

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)**

5 **MISCELLANEOUS APPLICATION NO. 1702 OF 2015
(ARISING FROM CIVIL SUIT NO. 877 OF 2014
AND
(CIVIL SUIT NO. 304 OF 2014)**

10 **HABIBA ISMAIL SSEBIAPPLICANT / OBJECTOR**

VS

TOP FINANCE CO. (U) LTDJUDGMENT CREDITOR

15

AND

1) DAVID MUHWEZI

2) KIBALIZI MOSES JUDGMNET DEBTORS

20

AND

3) CHRIS RUGUMAYO NYAMUTALE RESPONDNET

25

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

30 By this application made under 0.22 rr 55 (2), 56 and 57, 0.52 rr 1,2 and 3 C.P.R and SS.64
and 98 CPA, the Applicant / Objector sought orders that the property comprised in Plot 3922,
Block 214, Kyadondo be unconditionally released from attachment and the sale stayed or set
side.

Costs of the application were also applied for.

The grounds for the application are that the property is not the property of the judgment debtors.

- 5 The Objector acquired the property for valuable consideration in 2002, and has carried out enormous developments thereon.

The Judgment Creditor advertised the property for sale and served the Applicant with an eviction notice.

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The Applicant will suffer irreparable damage and loss if the attachment and sale are not halted or set aside.

- 15 It is in the interests of justice and equity and the balance of convenience also demands that the application be granted.

There is an affidavit in support of the motion, supplementary affidavits and affidavits in reply relied upon by either of the parties.

- 20 The application was called on two occasions but it did not take off and was finally given last adjournment to 29.03.16.

On that date, the LC1 Chairperson of the area where the disputed property is, appeared before court to testify as to whether the sale agreement before court was authentic.

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In his sworn testimony, he stated that he had been chairman LC1 since 2002 to date. He identified the agreement of sale as that of a plot of land. The agreement was made on 16.05.2002, between Esther Namutebi Semutonga – Seller and Habiba Ismail Sebi – Buyer.

- 30 The seller was a resident of the area where the witness is chairman LC1, that is Kanisa Zone, Kisaasi. The buyer was also known to the witness and he told court he could recognize her if he saw her.

One of the witnesses to the agreement Ferisi Kizito is the mother of the seller, but she is now dead.

The witness identified his signature and the stamp on the document and also his names that is
5 Bernard Lubwama Walusimbi.

The agreement was tendered into evidence as Exhibit A₁, without any objection from Counsel for the Respondent.

10 It was further stated that the buyer occupied the plot of land and built houses there. She lives there although she travels from time to time; although the witness does not know who stays there when she is away. However, he was certain that the property belongs to her as Habiba has never told him that she sold the land. He denied knowing one David Muhwezi.

15 In cross examination, he said that he does not know the other witness to the agreement.

Further that, the Registered owners of the land were the family of the late Ham Walusimbi who lived in Namugongo. He named them as David Sengendo, Robert Kisitu, Moses Kibalizi Senoga and Nakku.

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The witness stated that he had not had opportunity to look at the title and did not know the Plot number though he knows the place.

The agreement was for sale of Kibanja. He also does not know the Plot number of the land
25 opposite the disputed land. However, he named the neighbors to the land as George Wilson Kabanda, and Lwengo (deceased) on the other side. He had forgotten the other neighbor.

The title belongs to Moses Kabalizi whom he can identify by face and also knows where he works. There is an encumbrance on the Title, that is caveat placed there by Top Finance Co.
30 Ltd on 13.03.14 at 4:30pm. Kibalizi is still alive.

The matter was then adjourned to 07.04.16 to enable Counsel for the Respondent present the original title.

On that date, Counsel for the Respondent was late but appeared as the hearing was about to take off.

5 Counsel for the Applicant submitted that this was an application objecting to the eviction of the Applicant from the suit premises. He relied on the case of – **NEC & 2 Others vs. Nile Bank Ltd SCCA 17/94** to define objector proceedings as “..... *proceedings instituted during the process of executing a decree passed by a court of law*”.

10 In the present case. He said, there is Civil Suit 04/14 – **Top Finance Co. Ug Ltd vs. David Muhwezi and Kibalizi Moses C.S. 304/14**

This application arose in the process of executing the decree in the above case.

15 The Applicant contends that the attached property does not belong to the judgment debtors but to her.

Her claim is supported by the affidavit of Rafael Mujulizi – paragraphs 7-8- who depones that the Applicant purchased the land from Esther Namutebi Semutego on 16.05.02.

20 Counsel asserts that this evidence of Mujulizi is corroborated by the evidence of Bernard Lubwama Walusimbi, LC1 Chairman of the area, who testified in court as already, indicated. The sale agreement was tendered as Exhibit A₁.

25 Going through the evidence of the Chairman, Counsel sated that it is corroborated by the affidavit of Rafael Mujulizi who stated that the Applicant has extensively developed the land and has premises thereon.

30 In Mujulizi’s affidavit in rejoinder, paragraphs 8, it is contended that the occupants of the suit premises are Tenants of the Applicant and they do not know the Judgment Debtors.

Court was urged to believe the evidence on the ground that it had not been denied nor tested in cross examination.

The affidavit of Okiru Levin, Court Bailiff was also referred to confirm that the premises belong to the Applicant. While the Bailiff served the tenants with notices to vacate the premises and notified them of the new owner- paragraph 11 and Annexure H thereof, Counsel argues that the tenants never left the premises, an indicator that the property still
5 belongs to the Applicant.

Commenting on the affidavit of the Third Respondent where he claims to have bought the property from the registered owner Kibalizi Moses, Counsel argued that the Applicant's not claiming to be registered owner of the suit premises but a customary owner of the Kibanja
10 where she has developments.

The Applicant's claim is supported in paragraphs 4 and 5 of Mukulizi's affidavit in rejoinder where he states that ***"....the Applicant's interest is restricted to her customary interest and all the developments on the land belong to the Applicant."***
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Further that, it is not true as deponed by the Third Respondent that the application was over taken by events. Counsel asserted that the execution was never completed as the sale was a judicial sale of unmovable property.

20 The case of **Allan Nsubuga Ntanoga vs. Uganda Micro Finance Ltd and 4 Others HCMA 0426/2006** where the case of **Lawrence Muwanga vs. Stephen Kyeyune C.A 12/01** was cited with approval relied upon to support Counsel's argument. – It was held in that case that ***"a judicial sale unlike a private one is not complete immediately it takes place. It is liable to be set aside on appropriate proceedings. If no such proceedings are taken or if taken
25 and are not successful, the sale will then be made absolute."***

In the **Lawrence Muwanga case (Supra)**, Justice Tsekooko ruled that ***"the Intraship case was distinguishable because it involved movable property...."***

30 Court was then invited to take into account the findings in the two cases, look at the issues framed and confirm that the property in the present case is not held by the Judgment Debtor but by the Applicant on account of herself but not on account of the Judgment Debtor.

And the court should find that at the time of attachment to date, the property is in the possession of the Applicant / Objector.

5 Counsel then prayed that the application be allowed with costs to the Applicant. The attachment set aside and the First Respondent can pursue other Respondents elsewhere.

In reply, Counsel for the Respondent went through the background of the main suit. She stated that the suit was filed by the Judgment Creditor (C.S. 304/14) for recovery of Shs. 71,225,861/- being the principal sum and interest of the loan facility advanced to the First
10 Judgment Debtor.

The Second Judgment Debtor was a guarantor who pledged property comprised in Mengo, Kyadondo Block 214, Plot 392, land at Kisaasi as security for a loan.

15 The matter was heard and judgment was passed against the debtors.

The Judgment Creditor commenced execution proceedings against the Judgment Debtors – a warrant of sale and attachment of the Second Judgment Debtor’s property was issued by court and was advertised in the Daily Monitor Newspaper of 04.05.15 page 57.

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The property was eventually sold to Chris Rugumayo Nyamutale in execution of the decree in C.S. 304/14.

25 Suffice it to state that the execution proceedings reverted into these Objector proceedings seeking unconditional release from attachment or stay of sale or setting aside the sale of the disputed property on the ground that the Objector is the rightful owner.

30 Counsel for the Respondent then set out issues to be determined in the application, which will be set out later in this ruling. She submitted that a search was carried out to establish ownership of the property and the certificate of title is registered on the names of Kibalizi Moses – Second Judgment Debtor.

That under S.59 of the R.T.A, a certificate of title is conclusive evidence of ownership and therefore the Applicant is not the rightful owner of the property in issue. – The case of

Mugerwa and Another vs. Kagawa C.A. 09/12 was cited in support of ownership, adding that the title can only be impeached for fraud, but which the Objector, has not raised against the Judgment Debtors.

- 5 It was then contended that the Applicants claim that she is the owner of the suit property is unjustified, unsupported by evidence, misguided, false and untenable in law.

While the claim of the Objector is based on Exhibit A1 – Sale agreement on which the Objector alleges she bought the land from Namutebi Esther, the alleged Seller has never been
10 the registered owner of the suit property and is not known to the registered owner.

There is no map of the sale agreement showing the boundaries of the land of the Objector allegedly bought. Therefore that, the agreement is false and is only intended to defeat the interest of the Respondent, and it is for an entirely different piece of land not connected to the
15 suit property.

Furthermore that, there is no evidence as to how the alleged seller came to settle on the suit land to justify her interest in the land under S.29 (20 of the Land Act.

- 20 While the witness for the Objector (LC1 Chairman) said the registered proprietor of the land was Ham Walusimbi, the certificate of title presented to court shows that the first entry on the title is Moses Kibalizi. Hence, Counsel concluded the witness LC1 Chairperson does not seem to be well acquainted with the affairs of the land in the area. (Original title not presented – search certificate indicates Kibalizi is owner plus the registered interest of the
25 Respondent).

The purported sale agreement did not confer title of the suit property to the Objector, Counsel added. And apart from the agreement, there is no other evidence to prove that the Objector has been in occupation of this land for example receipt for water or electricity – The case of
30 **Byatike vs. Kikonyogo HCCA No 3/2014**. Such documents were held in that case to be sufficient proof of occupation.

Insisting that the Applicant / Objector is not the owner of the suit property, Counsel concluded stating that the Applicant cannot claim any right or remedy under an illegal

transaction in which he/she took part and that a court of law cannot sanction what is illegal - **Makula International vs. His Eminence Cardinal Nsubuga [1982] HCB 11** in support.

5 As to the issue whether the property was rightly attached and sold in execution in C.S. 877/2015, Counsel submitted that the Second Judgment Debtor was rightly entered on certificate of title of the suit property. And that since the entry is not alleged to have been fraudulent, then the Second Respondent has all rights due and existing over the land, including the right to mortgage the property.

10 The suit property, Counsel asserted belongs to Kibalizi Moses who guaranteed it as security for a loan advanced to the First Judgment Debtor on 04.12.13. The title to secure the land was deposited with the Judgment Creditor and has been in its possession since then. The Objector /Applicant does not deny the document.

15 That therefore the Judgment Creditor has powers to sell the property upon failure by Judgment Debtor to repay the loan. – The case of **Jeane Frances Nakamya vs. DFCU Bank Ltd and Another HCCS 813/2007** was cited in support.

20 And that the property in the present case was rightly mortgaged and sold in execution. The Objector never lodged a caveat to protect he alleged interest if any, and only filed this application to frustrate and deny justice to the Judgment Creditor.

25 On the issue of remedies, Counsel went through the prayers sought by the Applicant. It was then contended that if court agrees that the Applicant is not the rightful owner of the property and that the property was rightly attached and sold, then the Objector is not entitled to any remedies.

30 Further that, the application had been overtaken by events as there is no status quo to maintain. The suit property was sold and handed over to another person who is now in possession. The application was filed after the sale of the property had been effected.

And if the application is allowed, the Judgment Creditor and the purchaser will suffer irreparable damage.

It was then prayed that the application be disallowed with costs to the Respondents.

In rejoinder, Counsel for the Applicant argued that the evidence that the Applicant has a customary interest in the land was never challenged.

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Also that, there was lack of due diligence on the part of the First Respondent, who would have found that Kibalizi was not in possession if a fact finding mission had been carried out.

Counsel reiterated earlier submissions.

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Court carefully listened to the submissions of both Counsel, looked at the law and the authorities cited in support and against the application. It is apparent that the sole question to be investigated in the matter is one of possession.

15 The question to be decided is **whether on the date of attachment, the Judgment Debtor or the Objector was in possession**, or where the court is satisfied that the property was in the possession of the Objector, court has to determine **whether she / he held it on his/her own account or in trust for the Judgment Debtor**.

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Earlier decisions have indicated that in such a situation as of the present case, *“questions of legal right and title are not relevant, except in so far as they may affect the decision as to whether the possession is on account of or in trust for the judgment debtor or some other person. To the extent the title may be part of the inquiry”*. – See **Harilal & Co. vs.**

25 **Buganda Industries Ltd [1960] IEA 318 (HCU)**.

It is not disputed in the present case that the Second Judgment Debtor Kibalizi Moses is the registered proprietor of the land – as per certificate of title. And that he mortgaged the land as security for payment of a loan granted to the First Judgment Debtor, as he guaranteed
30 payment of the loan.

It is also evident that the Applicant is not claiming to be the registered owner of the disputed land, but a customary owner of the kibanja and the development thereon.

That the Applicant bought the land and took occupation thereof, built houses which are occupied by her was confirmed by the undisputed evidence of PW₁ the LC1 Chairperson of the area where the land is.

- 5 The affidavit of Mujulizi in rejoinder confirmed that the occupants of the premises on the suit land are tenants of the Applicant and do not know the Judgment Debtors.

The Bailiff who served the tenants notices to quit the premises and notified them of the new owner. But there is no indication that the tenants ever left the premises.

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Without any evidence to the contrary, this court finds that at the time of attachment of the disputed land, the Applicant/ Objector and not the Second Judgment Debtor was in possession of the land.

- 15 She held it on her own account as a result of having acquired ownership after a sale, making developments thereon and putting tenants on the land.

She was not holding the land in trust for the Second Judgment Debtor.

- 20 The Second Judgment Debtor obtained title to the land on 05.01.10 whereas the Applicant bought the land or obtained interest thereon on 16.05.2002 (sale agreement).

The suit land appears not to have been registered at that time but being private Milo land, the Applicant can be categorized as a Customary Tenant.

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Having been in occupation of the suit property at the time of the attachment and purported sale, the rights of the Applicant ought to have been taken into account.

- 30 Indeed the Judgment Creditor to whom the property was mortgaged ought to have done due diligence to ensure that the property had no encumbrances.

The Second Judgment Debtor was deliberately dishonest when he proceeded to mortgage the title without due regard for the interests of the customary owner.

Since the purported sale of the land to the Respondent was a judicial sale, ***“it was not complete immediately it took place. It was liable to be set aside on appropriate proceedings”***. – See **Allan Nsubuga Ntanoga vs. Uganda Micro Finance Ltd (Supra)**.

5 Court is satisfied in the present case that at the time of the attachment, the property was not in possession of the Second Judgment Debtor or in possession of a person in trust for him. There is no indication that the tenants in the premises were paying rent to the Second Judgment Debtor

10 The court will accordingly make an order releasing the property from the sale until such time as the interest of the Objector is wholly catered for by the Judgment Debtors.

The Applicant having established that by the date of attachment, she was in possession of the property, the application is allowed and the property is released from sale under 0.25 r 57

15 C.P.R.

The costs of the application to be by the Judgment Debtors to the Applicant.

20 **FLAVIA SENOGA ANGLIN**

JUDGE

29.04.16