

Zimbe v Uganda and 2 Others
(Civil Appeal 11 of 2023) [2024]
UGHCLD 120 (29 April 2024)
[2024] UGHCLD 120

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3. SSEBATINDIRA GEORGE..... RESPONDENTS

BEFORE: HON. JUSTICE BERNARD NAMANYA**JUDGMENT****Introduction:**

1. This is an appeal against the decision of Her Worship Namusobya Sarah-Mutebi, Chief Magistrate, in Miscellaneous Application No.5 of 2022, Chief Magistrate's Court of Nabweru at Nabweru delivered on the 13 January 2023. The issue raised by the appeal is whether the court can set aside sale of immovable property sold by a court bailiff pursuant to a warrant of attachment and sale issued by court.

Background:

2. The background of this appeal is that on the 2 July 2019, the 2nd respondent (Kalema Michael) was convicted of cheating contrary to Section 307 of the Penal Code Act (Cap 120), and theft contrary to Sections 254 and 261 of the Penal Code Act (Cap 120). He was sentenced to prison, and was further ordered to compensate the complainant (Nagita Margret) a sum of Shs 50,000,000. When the 2nd respondent failed to compensate the complainant

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as ordered, immovable property being a kibanja located at Katooke "B", Nansana Municipality, Wakiso District was attached, and sold by a court bailiff to the 3rd respondent (Ssebatindira George).

- 3. The appellant (Zimbe Denis) sued the respondents in Miscellaneous Application No.5 of 2022, Chief Magistrate's Court of Nabweru at Nabweru contending that the immovable property was wrongly attached, and sold in execution of the orders of court. He sought an order that the property be released from attachment and that the sale of the property to the 3rd respondent be set aside. It is the appellant's case that he is the owner of the suit property which he purchased from Nansubuga Deborah, Sekamate Fred, Namazzi Teddy and Kizza Frida Mahoro; and has been in possession of the same since purchase. He adduced a sale agreement dated 29 March 2017 to prove that he purchased the suit property. He contended that the suit property was wrongfully attached by the court and sold to the 3rd respondent.
- 4. The 2nd respondent in his affidavit in reply to Misc. Application No.5 of 2022, stated that he once owned the suit property but he later sold it to Kizza Frida Mahoro and Namazzi Teddy, and that therefore, he does not have any interest in it. That the court erroneously attached the suit property because it did not belong to him anymore.

- 5. The 3rd respondent (Ssebatindira George) in his affidavit in reply to Misc. Application No.5 of 2022 averred that he found out about the impending sale of the suit property from court brokers, did the necessary due diligence to confirm the authenticity of the court order, and the existence of the property through the area Local Council 1 authorities. That when he was satisfied of the existence of the property, he bid for it, emerged the highest bidder, and paid a consideration of Shs 60,000,000 which money was paid

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in court. He claims that he was subsequently given vacant possession of the property, and has since occupied the same without any interference. That the appellant has never been in possession of the suit property, and is conniving with the 2nd respondent (Kalema Michael) who is his brother, to interfere with his quiet possession of the suit property.

- 6. The Attorney General on behalf of the 1st respondent, deposed an affidavit in reply stating that the suit property was sold in execution of a decree and that the objector proceedings were overtaken by events.
- 7. In his affidavit in rejoinder to the 3rd respondent's affidavit in reply, the appellant averred that he owns the suit property, and that at the time of the attachment and sale of the property, he was in possession of it. That after he purchased the suit property, he acquired possession and placed his agents; Alex Mukisa, Emmanuel Kiwalabye and Birabwa Harriet on it. He admitted that the 2nd respondent is his brother, but denied conniving with him to interfere with the 3rd respondent's interest. That the suit property was only fenced by the 3rd respondent but he is not in possession of it.

The findings of the lower court:

8. The learned Chief Magistrate found that Order 22 rules 55, 56 and 57 of the Civil Procedure Rules envisage where the property is subject to attachment but not property that has already been attached and sold. She concluded that the application was filed on the 12 April 2022 while the property was sold on the 17 December 2021. According to her, the said application was filed after the sale of the suit property to the 3rd respondent, and that the objection was designedly delayed. The learned Chief Magistrate found that as the immovable property was already sold to the 3rd respondent, the application was overtaken by events. She refused to set aside the sale of the property, and dismissed the application with costs to the respondents.

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Grounds of appeal:

- 9. Dissatisfied with the ruling of the lower court, the appellant lodged this appeal on the following grounds:

- i) The learned trial magistrate erred in law and fact when she held that the objection was designedly delayed; and
- ii) The learned trial magistrate erred in law and fact when she failed to evaluate the evidence on the court record and thus reached a decision which occasioned a miscarriage of justice.

Representation:

10. At the hearing of the appeal, the appellant was represented by Mr. Kenneth Kajeke of M/s. Kajeke, Maguru and Co. Advocates, the 1st and 2nd respondents were unrepresented while the 3rd respondent was represented by Mr. Yovani Manyari of M/s. Yovani and Co. Advocates.

Duty of the first appellate court:

11. The duty of the first appellate court is to subject the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal, before coming to its own conclusion. While doing so, the first appellate court must keep in mind that, unlike the trial court, it had no chance of seeing and hearing the witnesses while they testified, and therefore had no benefit of assessing the demeanor of the witnesses. To this effect, the first appellate court must be guided by the impression made on the judicial officer who saw the witnesses. The case of *Fr. Narsensio Begumisa & 2 Others vs Eric Tibebaga*, Supreme Court Civil Appeal No.17 of 2002 (Coram: Oder, Tsekooko, Karokora, Mulenga & Kato JJ. S. C) sets out the duty of the first appellate court in the following words:

> "It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of

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fact as well as of law. Although 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."

12. I shall keep the above principles in mind while resolving the grounds of this appeal.

Consideration and determination of the appeal:

- 13. The main issue raised by this appeal is whether the court can set aside sale of immovable property sold by a court bailiff pursuant to a warrant of attachment and sale issued by court.
- 14. Order 22 rules 55, 56 and 57 of the Civil Procedure Rules provide as follows:

"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 respects, 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.

Where upon the investigation under rule 55 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, or that, 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."

15. Having considered the objector proceedings brought by the appellant against the attachment and subsequent sale of the property to the 3rd respondent, the learned Chief Magistrate, Namusoby Sarah-Mutebi held as follows:

> "The foregoing rules 55,56,57 envisage where the property is subject to attachment. The facts of this application show that attachment was made and sale of the property (sic). The 3rd respondent Mr. Ssebatindira, he purchased the property at Shs. 60,000,000/= (sic). Do rules 55, 56 and 57 still apply in the circumstances? The application was filed on 12/4/2022, the property was sold off to the 3rd respondent on 17/12/2021. It was made after the sale was carried out. The objection to the attachment was designedly delayed. The application was

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overtaken by events and is dismissed with costs to the respondents."

- 16. With due respect to the learned Chief Magistrate, her holding is manifestly wrong in law. The learned Chief Magistrate did not consider how in practice, the courts have applied the rules of procedure cited in her decision. This is evident in her decision that makes no reference at all, to decided cases.

- 17. The law on objector proceedings is laid out by the Supreme Court of Uganda in a number of decided cases, most notably, *David Muhenda & 3 Others v. Margret Kamuje* [2000] UGSC 7 (Coram: Oder, J. S. C., Mulenga, J. S. C., and Mukasa-Kikonyogo, J. S. C.), and *Lawrence Muwanga v. Stephen Kyeyune* (legal representative of Christine Kisamba) [2002] UGSC 5 (Coram: Tsekooko, J. S. C., Karokora, J. S. C., Mulenga, J. S. C., and Kanyeihamba, J. S. C.).
- 18. In the case of *David Muhenda & 3 Others v. Margret Kamuje* (supra), Oder, J. S. C summarized the law on objector proceedings as follows:

"(i) 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.

(ii) The objector shall 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 the Court is satisfied that the property was

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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.

(iv) 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."

19. In the case of *Lawrence Muwanga v. Stephen Kyeyune* (supra), the court considered the issue as to whether the court can release immovable property from attachment where a sale has already taken place, and the court bailiff has already made a return of the sale. The brief facts of the case were that on the 17 August 1993, the judgment debtor by deed donated to his wife and children his house at Mengo, Kisenyi and a Kibanja at Bakuli. Subsequently, on the 11 August 1997, a consent judgment was entered against the judgment debtor (Godfrey N. Kisamba). On the 17 January 1998, the judgment debtor died. An order of attachment of the property that was already vested in the wife and children, by virtue of the deed of donation, was issued on the 3 September 1999, and the property was sold to the appellant on the 10 November 1999. On the 15 November 1999, the court bailiff filed a return of the court warrant, reporting that the property had been sold to the appellant. On the 16 December 1999, the wife of the judgment debtor filed objector proceedings in the High Court and *inter alia*, sought an order nullifying the sale of the property to the appellant. Justice John B. Katusti, Judge of the High Court, held that by the time of attachment of the property, it was already vested in the wife of the judgment debtor who held it on her own account. The learned Judge ordered for the release of the property from attachment and sale. The

appellant contested the Ruling of the

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High Court, and filed an appeal to the Court of Appeal. Justice Engwau, Justice of Appeal delivered the lead judgment with which other members of the court concurred. He upheld the Ruling of the Justice John B. Katusti, holding that the objector was in possession of the property on her own account, and not in trust for the judgment debtor, and that the learned Judge was right to release the property from attachment. The appellant appealed to the Supreme Court who dismissed the appeal, and agreed with the findings of the High Court and Court of Appeal.

20. In the case of Kibuuka Nelson & Anor v. Yusuf Ziiwa (HCT-00-CV-MA-0225-2008) [2008] UGHC 171, Justice Yorakamu Bamwine (as he then was) considered the legal question as to whether a sale that had already taken place pursuant to a warrant of attachment by court can be set aside, and he held as follows:

> "Now assuming that a sale has already taken place, as one side to this dispute appears to suggest, is it a correct position of law that it cannot be set aside? The answer is a resounding No. The position of the law as laid down in a number of authorities, including James Kabateraine vs Charles Oundo and Another HCCS No. 177/94 reproduced in [1996] 1 KALR 134 is that no property can be declared to have been validly attached and sold in execution unless, first, the order of attachment has been issued, and secondly, in execution of that order other things prescribed by the rules in the relevant statutes have been complied with. For as long as it is still within the power of the court to declare a sale invalid, for instance, when any of the requirements in the rules of court or Parties for the time being in force have not been complied with, the transaction cannot be said to be 100% safe or at all. Put differently, if it is proved that an execution has been irregularly

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carried out, the court is empowered to make an order of restoration. A wrong execution is in the eyes of the law [is] a trespass. See: HCT-00-CC-MA-0070-2006 Eldreda Muchope vs Diamond Trust Bank Uganda Ltd and Another (un reported)." Underlining is mine for emphasis.

- 21. Having regard to the above decided cases, the position of the law is that a court sanctioned sale of immovable property is liable to be set aside upon objection by an aggrieved party, and the fact that the property has been sold pursuant to execution proceedings, does not preclude court from making an inquiry into the attachment, and setting aside the subsequent sale if need be. In order for objector proceedings to succeed, the court must be satisfied that the property was in possession of the objector at the date of attachment. Secondly, the court must determine whether the objector held the property on his or her own account or some other person. If the objector held the property in trust for the judgment debtor, objector proceedings will not succeed.

- 22. Accordingly, the learned Chief Magistrate was wrong to hold that since the sale had been completed, and a return of the sale made by the court bailiff, the appellant could not legally challenge the sale by way of objector proceedings.
- 23. The appellant adduced evidence of a sale agreement dated 29 March 2017 by which he purchased the suit property from Nansubuga Deborah, Sekamate Fred, Namazzi Teddy and Kizza Frida Mahoro. Until this evidence is rebutted by the 3rd respondent, I accept it on the basis of the decision in *George Kiggundu v. Attorney General* (Civil Suit No.386 of 2014) [2019] UGHCCD 189 (per Justice Musa Ssekaana). In the lower

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court, the appellant filed an affidavit in support of objector proceedings deposed by Kiwalabye Emmanuel, who stated that he was brought by the appellant to occupy the suit property, and that the appellant was in possession of the suit property at the date of attachment of the property. The 2nd respondent (Kalema Michael) gave evidence to the effect that although he once owned the suit property, he sold it to Kizza Frida Mahoro and Namazzi Teddy, and that he no longer has any interest in the suit property.

- 24. This court is satisfied that the appellant proved the two essential elements required for objector proceedings to succeed. First, the appellant proved that at the time of attachment, he was in possession of the suit property. Second, the appellant proved that he held the suit property on his own account and not in trust for the judgment debtor (Kalema Michael). I am satisfied that the suit property was wrongfully attached, and sold by the court bailiff, Mutiibwa Johnson, because the 2nd respondent (Kalema Michael) who was the judgment debtor was not in possession of the suit property.
- 25. The 3rd respondent (Ssebatindira George) did not adduce evidence of the due diligence that he did to satisfy himself that the suit property was in possession of the judgment debtor, Kalema Michael (2nd respondent) and that he held it on his own account. He claimed that he made inquiries from the local council officials who informed him that the suit property was owned by the 2nd respondent but no evidence was led to prove this claim. For example, where is the evidence from local council officials that the 3rd respondent (Ssebatindira George) claims to have consulted?
- 26. I have reviewed the record of the lower court. The Chief Magistrate of Nabweru at Nabweru issued a warrant of attachment of sale of the suit property on the 19 October 2021. A notice of sale of the property was

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advertised in the Monitor newspaper of 26 October 2021. On the 24 November 2021, the court bailiff, Mutiibwa Johnson applied for renewal of the warrant of sale, the earlier one having expired. On the 26 November 2021, the Chief Magistrate issued a fresh order for the sale of the property. On the 17 December 2021, the court bailiff sold the property to the 3rd respondent (Ssebatindira George). On the 20 December 2021, the court bailiff, Mutiibwa Johnson, reported that the property was sold to the 3rd respondent pursuant to the order of court.

- 27. Having regard to the chronology of events, did the appellant designedly delay to institute objector proceedings? I do not think so. It is my finding that the application for objector proceedings was not designedly delayed because the court record shows that on the 9 February 2022, Nansana Police Division wrote to the Chief Magistrate of Nabweru at Nabweru communicating the decision to enforce the warrant of attachment and sale of the suit property, upon instructions by the Land Protection Unit of the Uganda Police. Two months later on the 12 April 2022, the appellant instituted objector proceedings. There was no delay on the part of the appellant.
- 28. Having regard to the evidence before me and the law, it is my conclusion that the judicial sale to the 3rd respondent was unlawful and illegal, and is hereby set aside. See Nakato v. Nanyonga & Anor (Civil App. No. 0412 of 2011) [2012] UGHCCD 290.
- 29. I therefore find merit in this appeal, and order as follows:
- 1. The Ruling of Her Worship Namusubya Sarah-Mutebi, Ag. Chief Magistrate, Chief Magistrate's Court of Nabweru at Nabweru

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delivered on the 13 January 2023 in Misc. Application No.5 of 2022 is set aside.

- 2. The suit property being a kibanja located at Katooke "B", Nansana Municipality, Wakiso District is released from attachment.
- 3. The sale of the suit property to the 3rd respondent (Ssebatindira George) is set aside.
- 4. The appellant is awarded the costs of this appeal and in the Chief Magistrate's Court of Nabweru at Nabweru.

IT IS SO ORDERED.

BERNARD NAMANYA JUDGE 29 April 2024

| 29 April 2024 at 12:30pm
Attendance for delivery of the Judgment | |

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| Mr. Kenneth Kajeke | Counsel for the appellant |

Mr. Yovani Manyari	Counsel for the 3rd respondent
The appellant, 2nd and 3rd respondents are in court	
Allena Kanyakire	Court Clerk
Kenneth Kajeke:	
We are ready to receive the judgment.	
Court:	
Judgment delivered in open chambers.	
	BERNARD NAMANYA
	JUDGE
	29 April 2024

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