

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISC. APPLICATION NO.HCT-00-LD-MA-2365-2023
(ARISING OUT OF EMA NO.048 OF 2020)
(ARISING OUT OF CIVIL SUIT NO.216 OF 2015)**

JOELLE KANYANKORE::: APPLICANT

VERSUS

DFCU BANK LTD::: RESPONDENT

BEFORE: HON. JUSTICE BERNARD NAMANYA

RULING

1. This application was brought under Section 33 of the Judicature Act (Cap 13), Sections 82 & 98 of the Civil Procedure Act (Cap 71), Order 46 rules 1 & 8 and Order 52 rule 1 & 3 of the Civil Procedure Rules (S.1 71-1) for orders that:
 - i). The warrant of attachment and sale of immovable property comprised in LRV 461 Folio 7, Plot 21 Land at Mackenzie Vale Kololo be reviewed and/or set aside by this court;
 - ii). An order directing for an independent valuation report by the Chief Government Valuer;
 - iii). An order for an independent audit into the loan agreement, payments made towards clearing the loan and the actual amount now due; and
 - iv). Costs of the application.

2. The application is supported by Ms. Joelle Kanyankore sworn on the 8 August 2023 in which she states as follows *inter alia*:



- i). That she is the judgment debtor in Civil Suit No.216 of 2015, and the registered proprietor of the immovable property comprised in LRV 461 Folio 7, Plot 21 Land at Mackenzie Vale Kololo;
- ii). That Hon. Lady Justice Wolayo Henrietta issued an order on how execution should proceed on the 7 February 2020, in the following terms:
 - “1. Execution will proceed;*
 - 2. The Registrar will permit both parties to provide valuation and the Registrar will make a decision on the value having regard to the circumstances including the value of an apartment;*
 - 3. The Registrar will visit the site to make his own independent assessment;*
 - 4. The Registrar will report back to the judge on each step of the execution process.”*
- iii). That pursuant to the above court order, parties had to file their respective valuation reports in order to ascertain the current market value of the property;
- iv). That according to the valuation report filed in 2020 by the respondent, it indicated that the current value of the property was Shs 4,050,000,000, and the forced sale value of the property was Shs 2,430,000,000;
- v). That according to the valuation report filed by the applicant, it indicated that the correct market value of the property as of the year 2020 was Shs 12,560,000,000.



- vi). That upon parties filing the valuation reports, the file had to be forwarded to the trial Judge for determination but the same was never done;
- vii). That the respondents moved the Registrar to issue a warrant of attachment and sale of her property valuing the same at Shs 1,000,000,000;
- viii). That the warrant of attachment was issued without a current valuation report to ascertain the current market value of the property;
- ix). That no sale can be executed without a valuation report made within six months from the date of sale;
- x). That the respondent through its auctioneers is planning to sell the property at an extremely very low price in order to cheat her;
- xi). That the respondent is just fraudulently undervaluing her property;
- xii). That this court has powers to order the property to be independently and impartially valued by the Chief Government Valuer to ascertain the current market value; and
- xiii). That this court has powers to order for an independent audit to ascertain the exact amount she is indebted to the 1st respondent.

3. The respondent opposed this application, and filed an affidavit in reply dated the 11 August 2023 through its legal manager, Mr. Muhamad K. Ssenoga, stating the following *inter alia*:

- i). That in 2015, the applicant filed Civil Suit No. 216 of 2015 against the respondent seeking to stop the respondent from realising their mortgaged property following the applicant's default on payment of the outstanding amounts. The parties entered into a consent judgment on the 4 September 2015. The consent judgment was duly confirmed

by all parties before Hon. Lady Justice Damalie Lwanga, and the same was endorsed by Court on the 1 October 2015;

- ii). That the applicant defaulted on the payment terms under the consent judgment, and the respondent commenced execution proceedings in the matter;
- iii). That the applicant filed an application challenging the said consent judgment, and seeking to set aside the same in the High Court Execution Division. However, this matter was settled by a second consent dated 25 April 2016 before Hon. Lady Justice Flavia Anglin, and the parties agreed to maintain the payment terms previously agreed upon in the consent judgment of 4 September 2015;
- iv). That the applicant defaulted on her obligations under the second consent upon which execution proceedings were commenced;
- v). That the court appointed bailiff carried out valuation of the property before the sale which was due to take place on the 19 August 2023 or soon thereafter;
- vi). That the figure of Shs 1 billion only is not a valuation of the property but rather an estimation by the bailiff, and that the same is of no legal consequence;
- vii). That the court appointed bailiff is required to value the property before the sale, and not before the attachment. The court appointed bailiff has not conducted the same and the allegation of the intention to undersell the property is speculative;
- viii). That the property is a freehold title and not a condominium, and that the question of disposing off independent apartment units does not arise;



- ix). That the warrant of attachment and sale, is not one of the warrants envisaged under the enabling laws to be reviewed by this court. The only order that is subject for review or setting aside is the consent decree sought to be executed, and not a warrant of attachment and sale;
- x). That this application does not satisfy any grounds for review or setting aside of the warrant of attachment and sale, which grounds are that; there is an error on the face of the record or that there is discovery of new facts/evidence which is not the case in this application;
- xi). That the applicant has no legal basis in involving the Chief Government Valuer in a purely private matter, which does not involve the Government or any Government Agency; and
- xii). That upon entering into a consent judgment, and the same being endorsed by Court, the issue of the outstanding loan amount does not arise.

4. In rejoinder, the applicant, Ms. Joelle Kanyankore, filed an affidavit sworn on the 14 August 2023 stating the following *inter alia*:

- i). That the respondent has at all material times had a grand scheme of selling her property at a giveaway price. The respondent and her agents extremely undervalued her property, and are on a mission to steal and/ or cheat her all in the name of carrying out an execution;
- ii). That as the owner of the property, she is entitled to be part and parcel of the entire execution process including carrying out valuation;
- iii). That the property should be sold as condominium property since the value of three apartments can settle the respondent's debt; and



- iv). That the outstanding balance is different from the 2nd consent judgment that was signed since there was money paid by the applicant, and yet the respondent is now claiming the entire amount.
5. At the hearing of the application on the 21 August 2023, the applicant was represented by Mr. Sserunkuma Farouk holding brief for Mr. Kigenyi Emmanuel and Mr. Nsenga Emmanuel of M/s. Alma Associated Advocates while the respondent was represented by Mr. Kakuru Martin of M/s. Ligomarc Advocates.
 6. The main issue for determination is whether the application meets the criteria for review of the warrant of attachment and sale of the property issued on the 19 June 2023 by the Assistant Registrar of the Court.
 7. Section 82 of the Civil Procedure Act (Cap 71) read together with Order 46 rule 1 of the Civil Procedure Rules (S.I 71-1) stipulate that any person considering himself or herself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred or by a decree or order from which no appeal is allowed, may apply for a review of judgment to the court which passed the decree or made the order.
 8. In the case of FX Mubukuke v. UEB, High Court Miscellaneous Application No. 98 of 2005, court held that for an applicant to succeed in an application for review of a ruling or judgment, they ought to first show that either: i) there is a mistake or error apparent on the face of the record; or ii) that there is discovery of new and important evidence which after exercise of due diligence was not



within the applicant's knowledge or could not be produced by him or her at the time when the decree was passed; or iii) that any other sufficient reason exists.

9. Counsel for the respondent argued that the warrant of attachment and sale cannot be reviewed since it was only aimed at enforcing an earlier order of the Court issued by the Hon. Lady Justice Wolayo Henrietta on the 7 February 2020 that execution should proceed. That it is only the order issued by the learned Judge that should be reviewed, but not the warrant of attachment and sale. He further argued that the order sought to be reviewed expired on the 19 August 2023. On his part, counsel for the applicant argued that the warrant of attachment and sale is indeed an order of court within the meaning of Section 2 of the Civil Procedure Act that is capable of being reviewed.

10. I have perused the impugned warrant of attachment and sale. It is issued by the Assistant Registrar of this Court on the 19 June 2023 addressed to a court bailiff, Mr. Opondo Geoffrey, and reads in part:

“...This is to command you to attach and sale the immovable property of the Judgment Debtor comprised in LRV 461 Folio 7 Plot 21 Land at Mackenzie Vale Kololo to the highest bidder through public auction...”

11. I am not persuaded by counsel for the respondent that the warrant of attachment and sale is not an order of Court capable of being reviewed. I am satisfied that the warrant of attachment and sale is a decision of the Court ordering the court bailiff to sell the property by public auction. It is thus an order of the Court. See Section 2(o) of the Civil Procedure Act (Cap 71).



12. I am equally not satisfied with the arguments of counsel for the respondent that since the warrant of attachment and sale expired on the 19 August 2023, then the instant application is overtaken by events. The fact of the matter is that by the time the instant application was filed on the 8 August 2023, the warrant of attachment and sale was still in force; it is therefore necessary for court to pronounce itself on the matter considering that the applicant questions the legality of the warrant of attachment and sale.
13. In conclusion, it is my decision that the warrant of attachment and sale is an order of the Court capable of being reviewed under the provisions of Section 82 of the Civil Procedure Act (Cap 71) and Order 46 rule 1 of the Civil Procedure Rules (S.I 71-1).
14. I now turn to the merits of the application. The crux of the applicant's case is that the warrant of attachment and sale estimates the value of the property at Shs 1,000,000,000 (shillings 1 billion) which is a gross undervaluation, and not the current market value of the property. The relevant part of the impugned warrant of attachment and sale reads as follows:
- “SCHEDULE. Immovable property include;- LRV 461 FOLIO 7 PLOT 21 LAND AT MACKENZIE VALE, KOLOLO. Estimated value is Ugx.1,000,000,000 (Uganda Shillings One Billion).”*
15. Counsel for the applicant argues that the process of attachment and sale of the property contravened the orders of the Court issued by the Hon. Lady Justice Wolayo Henrietta on the 7 February 2020. It is further argued that the order by the learned Judge required both the applicant and the respondent to file respective valuation reports of the property, and on this basis, the Registrar would make a decision on the value of the property. Counsel for the applicant

argues that the respondent filed a valuation report by Certified Property Surveyors, Valuers & Estate Agents dated March 2020 indicating an estimated market value of the property at Shs 4,050,000,000 (four billion fifty million). He further argues that the applicant filed a valuation report by Oringo & Company Valuers dated 19 November 2020 which put the estimated market value of the property at Shs 12,560,000,000 (twelve billion five hundred and sixty million). Counsel for the applicant argues that upon the respective valuation reports being filed, the Court had to make a decision on the value of the property, which was not done. The final important argument put forward by counsel for the applicant is that whereas Regulations 11(1) and (2) of the Mortgage Regulations (2012) makes it mandatory for the mortgagee to carry out a valuation of the property for purposes of sale, 6 months before the date of the sale, this legal requirement was not complied with.

16. On his part, counsel for the respondent argues that a valuation of the property was indeed done before any sale could be done. He refers to a valuation report dated 19 June 2023. It is further argued for the respondent that: the orders of the Hon. Lady Justice Wolayo Henrietta on the 7 February 2020 were complied with, and both parties filed valuation reports; that the figure of 1 billion shillings set out in the warrant of attachment and sale is not a valuation of the property but rather an estimation by the court bailiff, and is of no legal consequence; that the court bailiff is required to value the property before the sale and not before the attachment; that the allegation of undervaluation of the property is speculative; that since a valuation of the property was done before any sale could be conducted, the Mortgage Regulations were fully complied with; and that there is no sufficient cause for review of the warrant of attachment and sale.

17. I will start by disposing of the argument advanced by counsel for the respondent that a valuation of the property was indeed carried out prior to the sale which was due to take place by the 19 August 2023. Paragraph 12 of the affidavit in reply filed by the respondent states that:

“That I verily believe that the court appointed bailiff has engaged a valuer to value the property before the sale which is due on 19 August 2023 or soon thereafter”.

18. According to the respondent, a valuation of the property prior to the anticipated sale was done. The problem is that the respondent did not attach the said valuation report to its affidavit in reply. In his written submissions, counsel for the respondent refers to a valuation report dated 19 June 2023. The said report is not before this court; it was not attached to the respondent’s affidavit in reply. Accordingly, I reject the argument that a valuation of the property was conducted by the respondent prior to the sale which was scheduled on the 19 August 2023.

19. This brings me to the question of how the estimated value of Shs 1 billion was arrived at in the impugned warrant of attachment and sale. The respondent argued that the property value of Shs 1 billion is of no legal consequence but the applicant disagrees, and argues that the respondent has contrived a scheme to undervalue her property and sell it off cheaply.

20. Regulations 11(1) and (2) of the Mortgage Regulations (2012) provide as follows:

“11. Valuation of mortgaged property

(1) The mortgagee shall before selling the property, value the

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property to ascertain the current market value and the forced sale value of the property.

(2) For the purposes of sub regulation (1), the valuation report shall not be made more than six months before the date of sale.

(3) The valuation report shall contain the current pictures of the property, including—

(a) the front view of the property;

(b) the side view of the property; and

(c) the detailed description of the property.”

21. In the case of *Progressive Group of Schools Limited and 2 Others v Barclays Bank of Uganda and another (Civil Appeal No. 349 of 2020) [2023] UGCA 81 (Coram: Hon. Justice Richard Buteera, D.C.J., Hon. Justice Catherine Bamugemereire, JA., & Hon. Justice Stephen Musota)*, it was held that:

“The question of the need for valuation of mortgage property before sale is settled. In Ranchhobhai Shivabhai Patel Ltd & Anor v. Henry Wambuga (Liquidator of African Textile Mill Ltd & Anor, (SCCA) No.6 of 2017 court held that the Respondents had acted negligently when they sold the suit properties without a pre-sale valuation and as such, the sale was conducted unlawfully. In the English case of Pendlebury v. Colonial Mutual Life Assurance Society Ltd (1912) 12 C.L.R. 676, it was held that the factors which are taken into consideration to determine whether the mortgagee has failed in his duty are; omission to take obvious precautions to ensure a fair price, failure to get a proper valuation, and failure to adequately advertise the sale. In the instant case, without a pre-sale expert valuation of the suit property, the 1st Respondent could not determine with

certainty the fair market price, and the forced sale value of the Appellants' property. In light of the trial Judge's finding that the 1st Respondent did not carry out a valuation before sale of the suit properties, and in view of the authorities above cited, it is my finding that the 1st Respondent [Barclays Bank] breached their duty to ensure that the suit property was sold at its fair market value. The breach of duty extends to their omission/failure to advertise some of the properties sold and the failure to undertake a fresh advertisement when they adjourned the sale. For the above stated reasons, we are inclined to find that the sale of the suit lands/securities was tainted with illegality.”

22. At the outset, I wish to state that I do not agree with the respondent that the estimated value of Shs 1 billion in the impugned warrant of attachment and sale is of no legal consequence or that since the court bailiff was to carry out a valuation of the property prior to the sale, then no irregularity occurred. In addition to the requirements of the law as set out above, the sale of the property in this particular case was required to comply with the earlier order by the Hon. Lady Justice Wolayo Henrietta.
23. The order issued by the Hon. Lady Justice Wolayo Henrietta on the 7 February 2020 was to the effect that before the Registrar of the Court would arrive at the decision of the value of the property, she would have to consider the two valuation reports filed by both the applicant and the respondent.
24. Although both parties submitted valuation reports, this was done in 2020, and according to the law (as set out above), the Registrar of the Court could not

have based on these valuation reports to arrive at the estimated value since any such valuation reports should have been done 6 months before the date of the sale. This means that both parties were required to file updated valuation reports that would form the basis of the decision on the value of the property by the Registrar of the Court. There is no evidence before me that such updated valuation reports were filed by the parties. In any case, there is no indication that the Registrar of the Court based on any valuation reports to arrive at the figure of Shs 1 billion as the value of the property. Accordingly, it is my decision that the process by which the decision on the value of the property of Shs 1 billion was arrived at, is contrary to the order issued by the Hon. Lady Justice Wolayo Henrietta on the 7 February 2020.

25. I am satisfied that there is sufficient reason to review the warrant of attachment and sale of the property issued on the 19 June 2023 by the Assistant Registrar of the Court.
26. I now wish to deal with the rest of the orders that were sought by the applicant – an order directing for an independent valuation report by the Chief Government Valuer; and an order for an independent audit into the loan agreement, payments made towards clearing the loan and the actual amount now due.
27. The question of how the value of the property is to be determined was already dealt with by the Hon. Lady Justice Wolayo Henrietta on the 7 February 2020. There is no need for this Court to revisit the matter. The parties and the Registrar of the Court should observe and implement the orders of the learned Judge as issued on the 7 February 2020. It is my decision that the applicant is

not entitled to an order directing for an independent valuation report by the Chief Government Valuer.

28. Similarly, on the question of an order sought by the applicant for an independent audit into the loan agreement, payments made towards clearing the loan, and the actual amount now due; this matter was settled by the consent judgment dated the 4 September 2015, the key terms of which are reproduced below:

“1. The plaintiff shall pay USD 133,629.00 (United States Dollars One Hundred and Thirty three thousand, six hundred and twenty nine only) immediately upon execution of this consent receipt of which the Defendant hereby acknowledges.

2. The Defendant shall within four (4) working days handover to the Plaintiff the Certificate of Title for property comprised in Kyadondo Block 244 Plot 3017, Land at Kisungu together with the requisite release of mortgage instrument.

3. On or before the 30th September 2015, the plaintiff shall pay to the Defendant a sum of USD 54,882 (United States Dollars Fifty Four thousand, Eight hundred and eighty two only).

4. The outstanding sum after payment in (3) above shall continue to attract interest on reducing balance at the rate of 14% p.a. and shall be payable in quarterly instalments of USD 49,189.61 (Forty nine thousand, one hundred and eighty nine point six one) with effect from 11th January 2016 up to 11th April 2019 and a last instalment of USD 28,429.61 (United States Dollars Twenty eight thousand, four hundred and twenty nine point six one) payable on 11th July 2019.



5. *The plaintiff shall pay agreed costs of Ushs 6,500,000 (Six Million Five Hundred thousand shillings only) payable as follows [...]*

6. *In the event of default on instalment payments in 3 and 4 above, the defendant shall be at liberty to take out execution proceedings including but not limited to the Plaintiffs' property comprised in LRV 461 Folio 7, Plot 21 land at Mackenzie Vale Kololo. [...]*”

29. The consent judgment dated the 4 September 2015 is binding on the parties and must be strictly observed and enforced. See the case of *Attorney General & Uganda Land Commission v. James Mark Kamoga & James Kamala, SCCA No. 8 of 2004.*

30. The result is that this application has partially succeeded, with the following orders:

- 1). That the warrant of attachment and sale of immovable property comprised in LRV 461 Folio 7, Plot 21 Land at Mackenzie Vale Kololo dated 19 June 2023 is reviewed and set aside.
- 2). That the attachment and sale of the property shall comply with the Order issued by the Hon. Lady Justice Wolayo Henrietta on the 7 February 2020; and the consent order issued by the Hon. Lady Justice Flavia Anglin Senoga on the 25 April 2016.
- 3). That each party shall bear its own costs of this application. This is in the interest of reconciliation of the parties, and ultimate resolution of the dispute between the parties.

IT IS SO ORDERED.



BERNARD NAMANYA
JUDGE
15 January 2024

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