

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

MISCELLANEOUS APPLICATION No. 1202 OF 2021 AND MISCELLANEOUS CAUSE

No. 0032 OF 2023 (Consolidated)

(Arising from Civil Suit No. 0598 of 2013)

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1. **KABIITO KARAMAGI (RECEIVER / MANAGER OF }
 **SPENCON SERVICES LTD IN RECIEVERSHIP }
2. **DFCU BANK LIMITED }
 APPLICANTS******

VERSUS

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1. **YANJIAN UGANDA COMPANY LIMITED }
 RESPONDENTS
2. **NATIVE POWER COMPANY LIMITED }
 Before: Hon Justice Stephen Mubiru.****

RULING

a. Background.

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The 1st respondent was on 19th November, 2010 contracted by M/s Spencon Development Company Ltd, the registered proprietor of the two plots of land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane and LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya - Kampala, to construct two apartment blocks on the two plots to be known as “Windsor Curt Apartments.” In order to finance the construction of the residential housing project of 40 apartments on that land, M/s Spencon Development Company Ltd mortgaged the title deeds to the two plots to the 2nd applicant’s predecessor in title, M/s Crane Bank Limited, as security for a series of loans. The 1st respondent remained on site in possession of the two plots as an unpaid contractor. It as well lodged a caveat on the property comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane Mbuya, 25
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Kampala after M/s Crane Bank’s legal mortgage was registered. The 1st respondent subsequently filed HCSS No. 598 of 2013 against M/s Spencon Development Company Ltd for the unpaid contract sum. Judgment was on 13th February, 2015 entered in the 1st respondent’s favour for the sum of US \$ 1,220,246 and shs. 20,000,000/= as general damages, interest of 12% pa on the

special damages from the date of filing and on the general damages at 6% pa from the date of judgement. Costs were also awarded to the 1st respondent.

The 1st respondent then applied for and obtained an order of attachment and sale of Plot 5 Nadiope Lane Mbuya, which was at the time registered in the name of M/s Spenco Development Company Ltd. The Court on 19th June, 2015 issued a warrant of attachment of Plot 5 and the property was advertised for sale in the “Daily Monitor” newspaper. Upon advertisement of the attached property for sale, M/s Crane Bank Limited, the predecessor in title of the 2nd applicant, lodged objector proceedings in the Execution Division Application No. 1797 of 2015 as mortgagee of plot 5 against the attachment and sale of the property, which application was subsequently transferred to this Division and is now Application No. 1202 of 2021. An interim order of stay of sale had been issued on 14th July, 2015 before that transfer. The order stopped the sale and release of the property from attachment until determination of the objector proceedings. The applicants attempted to lapse the 1st respondent’s caveat but on 2nd November, 2021 this court issued an order to maintain the caveat and the order was registered on the title deed as an encumbrance.

In the meantime, M/s Spenco Development Company Ltd having defaulted on its loan obligations and become insolvent, M/s Crane Bank Ltd as mortgagee, in exercise of its powers under the security documents securing the borrowing, on 28th September, 2016 placed the borrower under receivership and appointed the 1st applicant as Receiver / Manager. In October 2016, the Bank of Uganda placed M/s Crane Bank Ltd under statutory management and later under liquidation by virtue of section 88 of *The Financial Institutions Act, 2004*. On 25th January, 2017, pursuant to a Purchase of Assets and Assumption of Liabilities Agreement, the 2nd applicant acquired some of the assets and liabilities of M/s Crane Bank Limited including the M/s Spenco Development Company Ltd’s loan and attendant security. Later the 2nd applicant in exercise of its powers as mortgagee, sold both plots to the 2nd respondent by an agreement of sale dated 1st September, 2021.

b. The two applications.

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The application by Notice of motion in Miscellaneous Application No. 1202 of 2021 is made under the provisions of section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act* and Order 22 rules 55, 56 and 57; as well as Order 52 rules 1, 2, and 3 of *The Civil procedure Rules*. The applicants seek an order discharging land comprised in LRV 3727 Folio 25 Plot 3
5 Nadiope Lane and LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala, from attachment and sale in execution of a decree. It is the 2nd applicant's case that the said land has, at all material times secured the satisfaction of the debt obligations of M/s Spencon Development Limited and M/s Spencon Services Limited owed to the 2nd applicant as the successor-in-title of M/s Crane Bank (U) Limited. They were mortgaged as security for the repayment of loans which
10 have accumulated to the tune of approximately shs 60,000,000,000/=

The second application, too by Notice of motion, which was filed on 23rd September, 2020 is Miscellaneous Cause No. 0023 of 2023 which is brought under the provisions of section 179, 180 and 195 (1) of *The Insolvency Act of 2011*, section 140 (1) of *The Registration of Titles Act*
15 and Regulation 203 of *The Insolvency Regulations, 2013*. The 1st applicant seeks directions on matters concerning his functions as the Receiver / Manager of M/s Spencon Development Limited regarding a caveat lodged on the insolvent company's property comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala and the 1st respondent's occupation of land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane, Mbuya, Kampala. The applicants sought
20 removal of the caveat and recovery of general damages from the 1st respondent.

It is the applicants' case that the properties comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane and LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala have at all material times secured the satisfaction of the debt obligations of M/s Spencon Development Limited and
25 Spencon M/s Services Limited owed to the 2nd applicant as the successor-in-title of M/s Crane Bank (U) Limited. They were mortgaged as security for the repayment of loans which have accumulated to the tune of approximately shs 60,000,000,000/= Following default on the loan repayment by the borrowers, the 1st applicant realized through sale the mortgaged properties on 1st September 2021, at a consideration of shs 6,000,000,000/=, inclusive of applicable taxes.
30 After the said purchase, the Purchaser took possession of the suit properties and is still in possession thereof. The Purchaser completed the transfer of Plot LRV 3727 Folio 25 Plot 3

Nadiope Lane into its names but the transfer of the LRV 3757 Folio 12 Plot 5 Nadiope at Mbuya has stalled because of this dispute which has caused and continues to cause further financial loss to the 2nd applicant. The applicants contend that the 1st respondent has no registerable interest in the land and that therefore the caveat was lodged wrongfully. The 1st respondent had also
5 through its security guards, prevented access to LRV 3727 Folio 25 Plot 3 Nadiope Lane.

c. Consolidation.

The law under Order 11 rule 1 of *The Civil Procedure Rules*, is that where two or more suits are pending in the same court, based on the same facts, founded on more or less similar grounds and
10 seeking similar relief from the court, although filed separately, in which the same or similar questions of law or fact are involved or common to all may arise, such suits may be consolidated, either upon the application of one of the parties or at the court's own motion and at its discretion. The court must interpret and apply the Rules so as to secure the just, most expeditious and least expensive determination of every civil proceeding on its merit. The purposes of this provision
15 are to avoid a multiplicity of proceedings, to promote the most expeditious and least expensive resolution of disputes, and to avoid inconsistent judicial findings.

Having analysed the relevant factors including the balance of convenience, absence of prejudice, duplication of evidence, common parties, stage of the applications, potential for inconsistent
20 findings and level or complexity if heard together or consecutively, I was satisfied that the requirements of this provision have been met in this case. Consolidation would not overly prolong or complicate the proceedings as the issues in both applications are fairly simple, discrete and not particularly complex. Their consolidation would result in cost savings, involve no additional delay, no undue procedural complexities and avoid multiplicity of proceedings and
25 inconsistent judicial findings. Accordingly in order to promote expeditious and inexpensive determination of the dispute between the parties involved and avoid a multiplicity of proceedings and inconsistent judicial findings, at the 1st respondent's motion and in exercise of its discretion, Miscellaneous Application No. 1202 of 2023 was consolidated with Miscellaneous Cause No. 0023 of 2023.

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d. The 1st respondent's affidavit in reply;

In its affidavit in reply, the 1st respondent avers that on 14th July, 2015 the court issued an interim order staying the sale and or releasing the suit property from attachment, meaning that the property could not be sold and could not be released from attachment until disposal of the main application. The purported sale by the applicants is illegal. The 1st respondent is in possession of the suit property as an unpaid contractor and judgment creditor and has a lien thereon. As occupier, the 1st respondent is paying the utility bills.

e. The 2nd respondent's affidavit in reply

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In its affidavit in reply, the 2nd respondent avers that it is a party to the Sale Agreement purchasing Plot 5 Nadiope Lane, LRV 3757 Folio 12. Sometime in mid-September 2021, the 2nd respondent was handed peaceful vacant possession, by DFCU, of the co-joined land comprised on Nadiope Lane, LRV 3727 Folio 25, Plot 3 and Nadiope Lane, LRV 3757 Folio 12, Plot 5 which then had incomplete shell structures; the company has since redeveloped the property. The 2nd respondent applied to be provided meters from National Water Sewerage Corporation and UMEME whose utility bills have since mid-September 2012 have been issued in the company's own names. The 2nd respondent had to first clear utility bills arrears which were connected to Plot 3 and Plot 5 before the utility companies would change the meter names into the 2nd respondent's name. The 1st respondent's pursuit of Plot 5 sold by DFCU as the secured creditor has resulted in wrongful interference of the 2nd respondent's said Sale Agreement.

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In the supplementary affidavit sworn by the Recoveries Manager of the 2nd applicant, it is averred that the 1st respondent's application for execution before the Commercial Court was only in respect of Plot 5 and not Plot 3 and 5. Plot 3 is not subject to the execution proceedings before the Commercial Court. The Order only restrained the 1st respondent from selling of the said Plot 5 pending the determination of the main cause before the Commercial Court. That property has not been transferred to the purchaser. The Commissioner Land Registration in the Ministry of Lands, issued notice to the 1st respondent as a Caveator informing it that its caveat would lapse within a period of 60 (sixty) days. The said notice was issued almost 3 (three) months before the Court's issuance of the temporary injunction. The Order to maintain the caveat was obtained on

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2nd November, 2021 and registered on 29th November 2021, by which time the caveat had already lapsed. The 1st respondent is no longer in possession. The purchaser has since September, 2021 been in possession since and has developed the property significantly. The Purchaser is in occupation of the premises where it is paying the utility bills and property rates.

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f. Submissions of counsel for the applicants:

M/s Ligomarc Advocates on behalf of the applicants submitted that in September, 2022 the applicants sought the direction of court against the respondent with regard to the occupation of
10 the respondents over plot 5 and LRV 3727 Folio 12 Plot 3 Nadiope Lane. The property belonged to Spencon in receivership and removal of a caveat from Plot No. 5 by the respondent. He 1st applicant was appointed receiver and the 2nd applicant's successor in title of the properties. The respondent is in possession of Plot 3 and caveated plot 5. The caveat on plot 5 was later vacated following the lapse of the notice of the Commissioner Land Registration for its removal on 17th
15 August, 2021. The annexures of the search certificates show this. The respondent is no longer in possession of both plots. The properties were sold on 1st September, 2021. Plot 3 was sold and transferred. Plot 5 the sale was conditional to be concluded when the caveat was vacated. The caveat lapsed but there is an order of temporary injunction.

20 The purchaser was registered on plot 3 on 14th September, 2021 and is also in possession. There is a contract for security services, bills, improvements and other proof of possession. The sale was on 1st September, 2021. The judgment sought to be enforced was on 23rd February, 2015. M/s Spencon Development Limited went into receivership in 2016. The sale of plot 3 was not affected by the warrant of attachment. It is only plot No. 5 that was listed. The sale was
25 conducted by the 2nd applicant as a mortgagee. The mortgage at the time of sale was DCU Bank under section 11 of *The Insolvency Act* as applied in *Bank of India U Ltd v. NCB U Ltd and URA HCCS No. 009 of 2021* where the sale was nullified. A judgment debt does not confer proprietary interest in the judgment creditor's land. The applicants have superior interest.

30 Since the caveat over LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala has lapsed and the Purchaser is in possession of the Suit Property, this application is substantially overtaken by

events. There is one remaining question regarding the 1st respondent's right as a Judgment Creditor vis-a-vis those of the 2nd applicant as Legal Mortgagee in respect of the suit property which is not only crucial but jurisprudential. The 1st respondent cannot get positive remedies except by way of consequential orders. In the suit leading to the judgment, they were in
5 possession not on account of asserting a right of unpaid contractor but to secure their machinery as at page 5 of the judgment. Section 2 of the Mortgage requires a lien to be registered. The respondent's rights are under the receivership and they cannot approbate and reprobate. They attached and then submitted to insolvency; they waived the attachment. The injunction is an interim order of 14th July, 2015 and the sale is in September, 2021. It was the 1st respondent who
10 was threatening to sell. The equitable principle applies. They cannot get the remedy of possession because it is not pleaded. Section 33 of *The Judicature Act* and section 98 of *The Civil procedure Act*. Declaration on ranking claims and the applicant has a superior right. *Rigo z messenger case, (1836) 1 All ER 79*.

15 Plot 5 LRV 3757 Folio 12 Nadiope Lane at Mbuya is attached. It was mortgaged to the DFCU bank. The mortgage was registered on 24th January, 2011 and further mortgage on 2nd July, 2011 and a further charge on 22nd March, 2012. The property was attached around 24th June, 2015. The judgment is against the property and was delivered on 23rd February, 2015. The warrant is dated 19th June, 2015 returnable within 30 days on 19th July, 2015. In *Edwin Otile Ojungu v.*
20 *Acanilwete cop Socierty Ltd and another, 1994 KLR 735*. Land that is mortgaged is attachable if the lien is discharged. The amount is shs. 18,456,257,325/= as at 13th July, 2015 although partial recovery was made by sale. Only shs. 4 billion was recovered. The question of possession DFCU has the title deeds. It has constructive possession of the property. The sale of the property was by agreement which is attached as annexure "A" to the supplementary affidavit of Isaac Mpanga. It
25 was in respect of both plots and the consideration was 6 billion. Clause 2.1 as per payment of shs. 3.5 billion was made and a balance is to be paid later on . Clause 4.1 refers to plot 3 and addresses the transfer upon execute of the agreement. It was a sale of only one of the plots. Under the FIA the transmission of mortgages is possible. The equitable principle of considering as done that which was intended to be done cures the defect of non-registration of the mortgages.

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g. Submissions of Counsel for the 1st respondent.

M/s Nambale, Nerima and Co. Advocates on behalf of the applicant submitted that section 38 (b) and 44 of the CPA it is not in doubt that the judgment debtor is the registered proprietor of plot 5 Nadiope Lane. A mortgage is not a bar to attachment. In objector proceedings possession is key.

5 There is no evidence of Crane Bank having taken possession at the time of attachment. The receiver sought to have the 1st respondent to leave the property. The 1st respondent had been in possession and that is decisive. A mortgagee is not without a remedy. Order 22 rule 59 of the CPR the Court may allow the attachment to continue subject to the mortgage or charge. A judicial sale results in funds being deposited in court which will then distribute. There is a need
10 for further investigation to determine how much was disbursed, principal and interest. The issues of the debt will be established after the sale. The interim order has preserved the attachment. Order 22 rule 52 attachment ends upon satisfaction of the decree or dismissal of the application for execution O22 rule 54 or property is released from attachment as per O 22 r 55 of the CPR.

15 Once court had attached the property and it has not been lifted, it is unlawful to purport to sell the property. The sale of 1st September, 2021 was unlawful and a violation of mandatory Orders. The purchaser is not transferred yet. The Land Division enjoined plot 5 in Mic Cause 1033 of 2020 which is now MC 032 of 2023 in this Division. They could not sell since Spencon had undergone receivership and before the receivership could be terminated. The registered
20 mortgagee is Crane Bank and the mortgage had never be transferred to DFCU. Section 17 (2) of The Mortgage Act requires transfer before a mortgagee can sell. If a judicial sale continues the Court will be able to supervise a valuation and ensure the sale is at the highest possible price. The supplementary affidavit of the 2nd respondent plots 3 and 5 were sold for shs. 6,000,000,000/= on 1st September, 2021. The valuation attached to the affidavit in reply to the
25 objector proceedings. In 2015 they were valued at shs. 15,189,700,400/= The sale is less than transparent as eight years later it is sold at less than half that value.

For this particular borrowing, Spencon mortgaged other properties including at Kawempe. As regards plot 3 the applicant is an unpaid contractor entitled to remain on site. The applicant was
30 ejected after the sale. The status quo ante has to be restored. Alternatively, the bailiff would be in charge and met the cost of securing the property to be recovered from the proceeds of sale. The

objector application ought to be dismissed and allow continuation of sale of plo5. The 1st respondent's possession should be restored. The sale of plot 3 be voided and set aside. The agreement shows that they were aware of the possession. The cost of the application t the respondent. I pray for interim relief. Any further alteration of the property by way of construction or alteration. The Court should have regard to section 179 and 180 of *The Insolvency Act*.

h. Submissions by Counsel for the 2nd respondent.

10 M/s Muyanja & Co. Advocates and Solicitors, submitted that the judgment in CS 598 of 2013 only determined the monetary liability the Spenco owed Yanjin the employer. It did not determine any Yanjin interest in the suit land. *Owembabazi Enid v. Guarantee Trust Bank Ltd, HCCS 63 of 2019* only rights that create physical interest on the land are enforceable in respect of land. *Adrabo Stanley v. Madira Jimmy* on right that gives possession. Section 1 (g) of the RTA includes interest and rights that may be made in respect of land. Any interest must be capable of registration *KCB v. Afraha [2001] 1 EA 86*. The mortgage of 21st January, 2011 was the first encumbrance. All other interests have to be subject to it. *The mortgage Act* protects purchasers to the extent that no case of fraud, misrepresentation or dishonest conduct is raised against the mortgagee. The 1st respondent not raised such grounds. Section 29 of The Mortgage Act protects the purchasers. In *J.M Hauliers Ltd v. Access Microfinance bank Tz Ltd, 2022 TZ CA No. 522 of 22nd August, 2022*. Court does not interfere when a mortgagee is exercising its power of sale where a statutory ground to set the sale aside have not been raised against the mortgagee, hence the purchaser is entitled to possession. We side with the applicants that the temporary court order ought to be vacated from Plot 5.

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The mortgage and debenture are protected by different laws; RTA section 2 supremacy clause. Therefore the CPA ns the CPR are secondary. *African Textile Ltd v. coop bank ltd HCCS 20 of 2005*. At page 7 a secured creditor to stands out of insolvency. The application is not about receivership. In *Pou Cohi Kam v. Wealth Credit Ltd 2018 Hong Cong CA 250* what cannot be registered cannot sound against a registered interest. The warrant of attachment was issued *per incuriam*. Property that is mortgaged is not subject to attachment.

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i. The decision.

According to Order 15 rule 3 of *The Civil Procedure Rules*, the court may frame issues from all
5 or any of the following materials; - (a) allegations made on oath by the parties, or by any persons
present on their behalf, or made by the advocates of the parties; (b) allegations made in the
pleadings or in answers to interrogatories delivered in the suit; and (c) the contents of documents
produced by either party. The court may at any time before passing a decree amend the issues or
frame additional issues on such terms as it thinks fit, and all such amendments or additional
10 issues as may be necessary for determining the matters in controversy between the parties shall
be so made or framed (see Order 15 rule 5 of *The Civil Procedure Rules*). It is on that account
that the Court proceeds to address the following issues; (i) whether the property comprised in
LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala is subject to attachment and sale in
execution of a decree against M/s Spencon Development Company Ltd; (ii) whether the sale of
15 land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane and LRV 3757 Folio 12 Plot 5
Nadiope Lane, Mbuya, Kampala is valid; (iii) whether the 1st respondent's caveat lodged on land
comprised LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya – Kampala subsists and should be
maintained; (iv) whether the land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane and
LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala should be discharged from
20 attachment.

- i. Whether the property comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane,
Mbuya, Kampala is subject to attachment and sale in execution of a decree against
M/s Spencon Development Company Ltd;

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Section 44 of *The Civil Procedure Act* prescribes the property which can and cannot be attached
in execution of a decree. 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
30 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
5 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 land comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala, is “property belonging to the judgment debtor” or property over which it “has disposing power which [it] may exercise for his or her own benefit.”

10 As at 12th November, 2021 the land was registered to M/s Spencon Development Company Ltd of P. O. Box 926, Kampala, having been so registered on 23rd September, 2010 at 12:05 pm under Instrument No. 435889 (see annexure “B” to the 2nd applicant’s supplementary affidavit in support of the application). Therefore, at the time the warrant of attachment was issued on 19th June, 2015 the title deed was still registered to the judgment debtor, M/s Spencon Development
15 Company Ltd and the property was thus attachable.

Before property can be sold in execution of a money decree, the court must first attach it, so as to bring it within its jurisdiction, and then sell it. It however is counsel for the applicant’s argument that land subject to a mortgage is not available for attachment in execution of a decree. It so
20 happens that the title deed to LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala was first mortgaged to M/s crane Bank Limited on 24th January 2011 at 12:41 pm under Instrument No. 442774. Further charges were registered by the same bank on 20th July, 2011 at 9:48 am under Instrument No. 452126 and on 22nd March, 2012 at 2:40 pm under Instrument No. 464943. The implication is that by the time judgment was delivered in favour of the 1st respondent and a
25 warrant of attachment issued, the land was encumbered with a mortgage in favour of the 2nd applicant.

Existence of a mortgage on the property of a judgment debtor does not of itself exempt the property from attachment in execution of a decree. According to Order 22 rule 59 of *The Civil*
30 *Procedure Rules*, where during objector proceedings the court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession and thinks fit to

continue the attachment, it may do so, subject to the mortgage or charge. Where any property the sale of which is directed is subject to a mortgage, the court may, with the consent of the mortgagee, direct that the property be sold free from the same, giving to such mortgagee the same interest in the proceeds of the sale as he had in the property sold.

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Where the sale proceeds with the consent of the mortgagee, the proceeds are brought into court and applied in the following order of priority: (a) in the payment of all expenses incidental to the sale or expenses properly incurred in any attempted sale; (b) in payment of whatever is due to the mortgagee on account of the mortgage, and of costs, properly incurred in connection therewith; 10 (c) in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made; (d) in payment of the principal money due on account of that mortgage; and (e) the residue (if any) is paid to the person proving himself to be interested in the property sold or, if there are more such persons than one, then to such persons according to their respective interests therein or upon their 15 joint receipt. The issue therefore is answered in the affirmative, the land is subject to attachment and sale in execution of a decree against M/s Spencon Development Company Ltd.

ii. Whether the sale of land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane and LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala to the 2nd respondent is valid; 20

By an agreement dated 1st September, 2021 (annexure “A” to the 2nd applicant’s supplementary affidavit in support of the application), the 2nd applicant sold land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane and LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala to the 25 2nd respondent, M/s Native Power Company Limited at the price of shs. 6,000,000,000/= The Purchaser paid the sum of shs. 3,500,000,000/= upon execution of the agreement and it was agreed that the balance of shs. 2,500,000,000/= was to be paid within three months from the date of execution of the agreement. However, although the 2nd respondent took possession both plots, it has only transferred LRV 3727 Folio 25 Plot 3 Nadiope Lane into its name.

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a) Validity of the sale of LRV 3727 Folio 25 Plot 3 Nadiope Lane.

As regards the property comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane, the 1st respondent's claim is based only on an assertion of a contractor's lien. A lien is a legal claim on a property that is used to secure payment of a debt. A contractor's lien (often known as a mechanic's lien, or a construction lien) is a claim made by contractors or subcontractors who have performed work on a property and have not yet been paid for work done on that property, against the property. It is a type of security interest in real property provided to contractors, suppliers, and others as a tool to collect payment on building projects. A contractor's lien is said to arise when "the first shovel hits the ground." The lien attaches to the land that is the subject of a contract for erecting, repairing, moving, or altering improvements to land or for furnishing labour or material therefor, owned or held by the owner and used or designed for use in connection with such improvements, and it is invoked by giving notice in writing to such owner or his or her agent having charge of such land that he or she shall claim a lien for labour or material (see *Econocom 183 CC t/a Econocom v. Swanepoel and Another (59961/2014) [2014] ZAGPPHC 853 (18 September 2014)*). There is no evidence in this case showing that the 1st respondent ever issued such notice to M/s Spencon Development Company Ltd.

A contractor's lien is also a right of retention and often it will be a useful tool for a contractor to retain possession of the property (the site and the works) until he/she/it is paid for work done (see *Ploughall (Edms) Bpk v. Rae 1971 (1) SA 887 (W)*). A temporary absence, such as occurs at the end of a working day or over a weekend, does not interrupt a contractor's lien where the contractor remains engaged in the work and continues to assert his occupation of the site. Reliance on a contractor's presupposes not only that the contractor is entitled to payment, but also that the employer's debt is due: such a lien cannot be exercised in respect of a future debt (see *Conress (Pty) Ltd and another v. Gallic Construction (Pty) Ltd 1981 (3) SA 73 (W) 76*).

Possession must be continuously maintained because once lost, it cannot be regained by self-help (see *Nino Bonino v. De Lange 1906 TS 120 122; Ploughall (Edms) Bpk v. Rae 1971 (1) SA 887 (T) 891* and *Scholtz v. Faifer, 1910 T.P.D. 243*). In instances where work is suspended, or possession is voluntarily surrendered or abandoned, the lien will be lost (see *Savory v. Baldochi 1907 TS 523 525* and *Morris v. Taljaard 1952 (1) SA 49 (C)*). If possession is lost and

subsequently regained, the lien will not be revived unless possession was lost due to force or fraud and regained by order of court. A former lien-holder is entitled to apply for a summary order of restitution of possession where he/she/it was dispossessed by resort to fraud, force or some other clandestine act or undue means or wrongful act on the part of part of the owner, or a third party (see *Assurity (Pvt.) Ltd v. Truck Sales (Pvt.) Ltd 1960 (2) SA 686 (SR) at 689H – 690A* and *Wightman t/a JW Construction v. Headfour (Pty) Ltd and Another (A28/2006) [2006] ZAWCHC 78; 2007 (2) SA 128 (C) (7 September 2006)*). The first requirement for the valid exercise of a lien is effective, actual, uninterrupted and lawfully acquired possession. The contractor must have the intention to hold and exercise control over the property with a view to secure some benefit as against the owner, for example as security. The contractor is also required to prove that the site or the relevant portion of it is occupied and under its control at all material times.

There can be no doubt in the instant case that, at least until the 2nd respondent took possession, the 1st respondent exercised full physical control over the premises and could thus assert a contractor's lien over it. There however is no evidence to show that the 1st respondent had the intention to hold and exercise control over the property as security for payment. Following the suspension of the construction works during the year 2012, it appears that the 1st respondent's continued occupation was for purpose of securing its materials, tools and equipment located thereon; at least that is the finding made by the trial judge in the judgment delivered on 13th February, 2015 in H.C.C.S No. 598 of 2013 and in the affidavit in reply of the 1st respondent's director to the Notice of motion in Miscellaneous Cause No. 23 of 2023. Without evidence to show that the 1st respondent remained in possession of the works when relying on a contractor's lien until its dispossession by the 2nd respondent, the issue of restitution of possession does not arise.

It is noteworthy that the then Acting Deputy Registrar of the High Court Land Division on 2nd November, 2021 in Miscellaneous Application No. 1430 of 2021 filed by the 1st respondent against the applicants arising from Miscellaneous Cause No. 0103 of 2020 (now 023 of 2023) duly issued a temporary injunction order in the following terms;

A temporary injunction doth issue to restrain the respondents, their servants and agents from selling, removing the applicant's caveat or otherwise dealing in or alienating property comprised in Leasehold Register Volume 3727 Folio 25 Plot 3 Nadiope Lane, Mbuya and Leasehold Register Volume 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya until final disposal of the main cause.

Before that, the said Acting Deputy Registrar had issued an interim restraining order in similar terms on 20th September, 2021 that had on 30th September, 2021 been extended until 21st October, 2021. By that time the land comprised in Leasehold Register Volume 3727 Folio 25 Plot 3 Nadiope Lane, Mbuya had been on 1st September, 2021 sold and subsequently transferred into the 2nd respondent's name on 14th September, 2021 and the 2nd respondent had already taken physical possession of the land. That temporary injunction order has no bearing on this transaction.

However, the transaction of sale is impugned on account of the fact that at the time of sale of this land by the 2nd applicant as mortgagee, M/s Spencon Development Company Ltd had been placed under receivership / management of the 1st applicant by the 2nd respondent. The receiver was appointed under debenture deeds that created security over the Company's assets. This receivership was initiated by M/s Crane Bank Limited as secured creditor to recover amounts outstanding under secured loans upon the company's default on the loans. It is contended by counsel for the 1st respondent that by doing so, the 2nd applicant divested itself of the power of sale as mortgagee, which power was then vested in the 1st applicant. This is because section 180 (2) (a) and (b) of *The Insolvency Act* requires a Receiver to take custody and control of all the property which is under receivership and to register in his or her names all land and other assets under receivership. Since the 1st applicant's appointment as Receiver / Manager on 28th September, 2016 it appears he had not caused the transfer of the title to LRV 3727 Folio 25 Plot 3 Nadiope Lane into his name by the time it was sold by the 2nd applicant to the 2nd respondent.

By virtue of section 20 of *The Mortgage Act*, there are multiple remedies available to a mortgagee against a mortgagor in default, including; - (a) requiring the mortgagor to pay all monies owing on the mortgage; (b) appointing a receiver of the income of the mortgaged land; (c) leasing the mortgaged land or where the mortgage is of a lease, sublease the land; (d) entering into possession of the mortgaged land; and (e) selling the mortgaged land. Remedies, other than

foreclosure, are not exclusive: it is open to the mortgagee to exercise a number of them in turn in respect of a single mortgage. The mortgagee is under no duty to consider any interests other than its own when deciding whether or not to exercise its rights which it has to take possession or to appoint a receiver, or otherwise. It was therefore open to the 1st applicant to sell the mortgaged
5 land despite having appointed a receiver under the debentures. As long as the mortgagee exercised the power for proper purposes, and not for the sole purpose of vexing the mortgagor, it would not be in breach of its duty of good faith.

That notwithstanding, according to section 92 (1) of *The Registration of Titles Act* and 17 (2) of
10 *The Mortgage Act*, it is only the proprietor of a mortgage who has the right to transfer the same. Section 1 (l) of the Act defines “proprietor” to mean the owner, whether in possession, remainder, reversion or otherwise of a mortgage, whose name appears or is entered as the proprietor of that mortgage in the Register Book. It also includes the donee of a power to appoint or dispose of that mortgage. The person named in any instrument so registered as the proprietor
15 of or having any estate or interest in or power to appoint or dispose of the mortgage described in the instrument is deemed and taken to be the duly registered proprietor of the mortgage, from the date and time when a memorial of the instrument is entered in the Register Book upon the folium constituted by the certificate of title (see section 46 of the Act). It is upon registration of a transfer of the mortgage that the estate and interest of the mortgagee as set forth in the
20 instrument, with all rights, powers and privileges belonging or appertaining thereto, passes to the transferee, and the transferee thereupon becomes the proprietor thereof (see section 92 (2) of the Act).

Although by the Purchase of Assets and Assumption of Liabilities Agreement of 25th of January,
25 2017, the 2nd applicant had acquired some of the assets and liabilities of M/s Crane Bank Limited, including the M/s Spenco Development Company Ltd’s loan and attendant security, it appears that by 1st September, 2021 when it sold LRV 3727 Folio 25 Plot 3 Nadiope Lane to the 2nd respondent, it had not caused the transfer of the mortgage into its name. By virtue of section 92 (1) of *The Registration of Titles Act* and 17 (2) of *The Mortgage Act*, the 2nd applicant did it
30 have the capacity to sell and transfer that mortgage. In light of section 54 of the Act, it could not do so simply on the strength of the Purchase of Assets and Assumption of Liabilities Agreement,

since no instrument, until registered in the manner provided by the Act, is effectual to pass any estate or interest in any land under the operation of the Act. Registration of the legal instrument used to transfer title to a property from one party to another proves proprietorship and recognition of the current and rightful owner of the property with the right ad capacity to transfer
5 it.

Since the name of the 2nd applicant does not appear and neither is it entered as proprietor of that mortgage in the Register Book, and yet the 2nd applicant is not the donee of a power to dispose of that mortgage, the 2nd applicant did not have legal capacity to sell and transfer that mortgage to
10 the 2nd respondent. The maxim *nemo dat quod non habet* (no one gives who possesses not) applies, especially when a prior legal interest conflicts with a subsequent legal interest in the same land, to prevent a party passing title to a better interest than that which they themselves possess (see *Bishopsgate Motor Finance Corpn. Ltd. v. Transport Brakes Ltd [1902] AC 325 at 326* and *Greenwoods v. Bennett (1973) 1 QB 195*). If someone purports to give or sell some
15 property but does not have a legal right or title to perform such transfer, then the transfer is not effective. Such a transfer cannot be enforced under law.

The Purchase of Assets and Assumption of Liabilities Agreement of 25th of January, 2017 was executed courtesy of section 95 (1) (b) of *The Financial Institutions Act, 2004* empowering the
20 Central Bank, within twelve months from the date of taking over as a receiver, to arrange for the purchase of assets and assumption of all or some of the liabilities by other financial institutions. None of the provisions of that Act exempt a purchaser of assets from compliance with sections 47, 54 and 92 (1) of *The Registration of Titles Act*. A mortgage transfer takes effect when a person is added, removed or replaced on an existing mortgage on the Register. The 2nd
25 applicant's name has never replaced that of M/s Crane Bank Limited on the Register.

The 2nd respondent cannot seek protection of section 29 (1) of *The Mortgage Act*, by which a purchaser in a sale effected by a mortgagee acquires good title except in a case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser
30 has actual or constructive notice. This is because the 2nd respondent's purchase was not from the registered mortgagee. That protection applies only where the purchase is from a person

registered on the title as mortgages. It is for that reason that the issue is answered in the negative, the 2nd applicant's sale of the land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane, Mbuya to the 2nd respondent is void by reason of the 2nd applicant's lack of legal capacity to sell and transfer the land under powers of mortgagee.

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b) Validity of the sale of LRV 3757 Folio 12 Plot 5 Nadiope Lane.

By a judgment delivered on 13th February, 2015 in High Court Civil Suit No. 598 of 2015, M/s Spenco Development Company Ltd was ordered by a decree of this Court to pay to the 1st respondent the sum of US \$ 1,439,890.28 and shs. 24,000,000/= being general damages and shs. 56,789,902/= being costs. By a warrant of attachment and sale issued on 19th June, 2015 a Court Bailiff was authorised to execute the decree by way of attaching and sale of the immoveable property to wit; Land comprised in Lease Hold Register Volume 3757 Folio 13, Plot 5 Nadiope Lane Kampala District, measuring approximately 0.249 hectares. The warrant was returnable on 15 19th July, 2015. By the Executions and Bailiffs Division Miscellaneous Application No. 1798 of 2015, M/s Crane Bank Ltd sought to restrain the 1st respondent from proceeding with the sale of LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala by public auction in execution of the decree. The then Deputy Registrar of the now defunct Executions and Bailiffs Division of this Court, on 14th July, 2015 duly issued an interim restraining order in the following terms;

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An Interim order does issue staying the sale and or releasing Property comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane at Mbuya Kampala District from attachment pending the hearing and determination of the objector application seeking the release of the suit property.

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That order was buttressed by another issued by the Acting Deputy Registrar of the High Court Land Division on 2nd November, 2021 in Miscellaneous Application No. 1430 of 2021 filed by the 1st respondent against the applicants arising from Miscellaneous Cause No. 0103 of 2020 (now 023 of 2023). By that order, the applicants, their servants and agents were restrained from 30 selling, removing the applicant's caveat or otherwise dealing in or alienating property comprised in Leasehold Register Volume 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya until final disposal of the main cause.

It is the 1st respondent's case that by virtue of its caveat lodged on the title to the land on 20th April, 2013, the interim restraining order of 14th July, 2015 and the temporary injunction order of 2nd November, 2021 and the fact that the land is the subject of an existing warrant of attachment
5 in execution of a decree in favour of the 1st respondent, the 2nd applicant's sale of the land comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya to the 2nd respondent is invalid and that the applicants' attempt to follow the transaction through with registration of a transfer of the land to the 2nd respondent, should be stopped. The applicant's case is that the 1st respondent has no caveatable interest in the land and that it was properly sold in exercise of powers of
10 mortgage by the 2nd applicant.

It is trite that although a warrant of attachment and sale, does not create a proprietary interest and so is not caveatable as such, being a proceeding directly against property, concerning the title or status of the *res*, it is a proceeding *in rem*, binding upon those who are known to claim or who
15 might claim ownership of or an interest in the property. It is issued against the particular property, enforceable against the whole world. Once issued, it does not create a charge or lien upon the attached property, it does not confer any title on the judgment creditor; it merely prevents and avoids private alienations of the land. The Judgment Creditor acquires, by virtue of the attachment, a right to have the attached property kept in *custodia legis* for the satisfaction of
20 his debt. Land lawfully attached by virtue of legal process is deemed to be in *custodia legis* and that of itself prevents further dealings in the land without the leave of Court, otherwise, there would be interference with the possession and title before the function of law has been performed as to the process under which the property was attached.

25 When a thing or property is in *custodia legis*, it cannot be distrained, transferred, sold or otherwise interfered with by a private person, without the prior permission of the court. Land that is the subject of a warrant of attachment remains under the court's control and continuous supervision for the duration of the warrant, and the importance of such supervision cannot be overstated. The bailiff's possession is the possession of the court, for the benefit of all persons
30 interested, whether named as parties in the proceedings or not, and it cannot be disturbed without the consent of the court. No sale can take place, no debt can be paid, no contract can be made in

respect of such land, which does not receive the sanction of the court. Thus, only the court may authorise a transfer or encumbrance of the property. The court must administer it independently of any rights acquired by third persons, pending the litigation.

5 That notwithstanding, according to Order 22 rule 51 (1) of *The Civil Procedure Rules*, where the property to be attached is immovable, the attachment is made by an order prohibiting the judgment debtor from transferring or charging the property in any way, and all persons from taking any benefit from the transfer or charge and ordering the judgment debtor to deliver up to the court the duplicate certificate of title to the property. Such order has to be affixed on a
10 conspicuous part of the property and at the court house. A decree issued by the court, is a registrable instrument and once registered secures the judgement debt and interest thereon and its beneficiary takes priority over unsecured creditors. Registration prevents the Judgment Debtor from selling the land without paying what is owed to the Judgment Creditor. The Judgment Creditor can sell the land subject to the charges, liens and equities to which it was subject in the
15 hands of the Judgment Debtor.

Subject to *The registration of Titles Act*, the warrant of attachment and sale binds the land when it is received by the bailiff. According to section 54 of *The registration of Titles Act*, no instrument until registered in the manner provided by the Act is effectual to pass any estate or interest in any land under the operation of the Act or to render the land liable to any mortgage;
20 but upon such registration the estate or interest comprised in the instrument passes or, as the case may be, the land becomes liable in the manner and subject to the covenants and conditions set forth and specified in the instrument. A registered decree is superior to an unregistered agreement of sale. This is because registration is the operative act that binds or affects the land insofar as third parties are concerned. The Judgment Creditor acquires protection in respect of
25 the attached property which nothing can subsequently destroy except the very dissolution of the attachment itself. The protection continues until the debt is paid, or sale is effected under execution issued on the decree, or until the decree is satisfied, or the attachment discharged or vacated in some manner provided by law.

30 Registration of a decree does not create an estate or charge upon the land. This is because under section 135 (1) of *The Registration of Title Act* a decree of execution does not in itself bind,

charge or affect any land, lease or mortgage; but the registrar on being served with a copy of such decree of execution issued out of any court, accompanied by a statement signed by any party interested or his or her advocate or agent, specifying the land, lease or mortgage sought to be affected by the decree, enters it in the Register Book; and after the land, lease or mortgage so specified has been sold under such decree, the registrar, on receiving a transfer thereof, registers the transfer.

A decree upon registration takes the character of a charge on the land. A charge creates no interest in or over the land, but is only a security for the payment of money. By registration of a decree therefore, the Judgment Creditor acquires a right to have the attached property kept in *custodia legis* for the satisfaction of his debt. The bailiff is merely entitled to realise the value of the land for the Court to distribute the proceeds. No charge may be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge. Registration of the decree helps to protect the Judgment Debtor's right of recourse to the land for recovery of the judgment debt against claims by third parties and also gives the bailiff the right to dispose of the land or equity after the period of advertisement specified in the warrant. The protection created by registration of the decree will remain in force so long as the warrant of attachment remains valid in the hands of the bailiff and is kept alive by renewal.

However in the instant case, there is no evidence to show that the 1st respondent caused registration of the decree on the title before or after issuance of the warrant of attachment on 19th June, 2015. Instead the 1st respondent lodged a caveat on the title on 20th April, 2013 vide Instrument Number 482236, which was not on account of the decree, since none had been issued by then, but on account of the constructor's lien. Though a constructor's lien technically exists as soon as a contractor applies its services and/or materials, it is effectively meaningless unless a caveat is registered on the title with the commencement of a corresponding action in court. The affidavit in support of the caveat stated as follows;

2. That Yanjian Uganda Company Limited claims an interest in the above described land as a company contracted by the registered proprietor to construct thereon Windsor Court Apartments.

3. That on 19th November, 2010 Yanjian Uganda Company Limited entered into a building contract with Spencon Development Company the registered proprietor of the above described land to construct apartments. (A copy of the contract is attached hereto and marked as Annexure “A”).
- 5 4. That Yanjian Uganda Company Limited completed construction but has not been paid for its services by the Spencon Development Company being the registered proprietor of the above described land.
5. That the total amount due to Yanjian Uganda Company Limited from Spencon Development Company is US \$ 1,841,494 and the matter is currently in arbitration. (A copy of the Statement of Claim I attached hereto and marked as Annexure “B”).
- 10 6. That the amount due to Yanjian Uganda Company Limited approximately equals the value of the above described land.
7. That Yanjian Uganda Company Limited will suffer irreparable damage if there is any change in proprietorship, or any dealing on the said land is effected without its NOTICE or CONSENT.
- 15

Although no instrument until registered in the manner provided by *The registration of Titles Act* is effectual to pass any estate or interest in any land under the operation of the Act, there is, however an exception, i.e., when a party has knowledge of a prior existing interest which is unregistered at that time he acquired a right to the same land, his knowledge of that prior unregistered interest has the effect of registration as to him or her. The fact that the system sets up a caveat system providing for the protection unregistered and caveatable interests makes clear that the Torrens based legislation assumes unregistered interests can exist (see *Barry v. Heider. [1914] HCA 79; 19 CLR 197*). A caveator may only lodge a caveat to protect an estate or interest in land. A person asserting a right or interest in land may lodge a caveat in order to protect their right or interest from the registration of inconsistent dealing (see section 139 of *The Registration of Titles Act*). Knowledge of an unregistered interest disclosed in the caveat, is equivalent to registration.

30 Thus, if it can be proven that the 2nd respondent, at the time of the sale on 1st September, 2021, had knowledge of the warrant of attachment affecting the land issued on 19th June, 2015, the same would be considered equivalent to registration as to the 2nd respondent. The attachments to the affidavits submitted in this application show evidentiary proof that 2nd respondent had knowledge of such transaction by way of the orders preserving the caveat lodged on the title by

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the 1st respondent, prior to the 2nd respondent's purchase. When an instrument has been properly recorded, such record is constructive notice of its contents and all interests, legal and equitable, included therein. Under the rule on notice, it is presumed that the purchaser has examined every instrument on record affecting the title. Such presumption is irrefutable and cannot be overcome
5 by any claim of innocence or good faith.

By clauses 3.1 and 3.3 of the sale agreement dated 1st September, 2021 the 2nd respondent acknowledged having conducted its due diligence and being well aware that the property comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala was at the time of that
10 sale encumbered with a Caveat by the 1st respondent lodged on 20th April, 2013 vide Instrument Number 482236. It is on that account and the 2nd applicant undertook to remove / vacate the same. The 2nd applicant affirmed that it commenced the process of removal of the caveat and undertook to pursue it to its logical conclusion. By virtue of these express terms, the 2nd respondent had constructive knowledge of a prior existing unregistered charging order / warrant
15 of attachment of the land at that time he acquired it by purchase from the 2nd respondent.

The priority enjoyed by the beneficiary of a warrant of attachment extends, with full force and effect, to the buyer at the auction sale conducted by virtue of such warrant. It follows therefore that a warrant of attachment, has preference over a later unregistered sale and, even if the later
20 sale is subsequently registered before the sale on execution but after the warrant is issued, the validity of the execution sale should be upheld because it retroacts to the date of the warrant.

For example in *Black v. Garnock* [2007] HCA 31; 230 CLR 438; 237 ALR 1, the parties entered into a contract for the sale of a rural property, contracts were exchanged and a deposit was paid
25 in the usual course. On the day of settlement the purchasers were put on notice that the vendor owed a debt to a third party and that third party was going to "stop the sale." Although the purchasers had obtained a final search on the morning of settlement, they did not obtain an updated final search after receiving the notice from the third party and prior to settlement taking place later that day. Between those times, the third party had lodged a writ against the property,
30 and the High Court held that the writ defeated the interests of the purchasers. The transfer was rejected for registration at the Department of Lands as a result of the existence of the prior writ

now on the title. An attempt on behalf of the purchasers to lodge a caveat also failed. Even though the purchasers had paid the balance of the price to the vendor, they were not able to be registered on the title to the property.

5 The purchasers commenced proceedings seeking an injunction preventing execution of the writ, amongst other reliefs, claiming that as holders of equitable interests in land, the purchasers were entitled to priority over any rights to the land that might be held by the judgment creditors. It was held in the majority that the Torrens land system, being a system of title by registration, meant that registration of a transfer under a writ vests in the transferee a particular kind of title by
10 registration. The purchasers' attempt to rely on their equitable interests to claim priority over any rights to the property was not accepted, as the writ was registered first on the title. Consequently a purchaser's failure to lodge a caveat resulted in the loss of a purchaser's priority when a writ of execution in relation to a judgment debt against the vendor was registered on the title of the property that was being sold just prior to completion of the contract. A prior unregistered
15 equitable interest in a property was defeated by a subsequently registered warrant of attachment and sale of the property.

Similarly in the instant case, the prior caveat lodged by the 1st respondent on the title on 20th April, 2013 vide Instrument Number 482236, whose validity was extended by an order of court
20 duly registered thereon on 29th day of November, 2021 at 4:12 pm under instrument no. KCCA-00086212, defeats the intervening unregistered equitable interest of the 2nd respondent in the property created by the agreement of sale dated 1st September, 2021. Secondly, no sale can take place in respect of land that is the subject of a valid warrant of attachment and sale in execution, without the sanction of the court. It is only the court which issued such warrant that may
25 authorise a transfer or encumbrance of such land during the validity period of the warrant of attachment and sale.

A warrant of attachment of land in execution of a money decree vests the power to dispose of such land in the bailiff alone, and that power is subject to the supervision and prior authorisation
30 from the appointing court. By virtue of the 14th of July, 2015 interim restraining order staying the sale and release from attachment, of the property comprised in LRV 3757 Folio 12 Plot 5

Nadiope Lane at Mbuya Kampala District, pending the hearing and determination of the objector application seeking discharge of the property from attachment, the issue is answered in the negative, the 2nd applicant's sale of the land comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane at Mbuya Kampala District to the 2nd respondent is void by reason of it having been a sale
5 of property in *custodia legis* without the prior leave of Court.

iii. Whether the 1st respondent's caveat lodged on land comprised LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala subsists and should be maintained;

10 The reason given by the 1st respondent in the affidavit in support for lodgement of the caveat was that M/s Spencon Development Company Limited owed it US \$ 1,841,494 and that the matter was by the subject of an arbitration process. In the 1st respondent's view, that amount was approximately equivalent to the value of the land caveated. It is trite though that mere work and labour done on property is not a caveatable interest (see *Walter v. Registrar of Titles [2003]*
15 *VSCA 122 at [18]* and *Depas Pty Ltd v. Dimitriou [2006] VSC 281*). Further, a caveat is not supportable by a mere prospective or actual court proceeding.

Similarly, a caveat cannot be lodged only because the registered proprietor of land owes another money as this does not constitute an actual interest over the debtor's land. Consequently a Court
20 judgment against the registered proprietor of land does not necessarily create a caveatable interest in the land giving rise to an entitlement to lodge a caveat over it. However, as a supplier of material and services which are affixed to the land, an unpaid contractor whose payment is due, has the right to register a caveat in anticipation of legal proceedings, on basis of a construction lien relating to the improvements it builds for a registered owner of land (see
25 *Hewett v. Court (1983) 149 CLR 639 at 668*), where; (i) there exists an actual or potential indebtedness by the owner of the property to the contractor arising from a payment or promise of payment, either of consideration in relation to the acquisition of the property or of an expense incurred in relation to it; (ii) such property is specifically identified and appropriated to the performance of the contract; and (iii) the relationship between the actual or potential
30 indebtedness and the identified and appropriated property be such that the owner would be acting

unconscientiously or unfairly if he or she were to dispose of the property without the consent of the contractor or without the actual or potential liability having been discharged.

In the instant case, the judgment delivered in the 1st respondent's favour on 13th February, 2015
5 and the subsequent warrant of attachment of the land in execution of that decree issued on 19th
June, 2015 ratified the caveat lodged on 20th April, 2013. This is because the judgment and
decree ascertained the actual indebtedness by the owner of the property to the contractor
concerning expenses incurred in relation to the property, which property was under the
construction agreement specifically identified and appropriated to the performance of the
10 contract, and the owner would be acting unconscientiously or unfairly if it were to dispose of the
property without the actual liability having been discharged.

To be caveatable, an interest must be capable of registration. There are three forms of caveatable
interests: (i) interests capable of registration and assignment including vendor's lien, a
15 purchaser's lien, an equitable mortgage and easements (see *Sentongo Produce & Coffee Farmers
Ltd v. Rose Nakafuma Thijusa H. C Misc. Cause No 690 of 1999* and *Ainomugisha Doreen v.
Saava Michael David Kyazze, H.C.C.S. No. 839 of 2017*); (ii) unregistrable interests including
beneficial interests under a trust: and (iii) rights entitling parties to injunctive relief or specific
performance such as an option to purchase, vendor's lien or other proprietary remedies
20 recognised in equity (see *Black v. Garnock [2007] HCA 31; 230 CLR 438; 237 ALR 1*). It will
relate to, or have a nexus with, the land in some way and certainly will result from the actions of
the registered proprietor of the land, but it need not arise only in the context of transactions
which confer a proprietary interest. The interest may be one in respect of which equity would
give specific relief against the land itself in the strict or primary sense, or by injunction or
25 otherwise, including constructive and resulting trusts. The extent of the interest is to be measured
by the protection which equity will afford.

In order to lodge a caveat, a person must have a legal or equitable estate or interest in land; the
interest must be in the land, not merely a contractual or personal right. A legal interest in land is
30 one which constitutes a recognisable common law estate and which is created in accordance with
the requisite formalities. The interest must also be express and exist at the time of lodgement, it

cannot be a future interest. The intending caveator's interest must either arise from a registerable instrument or be based on a transaction that entitles him/her/it to call for a registerable instrument. Its purpose and function is to maintain the status quo to preserve and protect the rights of a caveator. It prohibits the caveator's interest from being defeated by the registration of a dealing without the caveator having first had the opportunity to invoke the assistance of a Court to give effect to the interest. Where a caveat is lodged, the Registrar must not record in the Register any change in the proprietorship of or any dealing purporting to affect the estate or interest in respect of which the caveat is lodged, except where: (a) the caveator has consented to Registrar; (b) the dealing is subject to rights of the caveator; (c) the registration is provided for in the caveat; or (d) where transfer passes to the caveator. The Registrar can register a transfer or dealing that is to pass to the caveator the estate or interest they are claiming to have.

The Commissioner Land Registration ought to give careful consideration to the grounds on which a caveat is lodged by an intending caveator, in light not just of the caveator's assertions but also in view of any supporting documentation the caveator may have at hand, so as to exercise his or her independent forensic judgement in ascertaining if the caveator has an interest in the subject land. Any person adversely affected by a caveat can bring proceedings against the caveator to have the caveat removed and the court has wide discretion to make such order as it thinks fit. The court will order the removal of the caveat if: (i) there were no proper grounds for lodging it; (ii) the caveatable interest has been lost; (iii) the caveator does not have the interest claimed; (iv) dealings with the caveat are too broad; (v) the caveat is in the wrong form; and (vi) if the interest is not enforceable against the person who has lodged an instrument for registration.

The procedure for the removal of a caveat is for the party wishing for its removal to write to the caveator, and invite them to execute a Withdrawal of Caveat to remove the caveat lodged by them from the title to the property. If the caveator does not respond to the request to withdraw the caveat, a Lapsing Notice can be issued on application to The Commissioner Land Registration supported by a statutory declaration stating the opinion of the applicant that the caveator does not have the estate or interest claimed, for the removal of the caveat, or by lodgement of a transfer or dealing for registration. This triggers a notice by the Registrar to the caveator that the caveat will lapse 60 days hence unless the caveator makes an application to

Court for an order stopping the lapsing of the caveat. The caveator can then; (i) make an application to stop the lapsing of the caveat or (ii) not respond to the notice which will result in the caveat automatically lapsing. Alternatively an application may be made directly to Court to extinguish the caveat.

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According to section 140 (2) of *The Registration of Titles Act*, except in the case of a caveat lodged by or on behalf of a beneficiary claiming under any will or settlement or by the Registrar, every caveat lodged against a proprietor is deemed to have lapsed upon the expiration of sixty days after notice given to the caveator that the proprietor has applied for the removal of the caveat. The court has power to direct the Registrar to delay registering any dealing with the land, lease or mortgage for a further period specified in such order, provided an application for such order is made before the expiration of the sixty days, and the caveator or his or her agent appears before the court and gives such undertaking or security, or lodges such sum in court as the court considers sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed. Similarly section 184 (5) of *The Insolvency Act* empowers the Court, notwithstanding the provisions of *The Registration of Titles Act* or any other law, to grant an extension of a caveat on the application of the caveator, upon establishment of a *prima facie* case for preservation or protection of the estate or interest in receivership, and furnishing security for costs commensurate to the estimated loss and damages of the value of the subject matter of the dispute. Otherwise a caveat cannot be renewed by or on behalf of the same person in respect of the same estate or interest (see section 140 (3) of the Act). A caveat operates as a statutory injunction, preventing the registration on title of dealings contrary to the asserted interest and affording the caveator an opportunity to invoke judicial intervention to preserve their interest. Under the Torrens System, a person who seeks to preserve an unregistered interest against a subsequent inconsistent dealing must at the very least, lodge a caveat to preserve and maintain it, or that interest will be extinguished (see *Leros Pty Ltd v. Terara Pty Ltd* [1992] 66 ALJR 399). To justify the extension of a caveat, the caveator must therefore demonstrate that there is a sufficient likelihood of proving an interest in the land in proceedings pending before Court; a caveator bears the onus of establishing a serious question to be tried that it has the “estate or interest in land” as claimed, and that the balance of convenience favours the maintenance of the caveat. Court will look at the nature of the interest caveated and

choose the option with the lowest risk of harm. The court (as in an interlocutory injunction application) takes whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong,” and the caveator must give an undertaking or security to indemnify every person against any damage that may be sustained by reason of any dealing with the property being delayed as a result of the proceedings pending before Court (see *Piroshenko v. Grojsman* [2010] VSC 240; 27 VR 489).

In the instant case, the “notice to the caveator of an application to remove a caveat” was issued on 17th August, 2021. Assuming it was transmitted on the same day, the implication is that it would automatically lapse on 7th October, 2021 if the 1st respondent did not before that date, file an application for the Court to direct the Registrar to delay registering any dealing with the land, lease or mortgage for a further period specified in the order. Although the pleadings do not disclose when the application was filed, the order directing the said restraining Court order was issued by the High Court Land Division in Civil Suit No. 0103 of 2020 on 2nd November, 2021 and it was duly registered on 29th day of November, 2021 at 4:12 pm under instrument Number KCCA-00086212 (see annexure “C” to the 1st respondent’s supplementary affidavit in reply). I therefore have not found evidence to support the applicant’s contention that the order to maintain the caveat was obtained after the caveat had already lapsed.

Considering that the land comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala is still in *custodia legis*, it is imperative that the caveat be maintained. Accordingly, the issue is answered in the affirmative; the 1st respondent’s caveat lodged on land comprised LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala subsists and should be maintained thereon.

iv. Whether the land comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala should be discharged from attachment.

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 not 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*). A release from attachment will be made if the Court is satisfied; 5 (i) that the property was not, when attached, held by the judgment-debtor for himself or herself, or by some other person in trust for the judgment-debtor; or (ii) that the objector holds that property on his or her own account. The standard of proof required in such proceedings is that of balance of probabilities (see *Trans Africa Assurance Co. v National Social Security Fund [1999]* 10 *1 E.A. 352*).

The term “possession” expresses the physical relation of control exercised by a person over a thing. Legal possession comprises the possibility of physical control, super-added with a will to exercise such control, provided such possession has not originated either by force or by fraud. 15 The expression "possession" is a legal term and its proof varies with the nature of property under the scrutiny of the courts and it can be proved by credible oral evidence as well. Possession may be actual or constructive. For purposes of objector proceedings, a person with constructive possession stands in the same legal position as a person with actual possession. A person who knowingly has direct physical control of a property at a given time has actual possession of it. A 20 person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is in constructive possession of it.

The question then is whether it is the applicants or the 1st respondent that exercised dominion over the entire property comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, 25 Kampala. It is trite that a possessor of land may not have actual physical possession of the whole, but where he or she has the ability to exercise control over it, he or she will be taken to have constructive possession of the rest of it. Where part of the land claimed is not under actual physical possession, there must be unequivocal evidence before court that the claimant deals with the part in actual possession and the portions of the land, not in actual possession, in the 30 same way that a rightful owner would deal with it. Constructive possession of such land may be proved by evidence of exclusion of other persons. Open, notorious, continuous, exclusive

possession or occupation of any part thereof would in such circumstances constructively apply to all of it. In such cases, occupancy of a part may be construed as possession of the entire land where there is no actual adverse possession of the parts not actually occupied by the claimant.

5 The property sought to be discharged must be shown to have been controlled solely by the applicant, excluding or with the power to exclude any others from using it as well. This is determined by examining available records disclosing the name of the person by whom or on whose behalf the property is occupied. This information may be gathered from documents used in the ordinary course of business as proof of possession or control of property, such as those
10 which would enable the possessor of the document to transfer or receive the property thereby represented. A document which is used in the ordinary course of business as proof of possession would satisfy the definition as also a document which would enable the possessor to possess the property.

15 The 1st respondent claims to be in physical possession of the land comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala. As proof of that possession, the 1st respondent relies on a tax invoice issued by Umeme Limited for payment of a sum of shs.406,504/= for electricity consumed as per meter number U215467 on premises located at Wattuba along Bombo Road for the period running from 1st May, 2022 up to 1st June, 2022. On the other hand, the 2nd respondent
20 claims to be in physical possession of the land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane, Mbuya, Kampala. As proof of that possession, the 2nd respondent relies on a tax invoices issued by Umeme Limited being bills for payment for electricity consumed as per meter number 14408613260 on premises located at Nadiope Lane, Upper Mbuya in the following sums; - shs. 260,984/=for the period running from 1st February, 2022 up to 1st March, 2022; shs. 352,371/=for
25 the period running from 1st March, 2022 up to 1st April, 2022; shs. 215,531/=for the period running from 1st April, 2022 up to 1st May, 2022; and shs. 388,286/= for the period running from 1st May, 2022 up to 1st June, 2022. the 2nd respondent relies on a tax invoices issued by the National Water and Sewerage Corporation being bills for payment for water consumed as per Customer number 21178618 on premises located at Mbuya in the following sums; - shs. 2,360/=
30 dated 9th March, 2022; shs. 10,700/= dated 4th April, 2022; shs. 13,140/= dated 9th May, 2022; and shs. 2,360/= dated 9th June, 2022.

Having perused the sets of documentary evidence adduced by the two parties to corroborate their respective claims to possession, I am inclined to believe that it is the 2nd respondent rather than the 1st respondent in current possession of the land. However, it is possession as at the time of attachment that is paramount. When the warrant of attachment was issued on 19th June, 2015 it was the 1st respondent in actual possession rather than the 2nd respondent. This is deduced from clause 5.0 of the sale agreement dated 1st September, 2021 by which the 2nd respondent accepted the responsibility of obtaining vacant possession of the property upon execution of the agreement. The 2nd respondent therefore must have gained physical possession sometime after that date, which was more than six years after the warrant of attachment in execution had been issued. That eliminates the 2nd respondent's claim to an adverse possession capable of defeating the attachment.

What is left then is a contest between the 1st respondent who was in actual possession at the time, and the applicants' predecessor in title who had constructive possession. The 2nd applicant's claim to constructive possession is based on the fact that the title deed to LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala was first mortgaged to M/s crane Bank Limited on 24th January 2011 at 12:41 pm under Instrument No. 442774. Further charges were registered by the same bank on 20th July, 2011 at 9:48 am under Instrument No. 452126 and on 22nd March, 2012 at 2:40 pm under Instrument No. 464943. On the other hand, the 1st respondent's actual possession commenced sometime after execution of the construction contract on 19th November, 2010. This then is a priority dispute between the two parties.

Priority disputes may arise between: (i) two legal interests; (ii) a legal and an equitable interest; (iii) two equitable interests; (iv) a mere equity and a legal interest; and (v) a mere equity and an equitable interest. Priorities rules resolve conflict between different but inconsistent interests in the same object of property. Inconsistent interests purport to confer mutually exclusive property rights to two separate people at the same point in time. As a general rule, if the interest transferred stems from good title, priority will rank in order of the time at which the interest was

acquired. The first in time prevails. If it is possible for interests to coexist, the second (later) interest is subject to the first. If it is not possible, the second is nullified.

5 In general, where two competing interests are of the same type in all respects except for the time of creation, the earlier prevails. Generally, an earlier equity is not to be postponed to a later one unless, because of some act or negligence of the prior equitable holder. An earlier equitable interest will be deferred to a later legal interest acquired by a bona fide purchaser for value without notice of the equitable interest. In the Torrens system, priority is given to a registered interest over unregistered interest and interest registered at a later date, provided it was acquired
10 bona fide and for valuable consideration and without actual or constructive knowledge of the adverse interest. A registered decree binds the land of the judgment debtor as a charge; and deeds or mortgages of such lands, duly executed but not registered, are inferior against the judgment creditor who first registers a decree (see *Miller v. Duggan (1892) 21 SCR 33*). If a decree is registered, it is no longer a priority dispute. Only when both are unregistered interests will it be a
15 priority dispute.

As regards security interests, a perfected interest has priority over an unperfected one. If there is more than one perfected interest, the priority order is from earliest registration date to latest. If there's more than one unperfected interest, the priority order is from earliest attachment date to
20 latest. A Security interest is an enforceable legal claim or lien on collateral that has been pledged, usually to obtain a loan. In the instant case, the mortgage and the warrant of attachment are in the nature of security claims. The mortgage secured the loan advanced by the 2nd respondent's predecessor in title while the unregistered decree and warrant of attachment together constitute an equitable charge on the property.

25

One of the essential requirements possession under Order 22 rules 56 and 57 of *The Civil procedure Rules* is that the objector in possession must have the power to dispose of the interest held by them in the object. The power to dispose must be distinguished from the right to dispose.
30 The right to dispose arises if a party dealing with the object: (i) is the owner of the object; (ii) only transfers to the other party an interest not greater than its own; or (iii) if transferring an

interest greater than its own, is authorised to do so. The right to dispose includes the power to dispose. For instance, where the owner grants a security interest to a secured creditor, the secured creditor will have both the right and the power to dispose. But, in some circumstances, the power to dispose can exist without the right to dispose, i.e., when the person dealing with the object is not the owner and has no authority to dispose of it but is still able to create a valid interest. For instance, a lessee who is not the owner and lacks the authority (no right to dispose) may still have the power to dispose and create a valid interest by granting a security interest.

In the instant case, due to non-registration of a transfer of mortgage, the applicants have neither the right nor the power to dispose of the land as mortgagees in constructive possession. On the other hand, although by virtue of not having a valid registerable or registered interest in the land the 1st respondent has no right to dispose of it, by reason of the warrant of attachment the 1st respondent has the power to dispose of it in the capacity of a Judgment Creditor. The 1st applicant therefore had both the physical possession and the power to dispose of the land from 19th June, 2015 until their dispossession sometime after 1st September, 2021. On the facts of the case therefore, actual physical possession coupled with the power of sale must trump constructive possession devoid of the power of sale.

In addition, the warrant in execution was issued on 19th June, 2015 and its duration was extended by the interim injunction court order dated 14th July, 2015 to still be in force to-date. However, the land was mortgaged to M/s Crane Bank Limited on 24th January, 2011. Being prior in time to the decree entered on 13th February, 2015 and the warrant of attachment issued on 19th June, 2015, and being a legal interest as opposed to the equitable one based on the decree and warrant of attachment, priority would be given to the registered mortgage interest over unregistered interest under the decree. A mortgagee has the undoubted right to subject the mortgaged property to the payment of the mortgage debt, to the exclusion of all general creditors of the mortgagor and persons holding junior liens thereon. However, the mortgage in the instant case has never been transferred to the 2nd applicant, and therefore the 2nd applicant cannot seek to assert that priority right. Moreover, although an earlier equitable interest will be deferred to a later legal interest acquired by a bona fide purchaser for value without notice of the equitable interest, in the instant case the 2nd respondent was at the time of the transaction expressly notified of the 1st

respondent's claim and therefore cannot be classified as a bona fide purchaser for value without notice of the 1st respondent's equitable interest.

Although unsecured creditors are permitted to commence or continue legal proceedings to
5 recover debts despite the appointment of a Receiver by a secured creditor, and although the 1st
respondent had by 19th June, 2015 initiated execution proceedings, it is noteworthy that on 16th
December, 2016 it submitted its claim to the 1st applicant as a judgment creditor, seeking to have
its debt recovered under the receivership. Receivers have a duty to the secured creditor that made
the appointment, but have no duty to report their findings to unsecured creditors, although they
10 are obligated to sell assets for market value. Receivers appointed by a secured creditor are only
responsible for repaying secured creditors.

Be that as it may, having found that none of the applicants nor the 2nd respondent was in
possession at the material time on their own account. At all material time the land was in
15 possession of the 1st respondent as contractor, on account of or in trust of the judgment debtor.
This issue therefore is answered in the negative; there are no valid grounds for discharging the
land comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala from attachment.
Accordingly, since all issues raised have been decided in favour of the 1st respondent, the
application fails and it is dismissed, with costs to the 1st respondent.

20

v. Consequential orders

A consequential order is an order founded on a claim of the successful party, ancillary or
connected with the main relief granted, that is made in order to work out or give effect to the
25 final judgment or order of the court. Being a respondent in the consolidated application and the
successful party at that, the 1st respondent only sought a dismissal with costs. However, the Court
is alive to the fact that the litigation concerns a process of execution that began around 19th June,
2015 and has been kept alive by reason of two interlocutory orders of restraint that were to
remain in force until the determination of this application. Dismissal of the consolidated
30 application without further directions in the circumstances would not only leave the incomplete

execution process in limbo but would also invite unnecessary further litigation. It is for that reason that the following consequential orders by way of directions are made;

- 5 a) Immediately following the end of the current Court Vacation, the Deputy Registrar of this Division is to revive the process of execution of the decree by issuing a fresh warrant of attachment and sale in respect of land comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala.
- 10 b) The persons in possession of the land comprised in LRV 3757 Folio 12 Plot 5 Nadiope Lane, Mbuya, Kampala are to forthwith grant vacant possession, for purposes of the execution, to the bailiff appointed by the Deputy Registrar of this Division to execute that warrant.
- c) In accordance with Order 22 rule 59 of *The Civil Procedure Rules*, and as one of the conditions for sale of the land, the sale shall be subject to the mortgage.
- 15 d) The Commissioner Land Registration should forthwith cancel registration of the 2nd respondent as proprietor of land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane, Mbuya, Kampala and instead restore the name of M/s Spencon Development Company Limited as the registered proprietor thereof. The 2nd respondent is to forthwith deliver up the duplicate certificate title now in its possession, to the Commissioner Land Registration for purposes of that
- 20 rectification.
- e) The 1st respondent is to bring this decision to the attention of the Commissioner Land Registration.

Delivered electronically this 28th day of July, 2023

25 **Mubiru**.....

.....**Stephen**

Stephen Mubiru
Judge,
28th July, 2023.

30 17th August, 2023.
11.36 am

Attendance

Mr. Busuulwa Cypress Bill, Court Clerk.

Mr. Masembe Kanyerezi with Mr. Timothy Lugayizi, Counsel for the 2nd applicant are in Court.

Ms. Brigitte Nakamoga, Legal Officer of applicant is in Court.

Ms. Nelson Nerima, Counsel for the 1st respondent is in Court.

5 There is no representative of the 1st respondent in Court.

EX TEMPORE RULING

10 During the hearing of Miscellaneous Application No. 1277 of 2023 seeking leave to appeal the above ruling, it has become apparent that an imperative consequential order was by an accidental slip on the part of the Court, omitted from the ruling. Under section 99 of *The Civil Procedure Act*, clerical or mathematical mistakes in judgments, decrees or orders, or errors arising in them from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.

15

This provision may be invoked in order to amend a previous ruling or judgment to reflect the original intention of the court; to make clerical or typographical amendments; or where the clarification, supplementation or amendment of a previous order is required to give effect to such order. This section not only allows the court to correct garbled or incorrect transcriptions, spelling and grammatical mistakes, and even matters of style, but also so that the reasons recorded accurately reflect why the court made the decision that it made, even if they were not then properly or fully articulated. When a judgment is delivered (orally or in writing) the court on its own motion or parties or their advocates may ask the judge to correct phrases that are confusing or unclear, or minor factual points that have been accidentally misstated. This power
20 may be invoked where the decree does not correctly reflect the court's decision, as contained in its reasons stated in the judgment.

25

If a judgment, ruling decree or order contains what the court acknowledges is an error when it is pointed out, the judgment, ruling, decree or order should be corrected, unless there is some very
30 good reason for not doing so. A judgment and its corresponding decree, or ruling and its corresponding order, should be an accurate record of the court's findings and of the reasons for the decision, as well as the resultant orders. It is the duty of the court to alter the judgment, ruling, decree or order in order to make it an accurate record of the decision and the reasons for

which the decision was made, which may not have been properly or adequately expressed at the time, and even in some cases may not have been articulated at all.

Errors arising in a judgment or ruling from any accidental slip or omission may at any time be corrected by the court in order to give effect to the Court's manifest intention or what should have been the Court's express intention in the judgment, but should not be used as an opportunity to re-write the judgment. In *Lakhamshi Brothers Ltd v. R. Raja and sons* [1966] EA 313 at 314 it was held that;

There are circumstances in which the court will exercise its jurisdiction and recall its judgment, that is, only in order to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter. But this application and the two or three others to which I have referred go far beyond that. It asks, as I have said, this court in the same proceeding to sit on its own previous judgment. There is a principle which is of the greatest importance in the administration of justice and the principle is this, it is in the interest of all persons that there should be an end to litigation.

Under slip rule court cannot correct a mistake arising from its misunderstanding of the law (see *Ahmed Kawoya Kanga v. Banga Aggrey Fred* [2007] KALR 164). A slip order will only be made where the Court is fully satisfied that it is giving effect to the intention of the Court at the time when Judgment was given or in the case of a matter which was overlooked, where it is satisfied beyond reasonable doubt, as to the order which it would have made had the matter been brought to its attention (see *Fangmin v. Dr. Kaijuka Mutabazi Emmanuel H.C. Civil Application No. 15 of 1977*; *Mutual Shipping v. Bayshore Shipping* [1985] 1 All ER 520; *King v. Thomas McKenna Ltd* [1991] 1 All ER 653 and *UDB v. Oil Seeds (U) Ltd S. C. Civil Appeal No. 06 of 2009*). It must be an accidental slip or omission by the court and correcting it should not be in the circumstances of the case constitute the Court to be sitting on its own previous judgment. It should be an omission in expressing the manifest intention of the court. It should be an accidental slip or omission that occurred such that the judgment fails to express the manifest intention of the Court at the time the judgment was made.

The slip rule has three features; first, the rule is not directed to pure omissions, i.e. something that the Judge meant to do but by some oversight he or she forgot to do. Secondly, the slip is in the nature of a "clerical or typographical" error. This betokens an error in expression or

calculation of something contained within the decision, not an error going to the reason or intention forming the basis of that decision. Such slips might include an arithmetical error in adding or subtracting sums, mis-transposing parties' names, a slip in carrying over a calculation from one part of the decision to another or, as here, the mistaken insertion of a rogue number.

5 Thirdly, it is this kind of slip (clerical or typographical) that is as a result of "accident or omission." This, too, points to correction of slips or mistakes in expression, rather than changes to the reasoned or intended basis of the decision (see *NKT Cables A/S v. SP Power Systems Ltd [2001] All ER (D) 74*). It is not a warrant to correct what are more substantive errors, in the sense of a mistake of fact or law, is it a warrant to correct a pure omission, being something that the
10 Judge intended to include or take account of but which he or she has wholly omitted to in reaching his or her decision.

**This provision only covers genuine slips or omissions in the wording of a handed down judgment which were made by accident, e.g. the mis-description of a party or the incorrect
15 insertion of a date. The slip rule is only applicable to give effect to the court's thoughts or intentions at the time of making the order and not additional thoughts arising after it is handed down. It cannot be used to correct substantive mistakes, for example an error in law. It cannot be invoked to add a provision having substantive effect which was not in the contemplation of the parties or the court at the hearing. Substantive errors can only be
20 corrected through the appeal process. Due to the *functus officio* doctrine, the court has no power to correct substantive errors concerning the decision itself (i.e. a mistake of its own in law or otherwise) even if they are apparent on the face of the judgment. In those circumstances, the remedy would lie in the appeal process.**

25 What gives the court jurisdiction under this provision is that the slip or omission was accidental, and not due to a mistake or error of the court or a party or any misunderstanding. Its real purpose is to ensure that the judgment conforms to what the court intended. The key requirement in every case is simply that the order should reflect the actual intention of the court. The rule applies only to situations where if the amendment requested was not effectuated, the original order would not
30 represent the intended order of the court. The slip rule can be applied only where the proposed amendment is one about which no real difference of opinion can exist. In the instant case, by an

error arising from accidental slip or omission, an imperative consequential order directing the restoration of the mortgage on the title to land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane, Mbuya, Kampala, was omitted. It should have been included, to read as follows

- 5 f) The Commissioner Land Registration should forthwith restore the mortgage of M/s Crane Bank Limited onto the title deed to land comprised in LRV 3727 Folio 25 Plot 3 Nadiope Lane, Mbuya, Kampala. The 2nd respondent is to forthwith deliver up the duplicate certificate title now in its possession, to the Commissioner Land Registration for purposes of that
10 rectification.

The ruling has therefore been corrected to that extent and the above paragraph deemed inserted after paragraph (e). Consequently what was paragraph (e) is now re-numbered as paragraph (g) as follows;

- 15 g) The 1st respondent is to bring this decision to the attention of the Commissioner Land Registration.

Each party is to bear its costs of this correction since none of them is to be blamed for the
20 omission.

25

Stephen Mubiru
Judge
17th August, 2023.
11.40 am.