

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISC. APPLICATION NO. 71 OF 2013
(ARISING OUT OF CIVIL SUIT NO. 533 OF 2013)

EMMANUEL TAMALE.....

APPLICANT

VERSUS

NAGALAMA COFFEE AGENCY.....

RESPONDENT

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This is an application brought under Section 98 CPA 0.52r & 3 CPR by which the applicant seeks court to invoke its inherent powers for an order that the attachment and sale issued in respect of his land described as Kyaggwe Block 269 Plot 1 at Wabikokoma (hereinafter referred to as the suit land) be vacated/set aside. The applicant in addition seeks for costs of the application.

The brief grounds of the application are that the order for attachment has existed on the certificate of title in respect of the suit land since 1969 yet the respondent has no known claim against the suit land. The applicant swore two affidavits on 23/10/13 and 6/2/14 in support of the application in which he expounded on the grounds relied on. The applicant was represented by Benard Mutyaba who presented oral submissions.

When this application came up for hearing the first time on 20/1/14, court indicated that service upon the respondent was unsatisfactory. I ordered that service be repeated in the presence of the LC1 Chairperson in which the offices of the respondent are situated. At the subsequent hearing of 17/2/2014, counsel for the applicant reported that service had been effected in the manner

ordered but again the respondent had failed to respond to the application and were absent in court. He then moved court to allow him proceed *ex parte* under Order 9 rules 11 and 20 CPR. Counsel presented and I was satisfied with the affidavit and supplementary affidavit of service sworn on 14/2/2014 and 17/2/2014 respectively and allowed the matter to proceed in the absence of the respondent.

In support of his submissions, Mr. Mutyaba presented an original copy of a search report from the land registry at Mukono showed that the land is registered in the names of the applicant. He submitted and I also noted that the registry copy of the title is encumbered by a lease of 99 years and an order of attachment issued by the High Court and registered under Instrument No. MKO30961 of 29/10/69. The copy of the order presented showed that it was issued by the High Court on 3/10/69 under Order 19 rule 51 CPR in Civil Suit No.557/1965. It was issued in favour of the respondent as plaintiff/decree holder and against Kimota Coffee Growers Ltd and the applicant as the judgment debtors. It is the latter that the applicant finds offensive and prays for its removal. The applicant showed by his affidavit of 23/10/13 that he is in active possession of the suit land. That he discovered the presence of the order on his title while making a random search at the land registry. It was argued for him that he disputes the order for he has never dealt with the respondent company and had never been served with any notice of sale or eviction to warrant the presence of the order on the title in respect of the suit land. Counsel further argued that the order had remained dormant on the title since 1969 without any action being taken by the respondent and therefore justice demands its removal by the court.

It was submitted and rightly so by counsel that there was no contest to this application. Counsel relied on the authorities of **Allan Mugisha Nyirikindi Vs Commissioner Land Registration (HC M/C No. 45/11)** and **James Ham Ssali & Anor Vs Land Registration (HC M/C No. 45/11)** in which the High Court discussed the provisions of O. 9 R. 11(2) CPR. It was held that where a defendant fails to file a defence (or in this case an affidavit in reply), the claimant would be entitled to set down the matter for hearing *ex parte*. He also submitted that no affidavit was submitted to deny or rebut the application and that following the case of **Samuel Massa Vs. Rose Acheng (1978) HCB 297 (quoted in Allan Nyirikindi (supra))**, it is deemed that the evidence adduced by the applicant remains unchallenged and admitted by the respondent.

Counsel further relied on the provisions of 135(3) RTA, to submit that the attachment order on its own is redundant and its beneficiary needs to move the Registrar of Titles for an order of transfer or sale for it to become effective. He also argued that for an order to remain on a title since 1969 is a clear injustice to the owner of the land. He thus prayed for its removal so that the applicant is allowed to deal and enjoy his land.

I have carefully perused the pleadings and submissions of counsel. I have also considered the authorities presented in support of the application. I am in agreement with counsel for the applicant that upon the law and authorities relied on; a party who fails to respond to a claim has voluntarily chosen to keep him/herself out of the proceedings. He/she is deemed to have admitted the facts alleged against them. I take it therefore that the respondent accepts that fact that an attachment order in their favour was registered on the title in respect of the suit land since 29/10/69, that it has remained dormant and not acted upon since then. It is also taken that the respondent has no claim whatsoever against the applicant and I therefore conclude that there is no legal basis for the order to have been placed or remain on the certificate of title in respect of the suit land.

According to Section 135(1) RTA, any person claiming to be interested in or a beneficiary of a decree of execution by any court may move the Registrar to have the order entered onto the Register Book. He/she does this by serving the Registrar with the order and a statement signed by him/her or his/her advocate or agent. However according to Section 135(3) RTA,

Every such decree shall cease to bind charge or affect any land specified as aforesaid, unless a transfer upon a sale under the decree is lodged for entry upon the register within twelve months or such further period as the court may order from the day on which the copy was served.

As ably submitted by counsel for the applicant, there is no evidence to show that the respondent has ever taken any steps to realize the decree by execution and there is also no evidence that the Registrar has ever received any notification of an execution of that decree by sale or otherwise. In my view, the period the decree has remained on the title without any action, the decree holder has over exceeded what is allowed in law. I find that the continuing presence of the decree on

the certificate of title is a gross injustice to the applicant as the registered owner and infringes on his constitutional right to enjoy his property without undue interruption.

The RTA did not provide the procedure through which a registered owner may move the Registrar to remove such a decree. The procedure chosen by the applicant is thus the most appropriate in the circumstances. I thereby invoke the inherent powers of this court both under Section 33 of the Judicature Act and Section 98 of the Civil Procedure Act to allow this application and order that the attachment by order of court (High Court) registered under instrument No. MKO30961 dated 29/10/69 against the original certificate of title in respect to the land known as **KYAGGWE BLOCK 269 PLOT 1** land at Wabikokoma be vacated/set aside. The applicant will serve this order upon the Commissioner for Land Registration for enforcement. The applicant is in addition granted the costs of this application.

I so order

DATED at Kampala this 26th day of February, 2014.

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EVA K. LUSWATA

JUDGE