

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

MISCELLANEOUS APPLICATION No. 1517 OF 2021

(Arising from Civil Suit No. 0569 of 2021)

JOMAYI PROPERTY CONSULTANTS LIMITED APPLICANT

VERSUS

HENRY K. TUMUKUNDE RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicant is in the real estate business. By an agreement dated 10th December, 2012 the respondent sold 200 acres of land to the applicant at the price of shs. 17,500,000/= per acre hence a total of shs. 3,500,000,000/= The respondent permitted the applicant to level, partition and demarcate the land into numerous plots for re-sale as part of the applicant's business. Following that exercise, the applicant has since resold the plots to numerous other persons, some of whom occupy parts of the land. Differences having subsequently arisen between the applicant and the respondent regarding the performance of the agreement of sale, when the respondent attempted to rescind it, the applicant sued the respondent seeking a declaration that it is the beneficial owner of land comprised in Mawokota Block 31 plots 11, 24, 29, 30, 31, 32, and 33 at Njagi, Sabagabo in Mpigi District. The applicant further sought an order of specific performance requiring the respondent to cause a transfer of the land into the applicant's name.

The parties subsequently negotiated and filed a consent judgment on 24th June, 2015. By that judgment, the applicant was to pay the respondent the sum of shs. 1,087,487,825/= in specified instalments. On his part, the respondent was obliged within two weeks of receipt of the first instalment of shs. 100,000,000/= to deposit the title deeds to the said land into court. By a warrant of attachment dated, 9th November, 2021 the respondent now seeks to execute the consent decree by way of attachment and sale of the land which is the subject matter of the consent decree, for the

recovery of shs. 1,041,487,825/= The applicant contends that instead of unlocking the deadlock between the parties in the performance of the contract by complying with his obligation to deposit the titles in court, the respondent instead erroneously proceeded to seek execution of the decree by way of attachment and sale of the land he sold to the applicant.

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b. The application.

The application is made under the provisions of section 98 of *The Civil Procedure Act*, Order 22 rule 23 and Order 52 rules 1, 2 and 3 of *The Civil Procedure Rules*. The applicant seeks an order staying or setting aside execution of the decree in the original suit. The applicant contends that the respondent cannot seek to execute the consent decree before discharging his obligations imposed thereunder. The applicant paid the respondent shs. 100,000,000/= as agreed but the respondent has never deposited the title deed in court. To-date the applicant has paid the respondent a total of shs. 3,344,721,000/= Deposit of the title deeds in court was a condition precedent to payment of the balance. Whereas the applicant is ready able and willing to pay the sum of shs. 271,287,825 outstanding due under the consent decree, the warrant of execution has misstated the sum due. If the process is not stayed, the applicant stands to suffer irreparable injury. Failure to issue title deed to subsequent purchasers of plots on the land has occasioned the applicant loss of business and reputation.

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c. Affidavit in reply

By his affidavit in reply, the Judgment Creditor averred that the applicant breached the consent settlement when it failed to pay shs. 100,000,000/= by 7th July, 2015 as agreed. He could not deposit the title deed in court before the applicant had complied with that condition. The entire decretal amount is still due and he has neither received the shs. 816,200,000/= nor the shs. 3,344,721,000/= as claimed by the applicant. Issuance of the warrant of attachment in the circumstances was therefore justified and the application ought to be dismissed.

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d. Submissions of counsel for the applicant.

M/s Kintu, Nteza and Co. Advocates on behalf of the applicant submitted that the respondent was required to deposit in court the land titles together with photos and transfer for custody until
5 payment in full. It was a condition precedent to the payment. Despite that default by the respondent, the applicant has made subsequent deposits of shs. 816,200,000/- proof of payment is attached to the affidavit in support. This payment after the respondent's default does not constitute a waiver of the condition because the applicant was not aware of the respondent's default and only realised that he was in default when the respondent sought execution. He seeks to have the title
10 and the money at the same time. The land is no longer the property of the applicant. It is not available to attachment. The entire interest of the applicant was conveyed to third parties.

e. Submissions of counsel for the respondent.

15 When the application came up for hearing on 15th March, 2022 counsel for the respondent sought an adjournment in order to file written submissions. He was given up to 18th March, 2022 to have filed and served the same on counsel for the applicant. To-date he has not done so.

In a broad sense, the right to a fair trial in civil proceedings is interpreted as the right to be treated
20 fairly, efficiently and effectively by the court in the course of its administration of justice. In observing the right to be heard, it is the duty of the court to create and notify the parties of the time available to them to take the necessary step. There must be an equal and reasonable opportunity for all parties to present their respective cases. It means that each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial
25 disadvantage vis-à-vis the opposing party. The Court having done so, it is not its duty to ensure that a party takes advantage of the opportunity so created. I am of the considered view in the instant case that the respondent was afforded a reasonable opportunity to present his submissions, but for some unexplained reason has failed to do so to-date. The court therefore proceeds to deliver the ruling without the respondent's submissions.

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f. The decision.

According to section 2 (c) of *The Civil Procedure Act*, a “decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. For an decree to be executable; (i) there must have been an adjudication in a court proceeding; (ii) it must have determined the substantive as opposed to the procedural rights of the parties with regard to all or any matter in dispute in the proceeding; (iii) the determination must be of a conclusive nature; (iv) there must be a formal and unambiguous expression of the adjudication; and (v) its enforcement must not be barred by limitation or other circumstances; (vi) it must force of execution and not merely declaratory of rights; (vii) there should be unfulfilled or pending obligations due from the judgment debtor to the judgment creditor under the terms of the order. There can, therefore, be no execution unless there exists a formal determination of the liability to be specifically enforced. The consent decree in the instant case meets all the above criteria.

A decree of a Court of competent jurisdiction is valid until set aside on appeal and as such must be obeyed. So long as the decree is not set aside by a competent court it remains executable. Once a decree or order is passed by the court, it is the obligation of the person against whom the decree is passed (judgment-debtor), to give effect to it so as to enable the decree-holder to enjoy its benefits. A court decree is meant to be obeyed without demand and if there is default in obedience, the Judgment Creditor is entitled to commence enforcement proceedings. When there is no voluntary compliance with the decree by the judgment debtor, then execution of the decree becomes necessary, indeed inevitable. A decree will be executed by the court as facilitative process and not as an obligation. If none of the parties approaches the court, then the court has no obligation to implement it *suo motu*. If the parties agree that no warrant of attachment may be issued for a certain time within which the judgment-debtor promises to pay the decretal amount the court can act on the compromise. In the instant case, there is no such compromise. To the contrary, Clause 7 of the consent decree provides that “in event of default of any instalment or part thereof, the whole debt shall become due and recoverable by execution.”

It was contended by counsel for the applicant that the respondent cannot seek to execute the decree before he has complied with the conditions specified therein. The law is that if the decree has not been discharged or satisfied by adjustment or otherwise, it would be bound to be executed at the instance of its holder. Execution of the decree though may be conditioned on either party performing its obligations. This is because the decree must be executed wholly as it stands or not at all. This is particularly true of a decree for specific performance where the party who seeks execution must satisfy the executing court that he or she is in a position to perform the obligations which the decree imposes on him or her. Consequently, in a case where, as in the present, the judgment creditor seeks to execute a decree but is himself unable to perform obligations the decree imposed on him, namely, to deposit the title deeds in court, he is not entitled to execute the decree.

When a decree imposes obligations on both sides which are so conditioned that performance by one is conditional on performance by the other, execution will not be ordered unless the party seeking execution not only offers to perform his side but, when objection is raised, satisfies the executing Court that he is in a position to do so. Any other rule would have the effect of varying the conditions of the decree: a thing that an executing Court cannot do. There may of course be decrees where the obligations imposed on each side are distinct and severable and in such a case each party might well be left to its own execution. But when the obligations are reciprocal and are interlinked so that they cannot be separated, any attempt to enforce performance unilaterally would be to defeat the directions in the decree and to go behind them which, of course, an executing Court cannot do. The following are the relevant clauses of the decree;

5. Parties also agreed that in respect of the 1st instalment the judgment debtor shall by the 7th July, 2015 pay the judgment creditor Ugx. 100,000,000/= to be deducted from the 1st instalment.
6. Within two weeks of receipt of the Ugx. 100,000,000/= the Judgment Creditor / Respondent shall deposit in court the land title together with photos and transfers for custody till payment in full.

Upon reading the two clauses, it becomes clear that this is not a case of two independent and severable directions in the same decree but of one set of reciprocal conditions indissolubly linked

together so that they cannot exist without each other. It is akin to a decree for specific performance where the decree itself cannot be given unless the side seeking performance is ready and willing to perform his side of the bargain and is in a position to do so. Whenever a decree is so conditioned that the right of one party to seek performance from the other is conditional on his or her readiness and ability to perform his or her own obligations, one cannot seek to enforce the other's obligation without first discharging his or her own.

A decree must either be executed as a whole or not at all; it cannot be split up into different and un-correlated parts and be executed unilaterally. To hold otherwise would be to permit Court at execution to go behind the decree and vary its terms by splitting up what was fashioned as an indivisible whole into distinct and divisible parts having separate and severable existence without any interrelation between them just as if they had been separate decrees in separate and distinct suits. I therefore find that the respondent is incapable of enforcing the decree without first discharging the obligations in imposes upon him.

Besides that, section 44 of *The Civil Procedure Act* prescribes the property which can and cannot be attached 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 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." By a contract dated 10th December, 2012 the respondent sold the entire land now under attachment, to the applicant.

It is trite that a contract for the sale of land, which is capable of specific performance, operates in equity so as to confer a trust on the purchaser pending completion of the sale. Although some controversy exists as to the exact nature of the trust, it is well established that, upon exchange of contracts, equity will “treat that as done which ought to be done” (see *Walsh v. Lonsdale (1882)* 5 *21 Ch D 9*) with the consequence that the purchaser acquires equitable ownership even though full (legal) title to the land will not pass until completion (and registration). It is well established that, during the interim period between exchange of contracts and completion, the rights and duties of vendor and purchaser are defined in terms of a trust; the vendor holds the legal estate upon trust for the purchaser and the purchaser becomes a beneficial owner of the land (see *Lysaght v.* 10 *Edwards (1876) 2 Ch D 499*; *Chang v. Registrar of Titles (1976) 137 CLR 177* and *Rayner v. Preston (1881) 18 Ch D 1*). The purchaser acquires an equitable interest in the land and retains that interest for as long as the contract remains enforceable, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express 15 contract as to the time of delivering possession.

Neither the seller nor the buyer has unqualified beneficial ownership (see *Jerome v. Kelly (Her Majesty’s Inspector of Taxes) [2004] 2 All ER 835*; *[2004] 1 WLR 1409*). Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific 20 performance is available and that the contract will in due course be completed, if necessary by the Court ordering specific performance. The buyer holds equitable title once the contract is executed. The seller holds the legal title in trust for the buyer and the buyer holds the purchase money in trust for the seller. Once the contract is satisfied, the seller gives the buyer a deed, which vests legal title in the buyer from the date the contract was signed. This means that the buyer can exercise 25 all of the rights of ownership, use and enjoyment of the property during the term of the instalment agreement. However, the seller retains legal title (sometimes referred to as holding bare legal title) to the property. It therefore is not land in respect of which the seller anymore has disposing power which he or she may exercise for his or her own benefit. It is the applicant’s case that the land has since, with the permission of the respondent, been portioned off into numerous plots which were 30 sold to third parties, some of whom now occupy parts of it. Those third parties are the current beneficial owners of the land and not the applicant.

Consequently, the application is allowed. The land comprised in Mawokota Block 31 plots 11, 24, 29, 30, 31, 32, and 33 at Njagi, Sabagabo in Mpigi District is hereby released from attachment. Execution of the decree is as well stayed until the respondent has performed an obligation the decree imposed on him, namely, to deposit the title deeds in court. The costs of this application are awarded to the applicant.

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Delivered electronically this 24th day of March, 2022

.....Stephen Mubiru.....
Stephen Mubiru
Judge,
24th March, 2022

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