs.

There is also an affidavit in reply deponed by Kabayo Alex on behalf of the Respondent Rockshield International Ltd.

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He contends that the application and affidavits in support are full of falsehoods and misrepresentation.

40 That court issued warrant of attachment and sale of property comprised in Plot 33-43 Portal Road, Entebbe and Plot 66-62 LRV 4412 Folio 1 Kampala Road, Vide EMA No. 827/16. This was in execution of the judgment and orders in HCCS 461/2013- Respondent now against the Judgment Debtors.

The property comprised in Plot 60-62 LRV 4412, Folio 1 Kampala Road was sold to Avcon International Ltd and Shs. 495,000,000/- recovered.

5 But that the entire decretal sum US Dollars \$130,000, Ug. Shs. 129,633,000/- and costs were not realized and there is still an outstanding sum owing to the Respondent/Judgment Creditor.

It is the said outstanding amount to be realized by sale of Plot 33-43 Portal Road, Entebbe.

10 Denying paragraphs 209 and 2-7 of the supporting affidavits, it was contended that the Wakiso District Land Board has a right and independence to grant or refuse to grant a lease.

That the property on Entebbe Road is not valued at Shs. 1,300,000,000/- and the Judgment Debtors were the proprietors of the property.

15 The Judgment Debtors agreed to the sale of the property and handed over the title deed to court for purpose of the auction.

20 While the Applicants were holding on to the property in issue, their lease expired in 2005 and it was not renewed and currently Tamari Foods Exporters Ltd under the directorship of the Judgment Debtors holds the lease to the property.

The company has legal ownership of the property and the Applicant has no equitable interest whatsoever.

25 The said company has both legal and actual possession of the property and are the registered proprietors here.

The Applicant is not in possession or occupation of the said property.

30 The Respondent is not aware of any fraud involved in ownership of the said property.

35 During the hearing of the suit and the subsequent execution proceedings, the property was in possession of the Judgment debtors and the Applicants had no interest in the property and they merely wish to defeat execution and the course of justice. They have no legal or lawful claim whatsoever.

40 The Applicants have no locus to file this application which has no legal justification, while the Judgment Debtors as owners of the property are ready and willing to sell the same in fulfillment of the decretal sum.

There is an affidavit in rejoinder by Francis Xavier Yiga stating among other things that the Judgment Debtors have no actual possession or physical possession and it is to first establish who rents the bar and restaurant located on the premises in dispute.

The Applicants' interest can only be established upon investigation by court.

After a number of adjournments for the reasons appearing on record, the application was heard on 20.04.17.

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Counsel for the Applicant went through the motion and the orders sought.

He emphasized that the rules under which the application is made raise the question as to **whether at the time of attachment; the property was in possession of the Applicant** – 0.22 r
10 57 C.P.R.

He submitted that, once court is satisfied that the property was in possession of the Applicant at the time of attachment, it releases the property.

15 The case of **Mary Nakato vs. Nanyoga Rose & Another C.A 0412/2011** was cited in support. It was held in that case that ***“The question to be decided in cases of this nature is whether on the date of the attachment, the Judgment Debtor or Objector was in possession. And 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”.***

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The sole question to be investigated is this one of possession and some interest in the property, Counsel insisted.

He added that from the circumstances of the present case and as can be discerned from the
25 affidavits in support, it is clear that the First Applicant were the lessees in occupation and physical possession.

The lease expired about 2005 and there was a lapse of about seven years in applying for extension. However that, the application was made in 2013, and rejected by the District Land Board on the sole grounds that there was another Applicant for the same.

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And although the lease was eventually granted to Tamari Foods Exporters Ltd, the Applicants remained for physical possession.

Annexure E to the affidavit in rejoinder of Francis Xavier Yiga is evidence that the new lessees
35 acknowledged that the Applicant was the one in physical possession. There was no suggestion to compensate them for their occupancy.

The other evidence of physical possession are the taxes. That is, the property rates paid to the Municipal Council over time- receipts of 2014, 2015. The Annexure has an apparent typing
40 error on the face of it, that is, the way the Applicants' receipts would be written. The Applicants wrote to complain.

The rental receipts are more evidence of possession – affidavit in rejoinder. The property has a building part of which is rented out as a school. Refer to the receipts of 2012, 2013, 2014, 2015 and 2016- from a tenant called Ouma Grace.

- 5 The final evidence of possession is a letter from the Lawyers of Tamari Foods Exporters Ltd – Annexure F, demanding rent from the Applicants for the premises they occupy are in possession.

10 The Second issue- Counsel argued is interest in the land. It is clear that the land is not vacant, Counsel pointed out. It has buildings dating back to the 60's which are still being used by the Applicant as a recreational facility for indoor games.

15 Although the lease expired and is held by a new proprietor, the Applicants have residual equitable interests. They cannot be disposed in a fashion below the level of squatters. And that residual equitable interest is enough for court to release the property from attachment.

20 The Co-Respondents on the other hand have no interest in the land, Counsel argued. They are neither registered proprietors nor occupants. The property is leased to Tamari Foods Exporters Ltd, which company is not a party to these proceedings and was not a party in the civil suit.

While the Co-Respondents are said to be Directors of the Company, a company is a separate legal entity from its subscribers.

25 That the Respondent could not attach property of the company, the registered proprietor that was not a party to the suit. The attachment, Counsel asserted, was therefore unlawful.

30 And that since the requirements for release of the property have been satisfied as set out in the supporting affidavits and the equitable interests of the Applicant in the land proved, court should order the release of the property from attachment together with costs of the application.

Counsel for the Co-Respondents submitted that the application is misplaced and should be dismissed with costs.

35 Whereas Counsel conceived that the attempt to attach the property was wrong in law and in fact, he argued that the Applicant equally has no right or interest in Plot 33-43 Portal Road, Entebbe, so as to make this application.

40 The evidence attached to the application shows that the Applicants' interest is in Plot 45-47. And there is nothing else to show that they have interest in Plot 33-43, save for Annexure "G"- the letter dated 25.05.15, and Town Clerk received it or responded to it, to acknowledge that there was an error in assessment.

That there could not have been an error in the assessment and receipts of the Town Clerk that indicate Plot 45-47 as the Town Council has records.

Therefore for the Applicant to claim that they have been paying rent for the property in 2015 is an afterthought to cover-up their claim for the suit property which does not belong to them.

- 5 Further that, the Applicants concede that the lease expired and their application for renewal rejected in 2013.

Counsel argued that, a lease is an infraction of time and once the lease has run to the full term and expired, there cannot be an application for renewal.

10

The only time a lease is extended is when there is a development, and renewal is sought before expiry of initial lease. If initial lease expires but one continues in possession and is able to complete developments the application can be made for renewal of expired lease. Otherwise, a lease about to expire can only be renegotiated and a variation sought when it is still running.

15

That the claim of a physical possession is untenable at law and more particularly the claim that Applicants have rights because of a standard lease agreement.

- 20 The Public Lands Act and Public Lands Ordinance then in force, clearly prove that a lessee whose lease is about to expire is entitled to remove its machinery and equipment from the premises three months before expiry of the lease. If the lessee fails to do so, all the machinery etc, if any on the premises passes on to the lessor.

- 25 It is unfortunate, Counsel stressed, that the Applicant has not attached any lease agreement over the suit premises. The presumption is that they do not have any otherwise this was the most opportune moment to produce it.

- 30 The certificate of title attached to the application- Annexure A to Second Applicant's affidavit, it was pointed out, refers to a term of 49 years with effect from 01.01.52 for Plot 107-121 Kampala Road and not Portal Road. It is not the same property.

And that since the lease had long expired in 2001, that would not give them right to occupy the property.

- 35 It was insisted that, the Applicants are not entitled to succeed in this application because the property is not under attachment. It is also not the property of the Judgment Debtors and that it has been proved that 0.22 r 51 C.P.R has been fulfilled in order for property to qualify for attachment.

- 40 There is no evidence of any court order prohibiting the Judgment Debtor from transferring or charging the property in any way and prohibiting all persons from taking any benefits from the transfer or charge and ordering the Judgment Debtor to deliver up to the court the duplicate certificate of title to the property. And it is not stated in the application that the warrant of attachment was served on the Judgment Debtor, Counsel argued.

Further that, all other persons are prohibited from taking any benefit by way of registering the warrant of attachment on the Register of Titles, where it is noted by the Registrar of Titles and given an instrument number.

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No such instrument number is mentioned in any of the affidavits and therefore that such a warrant is not registrable by the Registrar of Titles because it is an admitted fact by both the Applicant and the Judgment Creditor that Plot 33-43 Portal Road, Entebbe is in the names of Tamari Foods Exporters Ltd, who is not a Judgment Debtor or Guarantor of the Judgment Debtors in any way.

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Therefore that, Plot 33-43, was not and is not liable to attachment in C.S. 461/13 and has never been attached in law. The court was then urged to set aside the warrant of attachment issued in respect of Plot 33-43 as it was issued in error.

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Counsel agreed with Counsel for the Applicant that the property of a company is separate from that of its Shareholders and Directors. And that the Directors cannot individually commit the property of the company, unless the company does so under its seal, witnessed by its Directors.

20 It was prayed that the application be dismissed with costs.

Counsel for the First Respondent also opposed the application. He agreed with Counsel for the Co-Respondents about the question to be decided in matters of this nature. The question has already been referred to and there is no need to repeat it here.

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He emphasized that, the question of legal right and title are not relevant except in so far as they may affect the decision as to **whether 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.** The case of **Habiba Ismail Sebbi vs. Top Finance Co. (U) Ltd & David Muhwezi, Kibaliza Moses and Chris Nyamutale MA 1702/15 from C.S. 877/14.**

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The court was also referred to the affidavit in reply of Kabayo Alex of 03.03.17, paragraph 5 which indicates that court issued a warrant of attachment and sale for the property comprised in Plot 33-43 Portal Road, Entebbe and Plot 60-62 Kampala Road, in execution of the judgment and orders in **HC CS 461/13- Rockshield International Ltd vs. Bakusheka James & 3 Others**, to emphasize that the sale of the property did not realize the entire decretal sum, hence attachment of Plot 33-43, Portal Road, Entebbe.

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Paragraph 20 – to point out that the search revealed that the property was registered in the names of the Company under the Directorship of the Judgment Debtors.

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Paragraph 22- the Judgment Debtors handed over the title deed to court for purposes of the auction.

Paragraph 25- 26, 28 – The Company of the Judgment Debtors is in both legal and actual possession of the property in issue and not the Applicants.

Paragraph 33 – The Judgment Debtors are not opposed to the sale of the property in fulfillment of the decree.

It was also pointed out that the First Applicant does not indicate whether it is a legal entity with capacity to sue or be sued, yet this is important in as far as the claim is concerned.

The Second Applicant does also not establish any locus or claim of right or in what capacity he is objecting to the execution. The same applies to Kasangaki the Third Applicant who did not even file any affidavit in support.

It was asserted that, it is clear that none of the Applicants has locus to institute the proceedings before court. And that on those grounds alone, the application should be dismissed.

And that it is not clear from the pleadings as to which property the Applicants are claiming. The title deed attached to the affidavit of Mukiibi is for Plot 107-121, Kampala Road, Entebbe.

The affidavit in rejoinder of Francis Xavier Yiga Annexure A2 refers to Plot 45-47 Portal Road, while Annexure C refers to both Plot 45-47 and Plot 33-43 Portal Road. The Annexure is not an official document. It refers to receipts and map of the area. The receipts have no reference whatsoever to the property, the subject of this investigation.

The First Applicant has also not established possession. Registration S.59 Register of Titles Act provides that a certificate of title is prima facie evidence of ownership. Yet the First Applicant has not established possession of title for the property in issue. And the proceedings are not even meant to impeach the title to the property Plot 33-43.

Referring to paragraphs 10 of the affidavit in rejoinder of Xavier Yiga, Counsel submitted that, the annexures thereto having nothing to do with the plot in issue. No pleadings were attached.

And while paragraph 15 thereof is based on information, the lawyers are not mentioned.

That therefore, the affidavit contravenes 0.19 rr 1 and 3 C.P.R, which requires the Deponent to make distinction between facts of knowledge and sources of information. The affidavit is bad in law, Counsel asserted, and should be struck out. The case of **Kananura vs. Bitaitana [1984] HCB** was cited in support.

It was the further submission of Counsel for the Respondents that, all the annexures attached to the affidavits of the Applicants, especially the affidavits in rejoinder, do not comply with the law. They are not certified. He contended that, annexures have to be certified as provided by the Commissioner for Oaths (Advocates) Act, and the rules made there under rr 8 and 9.

The 3rd Schedule of the rules provided for forms of exhibits, he pointed out. But that the documents before court do not comply with the rules. He then stated that ***“Non compliance with mandatory rules is fatal”*** The case of **Chelbet Fred & Another vs. Masaila MA 140/2010 arising from CA 07/08** was relied upon for the holding that ***“such documents cannot be relied upon as evidence”***. – P.9.

And that since the totality of the application seems to reply on the annexures, court is left without supporting documents.

Also that part of the submissions of both Counsel is not contained in the affidavits and they were therefore submitting from the bar. And court was urged to reject those submissions which were not supported by the attached affidavits.

Counsel then prayed for the dismissal of the application with costs.

In rejoinder, Counsel for the Applicant insisted that the submissions of both Counsel intend to divert the court using technicalities. That courts have established that Article 126 of the Constitution does away with technicalities in pursuit of the ends of justice. Therefore that, court should disregard the uncertified attachments and gaps.

Further that, Counsel misled court that the First Respondent is in possession and control of the property without adducing evidence to that effect.

Court was asked to look at what amounts to possession, emphasizing that this is a club for recreation.

Referring to the locus of the parties, it was submitted that all correspondence indicate that they were addressed to the First Applicant. The property was owned by them and therefore they are a legal entity.

The Second Applicant is a member of the club. If the Respondent wanted to disprove that, he should have cross examined him.

Plot 102-171- the title attached is not title to the suit property but was meant to prove that the First Applicant is a legal entity and owns properties around the same place, since they had no copy of the title for Plot 33-43.

The title of the First Applicant expired and was renewed in the names of Tamari Foods Exporters Ltd.

As to the law quoted by the Second Respondent, it was pointed out that it is no longer good law as it was replaced by the Land Act. Court was therefore urged to disregard the submissions in that respect.

Reiterating earlier submissions, Counsel asserted that the Respondent and Co-Respondents are not owners of the property and the illegality remains.

The Annexure “G” notice to show cause was from C.S 109/15. It proves that Applicant was sued over the property of the Municipal Council.

That the letter was not indicated on as received or stamped does not take away the letter.

The property should be released from attachment with costs to the Applicant, he prayed.

Having gone through the application and affidavits for and against the application and giving them and the submissions of all Counsel the best consideration, I can in the circumstances, this court finds that the following are the issues to be determined :-

- **Whether the property in issue was liable to attachment.**

- **Whether it should be released from attachment and the execution set aside.**

It is apparent from the principles established by decided cases that, the sole question to be investigated in cases of this nature is one of possession.

That is, ***“whether on the date of attachment, the Judgment Debtor or the Objector was in possession. And where court is satisfied that the property was in possession of the Objector, it has to determine whether the objector held possession on his/her its own account or in trust for the Judgment Debtor”.***

In determining those questions, I wish to bear in mind the principle set down in earlier cases that at this point ***“questions of legal right and title are not relevant, except in 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”.*** – Refer to the case of **Harilal & Co vs. Buganda Industries Ltd [1960] IEA 318 (HCU)** relied upon in the case of **Habiba Ismail Ssebi vs. Top Finance Co. (U) Ltd and David Muhwezi and Kibalizi Moses MA 1702/2015** and **Mary Nakato vs. Nanyonga Rose and Ssekito Edward C.A 0412/2011.**

In the present case, Tamari Foods Exporters Ltd are the registered lessees of the suit property, but they are not parties to the present application and neither were they parties to the suit out of which the impugned execution arises.

While the Applicant’s lease over the property expired, they are in actual possession and were still in occupation of the disputed property as at the time of the attachment. There are developments on the land that are used for recreation.

The attachments to the supporting affidavit- letters from Counsel from Tamari Foods Exporters Ltd offering to compensate the Applicants to the extent of the value of the developments on the land, in return for the Applicants' agreement to vacate the property – See letter dated 05.01.15.

- 5 And another letter dated 23.03.15 demanding payment of rent from the Applicants, indicates that the Applicants were in continued occupation of the land; thereby lending credence to the Applicants' claim of being in possession at the time of attachment of the disputed property. The possession was not on account of the Judgment Debtors or in trust of some other person.
- 10 That there are serious issues of ownership of the property in question cannot be denied. And such issues cannot be properly determined until all the parties involved are brought on board. The parties include Tamari Food Exporters Ltd which by virtue of its corporate entity is different from the Judgment Debtors.
- 15 The lease claimed on behalf of the said Company is said to have been granted by the Departed Asians Property Custodian Board, while the application for renewal of the lease by the Applicants had been made to Wakiso District Land Board. All the three bodies are not party to the application.
- 20 The Judgment Debtors and the Respondent are free to sue the Objector so that all the issues between the parties can be properly and finally determined. This is because courts have clearly emphasized that ***“the scope of investigation carried out by court under 0.22 rr 55 (1), 56 and 57 C.P.R is not for determining ownership that was threatened by attachment. At the end of the Objector proceedings, one of the parties has to sue in order to determine the issue of title to the property. An order made under the rule is only provisional and a suit may be brought to claim the property notwithstanding the order”***. – See **Uganda Mineral Waters Ltd vs. Piran & Another [1994-1995] HCB.**
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- This court being satisfied that the property at the time of the attachment was in possession of the Objectors and that they have interest in the property which have not been catered for the Judgment Debtors and the Respondent and that the lessee of the suit property is not party to the suit, finds that the property was wrongly attached.
- 30

- The property should therefore be released from attachment.
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- The order to release the property will not in any way adversely affect the rights of the Judgment Creditor/Respondent who can resort to other ways to enforce his judgment against the Judgment Debtors.

- 40 Before I take leave of this ruling, I wish to comment about the objections raised by Counsel for the Respondent and the Judgment Debtors about the attachments to the supporting affidavits not being certified by the Commissioner of Oaths.

In my view, the mistake of the Commissioner of Oaths should not be visited upon the Applicants. Rules of procedure were meant to be hand maidens of justice and not to defeat it. And under Article 126 of the Constitution, substantive justice must be administered without undue regard to Technicalities.

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The application is allowed on those grounds. The costs of the application should be borne by the Judgment Debtors.

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Flavia Senoga Anglin
JUDGE
27.09.17