

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
MISCELLANEOUS APPLICATION NO. 057 OF 2020
(ARISING OUT OF CIVIL SUIT NO 31 OF 2020)

1. SENTENZA ERIEZA
2. PROSSY NABUKENYA ::::::::::::::::::::::::::::::::::: APPLICANTS/OBJECTORS

VERSUS

1. TWESIGYE ELIYASI
2. SEMUWEMBA CHARLES ::::::::::::::::::::::::::::::::::: RESPONDENTS

Before; Hon Justice Victoria Nakintu Nkwanga Katamba

RULING

This application is brought under Order 22 Rules 55, 56 and 57 and Order 52 Rules 1,2 & 3 of the Civil Procedure Rules, Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act, for orders that;

- a) The land comprised in Block 76 Plot 1191 at Kabula, Saabaddu, Lyantode, Masaka and all developments thereon be immediately released from attachment unconditionally and or should not be attached, sold, disposed of in anyway;
- b) The purported sale of the suit property between the Respondents be nullified and or set aside;
- c) An order staying the execution and or eviction of the Applicants vide Consent Judgment entered into on the 21st July, 2020 be made against the Respondents and or their agents, assignees, and successors in title;
- d) Costs of the application be provided for.

The grounds of the application as contained in the affidavits of Senteza Erienza & Prossy Nabukenya (the Applicants) are briefly that;

1. The Applicants claim an interest in the land at Kabula Block 76 Plot 1191 land at Lyantonde as lawful owners;
2. The Applicants are in possession of the property;

3. Neither the judgment debtor nor creditor have ever occupied the said land and the Judgment debtor has no interest whether legal or equitable in the same;
4. The said land was bought jointly by the Applicants as husband and wife sometime in 2010 and the 2nd Applicant authorized and or consented to the husband to register the land in his sole names;
5. Unknown to the 2nd Applicant, the 1st Applicant agreed with the 2nd Respondent to have the land transferred into the 2nd Respondent's names to secure a loan from Centenary Bank for the 1st Applicant and 2nd Respondent's benefit;
6. The 2nd Respondent disposed of the land to the 1st Respondent and the transaction was marred with fraud including a consent judgment of the 20th July 2020;

In his affidavit in reply, the 1st Respondent stated briefly that;

1. He purchased the suit land and the house thereon on the 11th day of March 2020 vide a sale agreement dated 11/03/2020 and he is currently the registered proprietor;
2. He is a bona fide purchaser for value without notice;
3. He agreed with the 2nd Respondent to receive vacant possession on 11th May 2020 and when that did not happen, he instituted a suit for vacant possession and breach of contract;
4. The 2nd Respondent undertook to deliver vacant possession on 21st August 2020 and a consent judgment to that effect was entered;
5. This application lacks merit as the 1st Applicant was aware of the purchase and even sent a relative to collect the balance due to him from the 2nd Respondent;
6. The 2nd Applicant does not live on the suit land but rather on their matrimonial home at Rushoga Village and the suit house is currently occupied by one Caroline Kyogabirwe the 1st Applicant's concubine;
7. The 1st Respondent has been inconvenienced as he intends to use the suit land as his matrimonial home;
8. The Application is incompetent and it is just and equitable that it is dismissed with costs;

The second Respondent Semuwemba Charles stated in his affidavit in reply that;

1. He purchased the suit land on 5th August 2014 before the LC1 Committee of Kooki Ward D vide sale agreement dated 05/08/2014;
2. That he decided to sell the land when he did not have money to pay the 1st Applicant's remaining balance and the 1st Applicant was involved in finding a purchaser;
3. The 1st Applicant sent his relatives Ssewandigi John, Ssemata Edmond and Ssendaula Ernest to witness the sale and Edmon Semata received the 1st Applicant's remaining balance;
4. The contents of the Applicants' affidavits are concocted with intention to tell lies and defraud the 1st Respondent of his house;

Damulira Ashraf, the LC1 Kooki Ward D Lyantode where the suit land is located, deponed an affidavit in reply and stated that;

1. The suit land is occupied by the 1st Applicant and his girlfriend Kyogabirwe Caroline, and the 2nd Applicant does not work or reside in the said area;
2. The suit land belongs to the 1st Respondent having purchased it from the 2nd Respondent and the 1st Applicants relatives were witnesses to the sale agreement;
3. This application was brought in bad faith;

Counsel for the Applicants raised preliminary points of law that the Respondents' affidavits are bad in law as they offend Order 6 Rules 8 and 10 of the Civil Procedure Rules which requires denials to be specific, and that representation of the Respondents by Adv. Lukaawa Bashir of M/S Lukaawa & Co. Advocates is an abuse of court process since the same Advocate witnesses the purported sale agreement for the suit land.

Regarding the merits of the application, Counsel submitted that on the prayer for objector proceedings that proof of possession by the Applicants is confirmed by the uncontroverted evidence of the Applicants in their affidavits. Counsel prayed for a judgment on admission under Order 13 Rule 6 of the Civil Procedure Rules for reason that the Respondents affidavits in reply unequivocally admit the fact of the Applicants' being in possession. Counsel

submitted that the judgment debtor who is the 2nd Respondent herein has never been in possession and owner of the suit property and that the Applicants are in possession on their own account and not holding the property in trust for the judgment debtor. Counsel prayed for the court to grant the Applicants' prayers.

Counsel for the Respondent cited the law on objector proceedings under Order 22 Rules 55,56 and 57 of the Civil Procedure Rules and argued that this application is unsustainable because there is no property that has ever been attached so as to warrant court to release it from attachment. On the prayer for nullifying or setting aside the sale of the suit property, Counsel submitted that this prayer is also incompetent that ought to be made in a fully-fledged suit by plaintiff. Counsel relied on Section 19 of the Civil Procedure Act, Order 4 Rule 1 (1) of the Civil Procedure Rules and the case of General Parts U Ltd & Anor Vs Non Performing Assets Recovery SCCA No. 9 of 2005 which direct on the mode of instituting suits.

As to whether execution should be stayed, counsel argued that this prayer is also incompetent as there is no pending appeal or hearing requiring a stay of execution to preserve the status quo of the subject matter. Counsel prayed for court to find that the application lacks merit and have it dismissed with costs.

Consideration of the application;

Before I consider the merits of this application, I will first determine whether this application is proper and competent before this court.

The Applicants brought this application under Order 22 Rules 55, 56 and 57 and Order 52 Rules 1,2 & 3 of the Civil Procedure Rules, Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act.

Order 22 rules 55,56 & 57 Civil Procedure Rules provide the procedure and rules relating to objector proceedings. **Rule 55** provides that;

“Where any claim is preferred to, or any objection is made to the attachment of, any property attached 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 or 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.”

Rule 57 provides 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 in the occupancy of a tenant or other person paying rent to him or her, or that, being in the possession 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.”*

The Applicants’ first prayer is that the land comprised in Block 76 Plot 1191 at Kabula, Saabaddu, Lyantode, Masaka and all developments thereon be immediately released from attachment unconditionally and or should not be attached, sold, disposed of in anyway;

I have carefully perused the record and the Applicants have not found any evidence to show that the suit land has been attached in execution of any decree. There is however an application for the execution of the decree in Civil Suit No. 31 of 2020 filed by the 1st Respondent herein and the mode of execution is, “ removal of the Defendant and all occupants from the suit land...” I have not found an order of the court for the warrant to give vacant possession in execution of the decree. This means that the suit property has not been subject to any order of execution and certainly not attachment.

The purpose of objector proceedings is to prevent property from being attached if that property is at the date of attachment not in the judgment debtor’s possession or if the

judgment debtor is holding it in trust for another. An application for objector proceedings therefore acts as a bar to a warrant of attachment.

The Applicants' prayer is for release from attachment which in the circumstances of this case is unmaintainable and inconceivable since there has not been any warrant of attachment issued by the court and the judgment that's the subject of the property in dispute is for orders for vacant possession. I therefore find that the order sought for release from attachment cannot be maintained and this application is incompetent to that extent.

The Applicants further sought an order for nullification of the sale of the suit property between the Respondents. Counsel for the Applicants did not submit on this prayer and in their affidavits, the Applicants attempted to adduce evidence challenging the purported sale. I am confined to agree with Counsel for the Respondent that such an order cannot be sought under an application for objector proceedings but rather through instituting an ordinary suit to assert the rights of the parties and have the dispute determined on its merits.

The Civil Procedure Act and Rules are very clear on the modes of instituting claims and a contentious sale as in the instant case cannot be determined through this application. The issues raised by the Applicants challenging the sale of the disputed land, between the 2nd Applicant and the 1st Respondent are contentious and this court cannot simply rely on affidavit evidence to determine them. The Applicants should institute a proper suit and present their dispute for court's determination. I further hold that this application is incompetent in that regard.

Counsel for the Applicants made an alternative prayer that the execution be stayed or set aside so that the suit can be heard on its merits with the participation of the applicants as parties.

Order 43 r. 4 (3) of the Civil Procedure Rules provides for the conditions under which court may grant an application for stay of execution.

1. The applicant must satisfy court that substantial loss will occur unless execution is stayed;

2.The applicant must show that the application has been made without unreasonable delay, and;

3.The applicant is willing to provide security for performance of the decree should the decision become binding at a later stage.

Order 43 Rule 4(1) of the Civil Procedure Rules on stay by this court provides that, “***An appeal to the High Court shall not operate as a stay of proceedings under a decree or order appealed from except so far as the High Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the High Court may for sufficient cause order stay of execution of the decree.***”

From the foregoing, a party seeking an order for stay of execution must in addition to having lodged a pending appeal show that they have sufficient cause or grounds. These grounds have been expounded in several decisions including the case of ***Hon. Theodre Ssekikubo & Others Vs AG & Anor. Constitutional Application No. 06 of 2013.***

In the instant case, no appeal has been lodged from the decision of the court by the Parties.

I therefore hold further that this application is incompetent in as far as the Applicants cannot maintain the alternative prayer for stay of execution.

In the result, this application fails as a whole and is hereby dismissed with costs.

I so order.

Dated at Masaka this 5th day of October, 2021.

Signed;



VICTORIA NAKINTU NKWANGA KATAMBA

JUDGE