

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

MISCELLANEOUS APPLICATION No. 1130 OF 2021

(Arising from Civil Suit No. 1056 of 2020)

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1. MIVULE PETER }
2. SSENOGA DEREK } OBJECTORS / APPLICANTS
3. NALUMANSI STELLA }

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VERSUS

1. NDAWULA RICHARD MUKASA } JUDGMENT CREDITOR
2. KAWEESA STEVEN } JUDGMENT DEBTOR

Before: Hon Justice Stephen Mubiru.

RULING

15 a. Background.

Before his death, the late Kato Ezera was the registered proprietor of land comprised in Kyadondo Block 90 Plot 2 at Katelemwa. Upon his demise, the applicants together with the judgment debtor were granted letters of administration as joint administrators of his estate. Following a sub-division and distribution of the land, one of the resultant parcels, Kyadondo Block 90 Plot 878 was transferred to the judgment debtor. Following a successful litigation against the judgment debtor, on basis of a warrant of attachment dated 23rd August, 2021 the judgment creditor caused the attachment of the plot in execution of the decree that on 26th March, 2021 awarded him a sum of shs. 110,000,000/= with interest at the rate of 10% per annum from the date of judgment. The land was on 1st September, 2021 advertised for sale by public auction. The applicants then filed an objector application contending that the plot is not available for attachment and sale in execution of a decree against the judgment debtor, since it constitutes their family ancestral burial ground.

30 b. The application.

The application is made under the provisions of section 98 of *The Civil Procedure Act*, Order 22 rules 55, 56 and 57 and Order 52 rules 1 and 2 of *The Civil Procedure Rules*. The applicants seek orders that an investigation be carried out into the ownership of land described as Kyadondo Block

90 Plot 878, its intended sale be stayed pending that investigation, that it is released from attachment and the costs of the application. The applicants' case is that out of the estate of the late Kato Ezera, the said land was set aside and dedicated as the clan burial ground. It is where the body of the late Kato Ezera and all their other ancestors were laid to rest. Without their knowledge and consent, the judgment debtor fraudulently caused the registration of that land in his name, yet it is not his personal property. Its attachment and sale will result in the removal of the graves, to the detriment of the family and clan of the deceased. It should therefore be released from attachment.

c. Affidavit in reply

By the 1st respondent's affidavit in reply, it is averred that the application is incompetent. The judgment debtor has since 2nd December, 2019 been the registered proprietor of the land, following a sub-division that occurred during the month of July, 2016 with the consent of the applicants in favour of the judgment debtor. The applicants thereafter signed a transfer form dated 15th July, 2016 in favour of the judgment debtor. The application is therefore based on a collusion between the applicants and the judgment debtor to frustrate the attachment. The graves are located only to one side of the land near the boundary while the bigger part of it is utilised by way of cultivation of seasonal crops. Consequently the graveyard occupies only a fraction of the land, most of which is bare and vacant. Alternatively, the applicants' claim to the graveyard can be ascertained and partitioned off the rest of the land. The court hold find the bare and vacant part of the land available for attachment n execution of the decree against the judgment debtor.

d. Submissions of counsel for the applicants.

M/s MSM Advocates on behalf of the applicants submitted that the applicants have furnished court with a copy of the inventory filed in the Family Division of the court showing that the land in issue was set aside as the family graveyard. As administrators of the estate of the late Kato Ezera, the applicants have an interest in the land and are in constructive possession on account of that estate. Once the applicants prove possession on their own account at the time of the judgment, the court is enjoined to release the property from attachment even if there is title and disposing power remaining in the judgment debtor.

e. Submissions of counsel for the Judgment Creditor.

M/s KM Advocates and Associates on behalf of the judgment Creditor submitted that the applicants are not in possession of the land. The land is registered to the judgment debtor. The
5 graveyard occupies only a small fraction of it while the rest is occupied by agricultural crops. There is no evidence to show that the crops belong to the applicants. The Judgment Creditor is interested in attaching only approximately 0.80 acres of it, excluding the part occupied by the graves. There is no evidence to show that the judgment debtor secured registration by fraud. The
10 inventory relied upon was doctored and back-dated. The application is a disguised attempt by the applicants to come to the rescue of their relative.

f. The decision.

The law on objector proceedings has long been established. The sole question to be investigated
15 is one of possession. 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. Under Order 22 rule 57 of *The Civil procedure Rules*, the Court has the mandate to release property from attachment once satisfied that it was not in the possession of the judgment Debtor; or in possession of the objector on account of or in trust of the judgment debtor,
20 but for some other person (see *Khakale E. t/a New Elgon Textiles v. Banyamini W (in the matter of Mugunjo) [1976] HCB 31* and *Kasozi Ddamba v. M/s Male Construction Service Co., [1981] HCB 26*).

Section 44 of *The Civil Procedure Act* prescribes the property which can and cannot be attached
25 in execution. Several types of property are liable for attachment and sale in execution of a decree like lands, houses or other buildings, goods, money, banknotes, checks, bills of exchange, government securities, bonds or other securities etc., “and all other saleable property, movable or immovable, belonging to the judgment debtor, or over which or the profits of which he or she has a disposing power which he or she may exercise for his or her own benefit, whether the
30 property be held in the name of the judgment debtor or by another person in trust for him or her or on his or her behalf.”

In short, property liable to attachment and sale in execution of a decree is the “property belonging to the judgment debtor” or the property over which, or the profits of which, he or she “has disposing power which he or she may exercise for his or her own benefit.” The question then is whether or not the plots in possession of the nine applicants constitute “property belonging to the judgment debtor” or property over which he or she “has disposing power which he or she may exercise for his or her own benefit.” The applicants claim that although registered to the judgment debtor, this land is not available for attachment and sale since it is land dedicated as their family graveyard.

A graveyard or cemetery is a place where dead bodies and human remains are buried. It is a locale set aside, either by governmental authority or private enterprise. A public cemetery is open for use by the community at large while a private cemetery is used only by a small segment of a community or by a family. Cemeteries can be the place where the final ceremonies of death are observed. These ceremonies or rites differ according to cultural practice and religious belief. The establishment of a cemetery involves the process of formally designating a tract of land for use for the burial of the dead. It must be set apart, marked, and distinguished from adjoining ground as a graveyard. Private interests in the place of burial are subject to the control of public authorities, which have the right to require the disinterment of bodies if deemed necessary. It is well-established that the state has the power in the promotion of public health, safety and welfare to cause the abandonment of a cemetery and the removal of the bodies therein.

Generally there are two categories of cemeteries, public and private. A public cemetery is one used by the general community, a neighbourhood, or a church, while a private cemetery is one used only by a family or a small portion of the community. However, actual public use rather than ownership determines whether a cemetery is public. Thus, a cemetery, though privately owned or maintained, may be deemed a public cemetery if it is open, under reasonable regulations, to the use of the public for the burial of the dead. A cemetery, though privately owned, is properly classified as a “public cemetery” where it consists of a great number of burial plots or sites sold and for sale to the public. Conversely, a family burial ground is one in which no lots are sold to the public and in which interments are restricted to a group of persons related to each other by blood or marriage.

According to sections 59, 77 and 176 (c) of *The Registration of Titles Act*, save for fraud and illegality in the process of acquisition of title, every certificate of title issued under the Act should be received in all courts as conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.

Fraud within the context of transactions in land has been defined to include dishonest dealings in land or sharp practice to get advantage over another by false suggestion or by suppression of truth and to include all surprise, trick, cunning, disabling and any unfair way by which another is cheated or it is intended to deprive a person of an interest in land, including an unregistered interest (see *Kampala Bottlers Limited v. Damanico Limited*, S.C. Civil Appeal No. 22 of 1992; *Sejjaaka Nalima v. Rebecca Musoke*, S. C. Civil Appeal No. 2 of 1985; and *Uganda Posts and Telecommunications v. A. K. P. M. Lutaaya* S.C. Civil Appeal No. 36 of 1995). It must be brought home to the person whose title is impeached or to his or her agents (see *Fredrick J. K Zaabwe v. Orient Bank and 5 others*, S.C. Civil Appeal No. 4 of 2006 and *Kampala Bottlers Ltd v. Damanico (U) Ltd.*, S.C. Civil Appeal No. 22 of 1992). The burden of pleading and proving that fraud lies on the person alleging it and the standard of proof is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases (see *Sebuliba v. Cooperative bank Limited [1987] HCB 130* and *M. Kibalya v. Kibalya [1994-95] HCB 80*).

In the instant application, apart from allegations of fraud having been pleaded by the applicants, no evidence has been adduced proving to the required standard, any fraud brought home to the judgment debtor as would vitiate his title. I therefore find that the judgment debtor is the registered proprietor of the land. I reject the applicant's contention that his registration was procured by fraud.

However, an owner of mailo land may devote his or her premises to burial purposes, so long as burials are properly conducted and there is no hazard to health and wellbeing of the public; mere aesthetic reasons, not affecting the public health, life, comfort, or wellbeing are not sufficient grounds for prohibiting the use of private property as a cemetery. Dedication of the land by the owner, for the purposes of a graveyard may be effected by deed, acts or conduct of the former owner. There is no doubt as to the proposition that a burial ground may be so dedicated, either by

express instrument, by adverse use, or by permission or license to so use the land. With regard to a family cemetery, there ought to be some evidence that there are graves on the land, such as gravestones, cemetery fences, sculptures / monuments, other burial ornaments or evidence of location or existence of graves. There should be evidence, like reputation in the community, of the land constituting a family burial ground in which interments are restricted to a group of persons related to each other by blood or marriage, where no lots are sold to the public. A member of the family must have reserved the right to access and maintain the cemetery at some time in the past.

Registered land may be affected by a reservation of rights to a family cemetery established by custom or usage. These rights are it is akin to an easement that allows family members or other beneficiaries to make burials, visit, and maintain the cemetery. Cemeteries are, of course, important ways of remembering the past, connecting the people alive today with those buried long ago. Therefore those who are related to people buried on land that is privately owned have an implied easement to visit that land. In many cases, the landowner is also a relative. The idea here is that when the landowner permits burial on the land, he or she impliedly grants the right to family members to visit the grave. It is an easement by estoppel. In *Trefry v. Younger*, 226 Mass. 5; 114 N.E., 1033, it was held that the interest of the owner of a burial lot is in the nature of an easement; it is not an absolute right in the property, but the right of burial, so long as the place continues to be used as a burial ground; to make interments in the lot exclusively of others as long as the burying ground or cemetery remains as such. It is also the right, so long as the place continues to be used as a burial ground, to prevent a disturbance of the bodies.

A beneficiary of the easement establishing a certain plot of ground as a graveyard acquires two distinct rights: (i) the right to bury his or her dead there; and, (ii) the right to protect the graves of the buried dead from desecration. The rights, of necessity acquired from one or the other source, are coterminous with the source; they expire with its annihilation; if they come by deed, they may be destroyed by deed; if they come by either adverse use, by permission or license to so use the property, they may be destroyed by abandonment. For as long as the dead are there buried, their graves are marked, and any acts are done tending to preserve their memory and mark their last resting place by way of monuments and gravestones marking the graves, so as to show and

perpetuate the sacred object and purpose to which the land has been devoted, no physical possession is required in such cases.

5 The applicants have adduced evidence of an inventory filed on 23rd February, 2015 showing that Kyadondo Block 90 Plot 878 was designated as having been “maintained as a clan burial grounds.” They have also presented photographs showing over twenty tombstones existing on the land. I find on the basis of the evidence before me that the 0.41 hectares (approximately one acres) of land comprised in Kyadondo Block 90 Plot 878 was set apart as a family burial ground or cemetery, and it was so used by Kato Ezera during his life, several of his family being then and there buried, 10 and when he died he was there buried. His descendants, since his death, have used it as a family burying ground, and many of them are there buried. Monuments and gravestones have been erected and maintained over several of the graves, and from time to time appear, from what can be deduced from the photographs, to have been repaired, and the cemetery put in order and otherwise cared for. Having considered the evidence before me, I do not entertain the slightest doubt that there is 15 established on that land, a family graveyard and that the land is dedicated to that use.

Article 126 (1) of *The Constitution of the Republic of Uganda, 1995* requires courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people. The places where the dead are buried have from time immemorial been considered sacred and 20 inviolable. “The most refined and sacred sentiments of humanity cluster around the graves of departed loved ones, and that when these sentiments have become associated and connected with a particular spot of ground, by the invitation or consent of the owner, he shall not, for any secular purpose, disturb them.....So long as the space is maintained as a burial place, either with regard to those already buried or to those who may thereafter be buried there, it is holy ground and human 25 instinct responds to this sentiment” (see *Frost v. Columbia Clay Co., 130 S.C. 72*). The landowner may designate the frequency of access, hours and duration of the access and the access route if no traditional access route is obviously visible by view of the land. The right of ingress and egress must be reasonable and limited to the purposes related to burials, including visiting graves, and maintaining the gravesite or cemetery.

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The use of a graveyard is twofold; for the purpose of continuous burials, and for the purpose of preserving the remains and memory of those who have been buried. Therefore land reserved as a family cemetery cannot be used by the registered owner for any purpose inconsistent with cemetery purposes. It has not been shown that the cultivation of agricultural crops thereon in the meantime
5 on the part reserved for continuous burials is inconsistent with that purpose. Instead it is the partitioning in execution proposed by the judgment creditor that has the potential of interfering with that purpose.

In the instant case, the registered proprietor holds the land in trust as a family burial ground. The
10 owner cannot, without the consent of the family, reduce the size of the land set apart as a cemetery (see *Bitney v. Grim*, 144 P. 490 at 491). The owner of land that contains a family cemetery has two options with respect to the cemetery; the first is to allow the cemetery to remain in place. The other option is to obtain a court order allowing the relocation of the cemetery, if it has been abandoned and it is not historically significant. The preferred treatment of cemeteries though is
15 preservation in place and relocation of graves should be considered a last resort. An owner of land that includes a cemetery is thus obligated to leave the graves alone and not damage or desecrate gravestones, cemetery fencing, monuments, etc. It is only where a cemetery has been so neglected as entirely to lose its identity as such, and is no longer known, recognised, and respected by the public as a cemetery, that it may be said to be abandoned.

20 The sole inquiry in this application is whether or not the land in issue may be attached in execution and thus cause its abandonment for family cemetery purposes. In other words, whether or not the applicants have the right to demand the maintenance of the burial ground as such. It is my considered view that where land has been dedicated as a graveyard, it remains subject to that use
25 as long as bodies remain buried there and until they are removed by a public authority or by friends or relatives. A central right of property ownership is the right to exclude, which is lacking in this case. When human remains are intentionally buried on land with the consent of the owner, customary law recognises that the character of such land has been fundamentally and perpetually transformed. Land that contains human remains dedicated as a graveyard is subject to unique
30 customary law doctrines that limit the rights of the registered owner to exclude others.

Since land reserved as a family cemetery cannot be used by the registered owner for any purpose inconsistent with cemetery purposes, it is not property over which the judgment debtor has disposing power which he or she may exercise, without the assent of any other person, for his or her own benefit. It therefore is not property which can be attached in execution. To deny this application would be to prevent further use of the land for burial purposes by the applicants' family. Consequently, the land comprised in Kyadondo Block 90 Plot 878 is hereby released from attachment. The costs of this application are awarded to the applicants.

10 Delivered electronically this 23rd day of March, 2022

.....Stephen Mubiru.....
Stephen Mubiru
Judge,
23rd March, 2022.