REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: *ODER, TSEKOOKO, KAROKORA, MULENGA AND KENYEJHAMBA, JJSC.)*

CIVIL APPEAL NO. 12 OF 2001

BETWEEN

LAWRENCE MUWANGA

APPELLANT

AND

STEPHEN KYEYUNE (Legal Representative of Christine Kisamba, deceased) RESPONDENT

[An appeal from the decision of the Court of Appeal at Kampala, (Okello, Mpagi-Behigeine and Engwau, JJ.A.) Dated 31/08/2001, in Civil Appeal No.20 of 2000.J

JUDGMENT OF TSEKOOKO. JSC. This is a second appeal. The appeal is against the decision of the Court of Appeal which upheld the decision of Katutsi, J, in the High Court where the learned judge accepted objection proceedings brought under 0.19 Rule 55 and he made an order to release from attachment a house and land belonging to Christine Kisamba.

The background, to this appeal can be briefly stated. In 1997 the appellant, Lawrence Muwanga, instituted a suit in the High Court to recover a debt of a sum of shs.16,300,000/= from Godfrey N. Kisamba, the husband of Christine Kisamba. On 11th August 1997, a consent judgment was entered against Godfrey N. Kisamba. I shall hereinafter refer to him as "the judgment-debtor". On 17th January, 1998, Godfrey Kisamba, the judgment-debtor, died in Mulago Hospital. However, before the suit was instituted against him, he had on 17/8/1993 by deed of gift donated to his wife, Christine Kisamba, and his children Billy Makanga, Namunugu Godfrey, Sebulime Godfrey, Namirembe Christine and Muyanja Gideon, his house situate at Mengo, Kisenyi and a Kibanja situate at Bakuli, Kampala. After his death, his widow Christine Kisamba and his brother John Mbabali Makanga, on 22/4/1999, obtained letters of Administration from the High Court to administer the estate of the judgment-debtor.

On 12/8/1999, a Deputy Registrar of the High Court issued a notice addressed to "Godfrey Kisamba" requiring him to appear in Court on 30/8/99 to show cause why execution should not issue. As noted already, the judgment debtor (Godfrey Kisamba) had by then died. Nevertheless on 3/9/1999 another Registrar of the High Court issued a warrant of attachment under 0.19 Rule 51 of the CP Rules ordering for the attachment of the judgment-debtor's aforementioned house at Mengo, Kisenyi, valued at shs.5m/=. As indicated already, the house had been donated to C. Kisamba and her children. The proposed sale of the house was advertised in the Uganda Gazette of 8th October, 1999. In the Gazette, John Kasule, a Court Bailiff, stated that after 30 days, the house would be sold "unless the defendant pays all money owed plus fees and costs".

On 15/11/99, the said John Kasule filed a return of the Court warrant and therein reported that the house had been sold on 10th November, 1999. It seems that either before or soon after the said sale, Christine Kisamba, received threats to evict her. So on 16th December, 1999, Christine Kisamba, who incidentally had by now become a coadministrator of the estate of the judgment-debtor, instituted objection proceedings seeking for orders to, inter alia, stop attachment and sale of the house and the Kibanja and also sought orders that the sale of the house and Kibanja be nullified. On 18/2/2000, the day of hearing the objection proceedings, the appellant, as respondent to the objection proceedings was present in Court but his lawyer was absent. His lawyer requested Court by letter for the hearing to be

adjourned. The request for adjournment was rejected by Katutsi, J, who thereafter heard the objection proceedings on basis of the affidavits and he granted it because:-

> **"by the tune of attachment the objector held the property on her own account that is to say she was in possession of the property on her own account".**

The judge also held that the objector was protected by the provisions of Order 19 Rule 55 of CP Rules. The learned judge ordered for the release of the property from attachment and sale. Unfortunately, although the learned judge had been requested to nullify the sale of the house, he did not nullify the sale which as already noted had taken place on 10/11/1999. The judgment creditor, the current appellant, contested the ruling and so he appealed to the Court of Appeal on the basis of eight grounds of appeal. The parties presented written arguments and only in respect of grounds 1 and 4. The rest of the grounds were abandoned.

In the Court of Appeal, ground one complained that the learned trial judge erred in law in entertaining a matter/suit where no Court fees was paid. The complaint in ground four was that the learned judge erred in law in releasing the property that was no longer under attachment and had been sold off. Engwau, JA, gave the lead judgment with which the other members of the Court of Appeal concurred. On the first ground the learned Justice of Appeal held that as the question of non-payment of Court fees had not been raised during the hearing of the proceedings, the trial judge could not be criticised for not ruling on it. The learned Justice of Appeal further held:

> *"that a complaint against non-payment of Court fees is a minor procedural and technical objection which does not and should not affect the adjudication of substantive justice as envisaged in Article 126(2)(e) of the 1995 Constitution of Uganda. The remedy for non-payment of Court fees would have been the invocation of Rule 6 of the Court Fees and Deposits Rules*
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> *(Cap.41) to order the defaulting party to pay the necessary fees to the Court".*

On ground four the learned Justice of Appeal upheld the trial judge to the effect that at the time when the property was attached, Christine Kisamba, the objector, was in possession of the property on her own account but not on trust for the judgment-debtor. He also concluded that the issuance of the warrant of attachment and sale of the property offended the clear provisions of Order 19 Rule 19(1)(b) which requires that before execution of a decree in

case of a deceased judgment- debtor, service of notice to show cause should first be served upon a legal representative of that judgment-debtor which was not done in this case. The other members of the Court of Appeal concurred. The appellant has now appealed against those two holdings by the Court of Appeal. There are three grounds of appeal.

The objector Christine Kisamba died before this appeal was filed. The appeal before us is now opposed on behalf of the objector by Stephen Kyeyune, her legal representative.

It is noteworthy that the first ground of appeal is in fact a reproduction of the first ground in the Court below namely that the learned Justices of Appeal erred in law in entertaining a matter where no Court fees were paid. In their written submissions, Messrs Lumweno & *Co,* Advocates, counsel for the appellant, virtually repeated the arguments presented in the Court of Appeal. Counsel argued that as no court fees were paid in the High Court when the respondent instituted the objection proceedings (Misc. Application 1611 of 1999) the ensuing court proceedings were a nullity. For this proposition learned counsel relied on ***Unta Exports Vs Customs (1970) EA.648, Makula International Vs Cardinal Emmanuel Nsubuga (1982) HCB*** *II* and on Rule 6 of Court Fees, Fines and Deposits Rule (SI.41-2). Learned counsel contended that because in the Court of Appeal neither the respondent nor her counsel gave cogent reasons why fees were not paid, the proviso to Rule 6 does not apply so as to allow the objector to pay the fees belatedly to validate the proceedings. Mr. Peter Kusiima, counsel for the respondent, supported the decisions of the courts below. He argued that since the question of non-payment of court fees was not raised before the trial judge, it was raised in Court of Appeal, as a new matter and an after thought, for which the courts below should not be blamed. He opined that because Christine Kisamba is now dead, it is difficult to establish whether or not court fees were paid.

Counsel himself did not represent her in the High Court. Counsel surmised that the objector could have even paid the fees and court officials might have omitted to make an endorsement on the case file. Therefore counsel submitted that in these circumstances, the proviso to Rule 6 is applicable. He urged that since the Court of Appeal omitted to order, which it should have ordered, for payment of requisite court fees, this Court should order for payment of the requisite fees.

With respect I am not persuaded by the arguments of counsel for the appellant. **I** think that the arguments of counsel for the respondent are sound. In my opinion the present case is distinguishable from that of ***UNTA Exports Ltd. Vs. Customs*** (1970) EA 648. It appears to me that the principle in the decision of ***Yese Ruzambira Vs. Kimbowa Builders*** & ***Construction Ltd. (1976) HCB 278*** covers this matter as does the proviso to Rule 6.

I have perused the High Court record filed in these proceedings. **I** find no reference in the appellant's affidavit which was a reply to that of the late Christine Kisamba, the objector, nor in any other document, complaining that no court fees had been paid in respect of the objection proceedings. The notice of motion instituting the objection proceedings was filed in the High Court by a different advocate, not the present one. The objector, Christine Kisamba, is herself dead and her legal representative has been substituted to enable the appeal to be prosecuted. There is no evidence to suggest that the legal representative knew or had any knowledge of how the notice of motion was filed in the High Court. It is apparent that Court officials who should know whether or not requisite court fees were paid have not been taken to task. Even if those officials were taken to task, it may turn out that they were to blame for failure to make appropriate endorsement on file indicating whether court fees were paid. It is difficult to imagine that Court officials in the High Court could have received the Court papers, opened the file and assigned a number to it (the notice of motion) without ensuring that Court fees were paid first before the papers could be accepted and filed.

Be that as it may, Justice Engwau relied on the decision of Manyindo J. as he then was, in ***Yese Ruzambira Vs. Kimbowa Builders and Construction Ltd.*** (1976) HCB 278 in which the learned Judge held that:

"Non payment of Court fees could not affect ***a Judgment entered by consent*** *and that the remedy for non-payment of fees was to rely on rule 6 of the Court Fees, Fines and Deposits Rules (Cap 41) to order the defaulting party to pay the necessary fees to the Court".*

I have already reproduced another portion of the passage in which the learned Justice of Appeal alluded to Art. 126(2)(e) of the 1995 Constitution and to Rule 6 of the Court Fees Rules.

The provisions of Rule 6 which the appellant's (and indeed respondent's) counsel relied on reads as follows:-

"No document in respect whereof a fee is payable shall be used in any legal proceeding, unless it shall have been initialled as aforesaid; or unless the Court shall be otherwise satisfied that the proper fees in respect thereof have been paid:

Provided that if any such document is through mistake or inadvertence received, filed or used in any Court without the *proper fees in respect thereof having been paid, the*

Court may, i f it thinks fit, order that such fees as it may direct be paid on such document, and upon such fees being paid the document and every proceeding relative thereto, shall be as valid as if the proper fees had been paid the first instance".

The proviso to Rule 6 gives discretionary power to court to make orders for a defaulting party to pay the proper fees. Such an order is done in the interest of justice and must be done judiciously. All circumstances of any particular case must be weighed. I cannot see a better situation than the facts of this case where the proviso to Rule 6 can be applied justifiably. In the result I think that ground one of the appeal must fail.

Ground 2 and 3 can be conveniently discussed together. The complaint in ground 2 is that the Justices of Appeal erred in law in releasing the property that was no longer under attachment and which had been disposed of. In ground 3 the appellant complains that the Justices of Appeal erred in law by entertaining an application for objection proceedings where the property, the subject matter of the said proceedings, had already been disposed of. These two grounds are in fact ground four of appeal in the Court of Appeal which stated that the learned trial judge had erred in law in releasing the property that was no longer under attachment and had been sold off. Basically the written arguments presented by the parties in the Court of Appeal in respect of ground four there have been reproduceed by the two parties in respect of the present grounds 2 and 3 in this appeal. Likewise, the law and

cases cited and relied on in the Court of Appeal are virtually the same cases and law relied on by the parties in their written arguments which are before us. Therefore the question that needs to be answered is whether the conclusions reached by the Court of Appeal were erroneous and if so whether they should be overturned.

The facts have already been set out. The findings of the two courts below are that on 17/8/1993 the judgment-debtor by deed donated to his wife and the children his house at Mengo Kisenyi and a Kibanja at Bakuli. That was long before the judgment-debtor became a debtor to the appellant and before the suit germane to these proceedings was filed in 1997. By the time consent judgment against the judgment-debtor was entered against the judgment-debtor on 11/8/1997, the judgment-debtor was dead and the suit property had long vested in the widow and the children. In law by the time the order of attachment was issued on 3/9/1999 and the property was subsequently sold on 10/11/1999, the property had long vested in the widow and the children who, indeed, were in physical occupation of the said property. The deed itself vested ownership of property in the widow and children on 17/8/93. The vesting was not conditional but immediate.

It appears to me the property for all intents and purposes belonged to the widow and her children before the death of the judgment-debtor. The property therefore did not form part of the estate of the deceased and therefore was never liable to execution in satisfaction of the judgment-debt. I agree with the conclusions of the Court of Appeal that even if it were assumed that execution was levied against the widow as a coadministrator of the estate of the deceased, by virtue of 0.19 Rule 19(1)(b) of CP Rules,

" a notice to show cause why the house and Kibanja should not be sold before the purported execution and sale should have been issued and served on the administrators of the estate (Christine Kisamba and John Mbabali Makanga) as the legal representatives".

Rule 19(l)(b) is worded this way:-

19(1) "Where an application is made -

(b) against the legal representative of a party to the decree, the courts executing the decree shall issue a notice to the person against whom execution is applied for requiring him

to show cause, on a date to be fixed, why the decree should not be executed against him".

The rest of the provisions of the rule do not apply to the facts of this matter.

It is true that in paragraph 5 of the petition, in their joint petition for letters of administration, Christine Kisamba (the objector) and her joint petitioner, John Mbabali Makanga, stated that the deceased left a residential house at Mengo Kisenyi and a plot of land at Bakuli, Kampala. In the affidavit opposing the objection proceedings in the High Court, the present appellant relied on the contents of that para 5 of the petition to assert that the house and plot belonged to the judgment-debtor and he further asserted that the deed of gift dated 17/8/ 1993 was concocted by the widow, the objector. Both the trial judge and the Court of Appeal did not accept that assertion. I find no sound basis for disagreeing. There is no evidence to support the appellant's claim that the deed of the gift is a concoction or a forgery. In her affidavit, the objector was positive that the house was given by her husband by the deed dated 17/8/1993. The decision of the trial judge depended on his judicial appreciation of the contents of the affidavits of the objector and that of the appellant, as a respondent then. The judge preferred to rely on the affidavit of the objector in preference to that of the appellant. In a way, the Court of Appeal upheld the preference of the trial judge. We have not been shown which errors either the trial judge or the Court of Appeal committed in the preferences.

The appellant's counsel relied on ***Intraship (U) Ltd. Vs. G. M. Combine (U) Ltd. and F. Mungereza HCCS*** No. 14/1999 (1994) III KALR 22, for the view that once an auctioneer has sold off all or most of the property attached in execution, no useful purpose would be served by making a release order or stopping execution proceedings. In that case objection proceedings were instituted when most of the property had been sold, and, like in this case, the auctioneer had made a return of the sale and filed the return on the Court file. Kireju, J. declined to issue a release order. On the other, hand the Courts below relied on the decision of the High Court of Kenya in ***Jandu Vs. Kirpar & Another (1975)*** EA 225 for the contrary view. Indeed, the respondent's counsel distinguished the I***ntraship Case*** (supra) from the present case in that in the former case the property sold was moveable property, and I find that that distinction is quite relevant to this matter, considering that the property in these proceedings is still intact and is occupied by the family of the deceased objector. I agree

with the opinion of the editors of ***Chitaley & Rao's*** code of Civil Procedure 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 and are not successful, the sale will then be made absolute.

I do not agree with the contention of counsel for the appellant that upholding the decisions of the two lower Courts will lead to a multiplicity of suits. Nor do I accept his other contention that the objection proceedings were designedly delayed and therefore, under 0.19 Rule 55, the High Court should have declined to investigate the objection. Attachment was advertised in Uganda Government Gazette on 8/10/1999. It h?rdly requires imagination to appreciate that the widow was most unlikely to have seen the advertisement in the gazette. Whatever the case, according to the court record, the sale took place on 10/11/99 and apparently without the widow having been served with notice of intention to sell. The widow only became aware of the purported sale when Court bailiffs threatened to evict her from the suit property. Clearly that was after the purported sale. She then lodged objections on 23/12/99 having initiated the same by swearing her affidavit on 16/12/1999. This was barely a month after the purported sale. This cannot be described as a designed delay especially when there is no evidence that she was aware of the date of attachment and of even the date of the subsequent sale. In all these circumstances, I find that both grounds 2 and 3 are not sound and both ought to fail.

For the foregoing reasons, I would dismiss this appeal with costs to the respondent in this court and below.

JUDGMENT OF KAROKORA. JSC.

I read in draft the judgment prepared by Tsekooko, JSC. I concur that the appeal ought to be dismissed with costs here and below. I also agree that if court fees were not paid by the objector, the respondent should pay it.

JUDGMENT OF ODER: - JSC

I have had the advantage of reading in draft the judgment of Tsekooko, J.S.C. I agree with him that the appeal should be dismissed and with the orders proposed by

him. As Karokora, Mulenga and Kanyeihamba, JJ.S.C. also agree, the orders shall be as proposed by Tsekooko, J.S.C.

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have read in draft, the judgment of my learned brother, Tsekooko. J.S.C, and I agree with him that this Appeal should

JUDGMENT OF MULENGA, JSC

I had benefit of reading in draft the judgment prepared by my learned brother Tsekooko JSC. I agree that the appeal ought to be dismissed with costs. I have nothing else to add.

Delivered at Mengo this 19th Day of June 2002.