

**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 ::::::::::::::::::::::: 1<sup>ST</sup> DEFENDANT**
- 2. FAUSTIN NKUNDA ::: 2<sup>ND</sup> DEFENDANT**

**BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.**

**J U D G M E N T:**

The plaintiff's claim against the 1<sup>st</sup> defendant is for the refund of Shs.48,000,000/= (forty eight million and one hundred thousand shillings only) based on the latter's sale through auction authorized by court of the property comprised in Kabula Block 11 Plot 1 at Bugasa in Rakai district hereinafter referred to as the suit land. The brief facts of this case are that in June 2001 the Registrar of this honourable court issued to the 1<sup>st</sup> defendant a warrant to execute the decree in HCCS. No. 256 of 2001 Abdul Kadir Sempa (plaintiff)/Judgment creditor) and Alamanzane Bwanika (defendant/judgment debtor) and for the attachment and sale of the suit land which belonged to the said judgment debtor. In his amended plaint the plaintiff contends that he purchased the suit land under a misrepresentation by the 1<sup>st</sup> defendant that the land was

unoccupied and that the plaintiff would obtain vacant possession of the same. He states further that the 1<sup>st</sup> defendant's failure and/or refusal to refund the purchase price when there was a total failure of consideration on his part of giving vacant possession and handing over the certificate of title amounts to breach of contract for which the plaintiff claims special damages. The plaintiff also claims general damages for inconvenience and mesne profits.

In his defence the 1<sup>st</sup> defendant asserts that he dully discharged his obligations as an auctioneer and is not liable to refund the auction sale proceeds to the plaintiff. He states that the plaint does not disclose a cause of action against him and should be struck out with costs.

The 2<sup>nd</sup> defendant was joined to the suit by order of court due to the fact that he is in possession of the suit land. At the commencement of the hearing by way of scheduling the following issues were agreed upon for court's determination.

- 1- Whether the 1<sup>st</sup> defendant is liable to refund to the plaintiff the sum of Shs.48,100,000/= or any part thereof.
- 2- Whether the 2<sup>nd</sup> defendant has any interest in the property comprised in Kabula Block 11 Plot 1
- 3- Remedies available to the parties.

The whole thrust of the plaintiff's claim in this case is that he purchased the suit land under a misrepresentation by the 1<sup>st</sup> defendant that the land was unoccupied and he would obtain vacant possession thereof. To answer the plaintiff's claim therefore, I will deal with the 2<sup>nd</sup> issue first and then issue No. 1 and 3.

The claim against the 2<sup>nd</sup> defendant as framed in the amended plaint was for the sum of Shs.48,100,000/=, severally and jointly with the 1<sup>st</sup> defendant, interest on the said sum and costs of this suit, and in the alternative an order against the defendants jointly and severally to give to the plaintiff vacant possession of the suit land, general damages for inconvenience and mesne profits. These claims against the 2<sup>nd</sup> defendant were however abandoned and the plaintiff concedes that the 2<sup>nd</sup> defendant does have an interest in the suit land.

I will however proceed to consider this issue because the 1<sup>st</sup> defendant disputes the 2<sup>nd</sup> defendant's claim of legal interest in the suit land. The 1<sup>st</sup> defendant submitted that the lawful registered owner of the suit land was Alamanzane Bwanika and that the 2<sup>nd</sup> defendant had failed to prove that he had any interest in the land and that if he was in occupation of the land he was there unlawfully. He states further that even if the 2<sup>nd</sup> 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 2<sup>nd</sup> defendant (as DW2) testified that he and his siblings 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 Majambere Charles who testified (as DW3) that their father paid 10 heads of cattle and some money to Nomiya for the suit land. No written memorandum of the alleged sale was however produced in evidence. The 2<sup>nd</sup> defendant and DW3 testified further that although their interest was not registered, they and their families have lived on

this land since 1967 and have developments like residential houses, dams, a church and a government dispensary on the land. They stated that today the suit land is occupied by about 300 people. The valuation report (Exh. D4) also shows that the suit land is encumbered by squatters.

This issue of the 2<sup>nd</sup> defendant's possession of the same suit land has been handled by this court before in High Court Miscellaneous Application No. 207 of 2002 (arising from HCCS No. 256 of 2001) Abdul Kadir Sempa V Alamanzane Bwanika & Faustin Nkunda, where the 2<sup>nd</sup> defendant instituted objector proceedings against attachment of and his eviction from the suit land. In that case, Hon. Justice Ogoola found that the 2<sup>nd</sup> defendant/objector had satisfactorily proved his possession as a bonafide occupant of the suit land. The court also found that the 2<sup>nd</sup> defendant had bought the land in 1974 and had made substantial developments on the land having built a house, a church and valley dams thereon. Of course there are some discrepancies as to dates given the evidence of the two cases i.e. 1967 and 1974. That notwithstanding I have no reason to depart from the Hon. Justice's finding in that case. The question to be considered here, however, is not only that of possession but that of legal interest in the suit land. A bonafide occupant is defined under **S. 29(2)(a)** of the **Land Act (Cap 227)**, inter alia, 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."*

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

This issue is therefore answered in the affirmative – the 2<sup>nd</sup> defendant has legally recognizable interest in the suit land. Should he however wish to make his interest absolute and avoid any more court battles over the land, he should take advantage of the provisions of S.38(1) and (3) of the Land Act and acquire a registrable interest in the land.

**Issue No. 1: Whether the 1<sup>st</sup> 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 suit land was attached 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) by a warrant of attachment dated 27/06/2001, Exh. P3). A copy of the Certificate of Title to the suit land (Exh. ID. D1) 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.

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 1<sup>st</sup> defendant who was selling the land as a court bailiff. In cross examination by Mr.

Lutakome, counsel for the 1<sup>st</sup> defendant, the plaintiff testified that the 1<sup>st</sup> defendant showed him the suit land by walking but they 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 1<sup>st</sup> 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), Mr. 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 30<sup>th</sup> 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 he 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/=. 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).

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 1<sup>st</sup> defendant as had been contracted. He contends therefore that there was no valid sale of the suit land to him by the 1<sup>st</sup> defendant.

Attachment and sale of immovable property in execution of a court decree is provided for under S. 49 of Civil Procedure Act (Cap 71) and Order 22, rr, 51,61, 62, 63 and 64 of the CPR. What is attached and sold in satisfaction of the decree is the judgment debtors interest in the property so attached. 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 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 endorsements thereon and that the person named in the certificate as the proprietor is possessed of the estate or interest described.

In this 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.

In conducting an execution sale the court bailiff is bound by the provisions of 0.22, rr. 62 and 64 of the CPR. The 1<sup>st</sup> defendant's compliance with these rules has not been faulted.

The plaintiff admitted that before execution of the sale agreement, he visited the suit land twice with the 1<sup>st</sup> defendant accompanied by Mr. 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 1<sup>st</sup> 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 other 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 instance case therefore, the plaintiff is deemed to have had constructive notice of the 2<sup>nd</sup> defendant's interest in the suit land. As discussed earlier under Issue No. 2, the suit land was released from attachment and sale by an order of this court on 17<sup>th</sup> July 2002 after successful objector proceedings by the 2<sup>nd</sup> defendant. This order had however been overtaken by events because at that time the suit land had been sold in execution and the full purchase price paid on 30<sup>th</sup> July 2001 (Exh. P.1).

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 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 17<sup>th</sup> July 2002 whereas the sale of the land was completed on 30<sup>th</sup> 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. The plaintiff is therefore estopped from denying that there was a valid sale of the suit land to him.

As to whether the 1<sup>st</sup> 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 1<sup>st</sup> defendant should refund the whole purchase price to him. He stated that he made it very clear to the 1<sup>st</sup> defendant at the time of sale that he wanted vacant possession of the suit land so that he could develop it and that the 1<sup>st</sup> 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 1<sup>st</sup> defendant because it turned out that the land was occupied by about 300 occupants who included the 2<sup>nd</sup> defendant and DW3 and that an attempt to evict them failed. He stated that he was therefore entitled to recover his money from the 1<sup>st</sup> defendant for failure of consideration on the 1<sup>st</sup> defendant's part.

The 1<sup>st</sup> 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. 46(2) provides that;

*"An officer of the court or other person bonded to execute any order 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 is 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.

The 1<sup>st</sup> 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 that he did not obtain a receipt acknowledging payment of the said sum to the said advocate or the law firm that he represented, nor was the said advocate called to testify in court that he received the said sum of money from the 1<sup>st</sup> defendant as alleged.

It is a notorious unlawful practice by court bailiffs to pay themselves from the execution sale proceeds and hand over the money to the judgment creditor's advocate instead of handing the sale proceeds to the court Registrar who is their principal for purposes of the execution sale.

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 m/v) 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 (above) however, the judgment creditor's advocates admitted having received the proceeds from the court bailiff. In the instant case, there is no proof that the 1<sup>st</sup> defendant handed over the sale proceeds to the judgment creditor's advocate as he alleges. The 1<sup>st</sup> defendant has 9 years experience as a court bailiff and should have known that his dealings with the money was unlawful, and where the court bailiff acts contrary to the law he puts himself out of the protection guarantee by the Judicature Act and the onus is heavier on him to prove that he properly executed his duties as required by law.

**Issue No. 3: Remedies.**

Some of the remedies have been granted under the above issues.

The plaintiff obtained good title to the suit land under the execution sale. He should therefore be endorsed on the certificate of title as the registered proprietor thereof.

However, as a consequential order the Registrar of this court should trace the proceeds of the execution sale of the suit land by the 1<sup>st</sup> defendant.

Given the declaration in this ruling it is just that each party bears its own costs.

**Geoffrey Kiryabwire**

JUDGE

**Date: 30/08/07**

30/08/07

9:50am

**Judgment read and signed in Court in the presence of;**

- Lutaakome for defendant
- Byaruhanga h/b for Nuwagaba for plaintiff
- Kalibala for 2<sup>nd</sup> defendant

**In Court**

- 1<sup>st</sup> defendant
- Rose Emeru – Court Clerk

**Court:** Judgment read and signed.

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**Geoffrey Kiryabwire**  
**JUDGE**

**Date: 30/08/07**