

UGANDA / JUDGMENT

Mbambu Grace v Baluku Christopher and Bwambale Tadeo (Miscellaneous Application 33 of 2024) [2025] UGHC 403 (10 March 2025) [2025] UGHC 403

COURT

High Court of Uganda

BEFORE

David S.L. Makumbi, J

CASE / FILE NUMBER

Miscellaneous Application 33 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KASESE

HCT-25-CV-MA-0033-2024

(ARISING FROM EXECUTION APPLICATION NO. 23 OF 2023)

(ARISING FROM TAXATION APPLICATION NO. 7 OF 2023)

(ARISING FROM HCT-01-LD-CA-0051-2014)

(ARISING FROM KAS-CV-CS-LD-CA-0074-2013)

MBAMBU GRACE=====APPLICANT/OBJECTOR

VERSUS

1. BALUKU CHRISTOPHER =====JUDGMENT CREDITOR/1ST RESPONDENT

2. BWAMBALE TADEO=====JUDGMENT DEBTOR/2ND RESPONDENT

BEFORE HON. JUSTICE DAVID S. L. MAKUMBI

Applicant represented by M/S Sibendire, Tayebwa and Co. Advocates

1st Respondent represented by M/S Spero Advocates

2nd Respondent did not enter appearance.

RULING**BACKGROUND:**

This Application is brought by way of Notice of Motion under Section 98 of the Civil Procedure Act; Order 22 Rules 55, 56 and 57 of the Civil Procedure Rules; and Order 52 Rules 1 and 2 of the Civil Procedure Rules by which the Applicant seeks the following orders:

1. The property that is the subject of a warrant/order of attachment dated 13th November 2024 in respect of Execution Case No. 23 of 2023 located in Kinyamaseke West Cell, Kinyamaseke Central Ward, Kinyamaseke Town Council, Kasese District neighbouring John Baita in the west, the road in the east, Franco Katsuba in the north and Banoba Samuel Police in the south be immediately released from attachment;
2. Costs of the Application be provided for.

The Application is supported by the affidavits of the Applicant Mbambu Grace, Baluku Patrick, Mulyangasu Paul and Masereka Josephat by which they aver that the Applicant and the 2nd Respondent were customarily married on 2nd March 2002 but had been living in cohabitation since 1997. They further averred that the subject property belonged to the Applicant/Objector as owner and spouse of the 2nd Respondent who is also judgment debtor and that furthermore the Applicant had contributed towards all the developments on the subject property which developments included a residential building and various crops.

It was also averred that the Applicant and all her children inclusive of five minor children are all resident on the subject property and that the property in question constitutes the matrimonial home of the Applicant and the 2nd Respondent. The subject property was therefore not owned by the 2nd Respondent despite staying there as spouse to the Applicant. The Applicant went on to state in her affidavit that the property was given to her by virtue of an agreement executed in 2011 by which the 2nd Respondent compensated the Applicant for money he had earlier borrowed.

One Baluku Patrick swore an affidavit by which he stated that he witnessed the execution of the 2011 agreement. Furthermore Masereka Josephat, a 17 year old minor child of the also swore an affidavit by which he stated that the Applicant, 2nd Respondent and all his siblings were resident on the subject property.

In response to the application, the 1st Respondent and Judgment Creditor Baluku Christopher swore an affidavit by which he contested the Applicant's claim to the subject property and stated that the application was a connivance by the Applicant and the 2nd Respondent to frustrate the fruits of the judgment in his favour. He further averred by way of preliminary objection that the applicant lacked locus standi and that the application was incurably defective for want of service within the required 21 days.

The 1st Respondent went on to state various grounds upon which he contested the Applicant's ownership of the subject property and that all the affidavits filed in support of the application were full of falsehoods and prayed that the application be dismissed with costs.

The Applicant filed an Affidavit in Rejoinder by which she stated that the 1st Respondent's Affidavit in Reply was filed out of time and ought to be struck out and went on to aver that she was in possession of the subject property. She further denied that her evidence was based on connivance of falsehoods and maintained that she was in possession of the property in question and that the 1st Respondent was aware of the same at attachment.

Submissions:

Counsel for the Applicant cited the cases of **Biira Esther Kabaseke Kule v DPP and Another – MA No. 1261 of 2018** and **David Muhenda and 3 Others v Margaret Kamuje SCCA No. 9 of 1999** to lay down the foundation for objector proceedings.

Counsel then laid out the following issues for determination of the Court:

1. Whether the suit property was in the possession of the objector at the time of attachment.
2. Whether the objector was in possession in her own right or in trust for the judgment debtor.
3. Whether the suit property was matrimonial property and whether attachment of the same would affect the welfare of the children.
4. Remedies available.

Counsel went on to argue that the Applicant was in possession of the subject property from 2002 on the basis of her customary marriage to the 2nd Respondent as evidenced by the supporting affidavits.

Counsel went on to argue that the evidence in the matter established the fact that the property in issue belonged to the Applicant and was not being held in trust for the judgment debtor.

Counsel argues that while the issue of the property being matrimonial property not necessarily relevant it was still raised as an alternative by way of alternative argument to show that even if the Applicant were not the owner of the property she would still be entitled to the property on grounds that it was a matrimonial home. He went on to cite the decision of the Court in the **Biira Esther Kabaseke Kule** case cited above wherein the Court found that the suit property was matrimonial property and could not therefore be subject to attachment.

Counsel summed up the arguments stating that under Order 22 Rule 57 of the Civil Procedure Rules property found not to have been in the possession of the judgment debtor on his own account or in possession of another person on account of the judgment debtor then the property should be released from attachment.

Counsel for the 1st Respondent and judgment creditor argued in reply raising preliminary objections to the effect that the application was not served within the 21 days required by law. He argued that while the application had been endorsed on the 12th of December 2024 there was no proof of service on the 1st Respondent within 21 days and that the 1st Respondent had only discovered the application on 21st January 2025 while following up execution. Counsel cited Order 49 Rule 2 and Order 5 Rule 1(2) of the Civil Procedure Rules and various decided cases on the issue.

Counsel further argued by way of preliminary objection that the Applicant lacked locus standi in the matter as it is clear from the 2011 agreement that the land in question was bought for the children of the applicant and was never purchased in her own right. To the extent of the two objections Counsel prayed that the application be dismissed.

Counsel then went on to argue without prejudice that the Applicant did not own the suit land and that furthermore there were contradictions with respect to the location of the land in question. Counsel argued that even if there were no contradictions regarding the location of the suit land the agreement by which the Applicant claimed ownership of the suit land was in favour of her children who did not appear as objectors in this matter.

Counsel for the Applicant raised a preliminary objection and argued by way of reply to the preliminary objections raised by the 1st Respondent and also argued in rejoinder. As concerns the preliminary objection Counsel raised a cited the decision of the court in **Bollore Transport and Logistics Ltd v Tulsa Investments Ltd – HCMA 574 of 2021** to argue that the Affidavit in reply was filed out of time and ought to be struck out.

Counsel for the Applicant then argued in response to the Respondent's preliminary objection on service and insisted that service had been properly effected on the Court Bailiff responsible for execution of the decree on 13th December 2024 as well as the 1st Respondent's wife on 16th December 2024. Counsel further argued that even if service had not been effective the fact that the 1st Respondent conceded to learning about the application on 21st December fell within the exclusion period specified under Order 51 Rule 4 which excludes the period of 24th December to 15th January for the computation of time.

As concerns the preliminary objection on locus standi Counsel for the Applicant argued that from the 1st Respondent's own admission in Paragraph 11(f) he recognized the Applicant's interest in the property on grounds that it was a matrimonial home despite disputing her purchase of the same. To that extent he argued that the preliminary objection on locus standi was devoid of merit.

Counsel went on to argue that the question of the location of the property was neither a contradiction nor in dispute as the description of the neighbours to the property remained consistent regardless. Furthermore the question of reference to Kyesero I Cell and Kinyamaseke I Cell interchangeably did not amount to an inconsistency because Kinyamaseke I Cell was curved out of Kyesero I Cell.

As concerns ownership Counsel for the Applicant rejoined that there was nothing to controvert the Applicant's evidence of ownership and that furthermore the 1st Respondent did not deny that the Applicant was in possession of the property as a spouse and that her minor children live there. Counsel reiterated the holding in the **Biira Esther Kabaseke Kule** case cited above that suit property which qualified as a matrimonial home could not qualify as matrimonial property.

Counsel for the 1st Respondent then argued in reply to the Applicant's preliminary objection and in rejoinder to the response to the Applicant's preliminary objections.

As concerns the 1st Respondent's preliminary objection on the affidavit in reply being filed outside time Counsel argued that there was no proof that the persons served with the Notice of Motion were agents or family members of the 1st Respondent and that furthermore even for service on family members or agents service can only be done if the actual party cannot be found. Counsel argued that this was not disclosed in the affidavit of service. To that extent he argued that the 1st Respondent was not served as alleged by the Applicant and that the preliminary objection on the failure to respond in time be overruled.

Counsel further submitted in rejoinder concerning Order 51 Rule 4 and Rule 1 is restricted to amending, delivering or filing any pleading and not service of Notice of Motion which is governed by Order 5 Rule 1 and Order 49 Rule 2 of the Civil Procedure Rules.

As concerns locus standi, Counsel submitted that the purchase agreement was clear and that therefore the applicant could not approbate and reprobate by claiming both as purchaser and by virtue of being a spouse in a matrimonial home. This meant that she was not clear and could not therefore have locus in the matter.

ANALYSIS AND RESOLUTION OF THE APPLICATION:

In this matter both the Applicant and 2nd Respondent raised preliminary objections which objections I shall first address before continuing to the substantive merits of the application. The preliminary objections as raised by the 1st Respondent and Applicant are as follows:

1. The 1st Respondent objected to the validity of the application on grounds that it was not served within the 21 days required for service of Notices of Motion.
2. The 1st Respondent objected to the validity of the application on grounds that the Applicant lacked locus standi.
3. The Applicant objected to the 1st Respondent's Affidavit in Reply on grounds that it was filed out of time and ought to be struck out.

Resolution of Preliminary Objections:

As concerns the failure to serve the application within 21 days, the Counsel for the 1st Respondent argued that the 1st Respondent had never been effectively served and that the applicant had only become aware of the application on 21st January 2025 while following up execution of the court decree. Counsel further argued that even the service on the Court Bailiff

and the 1st Respondent's wife was not valid because the Court Bailiff was not an agent of the 1st Respondent and there was no proof that the 1st Respondent could not be found to warrant service on his wife. Counsel for the Applicant argued that service on the Court Bailiff and the 1st Respondent had been effected within the 21 days and that the service was valid to that extent.

I have considered the circumstances on record concerning service of this application on the Respondents. The Application itself was endorsed by Court on 12th December 2024 and therefore the period for service as established in Orders 49 Rule 2 and Order 5 Rule 1(2) started to run with effect from that date. According to Paragraphs 2-5 of the Affidavit of Service on record sworn by Kanyabungu Francis, he effected service on the 1st Respondent at Bamwenda Court Bailiffs and Auctioneers on 13th November 2024. I took this to be a careless mistake as the reference to 13th November 2024 referred to the said date as the same date referred to in Paragraph 2 as 13th December 2024 when the process server received the Notice of Motion for service. The date in Paragraph 3 was therefore intended to be reflected as 13th December 2024 when considered in the context of Paragraph 2 of the said affidavit.

I have considered the question of service in this matter carefully. What is clear from the Affidavit of Service is that the 1st Respondent as a person was never served personally. Service was effected at his known office premises and on his wife at his home. The 1st Respondent himself claims to have become aware of the application on 21st January 2025 while following up execution at the Court. The date on which the 1st Respondent claimed to have become aware of the application falls within the 21 day time limit because Order 51 Rule 4 specifically excludes the computation of time between 24th December and 15th January. Therefore by computation, there were 11 days between 12th December 2024 and 23rd December 2024. With the exclusion of 24th December 2024 to 15th January 2025, there were a further 10 days left from 16th January 2025 up to 26th January 2025. This meant that the 1st Respondent became aware of the application within the legally mandated time for service of the same. As much as the 1st Respondent contested the fact that service was not effected on him personally, when I consider the fact that he became aware of the application within the time established for service and even filed an Affidavit in Reply I am inclined to consider the failure to serve him personally as a technicality within the meaning of Article 126(2)(e) of the Constitution. The service on his wife and at his office premises was within the period stipulated in Order 5 Rule 1(2) of the Civil Procedure Rules. In my view there is no manifest injustice apparent from the failure to serve the 1st Respondent personally especially since he was able to respond to the application. It would be a different matter if he had not been able to respond to the application.

I therefore find that the substantive merits of the application outweigh the technicality raised by the 1st Respondent concerning the failure to serve him personally. I also find that service on the 1st Respondent was effected within the time specified in the Civil Procedure Rules despite not being personally effected on him. This objection is therefore overruled.

As concerns the question of locus standi in this matter the 1st Respondent contended that the Applicant lacked locus standi in as much as the agreement that the Applicant placed reliance to prove her personal interest in the property proved that the property in issue was acquired for her

children and not in her own right. I have taken into account the agreement and its translation annexed as “A” and “B” to the Applicant’s Affidavit in Support and while I do agree that it does not establish for her a direct right of ownership, it is also apparent from particularly Paragraph 14 of the Applicant’s affidavit that she also claims a right to the property as a matrimonial home where she resides with the 2nd Respondent and their minor children. The fact of the matrimonial nature of the home is not contested anywhere in the preliminary objection by the 1st Respondent. To that extent I do find that the Applicant has locus standi in this matter by virtue of her interest in the property as a matrimonial home. I do therefore overrule the preliminary objection of the 1st Respondent to the Applicant’s locus standi in this matter.

As concerns the Applicant’s preliminary objection to the 1st Respondent’s Affidavit with regard to the Affidavit in Reply being served out of time, Counsel for the Applicant cited the decision in **Bollore Transport & Logistics Ltd v Tulsa Investments Ltd – HCMA 574 of 2021** as the basis for this objection. In that case my learned brother Justice Wejuli Wabwire found that an affidavit in reply to an application filed out of time was a contravention of Order 12 Rule 3(2) of the Civil Procedure Rules and further cited the decision of His Lordship Justice Christopher Madrama in the case of **Stop and See (U) Ltd v Tropical Africa Bank Ltd – HCMA (Commercial Division) 333 of 2010** in this regard.

I have considered the afore-mentioned cases in the context of the matter before this court. The Application before this Court is matter of Objector Proceedings under Order 22 Rule 55 of the Civil Procedure Rules. When one considers Order 12 Rule 3(2), the context of the whole rule applies to interlocutory applications made immediately after Alternative Dispute Resolution proceedings or the Scheduling Conference. The rule in question cannot therefore in my view be extended to apply to interlocutory applications arising from proceedings such as these objector proceedings which by their very nature arise from execution proceedings. It is my considered view that in the absence of specific legal provision to the contrary there is no time-frame applicable to affidavit evidence prepared in response to applications such as objector proceedings provided the same is laid before Court at any time before Court closes pleadings and renders its decision.

I therefore overrule the Applicant’s preliminary objection and find that the 1st Respondent’s Affidavit in Reply was filed in time.

Having disposed of the preliminary objections raised in the application I now proceed to address the substantive merits of the application.

Merits of the Application:

The application in this matter is primarily founded on Order 22 Rule 55 of the Civil Procedure Rules by which any party not being a party to the suit but claiming an interest in a property attached in execution of a decree can object to the attachment of the said property as if they were a party to the suit. The Court shall then proceed to investigate the claim or objection provided that the claim or objection was not designedly delayed.

From the rule above what is clear is that for a party not being a party to a suit to be able to object to the attachment of a property in execution of a decree is that they must have an interest in the property. In the case of **David Muhenda & 3 Others v Margaret Kamuje – SCCS No. 9 of 1999** the Supreme Court citing the cases of **Chotobhai M. Patel v Chaprabh Patel (1958) EA 743**; **Sokempex Interstate Co. Ltd. v. Eurafro General Import and Export Co. Ltd. (1981) HCB 75**; and, **Uganda Mineral Waters Ltd v Amin Piran & Kampala Minerals Ltd (1994-1995) HCB 87** laid out the following guiding principles for objector proceedings arising out of Order 22 Rules 55, 56, 57, 58, 59 and 60.

1. 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.
2. The objector shall adduce evidence to show that at the date of the attachment he had some interest in the property attached.
3. The question to be decided is, whether on the date of the attachment, the judgment debtor or the 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.
4. Questions of legal right and title are not relevant except 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. To that extent the title may be part of the inquiry.

In this matter the Applicant claimed interest in the attached property both as an owner and as a spouse. According to evidence laid out in the Affidavit in Support to the application as well as the annexed documents the Applicant bought the matrimonial home from her husband the 2nd Respondent on 18th March 2011 as a form of settlement or compensation for land she had earlier sold in order to raise funds for treatment of the 2nd Respondent's mother. However, according to the translation of the agreement related to the purchase annexed to the 1st Respondent's Affidavit in Reply as "JC1" the land in question was bought for her children. This therefore suggests that the beneficial interest in the land after the purchase was vested in the children of the Applicant and 2nd Respondent. However, notwithstanding the terms of the 2011 agreement, according to the Supreme Court decision above, the question for this court to determine is one of possession and some interest in the property. Questions of legal right and title are irrelevant except to the extent that they affect the decision on whether possession of the property is on account of or in trust for the judgment debtor or some other person.

In this particular matter I note that as much as the Applicant purchased the matrimonial property for the benefit of her children, she also led evidence of possession by virtue of marriage since March 2002. This evidence was never contradicted or disputed by the 1st Respondent who, in disputing the Applicant's purchase of the property, referred to the same as matrimonial

property in Paragraph 11 of the Affidavit in Reply. The question therefore that remains for this Court to determine is whether the Applicant's interest in the property as a spouse amounted to possession and therefore a recognized interest in the property.

Section 22 of the Succession Act when read along with Rule 1 in Schedule 3 of the said act establishes a right of a surviving spouse to occupy a residential holding of a deceased spouse if the surviving spouse was ordinarily resident in the residential holding. In this matter as much as neither spouse is deceased the Succession Act does establish a legal interest for a spouse by virtue of their residing in the residential holding in the event of demise of one of the spouses. This right is clearly founded on possession as the Succession Act requires that the spouse be resident in the residential holding. In this matter the Applicant has demonstrated to this Court that she is resident in the property that is facing attachment in execution of the court decree and attached pictures proving the same. This evidence of possession as a spouse was not contested at all by the 1st Respondent.

It is my considered view that by proceeding with the attachment of the disputed property in this matter, the succession rights of the Applicant as a spouse resident in the disputed property inherent in Section 22 of the Succession Act would be adversely affected and yet the subject matter for which execution is sought did not originally involve her.

I therefore find that as at 13th November 2024 when this Court issued the Warrant of Attachment, the Applicant was and continues to be in possession of the suit property and also to hold interest in the same as a spouse resident in a residential holding within the meaning of Section 22 of the Succession Act. To that extent I do also find that the suit property in this matter which is the subject of a Warrant of Attachment in High Court Execution Cause No. 23 of 2023 at Kasese cannot be attached in execution of the decree of this Court in **HCT-01-CV-LD-CA-0051-2014** arising from **KAS-CO-CV-CS-LD-0074-2013**.

ORDER:

1. This Application is allowed with costs to the Applicant.
2. In accordance with Order 22 Rule 57 of the Civil Procedure Rules the suit property being subject of attachment vide **High Court Execution Cause No. 23 of 2023 at Kasese** is hereby wholly released from attachment.

David S. L. Makumbi

JUDGE

10/03/25

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