THE REPUBLIC OF UGANDA

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

HCT–00–CC–MA-0251–2006

UGANDA ELECTRICITY BOARD)
(IN LIQUIDATION)) :::::::::::::::::::::::: APPELLANT

VERSUS

ROYAL VAN ZANTEN (U) LIMITED :::::::::::::::::: RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

This is an appeal from the ruling and orders of the Deputy Registrar in HCT-00-CC-MA-0168-2006 in which he ordered the appellant to deposit in Court a sum of Shs.150,000,000- as security within a period of 30 days. In the alternative, it was ordered that property belonging to the respondent with a forced sale value of Shs.150,000,000- be attached in favour of the respondent pending disposal of the main suit.

The appeal has a fairly simple background. On 13/3/2006 the respondent filed a suit against the appellant claiming a sum of Shs.79,933,873- together with interest thereon and costs of the suit. Hearing is yet to begin. In the course of time, the respondent got to know that the appellant, a statutory body, was in the process of winding up it operations. The winding up process includes

sale of its non-core assets. The respondent feels that if the suit is successful, it will be unable to realize the fruits of its judgment. Hence the application under 0.36 r. 5 (1) (a) (now 0.40 r. 5 (1) (a)) of Civil Procedure Rules for orders that the defendant furnishes security in the sum of Shs.200,000,000-.

From the records, the appellant opposed the application on the ground that the alleged disposal of its assets was not being undertaken to defeat the respondent's claim. That in any case, in the event of the respondent's claim succeeding the same would be settled with the proceeds from the Divestiture Account of the Government of Uganda.

The Learned Deputy Registrar after hearing the submissions of the parties allowed the application on several grounds, namely, that:

i. the respondent satisfied the provision of 0.36 r. 5 (1) (a) of the Civil Procedure Rules, CPR.
ii. the deposit of a sum of Ug. Shs.150,000,000- or attachment of the appellant's property of equivalent value would not prejudice the appellant.
iii. the respondent was not required to prove that the appellant was disposing of its property with intent to obstruct or delay justice.

The findings and decision above are the basis of this appeal. The appellant feels that the Learned Registrar was wrong in his interpretation and application of the law.

Mr. Denis Wamala for the appellant.
Mr. Philip Karugaba for the respondent.

I have directed my mind to the able arguments of both counsel. I do not intend to tackle the grounds one by one. Rather I will review the record of evidence in order to determine whether the conclusion reached upon the evidence by the Learned Deputy Registrar should stand.

0.36 r. 5 (1) (a) provides for instances where the defendant may be called upon to furnish security for production of property. It provides:

"5. (1) where at any stage of the suit the Court is satisfied by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him –

(a) is about to dispose of the whole or any part of is property; or

(b) ……

(c) ……

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, …….. or to appear and show cause why he should not furnish security."

It is Mr. Wamala's submission that under this rule, Court must be satisfied not only that the respondent is about to dispose of its assets, but also that the disposal is with intent to delay or obstruct execution of any decree that may be passed against it.

I accept that submission.

It is not my intention to delve into the various rules of statutory interpretation. However, the correct attitude was in my view echoed by Lord Denning in **Engineering Industry Training Board –Vs- Samuel Talbot Ltd [1969] 1 All E.R. 840** when he said:

But we no longer construe Acts of Parliament according to their literal meaning. We construe them according to their object and intent.

It was like wise held in **Lall –Vs- Jeypee Investments Ltd [1972] EA 512** that every statute must be interpreted on the basis of its own language since words derive their colour and content from the context and the object of the statute is a paramount consideration.

Judging by the construction of 0.36 r. 5 (1) (a), its object is to prevent any attempt on the part of the defendant to defeat the fruits of the decree that may be passed against him. The sole purpose of the attachment before judgment is therefore to give an assurance to the plaintiff that his decree, if made, would be satisfied. It is a form of guarantee against the decree becoming

redundant for want of property for its satisfaction. If the defendant is a person of means, the remedy lies elsewhere.

It is argued for the respondent in apparent support of the Learned Deputy Registrar's order that intent to obstruct or delay execution is not a key ingredient to be proved to the satisfaction of Court by a party proceeding under this rule. Some two cases have been cited in that regard. They are:

1. Pyarali Datardini –Vs- Anglo American Amusement Park IV ULR 28.
2. Abby Mugimu –Vs- Basabosa HCCS No. 922 of 1990 reported [1991] ULS LR 157.

It is true that in the Datardini case Court considered the words *"with intent to delay or obstruct."* The Court held in that case that it was not necessary for the plaintiffs to show that the defendant intended to obstruct or delay the plaintiff in the execution of his decree in order to justify an application to the Court for his arrest before judgment; that it was enough if his going away would have that effect. I think that case is distinguishable from the instant one. First, a demand had been made upon the defendant for payment of rent for premises upon which he held his show in Kampala and the defendant left the jurisdiction next day without making any arrangement with the plaintiff. Court considered the fact that it was extremely improbable that this traveling show would again be in Uganda in the near future. The Court found the order prayed for appropriate to the circumstances of the case and the Judge was quick to add:

> *"I am not to be taken as holding that in all cases when a defendant leaves the jurisdiction the order for arrest – on failure to pay or find security for the amount sued for – will be made. It is an unusual remedy and will only be granted in appropriate cases."*

In my view, Court was justified to think that in the circumstances of that case, whether or not the defendant's disappearance was intended, his going away would leave the plaintiff with no assurance that he would ever be paid. The Court did not state, as implied by learned counsel for the respondent, that intent was not a necessary element for proof in a case of this nature. Court believes that this was sound reasoning. The circumstances of the case warranted that particular decision.

As for **Abby Mugimu –Vs- Basabosa,** supra, the defendant was also a non-national. It was feared that he would dispose of the whole property and thereafter abscond from the jurisdiction and therefore leave the whole bill to be settled by a co-defendant. The Court had occasion to consider what should be considered before attachment is allowed. It was held, inter alia, that before the Court could exercise its discretionary powers under 0.36 r. 5 by ordering attachment of property before judgment or furnishing security, there had to be real evidence that the defendant was about to leave the country or to sell the property and obstruct or delay justice.

Secondly, whereas the Datardini case was an application under 0.36 r. 1 (a) which deals with the arrest of the defendant if there is cause to do so, the instant application was under 0.36 r. 5 (1) (a) which basically deals with the furnishing of security by the defendant in circumstances stated therein. Whereas the Court in the Datardini case appeared to relax the rule regarding intent, albeit with caution, the Court in the **Abby Mugimu** case was emphatic that there had to be real evidence that the defendant was about to disappear.

The similarity between the Datardini case and the Abby Mugimu case is that the two cases involved human beings whose intention could not easily be discerned. The appellant herein is not a human being capable of disappearing like the ones in the two cited cases. The appellant is a statutory body. True it is in the process of winding up and winding up leads to de-registration. However, there is an elaborate process of doing so. I don't find the respondent's act any different from a situation where the plaintiff feels that the defendant in his case is close to his death and he applies for an order to attach his property pending judgment merely because in the event of death he may be inconvenienced. The law of succession would simply take care of that in the same way the law of divestiture affords the respondent a remedy herein. In the absurd scenario I have talked about above, the position would of course be different where the defendant because of the terminal illness sets out to sell his assets before his death and the plaintiff gets to know. Even then intention must be established. The Learned Editors of MLJ's CODE OF CIVIL PROCEDURE (of India) Vol. 4 at p. 433 while commenting on a law in pari materia with ours have this to say:

"For passing an order [under 0.38 r. 5] the intention of the defendant is sine qua non. But that intention is an internal fact. Direct evidence can hardly be expected. The question of intent alleged by the plaintiff has to be determined having regard to the particular facts and circumstances of each case."

I agree.

Sine qua non is the latin equivalent of "*something that is essential before you can achieve something else"* in the English language according to OXFORD Advanced Learners Dictionary, 6th Edition at p. 1106. In the instant case, it is apparent to me that the respondent's fear is not only exaggerated but also uncalled for. I have had occasion to allay some of it in a ruling that preceded the instant one.

The appellant is a statutory body established under the Electricity Act of 1964. As part of the government divestiture programme, it was split into three successor companies. As a result of that split, some of its assets were vested in those successor companies. It remained with its liabilities and non-core assets. In the course of time, government appointed a liquidator/official receiver to over see the winding up process. The appointment was itself a subject of another objection. Court upheld the appointment in a related ruling. The impugned disposal of the appellant's assets herein relates to the sale of some of its non-core assets which, according to another related case, **HCCA NO. 1 of 2006 Uganda Revenue Authority –Vs- UEB,** started way back in 2001.
See: **HCMA NO. 0273 of 2006 arising out of HCCA No. 1/2006 URA –Vs- UEB** (unreported).

This Court held in that application that S.26 of the PERD ACT, Cap. 98 (Public Enterprises Reform and Divestiture Act) provides for the use of proceeds of divestiture. Under that law, the Minister responsible for Finance is empowered to use proceeds of divestiture in the Divestiture Act to meet liabilities of a public enterprise such as the instant one which, given the mode and terms of divestiture, are directly or indirectly assumed by the government at the time of divestiture. I consider this to be the plain object of S. 26 (1) (b), (ii) of the Act. This being the

law in force, I said in that ruling (and I will say it again herein for emphasis) that I cannot appreciate the basis for the respondent's concern that on winning the case there may be no money to pay it once the appellant has been completely wound up. While the general rule is that a company's liabilities cannot be assigned, it is trite that they can be assigned by legal assignment, equitable assignment or by operation of law. In the instant case, the appellant's liabilities will simply vest in Government by operation of law. So in the event of the Minister of Finance failing to satisfy the debt from the Divestiture Act, which in my view is very unlikely considering the size of the respondent's claim of Shs.79,933,873-, the Government would be there to take it on. In other words once it is accepted that the sole object behind attachment before judgment is to give an assurance to the plaintiff that his decree, if made, would be satisfied, the law in this country gives that assurance to the plaintiff herein.

Accordingly, the question of the decree becoming infructuous for want of property for its satisfaction does not arise. I would have been of a different view if the appellant was an ordinary liability company in the process of being wound up, and not a statutory body. I consider the law to be that in the case of a public corporation, if it cannot meet its financial obligations, the loss falls on the consolidated fund and therefore impliedly on the tax payer. In the words of Lord Denning L.J. (as he then was) in **Tamlin –Vs- Hannaford [1950] 1 K.B. 18** at 23:

> *If it should make losses and be unable to pay its debts its property is liable to execution, but not liable to be wound up at the suit of any creditors. The tax payer would, no doubt be expected to come to its rescue before the creditors stepped in.*

I agree. I should only add that its mandate is statute derived. Likewise, cessation of its operations and the fate of its liabilities are all matters which are governed by law. They differ from those of ordinary companies.

Having said so, it is the considered view of Court that before making an order under 0.36 r. 5 (1) (a) the Court ought to be satisfied not only that the defendant is really about to dispose of his property or about to remove it from its jurisdiction but also that the disposal or removal is with

intent to obstruct or delay the execution of any decree that may be passed. As the learned editors in LMJ's CODE OF CIVIL PROCEDURE, ibid, state in the commentary:

> *"The satisfaction must be of the Court as regards these matters and it must be based on some material derived either from the affidavit of the party, applying [under 0.38 r. 5] or otherwise. It is no doubt necessary for the Court to state in the order passed [under 0.38 r. 5] the grounds on which its satisfaction is founded, but there must be some material on record to indicate that the satisfaction was not illusory."*

I also agree with the above legal reasoning and I adopt it.

In these circumstances I accept the submission of learned counsel for the appellant that the Registrar's holding that the respondent needed not to prove intent on the part of the appellant was made in error. He needed evidence from the respondent to show that the appellant had sold, was selling or was about to sell its property with intent to defeat the respondent's claim in the event of his suit succeeding, or that in the event of a successful suit, the decree would not be satisfied by the defendant or any other person on its behalf.
I don't see that evidence on record. On the contrary, there was evidence by way of one Noel Muhangi's affidavit to dispel any doubt as to whether or not the respondent's claim if successful would be settled. He specifically mentioned a settlement out of the Divestiture Act. The law contained in that Act is on Noel Muhangi's side.

As to the amount ordered to be deposited, that is, Shs.150,000,000- I cannot altogether agree with the Learned Deputy Registrar that such a hefty sum of money kept away for an indeterminate period would not prejudice the respondent in any way. But that is now beside the point, in view of my holding on the main ground of appeal.

When all is said and done, on revaluation of the evidence it has emerged that the Learned Deputy Registrar did not subject the issue before him to adequate scrutiny. There is reason for the Court to interfere with his decision. I therefore find merit in the appeal and I allow it. The impugned

order shall be set aside and it is set aside. In the appreciation of the novelty of the subject matter of this appeal, I order that each party bears its own costs.

Yorokamu Bamwine

J U D G E

14/07/2006