

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

MISCELLANEOUS APPLICATION NO. 0264 OF 2022

(Arising from Civil Suit no. 0973 of 2016)

5 **MOHAMMAD RAZI RAZA** **APPLICANT / OBJECTOR**

VERSUS

10 **1. COMMERCIAL BANK OF AFRICA } JUDGMENT CREDITOR**

2. HABIB KAGIMU } JUDGMENT DEBTOR

Before: Hon Justice Stephen Mubiru.

PROCEEDINGS

11th May, 2022.

9.05 am

15 Attendance

Mr. Busuulwa Cypress Bill, Court Clerk.

Mr. Mugabi Siras Kahima, Counsel for the applicant is in court.

The applicant is not in court

Mr. Pious Olaki, Counsel for the judgment creditor in court.

20 Ms. Jacinta Akino Legal Officer of the judgment creditor is in court

Counsel for the applicant;

We were served this morning. I need to file an affidavit in rejoinder in response to the allegation of fraud. I pray for an adjournment,

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Counsel for the respondent;

We filed this morning. I have no objection.

Court; hearing of the application is adjourned to 20th May, 2002 at 9.00 am. Today's costs are in the cause.

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Stephen Mubiru
Judge
11th May, 2022.
11.55 am.

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20th May, 2022.

11.04 am

Attendance

Mr. Busuulwa Cypress Bill, Court Clerk.

5 Mr. Mugabi Siras Kahima, Counsel for the applicant is in court.

The applicant is not in court

Mr. Pious Olaki, Counsel for the judgment creditor in court.

Ms. Jacinta Akino Legal Officer of the judgment creditor is in court

10 **Counsel for the applicant;**

The applicant bought in 2018 at a time when the property was mortgaged to standard chartered Bank by the judgment debtor. The applicant borrowed from Stanbic Bank to pay and the title deed was then transferred to Stanbic Bank. The judgment debtor has never appeared in person to facilitate the transfer of the and into the name of the applicant yet the land registry requires his physical presence.

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Counsel for the respondent;

The applicant says in his affidavit is a business associate of the judgment debtor. It not an arm's length transaction. Ground one of the application shows that the applicant has a general power of attorney or is interest in the estate of the judgment debtor. The agreement is Wampewo in respect of which the applicant had a loan from Stanbic Bank. We lodged a caveat on 28th April, 2021 and conducted a search on 28th January, 2022. The registered proprietor is the judgment debtor. The property is till encumbered by a mortgage of Stanchart Bank. All documents are signed on the same date. Suddenly there was a need to take over all the properties of the judgment debtor. The stamp duty paid is only 6 million yet they claimed to have paid over 6 million US dollars as the purchase price. The attachment was on 28th April, 2021. The application was filed on 23rd May, 2022. The premises is an office of the judgment debtor who is the honorary counsel of Malaysia and he is still in occupation of the property.

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30 **Counsel for the applicant;**

The applicant was in Pakistan at the time the advert came out in December, 2021. Around that time the world was under lockdown. The applicant only managed to come to Uganda in February this year. The applicant travels a lot in execution of his consular duties.

EX-TEMPORE RULING

The law on Objector proceedings has long been established. The sole question to be investigated 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, 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 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 money deposited in court as security for costs on grant of an order pending appeal, is “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.”

While the applicant claims to have purchased the attached property from the judgment debtor on 31st December, 2018 counsel for the respondent contend that it was a sham transaction intended only to take the property out of reach of the court in execution of the decree. I have perused the documentation relating to this transaction. The agreement by which the applicant claims to have purchased the property from the judgment debtor (annexure “D” to the affidavit supporting the

application) at the price of US \$ 1,670,000 is dated 31st December, 2018 but the signature page is not attached. The applicant then claims to have transferred US \$ 1,599,990.80 by Real Time Gross Settlement System (RTGS) from his account to that of the judgment debtor (annexure “B” to the affidavit supporting the application) on 4th January, 2019. But the parties had already executed the instrument of transfer on 31st December, 2018 annexure “C” to the affidavit supporting the application). Standard Chartered Bank issued the instrument of release of mortgage on 28th January, 2019 (annexure “E” to the affidavit supporting the application) yet the mortgage is still registered as an encumbrance on the title (annexure “F” to the affidavit supporting the application). Counsel for the respondent has challenged the validity of this transaction and characterised it as a sham and nominal transaction designed by the judgment debtor in order to escape from liability under the decree.

A transfer of immovable property made with intent to delay or defeat the creditors of the transferor is voidable at the option of any creditor so defeated (see *Twyne's case (1601) 76 ER 809; 3 Co. Rep. 80b*). “No one has power over his property to such extent using which he, whilst using his right of alienation of property, can delay, defraud or hinder his creditors” (see *Partridge v. Gopp, (1758) 28 ER 647*). When there is evidence to show that the objector and the judgment debtor colluded with each other, with the latter alienating the property under attachment to the former with a view to taking it out of the reach of the court executing a decree against the judgment debtor, the transaction will be voided.

For example in *Attorney General v. Twyne and Pearce, et al. (Twyne's case) (1601) 76 ER 809; 3 Co. Rep. 80b*, Pierce, owed four hundred pounds to his friend, Twyne, and another two hundred pounds to another creditor. To prevent the other creditor from collecting, Pierce entered into a secret deal with Twyne, whereby Pierce executed a general assignment of all his personal property, worth about three hundred pounds and which was mostly sheep, to Twyne in satisfaction of Pierce's four hundred pound debt to Twyne, but Pierce continued in possession of his property, identified the sheep with his own mark (and not Twyne's), and even sold some of the sheep for his own benefit. To collect the debt, the other creditor obtained a Writ directed to the Sheriff of Southampton to execute on Pierce's property. But when the Sheriff came out to take Pierce's sheep, Twyne directed his own men to forcibly resist the Sheriff and tell the Sheriff that Pierce's property

was really Twyne's property now. The other creditor next alleged that Pierce had made a fraudulent transfer of his property to Twyne.

5 Ultimately, the court finds that Pierce's assignment of all his personal property to Twyne was in the nature of a fraudulent transfer, based primarily on six findings of suspicious facts surrounding the assignment: (i) first, Pierce had made a general assignment of all his personal property to Twyne, which did not exclude such things that a person would normally exclude in such an assignment, such as personal clothing; (ii) second, even after the assignment, Pierce continued to treat all the properties as his own, even as to buying and selling sheep, such that if the assignment
10 were valid then Pierce had effectively defrauded both sellers to him and buyers from him alike; (iii) third, Pierce's assignment to Twyne was made in secret, and secret transactions inherently give rise to suspicions as to their validity; (iv) fourth, Pierce made the assignment to Twyne while the Writ to the Sheriff of Southampton was pending; (v) fifth, Pierce and Twyne effectively had an agreement that Twyne would hold Pierce's property for him in trust, "and fraud is always
15 appavelled and clad with a trust, and a trust is a cover of fraud"; (vi) sixth, the deed for the sheep given by Pierce to Twyne recited that the transaction "was made honestly, truly and bona fide," and the inclusion of such a clause under the circumstances was thought to also be suspicious.

The court also found that Pierce did indeed owe four hundred pounds to Twyne, and further that
20 if Pierce had transferred his property to Twyne in exchange for partial satisfaction of that debt that such would have been "good consideration" for the transfer. The court further noted that it would have been just fine for Pierce to have preferred one of his creditors (Twyne) over the other (Creditor) under these circumstances. The problem here, however, was that Pierce really didn't use the transfer to Twyne to pay off or down his debt to Twyne. Instead, Pierce and Twyne had an
25 agreement that Twyne would appear to receive Pierce's property, but Pierce would continue to be the *de facto* owner of the property and control that property, and their transaction was only to thwart the Creditor's efforts to collect the two hundred pound debt against Pierce. Thus, this wasn't a case at all of Pierce simply preferring one creditor to another.

30 To this end, the court stated that if there had been a real satisfaction of Pierce's debt to Twyne, then three things should have occurred: (1) The satisfaction would have occurred openly and not

in secret; (2) Pierce's property should have been appraised so that the precise amount of the satisfaction could be determined; and (3) Twyne would have actually taken possession of the property and Pierce would have had nothing further to do with it, much less treat it as his own. Failing these three things, the court could not conclude that Pierce's transfers to Twyne were actually in satisfaction of Pierce's debt to Twyne.

The court took this line of reasoning further, pointing out that if there was an agreement between Pierce and Twyne that the latter would simply hold the former's assets, then there could be no good consideration for the transfer. Otherwise, what you end up with is a trust *per nomen speciosum* (a specious trust), which "is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts."

Fraud is a deception deliberately practiced in order to secure unfair or unlawful gain. Debtors who are trying to cheat their creditors will always have some cover story to deny that fact, and instead of simply adopting the debtor's subjective and self-serving denials the court should look to the surrounding circumstances which indicate that one party is trying to hinder or defraud another party (the Badges of Fraud), to objectively determine the debtor's actual intention in making the transfer. A badge of fraud is a conduct that strongly indicates an intent to defraud the other party to a transaction or to delay or hinder a litigation. Such badges include, among other things, the transfer of property in anticipation of litigation or execution (see *Bank of Montreal v. Vandine* (1953) 1 D.L.R. 456; *Prodigy Graphics Group Inc. v. Fitz-Andrews*, (2000) O.J. No. 1203 (Ont. S. C. J.); and *Ferguson v. Lastewka et al* (1946) O. R. 577). In order to succeed, the judgment creditor must establish that the transfer was done with intent to defeat the judgment debtor's creditors, and not just that it has this effect.

Badges of fraud are the "accompanying circumstances tending to excite suspicion and distrust as to the bona fides of the challenged conveyance and which, standing unexplained, may warrant an inference of fraud" (see *Evans v. Trude et al. and Champlin et al.*, 193 Or. 648, 655, 240 P.2d 940 (1952)). In evaluating the existence of fraud, courts look to the judgment debtor's entire course of conduct and no particular "badge" or indicator is essential or determinative. In fact, in any given case, the court may consider the existence of one badge to be sufficient to establish fraud, and

certainly, the existence of multiple badges together increases the judgment debtor's exposure. A concurrence of several badges always makes a strong case for fraud. If there was an intention to defeat creditors, then it does not matter whether it was to defeat present or future creditors.

5 Suspicious circumstances which the courts may characterise as "badges of fraud" include the following: (i) secrecy surrounding the transaction; (ii) no change of possession occurred after the conveyance (the donor or transferor continues in possession and continues to use the property as his or her own); (iii) transfer to non-arm's-length person (a close relationship exists between parties to the conveyance); (iv) the transferor has only a few remaining assets (the transfer was
10 substantially all of the debtor's assets or left the debtor infinitesimally close to insolvency); (v) the transfer was effected with unusual haste (or was made outside the ordinary scope of the debtor's business); (vi) grossly inadequate consideration was paid (or the transfer documents contain false statements as to consideration; (vii) a benefit was retained by the transferor under the settlement (reservation of benefits, control or dominion by the debtor); (viii) the transfer was made in the face
15 of potential or threatened litigation; (ix) knowledge of the creditor's claim; and (x) lack of accurate documentation supporting the transaction. This indicia of fraudulent intent, allows for an assessment of the debtor's subjective perspective to be inferred from objective criteria. A constructive fraudulent conveyance is merely an actual intent fraudulent conveyance that has two badges so important that there is no need to make further inquiry.

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When fraudulent transfers are used to hide assets the subject of a debt collection, the Court looks for badges of fraud. In the instant case, the consent decree was executed on 13th November, 2018. The objector then claims to have purchased the property now under attachment, from the judgment debtor, a month and a half later on 31st December, 2018. The first application for execution was
25 filed barely three months later on 12th April, 2019. Although the instrument of transfer was executed on the same date of signing the agreement of sale 31st December, 2018, to-date, three and a half years later, the instrument has never been registered, with the effect that the title is still registered in the names of the judgment debtor, and the judgment debtor is still in physical possession of the property. While Standard Chartered Bank issued the instrument of release of
30 mortgage on 28th January, 2019 to-date, three and a half years later, the instrument has never been registered and the mortgage is still reflected on the title. Two other prime properties of the

judgment debtor were sold to the objecto under the same agreement of 31st December, 2018, to wit; LRV 50 Folio 17 Plot 41 Martin Road and LRV 3618 Folio 12 Plot 1094 Sir Apollo Kaggwa Road, both in Old Kampala. While the objector claims to have re-mortgaged the property to Stanbic Bank, no document to that effect has been presented. Stanbic Bank's involvement in these proceedings, whether by pleading, documentation of active participation, is conspicuous. Despite his counsel having been notified before today's proceedings, the objector has not availed himself for cross-examination. In paragraph 3 of his affidavit in reply, the objector states that he knew the judgment debtor before this transaction, through a business relationship between his company and that of the judgment debtor. This therefore was not an arm's length transaction.

Debtors are presumed to intend the natural consequences of their acts, and the natural consequence of incurring the purported transfer would, at a minimum, delay or hinder recovery of the judgment debt by the respondent. A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for other than a present, reasonably equivalent value, the debtor was insolvent at that time and the insider had reasonable cause to believe that the debtor was insolvent.

Given the timing and the way the transfer was purportedly done, many of the badges of fraud are present in this case; it is in fact replete with badges of fraud. This transaction is a mere scheme to circumvent the civil liability of the judgment debtor. It was made with the end, purpose and intent to delay, hinder or defraud creditors. The transfer of this property by the judgment debtor to the objector is accordingly set aside as void as against the respondent and other creditors. The property is liable to attachment and sale being the property of the judgment debtor. Accordingly the application is dismissed with costs to the respondent.

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Stephen Mubiru
Judge
20th May, 2022.
12.07 pm.