



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 0119 of 2019

In the matter between

**1. LUCY OKER LAGOL
2. INNOCENT ONEN
3. JIMMY OGOL JAMES**

APPELLANTS

And

**1. BONGA RONALD OKECH
2. ARACH DOREEN OGOL**

RESPONDENTS

Heard: 23 June, 2020.

Delivered: 30 October, 2020.

Civil Procedure — *Objector Proceedings* — In objector proceedings the sole question to be investigated is one of possession. The question to be decided is whether on the date of the attachment, the judgment-debtor or the objector was in possession. Where the court is satisfied that the property was in the possession of the objector, it must be found whether he or she held it on his or her own account or in trust for the judgment-debtor— Order 22 rule 60 of The Civil Procedure Rules — By virtue of this section, if a suit is not instituted to establish the right which is claimed in the objection, by the party against whom the order therein is made, that order is conclusive, but if a suit is so brought the order is subject to the result of such suit. The objector is required to adduce evidence to show that at the date of attachment he or she had “some interest” in the property attached — Questions of legal right and title are not relevant to objector proceedings, except in so far as they may affect the decision as to whether the possession is on account of or in trust for the judgment debtor or some other person.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

- [1] The background to the appeal is that by way of a specially endorsed plaint, the 1st respondent sued the 2nd respondent for recovery of a sum of shs. 19,745,000/= the former had borrowed from the latter and failed to re-pay. Judgment was on 12th July, 2019 entered in favour of the 1st respondent against the 2nd respondent, awarding him the sum claimed with interest thereon at the rate of 23% per annum from the date of default until payment in full. In execution of the resultant decree, a court bailiff attached a plot of unregistered land with a residential building thereon located at Te-Ogwali Aworanga village, Patuda Parish, Ongako sub-county in Omoro District and advertised it for sale.
- [2] On 11th November, 2011 the applicants filed an application seeking the release of the said property from attachment. They claimed that the property attached forms part of the estate of their late father, Hillary Ogol Lutanymoi. The applicants are beneficiaries of the said estate and thus customary owners of the land, yet neither the estate nor they were party to the proceedings that led to the attachment of that property. They claimed further that the residential house situated on that land was constructed jointly by the family and not by the 2nd respondent. The 2nd respondent relied on forged documents by which she claimed to have purchased the land and constructed the residential building thereon. A criminal prosecution for the offence of forgery had been commenced against her and it was still pending before the same court. The appellant claimed to be in physical possession of the land. The 2nd respondent is the wife of the 3rd appellant and was in occupation of the property in that capacity only. The property does not belong to her.

- [3] In his affidavit in reply, the respondent contended that the property attached belongs to the 2nd respondent and she was in physical possession at the time of attachment. She bought the property from a one Okumu Lawrence Olum on 14th January, 2012 and constructed the residential building thereon. The applicants had never been in possession of the property.

Ruling of the court below:

- [4] In his ruling delivered on 10th December, 2019 the trial magistrate found that unlike the respondent who presented documentary proof of the 2nd respondent's ownership of the land attached, the appellants had no evidence to support their claim of ownership. There is equally no evidence to support the contention that the 2nd respondent's documents of title were forged. The court found that on the balance of probabilities the property attached belongs to the 2nd respondent. She was in possession at the time of attachment and hence the application was dismissed with costs.

The grounds of appeal:

- [5] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;
1. The learned trial Magistrate erred in law and fact when he held that the appellants failed to prove that they are in possession of the attached property thereby reaching a wrong decision thus occasioning a miscarriage of justice.
 2. The learned trial Magistrate erred in law and fact when he held that the judgment debtor is the rightful owners of the attached property having proved ownership adducing the sale agreement unchallenged by the applicants.

3. The learned trial Magistrate erred in law and fact when he failed to release the property attached for sale whereas the respondent filed a suit for declaration of ownership of the attached property.

Arguments of Counsel for the appellant:

- [6] In their submissions, counsel for the appellant argued that the 2nd respondent is the wife of the 3rd appellant and was in occupation of the property in that capacity only. The pretty belongs to the estate of the late Hillary Ogol Lutanymoi in respect of which the 2nd respondent is not a beneficiary. The building located on the land was constructed for purpose of housing the entire family and were in possession at the time of attachment. The sale agreement that the court below relied upon to find the 2nd respondent to be owner of the property is still the subject of a pending criminal trial on accusations of forgery. The applicants have filed a suit against the 2nd respondent that seeks recovery of the land and a sale before the disposal of the suit would render the suit nugatory.

Arguments of Counsel for the respondents:

- [7] The respondents did not file any submissions in response.

Duties of a first appellate court:

- [8] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236*). In a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

- [9] In its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular, this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Grounds one two and three.

- [10] All the grounds of appeal will be considered concurrently. According to section 44 (1) of *The Civil Procedure Act*, all saleable property, movable or immovable, belonging to the judgment debtor, or over which or the profits of which he or she has a disposing power which he or she may exercise for his or her own benefit, whether the property be held in the name of the judgment debtor or by another person in trust for him or her or on his or her behalf, is liable to attachment and sale in execution of a decree. A judgment debtor's dwelling house is therefore attachable in execution of a decree.
- [11] The law on Objector proceedings has long been established. The sole question to be investigated is one of possession. The question to be decided is whether on the date of the attachment, the judgment-debtor or the objector was in possession. Where the court is satisfied that the property was in the possession of the objector, it must be found whether he or she held it on his or her own account or in trust for the judgment-debtor. The sole question to be investigated is, thus one of possession (see *Harilal & Co. v. Buganda Industries Ltd* [1960] EA 318 and *Trans Africa Assurance Co. Ltd. v. NSSF, S.C. Civil Appeal No. 1 of 1999*). The Court is bound to order the release of the attached property if it finds

possession in the objector on his account, even if there is title and disposing power remaining in the judgment-debtor.

- [12] Because they entail moving the court to stop the process of execution of a decree, objector proceedings are designed for the speedy disposal of emergent disputes regarding possession of what is otherwise attachable property, which arise in the course of execution of a decree. By virtue of Order 22 rule 60 of *The Civil Procedure Rules*, if a suit is not instituted to establish the right which is claimed in the objection, by the party against whom the order therein is made, that order is conclusive, but if a suit is so brought the order is subject to the result of such suit.
- [13] As a result, questions of legal right and title are not relevant to objector proceedings, except in so far as they may affect the decision as to whether the possession is on account of or in trust for the judgment debtor or some other person, yet the thrust of the appellants' argument relate to title rather than possession. The court is prohibited from going into complicated questions of title or the investigation of complicated questions such as fraud, trust and so on. A person laying such claims has the right to have the whole matter and all the questions which are in dispute fully investigated in an ordinary regular suit. In this case, the objectors have already instituted separate proceedings (H.C. Civil Suit No. 50 of 2019 filed on 27th November, 2019) to articulate or vindicate their claim of right to the land and to challenge the authenticity of the land purchase agreement dated 14th January, 2012 on basis of which the ownership and possession of the 2nd respondent is premised. That is where the questions of legal right title, fraud, trust and so on, are to be fully investigated.
- [14] Order 22 rule 56 of *The Civil Procedure Rules* requires the objector to adduce evidence to show that at the date of attachment he or she had "some interest" in the property attached. The emphasis is on the date of attachment and the objector must show his or her interest in the attached property on that date in

order to succeed. An equitable interest is as much an interest within the meaning of this rule as a legal interest in the property attached. The objector bears the burden of proving that he or she is entitled to or has a legal or equitable interest in the whole or part of the property attached in execution of a decree.

- [15] The appellants claimed that the property attached forms part of the un-administered estate of the late Hillary Ogol Lutanymoi and that they are the beneficiaries of that estate. In the first place, the law is that a beneficiary of an un-administered estate has no interest in the underlying assets themselves (see *Commissioner of Stamp Duties (Queensland) v. Livingston* [1965] AC 694). All that he or she has is a right to sue the administrator for the due administration of the estate. They obtain no proprietary interest in the assets constituting the estate until a distribution is actually made to them.
- [16] However, it is a cardinal right of beneficiaries of an un-administered estate that it will be properly administered (see *Marshall v. Kerr* [1995] 1 AC 148). The implication of this is that even though before administration beneficiaries of the intestate in question have no right, legal or equitable, to occupy the property without the permission of the personal representative of the deceased, they have an interest in its preservation until it is properly distributed to them according to the rules of intestacy. The beneficiary therefore has the right to sue only in exceptional circumstances.
- [17] Be that as it may, the applicants did not furnish proof of this apart from the assertion. They presented no evidence of objective facts validating that assertion such as a history of use, possession and similar activities undertaken by the late Hillary Ogol Lutanymoi on that land prior to his death. An assertion by itself is not proof of anything, or even a real argument. It only demonstrates that the person making the statement believes in it. It was never proved that the property attached formed part of the estate of the late Hillary Ogol Lutanymoi.

- [18] On the other hand, under Order 22 rule 57 of *The Civil Procedure Rules*, the Court has the mandate to release property from attachment once satisfied that it was not in the possession of the judgment debtor or in possession of the objector on account of or in trust of the judgment debtor, but for some other person (see *Khakale E. t/a New Elgon Textiles v. Banyamini W (in the matter of Mugunjo) [1976] HCB 31* and *Kasozi Ddamba v. M/s Male Construction Service Co., [1981] HCB 26*). The objector must show his or her possession of the attached property on that date of attachment in order to succeed. A release from attachment will be made if the Court is satisfied; (i) that the property was not, when attached, held by the judgment-debtor for himself or herself, or by some other person in trust for the judgment-debtor; or (ii) that the objector holds that property on his or her own account.
- [19] The term possession expresses the physical relation of control exercised by a person over a thing. Legal possession comprises the possibility of physical control, super-added with a will to exercise such control, provided such possession has not originated either by force or by fraud. The expression "possession" is a legal term and its proof varies with the nature of property under the scrutiny of the courts and it can be proved by credible oral evidence as well. Possession may be actual or constructive. For purposes of objector proceedings, a person with constructive possession stands in the same legal position as a person with actual possession. A person who knowingly has direct physical control of a property at a given time has actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is in constructive possession of it.
- [20] The question always is whether the objector exercised dominion over the property. This is determined by examining available records disclosing the name of the person by whom or on whose behalf the property is occupied. This information may be gathered from documents used in the ordinary course of

business as proof of possession or control of property, such as those which would enable the possessor of the document to transfer or receive the property thereby represented. A document which is used in the ordinary course of business as proof of possession would satisfy the definition as also a document which would enable the possessor to possess the property.

- [21] None of the applicants adduced evidence of actual possession of the property at the time of attachment. Neither did they adduce evidence of constructive possession, indirectly through any other person. On the other hand, it was the evidence of the respondent before the court below that the 2nd respondent was in actual possession of the property at the time of attachment. He relied on a land purchase agreement and receipts of construction material to characterise the 2nd respondent's possession as that of owner. Although conceding that the 2nd respondent was in possession at the material time, the applicants contended that her possession was not that of owner but was attributable only to her being the spouse of the 3rd applicant.
- [22] Whereas the respondent produced documents which the ordinary course of business serve as proof of possession and which would enable the possessor to possess the property as owner, the applicants never adduced evidence of the alleged marriage between the 2nd respondent and the 3rd applicant, apart from the assertion. They presented no evidence of objective facts validating that assertion such as; when the marriage was solemnised, the type of marriage and the duration of cohabitation as husband and wife on that property. An assertion by itself is not proof of anything, or even a real argument. It only demonstrates that the person making the statement believes in it. It was thus never proved that the 2nd respondent occupied the property attached only by virtue of being the 3rd applicant's spouse.
- [23] In objector proceedings, proof of possession as owner of the property attached is on the balance of probabilities. In the instant case the 1st respondent that showed

on a balance of probabilities that 2nd respondent held possession of the land attached on her own account as owner. Under Order 22 rule 58 of *The Civil Procedure Rules*, where the court is satisfied that the property was, at the time it was attached, in the possession of the judgment debtor as his or her own property and not on account of any other person, the court should disallow the claim.

Order:

[24] In the final result, there is no merit in the appeal. It is consequently dismissed. The costs of the appeal and of the court below are awarded to the respondents.

Delivered electronically this 30th day of October, 2020Stephen Mubiru.....

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellant : M/s Kunihiro and Co. Advocates.

For the respondent :