

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0071 OF 2017
(Arising from Civil Suit No. 025 of 2017)**

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1. **SIKA MUHAMAD JABIL** }
2. **JABRIL IBRAHIM** } **APPLICANTS**
3. **ATAMA BADRU IBRAHIM** }

10 **VERSUS**

ABON MUZAMIL **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

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RULING

This is an objector application for setting aside an order of attachment and sale of property comprised in plot 26 Adumi Road in Arua Municipality. It is made under the provisions of Order 20 22 rules 55 and 56, and Order 52 rules 1, 2 and 3 of *The Civil Procedure Rules*. The applicants contend 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 forms part of the estate of the late Haji Alhai Ibrahim Jabil, and they are the beneficiaries of that estate.

25 The background to the application is that on 15th May 2017, the Judgment Creditor / Respondent filed a suit under summary procedure against five defendants who included Arua Provision Stores (u) Limited and a one Hajat Siama Jabir, a paternal aunt to the applicants. His claim was for recovery of a sum of shs. 170,305,000/= being a loan the defendants had borrowed from him on 30th November 2011, for the construction of a building on plot 26 Adumi Road in Arua 30 Municipality, on the understanding that it would be repaid from rental proceeds to be collected from the property upon completion. Although the building was eventually completed and let out

to tenants, the defendants had failed to pay off the loan due to family feuds that developed thereafter over management of the property. The defendants not having applied for leave to appear and defend the suit, judgment was entered against them on 15th August, 2017.

The judgment creditor then presented his bill of costs which was on 26th September, 2017 taxed
5 and allowed at shs. 9,140,000/=. The judgment creditor / respondent then sought to have the entire decretal sum recovered by way of attachment and sale of property that is now the subject matter of this application. A warrant of attachment and sale of the property was issued on 4th October, 2017 and the property was advertised for sale by public auction / private treaty, in the New Vision Newspaper of Monday 23rd October, 2017, indicating that the sale was to take place
10 upon the lapse of 30 days from the date of the advertisement, hence this application to set aside the attachment and sale.

In support of the application, Counsel for the applicants, Ms. Daisy Patience Bandaru, submitted that the property attached is the property of the estate of Haji Alhai Ibrahim Jabil, which fact is
15 not disputed by the respondent as seen in the affidavit in reply of Hajat Siama Jabir, who is the administrator of the estate of Haji Alhai Ibrahim Jabil. She acknowledges this fact in paragraphs 15 and 40 of her affidavit in reply. She admits that Haji Alhai Ibrahim Jabil's estate has an interest in the property attached. The other interests do not exist but if they do they cannot be severed. She is the mother of the respondent and she makes an attempt to give a very long
20 history to establish the alleged interest but there is no evidence whatsoever to prove the interest. All her dealings in regard to this plot were in her capacity as administrator of the late Haji Alhai Ibrahim Jabil and not in her personal capacity. The applicants were the ones in possession of the property at the time of attachment to-date as stated in the supplementary affidavit in support of Jabrille Ibrahim, that it is the applicants who are collecting rent as well as in the affidavit of
25 Atama Badur Jabel in paragraph 7 and 8, that the rental income there from is being deposited on a joint family account. It is the tenants who are depositing the money on the account. This is in effect constructive possession by the applicants and this is also further corroborated by the respondent in his affidavit in reply from paragraph 34 - 37.

30 The main suit was for recovery of a loan against a limited liability company and four individuals in their personal capacity not as representatives of the estate. The account holders are not party to

the suit and were not aware of the existence of the suit. Even if the administrator was a party, she was sued in her personal capacity. Annexure D and E, disclose that she applied alone for permission to construct a building on the plot yet she was aware that the estate of Haji Alhai Ibrahim Jabil had an interest in it too. Before that, there had been an attempt on the part of the administrator to have the property registered in the name of different people as co-owners as seen in annexure "H" to her affidavit in reply. The other people were; Aduaza karim the son of her late brother, Akab another son of her late brother, Bakole another son of her late brother, and Atako a daughter of her late brother. They are children of her late brothers. Specifically, Aduaza karim is the son of the late Haji Alhai Ibrahim Jabil. They applied jointly for plot 26. In the standard forms it is a joint application while in the letters by which she applied for permission to develop the land she did so in her individual capacity. Her deceased brothers had an interest in the property. She owned the plot jointly with her late brothers. The people named in the application therefore have a beneficial interest in the property, the existence of which is not denied by Hajati Siana Jabir, the administrator of the estate.

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The applicants have demonstrated that they have an interest in the property attached and that they are responsible for overseeing the property as can be seen in their rent collection, hence this objection to the attachment. She concluded that the application should be allowed so as to preserve the property.

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In response, counsel for the respondent Mr. Bundu Richard argued that although the property attached was owned jointly by Hajat Siana Jabir and her three late brothers, it was attachable. In his submissions, if a co-owner of land is indebted, that property is available for attachment even if it is one moiety which cannot be severed. The property should be attached, valued, sold and the parties then share the proceeds of sale in pro-rata proportions.

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Having considered the material placed before me by both parties and carefully considered the submissions of their respective counsel, by an *ex tempore* decision, I set aside the order of attachment and sale of the property in dispute, ordered each party to bear their own costs of the application and undertook to give detailed reasons in this ruling, which I now proceed to do.

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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 the evidence of one of the judgment debtors, Hajat Siam Jabir, that upon the death of her father during the 1950s, she and her three brothers inherited his business which her three brothers then registered in the names, Arua Provision Stores (u) Limited, but her name was excluded as shareholder. They nevertheless operated the business jointly from the land now in dispute until their respective demise.

Being the only survivor, on 14th December, 1986 she took out letters of administration to the estate of one of her said late brothers, Haji Alhai Ibrahim Jabil, since he was signatory to most of the business transactions. During or around August 2011, she jointly filled in a standard Land Form 1 application for a leasehold over plot 26 Adumi Road, together with three of her nephews and a niece, inclusive of a one Aduaza karim, the son of the late Haji Alhai Ibrahim Jabil, all children of her late three brothers. By Land Form 19 dated 14th December, 2016 a freehold offer was granted by Arua District Land Board to the five applicants. The stipulated fees were duly paid on 15th April, 2016. Before that offer, Hajat Siam Jabir had on or about 25th July, 2011 in her sole names sought permission from Arua Municipal Council to construct a building on that land. The permission was granted on 4th August, 2011 and it is apparently pursuant to that permission that on or about 30th November 2011, she together with her co-defendants in the main suit contracted the debt for construction of a building on the plot, whose recovery is now being sought by way of attachment and sale of the property.

It is established as a fact from the pleadings filed herein that when first occupied by Hajat Siam Jabir and her deceased brothers, plot 26 Adumi Road was undeveloped, unregistered land within the municipality. They apparently jointly constructed a commercial building on the land from which they conducted business as Arua Provision Stores (u) Limited. That building was destroyed during the 1979 war. Upon their return from exile, some re-construction was done at plot 1-3 Adumi Road but plot 26 remained vacant. It is in apparent recognition of the fact that her late brothers retained an interest in the land that she jointly applied for a lease over this land with children of her deceased brothers. She contracted a debt in her personal capacity for

development of the land and constructed a commercial building thereon, before grant of an offer in her names and those of the named children of her late brothers, for a freehold over the land. Counsel for the respondent contends her interest in the property is attachable.

In order to succeed, the applicants as objectors must prove that at the time of the attachment; (1) they had some interest in the property attached, (2) the property attached was in their possession, (3) they were holding possession of the attached property on their 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 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, 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; and Betty Namugenyi v. Daisen Co Ltd and another and Forward International Co Ltd (Objector) H.C Miscellaneous Application No. 522 of 2005*).

It is apparent from the facts of this case that the ownership of this property is contested. The applicants claim that Hajat Siama Jabir has no interest in the property while on her part she claims the applicants have no title to the property. A decision in an objector application is not a decision as to title to the property in dispute or a declaration as to the rightful owner thereof. Where an objector application is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute (see Order 22 rule 60 of *The Civil Procedure Rules*). Objector proceedings are all about possession while questions of title will be settled in a separate suit by the judgment creditor against the successful objector. At the end of the objector proceedings, the party interested in proving title must sue in order to determine the issue of title to the property as the order made under the rule is only provisional (see *Uganda Mineral Waters Ltd v. Amin Pirain and another [1994-5] HCB 87*).

In his own admission in paragraphs 19 and 20 of his affidavit in reply, the respondent states that shortly after completion of construction of the building on this land, because of a dispute over ownership that erupted, the applicants stopped the tenants therein from paying rent to Hajat Siamia Jabir, evicted one who refused to comply and have since been collecting the rent from the
5 tenants. In her own admission as well in paragraphs 34 - 36, Hajat Siamia Jabir attests to the same facts. It was thus proved as a fact that it is not the judgment debtor Hajat Siamia Jabir who at the time of the attachment was in possession of the property but rather the applicants had constructive possession thereof. The applicants may not have actual physical possession, since none of them resides or conducts business on the premises but since they exercise control over
10 them in the assumed character of owner and had exercised peaceably the ordinary rights of ownership thereof since eviction of the judgment debtor Hajat Siamia Jabir, long before the respondent filed the suit against her, they are in law taken to have constructive possession.

Having evaluated the material before me and carefully considered the submissions of both
15 counsel, I found that the applicants had proved that at the time of attachment, (a) they had some interest in the property attached as beneficiaries of the estate of the late Haji Alhai Ibrahim Jabil, a former co-owner of the property together with one of the judgment debtors, Hajat Siamia Jabir; (b) the property attached was in their constructive possession by way of collection of rent from the tenants in possession; (c) the applicants were holding possession of the attached property on
20 their own account and not on account of Hajat Siamia Jabir, the Judgment debtor; (d) the property was not in possession of the Judgment debtor Hajat Siamia Jabir or some person in trust for her; and finally (e) the property was not in occupancy of a tenant or other person paying rent to the Judgment debtor, Hajat Siamia Jabir. It is for those reasons that I set aside the order of attachment and sale of the property comprised in plot 26 Adumi Road in Arua Municipality.

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By virtue of section 27 (2) of *The Civil Procedure Act*, costs follow the event, unless for some reason the court in its own discretion directs otherwise. A successful party can be denied costs if it proved that but for his or her conduct, the litigation could have been avoided. In the instant case, it appears to me that litigation in this matter could have been avoided but fir the applicants'
30 uncompromising conduct and it is for that reason that I directed each party to bear its costs.

Dated at Arua this 27th day of November, 2017

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Stephen Mubiru

Judge

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27th November, 2017.