

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

MA NO. 1261 OF 2018

(Arising from EMA NO. 816 OF 2018)

(Arising from Criminal Session Cause No.001 of 2017)

BIIRA ESTHER KABASEKE KULE:.....OBJECTOR

VERSUS

1. UGANDA/DPP

2. CENTENARY RURAL

DEVELOPMENT BANK:.....JUDGMENT CREDITORS

AND

KULE EDGAR:.....CONVICT /JUDGMENT DEBTOR

BEFORE: HON JUSTICE DUNCAN GASWAGA

RULING

- [1] This is an application brought under Section 98 of the Civil Procedure Act and Orders 22 rules 55, 56& 57, Order 52 rule 1&3 of the Civil Procedure Rules SI 71-1 seeking for orders that; the execution relating to Kibuga Block 25 Plot 405 be set aside, property comprised

in Kibuga lock 25 Plot 405 be released from attachment and for costs of the application.

- [2] The brief background to this application is that the judgment debtor was convicted by Justice Lawrence Gidudu on the **24th of April 2017** in **High Court Criminal Session Case No. 01 of 2017** after pleading guilty to two different counts of embezzlement. He was sentenced to serve five years imprisonment on each one of the two counts which were to run concurrently, and in addition **to compensate the 2nd respondent Bank to the tune of UGX 600,000,000/- (Six Hundred Million Shillings Only)**. The respondents extracted a decree and applied to this Court for the attachment of the judgment debtor's house. However, before attachment could issue, the wife of the judgment debtor instituted these proceedings, objecting to the attachment of the house. She consequently secured a temporary stay of execution pending the hearing of this application. It is beyond the ground of contention that the applicant/objector and the judgment debtor/convict were and are still married and at the time of conviction of the judgment debtor all through to the time of the commencement of the attachment process, the two were living in the said house, the subject of this case, together with their children and dependants. The family had occupied the disputed premises since 2008.

- [3] At the hearing of the application a number of issues were raised by the parties to wit;

1) Whether the suit property was in possession of the objector at the time of attachment.

2) Whether the objector held possession of the suit property on her own account or in trust for the judgment debtor.

3) Whether the suit property is matrimonial property and whether attachment of the same would negatively affect the welfare of the children.

4) Whether the suit property is a Proceed of Crime as per Section 63 of the Anti-Corruption Act.

[4] The applicant was represented by Counsel Namara of M/s Namara, Twenda & Co. Advocates, the 1st respondent was represented by Counsel Kwezi Asimwe of the Office of the Director of Public Prosecutions, Anti-Corruption Division of the High Court, while the 2nd respondent was represented by Counsel Musiimenta Barbra of M/s Kampala Associated Advocates as for the judgment debtor was represented by Counsel Mulalira Faisal of M/s Nabukenya, Mulalira & Co. Advocates. The parties relied on written submissions and also furnished the court with a number of authorities for which the Court is grateful.

[5] **Issue 1 & 2**

1. Whether the suit property was in possession of the objector at the time of attachment.

2. Whether the objector held possession of the suit property on her own account or in trust for the judgment debtor.

All the Counsel preferred to argue issue 1&2 together. In regard to the first issue, counsel for the applicant submitted that the objector has been in possession of the suit property since 2008. That she is the wife to the judgment debtor. She referred this court to the loan agreements starting from page 28-52 of the application as loans that were acquired for the completion of the house. Counsel further referred the court to pages 53-56 showing payments for different

services and materials used in the construction of the said house and Pages 57-58 which were recordings in the applicant's personal diary for expenses incurred in the development of the property. Counsel further referred court to Page 60 of the application showing the eviction notice and stated that it was addressed to the occupant of the house which is a clear indicator that the applicant is resident on the suit property. She also referred court to pages 100-101 of the application showing pictures of the applicant and her family at the suit property.

- [6] Regarding possession of the Property, Counsel for the judgment debtor submitted that as per Order 22 rule 55, they are joint owners with the objector and not licensees or tenants. **See Article 33 of the Constitution of the Republic of Uganda, 1995.** That they have equal rights owing to the contribution of each parent. **See Julius Rwabinumi vs Hope Bahimbisomwe SCCA No. 10 of 2009 See also Katuramu v Katuramu HCT-01-CV-MA No. 026 of 2017,** specifically the liberal interpretation of contribution by Musene,J. Counsel also submitted that court should look at each property and its peculiar circumstances before making a confiscation order. That where there is lack of sufficient evidence to link the contribution from the proceeds of crime to the property or an expenditure towards the development of a legitimately acquired property but using proceeds of crime, such property shall under S.63, 64 & 65, upon leading evidence to rebut the presumption that the property, interest or expenditure does not represent proceeds of an offence, the property shall be released from attachment. Counsel further submitted that the standard of proof shall be on a balance of probabilities as per Section

63 A (5). In conclusion Counsel submitted that both respondents had not led congruent evidence through which court would exercise its jurisdiction to allow attachment herein. That even if the property were available, the respondents have not led evidence to guide court on how they would carve out the 50% (or any percentage) owned by the judgment debtor. He prayed to this court to return the application in the affirmative.

- [7] Counsel for the 1st respondent submitted that the criminal justice system has for long put emphasis on conviction and custodial sentences however this is not the case anymore. That courts are now removing from convicts what they earned from commission of crimes. This is proceeds of crime like land, cars e.t.c. **See Article 126 (2) c of the Constitution of the Republic of Uganda, 1995 and Section 126 (1) of the Trial on Indictments Act, Cap .** She further submitted that the judgment debtor/convict was sentenced by the Anti-Corruption Court and a compensation order of UGX 600,000,000 was made. That the respondents then moved to attach the suit property relying on Section 44(1) of the Civil Procedure Act. That the suit property is in the names of the judgment debtor/convict against whom the compensation order was made. **See Section 59 Registration of Titles Act.**
- [8] Regarding the possession, Counsel submitted that the applicant was holding the property in trust for the judgment debtor. That she (applicant) did not contribute to the property and cannot claim it. She referred Court to paragraph 5 of the 1st Respondent's submissions, stating that the applicant's assertion that putting the suit property under attachment is spreading criminal liability to the applicant as well

is not true. **See Stodgell v Stodgell [2009] EWCA Civ 243** page 5, paragraph 4, which dealt with confiscation under the United Kingdom legal regime. This is not spreading criminal liability to innocent family members but looking at the interest of the judgment debtor.

- [9] Counsel for the 2nd respondent submitted, regarding possession of the property, that the applicant was in possession of the suit property on account of or in trust for the judgment debtor. This is the gist of the application. That the applicant's case is that she has interest in the suit property by reason of contributions made towards the property and also by reason of being a wife to the judgment debtor. She submitted that the loan agreements attached are all for different purposes. The 1st loan agreement is of 2013 and clause 2(ii) of the same indicates that the purpose was for completion of the parent's house, the 2nd loan agreement for 13/08/2010 clause 2(ii) thereof states its purpose to be building and construction but does not specify which property; the 3rd loan agreement dated 26/05/2016, paragraph 5 specifically states that it was intended for loan acquisition and the 4th loan agreement dated 7/04/2017, paragraph 2 states its purpose to have been acquisition of working capital to add to the mobile money business. As shown above, most of the loan agreements do not relate to the suit property and the applicant cannot rely on those agreements to allege that she made a monetary contribution to the suit property. The loans relate to other properties as well. She further submitted that the receipts attached from page 53-58 of the application are not clear as to whether this expenditure was relating to the suit property as such the applicant furnished no proof of

contribution to the suit property. **See Teopista Mugenze v Pascal Byron Mugenze and Anor, C.S No. 166 of 1992**

- [10] It was also submitted that if the court was inclined to find that the property was in the possession of the Judgment debtor, then it was held in trust for the applicant. She invited court to find that actually if the applicant was indeed in possession of the suit property, then she was in possession of it in trust for the judgment debtor. **See Annexure 'C' of the 2nd Respondent's Affidavit- Certificate of Title in the names of judgment debtor.** She referred the court to Section 59 of the Registration of Titles Act and stated that the applicant does not have ownership of the suit property. **See David Muhenda & 3 Others v Margaret Kamuje, Civil Appeal No. 9 of 1999.** She prayed that the applicant's claim be disallowed and the application dismissed with costs to the 2nd Respondent.
- [11] In Rejoinder, Counsel for the applicant submitted that the eviction notice attached to the application at page 59 and the applicant's residential Identity Card attached to the affidavit in reply are a clear indication that the applicant resides in the house and that's where she was served the Court process from. That the applicant was in possession of the suit property at the time of attachment and when she was served with the eviction notice on 25/05/2018. She further submitted that the applicant was in possession of the suit property for herself. That it is matrimonial property where she has lived with her children since 2008.

Resolution of Issues 1 & 2

[12] Possession of Property by the Objector.

I will resolve issues one and two concurrently. As seen from the submissions of Counsel, the respondents contend that at the time of attachment, the property was not in the possession of the objector. The Rules of Civil Procedure which are relevant to this matter are; 55, 56 and 57 of Order 22. The said rules provide;

55. Investigation of claims to, and objections to attachment of attached property.

(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 aspects, 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. Evidence to be adduced by claimant.

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. Release of property from attachment.

Whereupon the investigation under rule 55 of this order the court is satisfied that for the reason stated in the claim or objection the property was not, when attached, in the possession of the judgment debtor or of some person in trust for him or her, or in the occupancy of a tenant or other person paying rent to him or her, being in the possession of the judgment debtor at that time, it was so in his or her possession not on his or her own account or as his or her own property, but on account of or in trust for some other person, or partly on his or her own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

- [13] In the case of **David Muhenda & 3others vs Margaret Kamuje SCCS 9/1999**, the Supreme Court of Uganda opined that the principles and procedures contained in these rules (above) may be summarized in the following ways, as had been authoritatively stated in **Chotobhai.M.Patel v Chaprabh Patel [1958] EA 743**, and **Uganda Mineral Waters Limited v Amin Dirani & Kampala Limited [1994-1995] HCB 87** that;

“Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such a 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 a party to the suit. The objector shall adduce evidence to show that at the date of the attachment he had some interest in the property attached. The question to be decided is, whether on the date of the attachment, the judgment debtor or 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. Questions of legal right and title are not relevant except so far as they 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.”

See Harilal & Co. v Buganda Industries Ltd [1960] 318 and Kasozi Ddamba v M/s Male Construction Service [1981] HCB 26

It is now apparent that when dealing with issues to do with objector proceedings two questions come to the fore;

- i) Whether at the time of attachment, the judgment debtor was in possession of the suit property,*
- ii) If so, whether they were in possession for themselves or in trust for another person.*

[14] I shall start with the first test to establish whether at the time of attachment it was the applicant/ objector who was in possession or for that matter in occupation of the suit/ demised premises. Evidence has been led to the effect that at the time of attachment the applicant and her children were living in the suit property, in one of the residential tenements, and had occupied it since 2008 as a family together with the judgment debtor/convict before he went to prison. Further, that the other tenements were being rented out and she continues to receive rent from two tenants. In support of this position the applicant stated that she had been served with the eviction notice by the respondents while in the same premises. Meaning that the respondents were alive to the fact that this was her residence or address. Apart from merely asserting that the objector was not in possession of the premises at the time of attachment the respondents did not substantiate nor adduce any evidence to disprove the objector's position which remains standing uncontroverted. With this evidence I find that the applicant has proved the first test to the satisfaction of the court i.e. that on the date of attachment she was in possession of the suit property.

[15] With regard to the second test, whether the objector held the property on her own account or in trust for the judgment debtor/ convict or some other person, the respondents have rejected the applicant's

contention that she has an interest in the suit property. The phrase “to hold in trust” has been defined as a term used to describe property held by a person who is not the owner but who is a trustee or an agent. **See The Law Dictionary, Featuring Black’s Law Dictionary, Free Online Legal Dictionary 2nd Ed.** The evidence on record is clear that the applicant/ objector and the judgment debtor/ convict are still husband and wife, having gotten married on 14/10/2006 as evidenced by the marriage Certificate (PE A1). It is also clear now that the couple and their children have lived in the said property, which they now refer to as their matrimonial home, since 2008. In her submissions, Ms. Kwezi Asimwe, Counsel for the first respondent ably analyzed the loan agreements attached to the application by the objector and proved that the purpose of most of the monies borrowed was not for acquisition, construction nor repair of the suit property but for other properties and other things as already indicated herein above. She further submitted that the objector having failed to furnish her contribution to the suit property clearly indicates that she had no interest in the said property whatsoever and must therefore be holding it in trust for the judgment debtor/ convict under whose sole names it is registered. Moreover, under Section 59 of the Registration of Titles Act, a Certificate of Title is conclusive evidence of ownership of a given property.

- [16] Be that as it may, this Court is not persuaded by Counsel’s argument for the following reasons. With these facts and in circumstances like these dealing with matrimonial or family property, provisions of Section 59 of the Registration of Titles Act should be applied very cautiously bearing in mind that although the judgment

debtor/convict's name is what solely appears on the certificate of title he might be holding the entire or part of the property, as seems to be the case herein, as head of family or on behalf of other people like the wife (and or children and dependants) whose interest may have accrued by virtue of being the wife, for the case of the objector, or through direct and or indirect contributions. This is a common occurrence or practice in marriages and families. **See Julius Rwabinumi v Hope Bahimbisomwe S.C.C.A No. 10 of 2009** and **Kagga v Kagga H.C.D.C No. 11 of 2005.** In my view, this would be a question of evidence. Corroborating the objector's above position, Mr. Mulalira Faizal, Counsel for the Judgment debtor submitted that after the judgment debtor getting married to the applicant in 2006, they raised money and together in 2008 acquired the suit property and embarked on developing it and it is now what they consider as their matrimonial home together with their children. None of the respondents contradicted this submission. Unfortunately, the parties, and most especially the judgment debtor have not been heard in detail on this particular aspect because the matter before court is not for determination of exact spousal contributions to the matrimonial property but whether the objector was holding the suit property registered in the judgment debtor's names on her own account or on behalf of the said judgment debtor.

- [17] In conclusion therefore and basing on the evidence before court, I find that in line with rule 56 (supra) the objector has satisfactorily demonstrated that on the date of attachment she was not only in possession or occupancy of the suit property but also had some interest in the suit property which she continues to hold on her own

account and not necessarily in trust for the judgment debtor/ convict or some other person. In such circumstances where the above two tests have been satisfied yet the respective interests (for the judgment debtor and objector) could not be readily ascertained basing on the insufficient material before court, it would be safer to allow the objection and release the said property from attachment pursuant to rule 57(supra). Otherwise grave injustice resulting into dispossession and homelessness would most likely be occasioned to totally innocent persons including minors who are so vulnerable. The first two issues are therefore answered in the affirmative and negative respectively.

- [18] The resolution of the above two issues in the affirmative and negative respectively, in my view, would be sufficient to conclude this entire case. However, given the entanglement, importance and novelty of the questions of law raised in this matter it would be prudent to have all the arguments advanced by counsel in respect of all the four issues analyzed and settled.

Issue 3

- [19] **Whether the suit property is matrimonial property and whether attachment of the same would negatively affect the welfare of the children.**

In regard to the third issue, counsel for the applicant submitted that the suit property is the applicant's matrimonial property. She relied on Article 26 of the Constitution of the Republic of Uganda, 1995 which protects the rights of individuals to own property either individually or in association with others. In regard to the fact that the property is

registered in the names of the judgment debtor she relied on Article 31(b) & 33(4) of the Constitution. She further referred court to the case of **Teopista Mugenzi vs Pascal Mugenzi HCCS 1166/1992.** She also stated that the applicant has interest in the property, she is a co-owner and wife and has made a contribution in that respect. It's their matrimonial property and as such it is not available for attachment. Concerning the welfare of the children she stated that the applicant has been living on the property with her children and they will be rendered homeless if the house is attached. She relied on the birth certificates, immunization cards and photos of the children. She further relied on Article 31(4) of the Constitution of the Republic of Uganda, 1995 which enjoins parents to care for their children. She further cited Section 5 of the Children Act and its schedule which are to the effect that the welfare of the children should be of paramount interest. She finally prayed that the welfare of the ten children resident in the home in question shouldn't be disadvantaged.

- [20] Counsel for the judgment debtor submitted that he takes exception to and strongly condemns the conduct of causing financial loss but that in spite of that, the convict's family should not suffer because of his criminal conduct, premised on the fact that criminal liability is personal and that if he has any other property, other than this one it should be available for attachment. Counsel Mulalira further referred the court to paragraph 7.11 of the submissions stating that the court in determining this matter ought to put into consideration the interests and rights of the children. That the children shall be left homeless if the execution is granted and that it should be emphasized that

children's rights are not merely an extension of their parent's rights that they are vulnerable and their rights too have to be catered for. **See Hilda Van der Burg & Anor v National Director of Public Prosecutions & Anor ,Constitutional Court of South Africa,** (page 25-28) decided on 12th June 2012.

- [21] Regarding the applicant's assertion that she contributed and that the suit property is matrimonial property, Counsel for the 1st respondent submitted that the loan agreements and receipts attached are for different properties located in Kasese. **See Annexure D-Loan Agreement** and specifically terms and Conditions in Paragraph 2(ii). The applicant can therefore not claim she used that money to develop the suit property. That the receipts and diary notes referred to on pages 57-59 bear no indication that they were used for the suit property. That there is no evidence to prove that the applicant contributed towards the house and as such, she has no claim in it.
- [22] Regarding children and the welfare principle, Counsel submitted that there are children involved in this case but at the same time there is also a victim of crime who is entitled to compensation which the Court awarded him. The victim has followed the law to realize his compensation by selling the suit property. The applicant raising the aspect of children is hiding behind them and victims of crime shouldn't suffer because there are children involved. **See Stodgell v Stodgell (Supra),** paragraph ii (iv). Counsel Kwezi Asiimwe further submitted that basing on the above case, if the wife has a share in the suit property, then her share should be removed and the balance, for the husband/ judgment debtor be used to satisfy the compensation order. Counsel concluded by stating that Court orders

are not in vain and therefore the victim cannot be left hanging and that no one should benefit from criminality.

Resolution of Issue 3

- [23] Until now courts continue to face the challenge of determining what constitutes matrimonial property. In **Muwanga vs. Kintu, High Court Divorce Appeal No.135 of 1997** Bossa, J (as she then was) stated that *“the property which the parties chose to call home and which they jointly contributed to”* is what constitutes matrimonial property. **Article 26(1) of the Constitution of the Republic of Uganda (1995)** recognizes the right of equality of men and women, be they married or not, to own property either individually or in association with others. This means that even in the context of marriage, the right to own property individually is preserved in the constitution as is the right of an individual to own property in association with others, who may include a spouse, children, siblings and or even business partners. **See Rwabinumi v Bahimbisomwe (supra)** where the Supreme Court, per Kisakye, JSC, also propounded that a spouse could prove that they contributed to the acquisition of the said property either through direct monetary or non-monetary contribution towards payment of the purchase price or mortgage instalments or its development; or indirectly through payment of other household bills and other family requirements including child care and maintenance and growing food for feeding the family. In **Katuramu vs Katuramu HCT-01-CV-MA No. 026 of 2017** Musene ,J followed the reasoning which had been adopted in the Kenyan case of **Kivuitu v Kivuitu [1990-1994] E.A 270** ,where Omolo, JA found that *“the wife indirectly*

contributed towards payment for household expenses, preparation of food, purchase of children's clothing, organizing children for school and generally enhanced the welfare of the family and that this amounted to a substantial indirect contribution of the property." While rejecting the submission that the respondent (wife) had not contributed monetarily in the **Katuramu case (supra)** the court held that *"this was not tenable because contribution does not only have to be monetary but can be in other forms. These include cooking, opening the gate, caring for the children, attending to the sick, receiving visitors, fetching water, making tea and washing clothes, tilling land, grazing animals and above all making love, which is the climax of a man's happiness on earth."*

[24] In the same vein. I find it imperative to bring into purview the provisions of **Section 38A (4)** of the Land Act Cap 227 which defines 'family land' as follows:

"Family land" means land-

- a. on which is situated the ordinary residence of a family;*
- b. on which is situated the ordinary residence of the family and from which the family derives sustenance*
- c. which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b)*

Or

d. which is treated as family land according to the norms, culture, customs, traditions or religion of the family.

- [25] In the present case there is uncontroverted evidence to prove that the objector and judgment debtor got married in 2006 and the judgment debtor corroborated the objector's evidence that they put money together to purchase the property in issue in 2008 on which they constructed the house now under attachment. As already declared herein above, some of the receipts filed by the objector are not in respect of this property. However, although the actual or distinct contribution or percentage of contribution attributed to each spouse (Judgment debtor and objector) is not ascertained the court is satisfied that each one of them has an interest in the property. The objector continues to take charge of the entire suit property even during this period when the judgment debtor is in prison. There is concrete evidence on record to confirm that this is the family's ordinary residence which the judgment debtor and objector chose to call home and to which they jointly contributed and stands on the family land. See, **Muwanga vs. Kintu**, **Kivuitu v Kivuitu**, **Katuramu v Katuramu** and **Rwabinumi v Bahimbisomwe** (supra).
- [26] The first respondent's counsel's proposal to have the objector/ wife's share (interest) removed and have the balance (i.e. judgment debtor/ convict/ husband's share) sold to satisfy the compensation order is untenable because there was no sufficient material before court to facilitate such division. But even if there was such material this court had not been invited to carry out such task. So, a mere declaration of

a spouse's interest without necessarily ascertaining it was enough to defeat the attachment of the suit property. Moreover, according to the valuation report this property is where the objector and judgment debtor's family resides in one of the tenements while the other two tenements are rented out and the rent is paid to the objector. A separation of the two tenements from the one occupied by the family would be cumbersome and indeed impossible to sale given its plan and most especially that it would not meet the requirements of **Section 9** of the **Condominium Property Act 2001**. Basing on the above discourse and authorities, I find that the suit property herein is matrimonial property.

- [27] The second limb of this issue is to find whether attachment of the suit property would negatively affect the welfare of the children. According to the **National Objective and Directive Principles of State Policy** as enshrined in the 1995 Constitution, under objective 19, *"the family is the natural and basic unit of society and is entitled to protection by society and the State."* **Article 31(4) of the Constitution of the Republic of Uganda, 1995** provides thus: *"it is the right and duty of parents to care for and bring up their children"*. In essence, the sanctity of the family should be protected and most especially the best interests and rights of the children which should never be looked at as merely an extension of their parents' rights. See **Hilda Van der Burg & anor vs. National Director of Public Prosecutions & anor, Constitutional Court of South Africa.** (Supra) In the same vein, the welfare of the children is of paramount importance and **Sections 3 and 5 of the Children Act, Cap 59** are instructive.

Section 3 states:

“The welfare of the child shall be of paramount consideration whenever the state, a court, a tribunal, a local authority or any person determines any question in respect to the upbringing of a child, the administration of a child’s property, or the application of any income arising from that administration.”

Section 5 provides: *“It shall be the duty of a parent, guardian or any person having custody of a child to maintain that child and in particular, that duty gives a child the right to education and guidance, immunization, adequate diet, clothing, shelter and medical attention.”*

- [28] There is undisputed evidence on record that the objector and judgment debtor were living on the suit property together with their children, all aged below eighteen years as evidenced by the photographs, birth certificates and immunization cards tendered in court. Even after the incarceration of the judgment debtor the objector as mother and primary care giver to these children has continued to take care of their welfare, utilizing the rent from the other two tenements to supplement the family income. Clearly, this family has lived here since 2008 and continues to derive its sustenance from this property. **See Section 38A (4) (b) of the Land Act.** It is also my considered view that the incarceration of the judgment debtor (parent) does not necessarily exonerate him from his duty to cater for the welfare of his children, including shelter, at least to the best of his ability in the prevailing circumstances.

[29] From the above analysis of the facts and the law it becomes apparent that if the suit property is attached and sold the family, especially the children will be evicted and rendered homeless. Courts of law should always act in the best interest of the child and avoid making orders that will jeopardize the stability of a family unit as well as the welfare of children who actually form the majority of the vulnerable group of our society and thus require adequate protection. The attachment of the suit property will have grave consequences on the innocent children and will appear as if the wife (objector) and the children are also being penalized for crimes committed by their husband/father, yet criminal liability is personal. Of course I say all this bearing in mind two things. One, impunity should never be condoned so that nobody benefits from criminality. Two, victims of crime, like the 2nd respondent/bank, should always be compensated so that the loss suffered is ameliorated. In conclusion therefore, I find that the suit property herein qualifies as matrimonial property and its attachment would adversely affect the welfare of the children. As such it cannot be and is not available for attachment. This issue is answered in the affirmative.

Issue 4

[30] ***Whether the suit property is a Proceed of Crime as per Section 63 of the Anti-Corruption Act, 2009.***

Counsel for the applicant submitted that the property, the subject of attachment was acquired before the offence was committed. And that according to Section 63 of the Anti-Corruption Act, confiscation is supposed to be for proceeds of crime. She submitted that as stated in paragraphs 4&5 of the applicant's affidavit in support of the

application the property in issue was acquired in 2008 and according to paragraph 10 of the affidavit the crimes were committed in 2016. That the judgment debtor caused loss of 600 million and it is clear that this property was not acquired out of the proceeds of that crime as per Section 63 of the Anti-Corruption Act. According to Section 63 of the Anti-Corruption Act, there is a rebuttable presumption that proceeds of crime cover the period of ten years before conviction. As such the property in issue still falls outside the ten years period since the conviction was on the 24/04/2017 and as such the property is not a proceed of crime and should be released from attachment.

- [31] Counsel for the judgment debtor submitted that Section 63 of the Anti-Corruption Act is in specific reference to benefits of crime. That property must have been acquired within ten years from the date of conviction and that the acquisition must have been a result of crime. That as per Section 63 A (b) there is no evidence to prove or infer that the convict used the stolen money i.e. proceeds of crime either directly or indirectly towards acquisition or development of that property. Also that the applicant had led evidence to prove her contribution through the receipts and her diary. He further submitted that the property was legitimately acquired prior to the committing of the offence and its development has no trace to the proceeds of the offence which was committed in 2016. Counsel further submitted that International Conventions like, **The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)**, **The United Nations Convention against Transnational Organized Crime**, **The United Nations Convention Against Corruption** and the **International Convention for the**

Suppression of the Financing of Terrorism indicate the principle of confiscation as being attached to proceeds of crime. They are also applicable where there is a hybrid of legitimately acquired property and money laundered. See Paper by Phillipa Bogere on **Transnational Criminal Justice and Crime Prevention: An International and African Perspective, Civil Recovery of corruptly acquired assets in Uganda.** He further submitted that as per page 65-94 of the application, prosecution led no evidence to tag the suit property to the crime that was committed. There was no background study that was done by prosecution that would inform court that in the last ten years the convict had lived a corrupt life to bring the property within the ambit of Section 63(A) (1) which is a rebuttable presumption.

- [32] He further submitted that on Page 65 of the application the Judge noted that the convict had worked with the bank for 14 years. Furthermore, that the Resident State Attorney stated that the convict had no record of previous convictions at page 80 of the application and at page 82 that he was a first offender. That therefore in the absence of evidence linking the suit property to the crime and owing to factors set out and accepted by the Trial Judge in the indictment, the convict gained no proceeds from this crime. All the money was taken away by conmen and the bag from which he was carrying the money turned out to be full of cassava flour. That he was a victim of conmen whom he could not even mention during trial for fear of his life. Counsel prayed to this court to look at and apply the purposive rule of interpretation (literal rule) while interpreting Section 63 A.

Indeed the purpose was for offenders not to benefit from what was stolen.

- [33] Regarding Section 63 A of the Anti-Corruption Act, Counsel for the 1st respondent submitted that the judgment debtor/applicant had claimed that the property was not a proceed of crime and therefore not subject of sale. She further submitted that the confiscation regime is under the Anti-Corruption Act and proceeds of a Crime are defined thereof. **See Section 1 of the Anti-Corruption Act.** Counsel further stated that under Section 54 of the Act, the DPP can make an application to court for confiscation. That the asset recovery regime is conviction based. She further stated that Section 63 A is restricted to assessment of benefits derived from crime. However, that what happened in this case is not that court ordered confiscation of property that was a proceed of crime, it is an order of compensation pursuant to **Section 126(1) of the Trial on Indictments Act.** This was not a confiscation order. See page 66, reasons and sentence of the Judge specifically at page 68 (p3) of second last paragraph. She submitted that once a compensation order is made in this way, then the judgment creditor will look for any property of the judgment debtor in line with Section 44(1) of the Civil Procedure Act. The judgment creditor will go ahead and make an application to court for property that can be sold and realize the proceeds or compensation. In this regard therefore, the property found is the suit property and as submitted, the applicant has no claim over the property.
- [34] Counsel for the 2nd respondent submitted that all the provisions of Section 63-64 of the Anti-Corruption Act were not applicable. That the convict was convicted of the offence of embezzlement on his own

plea of guilty. That Sections 63 and 63A are specific to the offence of Corruption and not embezzlement, the offence with which the judgment debtor was convicted. She referred this court to Section 2 of the Anti-Corruption Act which provides for the offence of Corruption and Section 19 thereof which provides for the offence of embezzlement. These are two separate and distinct offences with separate ingredients. That the provisions of Section 63 and 63A only apply to the offence of Corruption. She further submitted that the applicant had relied on Section 64 which allows the (Director of Public Prosecutions) or (Inspector General of Government) to apply to Court for a confiscation order and she stated that this order can be applied for where the convict has not satisfied an assessment order under Section 63 within 6 months. That neither the Director of Public Prosecutions nor Inspector General of Government applied to court for a confiscation order. That what the Court ordered was compensation. That the attachment therefore was in execution of a compensation order. **See R vs May**. Counsel further submitted that when a compensation order is given, the victim is allowed to attach any property in the name of the convict to regain what was taken from them.

Resolution of Issue 4

[35] I find it imperative to bring into purview all the above cited relevant legal provisions.

Section **63 of the Anti-Corruption Act, 2009** as amended is to the effect that;

“Where a person is convicted of an offence under this Act, the Court may make an order confiscating the

property that is the subject of or derived directly or indirectly from the Act of Corruption.”

Section 63A of the Amendment to the Act is to the effect that;
Presumption of Property or Interest.

“In assessing the benefit derived by a person from the offence of Corruption, it shall be a rebuttable presumption that-Any property or interest acquired by the convict within a period of ten years preceding his or her conviction represents a proceed or benefit derived from the offence of corruption.”

- [36] Proceeds of Crime have been defined to mean “*any economic advantage derived from or obtained directly or indirectly from a criminal offence or criminal offences.*” **See Article 1(a) Council Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.** It is important to note at this stage that counsel’s submissions were mostly centered on the question whether the suit property is a proceed of crime. Section 63 A of the Anti-Corruption Act specifically states that a confiscation order shall be made by court to recover proceeds of the Crime of **Corruption.** The matter before us arose from proceedings of embezzlement contrary to **Section 19 of the Anti-Corruption Act 2009,** as amended and not Corruption as Counsel for the applicant, the judgment debtor and the 1st respondent seem to state. The offences of Corruption and Embezzlement are

distinctly provided for under the Anti-Corruption Act. **Section 2 of the Anti-Corruption Act.**

- [37] It is further important to emphasize that the Judge while sentencing the convict made a **Compensation Order** and not a **Confiscation Order** as under Section 63 of the Anti-Corruption Act in the following terms: ***“The Convict is also ordered to compensate the Centenary Bank whose money he stole to the tune of 600 million only”***. Though not cited, the compensation order must have been made in line with **Section 126 of the Trial on Indictments Act, Cap 23** which states thus:

“When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable.”

- [38] On the same matter, **Article 126 (2) (c) of the Constitution of the Republic of Uganda, 1995** provides as follows:

“In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the

*following principles; (c) adequate compensation
shall be awarded to victims of wrongs.”*

- [39] As can be seen from above, although the Counsel concentrated so much of their submissions on the interpretation of Sections 63 and 63A of the Anti-corruption Act, 2009 the said provisions were not applicable to the facts at hand. Read together, the provisions are in respect of a confiscation order with a rebuttable presumption targeting the offender's property obtained within ten years before the conviction while the trial court herein had made a clear compensation order in the sum of Ugx. 600,000,000/= in respect of the defendant/convict's property. In other words, whereas the confiscation order envisaged under Section 63 and 63A is limited to proceeds of crime in that it may stretch only to cover what the convict may have acquired in the last ten years before their conviction (of course bearing in mind the rebuttable presumption), a compensation order is unlimited and operates within a much wider latitude (unless otherwise prescribed). First of all, a compensation order is not tied or limited to a particular crime or proceeds of crime or a specific period. A compensation order, as the one made in this case, will allow for a recovery of anything (house, car, money, debt etc) owned or registered in the convict's names to be made against him whether it had been acquired before or after the conviction or commission of the offence. I wish to emphasize that it is immaterial whether what is attached or confiscated to fulfill the debt is connected or not connected to the offence (or crime) in question. What matters is to see that losses caused to the victims of the crime are ameliorated by the perpetrators. It is better therefore that the recovery net is cast so

wide to fight impunity and ensure that nobody benefits from criminality. This issue is answered in the negative.

[40] **In a nutshell, for the reasons given above I find this objector application meritorious and grant it but without any order as to costs given its unique facts and circumstances involving a family property, wholly registered in the father/judgment debtor/convict's names, and the children's welfare at the centre. The suit property is not available for attachment and is therefore released from attachment pursuant to Order 22 rules 57 and 58 of the CPR. The execution order earlier issued in respect of the suit property is accordingly set aside. The respondents are advised to find another property, free of encumbrances, belonging to the Judgment debtor / convict for attachment.**

[41] Finally, before taking leave of this matter I wish to observe that this court acknowledges the novelty of the legal issues herein and the relatively new procedures in our legal system especially of forwarding judgments from the criminal and anti-corruption Divisions to the Execution and Bailiff's Division of the High Court for purposes of execution. Confiscation or recovery of assets or proceeds of crime from a defendant is one of the hardest tasks in a criminal trial as the process is always ferociously fought by the corrupt who are themselves usually very powerful and with high connections. The process is fraught with all sorts of challenges and obstacles ranging from corruption, comingling, record/file and evidence destruction, and delays to hiding away, disposing of the defendant's property/assets as well as transferring it into other people's names.

[42] It is therefore advisable that the prosecution (judgment creditor) endeavors to confiscate or attach assets or properties which are free of encumbrances to avoid objections, like those raised herein, and or further and unnecessary litigation which is costly. A successful confiscation would necessitate some intelligence work being done, through asset tracing and financial profiling of the suspect even before arrest and arraignment to establish his link with the targeted assets or any other assets. This should entail a general planning for the case right from investigations to arrest and prosecution where a strategy on how to get to the ultimate result of the case (e.g conviction, imprisonment and or compensation or confiscation) is determined from day one. For instance, apart from gathering such information, it should be clear why, when, how and by who a freezing order of the bank accounts or a confiscation order of the physical assets must be sought and made before, during or immediately after the trial proceedings. That is why many jurisdictions nowadays are turning to the prosecution-led investigations method especially in corruption cases. The prosecutor, who will finally appear at the frontline in court to conduct the case, is presented with the opportunity, as part of the team, to build the case from scratch while placing emphasis not only on the general outcome of the trial but also, and most importantly, on the material and evidence needed by court to effect a successful asset confiscation and recovery from the defendant.

Dated, signed and delivered at Kampala this 18th day of May 2020

Duncan Gaswaga

Judge