

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

MISCELLANEOUS APPLICATION No. 0418 OF 2023

5 **(Arising out of Civil Suit No. 0898 of 2019)**

GORREPATI SRINIVASA REDDY
APPLICANT

VERSUS

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1. GRANT THORNTON MANAGEMENT }
2. VISARE (U) LIMITED } **RESPONDENTS**

Before: Hon Justice Stephen Mubiru.

RULING

15 a) Background:

On or about 24th February, 2017 the 2nd respondent obtained a loan from KCB Bank Uganda Limited for facilitating the completion of the construction of a block of condominium residential apartments on land comprised in LRV 2651 Folio 9 Plot 65A located along the Lugogo Bypass in Kampala. As security for the loan, the 2nd respondent executed a mortgage over the title to the same land in favour of the bank. The 2nd respondent constructed a total of forty-four (44) units of residential condominium apartments but defaulted on the loan. Upon default on the obligation to pay the US \$ 1,930,813 as agreed, the Bank initiated a process of foreclosure. In order to raise part of the funds outstanding due under the mortgage, the 2nd respondent on 31st December, 2019 signed an agreement with the 1st respondent, selling twelve (12) out of the forty-four (44) units to the 1st respondent at the price of US \$ 2,400,000. The 1st respondent paid US \$ 500,000 to the bank in satisfaction of the condition for stay of the sale as ordered by court. It was agreed that in the event the 2nd respondent was unable to raise the balance outstanding by 31st December, 2020 the 1st respondent was to raise an additional US \$ 1,900,000 in order to redeem the 2nd respondent's mortgage.

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Subsequently, a tripartite memorandum of understanding between the 2nd respondent, the 1st respondent and KCB Bank was executed on 28th February, 2020 by which it was agreed that the

mortgage would be redeemed upon payment of US \$ 1,930,813. It is on that basis that on 26th March, 2020 a consent judgment was entered in the suit between KCB Bank and the 2nd respondent. While the 2nd respondent reserved the right of redeeming the 12 units by 31st December 2020, the 1st respondent reserved the right to cause transfer of the 12 units into its name or sell the security in the event of the 2nd respondent's default.

The 2nd respondent having defaulted and there being no independent titles yet to the 12 condominium units, the 1st respondent subsequently on or about 30th April, 2021 applied for attachment and sale of the entire land comprised in LRV 2651 Folio 9 Plot 65A located along the Lugogo Bypass in Kampala, on account of the 2nd respondent's default. The 2nd respondent sought relief from that process contending that it had performed its part of the bargain. On the other hand the 1st respondent contended that the sale could not be finalised since the 2nd respondent was yet to secure condominium titles to the twelve units. In a ruling delivered on 6th May, 2021 the learned Registrar observed that in the consent judgment, it was agreed that upon the 2nd respondent's default, the 1st respondent would have recourse against the security by way of attachment and sale. The learned Registrar therefore issued an order of execution by way of attachment and sale of the entire land.

The 2nd respondent appealed that decision and in the judgment of this court delivered on 11th January, 2022 the court found that by virtue of Order 22 rule 14 (4) of *The Civil Procedure Rules*, the Registrar executing the decree had to first decide whether it was necessary to order an attachment and sale of the entire property, or such a portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied was small, the court was obliged order the attachment of only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. Care had to be taken to put only such portion of the property to sale, the consideration of which was sufficient to meet the claim in the application for execution. The warrant issued without examining this aspect and not in conformity therewith was found to be illegal and it was accordingly set aside.

Following that decision, the 1st respondent undertook a valuation of the entire property the result of which revealed, in a report dated 20th October, 2022 that the Market Value of this property is

in the sum of US \$ 12,250,000 while its Forced Sale value is in the sum of US \$ 8,000,000. On that basis, the court issued a warrant of attachment and sale of the following; twelve (12) 3-bedroom units valued at US \$ 182,000 each, hence a total of US \$ 2,184,000 all comprised in Bock “B”; and ; fifteen (15) 3-bedroom units valued at US \$ 182,000 each, hence a total of US \$ 2,730,000 and one 2-bedroom unit valued at US \$ 170,000 all comprised in Bock “C”, rendering the total value of the property attached as US \$ 5,084,000 for the recovery of the then decretal sum of US \$ 5,501,540 exclusive of the costs of recovery.

Attempts at securing a buyer of only two out of the three blocks having been unsuccessful and with potential buyers / bidders expressing interest only in the entire property inclusive of Block “A,” the 1st respondent sought a variation of the order of 11th January, 2022 that required the Registrar to attach only such portion of the property as may seem necessary to satisfy the decree. It is on that basis that the Registrar made a reference to this court which on account of the 2nd respondent having itself seconded a bidder for the entire property, this court by a decision dated 23rd January, 2023 permitted the attachment and sale of the entire property. It is on that basis, the court on 23rd February, 2023 issued a warrant of attachment and sale of the following; fifteen (15) 3-bedroom units valued at US \$ 182,000 each, hence a total of US \$ 2,730,000 and one 2-bedroom unit valued at US \$ 170,000 all comprised in Bock “A”; twelve (12) 3-bedroom units valued at US \$ 182,000 each, hence a total of US \$ 2,184,000 all comprised in Bock “B”; and ; fifteen (15) 3-bedroom units valued at US \$ 182,000 each, hence a total of US \$ 2,730,000 and one 2-bedroom unit valued at US \$ 170,000 all comprised in Bock “C”, rendering the total value of the property attached as US \$ 7,964,000 for the recovery of a decretal sum of US \$ 5,885,540 exclusive of the costs of recovery. The warrant of attachment and sale of the property was renewed on 27th Marc, 2023, hence this application.

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b) The application:

The application by Notice of Motion 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 applicant seeks an order discharging land comprised in Leasehold Register Volume 2551, Folio 9, Plot No. 65A, Lugogo

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By-Pass Road Kampala comprising forty-four (44) units of fully developed residential apartments, from attachment and sale in execution of a decree. In the alternative, the applicant seeks an order discharging from the said attachment and sale, four (4) units of three-bedroomed apartments comprised in Block “A” situated on of the said land, two of which are on the fourth
5 floor and the other two of which are on the fifth floor.

It is the applicant’s case that since 12th December, 2022 he has been in physical possession of the four (4) units of three-bedroomed apartments comprised in Block “A” situated on of the said land, two of which are on the fourth floor and the other two of which are on the fifth floor,
10 having furnished and put the same to use. He maintains that possession on his own account as a purchaser for a valuable consideration and not on account of or in trust for the 2nd respondent as Judgment Debtor in the head suit. Sometime during December 2022, he learnt of the availability of three bedroomed apartments for sale in the upscale suburb of Kololo along Lugogo-by pass through one of the directors of the 2nd respondent, Mr. Vijay Reddy. From his physical
15 inspection, he discovered that the premises had three Blocks A, B and C and each block had three or two bedroomed apartments and that they were at the time comprised on one leasehold land title but were were to be sold as Condominium units pending the application to the relevant authorities.

20 The said director of the 2nd respondent, Mr. Vijay Reddy, told him that Blocks “B” and “C” had been attached by a Court Order issued by the Commercial Court and that he was only vested with authority over Block A which had sixteen (16) units, out of which fifteen (15) were three-bedroomed units while one (1) was a two-bedroomed unit. He established further from the 2nd respondent's said director that the condominium property plans for the premises had already been
25 approved and the plan was ready for registration. The applicant chose four (4) units of three-bedroomed apartments in Block A of which two (2) units were on the fourth floor and the other two (2) units were on the fifth floor. He negotiated for the purchase of the same at the price of US \$ 300,000 per unit, totalling US \$ 1,200,000. He deposited US \$ 30,000 in cash, for each unit and is due to pay the balance upon the 2nd respondent securing the condominium titles to the
30 units.

Upon deposit of the US \$ 120,000 the 2nd respondent granted him vacant possession, as well as both constructive and actual possession of the said four (4) units, alongside the keys to the apartments. He was introduced to the caretaker and the local area authorities. He has since furnished the said property which he now occupies alongside his tenants, and meets all utility bills including water and electricity, only to obtain a copy of a letter as an occupant, from Quickway Auctioneers & Court Bailiff's a giving them notice to vacate the premises. He has since discovered that the whole property including his four (4) units on Block A were attached by this Court and advertised in the New Vision Newspaper of Monday, 27th February, 2023 by the said auctioneers on the instructions of the 1st respondent.

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c) The Affidavit in reply:

By the 1st respondent's affidavit in reply, it is averred that the 2nd respondent has since the filing of the consent judgement, initiated a multiplicity of proceedings aimed at preventing execution of the consent decree. The current application is similarly brought in bad faith to deny the 1st respondent lawful means to recover the sum of money it paid to KCB Bank in settlement of the 2nd respondent's indebtedness. By a letter dated 1st March, 2023 the 2nd respondent was notified that the retry had been advertised for sale, directing the 2nd respondent to grant the auctioneer vacant possession of the entire property. When the auctioneer physically inspected the property on 14th March, 2023 and 24th March, 2023 alongside some interested purchasers, it is the 2nd respondent's director Mr. Vijay Reddy that took them around the property. It is only the said director who at the time was in possession of only one apartment comprised in Block "A]" while the rest of the property was vacant.

25 d) The submissions of counsel for the applicant:

Counsel for the applicant M/s Alaka & Co. Advocates submitted that the applicant at the date of attachment of the land was in physical possession of for units; 2 units on 4th floor and the other two on the 5th floor. He furnished the same since 12th December, 2022. His possession of the four units is on his own account and not on account of or in trust of the judgment debtor in the suit. The applicant was aware of the litigation at the time of purchase. Two other blocks had been

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attached by court at the time. Block “B” and “C” had been attached for sale by the court. Block A where he purchased was not subject to any attachment. This is distinguishable from *Akol Brand Hubs Services Ltd, H.C. Civil Appeal 0119 of 2019* which dealt with fraudulent transfer. The principle would have applied if by the time of purchase all the three blocks were under
5 attachment. Once under attachment, the public is notified there is a dispute over it. If it is not under attachment so the applicant assumed it was free. The peculiar circumstances of the case the principle is not applicable. This should be an exception.

The applicant explained the circumstances under which his proof of occupation as regards the
10 utility bills in the name of the 2nd respondent. It is correct in its peculiar circumstances. It was not weakened by cross-examination. The evidence rebuts the supplementary affidavit of the 1st respondent. He had indicated that the only occupant in the place was the 2nd respondent. The annexure DK3 is a renewal of warrant of attachment and sale issued on 27th March, 2023 subject to the 30 day notice in a newspaper. The sole question is possession as per *Lucy Oker Lagol v*
15 *Bonga Ronald Okech, H.C. Civil Appeal 0119 of 2019*.

e) The submissions of counsel for the 1st respondent:

Counsel for the 1st respondent M/s J. B. Byamugisha Advocates, submitted that Annexure R1 of
20 the affidavit in reply is the consent judgment. In para 5 it was agreed that the 1st respondent was to sell the whole property and developments therein in the event of default by the 2nd respondent. The default occurred. A warrant was issued for the whole property in EMA 0049 of 2021. The 2nd respondent filed an appeal 007 of 2021 challenging the attachment as an over attachment. An order was made to ascertain the value to avoid over attachment. Twice the property was
25 advertised but the sale failed. On 17th October, 2022 the 1st respondent sought to attach the whole property as per EMA 0289 of 2022. An NTC was issued as per page 29 of the attachment of the affidavit in reply. On 30th November, 2022 the parties appeared before the Registrar and she found she could not attach the whole. A reference was made to this Court. On 23rd January, 2023 and the order was varied. The judgment debtor put in a bid of all these blocks. The 3rd party
30 interest was never raised. The period of the advert run its course. On 23rd February a warrant

returnable on 23rd March, 2023 was issued. It was to expire before the date of sale hence the application for renewal. The warrant did not extend the time of sale.

5 The advocate for the applicant claims to have conducted due diligence. He established that execution proceedings were ongoing over the property. The first attempt to attach was in April. 2021. At the time he claims to have purchased, there was no attachment of any property. There was only a pending proceeding for the entire property. They could not rely on any attachment of part since it did not exist. The sale agreement, both parties were represented by the same law form. The witness has no tenant in the property contrary to his statement in paragraph 15. There 10 must be physical or constructive possession. The property attached is a leasehold Volume 265 Folio 9 which is indivisible property. There is no evidence of approval of condominium property, the objector claims to be in possession of four units out of 44. Section 40 of The Condominium Property Act, specifies requirements. The power is shs. 500,000/= and water bill is not for one unit but for the entire property. Section 41 of the Act prevents the creation of an interest in the 15 property.

f) Counsel for the applicant's submissions in reply:

The application is an independent objector. There is an intention to create condominium units. 20 The timing; after the transaction the only time the matter came up in court was on 11th January, 2022. The letter is dated 20th August, 2022 yet the sale was in December, 2022. There was no opportunity to raise it. Paragraphs 11 and 14. He was the only occupant. The bill was shs. 102,000 /= and in March he paid shs. 300,000/= the mistake in source of funds on one time transactions of payment should not be given too much weight. The warrants indicated that the 25 sale was for block B and C. The bids made on 19th August, 2022 followed suit.

g) The decision:

The law on Objector proceedings has long been established. The sole question to be investigated 30 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; (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] 1 E.A. 352*).

The instant application is two pronged; it primarily seeks discharge of the entire property comprised in Leasehold Register Volume 2551, Folio 9, Plot No. 65A, Lugogo By-Pass Road Kampala comprising forty-four (44) units of fully developed residential apartments, from attachment and sale in execution of a decree. In the alternative, the applicant seeks an order discharging from the said attachment and sale, four (4) units of three-bedroomed apartments comprised in Block "A" situated on of the said land, two of which are on the fourth floor and the other two of which are on the fifth floor.

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- i. Discharge of the entire property from attachment on account of possession of a part.

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. 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

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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.

5 The question always is whether the objector exercised dominion over the entire property comprised in Leasehold Register Volume 2551, Folio 9, Plot No. 65A, Lugogo By-Pass Road Kampala. 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
10 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 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
15 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.

The property sought to be discharged must be shown to have been used solely by the applicant, excluding or with the power to exclude any others from using it as well. This is determined by
20 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 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
25 the definition as also a document which would enable the possessor to possess the property.

In the instant case, whereas the applicant has presented utility bills and payment receipts for electricity and water in respect of the entire, Plot No. 65A, Lugogo By-Pass Road Kampala comprising 44 units, he lays claim to only four of them. He has not presented any evidence to
30 show that he has excluded in the past or has the ability of exclusion of other persons from the entire land comprised in Leasehold Register Volume 2551, Folio 9, Plot No. 65A. He therefore

does not have the *locus standi* to seek to discharge the entire said land from attachment. This part of the claim accordingly fails.

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ii. Discharge of only four units out of the entire property comprising 44 units.

A person who seeks to cause the release of land from attachment must demonstrate that his or her possession is on basis of a claimed interest in the land. The term “interest in land” means any ownership or possessory right with respect to the land that binds the whole world. An interest in land is to be contrasted with a “mere” contractual right existing between the holder of the right and the other party who grants the right in relation to the other party’s land, which is not capable of being enforced against a subsequent owner. An interest or property right in land may be narrowly construed as a legal right capable of ownership or more broadly interpreted as any uniquely recognised relationship among people with regard to use of the land. Rights that entitle the holder to own, possess, occupy, pass over or upon land or to take or remove something therefrom, or to restrict/prohibit the use of land, or to sell land to recoup debt claims, in other words, rights that give the holder a direct, physical “connection” to the land, are interests in land.

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Property attached in execution of a decree may be released from such attachment in whole or in part. Equities can no doubt be adjusted while making the division, if feasible and practical (that is without causing loss or hardship or inconvenience to other parties) by allotting the property or portion of the property transferred *pendente lite*, to the share of the transferor, so that the bonafide transferee’s right and title are saved fully or partially. Partial discharge of land from attachment rests on proof of a severable interest in the land. In order to be severable from mother title, a condominium unit must first exist as a parcel. A unit in a condominium property comes into existence as a parcel when the Registrar, upon an application for registration of a condominium plan, closes the part of the register relating to the parcel described in the plan, and opens a separate part for each unit described in the plan (see section 3 (1) of *The Condominium Property Act*). The plan includes a drawing illustrating the units the boundaries of which are

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described, a delineation of the external surface boundaries of the parcel and the location of the building in relation to them, delineated or distinguished by numbers or other symbols, the boundaries of each unit are clearly defined in the plan, the approximate floor area of each unit is clearly shown in the plan, and the plan is accompanied by a schedule specifying in whole
5 numbers the unit factor for each unit in the parcel (see section 9 (1) (b) to (f) of *The Condominium Property Act*).

Therefore, unless and until a condominium plan is registered and unit title deeds are issued, the interest of one buyer of condominium property is not severable and remains indistinguishable
10 from the interest of the other buyers. Until registration of a condominium plan, a purported sale of a condominium unit is not effective as a transfer of an interest in the building; it is effective only as a contract to sell a portion of the condominium designated for separate ownership. Purchasers generally acquire no lien or other priority against the property until registration of a condominium plan. Thus, in transactional documents, where the unit exists as a parcel at the time
15 of the transaction, the best practice is to describe the unit by the unit number and other information required by section 9 (1) of *The Condominium Property Act*. Section 40 and the second schedule to the Act specifically prohibits the sale a unit or proposed unit unless it is accompanied by the specified documents, including; the proposed rules, the proposed management agreement, the proposed recreational agreement, the lease of the parcel, if the
20 parcel on which the unit is located is held under a lease, a certificate of title in respect of the unit or proposed unit, any charge or proposed charge which may affect the title of the unit, and the condominium plan.

Although it is the applicant's claim that at the time of the transaction the 2nd respondent had
25 submitted and secured approval of its condominium plan, to the contrary, the pertinent clauses in the applicant's purchase agreement executed with the 2nd respondent dated 12th December, 2022 do not manifest this. They provide as follows;

30 AGREEMENT TO SELL BETWEEN VISARE (U) LIMITED ('The Vendor') AND GORREPATI SRINIV ASA REDDY ('The Purchaser') In respect of Four (4) Units of three bedroomed apartments on Block A, of which two (2) units are on the Fourth Floor and other two (2) units are on the Fifth floor comprised in Leasehold Register,

Volume 2651, Folio 9, Plot No. 65A, Lugogo By-Pass Road, Kampala Uganda measuring 0.351 Hectares.

5 ii. The Vendor submitted Condominium Property Plans to the Ministry of Lands, Housing and Urban Development and the Condominium Property Plans were approved and a recommendation given for registration.

10 v. The purchaser is desirous of purchasing Four (4) Units of three bed roomed apartments on Block A, of which two (2) units are on the fourth floor and the other two units are on the fifth floor (hereinafter referred to as" the Four (4) Units") and the vendor is desirous of selling the Four (4) Units to the purchaser.

1. **SALE AND PURCHASE**

15 a. The vendor hereby agrees to sell and hereby sells the Four (4) Units to the purchaser.

 b. The purchaser hereby agrees to buy and hereby buys the Four (4) Units from the vendor.

2. **CONSIDERATION**

20 a. The vendor sells to the purchaser all his interests in the Four (4) Units at a consideration of US \$ 300,000 (United States Dollars three hundred thousand) per unit totalling US \$ 1,200,000 (United States Dollars One Million two hundred thousand).

25 c. The Four (4) Units in the said property shall pass to the purchaser with no encumbrances or adverse claims on them at the time of payment of the first instalment of US \$ 120,000 (United States Dollars One Hundred and twenty thousand).

30 d. Upon the vendor receiving from the purchaser the first instalment of US\$ 120,000 (United States Dollars One hundred twenty thousand) at the time of executing these presents, the vendor shall hand over physical possession of the Four (Units) to the purchaser.

35 e. Upon execution of this agreement, the vendor undertakes to perform necessary acts incidental to enable the purchaser obtain constructive and actual possession of the said Four (4) Units which include but are not limited to, vacant possession, giving keys to the purchaser and introducing the purchaser to the care taker.

Nowhere in that agreement is any reference made to a drawing illustrating the four units that are the subject of the sale, the boundaries of which are described, a delineation of their external

surface boundaries as parcels and their location in relation to the building, delineated or distinguished by numbers or other symbols. There is nothing to show that at the time of that transaction, the boundaries of each unit were clearly defined in a duly registered plan, that the approximate floor area of each unit was clearly shown in the plan, and that the plan was
5 accompanied by a schedule specifying in whole numbers the unit factor for each unit in the parcel. The agreement is non-compliant with the requirements of section 40 and the second schedule of *The Condominium Property Act*, yet the legal title to a condominium unit is established through the execution of a legally sound condominium agreement, and not otherwise.

10 Section 3 (1) of *The Condominium Property Act* creates a legal cadastre (a parcel-based description of interests or rights in real property supported by titles or deeds, and registration), on basis of which property rights in the units can be asserted. The Cadastre answers the fundamental needs of registration concerning demarcation and establishment of rights in land. It defines the spatial extent of the units, supports transactions of transfer, provides evidence of ownership, and
15 provides a basis of their administration and management as real property. The physical determination of a parcel of condominium results in the recognition of its precise situation, of its exact limits, of its real dimensional appearance. The cadastral parcel then constitutes an unambiguously defined unit of the building within which unique property interests are recognised.

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Whereas the juridical component is satisfied by a description of the tenure (the mode of holding or occupying the land) and the holder, registerable interests in land being parcel-oriented, the deed plan is essential or critical for spatial representation of the physical extent of the proprietary interest it represents. Since a cadastral map displays how boundaries subdivide land into units of
25 ownership, proprietary rights under the Torrens system cannot exist outside or independent of well-defined parcels of land, in spatial terms. It is thus upon registration of a condominium plan that each individual unit in a multi-apartment building is separately demarcated, assigned individual legal title that can then be legally owned separately from the whole. All associated land, common areas, and other real property is then jointly owned in common by the individual
30 unit owners. It is thus imperative to have in place a clear delineation of boundaries of individual condominiums and common properties, and definition of rights of unit owners and the owners'

association before rights in the units can be asserted. A condominium unit includes the undivided interest in the common elements appertaining to that unit. Before registration of a condominium plan, none of the individual residential units in a multi-apartment building, the associated land and common areas, can be legally owned separately from the whole.

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It follows therefore that the four units claimed by the applicant cannot be legally owned, though they may be legally possessed, separately from the whole block. The agreement relied upon by the applicant did not create or pass any legal interest in the land, which for all intents and purposes is still registered to the 2nd respondent. The four units claimed therefore were at the time
10 of the sale not severable, and neither were they severed, from the whole and remain vested in the 2nd respondent as part of Leasehold Register Volume 2551, Folio 9, Plot No. 65A.

However, Order 22 rule 56 of *The Civil Procedure Rules* requires the claimant or objector to adduce evidence to show that at the date of the attachment he or she had “some interest” in the
15 property attached. Such interest must be a legal share in the property attached, or a legal legal or equitable claim to or right to it. Upon part-payment of the purchase price for a condominium unit in respect of which a condominium plan and title already exists, the buyer acquires an equitable interest in the unit, which subject to the terms of the agreement, entitles the buyer to the right to take possession, enjoy, access, and use of the property and eventually gain full ownership if they
20 finish paying for it. On the other hand, such beneficial interest may not be acquired in a condominium unit separately from the whole, before a condominium plan and title are registered. At best, the agreement between the applicant and the 2nd respondent is a personal contract enforceable, if the case otherwise admits, against the 2nd respondent by specific performance or by damages.

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It was contended by counsel for the respondent that the documentary evidence adduced by the applicant shows that payments made for utilities consumed at the premises are by the 2nd respondent in respect of the entire three blocks and not by the applicant. The applicant countered that this is so because the utilities are still registered to the 2nd respondent and separate one for
30 the units are yet to be created. It was insinuated by counsel for the respondent that the transaction between the applicant and the 2nd respondent is not an arm's length transaction but rather a

collusive one designed to prevent the execution of the consent decree. Matters were not helped by the fact that the applicant's primary aim as presented in the motion is to discharge the entire property from attachment and sale, and discharge of the four units that are the subject of the agreement, which ordinarily should have been his only focus, presented only in the alternative. It was acerbated further when two of the receipts indicate the source of funds as the 2nd respondent's director's salary and not from the income of the applicant.

An arm's length transaction is a business deal in which buyers and sellers act independently without one party influencing the other and are not associated with one another outside of the transaction in question. Both parties act in their own self-interest and are not subject to pressure from the other party. They also assure others that there is no collusion between the buyer and seller. Parties that at the time of the transaction have an existing relationship that is either business-related or personal may be inclined to make a collusive transaction. An existing relationship tends to influence the terms of a non-arm's length transaction. A transaction in which the buyer and seller have an identity of interest is not an arm's length transaction. A transfer made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer with actual intent to hinder, delay, or defraud any creditor of the debtor.

In transactions "at arm's length," the parties involved should have equal bargaining power and symmetric information, leading the parties to agree upon fair market terms. In contrast, a transaction not conducted "at arm's length" may happen between parties that may have a personal or close relationship. The test is whether or not under all the circumstances the transaction carries the earmarks of an "at arm's length" bargain. Such a transaction is characterised by three elements: (i) it is voluntary, i.e., without compulsion or duress; (ii) it generally takes place in an open market; and (iii) the parties act in their own self-interest to attain the most beneficial deal. It ordinarily is a transaction between two independent parties who bargain equally, who are non-related, and possess equal bargaining power without having any influence on each other. These transactions ensure that both parties value the assets at a fair price, provided the parties involved have an equal amount of information and act in their self-

interest. Whether a transaction produces an arm's length result generally will be determined by reference to the results of comparable transactions under comparable circumstances.

5 An objector's claim will be found collusive if it is fictitious, is unreal, or a distortion of the true relationship between the objector and the judgment debtor serving only as a mere mask having the similitude of a genuine transaction and worn by the parties with the object of confounding the judgement creditor. A confounding transaction may mask an actual association or, more commonly, falsely demonstrate an apparent association between the objector and the judgment debtor when no real arm's length transaction between them exists. The manner in which the application was drafted and filed, fronting discharge of the entire property before that of the applicant's four units, the agitated and passionate involvement in the proceedings by the 2nd respondent's director siding with the applicant during the hearing of the application, and the character of the documentary evidence produced to support the applicant's claim present a very persuasive circumstantial case that this application is intended to serve only as a mere mask
10 having the similitude of a genuine transaction, worn by the parties with the object of confounding the 1st respondent as judgement creditor.
15

Besides that, by the consent decree of 26th March, 2020, the 2nd respondent's right of alienation of the entire property was curtailed until full satisfaction of the decree. Clause 4 of the Consent
20 decree states that;

In the event of default of payment of the amount in Clause 3 (c) above to the defendant, the plaintiff hereby consents to the sale by the defendant of the suit property by private treaty with or without a fresh public notice, to recover the entire
25 outstanding amount with interest until recovery in full together with all the amounts paid by the third party to the defendant with interest thereon at the rate of 4% per month from the date of payment of each instalment until payment in full.

That clause in essence attached the entire property pending full payment of the decretal sum by
30 31st March, 2020 in full satisfaction of which the property would then be discharged. That clause practically took away the 2nd respondent's power of alienation of any part of the property for as long as any part of the decretal sum remained unpaid. The purported sale of a part of that property to the applicant which took place on 12th December, 2020 was therefore in violation of

the Latin maxim “*Ut pendent nihil innovetur*” which means that during litigation nothing should be changed, which enunciates the principle that the subject matter of a suit should not be transferred to a third party during the pendency of the suit (see *Bellamy v. Sabine, (1857) 1 De G & J 566; (1857) 44 E.R. 842*). In case of transfer of such immovable property during the
5 pendency of the suit, the transferee becomes bound by the final result of the suit.

Therefore a person purchasing or otherwise acquiring property from the judgment debtor during the pendency of the suit has no independent right to the property nor the ability to resist, obstruct or object to execution of a decree. This doctrine of *lis pendens* essentially aims at (i) avoiding
10 endless litigation, (ii) protecting either party to the litigation against the act of the other, (iii) avoiding abuse of legal process. This principle is intended to safeguard the parties to litigation against transfers by their opponents, so as to affect the rights of any other party thereto under any decree or order which may be made therein. It is also intended to strike at the attempts by parties to a legal proceeding to bypass the jurisdiction of a Court, before which a dispute on interests in
15 immovable property is pending, by private dealings which may remove the subject matter of litigation from the ambit of the court’s power to decide a pending dispute or frustrate its decree.

During the pendency of any suit related to the title of the property, no new interest can be created or added on the particular property which is subject matter to the suit. Neither party to the
20 litigation can alienate the property in dispute so as to affect his opponent. In other words the doctrine of “*Ut pendent nihil innovetur*” prohibits the transfer of disputed property. The Doctrine seems to be based on the concept of notice because a pending suit is considered as a constructive notice for the disputed property *pendente lite*. Any person related to the title of the property or subject matter of the suit, will be bound by the decision of the court. Therefore, it can be said that
25 the Doctrine gives power, jurisdiction or control to the court over the disputed property.

Therefore, a party to a suit in which the title to or power of alienation of real property is in dispute, is not allowed to transfer the property or to take any such decisions in respect thereof, which can interfere with the court’s proceedings. Hence for purpose of the proper administration
30 of justice, the doctrine prevents the litigants from transferring or disposing the disputed property during the course of the litigation over it. Litigation is deemed to commence from the date of the

presentation of the plaint and continues until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

5

Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate the necessity requires that the decision of the court in the suit shall be binding, not only on the parties to the litigation, but also on those who derive title under them by alienations made pending the suit, whether such transferees had or had no notice of the pending proceedings. If this were not so there would be no certainty that the litigation would ever come to an end. It would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The successful party would be liable in every case to be defeated by the adversary's alienating before full satisfaction of the judgment or decree, and would be driven to commence his her proceedings *de novo*, subject again to be defeated by the same course of proceeding.

A decree-holder is entitled to avoid *pendente lite* transfers of the properties by the judgment-debtor by simply attaching those properties in execution of the decree. It is open to the judgment-creditor to attach as the property of the judgment-debtor which has been transferred *pendente lite* to the objector with intent to defeat or delay creditors. A third party purchaser of a suit property pending litigation, without the permission of the Court cannot have any independent right over and above the right of the seller who happened to be the party to the litigation. The right of the transferee on the disputed property is limited to the extent of the right of the transferor in the disputed property as per the judgement. A transferee *pendente lite* is bound by the decree as much as if he or she were a party to the suit. A person purchasing immovable property from the judgment debtor during the pendency of the suit has no independent right to the property nor right to resist, obstruct or object to execution of a decree. The transferee *pendente lite* is treated in the eye of law as representative-in-interest of the judgment debtor and held bound by the decree passed against the judgment-debtor. Thus, it is only if the immovable property is purchased from the decree holder that the transferee will obtain title to the property. The whole object of the doctrine of *lis pendens* is to subject parties to the litigation as well as others, who

seek to acquire rights in immovable property, which is the subject matter of litigation, to the power and jurisdiction of the Court so as to prevent the object of a pending action from being defeated.

5 The principle of *lis pendens* being a principle of public policy, no question of good faith or bona fide arises. This renders irrelevant the fact that initially the attachment and dale of only Block “B” and “C” had been ordered. The foundation for the doctrine of *lis pendens* does not rest upon notice, actual or constructive; it rests solely upon necessity; the necessity, that neither party to the litigation should alienate the property in dispute so as to affect his opponent. It affects the
10 transferee not because it amounts to notice, but because the law does not allow litigant parties to give to others pending the litigation rights to the property in dispute so as to prejudice the opposite party. During the pendency of any suit the subject of which any right to an immovable property is directly, specifically or substantially in question, such property cannot be transferred by any party to the suit in a manner that affects the rights of any other party to the suit under any
15 decree or orders that may be made in such suit. The transferee from one of the parties to the suit cannot assert or claim any title or interest averse to any of the rights and interests acquired by the other party under the decree in the suit. Anything done by the transferee is prevented by the principle of *lis pendens* from operating adversely to the interest declared by the decree. For all the foregoing reasons this application lacks merit and is accordingly dismissed with costs to 1st
20 respondent.

Delivered electronically this 3rd day of April, 2023
Mubiru.....

.....**Stephen**

Stephen Mubiru
Judge,
3rd April, 2023.

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