

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS APPLICATION NO. 236 OF 2022

**(ARISING OUT OF MISC. APPLIC. NO. 236 OF 2022 AND REVISION
APPLICATION NO. 18 OF 2019)**

ARISING FROM EMA NO. 3042 OF 2018 AND CIVIL SUIT NO. 1071 OF 2017

ENGEYE BAKERY LTD:..... APPLICANT

VERSUS

- 1. BYATUKOREIRE FREDRICK T/A SHREW SOLUTIONS LTD**
- 2. ENGANO MILLERS LTD :..... RESPONDENTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this suit by Notice of Motion under Section 33 of the Judicature Act, Section 33 (1) and (2), 34 and 98 of the Civil Procedure Act, Order 52, Rules 1 and 3 of the Civil Procedure Rules, seeking for orders that;

- a) The 1st respondent be ordered to return the applicant's property wrongfully attached, in the alternative, both respondents be ordered to pay the applicant the current value of the said property.*
- b) That if the sale had proceeded and/ or the attached property is no longer available, the 1st respondent be ordered to account for it in order to deduct the decretal sum and refund the value of what was attached in excess.*

- c) *The 2nd respondent by direct implication and/ or necessary inference benefited from the unlawful execution process conducted by the 1st respondent, and should bear the consequence his noncompliance with the law.*
- d) *Both the respondents are jointly and severally liable for the consequences of the unlawful execution of the decree.*
- e) *Both respondents to reimburse Ugx. 400,770,000/= to the applicant after deduction of the decretal sum of Ugx. 20,700,000/= from Ugx. 421,470,000/=.*
- f) *Criminal proceedings to proceed against the 1st respondent for contempt of court and conversion of the suit items.*
- g) *Both respondents to pay costs of this application.*

The grounds supporting this application are contained in the affidavit of Namatovu Oliver; the director of applicant attached to the application which briefly states that;

- a) The 1st respondent as a court bailiff stormed the applicant's premises and took away property in execution of a decree arising from the above civil suit.
- b) The 2nd respondent was the sole beneficiary of the said execution to recover the decretal sum of Ugx. 20,700,000/=.
- c) Since the 2nd respondent is a beneficiary as stated, it cannot be exonerated from the underlying obligations arising from the execution to recover its money.
- d) The property which the 1st respondent attached was over and above the decretal value which was stated in the warrant of attachment issued to him by the court hence an over attachment.

- e) The 1st respondent in the same exercise took away items which were not provided in the warrant of attachment, hence unlawful/ wrongful attachment.
- f) The 1st respondent attached the suit items in absence of the applicant's directors nor any other person authorized to do so on its behalf.
- g) That to date, the property is still in the unlawful possession of the 1st respondent as a result of the long expiry of the warrant of attachment.
- h) The same 1st respondent is no longer a licensed court bailiff at the time of filing this application, and has no intention of renewing it.
- i) The 2nd respondent does not care whether or not the 1st respondent's action was lawful hence a direct inference and or necessary implication that its claim in the decree got satisfied by the 1st respondent.
- j) The 2nd respondent recommended the 1st respondent to court in order to obtain the warrant of attachment against the applicant hence vicariously liable for his acts as an express and/ or implied agent.
- k) The applicant is entitled to reimbursement of the monetary value of the good attached by both the respondents at the time of the attachment after deduction of the decretal sum in satisfaction of the decree.
- l) The over statement of the value of the subject matter in the plaint by the 2nd respondent exposed bad faith in execution of decree, to the detriment of the applicant.

The 2nd respondent filed its affidavit in reply deponed by Ocuku Solomom opposing this application wherein he stated that the application is devoid of merit and does not disclose any basis upon which the 2nd respondent's attendance is required in court. He further stated that the 1st respondent was a court appointed

bailiff answerable to the court. He further deponed that the 1st respondent executed the decree, made the return to court and before the court could order a sale, the applicant secured orders staying the execution process.

The 2nd respondent also contended that the applicant has never paid the Ugx. 20,700,000/= and the interest of 10% per annum awarded in Revision Application No. 18 of 2019. It was deponed that the 2nd respondent has never kept custody of the attached goods and equally awaits the fruits of its litigation.

The 1st applicant was duly served but did not file any affidavit in reply.

The applicant was represented by *Mr. Kayondo George* whereas the respondents were represented by *Mr. Kasiisa Ronald*.

The applicant proposed the following issues for determination by this court.

- 1. Whether the execution of decree vide EMA 3042 of 218 arising from Civil Suit No. 1071 of 2017 was unlawful?*
- 2. If not, who is responsible for the conduct?*
- 3. What remedies are available to the parties?*

The parties were directed to file written submissions which was accordingly done and I have considered them in this ruling.

Determination

Whether the execution of decree vide EMA 3042 of 2018 arising from Civil Suit No. 1071 of 2017 was lawful.

The applicant submitted that section 38 of the Civil Procedure Act and Order 22, Rule 10 of the CPR provides for immovable property as a mode of execution for recovery of decretal dues to the judgement creditor. Counsel further relied on the Judicature Court Bailiffs Rules which provides that execution proceedings shall be conducted by a person to be designated a court bailiff who shall hold a license issued by the appointing authority under Rule 5 of these Rules and a letter of appointment in the form specified in the first schedule to these Rules.

Counsel submitted that the applicant's claim is that whereas the 1st respondent, a court bailiff validly held a warrant of attachment and sale of its property, the process fell short of being in conformity with the legal provisions; prior to the application for execution of the decree, from the onset of the execution and thereafter until to date, since he seems to have appropriated the said property and has refused to appear in court to account for it.

Counsel also stated that the 1st respondent did not execute the warrant as directed by law because the execution was high handed and arbitrary culminating in loss of property by the applicant. Counsel noted that the all efforts to pay the decretal sum of Ugx. 20,700,000/= got frustrated when the 2nd respondent instead filed a suit to recover Ugx. Ugx. 40,000,000/= without proof, a fact which the applicant referred to as bad faith, deceitful, dishonest and crookedness and that a warrant was issued to recover the exaggerated sum after misleading court. He noted that the 2nd respondent did not appeal the decision vide Revision Misc. Applic. No. 18 of 2019.

Counsel submitted that execution must be in accordance with the decree and the law as per the case of Catherine Nakkazi vs Kirunda & Anor [1995] KARL 551. He noted that none of the directors were around when the 1st respondent was attaching the property of the applicant and no effort was made to contact them to ensure their presence while the execution proceeded to avoid allegation of misconduct like theft of property. He stated that there was need for the presence of a director of the applicant or an authorized person to assist the 2nd respondent while attaching the property for purposes of making the inventory upon which he or she would sign to avoid complaints of this nature.

Counsel stated that the applicant, under paragraph 4, stated that the 1st respondent extracted warrant of attachment in which he stated items of a total value of Ugx. 33, 500,000/= which were extremely low. He also noted that the 1st respondent attached items which were not mentioned in the warrant of attachment valued at Ugx. 269,350, 000/= a result of which the complaints were made to police and the deputy registrar but efforts to hold the 1st respondent accountable were futile.

Counsel further submitted that the applicant attached Annexures E1, E2, E3 and E4 for a mixer valued at Ugx. 2,600,000/=, an oven valued at Ugx 119,000,000/=, a rottery diesel oven valued at Ugx. 35,000,000/= and another oven valued at Ugx. 38,000,000/= respectively which were all taken by the 1st respondent. He relied on the case of *Kwesigabo Bamwine & Anor vs Nytil Picfare HCMA No. 70 of 1997* where it was held that property attached must be commensurate to the amount of debt. He therefore submitted that the 1st respondent's conduct while executing the decree in EMA No.3042 of 2018 was done without due regard to the provisions of the law and conformity to the rules of procedure.

Counsel further submitted that the applicant obtained a court order vide Misc. Applic. No. 750 of 2921 ordering the 1st respondent to avail the attached property for inspection, for which the applicant was to use as security to acquire a loan but the same was ignored by the 1st respondent. He therefore prayed that court finds that the execution of the decree vide EMA 3042 of 2018 arising from Civil Suit No. 1071 of 2017 was not done in accordance with the law.

In reply, counsel for the 2nd respondent submitted that it does not dispute that the execution process was handled by a court bailiff as required by the law. He stated that with a court appointed officer at the forefront and the applicant not having paid as at the date of execution, the court sanctioned execution cannot be said to have been illegal. He stated that if all at the applicant had any issue with execution, it ought to have filed the appropriate application before the executing court. Instead, it filed an application for revision and setting aside the execution.

The 2nd respondent also noted that the applicant's contention is on the conduct of the 1st respondent when he attached items not listed which to the applicant are of a higher value than that stated in the warrant. It was submitted that Rule 16 (3) and 24 (1) of the Judicature (Court Bailiffs) Rules provides for how such issues should be resolved. He submitted that the applicant never moved court to review the value of the items, there is no valuation report upon which an inference of under valuation can be drawn and that in the circumstances, the applicant's submission is lacking in material and merit.

Counsel further submitted that if the applicant is aggrieved by the conduct of the 1st respondent, it has recourse under Rule 24 (1) as the 2nd respondent lodged a complaint with the Chief Registrar. He noted that the 2nd respondent had no role to play in the execution process and waits in anticipation to a closure of the execution when it could receive its fruit. He therefore prayed that the court find that the execution was legal.

Analysis

Section 38 of the Civil Procedure Act and Order 22 of the Rules thereunder set out the powers of court to enforce execution. Under the section, execution may be ordered in different ways, which include among others attachment and sale of any property and arrest and detention in prison of any person in such manner as the nature of the relief granted may require.

The applicant submitted that the execution of the decree vide EMA 3042 of 218 was unlawful since the 1st respondent executed against the applicant's property arbitrarily and over attached property that was not mentioned in the warrant of attachment.

An execution is wrongful or unlawful when it is neither authorized nor justified by the warrant or by the decree issued by court. It is also wrongful when the requirements of the rules of procedure are not adhered to. The law designates court bailiffs as persons who carry out the execution process on its behalf. The general principle of law is that a court bailiff is an agent of court who enjoys immunity in the performance of his/her execution proceedings. This is provided for under **section 46 (2) of the Judicature Act** which 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 the execution of any such order or warrant.

However, this does not apply where the court bailiff acts unlawfully. It is trite law that a bailiff is supposed to only attach the property that satisfies the debt. In the case of *Addillah Shrwaa vs Sheikh Mohamed Hay Ahmed C.A No. 1 of 1976 Court of Appeal of East Africa*, the court held that only property as appears sufficient to satisfy any decree which may be passed in the suit can be attached and the order should be limited to property to the value of the amount claimed in the suit.

The bailiff has a duty to seize only such quantity of goods as would be reasonably be sufficient to pay the amount, and where the bailiff seizes more, prima facie, he is a wrongdoer. See: **Gawler vs Chaplin and Ors (1848) 154 ER 590 at 592**. The bailiff also has a duty to exercise a reasonable and honest discretion in estimating what the goods will realize at sale or auction. As such, he/ she has the burden of showing that he/ she exercised both a reasonable and honest discretion in estimating what the goods will realize at auction once the debtor proves that there has been an attachment of its property.

To succeed in a claim where there is over attachment, the applicant must show that the attachment was obviously excessive or clearly disproportionate to the debt. In accessing this, the court should take into consideration the conditions under which an attachment or sale of the property takes place. It is also important to note that while a bailiff is not obliged to obtain independent valuation in every case, he must, at the very least, have a basic grasp of the nature and value of what he is attaching in order to avoid over attachment.

In this case, the applicant led evidence to show that the property so attached by the bailiff was of higher value than that stated in the warrant. It further led evidence to show that the 1st respondent attached items which were not mentioned in the warrant of attachment valued at Ugx. 269,350, 000/= as result of which the complaints were made to police and the deputy registrar.

This is a serious allegation of over attachment. Unfortunately, the facts stated in the applicant's affidavit against the 1st respondent were not rebutted to. It is now settled law that where facts are sworn in an affidavit and they are not denied or

rebutted by the opposite party, the presumption is that such facts are accepted. See: **Massa v Achen [1978] HCB 297**. Since the 1st respondent failed to respond to the facts and evidence raised against him by the applicant in its affidavit, this amounts to a total admission of facts as against him.

The applicant adduced evidence of prices upon which the property attached was bought. It however did not adduce any valuation. Be that as it may, the 1st respondent did not contest any of the facts made against him. **Rule 16 (10) of the Judicature (Court Bailiffs) Rules** provides for the process of attachment. It provides as follows

10. The process of attachment shall be as follows:

- a) A warrant of attachment shall be served upon the debtor and a return shall be filed in court before the sale is ordered;*
- b) where the judgment debtor declines or evades service, the court bailiff shall serve the warrant upon the local council of the area and the area police station shall post a notice at the premises, the subject of execution;*
- c) the court bailiff shall make an inventory of the attached property in triplicate stating the appropriate value of each item which shall be signed by him or her and the debtor if possible, and witnessed by a member of the local council;*
- d) the court bailiff shall send the original copy of the inventory to the court that issued the attachment warrant and retain the duplicate for himself or herself and the triplicate for the debtor.*

There is no evidence on court record to show that the 1st respondent adhered to the above process stipulated by law. The 1st respondent did not file any copy of the inventory of the attached property before the court. Furthermore, the 1st respondent did not return the warrant of attachment by the 31st of January, 2019 as directed by the court. From this, I observe that the 1st respondent's conduct even after the attachment left a lot to be desired. He did not file any proceeds from the attached property with the court as mandated by the law.

The applicant led evidence to show that the 1st respondent sought execution of sums of Ugx. 40,000,000/= despite the decretal sums being revised to Ugx. 20,700,000/= under Misc. Applic. No. 18 of 2019. However, I note that the application for the revision before this court was only commenced after the execution process had been set in motion with the issuance of the warrant of attachment.

From the above circumstances, I am of the view that the 1st respondent acted unlawfully and in bad good faith when carrying out the execution of EMA 3042 of 218 arising from Civil Suit No. 1071 of 2017. The 1st respondent vandalized the applicant's property by uprooting the power cabling and water cooling system together with the other machinery and equipment not mention in the decree. An execution is irregular when any of the requirements of the rules of court or for the time being have not been complied with.

This issue is therefore answered in the affirmative.

Who is responsible for the conduct?

Counsel for the Applicant cited the case of *Francis Micah vs Nuwa Walakira [1995] KARL 36* where it was held that where a bailiff has been wrongful in its conduct, he/ she is held liable. He submitted that since the bailiff was ordered to avail the suit property for inspection and to appear in this application to answer questions between the parties and adamantly refused to heed to the directives, the inference is that the claims as put forward by the applicant in its affidavit remain true and uncontroverted.

Counsel further relied on the case of *Semakula vs Musoke [1981] HCB 267* where it was held that a court bailiff may be held responsible for his conduct, however he is construed as a representative of the judgement creditor to the extent of any excessive attachment, and such suit can be brought under s. 34 of the Civil Procedure Act in this case being the 2nd respondent.

He stated that the applicant led evidence of the ruling in Rev. Misc. Applic. No. 18 of 2019 which the 2nd respondent was informed of in order to enable the 1st respondent acquire the applicant's immovable property by presentation of an exorbitant sum of Ugx. 40,000,000/= in a plaint to the trial court other than the Ugx. 20,700,000/= known by the applicant.

He stated that in the application, court found to be the actual amount owing to the 2nd respondent and thus apparent bad faith, deceit and dishonesty by the latter thus leading to a miscarriage of justice.

Counsel relied on the case of *Makula International Ltd vs His Eminence Emmanuel Cardinal Nsubuga & Rev. Fr. Dr. Kyeyune, CACA No. 4 of 1981* where the court of appeal held that a court of law cannot sanction what is illegal as an illegality brought to the attention of court overrides all questions of pleading, including any admission thereof and court cannot sanction an illegality.

Counsel also submitted that the applicant adduced evidence that the respondents exhibited dishonesty and/ or adverse conduct in the execution process of attachment of the applicant's property. At the time the warrant of attachment was issued to the 1st respondent; there was a directive that all execution matters must be handled by a bailiff with approval from the judgement creditor or counsel in conduct of the case. He therefore prayed that the both the respondents are held responsible for the unlawful and wrongful execution process of the subject decree.

For the 2nd respondent, counsel relied on Rule 46 (2) of the Judicature Act to submit that where the 1st respondent acted injudiciously, then he was solely responsible for his conduct as being the person who was bonded to execute the warrant of court. This blame cannot be shifted to a decree holder like the 2nd respondent in the absence of any active participation in the bailiff's lapse to be judicious.

Counsel also submitted that decree holder does not share any relationship with court appointed bailiffs and cannot be held vicariously liable for misconduct of the 1st respondent. He stated that the 1st respondent was not acting as an agent for the 2nd respondent and neither did he report to the 2nd respondent. The 1st respondent

is an officer of court answerable to court and ought to be sanctioned as per the law prescribed. Counsel therefore prayed that court finds the 1st respondent solely responsible for his actions.

Analysis

As already discussed, court bailiffs are protected by the law in respect of any lawful or authorised acts done in execution of any such order or warrant under **section 46 (2) of the Judicature Act**. This qualified immunity ensures the need for the bailiffs to be shielded as officers of court when performing their duties as long as their actions are reasonable and were within the scope of their jobs. It shields court bailiffs from liability for damages when it is not clearly established that they acted in an incompetent manner or knowingly violated the law. The judgement debtors or claimants of a wrongful execution can pursue legal action against court bailiffs only if the bailiff acts illegally, negligently, insolently or oppressively.

Therefore, the general rule that applies is that the bailiff is as immune to legal proceedings in execution of this duty under execution. However, where the execution is unlawful the bailiff cannot enjoy that immunity. See: *Maria Onyango Ochola & Ors v. Hannington Wasswa & Anor [1988-1999] HCB 102*. A bailiff is therefore not entitled to absolute judicial immunity. He/ she incurs personal liability only when he or she acts illegally or in excess his powers given by the warrant of attachment. See: *Bifabusha vs Turyazooka [2000] 2 EA 330*, *Fenekasi Semakula vs James Musoke [1981] HCB 46*

John Kruse in his book “The Law of Seizure of Goods: Debtor’s Rights and Remedies” notes that a bailiff may be sued at common law for wrongful execution, which may occur in any of three ways; a) where the execution is unauthorised by neither the judgment nor the writ, where the execution is excessive, carried out at the wrong address or against the wrong person’s goods, b) where it is issued maliciously or without reasonable cause and; c) where it is done in breach of common law powers or procedure laid down by the rules of court.

I have already found that the execution was done unlawfully and in bad faith by the 1st respondent who not only over attached the applicant's properties but has to date not filed any inventory on the proceeds recovered or return of the warrant.

It is the applicant's case that the 2nd respondent is equally liable for the acts of the 1st respondent. I beg to disagree with this. This is because a court bailiff in executing a warrant issued by the court is no agent of the judgment creditor. The Court bailiff is the agent of the registrar of the High Court who authorised him/her by a warrant to attach and sale the attached property.

Unless the judgement creditor during the execution connives or colludes with the bailiff resulting in unlawful execution, then neither the party nor the bailiff can escape liability. This may include circumstances where the judgment creditor identifies the wrong property to the bailiff for attachment and the latter is privy to the truth, the bailiff colludes with the judgment creditor to undervalue for sale the attached property. However, where the bailiff, without the participation or active involvement of the judgment creditor, under values the property and sales it at a lower value, unless he can prove that the act was not willful, then he cannot appeal for the immunity.

From the evidence on court record, the applicant did not lead any evidence to show that the 2nd respondent connived or colluded with the 1st respondent to over attach the applicant's property or carry out the unlawful execution in the circumstances. It is trite law that once an illegality is brought to the attention of court or discovered by the court, it is the duty of the court to rectify it and ensure that justice prevails. As such, I find that the 1st respondent is solely responsible for the unlawful execution of the EMA 3042 of 2018 arising from Civil Suit No. 1071 of 2017.

When execution has been irregularly executed the court is enjoined to make an order of restoration since wrongful execution is trespass and criminal at the same time which ought to be stopped and checked.

The 1st respondent was directed to return the attached property of the applicant which he refused to do and his refusal would imply that he has converted the goods to his own use or sold them illegally. The actions of the 1st respondent are unreasonable, irregular and illegal and indeed an act of contempt against an order of this court.

It is impossible to overlook the extreme business disruption caused to the applicant by the actions and refusal to comply with the orders of this court to release the property/items in wrongful and illegal attachment. Punitive damages would be awarded against the 1st respondent of 100,000,000/=. This court has a duty to protect the unsuspecting public or judgment debtors from such criminals who disguise as court bailiffs and brokers to stem out the rogue elements.

In the circumstances, I make the following orders;

- a) The 1st respondent is ordered to pay the value of the wrongly and illegally attached property in total sum of **400,770,000/=** to the applicant.
- b) The 1st respondent should pay to the 2nd respondent a sum of **20,700,000/=** as the decretal sum.
- c) The 1st respondent should pay to the applicant a sum of **100,000,000/=** as punitive damages.
- d) An order to **ARREST** the 1st respondent- **BYATUKOREIRE FREDRICK T/A SHREW SOLUTIONS LTD** issues and he should be prosecuted for theft or conversion or any other related offences forthwith.
- e) The 1st respondent shall pay an interest of 20% per annum on all the awards from the date of this ruling.
- f) The 1st respondent to pay costs of the application to the applicant and 2nd respondent.

I so order.

SSEKAANA MUSA

JUDGE

25th January 2024