

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

MIS .CAUSE NO.167 OF 2010
(Arising from HCCS No. 325 of 2008)

BETWEEN

MRS RITA JACKLINE NAMUBIRU JJEMBA :::::::::::::::::::: OBJECTOR

AND

LAZ TRADING CO. LTD :::::::::::::::::::: PLAINTIFF

VERSUS

BARCLAYS BANK (U) LTD :::::::::::::::::::: DEFENDANT

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

Civil Procedure- Objector Proceedings – lack of spousal consent to mortgage by the judgment debtor – objector in possession of the property at the time of attachment – objector having interests in the property at the time of attachment.- subject of attachment having been sold.

Held: Application dismissed

Ruling

This is an application brought by the objector by way of Notice of motion under order 22 rules 55, 56, 57, 60 of the Civil Procedure Rules and order 52 rule 2 of the Civil Procedure Rules and section 98 of the Civil Procedure Act. It is for orders that the objector’s matrimonial property Block 232 Plot 2315

Kireka Banda 0.198 Hectares be released from attachment and sell and the costs of the application be provided for.

The application is supported by an affidavit deposed to by the objector, Mrs. Rita Jackline Namubiru Jemba. The objector's case is that she is the legal wife to Jackson Kimbugwe Jjemba which marriage was solemnized on 12th February 1983 at Namirembe Cathedral and that Jackson Kimbugwe Jjemba is the registered owner of land in Block 232 plot 2315 Kireka Banda which is family land where their matrimonial home is. However, the matrimonial home of Block 232 plot 2315 was attached to which objector prays that it be released from attachment and sell if any be set aside .The objector further states that she was in possession of the property and also had interest in the property at the time it was attached as a wife of the registered owner and has never given any spousal consent to the mortgage of the said land which is a requirement according to the law.

The objector (Rita Jackline Namubiru Jjemba) further stated that the plaintiff company (Laz Trading Co .Ltd) is the registered proprietor of Block 232 plot 2314 while her matrimonial home is on plot 2315 registered in the names of Mr. Jackson Kimbugwe (Objector's husband), the two plots of land (Plots 2314 and 2315), share a common boundary and it is the objector's argument that there was a misrepresentation in the valuation report where the valuer mistakenly quoted the land to be 0.198 hectares whereas it was 0.122 hectares as evidenced in valuation report

The plaintiff had deposed an affidavit in which he avers that he is the Director in Laz Trading Co. Limited and that Laz Trading Co. Ltd is the registered owner of 0.122 Hectares land comprised in Block 232 Plot 2314 Kireka Banda and that there no buildings on the same land as evidenced in the area schedule marked "A" field print "B". That the objector's matrimonial home is outside the company land which covers 0.122 Hectares Block as 232 Plot 2314 Kireka.

Mr. Phillip Dande, Head of Collection and Recoveries Department of the respondent Bank deposed an affidavit in which he stated that the property comprised in Kyadondo Block 232 plot 2314 at Kireka and Banda is not under attachment. He states that this land was foreclosed and disposed of pursuant to a court in High Court Civil suit No. 325 of 2008 and instituted by one, Rogers David Kintu on 22 February 2010. He further stated that before the loan was issued to the plaintiff, the defendant bank instructed M/s Byokusheka & Company (a firm of valuers) to carry out a valuation the property which was done. Based on the valuation report Mr. Dande believes the report to be true and without errors.

The objector in her affidavit stated that her matrimonial property is on Block 232 plot 2315. She further deponed that she should not lose her matrimonial home because of the valuers' mistake in mixing up Block 232 plot 2314 and merging it with block 232 plot 2315 and prayed court to summon the valuer/surveyor to explain why her matrimonial home was merged with plot 2314.

A further affidavit by Ms Zalwango Rebecca, the biological daughter of both the objector and Jackson Kimbugwe Jemba however stated that she suspects that their family house certificate of title is with a money lender, Chen Jin Zhu, the Managing Director of Huadar Gaung Dong, Chinese Co. Ltd. and prayed that Mr. Zhu produces the certificate of title for plot 2315.

Mr. Rukondo appeared for the Objector while Mr. Semakula appeared for the Respondent Bank. Mr. Byaruhanga was allowed audience in Court during the investigation hearing on behalf of M/s Huadar Gaung Dong Chinese Co Ltd (Registered Mortgagee) as friend of Court.

Counsel for the Objector submitted that Plot 2315 Kireka which the respondent sought to be attached was protected because it was matrimonial property and the objector wife did not consent to its mortgage He further submitted that the Objector was in possession of the land title. He submitted that there was some confusion over the land title for plot 2315 and 2314 which the survey report treated as the same whereas they were different.

Counsel for the respondent submitted that both plots 2314 and 2315 were enclosed in one boundary wall but that the survey showed that the two plots had been interchanged or switched for purposes of the loan. One of the plots was where the house was situated while the second is where the compound was.

I t was agreed as part of the investigation that this confusion be sorted out by another surveyor being appointed to verify the actual facts on the ground as the first report had led to disagreement between the parties.

During the trial it however transpired that the title was actually with a third party a money lender called Mr. Chen Jin Zhu the Director of M/s Huadar Dong, Chinese Co. Ltd. Court summoned Mr. Huadar to verify this fact and he attended Court with his lawyer Mr. Byaruhanga who surrendered the duplicate land title for plot 2315 to the Court for inspection. It was established from Mr. Byaruhanga

that his client had lent the Judgment creditor money and deposited the land title with him. Mr. Byaruhanga also produced photographs taken at the time the judgment debtor obtained the loan from his client. The photograph showed the judgment creditor with his wife seemingly to suggest that the wife had given consent to the whole transaction. However the woman in the photo was different from the objector in this case. He further notified Court that any attachment on the said property would have to be subject to the rights of his client as mortgagee.

I have addressed my mind to the motion and the affidavits for and against it. The law and tests to be applied to applications of this nature is fairly settled. In the case of **Uganda Mineral Waters Ltd V Amin Pirain & Anor [1994-5] HCB 87** where Musoke Kibuuka Ag. Judge (as he then was) stated that

“ The scope of the investigation to be carried out under 019 rules 55, 56 and 57 is not for determining ownership being threatened by attachment. At the end of the Objector proceedings one of the parties must sue in order to determine the issue of title to the property as the order made under the rule is only provisional. The Court must answer the question whether on the date of attachment, the Judgment Debtor or the Objector was in possession of the property.

If the Court finds that it was the Judgment Debtor who was in possession, then the inquiry will proceed no further. Secondly the Court must determine whether the Objector held the property on his own account or in trust for the Judgment Debtor or some other person ...”

The same proposition in Law is set out in the cases of **Harilal & Co. V Buganda Industries Ltd [1960] 318**; **Kasozi Ddamba V M/S Male Construction Service [1981] HCB 26** and my own decision of **Haider Somani V Najibu Mubiru and Joice Lubeka KasulaKwegya CA 234 of 2005.**

In this case the judgment creditor did not show up. Equally the objector herself, save for swearing an affidavit also did not show up in Court as she was said to be in the USA. This whole dispute came about because the respondent bank on the 21st November, 2008 advertised the sale of Block 232 plot 2314 Kireka. An affidavit by Mr. Phillip Dande the Head of Collections and recoveries at the

respondent bank states that the said plot 2314 was sold to one Rogers Kintu on the 22nd February 2010. Of course plots 2314 and 2315 are different but the survey reports confirm that they are enclosed in the same wall and for all intents and purposes to the unsuspecting eye form part of the same household. To get to plot 2314 one must have to as a practical matter deal with plot 2315 as well as they are enclosed within the same wall.

A review of the duplicate certificate of title provided to Court confirms the following. First that it is a Special certificate where plot 2315 was curved out of Block 232 Plot 342 Kireka. Secondly that the actual certificate was not in the possession of the objector as first told to Court but rather in the hands of a third party registered mortgagee. The said mortgage was registered vide instrument KLA 424880 on the 5th August 2009.

During the hearing I expressed concern at the absence of the objector in Court on such an important case as the attempted attachment of her matrimonial home. I was told she was abroad. A review of the objector's affidavit in support dated 19th March 2010 and affidavit in rejoinder dated 27th April 2010 shows the deponent did not sign the said affidavits but instead wrote her name. Both names in said affidavit are clearly written using different handwritings making me rightly believe she may not have even signed them.

To my mind the whole transaction involving the judgment creditor and the objector involving both plots 2314 and 2315 is very suspicious indeed. Why did they sub divide their property into two plots use the new titles for acquiring loans and then disappear? This is what has caused all the confusion with the survey reports. I think credit departments in banks should be very careful when evaluating such properties for loans.

That notwithstanding as to the motion it is clear that the two plots which are enclosed within one wall are distinct from one another and plot 2315 is not the subject of any attachment. It is in fact the subject of a mortgage with a third party. It is plot 2314 which is the subject of attachment and has already been sold. In that regard the motion is redundant it only seeks to bar access to plot 2314 because it is within the same wall. There is therefore no action for this Court to take on this motion. This Court will make not allow it to be used to further clearly suspicious transactions. The judgment debtor sub divided the property, most likely with the knowledge of the objector, without making arrangement for adjusting

the wall then obtained credit from two different sources and he should therefore bear any consequence of that unacceptable behavior.

This motion is dismissed and since the respondent bank also abandoned the conduct of the case each party will bear its own costs. The Duplicate certificate of title deposited in Court by M/s Huadar Gaung Dong, Chinese Co. Ltd may be returned to them by the Register under cover of letter by the Registrar.

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Geoffrey Kiryabwire

JUDGE

Dated: 17/12/2010

17/12/2010

4:20 p.m.

Ruling read and signed in Chambers in the presence of;

- P. Byaruhanga for Huadar Gaung Dong Chinese Co. Ltd. (mortgagee)
- MD of Huadar Gaung Dong Chinese Co. Ltd. Mr. Chin Jin Hua
- Ruth Naisamula - Court Clerk.

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Geoffrey Kiryabwire

JUDGE

Date: 17/12/2010

