THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL NO. 081 OF 2019

[An Appeal from the Ruling and Order of H/W Odwori Ponsiano Romans, Magistrate Grade 1 of Nakawa Chief Magistrates Court, delivered on 13th August, 2019 in M.A No. 258 of 2019 from Civil Suit No. 384 of 2019]

BEATRICE BUSUULWA :: APPELLANT

VERSUS

JP AFRICA (U) LTD :: RESPONDENT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This is an appeal from the ruling and orders of the Magistrate Grade 1 sitting at Nakawa Chief Magistrate's Court delivered on 13th August, 2019 *vide* Miscellaneous Application No. 258 of 2019 arising from Civil Suit No. 384 of 2019.

Brief Background

The background to this appeal is that the Respondent filed Civil Suit No. 384 of 2019 in the Chief Magistrate's Court of Nakawa against Milon Trading Ltd (herein after to be referred to as **"the Defendant"** in the main suit) seeking recovery of a sum of UGX 12,800,000/=, general damages, interest and costs. The Respondent also filed Miscellaneous Application No. 237 of 2019 for attachment before judgment of Motor Vehicle Reg. No. UBA 505P allegedly belonging to the Defendant. The said motor vehicle was attached on the 22nd

day of July 2019 and is currently parked at the Chief Magistrate's Court of Nakawa.

It is claimed by the Appellant that she had, on the 23rd day of May 2017, purchased the said motor vehicle from the Defendant at a consideration of UGX 45,000,000/=. The Defendant had also apparently purchased the said vehicle from the Respondent (the Plaintiff in the main suit). The Defendant had made part payment leaving a balance of UGX 12,800,000/= on the purchase price which was the subject of the suit.

The Appellant further claimed that after the purchase but prior to the attachment of the motor vehicle, she tried to get hold of the Defendant to transfer the vehicle into her names but the said company and its directors could not be traced. As such, the Appellant applied to the Magistrate's Court at Kakiri and obtained a Court Order authorizing her to have the said motor vehicle transferred into her names. The Order was granted on 11th February 2019 and the vehicle was finally transferred into her names on 16th July 2019. The Appellant therefore claimed that when the vehicle was attached on 22nd July 2019, it was in her possession and was registered in her names as owner.

The Appellant therefore applied to the Court that had granted the Order for attachment before judgment to set aside the said attachment and order release of the motor vehicle to the Appellant. The learned trial Magistrate declined to release the motor vehicle and dismissed the Application with costs.

The Appellant being dissatisfied with the decision of the trial Magistrate, filed the present appeal premised on the following grounds:

1. That the learned Magistrate Grade I erred in law and in fact when he held that the attached motor vehicle Reg. No. UBA 505P Toyota Hiace

belonged to the Respondent and as such could not be released from the attachment to the Appellant before Judgment.

2. The learned trial Magistrate Grade I erred in law when he failed to consider that the motor vehicle Reg. No. UAB 505P was registered and was in possession of the Appellant as an owner / Registered Proprietor at the time of attachment and thereby came to a wrong conclusion that the said vehicle was properly attached before Judgment.
3. The learned trial Magistrate Grade I failed to consider the fact that the Respondent's suit against Milon Trading Ltd was for recovery of UGX 12,800,000/= and attached motor vehicle Reg. No. UBA 505P on the basis that they had sold the same to Milon Trading Co. Ltd and thereby came to a wrong decision that the Appellant illegally transferred the same into her names.

The Appellant prayed for orders that;

a) The Appeal be allowed and the Ruling and Orders of the trial Magistrate be set aside.
b) The Appellant's motor vehicle Reg. No. UAB 505P Toyota Hiace be released from attachment.
c) The costs of this appeal and in the Court below be paid by the Respondent.

Representation and Hearing

At the hearing, the Appellant was represented by Mr. Moses Wacha on brief for Mr. Gilbert Nuwagaba while the Respondent was represented by Mr. Muhumuza Rogers. It was agreed that the matter proceeds by way of written submissions. Both Counsel made and filed their respective submissions. No submissions in rejoinder were filed.

Both Counsel agreed that the three grounds of appeal were interrelated and argued them together. I have adopted the same approach and will therefore deal with the grounds jointly.

Submissions by Counsel

Appellants' Submissions

Counsel for the Appellant submitted that this being a first appeal, the Court ought to be reminded of the duty of a first appellate court to review the record of the evidence for itself in order to determine whether the conclusion reached upon the evidence by the trial court can stand. Counsel referred the Court to the case of ***Salongo Kibudde Vs Mrs. Josephine Mubiru HCCA No. 35 of 2003***.

Counsel relied on the provision in Order 40 Rule 8 of the Civil Procedure Rules (CPR) which provides that where any claim is preferred to property attached before judgment, the claim shall be investigated in the manner herein before provided for the investigation of claims to property attached in execution of a decree for the payment of money. Counsel submitted that it would follow therefore that the Court would have to invoke the principles under Order 22 Rules 55, 56 and 57 of the CPR.

Counsel relied on the above said provisions and the decision in ***Moses Kamya Vs Sam Lukwago Misc. Application No. 271 of 2010 arising from HCCS No. 411 of 2009*** to submit that for an applicant to succeed to secure release of attached property, all he/she has to show is that at the date of the attachment, he/she had some interest in the property attached; provided that the Court enquires into the kind of interest and is able to establish that the interest is not merely academic but a right to property. It may be a right of

occupation or use or a proprietary interest. The interest must be capable of legal protection.

Counsel submitted that the learned trial Magistrate therefore erred when, instead of investigating whether the Appellant had some interest in the attached property, he concentrated on the purported ownership of the motor vehicle by the Respondent thereby ignoring the apparent claim of ownership by the Appellant and the clear evidence of possession that she had on her own account and not in trust or on behalf of Milon Trading Ltd (the Defendant).

Counsel for the Appellant emphasized that the main suit was not in respect of ownership of the motor vehicle but was a claim for recovery of money and the application for attachment before judgment was on the basis that the vehicle belonged to Milon Trading Ltd and the attachment was for purposes of guaranteeing payment of the claimed balance of UGX 12,800,000/= and not for recovery of the motor vehicle. The learned trial Magistrate therefore erred in law and in fact when he held that the attached motor vehicle belonged to the Respondent and therefore could not be released from the attachment before judgment. Counsel questioned why the Respondent would have to attach its own property for recovery of money owed to it by the Defendant. Counsel argued that if that was the case, the Respondent would have simply applied to Court for recovery of its motor vehicle and not for attachment to recover money.

Counsel concluded that the above error led the trial Magistrate to reach an erroneous conclusion that the said vehicle was properly attached. In due course, the learned trial Magistrate negated the principles set out in the above stated legal provisions which emphasize possession and interest in the property attached. Counsel prayed that the appeal be allowed and the Appellant's motor vehicle be immediately released from attachment.

Respondent's Submissions

In reply, Counsel for the Respondent submitted that at the time of issuing the court order for attachment of the said motor vehicle, the Appellant was not the registered owner of the vehicle but, in order to defeat the Respondent's interest, she fraudulently got registered as owner of the said vehicle. Counsel for the Respondent argues that this explains why the order was processed from Kakiri Magistrate's Court yet the Respondent's offices are located in Nakawa, which clearly was out of jurisdiction.

Counsel agreed with the provisions of the law cited by the Appellant's Counsel in regard to objections to attachment of property but argued that the Appellant fraudulently obtained registration of the vehicle in issue into her names. Counsel relied on the case of ***Konde Mathias Zimula Versus Byarugaba Moses & Another, HCCS No. 66 Of 2007,*** cited in ***Mayanja Hussein v Christopher HCCS NO. 0129 of 2010*** where it was held that "courts of justice will not allow a person to keep an advantage which he obtained in bad faith." Counsel submitted that the possession and registration by the Appellant was tainted with fraud and was done so in bad faith.

Counsel further submitted that the Appellant all along knew that the suit vehicle belonged to the Respondent and a search would have revealed the same. Counsel submitted that the law is that once an illegality has been brought to the attention of the court, then the same cannot be sanctioned by court. The Appellant had not come to court with clean hands and Counsel invited the Court not ignore the bigger picture.

Counsel prayed, in the alternative, that if the Court was inclined to set aside the order of attachment in favour of the Appellant who does not have any contractual obligations with the Respondent, it will be just and fair that the

Appellant is ordered to deposit into Court the monies demanded by the Respondent from the Defendant as security until the case in the lower court is disposed of on its merits. Otherwise, Counsel prayed that the application be dismissed with costs.

Resolution by the Court

Let me first point out the duty of a first appellate court. The duty of a first appellate court is to scrutinize and re-evaluate the evidence on record and come to its own conclusion and to a fair decision upon the evidence that was adduced in a lower court. **S. 80** of the **Civil Procedure Act Cap 71** is a point of reference on this position. This position has also been re-stated in a number of decided cases including ***Fredrick Zaabwe VS Orient Bank Ltd C/A NO. 4 of 2006*****;** ***Kifamunte Henry VS Uganda SC CR. Appeal No.10 of 1997*****;** and ***Baguma Fred Vs Uganda SC Crim. App. No. 7 of 2004***. In the latter case, **Justice Order, JSC (as he then was)** stated thus:

> ***First, it is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court.***

On the case before me, the evidence in the lower court was adduced by way of affidavits. In the affidavit in support of the application to set aside the attachment, the Appellant (then Applicant) stated that she is the owner of the motor vehicle in issue which was in her possession since 23rd May 2017. The Appellant stated that she was not a defendant in the main suit and was not in any way about or in the process of disposing off the motor vehicle. As such, the

said vehicle could not be attached for purposes of providing security for the satisfaction of the decree in the main suit. She stated that the said vehicle was operating as a commuter taxi and its continued attachment was causing loss of UGX 600,000/= per week to her.

The appellant further stated that she had purchased the said vehicle from the Defendant and attached a copy of the purchase agreement and a Delivery Note indicating that she took delivery and possession of the said motor vehicle on 23/5/2017. She also attached the motor vehicle log book indicating that she was the registered owner of motor vehicle as at 16th July 2019. The Appellant further stated that the vehicle was attached on 22/7/2019 without a Warrant of Attachment but pursuant to an Order of the Court in a matter to which she was not a party. She stated that at the time of attachment, the vehicle was in her possession and was not in the names of Milon Trading Ltd (the Defendant) and, as such, could not be attached for a sum of UGX 12,000,000/= purportedly owed to the Respondent.

In an affidavit in reply deponed to by **Rizwan Ullah**, the deponent stated that the Respondent was the registered owner of the motor vehicle in issue which they had sold to Milon Trading Ltd (the Defendant) who had made part payment leaving a balance of UGX 12,800,000/=. The deponent stated that it was expressly stated in the sale agreement that the purchaser (the Defendant) was not permitted to sell the subject motor vehicle to a third party before completion of the total purchase price.

The deponent stated that, unknown to the Respondent, the Defendant and the Appellant connived to defraud the Respondent by effecting transfer of the motor vehicle into the Appellant's names. The deponent stated that the Respondent had several times informed the Appellant that the vehicle belonged to the Respondent but the Appellant went ahead fraudulently to transfer the

vehicle into her names. He further stated that the Respondent's offices were well known to the Appellant and there was therefore no need for the latter to advertise a notice to have the vehicle transferred into her names. The Respondent therefore opposed the application for release of the motor vehicle from attachment.

In his Ruling, the trial Magistrate reviewed the evidence and Counsel's submissions and held as follows:

> *"… In clause 6 (of the agreement between the JP Africa and Milon Trading) 'the buyer shall not sell the motor vehicle to a third party … nor remove it out of Uganda before completion of the balance of the purchase except with the written consent of the seller' … The question then arises as to whether Milon could pass on a good title to the applicant to enable her have possession at the time of attachment of the motor vehicle?! A reading of the said clause 6 suggests the answer in the negative. Milon was forbidden from selling the motor vehicle to a third party unless consent was sought or amount completed. Any such sale could not pass a good title or property in the car. Any third party including the applicant who bought would not have possession legally. … As long as the purchase price was not concluded, property and so is possession remained with the respondent (JP) as Milon had nothing to transfer. … no one can give a good title other than he himself (JP in this case). I therefore find that yes possession before attachment is relevant but it must be legally acquired – passed on by one who has rights to do so. In this … case, it was illegally passed on and would not hold. I accordingly dismiss the application with costs."*

It was argued by Counsel for the Appellant that the trial Magistrate ignored the principles governing objection to attachment as laid down in Order 22 Rules 55, 56 and 57 of the CPR and instead dwelt on ownership of the suit motor vehicle which made him arrive at a wrong conclusion. For the Respondent, it

was argued that the trial Magistrate correctly found that the Appellant had secured possession and registration of the motor vehicle illegally.

It is true that in cases of attachment before judgment under Order 40 of the CPR, Rule 8 thereof provides a leeway to the Court to invoke the provisions of Order 22 Rules 55 – 60, among others, to deal with questions regarding objections to attachment of property. As such, an objection to an attachment before judgment is dealt with as though it was an attachment in execution of a final decree of the Court. In that regard, it is therefore important to examine the provisions, specifically, of Rules 55, 56, 57 and 58 of Order 22 CPR.

I will set out verbatim the relevant provisions of Order 22 of the CPR.

> ***55. Investigation of claims to, and objections to attachment of, attached property***
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> *(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.*
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> ***56. Evidence to be adduced by claimant***
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> *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.

58. Disallowance of claim to property attached

Where the court is satisfied that the property was, at the time it was attached, in the possession of the judgment debtor as his or her own property and not on account of any other person, or was in the possession of some other person in trust for him or her, or in the occupancy of a tenant or other person paying rent to him or her, the court shall disallow the claim.

From the foregoing provisions, the principles relevant to the handling by the court of an objection to attachment of property are laid out. Rule 55 gives the Court the power to investigate the claim or objection as if the claimant or objector was party to the suit. Under Rule 56, the claimant or objector has the duty to adduce evidence showing that at the date of the attachment, he or she had some interest in the property attached. Under Rule 57, where the Court is satisfied that the property, when attached, was not in possession of the judgment debtor, or that even if it was in his possession, he had it not on his/her own account but on account or in trust for another person, then the Court shall order release of such property or part thereof. But under Rule 58, where the Court is satisfied that at the time of attachment, the property was in possession of the judgment debtor as his/her own property and not on account

of any other person, or was in the possession of some other person in trust for the judgment debtor, then the Court shall disallow the claim or objection.

In the instant case, the trial Court disallowed the claim. The questions therefore for determination are two:

a) Whether there was evidence showing that at the date of the attachment, the Appellant had some interest in the subject motor vehicle; and
b) Whether there was evidence to satisfy the Court that at the time of attachment, the subject motor vehicle was in possession of the judgment debtor as his/her own property and not on account of any other person, or was in the possession of some other person in trust for the judgment debtor.

The answer to the above two questions would determine as to whether or not the trial Magistrate was right to disallow release of the subject motor vehicle from attachment.

Whether there was evidence showing that at the date of the attachment, the Appellant had some interest in the subject motor vehicle.

It was the conclusion of the trial Magistrate that the Appellant had no legal interest in the attached property since the property was illegally passed over to her and she could not have obtained a better interest than what the person who sold to her had. It was submitted by Counsel for the Appellant that the trial Magistrate erred when he concentrated on ownership of the property and ignored the evidence that indicated that at the time of attachment, the Appellant had interest in the subject motor vehicle and was also in its possession. Counsel for the Appellant submitted that the two were the essential elements that constitute an investigation into a claim or objection under Order 22 Rules 55 – 58 of the CPR.

In the case of ***Moses Kamya Vs Sam Lukwago (supra)***, **Madrama J.** (as he then was) held that in line with the provision in Order 22 Rule 56 of the CPR, for an applicant to succeed in securing release of attached property, he/she has to show that at the date of the attachment, he/she had some interest in the property attached. The Court however has to enquire into the kind of interest and has to establish that the interest is not merely academic but a right to property. It may be a right of occupation or use or a proprietary interest. The interest must be capable of legal protection.

I agree with the above legal position. What comes out is that the Court has to establish the nature of the interest claimed by the Applicant or Objector. It has to be a legal interest. Clearly therefore, the source of the interest has to be investigated. This is what the learned trial Magistrate did and he was right in this regard.

The next question in this regard is whether the trial Magistrate properly evaluated the evidence regarding the claimant's interest in the subject motor vehicle. The evidence before the trial court was that the Respondent was the registered owner of the suit vehicle which he had sold to Milon Trading Ltd (the Defendant). The Defendant had made part payment leaving a balance of UGX 12,800,000/= on the purchase price. The Respondent filed the main suit to recover the said balance on the purchase price with damages, interest and costs. Because the said motor vehicle was the only property of the Defendant that the Respondent was aware of, they moved the trial court to issue an order for attachment of the said vehicle before judgment reasoning that if the Defendant disposed of it before completion of proceedings, any decree would be rendered nugatory.

The Respondent further led evidence that according to clause 6 of the sale agreement between the Defendant and themselves, the Defendant was

prohibited from transferring the subject motor vehicle to any third party before completion of the purchase price or without the written consent of the Respondent. So, as far as the Respondent was concerned, the motor vehicle was still in the hands of the Defendant.

On the other hand, the Appellant showed that she had purchased the subject motor vehicle, taken possession of the same and had it registered into her names. Counsel for the Appellant argued that this was sufficient evidence of interest on the part of the Appellant and the trial Magistrate was wrong in refusing to order its release from attachment.

In my considered view, before purchase of the said motor vehicle, the Appellant had a duty to ascertain ownership of the motor vehicle. Like the trial Magistrate held, if the Defendant was to pass a good title to the Appellant, the Defendant had to have a good title himself. The evidence of title is important because a legal interest cannot be obtained without existence of good title on the part of the vendor; except under exceptional circumstances in line with the *Nemo Dat* Rule which were not pleaded in the instant case and are therefore not in issue.

It is clear to me that had the Appellant attempted to ascertain the Defendant's source of title, she would have discovered that the vendor had no legal interest to pass for reasons that the motor vehicle was still in the names of the Respondent, the Defendant had not completed full payment, yet the sale agreement expressly prohibited transfer of the motor vehicle before full payment. By looking at the sale agreement that formed the source of title for the Defendant and the fact that the vehicle was still in the names of the Respondent, the Appellant ought to have known the defect in the Defendant's title. With a defective title, the Defendant was not capable of passing on an interest that is capable of being protected under the law. As such, the

Appellant could not obtain one. Contrary to the argument of the Appellant's Counsel, legal interest in property cannot be divorced from title or ownership rights.

The trial Magistrate was therefore right in reaching the conclusion that the Appellant had not obtained a protectable legal interest in the property and her claim or objection to attachment of the subject vehicle could not succeed.

Whether there was evidence to satisfy the Court that at the time of attachment, the subject motor vehicle was in possession of the judgment debtor as his/her own property and not on account of any other person, or was in the possession of some other person in trust for the judgment debtor.

The next question to investigate is the possession of the motor vehicle at the time of attachment. The law is that the property should be in possession of the judgment debtor (in this case the defendant) as his property or if it is in the possession of another person, that other person should be having it in trust for the judgment debtor.

This question calls for examination of the aspect of "possession". Possession, in law, is the acquisition of either a considerable degree of physical control over a physical thing, such as land or chattel, or the legal right to control intangible property, such as a credit — with the definite intention of ownership. With respect to land and chattel, possession may well have started as a physical fact, but possession today is often an abstraction. A servant or an employee, for instance, may have custody of an object, but he does not have possession; his employer does, even though he may be thousands of miles from the object he owns. …Thus, possession tends to be regarded as prima facie evidence of the right of ownership; it gives this right against everyone except

the rightful owner. See: **Encyclopaedia Britannica, by Emily Rodriguez at al (eds.), 1998)**.

It is clear from the above that possession and ownership are inextricably interwoven. Physical control over property must be accompanied with the definite intention of ownership. The control over the property must have been acquired legally for it to be protected under the law. In my view the possession envisaged under Rules 57 and 58 of Order 22 CPR is legal possession. The real question therefore is, who, under the law, had legal control over the subject motor vehicle at the time of attachment?

On the case before me, the Appellant claims she was in physical possession of the motor vehicle. According to the Respondent, to their knowledge, the vehicle was still in the Defendant's possession and the two simply colluded to fail the Respondent's attempts to recover their money. On record, there is no conclusive evidence as to which party had physical possession of the subject motor vehicle. What is clear however is that in light of the circumstances that have been analyzed herein above, the Defendant still had legal control over the motor vehicle. Legally therefore, the Defendant had possession of the subject motor vehicle at the time of attachment.

Lastly, it was indicated by the Appellant herself that the Defendant was elusive and the office was actually closed when she wanted to have the vehicle transferred which compelled the Appellant to secure a court order authorizing her to transfer the motor vehicle. This further justifies the Respondent's claim of attachment of the subject motor vehicle before judgment. It proves the Respondent's fear that, should the motor vehicle be alienated, the Respondent may not be able to execute any decree that they may obtain from the Court. This is a further consideration that justifies the decision of the trial Magistrate not to allow release of the subject motor vehicle from attachment.

Decision of the Court

In all therefore, all the three grounds of appeal have failed. The decision of the trial Magistrate refusing to release the subject motor vehicle from attachment has been upheld. This appeal is therefore dismissed with costs to be paid to the Respondent in this Court and in the lower Court. The case file be remitted to the trial Court for further management of the suit.

It is so ordered.

Signed, dated and delivered by email this 9th day of November, 2020.

Boniface Wamala
JUDGE