THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT-00-CC-MA- 0137 OF 2004

(Arising from HCT-00-CC-C.S 0583 [0590] of 2003)

Muka Drilling Services Ltd Applicant

Versus

Geoserve (U) Ltd Respondent

BEFORE THE HON. MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant is the defendant in the head suit. It seeks for orders for compensation for unlawful execution and vandalisation of the applicants attached property, and that provision is made for costs of this application. This application is brought under Section 34 of the Civil Procedure Act and Order 48 Rules 1 and 2 of the Civil Procedure Rules. The application is supported by affidavits sworn by the Mujogya Gilbert Atwoki and Turyasiima Jacob.
2. The Respondent is the plaintiff in the original head suit. It opposes the application, and in that vein, filed an affidavit sworn by Bruce Medhurst.
3. The grounds upon which this application is based are three as set out in the notice of motion. Firstly that the respondent prematurely applied for execution against the

applicant. Secondly that the respondent vandalized the attached property of the applicant. Lastly that the respondent undertook to make good the damage but has failed to do so.

4. The applicant contends as can be gathered from the affidavits in support of this application that the applicant is the judgement debtor in the head suit and had been allowed by court to pay the decretal amount in instalments at regular intervals and that it had successfully complied with the payment schedule. In breach of this arrangement, the respondents had applied for attachment, alleging breach of this arrangement, and court issued an order for attachment and sale of a Samil Rig Reg. No. UAD 829E and Samil support truck No. UAD 821E.
5. Upon a complaint by the applicant, the Registrar of the High Court recalled the warrant of attachment, and cancelled the execution. At the time the said vehicles were in the workshop of Nepta (U) Ltd where they had been taken by the applicants for repair long before the attempted execution.
6. After the recall of the warrant of sale the directors of the respondent moved to the formerly attached property, and removed certain parts, and when confronted by the applicants, admitted doing so, and both parties thereafter agreed that the respondents would foot the cost of putting these vehicles in the same condition as when they were initially first taken to the Nepta (U) Ltd for repair. A written agreement to that effect was signed by the applicant and the respondents dated 18th September 2004.
7. The applicant now alleges that the respondents have not complied with that agreement, and have caused them loss and damage, in excess of Shs150,000,000.00, hence this application to recover such loss and damage.
8. The respondents oppose this application and have put forth a somewhat different version of events, justifying the application for execution, and suggesting that in fact the court bailiffs had sold the trucks in question, by the time the warrant of attachment and sale was recalled by the Registrar of this court. The court bailiffs deny such a sale to have occurred. In any case subsequent agreements signed by both the respondents and applicants are inconsistent with a sale to have occurred.
9. The agreement of 18th September 2004 does show that there was money outstanding to the respondents from the applicants, which had in fact been retained by the applicant's advocates at the time, John Matovu of Matovu, Kimanje and Co. Advocates who had not

passed on the same to the respondents. This money that ought to have been paid to the respondents was never paid up to the hearing of this application.

10. The applicant asserts that it had honoured its obligations with regard to payment of the decretal amount as agreed presumably before the Registrar of this court on 26th February 2004. the applicant does not provide particulars of these payments in its affidavit. On the other hand the respondent denies the applicant's assertion that it had paid as agreed. The respondent's affidavit does have attachments including a letter from the Court Bailiff dated 25 May 2004 that shows the Bailiff recovered from the applicant Shs 20,000,000.00. It is the obligation of the party who asserts a fact to prove it. The applicant in the instant case has made general claims to have complied with the agreement, but fails on the affidavits presented to court, to show how it actually complied with the agreement. I find that the applicant has failed to make out ground one, that application for execution was premature.
11. It appears to me that a finding on ground one is immaterial in any case to the applicants real claims in this proceedings, which are for Shs. 25, 774,903.00 being the estimated cost of repairs of the vehicles that are alleged to have been vandalised, and Shs. 150,000,000.00, which is for damages for none use of the said vehicles for a period of four months, as a result of failure to repair the same within reasonable time. The relief sought is not grounded on whether execution was lawful or not, or whether it was premature or otherwise. No relief claimed flows from the execution complained against in this case.
12. The crux of the applicant's complaint seems to be grounded in the trespass to the trucks, which is really independent of the execution process, and for which there is an agreement for resolving issues related to the same. The agreement between the parties of 18th September 2004 sets out the terms agreed too by the parties in resolving this dispute. In reality it is not an issue related to execution of the decree at all. The respondents had no lawful role to play in execution apart from setting the process in motion with their application to court. Trespass to the property in issue was not part of the process of execution whatsoever nor was it a consequence of execution. Trespass to the vehicles in question was committed on or about the 8th May 2004, after cancellation of the warrant of attachment and sale of the trucks, if the affidavit of Jacob Turyasiima is to be believed.

And this was after the court had cancelled the warrant of attachment and sale of the trucks. Trespass was committed after execution had already been lifted. The trespass is therefore unrelated to the execution whatsoever. It is entirely a new and separate cause of action based both upon trespass and or the subsequent contract that followed.

13. Section 34 (1) of the Civil Procedure Act provides,

> *"(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."*

14. The above provisions clearly relate to questions arising out of execution, discharge or satisfaction of the decree which are to be considered by the court that passed the decree rather than by a separate suit. See *Francis Micah v Nuwa Supreme Court Civil Appeal No. 24 of 1994[unreported]*.
15. For the reasons I have endeavoured to show above, I am satisfied that this application has no merit as presently put forth in this application. The substance of the present claim by the applicant against the respondent cannot be presented to this court under Section 34 of the Civil Procedure Act. The applicant is free to pursue its rights, if it wishes, by different proceedings, outside Section 34 of the Civil Procedure Act.
16. This application is dismissed with costs to the respondents.

Dated at Kampala this 30th day of March 2005.

FMS Egonda-Ntende

Judge