THE REPUBLIC OF UGANDA

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

MISCELLANEOUS APPLICATION NO. 0780 OF 2023
(ARISING FROM MISC. APPLICATION NO. 0249 OF 2023)
(ARISING FROM EMA NO. 0064 OF 2023)
(ARISING FROM MISC. APPEAL NO. 0036 OF 2022)
(ARISING FROM EMA NO. 77 OF 2020)
(ALL ARISING FROM HCCS NO. 680 OF 2018)

MEDIPHARM SALES LIMITED :: APPLICANT

VERSUS

MIRZA ASLAM ALI :: RESPONDENT

(Before: Hon. Justice Patricia Mutesi)

RULING

Background

This application is brought under **Section 33 of the Judicature Act Cap 13, Sections 82** and **98** of the **Civil Procedure Act Cap 71** and **Order 46 rules 1, 2** and **8** of the **Civil Procedure Rules S.I. 71-1** seeking:

1. An order reviewing and setting aside the ruling and orders in Misc. Application No. 0249 of 2023.
2. An order directing that the payment of the Respondent's taxed costs is shared equally between the Applicant and Maaz Pharma (A) Ltd.
3. A declaration that the garnishee order absolute attaching the sum of UGX 11,093,100 on the Applicant's account in ABSA Bank was unfair, improper and wrongful.
4. An order that the sum of UGX 5,546,550, being half of the taxed costs in Misc. Appeal No. 0036 of 2022 is reinstated to the Applicant's account in ABSA Bank.
5. An order providing for the costs of this application.

Briefly, the grounds of this application are that:

1. There was a mistake or error on the face of the record in that, while in Misc. Appeal No. 0036 of 2022 and EMA No. 0064 of 2023 it was ruled and ordered that the 2 Respondents therein pay costs to the respondent herein, execution only issued against the applicant herein.
2. It was wrong, unfair and contrary to the interest of justice to execute the appellant's taxed bill of costs against the Applicant only.
3. The decision in Misc. Appeal No. 0036 of 2022 did not specifically state that the costs were to be paid by the Applicant herein only.
4. The Applicant is ready and willing to pay half of the taxed costs so that the other half is paid by the other Respondent in the said appeal.
5. It is in the interest of justice that this application is granted.

The application is supported by the affidavit of Ms. Angella Martha Akurut, the Applicant's Accounts Assistant. She stated that the Applicant sold medicine to Maaz Pharma (A) Ltd on credit on various occasions in 2017. Throughout that period, she directly dealt with the Respondent who was a director in Maaz Pharma. Upon full account reconciliation, it was discovered that Maaz Pharma owed the applicant UGX 126,742,608. The Respondent drew cheques for this sum in favour of the Applicant but those cheques were all dishonoured.

Ms. Akurut stated that this prompted the Applicant to file Civil Suit No. 0680 of 2018 against Maaz Pharma to recover the debt. That suit was decided in favour of the Applicant. This Court issued a warrant of arrest against the directors of Maaz Pharma, including the Respondent. The Respondent successfully appealed that decision vide Misc. Appeal No. 0036 of 2022 on grounds that he was no longer a director in Maaz Pharma when the debt was incurred. Costs of that appeal were awarded to the Respondent whose bill of costs was taxed and allowed at UGX 11,093,100. The Court issued garnishee orders for the recovery of the entire UGX 11,093,100 from the Applicant's bank account in ABSA Bank.

Ms. Akurut believes the garnishee orders were wrong and unfair because the ruling in Misc. Appeal No. 0032 of 2022 did not specifically state that the costs were to be paid by the Applicant only. She concluded that the 2 Respondents in the appeal were supposed to evenly share payment of the costs and confirmed that the Applicant is ready to pay its own half of those costs.

The Respondent filed an affidavit in reply opposing the application. He asserted that, after the bill of costs was taxed, he applied for execution of the taxed costs.

The Court issued a notice to show cause which was served but the applicant never came to Court to show cause why execution should not issue. The Court issued garnishee orders for the recovery of the entire sum of UGX 11,093,100 from the Applicant's bank account in ABSA Bank. These orders were fully executed and, in his view, that implies that this application has been overtaken by events and cannot be allowed.

Issues arising

1. Whether this application is competent.
2. Whether the execution proceedings should be reviewed.

Representation and hearing

At the hearing, the applicant was represented by Mr. Elijah Wante of M/s Wante & Co. Advocates while the respondent was represented by Ms Nakibuuka Shadia of M/s Reeve Advocates. I have fully considered the submissions of counsel, the laws and authorities cited therein and all other materials on record.

Determination of the issues

Issue 1: Whether this application is competent.

Counsel for the Respondent contested the competence of this application on grounds that it seeks the review of execution which was already completed. Counsel emphasised that the Applicant was served with court process in the execution proceedings but it failed to attend Court. He concluded that this application has been overtaken by events and is no longer maintainable.

Although counsel for the Applicant did not respond to these arguments, I am satisfied that this application is competent. The Respondent's suggestion seems to be that a judgment creditor can execute a warrant in the most unlawful manner and, simply because the execution is complete, he or she would not face any repercussions. This is not, and cannot be, correct.

The mere completion of execution does not, in and of itself, render the Court powerless against any illegalities or injustices that could have been committed during the execution process. While courts tend to be reluctant in allowing applications whose effect would be to reopen already-concluded cases, courts also have an enduring duty to administer justice and to grant adequate relief to victims of wrongs. Courts retain the power to, sparingly, review execution of

their orders and decrees and grant all appropriate relief in deserving cases, even after execution is completed.

Depending on the form of execution issued by the Court, it may or may not be possible to reverse a concluded execution process. Nonetheless, even where third party rights have been created in the property sold in execution or where such property has since been destroyed or lost, the Court can still compensate the injured party with the value of that property if the sale can no longer be stopped or reversed.

I am fortified in this view by the generality of Section 82 of the Civil Procedure Act. That provision allows courts to review their decisions and to make any and all orders as it deems fit. If the legislature's intention had been to lock out all decisions which had been fully executed from the realm of review, it would, and should, have said so expressly in that provision.

The instant application seeks review of execution which was conducted by way of attachment of funds in the Applicant's bank account in ABSA Bank. If the attachment of those funds is found to have been excessive as the Applicant has claimed, the Court can easily order the return of those funds to the Applicant's account. Although the execution is complete, I have not found anything which can impede this Court from crosschecking its record to ascertain whether there is any error apparent on the face of its record as far as apportionment of the judgment debt is concerned. This application is, therefore, found competent.

Issue 2: Whether the execution proceedings should be reviewed.

I reiterate that the Court's power to review its own decisions is provided for under Section 82 of the Civil Procedure Act. The 3 grounds which can justify review, as prescribed in Order 46 rule 1(1) of the Civil Procedure Rules, are:

1. The discovery of new and important evidence which, after exercise of due diligence, was not within the applicant's knowledge or could not be produced by him or her at the time when the decree was passed or the order made.
2. A mistake or error apparent on the face of the record.
3. Any other sufficient reason.

It is trite law that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and, instead, requires an examination or an argument to establish it. Additionally, misdirection by a judicial officer on a matter of law cannot be said to be an error apparent on the face of the record. This position was summarised by the Supreme Court in **Edison Kanyabwera V Pastori Tumwebaze, SCCA No. 6 of 2004** when it held that:

> ***"... In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no Court would permit such an error to remain on record."*** (Emphasis mine).

The main allegation in this application is that there is an error apparent on the face of the record in EMA No. 0064 of 2023 and Misc. Application No. 0249 of 2023 which is that the garnishee orders were issued against the Applicant only yet the Court had allowed the said appeal with costs against both the Applicant and Maaz Pharma (A) Ltd. Having revisited the Court record in its entirety, my considered view is that this no error apparent on the face of the Court record or at all.

The alleged error is not apparent on the face of the rulings in Misc. Appeal No. 0036 of 2022, EMA No. 0064 of 2023 and Misc. Application No. 0249 of 2023. Arguing that the decision to issue garnishee orders against the applicant only was unfair, counsel for the applicant appealed to the Court's good conscience and sense of justice for a finding that it would have been fairer for the applicant and Maaz Pharma (A) Ltd to share the payment of the taxed costs equally. The alleged unfairness is not manifest or self-evident on the record and actually requires legal argument on equity and justice to establish it.

In any case, even when such legal arguments are considered, I am still unable to find that the Court's decision to issue execution against the applicant only was an error at all. In dismissing Misc. Appeal No. 0036 of 2022 with costs, the Court did not specify who of the Respondents therein would pay the costs or what portion of the costs each of those respondents would bear. As counsel for the applicants correctly submitted, the position of the law is that, unless specified otherwise, an order for costs against 2 or more parties renders each of them

jointly and severally liable to pay those costs (See **Attorney General & Anor V Ouma Adea, HC Misc. Appeal No. 3 of 2013**).

My impression from the submissions is that the applicant misconstrued the import of the finding that 2 or more people are *"jointly and severally"* liable for a judgment debt. In **James Sebagala V China Palace (U) Ltd, HCMA No. 152 of 2015**, this Court faced a debtor who, similarly, complained that his creditor had singled him out to make good the entire judgment debt while leaving out other debtors. The Court held that:

> ***"... while the defendants contributed to this indebtedness, no reasonable division can be made by way of apportionment of the debt. Furthermore, it would be unfair for the judgment creditor to be undercompensated because one of more of the defendants is insolvent and cannot pay his share of proportionate liability.***
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> ***"... their agreement did not contain any words of limitation or conditions. It was typically an absolute document giving the judgment debtor the freedom to recover from any of the judgment debtors. In the premises, the judgment creditor could proceed against any of them and it is upon whoever is aggrieved with this procedure to pursue the other obligators for a contribution to their share of the liability. It is therefore this court's finding that the judgment creditor did not breach any procedure by proceeding to execute against the applicant ..."*** Emphasis mine.

The above dictum represents the correct import of the phrase *"jointly and severally liable"*. Where parties are jointly and severally liable for a judgment debt, the creditor is not required to sit down with a calculator to apportion that debt evenly amongst all of them. Each of the debtors is bound to pay the entire debt in full. None of them can refuse to pay that debt in full on grounds that the other debtors have not been asked to chip in. All such debtors can do is to pursue claims for contribution from the other debtors. Above all, the Court cannot ask the judgment creditor to bring back the money recovered from one of the debtors since each debtor is equally liable to pay the whole debt in full.

While I agree with the Applicant that it was unfair and unjust for it to pay all the taxed costs singlehandedly, I do not think that this gives rise to sufficient cause

justifying review of the execution. This is because, when several persons are jointly and severally liable for the same judgment debt, any one of those persons can be called upon to pay the entire debt. The correct solution for the resultant injustice after only one of the debtors pays the entire debt is not for that debtor to sue the creditor for a refund. The correct solution is for him or her to sue the other debtors for their contributions to that debt.

Consequently, I make the following orders:

i. This application is hereby dismissed.

ii. Costs of this application are awarded to the respondent.

Patricia Mutesi

Patricia Mutesi

JUDGE

(13/03/2024)