

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO.-CL 1996/W 239

BETWEEN GIRVAN WILLIAMS JUDGMENT CREDITOR
AND OMOTOSO USWALE- NKETIA JUDGMENT DEBTOR

Mr. Richard Reitzin instructed by Messrs. Reitzin & Hernandez for the Judgment Creditor.

Mrs. Sharon Usim instructed by Usim, Williams & Company for the Judgment Debtor.

Heard 18th September 2006 and 25th July 2007

Campbell, J.

(1) The application before the Court is an application for Sale of Land, to enforce payment of a judgment debt. The judgment debtor is the registered proprietor of one undivided four-fifths share as tenants in common, with his wife Annmarie Silburn a tenant in common as to the remaining one-fifth share of Lot 16, 5 Napoli Close, Angels Estate, Phase II, St. Catherine.

(2) The property, Lot 16, 5 Napoli Close, Angels Estate, Phase II, St. Catherine is the matrimonial home of the debtor and Silburn and their children. Was purchased from the National Housing Trust, which has a mortgage on the said property.

(3) Part 55 of Civil Procedure Rule deals with sale of land by order of the Court.

55.1 provides;

This part deals with Sale of Land:

(a)

(b) When it appears to the Court *to be necessary or expedient that the land should be sold* whether to enforce a judgment or for any other reason.

*(4) **Rule 55. (2) (1)** provides:

(1) The application for an order for sale must be supported by affidavit evidence.

(2) The evidence under paragraph (1) must -

(b) state -

(1) the reason for seeking an order for the sale.

(5) On the 7th October 1998, judgment was assessed in the sum of \$5,000,101.63 (inclusive of interest to the date of judgment) as a result of loss suffered when the judgment creditor had his hand chopped off by the judgment debtor on 14th October 1995.

(6) On the 19th July 2005, an order was made for the debtor to pay the sum of \$10,000 per month in default to be imprisoned for 10 days.

(7) In an affidavit filed on 27th September 2005, the judgment creditor states that the debt then stood at \$9,185,392.19 and will increase at the rate of \$40,000.00 per month even if the payments of \$10,000.00 ordered by the Court is paid.

(8) On 21st October 2005, Mrs. Justice Sinclair-Haynes on the judgment creditor's application to sell land ordered, inter alia;

(3) That Mrs. Silburn is served notice of the proceedings.

(4) The judgment creditor is to notify the National Housing Trust of the within application by prepaid registered post.

(5) All deponent are to attend for cross-examination.

(6) That the judgment debtor and Mrs. Silburn are hereby restrained from selling, etc. the land subject of this order or dealing in any way whatsoever with the same pending the determination of this application.

(9) Is there any evidence before the Court from which it can be said that the sale of the land is *necessary*, that is, it *must be done* or it is *expedient or advantageous to do so*. This determination will require a weighing of the reasons given for seeking the sale against the hardship that such a sale will create for the debtor.

(10) A good starting point is an assessment of the effect the sale will have in allowing the judgment creditor to realize the fruits of the judgment. It is noteworthy that of the sum awarded, \$1,584,422.00 represented Special Damages or funds that would have been expended by the judgment creditor in attending to his injury.

(11) It would require forty years on the present terms of payment to liquidate the judgment sum awarded. As already noted, the sum being paid is incapable of keeping abreast of interest payments. A lump sum payment, that the sale of the land would represent, would make the satisfaction of the debt more realistic.

Judgment Debtor's Plea of Ruination

(12) In his affidavit in opposition to the application, the judgment debtor states, that his present expenses outweigh his earnings. That he will be enrolling at the German Automotive School, to boost his income. That in July 2005 he was summoned to Court to be orally examined as to his ability to pay judgment sum.

(13) The judgment debtor has said that he will be ruined by such an order for a sale of his land. At para 16 of his affidavit, filed on 4th November 2005, he states;

“That if our house were sold, we would be forced onto the streets with our children as we have no alternative means of accommodation.”

(14) A similar plea was raised in **Linotype – Hill Finance Ltd. v Baker** (1992 4 All ER 887, a case which dealt with an application for a stay of execution by a judgment debtor,

- pending appeal. It was held that where the Court is satisfied that without a stay, the debtor will be ruined and that his *appeal has a reasonable prospect of success*, a stay *should be granted*. The plea of ruination of the judgment debtor without more is insufficient. There was here, no appeal from the judgment of the 7th October 1998.

(15) In any event, I don't accept that such an outcome, as the judgment debtor forecast, is likely. The evidence is, the judgment creditor has acquired a skill which has increased his earning potential. In addition, his wife's share in the land will be at the disposal of the family. The family will benefit by having a large portion of the sword of debt hanging over it removed.

(16) The administration of justice will be assisted by demonstrating that remedies and awards do come to the hands of aggrieved persons who take their matters to the Court. Thereby dispensing with the need for reprisals and revenge in matters of this nature, which is a source of concern.

(17) Also, in **First Trade International Bank and Trust Ltd. v Crown Motors Ltd.**, C.L. 1997/F031, unreported decision of Supreme Court, delivered on 9th March 2005, the judgment debtor apparent parlous financial state was no bar to an order for sale.

On 25th June 1998, Crown Motors was ordered to pay to First Trade the sum of \$209,669.21 in 90 days. Writ of Seizure and Sale was issued on 9th February 2000. On 12th April 2000, Crown Motors filed an affidavit in which its chairman stated that the only assets of Crown Motors are premises at No. 29 Hagley Park Road and Honda parts valued at J\$1.5M and that Crown was unable then to lodge the sum of US\$209,669.21 as ordered by the Court. Counsel for the judgment creditor unearthed another property, the subject of the order.

(18) Despite submissions to the effect that the subject property was occupied for years by another member of the group and that the group of companies to which Crown belonged was owed more money than the instant judgment sum, the Court held; the order of 25th June 1998 was to have been complied with within 90 days of that date, i.e., by 24th September 1998. There being no appeal from that judgment, the order for sale would be granted.

Third Party Interest in the Land

(19) Part 55 refers to several of the rules concerning third parties who may have an interest in the land, the subject of an order for sale. See Rule 55. (2) (b) (iii), which provides that an application must state by affidavit evidence;

(iii) the full names and addresses of all persons who to the knowledge or belief of the applicant have an interest in the land.

(iv) the nature and extent of such an interest.

And Rule 35.5

An inquiry into what interests any interested person may have in the land and the extent of such interest in the net proceeds of sale.

(20) The Family Property (Rights of Spouses) Act, 2003 recites at S. 17 (1) subject to the provisions of this Act provides at sub paragraph:

(b) Secured or unsecured creditors of a spouse shall have the same rights against that spouse and any property owned by that spouse as if this Act has not been enacted.

(21) Mrs. Silburn states that her income has changed significantly from the time of the interim order, and that she is now responsible for meeting the household expenses. That the true extent of her investment and interest is not reflected in the duplicate title because

she had acquired a loan of US\$35,000 which was used to do significant improvements at the home.

(22) It was suggested to her that her affidavit sworn on the 14th December 2005 was to the effect that she had been unemployed for a significant period of time up to the purchase of the property during which time the judgment debtor was solely responsible for meeting all expenses of the household and there was no assertion then that she was self-employed.

(23) I was not impressed by the evidence of Mrs. Silburn; which appeared contrived and lacking in documentary support. There was no evidence that she has been responsible for the repayment of the loan from NHT. The letter that purports to evidence the loan of \$35,000.00 on which her beneficial claim rests is not supported by any other evidence, although she claims that the funds were sent via Western Union. There are no receipts to support these transmissions via Western Union. Neither is there evidence of her disbursing funds in the improvement of the house.

(24) I did not find her evidence credible, and find that she did not contribute to the acquisition or improvement of the house beyond making possible the NHT loans, which the judgment debtor has been repaying.

I find that the interest of the spouse in the subject land is that shown on the Duplicate Certificate of Title. The net proceeds of sale will be reduced by a sum equivalent to the wife's one-fifth share in the tenancy in common.

(25) I am satisfied that in all the circumstances of this case, it is necessary and expedient to grant the order for sale. The judgment debtor has effectively been kept out of the fruits of his judgment since the order was made. The application is granted.

• It is hereby this day ordered that -

1. The land comprised in Certificate of Title registered at Volume 1339 Folio 595 of the Register Book of Titles be sold in execution of the judgment herein.
2. The sale be effected by public auction failing which the sale may be effected by private treaty.
3. The judgment creditor's attorneys shall have conduct of the sale.
4. Neither the judgment debtor nor Mrs. Debbie Annmarie Silburn nor any of his/her or their servants and/or agents shall be entitled to bid at any auction of the land nor to purchase the land by private treaty.
5. The judgment debtor and Mrs. Debbie Annmarie Silburn and each of them shall deliver up vacant possession of the land and every part thereof (save any part occupied by any tenant) to the judgment creditor's attorneys by 2:00pm on Friday, 28th September 2007 and shall at the same time deliver to the judgment creditor's attorneys all keys for the improvements upon the said land.
6. In the event of any failure to deliver up possession, the judgment creditor shall be entitled to take possession on and from 2:00m on Friday, 28th September 2007.
7. Pending delivery up of possession, the judgment debtor and Mrs. Debbie Annmarie Silburn and each of them is/are hereby restrained from doing or causing, permitting or suffering to be done any act, matter or thing which would, or would be likely to reduce the value of the land (including the improvements thereon).
8. The judgment debtor and Mrs. Debbie Annmarie Silburn are hereby further restrained from selling, offering for sale, mortgaging, charging or otherwise encumbering the land the subject of this order or dealing in any way whatsoever with the same pending completion of the sale.
9. The judgment creditor's attorneys shall obtain a valuation of the land from a licensed real estate valuer. The judgment debtor and Mrs. Debbie Annmarie Silburn shall cooperate fully and in all respects with the carrying out of the said valuation.
10. For the purposes of the auction hereby ordered, the reserve price shall be the forced sale value stated in the said valuation.
11. The auction shall be conducted by a licensed real estate dealer.

12. In the event of a sale by private treaty the sale price shall be the best price reasonably obtainable in the circumstances at the time.
13. The judgment debtor and Mrs. Debbie Annmarie Silburn shall execute all documents and do all things reasonably requested of them by the judgment creditor's attorneys in order to give effect to these orders and they and each of them shall not do, or cause, permit or suffer to be done, any act, matter or thing to prevent, hinder or delay in any manner whatsoever the carrying out of these orders.
14. The judgment debtor shall pay the judgment creditor's costs of and incidental to this application as taxed if not agreed, and the judgment creditor is granted a special costs certificate.
15. All costs, fees and expenses of and incidental to the sale or attempted sale or sales of the land shall be recovered by the judgment creditor's attorney from the proceeds of sale.
16. The net proceeds of sale (after the payment of all taxes, duties, costs, fees and expenses) shall be applied in reduction of the judgment debt – first in reduction of the interest accrued and accruing thereon and then in reduction of the principal amount of the judgment debt.
17. The rent payable by any tenant occupying any part of the land shall, from the date of this order, be paid to the judgment creditor's attorneys and shall be applied in reduction of the judgment debt, interest, costs, fees and expenses.
18. The judgment creditor's attorneys shall cause a copy of this order to be served upon any tenant occupying any part of the land.
19. The judgment creditor's attorneys may apply directly to this judge in chambers for a certificate pursuant to rule 55.7(1) of the Civil Procedure Rules, 2002 (as amended) upon giving 2 days' notice to this judge but otherwise without notice. In the event of this judge being unavailable, the application may be made to any judge upon the giving of 3 days' notice.
20. In the event of the net proceeds of sale of the land being insufficient to pay off the judgment debt, interest and costs, the judgment creditor shall be at liberty to take such further steps in execution of the judgment as he may be advised.
21. The judgment debtor shall continue to pay the judgment creditor the sum of \$10,000.00 per month until further order.

