THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(EXECUTION DIVISION)

MISC. APPLICATION No. 2219 OF 2013

(Arising from H.C.C.S. No. 193 of 2013)

ISAAC WALUKAGGA } ..... APPLICANT

VERSUS

JAMES BALINTUMA } ..... RESPONDENT

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

RULING

This Objector application, brought under 0.22 rr.55 and 57, and 0.52 rr. 1 and 3 of the Civil Procedure Rules, urges Court to release property measuring 25 decimals (herein the suit property), out of property comprised in LRV 3884, FOLIO 12, PLOT 655, from attachment under execution. The Applicant contends that although the suit property still forms part of the title to LRV 3884, FOLIO 12, PLOT 655 belonging to the Judgment debtor, he purchased it before the attachment and was already in possession carrying out construction work on it; and further that there already existed a distinct dividing wall between the two properties. The Judgment debtor, in his affidavit sworn in rejoinder, corroborated the Applicant's claim of proprietary interest in the suit property and his having been in possession at the time of the attachment.

The Respondent however contests all this; and has raised a preliminary point of objection to the supplementary affidavit, sworn by Frank Semamabo the area L.C. Chairperson, in support of the application, that it was filed out of time, thus offending the provisions of 0.12 r.3 of the Civil Procedure Rules. The genesis of this objection lies in the designation of the affidavit deponed by Dr. Leslie Handel (the Judgment Debtor) in support of the application. Notably, this affidavit was deponed, not after, but before the Respondent's affidavit in reply to the application. It was therefore a supplementary affidavit; and so designating it an affidavit in rejoinder was a misnomer.

Second, the provisions of 0.12, r.3 of the Civil Procedure Rules, relied upon by the Respondent in support of the preliminary objection applies only to interlocutory applications as is stated in, in no uncertain language. However, an Objector application such as the one before me, is not an interlocutory application founded on some head suit yet to be resolved; but rather, it is itself the substantive suit, determination of which conclusively resolves the matter in controversy between the parties hereto. Accordingly then, on the ground of the misnomer of the affidavit which in reality is one in rejoinder, and that with regard to this Objector application being the substantive suit, the preliminary point of objection has no merit.

Counsel for the Respondent has also pointed out that in the lease agreement between the Kabaka of Buganda (as Lessor) and the Judgment Debtor (as Lessee), over the suit property, the Lessee covenants, with the Lessor, *'not to assign subdivide, sublet, sell, mortgage or part with the possession of the whole or any part of the premises without prior written consent of the Lessor ...'*. Counsel has therefore submitted that since the requisite consent of the Lessor was not obtained, the sale to the Applicant was illegal; and Court should declare it so. Here, Counsel is confusing what is prohibited by law, the commission of which is an illegality, and what is a contractual covenant between the contracting parties, failure to abide by which is merely a breach of the contract, actionable under the law of contract.

Furthermore, it is not open to the Respondent, who is not a party to the lease contract, to raise the issue of breach by the Applicant of any covenant in the lease agreement. That is for the Lessor; and since by the time of the attachment the Lessor had not terminated the lease, for whatever reason, the attachment of the leased property was proper.

The evidence in support of the application is that the suit property was sold to the Applicant on the 19th December 2012. However, the Respondent challenges the admissibility of the agreement adduced to prove the alleged sale. The ground for this objection is that since there is no evidence of payment of stamp duty, the sale agreement contravenes the provisions of the Stamps (Amendment) Act (Cap. 342, Laws of Uganda 2000 Edn.). Even if I am to find the sale agreement inadmissible in evidence, thus upholding the Respondent's objection, what is important is evidence that the Applicant was in possession of the suit property at the time of the impugned attachment in execution; and that he was in such possession, not on account of or in trust of the judgment debtor, but in his own right.

The decree of Court, being executed, is dated the 10th September 2013; and this is discernibly long after the alleged sale of the suit property to the Applicant. The Applicant has adduced evidence that upon acquiring the suit property, he built a partition wall dividing it from the remainder of the vendor's property; and that he has since been in possession carrying out construction work on the suit property. Both the Judgment Debtor and the area L.C. Chairperson have corroborated this. There is evidence, in support of the Applicant, that on the 30th August 2013, a building plan was submitted to the Wakiso District Engineer's office for assessment. It is duly stamped, as received. This plan is stated to be for property intended to be built by one Walukagga Isaac on part of property comprised in LRV 3884, FOLIO 12, PLOT 655.

The pictures adduced in evidence by the Applicant, and the ones attached to the Bailiff's affidavit, both show that the suit property is located at a lower level from the Judgment Debtor's main properties. The valuer's report, made pursuant to the warrant of execution, and attached to the Bailiff's affidavit, speaks of a second gate, and is clear that the Judgment Debtor's property has *'another uncompleted out–building, stepped, and leveled compound with retaining walls, beautifully decorated with stone masonry works ... all enclosed by cream painted perimeter wall fence...'* It further states that *'this out building at the time of inspection was still undergoing the construction process ... in "Shell" stage of construction process ...'*

The fact of a second gate to what would otherwise be the Judgment Debtor's undivided property is quite telling. It further supports the Applicant's contention that at the time of the attachment, he was already in possession of the suit property. The plan submitted to the District authorities for approval is evidence that before the impugned attachment herein, someone going by the name of Walukagga Isaac had already laid claim to part of the Judgment debtor's land in issue. There is no adverse claim by anyone of the same name as Walukagga Isaac, other than the Applicant, or anyone else, over the suit property. Albeit that the suit property is still within the Judgment Debtor's title, it is clear that at the time of the attachment of suit property, the Applicant was in possession, carrying out construction work thereon.

There is one other matter of importance here. As is shown in the warrant of attachment, the total decretal amount is U. shs. 306,226,000/= (Three hundred and six million, two hundred and twenty six thousand only). The valuation report places the open market worth of the property comprised in LRV 3884, FOLIO 12, PLOT 655, measuring about 1.68 acres, at U. shs. 1,612,580,000/= (One billion, six hundred and twelve million, five hundred and eighty thousand,

only). Its forced sale value is U. shs. 967,550,000/= (Nine hundred sixty seven million, five hundred and fifty thousand only). It is therefore evident that after the exclusion of the suit property, the remainder of the property attached would still adequately satisfy the decree, even when disposed off under forced sale.

It is therefore quite evident that the removal of the suit property from attachment, as sought, would not occasion any injustice to the Respondent/Judgment Creditor at all. I should also point out here that the warrant of execution, which commanded the Bailiff 'to attach the judgment debtor's house comprised in *BLOCK 268, VOLUME 3884, FOLIO 12, PLOT 655, LAND AT LUBOWA WAKISO DISTRICT'* was erroneously constructed; and, in fact, impossible to give effect to. A house is not a chattel, but a permanent fixture; hence, there is no way it can be attached without affecting the land it sits on. Accordingly, it is the property comprised in the registered title specified above, which the warrant should direct that it be attached.

Therefore, having found that the Applicant was in possession of the 25 decimals of land (the suit land), as owner, at the time of the attachment, I allow the application; and make the following orders: –

(1). The suit property is extricated from the Judgment Debtor's property and removed from attachment.

(2). The Bailiff must restrict the attachment in execution to the Judgment Debtor's property, distinctly separated from the Applicant's property by a retaining wall.

(3). The Bailiff must cause a fresh advert restricted to the remainder of the Judgment Debtor's property.

(4). Owing to the fact that there was no encumbrance or notice of the Applicant's interest in the suit property on the Judgment Debtor's title, at the time of attachment, the parties shall each bear their own costs.

Alfonse Chigamoy Owiny – Dollo
JUDGE