

UGANDA / JUDGMENT

Okwir v Okwir & Another

(Miscellaneous Application 101 of 2023)

[2024] UGHC 1077 (27 November 2024)

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COURT
High Court of Uganda

BEFORE
Okello, J

CASE / FILE NUMBER
Miscellaneous Application 101 of 2023

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**5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT LIRA
MISC APPLICATION NO. 101 OF 2023 (ARISING FROM CIVIL SUIT NO. 28 OF 2022)**

OKWIR SAMUEL..... APPLICANT/OBJECTOR

15 VERSUS OKWIR MORRISH.....JUDGMENT CREDITOR/RESPONDENT

AND

OGINI FARMERS COOPERATIVE SOCIETY LIMITED..... JUDGMENT
DEBTOR

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

30 RULING

By the objector application, the applicant seeks to have 30T/24H Maize Milling Machine/ Roller Mill released from attachment. The property was attached by court bailiff in execution of the decree of this court (Gaswaga,

35 J) given in Civil Suit No. 28 of 2022. It was a summary suit lodged by Mr. Morrish against Ogini Farmers Cooperative Society Limited. Mr. Morrish sought to recover Ugx 120,000,000 which Ogini had failed to pay being part of the consideration for the maize grains supplied to it. Ogini filed M. A 73/2022 for leave to appear and defend the summary suit but court

- 5 dismissed it with costs, finding no bonafide triable issue of fact or law. Court entered judgment on the summary suit, with costs, and interest of 8% on the decretal amount. The total amount that Mr. Morrish sought to realize by attachment of moveable property is Ugx 136, 373, 444.

- 10 The thrust of the Application is that the attached machine is the property of Mr. Samuel, the objector. He filed a supporting affidavit. Mr. Morrish the judgment creditor opposes the Application. Ogini, the Judgment debtor has had a dismal role save for supporting the objector's claim.
- 15 Mr. Egaru Emmanuel Omiat represents the objector while Mr. Mike Abwang Otim appears for the Judgment creditor. Dr. Makmot Kibwanga represents the Judgment debtor. All counsel addressed court orally.

Having perused the Motion and the affidavit for and against the 20 application, and having listened to the arguments by learned counsel, the main issue for determination is whether the machine ought to be released from attachment; and whether provision should be made for costs of this action.

25 To begin with, attachment and sale is one of the modes of execution of a decree or order of court rooted in section 38 (b) of the Civil Procedure Act Cap 282 (CPA). A court may order execution of its decree on the application

- 5 of a decree holder. Under section 2 of the CPA, a decree holder means a person in whose favour a decree has been passed or an order capable of execution has been made, and includes the assignee of the decree/order. Execution of decree/ order thus signifies the enforcement of or the giving effect to the Judgment or orders of a court of justice. See: *Words and*
- 10 *Phrases Legally Defined, Vol. 2, 3rd Ed., London and Butterworths 1989 at pp195-6*. In *Re Overseas Aviation Engineering (GB) Ltd [1962] 3 All ER 12, at p.16,* Lord Denning MR noted that the term 'execution' is familiar to lawyers as it means the process for enforcing or giving effect to the judgment of court. According to Black's Law Dictionary (9th Ed.) by
- 15 Bryan A. Garner, at page 145, attachment in execution thus means the seizing of a person's property to secure a Judgment or to be sold in satisfaction of a Judgment.

Under Order 22 rule 27 of the CPR every decree for the payment of money 20 may be executed by detention of the judgment debtor in civil prison or by attachment of his moveable property, or both. The above provision was adverted to by Lady Justice P. Kahigi Asiimwe in the case of **Lamu Pharma Limited Vs. Davimed Pharma Limited, and Wakiso Pharmacy Limited, Misc. Application No. 1332 of 2024**. I am in respectful agreement. In the 25 case at hand, the machine attached is a moveable property within the purview of section 44 (1) of the CPA. This section allows for attachment of property belonging to the Judgment debtor or property over which he has

5 a disposing power. The Machine at issue at least is not within the exempt category of things capable of being attached. I now proceed to examine the basis of the objection.

There is no doubt that the attachment happened on 26 October, 2023.

- 10 The Bailiff at the centre of the execution is Izoooh and Co. The objector contends that the machine belongs to him and not the judgment debtor. He claims it was attached from his factory, a business he established way back on 25 August, 2021. He asserts that the Judgment debtor was established much later on 02 December, 2021. The objector relies on
- 15 photographs indicating how the execution process was conducted. He similarly attaches documents showing how he purchased and imported the machine from China. The documents include an invoice, packing list, bill of lading, remittance of funds to the supplier through the objector's centenary bank account, and receipts issued by the supplier. I agree all
- 20 these documents are in the objector's name. The objector also relies on a tenancy agreement he executed as a tenant of a landlord of a warehousing premises located in Amuca Division, Lira- Kampala High Way, dated 25 August, 2021, to contend that the execution took place at the said rented premises.

On his part, the Judgment creditor asserts that due diligence was carried before the attachment. That the bailiff found that the judgment debtor was

5 in possession of the machine and was the one using it on its own account and not on account of the objector. Mr. Morrish also contends that the objector is a member of the judgment debtor which is a registered Cooperative Society. Reliance is placed on several documents such as a copy of the Motion in M. A 73 of 2022 for leave to appear and defend the 10 summary suit wherein the objector was mentioned as deponent of the affidavit to support the action by the Cooperative Society. Further reliance is placed on the Ruling in the said application in which leave was denied; and a copy of the bye-laws of the Cooperative Society showing, inter alia, the list of members (30 in total). Mr. Morrish further relies on coloured 15 photographs showing a sign post affixed next to a building. The sign post reads "Prime Flour manufactured by Ogini Grain Millers". Mr. Morrish relies on other photographs of packed Bags of Maize Flour Labelled "Prime Flour" and photographs of Milling Machine adjacent to the bags of prime flour. There are also photographs of two transport motor vehicles parked 20 near the sign post. One of the vehicles is laden with machine and the other with some items which are not easily identifiable because it is blurred. Men are seen standing behind one of vehicles laden with the invisible items. There is a separate photograph of a Uniformed Policeman and three men in civilian attire one of whom appears for the second time in another 25 photograph in which he was taking pictures of an unassembled machine inside a building. The other document attached by the Judgment creditor is the very tenancy agreement the objector is relying on.

- 5 I have studied all the material on record and the arguments of counsel without reproducing them here for brevity. I have also perused the files containing the head suit and the application for leave to appear and defend that suit. These files have given court deeper insights beyond the parties' affidavits in the present action which was quite limiting.
- 10

Regarding whether this court ought to release the machine from attachment, court is obliged to consider whether the objector has adduced evidence to show that on the date of the attachment he had some interest in the property attached. This is a requirement of Order 22 rule 56 of the 15 CPR which provides:

"O.22 rule 56: 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."

Order 22 rule 57 of the CPR guides on release of the property attached. Thus where upon the court investigation under Order 22 rule 55, court is satisfied that for the reason stated in the objection, the property was not, when attached, in the possession of the judgment debtor or of some person

25 in trust for him, or in the occupancy of a tenant or some other person paying rent to him, or that being in possession of the judgment debtor at that time, it was so in his possession not on his own account or as his own

5 property but on account of or in trust for some other person, the court shall make an order releasing the property wholly or to such an extent as it thinks fit, from attachment.

In the instant matter, the court investigation of the objection was confined

- 10 largely to the material before court. Court did not examine the objector because he was not in attendance. In any case Mr. Abwang Mike Otim informed court that he had earlier applied before Gaswaga J., to have the objector appear for cross examination but the objector made a no show. Whilst before me, learned counsel, however, abandoned the prayer he had
- 15 made before my noble learned brother, saying it was no longer necessary. The change in counsel's position meant he could not ask this court to strike out the objector's affidavit for absconding court for crossexamination. That said, under Order 22 rule 58 of the CPR court is obliged to refuse to release the property attached and disallow the claim where it
- 20 is satisfied that the property was, at the time it was attached, in the possession of the judgment debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him or in the occupancy of a tenant or other person paying rent to him.
- 25 It should be noted that rights to property attached may be determined by way of a suit. Thus under Order 22 rule 60 of the CPR where an objection is preferred, the party against whom an order is made may institute a suit
- 5 to establish the right he claims to the property in dispute, but, subject to the result of the suit, if any, the order (against the party against whom it is made, be it the claimant, the objector or the judgment creditor) shall be conclusive.

- 10 The provisions of the CPR which I have cited on the objector proceedings have been interpreted and applied in a plethora of cases. See: **Chotabhai M Patel Vs. Chatrabhai Patel & another** [1958] E. A 743; **Sokempex Interstate Co. Ltd Vs. Eurafro General Import and Export Co. Ltd** [1981] HCB 75; **Uganda Mineral Waters Ltd Vs. Amin Piran & Kampala**
 - 15 **Minerals Ltd** (1994-95) HCB 87; **Harilal & Co. Vs. Buganda Industries Ltd** [1960] 1 E. A 318; **David Muhenda & 3 others Vs. Margaret Kamuje**, Civil Appeal No. 9 of 1999 (SCU). The principles deducible from the above precedents, in my opinion, appear to be the following;
 - 20 i) Where an objection is made to the attachment of any property in execution on the ground that the property is not liable to attachment, court shall 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.
- ii) The objector must adduce evidence to show that at the date of the attachment he had some interest in the property attached.
- iii) The question to be decided is whether on the date of the attachment the judgment debtor or the objector was in possession, or where court is satisfied that the property was in possession of the objector, it must be found whether he held it 10 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.
 - iv) Questions of legal right and title are not relevant except so far as 15 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.

The term '*possession*' in the context of the objector proceedings is not 20 defined in the CPR. However, according to Black's law Dictionary, 9th Ed., at pages 1281-82, possession is the fact of having or holding property in one's power; the exercise of dominion over property. It is the right under which one may exercise control over something to the exclusion of all others. Oxford Dictionary of Law (p.371) equally considers the term 25 'possession' as denoting actual control of property combined with the intention to use it, rightly or wrongly as one's own. I agree. But possession is also a defacto relationship between a person and a thing. Possession is a question of fact. Although it is quite normal for possession and

- 5 ownership to go hand in hand, it need not be the case for in any case ownership is not a test in objector proceedings. I should perhaps observe that a person can be in possession without having ownership in the thing in question, for example, in the case of bailment of goods.

- 10 Courts have recognized the difficulty in the understanding and use of the term 'possession'. Thus in **Blakeman Vs. Associated Hotel Management Services Ltd, Civil Appeal No. 45 of 1984**, Madan J., noted that possession is a teasing topic whenever it arises. It does not hold one straight forward meaning; it has various meanings different in different 15 situations so that the ownership of property cannot be affixed with encumbered ease. Stable J., shares a similar view in his opinion in **Bank**

View Mill Ltd & others Vs. Nelson Corporation & Feyer & Co. (Nelson) Ltd (1942) 2 All E. R 476 at 486 (E&F). He observed that "the term possession is always giving rise to trouble." Similarly, Viscount Jowitt in

20 United States of America and Republic of France Vs. Dulfus Mieg et Compagnie, SA & Bank of England (1952) 1 All E. R 572 said, "the person having the right to immediate possession is, however, frequently referred in English law, has never worked out a comprehensively logical and extensive definition of 'possession'". To my mind, the context in which the 25 term 'possession' is used matters. I thus agree with the wisdom of Parker CJ in **Towers & Co. Ltd Vs. Gray (1961) 2 All E. R 68 at p.71** when he

5 stated "for my part, I approach this case on the basis that the meaning of possession depends on the context in which it is used."

In the instant matter, the documents I have reviewed show that, far from the objector's claim, the machine was attached whilst in possession and 10 therefore, control of Oginis Farmers Cooperatives Society Limited, the judgment debtor. The photographs I have referred to say it all. I need not repeat my comments. Suffice is to state that 30T/24H maize milling machine/roller mill were disassembled from the premises which is well

identified by the sign post. The sign post shows that the premises next to

- 15 it was being operated by Oginis for maize milling business. The maize flour packaged in bags were all marked with its name. I note that whereas the maize flour were equally attached in execution of the decree from the very premises housing the machine, there is no complaint about the attachment of the maize flour. The objector relies on documents of 20 purchase and importation of the machine to bolster his objection. And I think by relying on the documents, he appears to suggest, in the
- alternative (although not expressed) that, the machine, should court find it was in possession of the judgment debtor, then she held it on account of the objector.

To resolve the immediately the foregoing strand of argument, I have, as noted, considered material on record of court. I noted with interest that

- 5 the objector is first of all a member of the Cooperative Society- the judgment debtor. He is number one on the list of members, and an Engineer at that. I thus find Mr. Samuel to be a key member because evidence show that he is one of the two signatories to the Judgment debtor's Centenary Bank Account. His signature appears on the cheques

- 10 issued by the Cooperative Society to the Judgment Creditor which bounced. The bounced cheques were well used as the basis for the summary suit. The objector's signature has a striking resemblance with the one he used to sign the tenancy agreement and that on his Centenary Bank Application for Funds Transfer to China. It also strikingly resembles
- 15 the signature appended as a Member of the Cooperative Society at the registration of its Bye-laws. I have also noted that in M. A 73/ 2022 that was lodged by the Cooperative Society for leave to appear and defend the summary suit, Mr. Samuel the objector is himself mentioned as being the Applicant (perhaps accidentally). It was also averred in M. A 73/2022 that
- 20 his affidavit would be used to support the Motion. I note that ultimately, however, it was a one Otim Bonny who swore the supporting affidavit in M. A 73/2022. These, to court, is quite telling.

It seems to me, with respect, and on the material before court, that the 25 objector individually dealt with the Chinese supplier and imported the milling machine/roller not as his property but on account and for the benefit of the members of the Cooperative Society, he being one. The

- 5 process of the machine acquisition started in June 2021 when the Cooperative was not yet registered. Its registration with the Registrar of Cooperatives happened on 02 December, 2021 as shown by the Registrar's stamp. Before then, the members had submitted the very document to the District Commercial Officer Alebtong District Local Government who
- 10 stamped it on about 15 October, 2021 (the date is blurred). Although the date the members signed the Society's Bye-laws is not indicated, and although it is not known when they conceived and birthed the idea of forming the Cooperative Society, it can be deduced from the material on record that the members must have conceived their idea slightly before
- 15 June 2021 when the objector ordered for the machine from China. Otherwise it is inconceivable that the very machine could, on arrival in Lira, find its way to the premises occupied and identified with the Cooperative Society and not the objector. The objector has thus not proffered any explanation or demonstrated any arrangement he had with
- 20 the Cooperative Society beyond that reviewed by this court. He failed to prove that the judgment debtor was not in possession of the machine on the date of the attachment. The objector also failed to prove that the Judgment debtor was in possession of the machine on his account. In my opinion, the relationship and dealings between the objector and the 25 judgment debtor have been so intimate that the objector seized the
- opportunity of the present action to attempt a rescue mission. He wanted to remove the machine from the court's firm grip. I have not found the

- 5 objectors claim credible. I accordingly dismiss the application with costs to be paid by Mr. Samuel the Objector to Mr. Morrish the Judgment Creditor. The Judgment debtor had no role in this matter and it sided with the objector so no costs is available to it. I order that the process of sale of 30T/24H Maize Milling Machine/ Roller Mill which had stalled given the
- 10 earlier court interim and stay orders, be continued without further delay unless the money awards are fully paid to rescue the attached property. Thus the interim /substantive stay orders issued by the Assistant Registrar pending determination of the present objector application are lapsed.
- 15 Delivered, dated and signed in Court this 27 November, 2024

George Okello JUDGE

20 Ruling read in court

27th November, 2024

10:00am

25 Attendance

Applicant/ Objector absent Advocate for the Applicant/Objector (Mr. Egaru) absent Mr. Opito Geoffrey on brief for Mr. Mike Abwang Otim, for the JC/Respondent

30 Judgment Creditor/ Respondent present Judgment debtor absent Advocate for the Judgment debtor (Dr. Kibwanga) absent Mr. Esau Opiyo, Court Clerk

35 George Okello JUDGE

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