**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**MISC. APPLICATION NO. 279 OF 2004**

**(Arising from Misc. Application No. 86 of 2004 and C.S No. 533 of 2002)**

**CALTEX OIL (U) LTD :::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT/OBJECTOR**

**VERSUS**

**1. PETRO (UGANDA) LTD :::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**2. SAM KIRONDE :::::::::::::::::::::::::::::::::::: RESPONDENT/JUDGMENT DEBTOR**

**BEFORE: THE HON. LADY JUSTICE M.S. ARACH - AMOKO**

**RULING:**

When this application came before on the 21/5/2004 for hearing, counsel for the 1st Respondent Mr. Gilbert Nuwagaba raised the following preliminary objections, which he said, would dispose of the matter:

Firstly Mr. Nuwagaba submitted that from the Annextures to the supporting affidavit, the property in issue was sold to the 1st Respondent at Shs.l00m on 5/2/2004 in execution of a decree. Subsequently, it was transferred into the 1st Respondent's names. The property is therefore no longer under attachment. As such, there is nothing to object to in strict compliance with the provisions of 0.19 Rule 55, which provides for objection in the case of property which is still under attachment. For the Court to investigate the Objector's interest the property must still be under attachment. 0.19 r55 is not the proper procedure where property has already been sold in execution. The Applicant should institute a suit to cancel the 1st Respondents name from the title, if it is aggrieved. He referred to the case of **Intraship (U) Ltd –Vs- G.M. COMBINE (U) LTD and FULGENCE MUNGEREZA.** [1994] 111 KALR 22, where the Court held in similar circumstances that for the Court to investigate the Objector's interest, the property must still be under attachment.

Secondly counsel argued that the 1 Respondent did not in any way attach the said property, and was not a Judgment Creditor in any of the cases under which the property was sold. The normal procedure is to bring an application against the Judgment Creditor, not the purchaser. This application arises from Misc. Application No. 81 of 2004. It is therefore cited wrongly, since there is no reason why it should be brought to this Court.

Thirdly Mr. Nuwagaba submitted that the Applicant claims to be in occupation under a lease from the Respondent/Judgment Debtor and the Applicant does not deny this in the affidavit in reply. It is a mere tenant and its claim should be disallowed under 0.19 rule 58.

Fourthly Mr. Nuwagaba submitted that the Application was designedly delayed because there is already a sale. The Court cannot investigate what has already been sold. The Application is therefore time barred and should be struck out with costs.

Mr. Herbert Byenkya, learned counsel for the Applicant in his reply strongly opposed the objection. He submitted that the 1st Respondents counsel had not understood the application that is why he has raised these misconceived objections.

Mr. Byenkya explained that the Applicant is not objecting to the order of attachment or sale of the lease interest because it does not claim any interest in the lease. What the Applicant claims is that it is a sub lessee of a sub lease which is still subsisting and which entitled it to possession of the said property. His client is objecting to the order and the warrant of vacant possession issued to the 1 Respondent in MA No. 81/04, and not the attachment.

In his view, the effect of that order (of vacant possession) against his client as a sub lessee is to seize his property. The word ‘attachment’ is not a narrow word that only encompasses grabbing of property for sale, but includes the seizure of a person’s property to secure a Judgment. (See Black’s Law Dictionary 7th Edition 123 on definition of: “attachment”. His client is objecting to this seizure which in his view amounts to an attachment. The procedure adopted is therefore the right one. The case of Intraship (supra) is therefore distinguishable.

In response to the 2 said objections, Mr. Byenkya submitted that it is clear that the order in Misc. Application 81/2004 was applied for and obtained by the 1st Respondent. It cannot therefore distance itself from it when the order is being challenged.

Thirdly Mr. Byenkya also submitted that the Applicant is not a tenant. He is a sub lessee. The sub lease was entered on the title on the encumbrance page by way of a caveat under S. 139 RTA. The reasons and details will be shown in evidence during the trial.

Lastly, on the issue of delay, Mr. Byenkya contended that this objection arose out of the misunderstanding by the 1 Respondent's counsel of the application. As far as the Applicant is concerned, there was no need to object to the sale because it was advertised in a manner which showed that the encumbrance's interest would be protected. (See Annexture 'A' to Mr. Kironde's affidavit in reply). There was therefore no need to panic just because the interest was being sold. To have brought an Objector proceeding at that time would have been frivolous. The interest of the Objector was only affected by the order of vacant possession not by any other previous order of attachment. The Applicant responded with alacrity as soon as it found that there was an order for vacant possession and obtained an interim injunction. There is also enough evidence showing complaints by the Applicant.

In his brief reply, Mr. Nuwagaba reiterated his earlier submissions and maintained that the attachment referred to under 0.19 r 55 is an attachment under a 'decree' and not an order. An order of vacant possession cannot be therefore interpresented as a decree. Since the Applicant is challenging an order of vacant possession, which is not a decree, the Application is therefore misconceived under Rule 55; and cannot stand.

Mr. Nuwagaba also added that if there was any resistance to the 1st Respondent taking possession of the property it would have been the 1st Respondent to apply under 0.19 r 85.

The background to this application is that the property in dispute comprised in LRV 535 Folio 22 plot 55/57 at Wobulenzi was attached and advertised in execution of two decrees against the 2nd Respondent, to wit: HCCS No. 533/02 **Easther Matovu -Vs- Sam Kironde and Balintuma -Vs- Sam Kironde** HCCS No. 467/2002.

The 1st Respondent purchased the said property and registered it in its names. Its efforts to take possession of the property are being resisted by the Applicant, hence this application.

I have carefully considered the submission of both counsel and I have come to the following findings:

Regarding the first objection I agree with Mr. Byenkya that the Applicant is objecting to the order of vacant possession, and not to the attachment. The notice of motion is clear; and the orders prayed for are:

> *"a). An order of vacant possession issued in Misc. Application No. 81 of 2004 with respect to LRV 535 Fob 22 plots 55/57 at Wobulenzi arising from HCCS No. 533 of 2002 and HCCS No. 467/2002 be set aside.*
> *b). A warrant to give vacant possession issued to the ft Respondent on the 6 day of April 2004 be set aside."*

It is also true that the Applicants claim is based on a sublease. The grounds of the application clearly bear this out where it is stated that the grounds are as follows:

> *"(a). The Applicant was in possession of the suit property in its own right under a subs lease agreement at the time of issuing both the order of vacant possession and the consequential warrant by the Registrar of this Honourable Court."*

I however do not accept Mr. Byenkya's argument that the Applicant has followed the right procedure in objecting to the order of vacant possession. Instead agree with Mr. Nuwagaba's submission that, strictly speaking, the orders prayed for, do not fall under the provisions of 0.19 rule 55 which deals purely with objection to attachments of property as the short title indicates. In order to appreciate fully this point, it is instructive to read and understand the whole of 0.19 of the CPR. 0.19 deals with Execution of Decrees and Orders. That is what its title says. The word "Execution" is defined in Osbornes's Concise Law Dictionary 9th Edition pg 161 as:

*"the act of completing or carrying into effect (1) of a Judgment compelling the Defendant to do or to pay what has been adjudged."*

For the purposes of the instant case, I have also found the explanation in "Words and Phrases Legally Defined" Vol. 2 (D - J) more useful. The Learned Authors have defined the Execution as follows:

> *"The word 'Execution' in its widest sense signifies the enforcement of or giving effect to the Judgments or orders of Courts of Justice. In a narrower sense, it means the enforcement of those Judgments or orders by a Public Officer under the writs of fieri facias, elegit, capias, sequestration, attachment, possession, delivery, fieri facias de bonis ecclesiastics, etc. (17Halsbury's Laws* (4th *Edn) para 401).*

According to the Learned Authors, Attachment is just one of the modes of the Execution. The Leaned Authors go on and state:

*'The first point raised is as to the meaning of the words "taken in Execution", and it seems to me that the obvious meaning of the words is that when a sheriff goes into possession on a writ of fi.fa. the goods that he seizes are taken in Execution.' Marylebone Vestry -Vs- London (Sheriff) [1900]2 QB 591 at 594,* C4*, per Smith Li.*

*'To my mind, "to proceed to Execution on' or "to proceed to the enforcement of' a Judgment is only a way of saying "to Execute" or "to enforce that is, to go to the length of Executing, or to go to the length of enforcement, and I do not think that* normally anyone, whether a lawyer *or a layman, would say that a party who applies for an order for the examination of the Judgment Debtor as to means is Executing or enforcing the Judgment.'* ***Fagot —Vs- Gaches*** *[1943]1 KB 10 at 12, CA, per du Parcq LJ.*

*'The word "Execution" is not defined in the Act (Administration of Justice Act 1956). It is, of course, a word familiar to lawyers. "Execution" means, quite simply, the process for enforcing or giving effect to the Judgment of the Court and it is "completed" when* the Judgment *Creditor gets the money or other thing awarded to him by the Judgment.*

*That this is the meaning is seen by reference to that valuable old book Termes de la Ley, where it is said: "Execution is, where Judgment is given in any action, that the Plaintiff shall recover the land, debt, or damages, as the case is; and when any writ is awarded to put him in possession, or*

*to do any other thing whereby the Plaintiff should do any other thing whereby the Plaintiff should the better be satisfied his debt or damages, that is called a writ of Execution; and when he hath the possession of the land or is paid the debtor damages, or hath the body of the Defendant awarded to prison, then he hath Execution." The same meaning is to be found in* ***Blackman -Vs- Fysh*** *[1892] 3Ch 209], when Kekewich J said that Execution means the "process of law for the enforcement of a Judgment Creditor's right and in order to give effect to that right." In cases when Execution was had by means of a common law writ, such as fieri facias or elegit, it was legal Execution, when it was had means of an equitable remedy, such as the appointment of a Receiver, then it was equitable Execution. In either case it was "Execution" because it was the process for enforcing or giving effect to the Judgment of the Court.' Re Overseas A v/at/on Engineering (GB) Ltd [1962] 3 All ER 12 at .16, CA, per Lord Denning MR; also reported in [1963] Ch 24 at 39."*

Nearer home, section 38 of the CPA (Cap 71) provides as follows:

*"5.38. Powers of Court to enforce execution:*
*subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree holder, order execution of the decree-*

a. *by delivery of any property specifically decreed,*
*b. by attachment and sale, or by sale without attachment, of any property;*
c. *by attachment of debts;*
*d. by arrest and detention in pr/son of any person;*
*e. by appointing a receiver; or*
f. *in such other manner as the nature of the relief granted my require."*

The word Attachment is defined as:

*"The seizing of a person's property to secure a Judgment or to be sold in satisfaction of a Judgment." See: Black's Law Dictionary 7th Edn pg 123."*

In conclusion, "attachment" begins when the bailiff under an attachment warrant seizes the debtor's property for the purpose of satisfying a Judgment and ceases when the Judgment is

satisfied, after sale of the seized property so as to pay the Judgment Creditor the money so awarded to him by Court.

Rule 55 is specifically on the objection to attachment of attached property. That is what the short title says. In my understanding, objection to attachment means objection to attachment of property where property is attached in execution of a decree but before it is sold. Rule 55 does not apply after the property has been sold. That is the decision in the Intraship (U) Ltd (supra), once the property has been attached and sold, the execution is complete and anyone resisting the result of execution can only resort to Court to protect his right to the property sold and apply for an injunction which the 1st Respondent has done. This fact is found in the Notice of Motion where the Applicant says that one of the grounds for this application is that:

*"b). The Applicant has a suit pending against the ft Respondent to establish its right of possession to the land under the said sub lease agreement, and had by the time of the issuing of the warrant, obtained an interim injunction against the Respondent which order remains in force till the present day."*

This position is supported by section 49 of the CPA which provides that:

"49. *Purchaser's title. Where subject to any law relating to the registration of titles to land, where immovable property is sold in execution of a decree, the sale shall become absolute on the payment of the full purchase price to the Court, or to the officer appointed by the Court to conduct the sale."*

I therefore agree with Mr. Nuwagaba that there is nothing to object to under the strict compliance with Rule 55. This objection therefore succeeds.

Secondly, it is true that the 1st Respondent is not a Judgment Creditor in whose favour the property was attached. It is not a party to HCCS No. 537/02 467/2002 out of which the decrees were issued. It did not in any way attach the said property. It is merely a purchaser of attached property. But Mr. Byenkya pointed out that, it is a party to Misc. Appl. No. 81/2004 out which the Registrar of this Court issued the order of vacant possession sought to be set aside by this application. It would therefore have been cited rightly in this application if the right procedure

had been followed. As I have already stated under the first objection, however, this matter cannot be dealt with under 0.19 rule 55.

Thirdly, the Applicant indeed claims as a sub lessee. It is clear from the notice of motion and his affidavit. This fact is not in dispute and I accordingly make no ruling on it.

Fourthly, regarding the issue of delay, I agree with Mr. Byenkya that there was indeed no need to object to the sale because the Applicant interest appeared to have been taken care of in the advertisement; which showed that the encumbrance's interest would be taken care of. His client therefore saw no need to panic until it was served with an order of vacant possession. That is when it reacted by filing the instant application. But as I pointed out earlier on in this ruling, the Applicant has not followed the correct procedure in bringing this application before this Court. Indeed the Applicant has already filed a suit in the High Court against the 1st Respondent that is HCCS No.172/2004 seeking *inter alia,* for an order of specific performance of the said lease agreement. This suit is still pending before the High Court Civil Division. It is also on record that the Applicant applied for and obtained an interim order dated 23rd March 2004 restraining the 1 Respondents from evicting it from the said property vide MA No. 191/2004 arising out of Misc. Appl. No. 190/2004. This interim order was issued by the Hon. Mr. Justice Tabaro on 23 March 2004 in the presence of Mr. Herbert Byenkya counsel for the Applicant and Mr. Kandebe counsel for the Respondent. The interim order was granted pending the hearing of the application for a temporary injunction which will be heard on 12th July, 2004 (See: Annexture C to Russell Moro's affidavit). In my view the suit and the interim order adequately protect the interest of the Applicant in the suit property for the time being. If the 1 Respondent is not respecting the interim order of the Court as is apparent, then the matter should be brought to the attention of the presiding Judge quickly to handle appropriately. Otherwise as far as the Commercial Court is concerned the dispute in HCCS No. 553/2002 - **Esther Matovu -Vs- Sam Kironde** was decisively concluded and the decree has been executed. This Court therefore has no case pending before it between the two parties.

In the result and for the foregoing reasons, I uphold Mr. Nuwagaba's preliminary objection and I dismiss the application with costs to the Respondent.

M.S. Arach - Amoko

**JUDGE**

**Ruling Delivered in the presence of:**

1. Byenkya for the Applicant.
2. Mr. Nyakana holding brief for Mr. Nuwagaba.
3. Mr. Russel Miro.
4. Mr. Okuni - Court clerk.

MS. Arach - Amoko

**3UDGE**

25/5/2004