THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF FORTPORTAL HOLDEN AT FORTPORTAL

HCT-01-CV-CA-03 OF 2015

(ARISING FROM FPT-00-CV-CS-0111 OF 2010)

UGANDA FINANCE TRUST LTD …….…... APPELLANT

VERSUS

1. **ALLOYS MUHUMUZA**
2. **KAMAIKYA MARGRET ……..…… RESPONDENT**

BEFORE: HIS LORDSHIP JUSTICE OYUKO. ANTHONY OJOK, JUDGE

JUDGEMENT

This is an Appeal against the orders of His Worship Samuel Emokor chiefMagistrate in execution of the decree in **FPT-00-CV-CS-0111 OF 2010 made** on 19th February, 2015 where he released **Motor Vehicle Registration No. UAJ 923V** from attachment.

Background

The appellant instituted civil suit No.111 of 2010 in the chief magistrates court of fort portal at fort portal under summary procedure for the recovery of shs. 1,469, 000= (one million four hundred sixty nine thousand shillings only) being a loan advanced to the 1st respondent on 5th October, 2009 at an interest rate of 2.5% per month for which the 2nd respondent was the guarantor and costs of the suit.

The respondents applied for leave to appear and defend the suit in **FPT-00-CV-MA-024 OF 2010**and that application was allowed but the defendants refused to file the defence.

On 4th June, 2012, a decree was entered against the respondents and court ordered the respondents to pay the appellant **Shs. 1,469,000=(one million four hundred sixty nine thousand shillings only)**being the loan advanced, interest of 6% per annum from the date of the decree till full payment and the respondents to pay the costs of the suit.

On 3rd December, 2014, the appellant's bill of costs was taxed and allowed at **Shs. 4,399,000= (four million three hundred ninety nine thousand shillings only).**

A notice to show cause why execution should not issue was extracted and dully served upon the respondents which was ignored and court on 18th December, 2014 ordered for the attachment of their movable properties in execution of the decree and consequently **Motor Vehicle Reg. No. UAJ 923V** belonging to the 2nd respondent was attached.

The 2nd respondent contested the attachment of her Motor Vehicle that she could not suffer for the debts of the 1st respondent.

On 19th February, 2015, court ordered for the release of the Motor Vehicle of the 2nd respondent Reg. No. UAJ 923V from attachment hence this appeal.

The appellant being dissatisfied with the above order instituted the instant appeal and raised three grounds of appeal in the memorandum as follows;

1. That the learned Chief Magistrate who was not the court executing the decree erred in law and fact to release Motor Vehicle Registration No. UAJ 923V belonging to the 2nd respondent from attachment.
2. That the learned Chief Magistrate acted irregularly and contrary to established procedures to release Motor Vehicle Registration No. UAJ 923V belonging to the 2nd respondent from attachment.
3. That the orders made by the learned Chief Magistrate were wrong and in the circumstances varied the decree against the respondents.

Counsel Richard Bwiruka appeared for the appellant and counsel Ahabwe James for the respondent. By consent both parties agreed to file written submissions.

Counsel for the appellant submitted his submission but counsel for the respondent did not. So I will go with counsel's submission and the evidence on file and reach a conclusion.

Duty of the first appellate court:

It is the duty of the first appellate court to re-evaluate the evidence on record by subjecting it to a fresh and exhaustive scrutiny in order to make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it in that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court. **[See: Pandya vs. R (1957) EA 336, Ruwala Vs. R (1957) EA 570, Bogere Moses vs. Uganda Cr. App. No. 1/97 (Sc), And OkethiOkale versus Republic (1965) EA 555.]**

All grounds are submitted on separately as hereunder;

Resolution of Grounds:

Ground One: ***That the learned Chief Magistrate who was not the court executing the decree erred in law and fact to release Motor Vehicle Registration No. UAJ 923V belonging to the 2nd respondent from attachment.***

Counsel for the appellant submitted that the decree which was being executed was a decree of a Magistrate Grade One and it is the Magistrate Grade One that had issued execution. The 2nd respondent after attachment of her vehicle just came to the Chief Magistrate who called the file and the Appellant's counsel and that is how the record of 19th February, 2015 was made.

Counsel for the appellant cited **Section 30 of The Civil Procedure Act, Cap. 72** which provides that;

"A decree may be executed either by the court which passed it or by the court to which it is sent for execution."

Further cited **Section 29 of The Civil Procedure Act** which defines "a court which passed a decree" to mean;

a) Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance.

b) Where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit in which the decree was passed were instituted at the time of making the application for execution of the decree, would have jurisdiction to try such suit.

Counsel for the appellant submitted that the decree was passed by the Grade One Magistrate Her Worship Joy Namboozo and it was this Magistrate Grade One court or her successor which had powers to execute the decree. That the file was later allocated to His Worship Oji Philips Magistrate Grade One who issued execution. It was the same court supposed to release the attached motor vehicle of the 2nd respondent from attachment if it appeared reasonable for court to do so.

He further submitted that there was no application made by the 2nd respondent to the Chief Magistrate and even if there was such an application it had to be made to the court executing the decree under **Section 34(1) of The Civil Procedure Act.**

Further that the act of the Chief Magistrate ordering the release of the attached motor vehicle belonging to the 2nd respondent was unlawful since it was neither the court that passed the decree nor the court to which a decree was sent for execution.

In my opinion according to **Section 34(1) of The Civil Procedure Act** it is stated that;

"All questions arising between the parties to the suit in which the decree was passed, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

The Civil Procedure Act, Cap. 72under **Section 30** is very clear that;

"A decree may be executed either by the court which passed it or by the court to which it is sent for execution."

It goes on to define the term "a court which passed a decree" under **Section 29** to mean;

a) **Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance.**
b) **Where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit in which the decree was passed were instituted at the time of making the application for execution of the decree, would have jurisdiction to try such suit.**

The Magistrates Court Act grants powers to the Chief Magistrate under **Section 221** to call for and examine the record of any proceedings before a magistrate's court inferior to the court which he or she is empowered to hold for the purposes of satisfying himself or herself as to the correctness, or legality of any order recorded or passed and as to the regularity of any proceeding of that magistrate's court. But the same section further states that;

"If the chief magistrate acting under subsection (2) is of the opinion that any order is illegal or improper, he or she shall forward the record with such remarks therein as he or she thinks fit to the high court."

In the instance case however, the Chief Magistrate Court was not the court that had passed the decree in order for it to entertain the questions raised by the respondent but that he did it. He ought to have sent it to the High Court just like the law requires. Therefore he erred.

This ground succeeds.

GROUND TWO:*That the learned Chief Magistrate acted irregularly and contrary to established procedures to release Motor Vehicle Registration No. UAJ 923V belonging to the 2nd respondent from attachment.*

Counsel for the appellant submitted that the learned Chief Magistrate acted irregularly and contrary to established procedures to release Motor Vehicle Registration No. UAJ 923V belonging to the 2nd respondent from attachment.

Counsel cited **Order 22 Rule 55(1) of The Civil Procedure Rules** which provides that;

"Where any claim is preferred to, or any objection is made to the attachment of, any property attachment in execution of a decree on the ground that the property is not liable to the attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he she was a party to the suit; except that no such investigation shall be made where the court considers that the claim or objection was designedly delayed."

Further cited **Rule 57** of the same Order of the Civil Procedure which states that;

"Where upon the investigation under Rule 55 the court is satisfied that for the reason stated in the claim or objection the property was not, when attached, in the possession of the judgment debtor or of some person in trust for him or her, or that, being in the passion of the judgment debtor at that time, it was so in his or her possession not on his or her own account or as his or her own property, but on account of or in trust for some other person, or partly on his or her own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment."

Counsel for the appellant submitted that the Chief Magistrate's Court did not at any moment make any investigations to determine whether the objections raised by the 2nd respondent were genuine or were in line with the settled legal principles on objection to attach her motor vehicle hence reaching at an irrational and un just decision to the detriment of the appellant.

Further that the 2nd respondent did not dispute the fact that he was a guarantor to the 1st respondent to acquire the aforesaid loan facility, that he was the owner and in possession at the time of attachment of the Motor Vehicle Registration No. UAJ 923V and that the 1st respondent defaulted to pay as agreed in the loan agreement.

Counsel submitted further that there was no formal application made to court and there was no any reason whatsoever that warranted the release of the attached motor vehicle belonging to the 2nd respondent.

Further that besides the above legal provision, under **Section 71 of The Contracts Act, 2010** it is provided that;

"The liability of a guarantor shall be to the extent to which a principal debtor is liable, unless otherwise provided by the contract and the liability of a guarantor takes effect upon default by the principal debtor."

Counsel for the appellant quoted the case of **Alice Norah Mukasa vs. Centenary Bank Limited and Bonny Nuwagaba Civil Suit No. 77 Of 2010.** Where court held that;

"The purpose of a guarantor to a loan is to render assurance to the lender that in the event the borrower dies or fails to pay back the loan sums, the guarantor would pay the money. This is why the mortgage agreement makes the borrower and the guarantor jointly and severally liable."

Counsel went on to submit that it is on record that the 1st respondent completely failed to pay the loan he obtained from the appellant and the 2nd respondent as a guarantor had property which would be sold to settle the debt of the principal debtor herein (1st respondent). Further that there

was nothing barring the appellant from attaching the property of the 2nd respondent in execution since she guaranteed payment of the loan in case the 1st respondent failed to pay.

Further that the 2nd respondent if interested would have obtained indemnity from the 1st respondent after the attachment and sell of the motor vehicle belonging to the 2nd respondent.

Under **Section 68 of the Contracts Act**, a guarantor is defined as a person who gives a guarantee.

A guarantee is a contract whereby the guarantor promises the lender to be responsible, in addition to the principal borrower for the due performance by the principal of his existing or future obligations to the lender, if the principal fails to perform those obligations. Under the guarantee the guarantor promises or undertakes that he will be personally liable for the debt, default or miscarriage of the principal. The guarantor's liability is ancillary or secondary to that of the principle who remains primarily liable to the creditor. There is no liability on the guarantor unless and until the principal has failed to perform his obligations. In the instant case it is not disputed that the principle debtor, had failed to pay back the money borrowed from the appellant.

According to the case of **Paul Kasagga and Another v Barclays Bank (u) Ltd (HCT-00-CC-MA- 0113-2008) ((u)) [2008] UGCOMMC 42 (21 August 2008)**

A guarantee is a contract whereby a person contracts with another to pay a debt of a third party who notwithstanding remains primarily liable for such payment. See Encyclopedia of Form and Precedents 4th Ed page 761. The guarantor's liability for the nonperformance of the principle debtors' obligation is co-extensive with that obligation. A guarantee obligation is secondary and accessory to the obligation the performance of which is guaranteed. The guarantor undertakes that the principal debtor will perform his obligation to the creditor and that the guarantor will be liable to the creditor if the principal debtor does not perform.

The law relating to guarantors was stated by **Lord Reid in Moschi V Lep Air Services and Ors [1973] AC at Pg. 345** as follows:

"…If at any time and for any reason the principle debtor acts or fails to act as required by his contract he not only breaks his own contract but he also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid installment but for damages. His contract being that the principle debtor would carry out the principle contract, the damages payable by the guarantor must then be the loss suffered by the creditor due to the principle debtor having failed to do what the guarantor undertook that he would do."

Therefore according to the **Civil Procedure Rules under Order 22 Rules 55 And 57**, where there is an objection to the attachment of property in execution of a decree on the ground that it is not liable to the attachment, court shall proceed to investigate the objection and if satisfied

after the investigation court shall make an order releasing the property, wholly or to such extent as it thinks fit from attachment.

Indeed the Chief Magistrate did not investigate the matter as per the requirement to the above procedure. It is evident from the proceedings at page 2 paragraph 5, 6, and 7 that he only stated that in his view and never went an extra mile or if he went then there is no proof tendered in court to that effect. He did not follow procedure but instead released the attached motor vehicle to the respondent who is subject to law.

This ground succeeds.

GROUND THREE:*That the orders made by the learned Chief Magistrate were wrong and in the circumstances varied the decree against the respondents.*

Counsel for the appellant submitted that the decree passed by the Grade One Magistrate's Court cannot be reversed or varied by the Chief Magistrates Court and for that matter the Chief Magistrate's Court since decisions made by the Grade One Magistrate cannot be appealed against to the Chief Magistrate's Court.

Further that it is only the High Court which has power to reverse or vary the decision and the decree passed by a Grade One Magistrate by way of an appeal or revision.

Counsel further stated that the act of the Chief Magistrate to vary the decree to suggest that since the 2nd respondent was merely a guarantor, then her property should not be attached was unlawful and wrong in law.

In my opinion, **Section 221of the Magistrates Court Act** is very clear the chief magistrate should have just called the file, examine the record of the proceedings and satisfy himself as to the correctness of the order passed by the Grade One Magistrate and then if his opinion is that it was improper or illegal, then he ought to have forwarded the record with his remarks therein as he thinks fit to me and not to vary the decree as a whole.

I agree with counsel for the appellant that the statement of the Chief Magistrate about the respondent merely being a guarantor was unlawful and wrong in law because both **Section 71 of The Contracts Act 2010** and the case of **HSGS IMPEX UGANDA LTD vs. BAKAMA ENTERPRISES LTD & ANOTHER HCCD 787 OF 2014** are very clear about the liability of guarantors being co-extensive. The section is to the effect that;

"The liability of guarantor shall be to the extent to which a principal debtor is liable, unless otherwise provided by a contract. "

It goes on to inform us that ***"for the purpose of this section the liability of a guarantor takes effect upon default by the principal debtor."***

Indeed it is true that the judgment debtor failed to pay the loan, the 2nd respondent is the guarantor and there was nothing wrong with the appellant attaching the property of the 2nd respondent.

Therefore, this ground succeeds.

This appeal is allowed; orders of the Chief Magistrate set aside, orders of the trial court attaching the vehicle upheld, and the respondents pay costs of this appeal.

I so order.

Right of appeal explained.

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OYUKO ANTHONY OJOK

JUDGE

31/10/2017

Judgment read and delivered in the presence of;

1. Counsel Joseph Kaahwa holding brief for Richard Bwiruka for the Appellant.
2. Court Clerk – James
3. Court Clerk – Beatrice
4. In the absence of Counsel for the Respondents and both parties.

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OYUKO ANTHONY OJOK

JUDGE

31/10/2017