REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0039-2010

(Arising from MBR-00-CV-CS-554-2009

INID TUMWEBAZE :: APPELLANT

VERSUS

MPWEIRE STEPHEN & AN'OR. :::::::::::::::::::: RESPONDENTS

BEFORE: HON MR. JUSTICE BASHAIJA K ANDREW.

JUDGMENT

This appeal arises out of the decree in which ***Mpweire Stephen*** *(herein referred to as the "1st Respondent)* was adjudged as a judgement creditor and ***Senkima John Bosco*** (hereinafter *referred to as the "2nd" Respondent*) as the judgment debtor. When the suit property was attached and the sale done, ***Inid Tumwebaze*** *(herein after referred to as the "Appellant")* filed objector proceedings before the Magistrate Grade 1 Court at Mbarara (*hereinafter the trial "court")* which she lost. She then filed the ***Miscellaneous Application No.171-2010*** for leave to appeal the decision of the trial court, which was granted on the 17/9/2010, hence this appeal. Three grounds of appeal were advanced as follows:

1. ***The learned Magistrate erred in law to hold that the sale of the property was not illegal without taking into account the fact that the dealing in the land ab initio was illegal.***
2. ***The learned Magistrate erred in law to hold that the attachment and sale of the property was not precluded or prevented by the provisions of S.39 of the Land Act.***
3. ***The learned Magistrate erred in law for ignoring the false affidavits that were filed by the 1st Respondent when the same was pointed out to him.***

Submissions.

Counsel for the Appellant, M/s. Mwene- Kahima, Mwebesa & Co. Advocates submitted that the sale of the suit property was illegal and void *ab initio.* Counsel relied on the case of ***Makula International Ltd v. His Eminence Cardinal Nsubuga & A'nor[1982] HCB***

11 where it was held that a court of law cannot sanction what is illegal and illegality once brought to the attention of court overrides all questions of pleading, including any admissions made thereon.

Counsel further cited the case of ***UTEX Industries Ltd v. Attorney General, Supreme Court Civil Application No.52 of 1995,*** in which the court held that rules of procedure are handmaids of justice, in that they should be applied with due regard to the circumstances of each case; and that in the circumstances of the instant case ***Order 22 r. 60 Civil Procedure Rules(CPR)*** regarding objector proceedings should not be given absolute application; not to mention that the attachment and sell of the property is tainted with illegalities.

Counsel for the Appellant went on to submit that the pleadings of the Respondent in the trial court clearly state that it is family land that was attached as it had been mortgaged, or (in alternative) that what was attached was not family land because the attachment left out the homestead. Counsel opined that whatever the case, under ***Section 39 of the Land Act (Cap 227)*** such land is not subject of sale, and maintained that the dealing in the family land was illegal *ab initio*.

In reply Counsel for the Respondents, M/s. Ahimbisibwe & Co. Advocates, submitted that the appeal is incompetent, and that it should be dismissed for being brought by the Appellant who was not a party to the original suit, and that the objector has no right of appeal. To buttress this contention, Counsel cited *Order* ***22 r. 60 CPR*** to the effect that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he or she claims to be the property in dispute, but subject to the result of the suit if any, the order shall be conclusive.

Counsel further relied on ***Baku Rapheal & A'nor v.Attorney General, Supreme Court Constitution Appeal No.1 of 2005,*** where Mulenga J. S.C (R.I.P) held that there is no inherent right of appeal; and that an appeal is a creature of statute. Counsel argued that the Appellant in this case had no right of appeal, and that the property that was a subject of attachment and the sale does not fall within the ambit of ***Section 39 of the Land Act (supra).***

Resolution.

It would appear that the central issue in this case; and which takes priority in the resolution as a matter of law, is whether the suit land was family land or not, and whether it was subject to provisions of ***Section 39 of the Land Act(supra).*** This is so because the

allegations of illegalities in the transactions leading to the sale as put across by Counsel for the Appellant, if proved to have existed would supersede any other issues.

The trial court pointed out (at page 2, in the 3rd paragraph of its judgment) that the Respondent annexed an inventory of the attached property, which shows that the attached property had been partitioned from the homestead, and went to hold (on page 2 paragraph 3 line 3(supra)) that prior to the attachment, the attached property (banana plantation) and the homestead were one. The trial court then cited ***Section 39 of the Land Act (supra)*** which provides that:

> ***(1) No person shall—***
>
> ***(a) sell, exchange, transfer, pledge, mortgage or lease any land;***
>
> ***(b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any land; or***
>
> ***(c) give away any land inter vivos, or enter into any other transaction in respect of land—***
>
> ***(i) in the case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse;***
>
> ***(ii) in the case of land on which a person ordinarily resides with his or her dependent children of majority age, except with the prior written consent of the dependent children of majority age;***
>
> ***(iii) in the case of land on which a person ordinarily resides with his or her children below the age of the majority, except with the prior written consent of the committee;***
>
> ***(iv) in the case of land on which ordinarily reside orphans below majority age with interest in inheritance of the land, except with the prior written consent of the committee."***

The trial court went further to state that by the application of usage of phrases/words applied under ***S.39(supra),*** it is apparent that a sale of family property pursuant to a court order is excluded. The trial court relied on John T Mugambwa in his book; ***Principles of Land Law in Uganda (Fountain Publishers, 2002)*** at ***page 38*** where the author states that ***Section 39 of the Land Act*** does not apply where it is sought to sell family land in execution of a judgment debt against the land owner.

Applying the same principle to the instant case, trial court went on to hold that the property the subject of the ruling was put to sale by M/s.Ankole Speed Way Auctioneers

pursuant to a warrant of attachment and sale issued by the court on 7/4/2010. The trial court concluded by stating as follows:

> ***"It appears that the attachment and subsequent sale of the attached property was not precluded or prevented by the provisions of section 39 of the Land Act."***

With due respect**,** I find that the statement from John T Mugambwa's book (supra) was taken out of context by the trial court, in that it applies to a situation where the property was not mortgaged, but only attached after a judgment of court as a property of a judgment debtor. According to the facts of the instant case, Ssenkima John Bosco, the husband to the Appellant, pledged as security for money borrowed the property where he lived with his spouse, Inid Tumwebaze (the Appellant) to Mpweirwe Steven. Senkima had, however, not procured consent from; nor informed his spouse Inid Tumwebaze. This act and / or omission evidently runs counter the spirit and letter of ***Section 39(1)(c)(i) (supra)*** which categorically prohibits transactions in such land as the one in question.

It is noted that the Respondent's main contention is premised on the position that by the time of the attachment the suit property had been demarcated off the homestead; implying that the two were separate and that the banana plantation could not be subject of spousal consent under ***Section 39(supra).*** With due respect, this is a misreading of the provisions of the law. Under ***sub-section(1) (c) (i)of Section 39(supra)***, it clearly stipulated as follows:

> "***In the case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse."[Underlined for emphasis].***

There is evidence on record of the trial court that family land in this case included; not only the homestead but also the banana plantation on the land upon which the homestead was. For all intents and purposes, this is land where the 1st Respondent's family ordinarily resided with his spouse and from which they derived their sustenance. To argue that the banana plantation had been demarcated from the homestead would be to defeat the stipulation of "***land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance***"; for it is inconceivable that a homestead without the banana plantation in this case would provide the sustenance contemplated by the law. Therefore, even transacting in family land on which the banana plantation was in this case would require spousal consent as it formed part "***of land on which the person ordinarily resides***". Needless to emphasise that the said provisions of the law are mandatory and cannot be circumvented.

Clearly, the whole dealing in the land was void *ab initio* for want of spousal consent, and to that extent, the Respondent is precluded from hiding under the argument that ***Section 39(supra)*** does not apply where it is sought to sell family land in execution of a judgment debt against the land owner. The law on illegalities well is settled. In the case of ***Makula International Ltd (supra)*** cited by Counsel for the Appellant, it was held, *inter alia*, that:

> ***"A court of law cannot sanction what is illegal, an illegality once brought to the attention of court, overrides all questions of pleading, including any admission made thereon."***

It is thus settled law that an illegality supersedes everything else raised by the parties, even in the instant case.

It is also noted that the trial court (at page 3, in the 2nd paragraph of its ruling) made the following observation which, in my view, call for special consideration:

> ***"...The application was a waste of time since the property had already been sold to bonafide purchaser."***

The implication here was, as it were, that let matters lie, since in any case the attachment and sale have already been concluded. Counsel for the Appellant submitted that this position lacks merit, and court should not allow the *status quo* to continue, but that it can be rectified by an order of this court.

The position of the law in such a situation where sale transactions, such as the instant one, are tainted with illegalities was well articulated in the case of ***Karooli Mubiru & 21 O'rs v.Edmond Kayiwa & 5 O'rs [1979] HCT 212.*** The Court of Appeal of Uganda held that:

> ***"In any case, the fact that a judgment had been satisfied and execution completed was not a good reason for not quashing a judgment which was a nullity since an execution completed under such a judgment was void ab initio."***

This court accordingly finds that the transaction that led to the sale of land and the sale itself were illegal *ab initio,* and the orders of the trial court are accordingly set aside. Since this is the central issue in the entire case, its resolution disposes of all the other grounds. The appeal is allowed with costs to the Appellant.

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BASHAIJA K. ANDREW

JUDGE

08/02/2013.