

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - CS - 479 - 2002

JIMMY TUMWINE PLAINTIFF

VERSUS

1. FRANK NKURUNZIZA (t/a Ferry & Marks
Services Court Bailiffs and Auctioneers 1ST DEFENDANT
2. FAUSTIN NKUNDA 2ND DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G:

Issue No. 1: Whether the 1st defendant is liable to refund to the plaintiff
the sum of Shs.48,100,000/= or any part thereof.

The first question to be considered here is whether the sale of the suit land to the plaintiff was a valid sale. The evidence before court is that the land comprised in Mailo Register, Kabale Block 11, plot 1, situated at Bugasa in Rakai District (hereinafter referred to as the 'suit land') was attached and sold in execution of a decree in H.C.C.S No. 256 of 2001 between Abdul Kadir Sempa (plaintiff)/Judgment creditor) and Alamanzane Bwanika (defendant/Judgment Debtor). (See: Warrant of

attachment and sale dated 27/06/2001, Exh. D.....) shows that Alamanzane Bwanika was registered as the first proprietor on 08/02/2001, under instrument No. MSK 83802. The copy does not indicate encumbrances on the land but the valuation report (Exh. D4) shows inter alia, that the land was encumbered by squatters.

The plaintiff, as PW1, testified that he got to know of the pending sale of the suit land from an advertisement in a local newspaper (Exh. 1D. P1) and contacted the 1st defendant who was selling the land as a court bailiff. In cross examination by Mr. Lutakome, counsel for the 1st defendant, the plaintiff testified that the 1st defendant showed him the suit land by walking but got tired and only inspected a small portion of the land and left. That, a second attempt to inspect the land failed due to heavy rain. He testified further that, the land he inspected was bushy and he did not see any people occupying the land; that what he saw was a partially constructed dam and 3 huts without doors, and herdsmen who were grazing cattle on the land (who they left there). He stated that he (and the rest of the inspection team) did not face any challenge or objection during the inspection.

The 1st defendant, as DW1, testified that before the sale he and the plaintiff accompanied by the area L.C.1 Chairman (whose name he could not remember), Kamugunda and Mr. Sulaim Musoke (counsel for the judgment creditor) inspected the land which was bushy and unoccupied, with an unfinished dam and 3 abandoned huts. That the sale agreement was executed on 30th July 2001 and that, although he was under no legal obligation to hand over vacant possession he did assist the

plaintiff to gain possession and occupation of the land when in November 2001 the sought the assistance of Rakai District Police Commander and the area police in Lyantonde to ensure that the herdsmen vacate the land in favour of the plaintiff. He submitted that the plaintiff obtained a court order for vacant possession and that his interests in the land should not be affected by any other person's. He asserts that there was a valid sale of the suit land to the plaintiff which was completed when the sale agreement was concluded on 30/07/01 and the plaintiff paid the full purchase price of Shs.48,100,000/=.

Although the plaintiff admits having signed the sale agreement and secured transfer of ownership of the suit land into his name, he denies having obtained vacant possession of the land or the certificate of title from the 1st defendant as had been contracted. He contends therefore that there was no valid sale of the suit land to him by the 1st defendant.

According to the testimony of Mr. Majambere Charles (DW3) who is also brother to the 2nd defendant and the L.C.1 chairman of the area where the suit land is located he and his late parents and his siblings settled on the suit land in 1967 and still occupy the land with their families. They have developments on the land which include banana plantations, residential houses, a church and a government health centre. He stated that the land is now occupied by about 300 people. This evidence is corroborated by that of the 2nd defendant (DW2) and by the valuation report (Exh. D4) which shows that the suit land is encumbered by squatters. DW3 and DW2 also

testified that there was an attempt to forcefully evict them and the other occupants from the land and that some developments were destroyed but no people were evicted. They stated that the eviction order was set aside in 2002 (See Exh. D5).

Attachment and sale of immovable property in execution of a court decree is provided under S.49 of Civil Procedure Act (Cap 71) and Order 22, rr 51, 61, 62, 63, 64 of the C.P.R. What is attached and sold in satisfaction of the decree is the judgment debtor's interest in the property. In this case, the copy of the certificate of title of the suit land shows that Alamanzane Bwanika (Judgment debtor) was the registered proprietor of the suit land at the time of the attachment, and according to The Registration of Titles Act (Cap 230), Section 59, except for fraud (attributable to the person whose title is sought to be impeached), a certificate of title shall be conclusive evidence of all particulars and endorsement thereon and that the person named in the certificate as the proprietor is possessed of the estate or interest described.

In the case no fraud is pleaded or proved against Alamanzane Bwanika and as the registered proprietor of the suit land he had saleable interest in the suit land which were validly attached in execution.

There is evidence (which is not contested), that after attachment of the suit land, the 2nd defendant successfully brought objector proceedings against the attachment and his eviction from the land. Court found that he had proved possession of the suit land and on 17/07/2002 granted him an order releasing the suit land from attachment and set aside the eviction order.

This order had however, been overtaken by events because the suit land had been sold and the full purchase price paid on 30th July 2001 (Exh. P1)

As stated in S.49 of the CPA

“Subject to any law relating to the registration of titles to land where immovable property is sold in execution of a decree, the sale shall become absolute on payment of the full purchase price to the court or to the officer appointed by the court to conduct the sale.”

The facts of this case are similar to those in the case of **Registrar, Trustees, Kampala Archdiocese and Anor V Harriet Namakula & Ors (1997 – 2001) UCLR 365** where the applicants sought to set aside a sale of motor vehicles attached in execution of a decree and sought to recover the money realized from the said sale. The application was brought against the court bailiff and the purchasers of the motor vehicles allegedly because the bailiff had sold the vehicles at a time when the High Court had made an interim order suspending the sale.

Court found that the court bailiff was not in court when the interim order was made and that he was not served with the order until after the sale. The court held that the sale was valid because the bailiff was not served with notice of the interim order suspending the sale until after the sale of the vehicles.

In the instant case however, the order releasing the suit land from attachment and sale was made on 17th July 2002 whereas the sale of the land was completed on 30th

July 2001. The sale was therefore valid because at the time of sale the order releasing the land from attachment was not even in existence.

As to whether the 1st defendant is liable to refund to the plaintiff the sum of Shs.48,100,000/= or any part thereof, the plaintiff contends that there was total failure of consideration and that the 1st defendant should refund the whole purchase price to him. He stated that he made it very clear to the 1st defendant at the time of sale that he wanted vacant possession of the suit land so that he could develop it and that the 1st defendant assured him that the land was unoccupied but was unlawfully used by herdsmen during day time to graze their cattle and that these would be evicted. The plaintiff stated that this was a misrepresentation by the 1st defendant because it turned out that the land was occupied by about 300 occupants who included the 2nd defendant and DW3 and that an attempt to evict them failed. He stated that he was therefore entitled to recover his money from the 1st defendant for failure of consideration on the 1st defendant's part.

The 1st defendant denies that there was failure of consideration and submits that the plaintiff acquired a clean and valid title to the suit land and was not entitled a refund of the purchase price when the suit land had been lawfully passed to him under the contract. He submitted further that he sold the suit land to the plaintiff as an officer of court and was therefore protected from being sued in connection with his acts done as a fully appointed court bailiff.

The Judicature Act (Cap 13), S. 36(2) provides that;

“An officer of the court or other person bonded to execute any other or warrant of any Judge or person referred to in subsection(1) acting judicially shall not be liable to be sued in any civil court in respect of any lawful or authorized act done in execution of any such order or warrant”.

According to the Court of Appeal in the case of **Bifabusha V Turyazooka (2000) 2 E.A.330.**

whenever a court bailiff as a court officer was protected from suit for any lawful or authorized act done in the execution of a warrant under S.46(2) of the Judicature Act, the protection was available only when the bailiff acted lawfully.

And according to the case of **Registrar, Trustees, Kampala Archdiocese and Anor V Harriet Namakula & Ors (supra), at p.365.** The general principle of law that a court bailiff is an agent of the court who enjoys immunity in the performance of his execution proceedings does not apply where the court bailiff acts unlawfully.

As already stated, the execution sale was lawful and it validly transferred Alamanzane Bwanika's interests in the suit land to the plaintiff.

The 1st defendant testified that he was supposed to recover Shs.12,000,000/= from the suit land but he recovered Shs.48,100,000/=. He took off his fees and handed over the balance of the proceeds to the judgment creditor advocate, Mr. Sulaim Musoke, of Muwema, Mugerwa & Co. Advocates. He said he did not realize that this

was a mistake. He said that he did not obtain a receipt or other evidence of the said payment to the advocate.

In considering the position of the court bailiff in conducting an execution sale, court in the case of **Registrar, Trustees, Kampala Archdiocese** (supra), had this to say;

"...the court bailiff, in selling (the motor vehicle) was no agent of the judgment creditor and, certainly, not of the purchasers. The court bailiff was the agent of the Registrar of the High Court who authorized him by a warrant to, inter alia, sell the attached property".

Court held further that court bailiffs are not supposed to pay themselves or anybody else from the proceeds of the sale in execution. They must remit all the proceeds of the sale to court and put in their bill to the registrar for settlement. In that case, the court bailiff had paid all the decretal amount and the consequent costs to lawyers of the judgment creditor and deducted parking charges for the sold motor vehicles.

The court stated at p. 373 that;

"...truly the proceeds of the sale should not be in the pockets of the bailiff or of the judgment creditor or of their advocates. It was noted that the decretal amount with costs were paid to and accepted by counsel for the respondents. It is therefore inconceivable that also the proceeds of the sale should be in the hands of the advocates. And I have already stated, and there seems to be no argument about it that all the entire proceeds of the sale should have been

remitted to the Registrar by the bailiff as his agent, and that the bailiff should have submitted to the Registrar his bill for settlement. This is what it should always be".

In that case however, the judgment creditor is advocates admitted having received the proceeds from the court bailiff. In the instant case, Sulaim Musoke, counsel for the judgment creditor was not called to testify and the 1st defendant presented no receipt or other evidence to prove that the money was paid to the advocates.

The 1st defendant as agent of the Registrar should therefore remit the proceeds of the execution sale to the Registrar and put in his bill for settlement.

The plaintiff received less than what he contracted to or intended / or was guaranteed to receive from the sale. Should part of the Shs.48,100,000/= should the balance of the Shs. 48,100,000/= after settlement of the judgment creditor is claim of the bailiffs bill plus other execution expenses be refunded to him?

The issue of the 2nd defendant's possession of the suit land was also considered and settled by this court in H.C. M. A. No. 207 of 2002 (arising from HCCS No. 256 of 2001, Abdul Kadir Sempa V Alamanzane Bwanika & Faustin Nkunda where the 2nd defendant instituted objector proceedings against attachment of and his eviction from the suit land. In that case, court found that the 2nd defendant/objector had satisfactorily proved his possession as a bona fide occupant of the suit land. Court also found that the 2nd defendant had bought the land in 1974 and had made substantial developments on the land having built a house, a church and a valley

dams thereon. The 2nd defendant was granted an order releasing the suit land from attachment and the order of eviction against him was set aside.

Although the order against attachment was overtaken by events as discussed under issues 1 above, the 2nd defendants unregistered interests as a bona fide occupant were not much affected.

A bona fide occupant is defined under S. 29 (2) (a) of the Land Act (Cap 227) as:

"a person who before the coming into force of the constitution has occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more..."

And a bona fide occupant is guaranteed security of tenure under Article 237(8) and (9) of the Constitution, and S. 31(1) of the Land Act, and the registered proprietor of the land enjoys his rights subject to those of the bonafide occupant.

Issue No. 2: Whether the 2nd defendant has any interest in the property comprised in Kabula Block 11, Plot 1.

The 2nd defendant was joined to the suit by order of court due to the fact that he is in possession of the suit land. The claim against the 2nd defendant as framed in the plaint was for vacant possession, general damages for inconvenience, mesne profits and costs of the suit. These were however, abandoned and the plaintiff concedes that the 2nd defendant has an interest in the suit land.

The 1st defendant however, disputes the 2nd defendant's claim of legal interest in the suit land and states that the lawful registered owner of the land was Alamanzane Bwanika and that the 2nd defendant had failed to prove that he has any interest in the land and that if he was in occupation of the land he was there unlawfully. He stated further that even if the 2nd defendant did have any interest in the suit land (which is denied) such interest was not registered and could not prevail over that of the lawful registered owner.

The 2nd defendant, as DW2, testified that he and brothers and sisters and their late parents settled on the suit land in 1967 and that his late father bought the land from one Nomiya Namiya in 1974. This evidence is corroborated by that of his brother DW3, who testified that their father paid 10 heads of cattle and some money to Nomiya for the suit land. They testified that although their interest was not registered, they and their families have since lived on this land and have developments like residential houses, dams, a church and a government dispensary on the land. They stated that about 300 people live on the land today.

The plaintiff admitted that before execution of the sale agreement, he visited the suit land twice with the 1st defendant, accompanied by Kamugunda and Mr. Musoke counsel for the judgment creditor, and inspected a small portion of the suit land on which he saw a partially constructed dam and 3 huts and herdsmen who were grazing their cattle on the land. He said he did not know whether the rest of the land he bought was occupied or not. He did not make any inquiries from the herdsmen or other persons who would be in the know. He only relied on the 1st defendant's

statement that the occupants on the land were there unlawfully and would be evicted from it.

In the circumstances therefore, it must have been a gross negligence on the plaintiff's part in deliberately omitting to make necessary inquiries, and he must bear the consequences if it turns out that the squatters were on the land lawfully. As was held by Justice Karokora, J.S.C, in the case of **Uganda Posts & Telecommunications V Abraham Kitumba, S.C.C.A No. 36 of 1995** that;

"the law is very clear that if a person purchases an estate which he knows to be in occupation of another than the vendor, he is bound by all the equities which the parties in such occupation may have in the land". The Hon. Justice relied on the holding of **Lough borough, L.C.** in the case of **Taylor V Stibbert [1803 – 13] All ER 432** where he stated that *"if a vendor is not in possession of the land he is selling, the purchaser must make inquiries of the person in possession or otherwise the property purchased will be subject to that person's right".*

In the instant case therefore, the plaintiff is deemed to have had constructive notice of the 2nd defendants interest in the suit land.

Geoffrey Kiryabwire

JUDGE

Date:

30/04/07

9:40am

Judgment read in open court and signed in the presence of:

- D. Rutiba for plaintiff

Parties in Court

- None
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

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