

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

CIVIL APP. NO. 0412 OF 2011
[Arising from Civil Suit No. 219 of 2010]

MARY NAKATO:.....PLAINTIFF/JUDGMENT CREDITOR

VERSUS

NANYONGA ROSE:.....DEFENDANT/JUDGMENT DEBTOR

AND

SSEKITO EDWARD:.....OBJECTOR

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

RULING

This is an application by way of Notice of Motion/Objector proceedings brought under Order 22 rules 55, 57; Order 52 Rule 1 of the Civil Procedure Rules and Section 98 of the Civil Procedure Act for orders that:

- a) The property situated at Bukejje Zone, Luwafu Parish, Makindye Division, Kampala District be released from attachment and/or execution.

- b) The purported sale of the above said property be nullified and/or set aside.
- c) Costs of the application be provided for.

The grounds on which the application is premised are:

- 1) The Objector herein claims interest in the attached property as a lawful owner of the same.
- 2) The Objector herein is in constructive possession of the property subject of attachment through a tenant who pays monthly rent to him.
- 3) The Judgment Debtor herein has no interest whatsoever whether legal or equitable in the attached property.
- 4) Neither the Judgment Debtor nor her agents/servants are in occupancy of the above said property.
- 5) There is a likelihood of the attached property being sold and/or put in possession of a third party and the Objector will suffer irreparable loss if the said property is not released from attachment and/or execution.

The application is supported by the affidavit in support and one in rejoinder, deponed to by the Objector. It is also supported by supplementary

affidavits of Zoumana Kane, Billy Kawooya Mbowa, and Musisi Joseph. It was opposed by the respondent with her affidavit in reply.

Mr. Swabur Marzuk represented the applicant, while Mr. Kajeke represented the Judgment Creditor. The Judgment Debtor, though served with the pleadings and hearing notice, did not appear in court.

At the Scheduling Conference the following facts were agreed that:

- 1) The Judgment Debtor/Defendant purported to sell the Objector's property situated at Bukejje Zone, Luwafu Parish, Makindye Division to the Judgment Creditor at Shs. 87,000,000= (Eighty seven million only) vide sale agreement dated 7th January 2010.
- 2) The said Judgment Debtor failed to give vacant possession of the said property to the Judgment Creditor contrary to the executed sales agreement since the said property was in possession of the Objector.
- 3) As a result, the Judgment Creditor filed a complaint against the Judgment Debtor vide MAK-00-CR-CO-1423-10 and the said Judgment Debtor was charged with the offence of obtaining money by false pretence contrary to Clause 303 of the Penal Code Act.

- 4) Subsequently, the Judgment Creditor instituted Civil Suit No. 219 against the Judgment Debtor claiming the purchase price of Shs. 87,000,000= (Eighty seven million only) where upon the Judgment Creditor obtaining judgment against the Judgment Debtor.
- 5) The said Judgment Creditor through Debt Masters & Recovery Trust obtained a warrant of attachment and sale and purportedly sold the suit property to a one Frank Lwanga.
- 6) At the time of the said attachment and purported sale, the suit property was in constructive possession of the Objector through his tenant a one Zoumana Kane.
- 7) On the 30th day of September 2011, the Objector learnt that his above said property was made subject of attachment and sale and thus filed the Objector proceedings.

The following issues were agreed:

- 1) Whether the suit property should be released from attachment.
- 2) Whether the purported sale of the suit property should be nullified and/or set aside.
- 3) What other remedies are available to the parties.

The Objector filed these proceedings challenging the attachment of the property on the grounds that it did not belong to the Judgment Debtor at the time of attachment, the property having been in constructive possession of the Objector.

By his affidavit in support and another one in rejoinder, the Objector deponed that he was the lawful owner of the property situated on a Kibanja at Bukejje Zone, Luwafu Parish, Makindye Division, Kampala District, on which he had constructed a residential cum commercial house which he has at all material times rented out to one Zoumana Kane at a monthly rental of Shs. 900,000=. He came to learn of the order of attachment in respect of his property pursuant to HCCS No. 219 of 2010 on 30/9/2011. He had never been party to the said suit, nor had he had any dealings in respect of the said property with the plaintiff/Judgment Creditor, so the attachment of his property was wrong and unlawful. The Objector further deponed that he had never authorized the Judgment Debtor, a onetime mistress of his, to deal with the property. In his rejoinder, he reiterated that the Judgment Debtor who had engaged in so many fraudulent practices sometimes leading to her prosecution, had never been in possession of the house and that the subsequent sale of the property to one Frank Lwanga was illegal and unlawful.

In opposition, the Judgment Creditor, in her affidavit in reply, deponed that she had bought the suit property on 7/1/2010 from the Judgment Debtor, and the sale agreement was witnessed by L.C. I Secretary for Youth. She further stated that the property had already advertised for sale and sold to one Frank Lwanga who now owned the property, and yet had not been made party to these proceedings; however that the execution of the decree had already been done and there was nothing to set aside; the tenancy agreement was an afterthought, and no document of ownership had been produced. She stated further that at the time of execution of the decree the suit premises were in possession and occupancy of the Judgment Debtor as owner herself. Alternatively that if the Objector was owner then he aided and abetted the Judgment Debtor's action for which he is estopped from denying; and that the Objector ought to have brought this matter by ordinary suit. She concluded that the Applicant/Objector had no sufficient grounds to warrant the grant of the application.

In rejoinder the applicant reiterated that the Judgment Debtor had never owned the property in issue and the sale by her to the Judgment Creditor was unlawful, which had necessitated the Judgment Creditor to file HCCS 219 of 2010 claiming the purchase price; and the complaint she filed to police leading to criminal charges being instituted against the Judgment

Debtor for obtaining money by false pretence. Further, the Judgment Debtor had never been in possession of the property that is why the Judgment Creditor failed to get vacant possession, hence the purported sale to one Frank Lwanga was illegal and unlawful. The Objector denied abetting and aiding the Judgment Debtor; and that this applicant could effectively settle the dispute between the parties without resorting to ordinary suit. He reiterated his prayer for the release of his property.

Other supplementary affidavits in support of the application were filed by one Musisi Joseph, the L.C. I Chairman of Bukejje Zone, Kiwafu Parish, Makindye Division, Kampala District where the property is situated, who deponed the Objector was the lawful owner of the suit property which is situated on the Objector's late father's family land, and the property had never belonged to the Judgment Creditor. He stated that on the 30/9/2011 and 6/10/2011 respectively he had stopped a group of bailiffs from Debt Master and Recovery Trust from attaching and/or evicting one Zoumana Kane from the above property on the ground that the property belonged to the Landlord, the Objector and not the Judgment Debtor.

Zoumana Kane, the Objector's tenant in the suit property, deponed that he was a tenant in occupancy of the suit property for which he paid Shs.

900,000= per month to the Landlord, the Objector. He confirmed the L.C. I's account of the area failed eviction by the Judgment Creditor's bailiffs on the two occasions at the L.C. I's intervention.

In his submission, Counsel for the Objector relied on Order 22 rules 55 (1), 56, and 57 and *David Muhenda & 3 others Vs Margaret Kamuje SCCS 9 of 99*, *Uganda Minerals Ltd Vs Amin Piram & Kampala Ltd [1994-95] HCB 87*, and *Chotabhai M. Patel Vs Chaprabhi Patel [1958] Ed 743* which cases applied the principles in the above rules.

The Judgment Creditor on the other hand submitted that whereas the Objector is relying on a Tenancy Agreement dated 1/8/2011 to prove possession, the sale to Frank Lwanga was on 29/7/2011; and the Objector did not tell court who was in possession of the suit property at the time of attachment and sale before the tenant came on board. Further, the Objector did not produce any evidence by way of agreement or deed of gift or letters of administration in respect of his father's estate since he said his late father had gifted the land to him. He concluded that the Judgment Debtor was in possession of the suit property on her own accord as owner and that the Objector had no interest in the suit premises.

I have considered the submissions of Counsel on both sides, the law and authorities relied on.

In proceedings of this nature, in order for the applicant to succeed, he had to satisfy the requirements of the law under which it was made. Order 22 rule 55 states that where any objection is made on the ground that such property is not liable to attachment; the court will proceed to investigate the claim. The burden is on the Objector to adduce evidence to show that at the date of attachment, he had some interest in the property.

Order 22 rule 55, 56, and 57 provide as follows:

“55 (1); 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.

(2) Where the property to which the claim or objection applies has been advertised for sale, the court ordering the sale may postpone it pending the investigation of the claim or objection.

“56; The claimant or objector shall adduce evidence to show that at the date of the attachment he or she had some interest in the property attached.

“57; where upon the said investigations the court is satisfied that for the reason stated in the claim or objection, such property was not, when attached, in the possession of the Judgment Debtor or of some person in trust for him, in the occupancy of a tenant or other person paying rent to him or that being in possession of the Judgment Debtor at such time, it was so in his possession not on his own account or as his property but on account of some other person, the court shall make an order releasing the property, wholly or to such an extent as it thinks fit from attachment”

The guiding principles in cases of this nature were considered in ***Chotabhai M. Patel Vs Chaprabhi (supra)*** which case was cited with approval in ***David Muhenda and 3 others Vs Margaret Kamuje (supra)*** and were stated as follows:

- 1) Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to attachment the court shall proceed to investigate the objection with the like power as regards examination of the Objector, and in all other respects as if he was party to the suit.

- 2) The Objector shall adduce evidence to show that at the date of attachment he had some interest in the property attached.
- 3) 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, it must be found whether he held it on his own account or in trust for the Judgment Debtor. The sole question to be investigated is, thus, one of possession of, and some interest in the property.
- 4) Questions of legal right and title are not relevant except 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 that extent the title may be part of the inquiry.

In the instant case, the court's enquiry can start at the agreed facts which were set out at the beginning. Both parties' Counsel signed the Joint Scheduling Memorandum which they filed in court on 23/12/2011, in which it is clearly undisputed that the Judgment Debtor purported to sell the Objector's property, the suit property, to the Judgment Creditor at Shs. 87,000,000=, after which the Judgment Debtor failed to give vacant possession because the property was in possession of the Objector; the

Judgment Creditor consequently filed the head suit, and a complaint vide MAK-00-CR-CO-1423-10 whereby the Judgment Debtor was charged with obtaining goods by false pretences. It was also agreed that the Judgment Creditor, through Debt Masters and Recovery Trust obtained a warrant of attachment and sale and purportedly sold the suit property to one Frank Lwanga; but at the time of the said attachment and purported sale, the suit property was in constructive possession of the Objector through his tenant one Zouma Kane.

On the basis of the above agreed points above, the matter can be disposed off in favour of the Objector.

Be the above as it may, the Objector did aver in his affidavit in support that he had interest in the property at the time of attachment he was in full possession and exclusive control of the suit property. I am convinced of the above averments by the undisputed fact that after the purported sale of the suit property by the Judgment Debtor to the Judgment Creditor, the Judgment Debtor failed to deliver vacant possession of the suit property, contrary to Clause 3 of the Agreement of Sale between the Judgment Debtor and Judgment Creditor (Exhibit D1). The Objector further avers that he has even at time of execution to date been in possession of the

property, and that was why Frank Lwanga, the purported buyer had never got vacant possession of the suit property.

In his supplementary affidavit in support, the tenant, Zoumana Kane also avers that he is currently occupying the property as tenant of the Objector. The L.C. I Chairman, Musisi, also confirmed ownership of the suit property by the Objector and that he intervened to stop the eviction which was pursuant to the attachment order.

The Objector also confirmed to court during its investigation of the claim how he came to own the suit property which he single handedly developed; and where he at one time stayed with the Judgment Debtor as his mistress, but who he later chased away after learning of her fraudulent antics.

On the other hand, the Judgment Creditor's averments in the affidavit as pointed out earlier were not supported with any evidence or explanation. The Judgment Debtor did not even appear in court despite proof that she was served with the hearing notice. Her appearance would have helped in court's investigations, to shed more light on the allegations of her alleged occupancy and interest in the suit property at the material time. Her keeping away confirmed that what she did in attempting to sell the suit property were fraudulent antics for which she is facing charges in court.

As stated earlier, the admission in the agreed facts sealed the fate of the Judgment Creditor and Judgment Debtor, in favour of the Objector.

I am further surprised that the purported sale agreement was witnessed, not by the L.C. I Chairman and/or Secretary, but by the Secretary for Youth. The omission to involve the L.C. I Chairman or Secretary ought to have put the Judgment Creditor on notice that there must be something fishy about the deal. Otherwise, what would the Secretary for Youth have to do with the sale of property in any area? If the Judgment Debtor actually occupied the property at the time of sale and attachment, then why didn't the buyer get vacant possession? No explanation is given to this except as admitted in the agreed facts.

The court is, therefore, satisfied that the Objector had an interest in the suit property and that at the time of attachment, he was in possession of the property on his own account, and not on account of the Judgment Debtor. The suit property was therefore wrongfully attached, and the release of the property from attachment is hereby ordered.

The second issue is whether the purported sale of the suit property to one Frank Lwanga should be nullified and/or set aside by this Honourable court.

Under paragraph 16 of his affidavit in support, the Objector averred that if the suit property is not released from attachment and/or execution, they shall suffer irreparable loss; and under paragraph 18, that it is just and equitable that the suit be released from attachment and the purported sale be set aside or nullified.

The Judgment Creditor under paragraphs 8, 9, 10 and 11, of her affidavit in reply opposed the prayer to set aside the sale which was effected under Exhibit P6, saying it was already complete and there was nothing to set aside.

The first warrant of execution, Exhibits P3, had expired and the warrant of execution, a renewal of warrant application was made (Exhibit P5) where after a fresh warrant, Exhibit P5 dated 29/7/2011 was issued with directions that the suit property should not be sold before 30 days from the publication of the notification of sale in the form as directed by court. It is however shocking to note that the bailiffs sold the suit property to the said Frank Lwanga on the very date of 29/7/2011 when the warrant was issued. This in itself was illegal and unlawful, having been contrary to the directives of court.

The sale also went contrary to Order 22 rule 64 which states:

Regarding nullification of a judicial sale, the Supreme Court in Lawrence Muwanga Vs Stephen Kyeyune SCCA 12/2001 (reported in [2002] KALR 144) stated that a judicial sale, unlike a private one, was not complete unpredictably it took place. It was liable to be set aside on appropriate proceedings. The fact that the property had been sold and a return made by the time of the Objector proceedings and not preclude court from enquiry into the merits of the sale and in fact setting aside such sale. In that case, the court nullified the sale of the property since it was in possession of the Objector as the owner thereof.

In the present case the Objector has proved that the suit property legally belonged to him and that at the time of attachment, the property was in his possession. The Judgment Creditor on the other hand has failed to support her averments that the Judgment Debtor was in possession at the time of attachment and what interest she had in the property; and why Frank Lwanga had failed to get vacant possession.

I therefore find that since the bailiffs contravened the court orders and the law when they sold the property to Frank Lwanga; and since the Objector has proved he was in constructive possession and owned the property at

the time it was attached and sold; the said judicial sale to Frank Lwanga was unlawful and illegal and is hereby set aside, and it is so ordered.

The last issue relates to the remedies available to the parties.

Basing on my findings and orders relating to issues (1) and (2) above, the suit property at Bukejje Zone, Luwafu Parish, Makindye Division, Kampala District is hereby released from attachment. The sale is hereby set aside as already ordered.

Finally, the application is granted with costs to the Objector. The costs will be paid by the Judgment Creditor and Judgment Debtor severally and jointly. It is so ordered.

Elizabeth Musoke

JUDGE

10/02/2012