

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISCELLANEOUS CAUSE No. 002 OF 2022
Arising From Execution No. 035 Of 2021
All Arising From Election Petition No. 08 Of 2021

GIDIEON BALINDA ::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT/OBJECTOR

VERSUS

1. HON. MBALIBULHA KIBANZANGA TABAN CHRISTOPHER

2. ACROBERT KIIZA MOSES

3. THE ELECTORAL COMMISSION ::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON JUSTICE VINCENT EMMY MUGABO

RULING

Introduction

This is an objector application to release the property comprised in Kyamukube, Bukangama parish Bukonzo Sub County Bundibugyo district (the subject land) from attachment and sale and for costs of this application. It is made by notice of motion under the provisions of Section 98 of the Civil Procedure Act (CPA), Order 22 rules 55 and 56, and Order 52 rules 1 and 3 of The Civil Procedure Rules (CPR).

The applicant contends that the property in issue is not subject to attachment in so far as it is not the property of the judgment debtor but rather that of the applicant, having purchased it from the judgment debtor on 29th June 2019. It is claimed that at the time of the attachment, the applicant was in full and exclusive possession of the land.

The application is supported by the affidavit of Balinda Gideon the applicant wherein he states that he is the equitable owner of the subject land having purchased the same from the 1st respondent in June 2019 and that he is not the judgment debtor in any case before court. He notes that upon purchase of the land, he took possession of the land and he has been residing there with his family and carrying out agriculture. Further that he only learned of the attachment when he was served with a vacation notice from straight auctioneers on 7th February 2022. He prays that court investigates the rightful owner of the subject land and release it from the wrongful attachment.

The 2nd respondent filed an affidavit in reply and states among others that the subject land was properly attached because it belongs to the 1st Respondent/Judgment debtor. Further that the applicant has no interest in the subject land and that he is not in possession of the same. He deposes that this application is a waste of court's time and intended to frustrate the 2nd respondent's execution efforts.

The 3rd respondent also opposed the application through the affidavit of Kunihira Robert, the Bundibugyo District Registrar of the 3rd respondent. He deposes that the application against the 3rd respondent is not properly before the court, is premature as the 3rd respondent has not taken any execution measures against the applicant or the judgment debtor.

The 1st respondent did not oppose the application.

Background

The 1st respondent is a judgment debtor in Election Petition No. 008 of 2021. The 2nd and 3rd respondents are judgment creditors. After taxation

of the resultant costs of the petition and of all matters arising therefrom, the 2nd respondent obtained a warrant of attachment and instructed straight auctioneers to attach among others the subject land. This is the land that the applicant now seeks to be released from the said attachment.

Representation and hearing

The applicant was initially represented by Mr. Guma David of Guma & Co. Advocates and later by Borris Advocates. Mr. Wahinda Enock of Ahabwe James & Co. Advocates represented the 2nd respondent. Mr. Kugonza Enock of the 3rd Respondent's Legal Department represented the 3rd respondent. Mr. Afuna Adula Isaac made an appearance for the 1st respondent.

During the hearing, counsel for the 2nd respondent applied to cross examine the applicant on his affidavit and his prayer was granted by court. Written submissions were filed on behalf of all the parties except for the 1st respondent. I have considered the Advocates' submissions in this ruling.

Consideration by court

Under **section 44 of The Civil Procedure Act**, property liable to attachment and sale in execution of decree includes land belonging to the judgment debtor, whether it is 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 the instant case, it is contended by the applicant that by reason of the transaction of purchase that took place a between the judgment debtor and the applicant in June 2019, the subject land no longer belonged to the judgment debtor and as such it was not available for attachment in

execution of the decree issued against him.

In order to succeed on an application like the present one, and in line with **Order 22 Rules 55 and 56 of The Civil Procedure Rules** the applicant as objector must prove that at the time of the attachment; (1) he had some interest in the property attached, (2) the property attached was in his possession, (3) he was holding possession of the attached property on his own account and not on account of the Judgment debtor, and / or (4) that the property was not in possession of the Judgment debtor or some person in trust for him or her; or (5) that the property was not in occupancy of a tenant or other person paying rent to the Judgment debtor; or finally (6) that although being in the possession of the Judgment debtor at such time, it was so in the possession of the judgment debtor not on the judgment debtor's own account or as the judgment debtor's own property. The crucial consideration therefore in applications of this nature is one of possession of the property at the time of the attachment.

If the Objector was in possession, or if some other person was in possession on account of the Objector, coupled with some interest in the property in favour of the objector, then the property should be released from attachment (see ***Haria and Co. v. Buganda Industries Ltd. [1960] EA 318; Joseph Mulenga v. FIBA (U) Ltd, H. C. Miscellaneous Application No. 308 of 1996***). It is a determination of possession and not ownership.

Turning to the application before me, the applicant in paragraphs 2 and 3 of his affidavit in support, notes that he is the equitable owner of the subject land having purchased the same from the 1st respondent in June 2019. Further that upon the said purchase, he took possession of the land

and that that is where he resides with his family and carries out agriculture.

Counsel for the applicant relied on the land sale agreement dated 19th June 2019 and that case of **Prompt Facilities Ltd Vs Richard Onen T/A Richard Electrical Services & Joyce Ataro Kitgum HCMA No. 25 of 2008** to submit that the only question for determination in an objector application that of possession and that possession can either be physical or constructive. Counsel argued that the applicant was in possession of the subject land and that he held it on his own behalf.

Counsel for the 2nd respondent relied on several inconsistencies brought out during cross examination of the applicant (which will be addressed later in the ruling) to argue that the applicant is not in possession of the subject property and his claim should therefore fail.

Counsel for the 3rd respondent maintained that the 3rd respondent has never attached the subject land and that this application was wrongly filed against the 3rd respondent.

It is now a settled principle of law that a Court faced with an objector suit is obliged to investigate whether at the time of the attachment complained of, the objector or the judgment debtor was in possession of the suit property. If the judgment debtor was in possession, then the execution of the warrant must continue. However, where the Court establishes that at that time the suit property was in the possession of the Objector, then the Court has to determine whether the Objector had such possession on his or her own account, or did so in trust for the judgment debtor. If it is the former, then the Court must release the property from attachment forthwith. However, if it is the latter, then the judgment debtor has legal

possession of the suit property; and so, the attachment, in execution of the warrant, stands.

For purposes of the investigation into the objector's alleged possession of the subject property, court allowed counsel for the 2nd respondent to cross-examine the objector. I note that during the said cross examination, some inconsistencies and contradictions appeared in the applicant's evidence. For their relevance to this application, I need to point them out, as below.

1. In his affidavit in support, the objector stated that he resides on the subject land which is located in Kyamukube, Bukangama parish Bukonzo Sub County Bundibugyo district. During cross examination, he stated that he resides in Ngite Village, Kalyala Parish, Ngite Sub County.
2. The land sale agreement describes the land to be neighbouring Kyamukube Health Centre III in the west, Moses and Mundeke in the north, a road in the south and Zakalia Matte in the East. The objector stated that Mundeke is in the south, a health centre III (whose name he did not mention) in the east and Zakalia in the west. He also makes no mention of the road.
3. In cross examination, he stated that it was Guma the Advocate who did the work. He met the lawyer in office. He did not know the lawyer's office. He then stated that the lawyer found him in Bundibugyo and drafted the agreements. Yet again, he stated that it is the 1st respondent who brought the lawyer and they sat in Makasi Alfred's office before Guma arrived. He notes that he met Makasi in 2019. He turns around and confirms that the said Makasi Alfred was not a lawyer in 2019 but a state Attorney in Bundibugyo.

4. The 2nd respondent compared the signature of Mr. Guma Davis who witnessed the impugned sale agreement with Mr. Guma Davis' signature of another agreement involving the judgment debtor. The two signatures appear very different but yet allegedly belong to the same person.

The above inconsistencies create doubt as to the objector's knowledge of the facts surrounding his acquisition and possession of the suit land. The law on inconsistencies and contradictions is settled. If they are major and intended to mislead or tell deliberate untruthfulness, the evidence may be rejected. If however, they are minor and capable of innocent explanation, they will not have that effect. (See ***Nambozo v Manana & another (Civil Appeal 3 of 2018) [2021] UGCA 198***)

After stating in his affidavit that he stays on the subject land and later telling court that he lives in a different village and parish altogether, coupled with all the inconsistencies and contradictions as laid out above, the objector intended to deliberately lie to court. I am unable to agree with his evidence of possession of the subject land.

Since objector proceedings are more concerned with possession, a person aggrieved by a decision arising out of the said proceedings is at liberty to institute an action to establish the legal rights attached to the property in question.

This application totally fails and it is hereby dismissed with costs to the 2nd and 3rd respondents.

I so order

Date at Fort Portal this 29th day of June 2022.



Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the ruling to the parties



Vincent Emmy Mugabo

Judge

29th of June 2022.