

UGANDA / JUDGMENT

Jurua v Create Consult Limited
(Miscellaneous Application 100 of
2023) [2024] UGHC 809 (29 August 2024)
[2024] UGHC 809

COURT
High Court of Uganda

BEFORE
Acellam, J

CASE / FILE NUMBER
Miscellaneous Application 100 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT ARUA

MISCELLANEOUS APPLICATION NO. 0100/2023 (ARISING FROM EXECUTION MISC.
APPLICATION NO. 014 OF 2023 AND HIGH COURT CIVIL SUIT NO. 0016 OF 2022)

JURUA KARILO ALIA:.....

VERSUS

CREATE CONSULT LTD:.....

BEFORE HON. JUSTICE COLLINS ACELLAM RULING

Brief Introduction

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This is an application brought by way of Notice of Motion under Section 98 of the Civil Procedure Act Cap 71 as amended and Order 50 rule 8 of the Civil Procedure Rules SI 71-1 for orders that;

1. The Learned Registrar's decision of 29th August 2023 granting a warrant of attachment and sale of property comprised in Leasehold Register Volume ARU6 Folio 14 Plot 20 Aniva Crescent, Arua city under EMA No. 014 of 2023 be set aside.

2. The Learned Registrar's decision of 29th August 2023 granting a warrant of attachment and sale of property comprised in Leasehold Register Volume ARU6 Folio 14 Plot 20 Aniva Crescent, Arua city be varied to substitute the property for another.
3. Costs of this application be provided for.

Background

It is contended that on 25th of May 2022 the Respondent filed Civil Suit No. 0016 of 2022 against the Applicant for recovery of the principal sum borrowed ugx 150,000,000 (Uganda shillings one hundred fifty million shillings only), interest on the principal amount of 10% per month, default penalty on the principal amount at the rate of 3% per day and costs of the suit. On the 25th of April 2023, judgement on admission of ugx 145,000,000 (Uganda shillings one hundred forty-five million only) was entered against the Applicant herein. On 8th June 2023, the Respondent filed EMA No. 14 of 2023 for execution of the orders granted. A Notice to Show Cause Why Execution Should not Issue was filed and served on the Applicant on the 21st of July 2023. On 29th August 2023, a warrant of attachment and sale of immovable property was granted against the Applicant for property comprised in Leasehold Register Volume ARU6 Folio 14 land at Niva cell, Arua municipality, Aniva Crescent, Plot No. 20 measuring 0.1310 hectares. A notice to vacate premises was served on the Applicant with a Daily Monitor Newspaper advert advertising a sale of the same property in 30 days by auction or private treaty. The Applicant now brings this application seeking Court to set aside the above orders.

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Grounds of the Application

The grounds on which this application is based on, are stated in the affidavits of the Applicant and Ajidiru Caroline. The affidavit of the Applicant deponed on 4th September 2023 states that he owes the Respondent ugx 145,000,000 (Uganda shillings one hundred forty-five million only) pursuant to a judgement entered against him by his own admission in HCCS No. 016/2022. The Respondent lodged EMA No. 014/2023 seeking an order of attachment and sale of the property. When served with a Notice to Show Cause Why Execution Should not Issue against him, he explained to Court that the land identified to be attached and sold is his residence and matrimonial home, so they need to utilize the alternative property he offered and his home isn't sold. Ajidiru Caroline in her affidavit deponed on 4th September 2023 states that she is the spouse of the Applicant, they got married customarily in December 2016 and started living on this property as a family. The Deputy Registrar granted a warrant of attachment and sale to the Respondent on this same property on 29th August 2023. On 4th September 2023, the Applicant was served with a notice requiring him and his family to vacate the property within 14 days or risk forceful eviction.

The Applicant contends that the said warrant of attachment and sale is aimed at rendering him destitute and homeless, thus should be set aside, and / or varied by substituting the property attached for sale.

Grounds in opposition

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In opposition, Ms. Bugaru Anzelina, Manager of the Respondent Company, in her affidavit deponed on 22nd September 2023, she contends that the market value of the alternative property offered by the Applicant is not sufficient to settle the decretal sum, the valuation report presented is false and lacks credibility, and the property identified and attached had already been offered as security for the loan by the Applicant. The property attached was vacant at the commencement of the execution, neither the Applicant nor his family were living on the property, and it had previously been rented out to tenants as stated in the affidavit of Abason Igamule. The affidavit deponed by Ajidiru Caroline is tainted with falsehoods and ought to be struck out. This application is improper before this Court, the Applicant didn't seek leave to appeal, there is no record of proceedings and also raised new grounds not pleaded at trial.

The Respondent concludes with a prayer that this application be dismissed with costs.

Grounds in Rejoinder

In rejoinder, the Applicant refutes the assertion by the Respondents that this application is improper before this Court. This application was premised in Order 50 rule 8 Civil Procedure Rules SI 71-1 and the Applicant didn't need to first apply for leave to appeal against the order of the Deputy Registrar. None disclosure of the Applicant that the property pledged was matrimonial property doesn't take away the fact that it indeed is. The evidence in the affidavit sworn by Ajidiru Caroline shows that the house on the property is a matrimonial home.

The Applicant concludes that the orders of the Deputy Registrar in EMA No. \$014/2023\$ ought to be set aside, and costs provided.

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Representation

During the hearing, the Applicant was represented by M/S Manzi & Co. Advocates whereas the Respondent was represented by M/S Buga & Co. Advocates.

Before I proceed to the merits of the application, I want to note that I have perused through the application and all the supporting documents or affidavit and affidavit in reply, Both Counsel for the Applicant and Respondent filed their submissions which I have duly put into consideration to come up with this Ruling. There were rejoinders made on record. I shall now proceed to enlist the issue in contention.

<u>Issues</u>

Whether the application is proper before this Court?

Determination

Submission of Applicant

Counsel contends that this application is an appeal against the order of attachment and sale of immovable property, brought by a motion on notice as provided under Order 50 rule 8 Civil Procedure Rules SI 71-1. Counsel invokes Section 33 Judicature Act for remedies and also Section 79 (1) (b) of the CPR regarding an appeal against an order of the Registrar of the Court.

Counsel of the Applicant further states that under Order 50 rule 8 of the CPR, there is no need to first apply for leave to appeal against the orders of the Deputy Registrar. The appeals under Section 76 CPA which lie to the Court of Appeal from the High Court are the ones provided for. Counsel concludes that the application is proper before this Court and should be allowed.

Submission of Respondent

Counsel for the Respondent submits that this application is misconceived and bad in law. There is no instant right of appeal from the decision of the Registrar for execution issued under Order 22 rule 51 of the CPR for attachment and sale of immovable property. Such order is not provided for under Order 44 CPR. The Applicant ought to have applied for leave to appeal set out in Order 44 rule 22 CPR. The Applicant sought no leave to appeal, has not sought for or obtained record of proceedings and raised new grounds unpleaded in the matter before the Learned Deputy Registrar.

Counsel concludes that the instant application is bad in law, misconceived and a serious misdirection thus fatally defective and cannot be cured by Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995 as amended.

Consideration of Court

In the case of Sika Muhamad Jabil & 2 Others vs Abon Muzamil HC Misc. Civil Application No. 0071 of 2017, Justice Stephen Mubiru in his Ruling stated that; "Under Section 44 of the Civil Procedure Act, property liable to attachment and sale in execution of decree includes land belonging to the judgement debtor, whether it is

held in the name of the judgement debtor or by any other person in trust for him or her or on his or her behalf."

Order 50 rule 8 Civil Procedure Rules SI 71-1 grants an aggrieved party by the decision of the Registrar a right to appeal against the same to the Judge. The Applicant filed MA No. 0100 / 2023 appealing the decision of the Registrar who granted a warrant of attachment and sale of immovable property against the Applicant under Order 22 rule 51 CPR.

In light of the facts, Counsel for the Applicant argues that the right way of having the orders of the Learned Deputy Registrar reviewed was to institute an appeal against the orders under Order 50 rule 8 CPR by motion on notice and without any undue delay which he complied with fully.

In response, Counsel for the Respondent has provided authorities to show that the procedure adopted by the Applicant is misconceived, the evidence is marred with falsehoods and the application cannot stand.

Order 22 rule 55 provides for investigation of claims to, and objections to attachment of, attached property and states that;

- (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 / objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he/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.

The orders sought to be appealed / reviewed were granted under Order 22 rule 51 CPR and Order 22 rule 55 clearly provides for how to object to a warrant of attachment and sale order when granted. The proper procedure would therefore be objector proceedings under Order 22 rule 55 CPR and the following rules therein. The spouse or any other person with an interest in property attached for sale is given clear guidelines on how to prove and object to the same.

I therefore find that this application is not proper before this Court and Article 126 (2) (e) of the Constitution cannot be pleaded to cure it.

2. Whether the Learned Deputy Registrar's decision of 29th August 2023 granting a warrant of attachment and sale of property comprised in Leasehold Register Volume ARU6 Folio 14 Plot 20 Aniva crescent, Arua city can be varied to substitute the property for another.

Submission of the Applicant

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Counsel contends that the Applicant informed the Registrar of the court that the land attached is his residential and matrimonial home and Ajidiru Caroline, spouse of the

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Applicant in her affidavit states that they got married customarily in December 2016 and started residing on that land with the Applicant as husband and wife together with their children. Counsel for the Applicant cited authorities that the attachment of family land was illegal and made reference to Section 39 (1) (c) (i) of the Land Act Cap

Counsel concludes that the order of attachment and sale is not fair since there is an alternative plot of land that can be substituted for the property attached. The order also defeats the Applicant's wife's rights protected under the law.

Submission of Respondent

Counsel for the Respondent submits that the Applicant should have been aware that the natural consequence of pledging property as security and failure to make repayment is execution and attachment of the same property. The Applicant voluntarily pledged the property as security to borrow money which he derived benefit so he cannot at the same time challenge attachment of the same property pledged as security. Counsel made reference to the equitable maxim of approve and reprobate, often described as "blowing hot and cold" and provided authorities on the same.

Counsel concludes that no evidence has been adduced to prove existence a marriage between the Applicant and Ajidiru Caroline, that the property attached is matrimonial property cannot stand. The Respondent's affidavit in reply deponed by Abason Igamule clearly states that he was a tenant on the same property from October 2017 to July 2021, thus it is a commercial property and not a residential home. There is therefore no need to vary the decision of the Deputy Registrar and for Court to suffocate its own decree.

Consideration of Court

In the case of *Uganda vs Kato & Ors* (1976) HCB 2024, Court stated that the test of determining whether a marriage is customary is whether the union is treated as a marriage by the laws or customs of the nation, race or sect to which the parties belong.

In light of the facts, Counsel for the Applicant challenged the warrant of attachment and sale of the property because the Applicant informed Court that the property identified was matrimonial property, but the property was still attached under the warrant.

In response, Counsel for the Respondent contends that the property attached is a commercial property not matrimonial and since it was already pledged as security for the loan, the applicant cannot object to its attachment to vary the order.

Section 101 of the Evidence Act Cap 6 states that he who alleges the existence of a fact must prove. It is therefore the duty of the Applicant to prove on a balance of probabilities that the property attached is a matrimonial property and thus the order must be varied.

No evidence has been adduced on record to prove the existence of a marriage between the Applicant and Ajidiru Caroline, or that any matrimonial property exists as a result

Accordingly, the property comprised in Leasehold Register Volume ARU6 Folio 14 Plot 20 Aniva Crescent Arua city is not matrimonial property, and the warrant of attachment and sale granted by the Learned Deputy Registrar need not be varied or set

Costs of the suit

By virtue of Section 27 (2) of the Civil Procedure Act, costs follow the event, unless for some reason the court in its own discretion directs otherwise. A successful party can be denied costs if it proved that but for his or her conduct, the litigation could have been avoided. In the instant case, it appears to me that litigation has been dragged by the Applicant and it is for that reason that I award costs to the Respondent company.

In light of the above, I hereby dismiss this application, the orders of the Registrar stand, and the execution proceedings should proceed. Costs granted to the Respondent.

I so order.

JUDGE

Dated at Arua this 29th
day of August 2024 .
..... Collins Acellam

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