

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

5 **MISCELLEANOUS APPLICATION NO. 638 OF 2016**

(ARSING OUT OF EMA 2342 OF 2014 AND CIVIL SUIT 166 OF 2014)

NALWEYISO MUKASA APPLICANT / OBJECTOR

10

VERSUS

1) ABAASI KABOGO JUDGMENT CREDITOR

2) HAJJI MOSES KALULE JUDGMENT DEBTOR

15

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

20 This application was made under 0.22rr55, 56 and 57, and 0.52 rr 1 and 2 C.P.R.

The Objector seeks orders of this court releasing her matrimonial property from attachment.

Costs of the application were also applied for.

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The application is supported by the affidavit of the Objector which was read and relied upon at the hearing.

Briefly, the grounds are that:-

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a) The land under attachment is her matrimonial property.

b) She is in possession of the land as wife of Haji Ahmed Mukasa and on account of her five children as the matrimonial home where she and the entire family were staying until 04.04.16 when they were evicted by court bailiffs.

5 c) The Objector was not party to the proceedings leading to the attachment of her matrimonial homestead.

d) There is a decree issued by the Circuit court of Nakawa in civil suit 132/2008, to the effect that, the said property is matrimonial property and not subject to sale without the prior
10 consent of the Applicant.

e) The Objector has not delayed in filing this application.

f) The Objector will suffer irreparable damage if the property is not released from attachment.
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The application was heard on 09.05.16.

Counsel for the Objector gave background to the application. He submitted that the Applicant and her husband Haji Ahmed Mukasa were owners of the property in issue which was their
20 matrimonial home. The property situate at Kajjansi, Kawooto Kitenda, also has rental units.

On 05.03.08. the husband of the Objector entered into an agreement and sold the property without the knowledge and consent of the Applicant. The property was sold to the Judgment debtor.
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When the judgment debtor tried to take possession, the Objector filed in Nakawa Circuit Court civil suit 132/2008, seeking a declaration that the property was a matrimonial home and was wrongfully sold to the Judgment Debtor.

30 On 20.10.08, the court found in favor of the Objector and issued the decree already referred to in this ruling – See Annexure__.

The sale was declared void and set aside and the Judgment Debtor was ordered not to _____. He was directed that the sum of Shs. 43,500,000/- be refunded to the Second Respondent / Judgment Debtor.

- 5 On 30.07.14, the Judgment Creditor Abaasi Kabogo got a judgment in default against the Judgment Debtor Moses Kalule in civil suit 166/14 for refund of Shs. 52,000,000/- that Judgment Debtor had allegedly borrowed from him and purportedly mortgaged the house decreed to the Objector. The Objector was not a party to the proceedings.
- 10 The Judgment Creditor there upon proceeded to attach the Objector's property although she was in occupation. She was evicted on 04.04.16 and the Judgment Creditor took possession of the property.

The Objector then filed this application seeking release of her matrimonial home from attachment on the ground that the property ought never to have been attached in execution.

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The property is currently held by the Bailiffs.

- The case of **Uganda Mineral Waters Ltd. vs. Amin Ivan and Kampala Minerals Ltd [1994 –**
- 20 **1995] HCB 87** was cited in support. The court held in that case that ***“court must consider the question as to whether on the date of attachment the Objector was in possession. If the judgment debtor was in possession, the inquiry will proceed no further. Also whether the Objector held the property on his/her own account or on account of the judgment debtor.”***

- 25 Counsel submitted that in the present case, the question of possession at the date of attachment is in favor of the Objector. She held the home on her own account as her matrimonial home and not on account of the Judgment Debtor.

- That where in the case of **Irari & Co. vs. Uganda Industries Ltd [1960] EA 318** it was held
- 30 that ***“the objector had failed to establish or prove that he was in possession.”*** In the present case, the Objector was in possession at the time of attachment.

Photographs of the eviction were placed on record by the Objector despite the objection of Counsel for the Judgment Creditor. – See Exhibits O₁- O₉.

It was prayed that property be released from attachment with costs to the Objector / Applicant.

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Counsel for the Judgment Creditor opposed the application relying on the affidavit in reply. He submitted that the Applicant conceded that she was evicted on 04.04.16 by Court Bailiffs under a warrant to give vacant possession to the purchaser.

10 There is a return of warrant Annexure DA by the Bailiff dated 04.04.16. The return indicates that the Judgment Creditor Abbas Kabogo was not a party to the eviction. The person who bought is Abbas Kawaage Mukasa. The Judgment Creditor is Abbas Kabogo and the Judgment Creditor has nothing to do with the eviction of the Applicant.

15 All the Judgment Creditor did was to apply for attachment and sale and court appointed a Bailiff, who sold and passed on the money to the Judgment Creditor.

That once his judgment was satisfied, he had no more role to play in the matter.

20 That this is confirmed by the return of warrant filed on 04.04.16 that the property was handed over to Mukasa Abbas Kawaage. The Judgment Creditor is not mentioned in any of the documents on the return.

Further that, the application is brought under 0.22 rr 55, 56 and 57 C.P.R, and it is therefore important to define when attachment begins and ends.

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That attachment began when the application of the Judgment Creditor is registered by the Registrar of Titles in Registry and a copy was pinned on the property to be sold – 0.22 r 51 C.P.R. - Referred also to Warrant of Attachment.

30 And that it ceases when the Judgment Debtor pays the money or the property is sold and the ____ is registered as the proprietor.

That a look at the certificate of title in the present case will show that the purchase was registered on the title.

The challenge if the sale can continue in another for ___ not by way of Objector proceedings.

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It was argued that the Applicant can no longer seek release of the property from attachment since it is owned by someone else who is not a party to the proceedings and his rights cannot be taken away without hearing from him. – 0.22 r 57 C.P.R.

10 Also that all attachments to the motions (Annextures) cannot be looked by court as they are not certified by the Commissioner of Oaths – r 8 Advocates Commission of Oaths __ and the Oaths Act.

15 And that the decree of Nakawa court referred to by Counsel for the Applicant talks of different property and not the property which is the subject of the warrant for vacant possession Block 383, Plot 53 56 land at Katete, Kawotoo Wakiso District. The decree of Nakawa Court only mentions land at Kajjansi.

There is no indication how the two lands are the same.

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The property in issue before this court is registered property and was free of any encumbrance. The application is accordingly misconceived as the matter has gone beyond attachment and yet Buyer was not made a party to the application.

25 The Applicant was on notice having seen the order for delivery of property to the purchaser but preferred not to join the purchaser to the application.

Counsel for the Applicant's submission that the property is in the hands of the Bailiff was attached as evidence from the Bar. That the return is very clear unless there is a claim of fraud.

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There is also acknowledgment from the buyer and an inventory of 04.04.16 stamped by the O.C Kajjansi Station.

Counsel prayed for the dismissal of the application with costs to the Judgment Creditor.

Counsel for the Judgment Debtor also opposed the application relying on the affidavit of the Judgment Debtor dated 04.05.16 especially paragraph 3 and 0.22 r 55 C.P.R.

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He argued that the property is no longer under attachment and therefore cannot be the subject of the present application. That the court has ceased to have ___ to investigate this matter which was deliberately delayed in being brought to court.

10 Annexure DA – copy of return of the warrant indicating property was delivered to purchaser.

Under 0.22 r 57, the court would order the property to either or partially be released from attachment and the current application cannot deliver those orders as the property is in the hands of a third party.

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It was also the argument of Counsel that it is not the Judgment Debtor who ___n property for attachment but the Judgment Creditor and therefore the Judgment Debtor should be absolved from such proceedings. And also that the Objector has not shown any claim or interest as it is not clear if the property in issue is where her interest is.

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That court will find it difficult to determine if the property attached is where her matrimonial home was and therefore she has no color of right or claim as Objector.

Counsel concluded that it is in the interests of justice that the application be dismissed with costs, and if any right of the Applicant exists, she can pursue them under 0.22 r 60 C.P.R.

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In rejoinder, Counsel for the Applicant insisted that, since Applicant was in possession at the time of attachment, court has reason to release property from attachment.

The Judgment Creditor had a duty to find out who was in possession of the property and the
30 relationship of the Judgment Debtor to Applicant.

The Applicant has no relationship to the Judgment Debtor at all and the law protects her.

The First Respondent did not put in an affidavit in reply therefore not contesting application.

The Applicant cannot be deprived of her interest in the property as she was not a party to the decree of 2014. Application was in possession at time of attachment and lost possession on 04.04.16. Judgment Debtor had title but was not in possession.

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Having listened to the submissions of all Counsel and upon giving them the best consideration, I can in the circumstances; I am constrained to agree with Counsel for the Applicant that the question to be answered is **whether on the date of attachment, the judgment debtor or Objector was in possession of the property.**

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In the present case, it is not disputed that it was the Objector in possession of the property. However, the circumstances the court issued warrant for vacant possession and the Objector was evicted from the property and it was taken over by the purchaser. The purchaser is not a party to the proceedings with vacant possession having been given to the buyer.

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The application is overtaken by events.

While the Applicant has reason to claim ownership of the property, decided cases have made it clear that ***“the scope of ___ to be carried out by court under 0.22 r 55 (1) and 56, and 57 is not for determining ownership that was threatened by attachment”*** and in this case by handing over vacant possession.

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Courts have had that at the end of Objector proceedings one of the parties must sue in order to determine the issue of the Title to the property. An order made under the rule is only provisional and a suit may be brought to claim the property notwithstanding the order. – See Uganda Mineral Waters Ltd vs. Piran & Another [1994-1995] HCB.

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30 **Flavia Senoga Anglin**

Judge

24.05.16