

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0097-2006

(Arising from HCT-00-CC-CS-0335-1999)

Vitafoam (U) Ltd

Objector No.1/Applicant

Uganda National Industrial Properties Ltd

Objector No.2/Applicant

Versus

Gatco Chemparm Import & Export

Judgment Creditor/Respondent

Legislation referred to:

1. *Civil Procedure Rules (1964 Rev Ed).*

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The judgment creditor/respondent applied for attachment of certain properties it described as moveable properties alleged to be properties of the judgment debtor. The properties sought to be attached were described as Mattress splitting machine, Quilting and Tailoring machine, Main Foaming machine (YMA brand made in Denmark), Horizontal Mattress splitting machine, Heavy duty Generator, 4 tanks, rebounded mattress units, Weighing Scales, all estimated to be of the value of

Shs.300,000,000.00 only. The application does not state the location of the said properties.

2. On the 19th January 2006 the Registrar of this court issued a warrant of attachment directing attachment of the said properties stated to be 'located at M3 Yusuf Lule Road, PO Box 846, Jinja. In the premises, Housing, Gulu Foam Industries Ltd.' It is not clear where the court obtained details of the location given the fact that the same were absent from the application.
3. On the 24th January 2006 Emmanuel Musiime, a court bailiff, went, apparently to Plots M30 C Yusuf Lule Road, Njeru, and 135 Yusuf Lule Road, Njeru, Mukono District, and locked up one of the factory buildings in which there was ongoing production. Subsequently the court bailiff advertised for sale 8 items of machinery and or equipment in the Monitor Newspaper of 7 February 2006.
4. Apparently as a result of the said events, the two objectors brought the present application objecting to the attachment and sale of the properties in question which they contend belong to both objectors and were in the possession of the objector no.1, and not the judgment debtor, at the time the said properties were seized. In support of their application a total of 7 affidavits were filed. The judgment creditor opposes these objection proceedings, insisting that the properties in question were in possession of the judgment debtor at the time they were attached. In support thereof a total of 3 affidavits were filed. Counsel filed heads of argument in support of their cases at the direction of the court.
5. From the affidavits filed in this matter, it is uncontested that Objector No.2 is the registered proprietor of Plot. No. M 30 C Yusuf Lule Road, Njeru. And the judgment debtor is the owner of the Plots No. 131--135 Yusuf Lule Road, which is adjoining to Plot No. M 30 Yusuf Lule Road. It is contended for the objectors that the factory on Plot No. M 30 Yusuf Lule Road belongs to Vitafoam (U) Ltd. It is contended for objector no.2 that the plant and machinery on Plots No.131—135 Yusuf Lule Road belong to objector no.2, and not the judgment debtor who owns that property.
6. Mr. Alfred Okumu, the General Manager of objector no.1, stated in his affidavit that the objector no.1 was the owner of the main foaming machine, sewing machine, weighing scales, the mattress splitting machine and the four tanks described in the warrant, having

imported the same from Denmark in 1982, long before the judgment was incorporated. The import documents were annexed to the affidavit. The affidavits in reply by the respondent do not contest this averment. Mr. Okumu further stated that the objector no.1 was in possession of the said properties in its own right, and not on account of any one else, judgment debtor included.

7. The affidavit of Mr. Andrew Kasirye is worthless in terms of refuting the averments by Mr. Okumu aforesaid. Mr. Kasirye stated in his affidavit that he is aware that the Judgment Debtor ordinarily carries on business from Plot No. M 30 Yusuf Lule Road in Jinja for profit. The attachment in this case was not effected in Jinja. It was effected in Njeru. The two towns are not one and the same though they are both along side the River Nile. Where Mr. Kasirye obtained this knowledge is not shown.
8. Mr. Kasirye further deponed that the ownership of both the objector companies and the judgment debtor is one and the same. That may well be true. He has, however, not shown how this is relevant to the issues of ownership of the machinery and possession of the same that are in issue in these proceedings.
9. There is the affidavit of Mr. Emmanuel Musiime, a court bailiff, who deposes in his affidavit that he met Mr. Alfred Okumu in January 2006 who introduced himself as the general manager of Gulu Foam Industries Ltd and conducted him around the factory premises on Plot No. M30 Yusuf Lule Road in Jinja. He attached to his affidavit, a copy of the company profile that he stated he obtained from Mr. Okumu.
10. Mr. Nicholas Barigye, a photographer by profession, swore an affidavit for the respondents. He stated that he had been hired by Emmanuel Musiime and taken to Jinja to take some photographs of factories in Jinja. He stated that the factories of the objector no.1 and the judgment debtor are situated on separate but adjacent plots of land. He took photographs of the same and annexed them to the affidavit.
11. Ms Grace Dwonga stated in her affidavit that objector no.2 was the owner of rebonding machine, quilting and the automatic horizontal cutting (splitting) machine, having imported the same from Sunkist Chemical Machinery in Taiwan in 1989. She attached copies of the import documents. She further averred that the said properties were being used by objector no.1, with the permission of objector no.2 at the objector no.1's factory on premises on Plot No. M30C and 135 Yusuf Lule Road, in Njeru, Mukono District.

12. It is clear that the court bailiff, Emmanuel Musiime, was directed to attach properties located in Jinja. In the affidavit of Mr. Kasirye it is stated that the Judgment Debtor's factory is situated in Jinja. Likewise in all other affidavits for the respondent, that of Mr. Emmanuel Musiime and Mr. Barigye, it is clear that the factory or factories they visited are in Jinja, though on Yusuf Lule Road.
13. On the other hand, the objectors have objected to attachment to their property in Njeru, in Mukono District. I take judicial notice of the fact that Jinja town in Uganda, is not in Mukono District but is in Jinja District. It may be possible that there is a Yusuf Lule Road in Jinja. Mr. Kasirye and Mr. Emmanuel Musiime have asserted so in their affidavits. Jinja is, however, a different location from Njeru. What has been attached is stated to be in Njeru. I can only conclude that this attachment must be in error. It is not what was authorised. The warrant of attachment did not direct the court bailiffs to proceed to attach properties in Njeru but in Jinja, a different location from Njeru.
14. Nevertheless the court bailiff, in light of the affidavit he has sworn in this matter, without stating the location of the property which he attached, recounts a visit to the judgment debtor's premises in Jinja. It is obvious that the court bailiff needs to be directed to where Jinja town is so that he may proceed to attach properties there, if the warrant were still to be valid. Unfortunately, the warrant must have expired.
15. As the respondent's affidavits that contest the objectors' affidavits are referring to property located elsewhere, in Jinja, other than the property sought to be released in this matter, located at Njeru, I need not have any regard to them for that reason. The said affidavits must be referring to some different property other than the property attached. I accept the objectors' contentions that the property attached situate on Yusuf Lule Road, in Njeru, Mukono district, was not in possession of the judgment debtor. I further accept their contention that the objectors were in possession of the said property on their own account, and not that of the judgment debtor.
16. In case I am wrong, in my conclusion above, I shall proceed to consider the application in other respects. I will begin by bringing in view the relevant law. Objection proceedings are governed by Order 19 Rules 55,56,57,58,59 and 60 of the Civil Procedure Rules (1964 Rev Ed). I shall set out rule 57.

‘Where upon the said investigation the court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, in the occupancy of a tenant or other person paying rent to him, or that being in the possession of the judgment-debtor at such time, it was so in his possession not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.’

17. The objector, in order to succeed, has to show that the property in question was not in possession of the judgment debtor, at the time of attachment, or in possession of some person, who was holding it in trust for the judgment debtor. Or that it was in possession of the judgment debtor, not on account of the judgment debtor, or not as the judgment debtor’s property, but on account of another person.
18. In the instant case the objectors have to show, as claimed in the objection, that the property in question was not in possession of the judgment debtor at the time of attachment. And that the person in whose possession this property was at the time of attachment was not holding the same on account of or in trust for the judgment debtor.
19. The objectors have laid claim not only to title but possession of the property in question. The objectors have put forth documents showing that they purchased the properties in question. For objector no.1, the properties in question were purchased long before the judgment debtor was born or incorporated. This is not contested. The judgment creditor has contended that the objector has a factory on Plot 135 Yusuf Lule Road, and not Plot no.M30 Yusuf Lule Road, all in Jinja. As noted above, obviously the properties attached are not in Jinja.
20. Nevertheless even if we lost sight of the town in which the factories are located, the objector no.1 states that it actually runs factories on both plots, with the factory on Plot no. M30 Yusuf Lule road, having been its initial factory and then extended later to Plots 131-135 Yusuf Lule Road. The affidavits of Grace Dwonga and Justin Okeny refer.

21. The affidavit of Mr. Emmanuel Musiime for the respondent alleges that Plot No. M30 Yusuf Lule Road is the factory of the judgment debtor. In support of that he attached a brochure issued by the judgment debtor that indicates that its factory is at Plot M30 Yusuf Lule Road, PO Box 846 Jinja, in the section of brochure on Contact Information, Part 7. The brochure, in part 3 titled 'location', states,
- 'GFIL is located at the source of the River Nile in Njeru Town near Jinja adjacent to Vitafoam (U) Ltd, one of Uganda's leading industrial towns. The head offices are at Jinja Road, Plot 16 and Uganda Manufacturer's Association show grounds in Lugogo both in Kampala.'
22. Mr. Justus Okeny, a shareholder and director of both objectors and the judgment debtor stated in his affidavit, inter alia, that the judgment debtor owns no machinery or equipment but is the registered proprietor of Plots No.131-135 Yusuf Lule Road, Njeru. He explains, as does Mr. Okumu in another affidavit, that the brochure referred to in Mr. Emmanuel Musiime's affidavit, was done for marketing purposes.
23. Obviously the judgment debtor in this brochure held itself out as having a factory in Njeru. And that the factory was at Plot no. M 30 Yusuf Lule Road, if parts 3 and 7 are to be read together. This holding out would obviously bind the person holding out, but not necessarily other persons. It does not amount to evidence of possession on the judgement debtor's account, without more.
24. The judgment debtor is actually the registered proprietor of Plots 131-135 Yusuf Lule Road, Njeru, and not Plot M 30 Yusuf Lule Road, Njeru, which is owned by objector no.2. Unfortunately, there was no previous attempt to examine the judgment debtor and its officers as to exactly what are the properties of the judgment debtor. Again unfortunately, no attempt was made to cross examine the deponents of the affidavits for the objectors, on their affidavits, 7 affidavits in total, so that this brochure could be put to them in cross examination. I suppose the cross examination was unnecessary since the respondent was insisting that the judgment debtor's property is in Jinja.
25. Objector no.1 has demonstrated that long before the incorporation of the judgment debtor it had purchased the machinery it seeks released and put it on Plot no. M30 Yusuf Lule

Road, Njeru. I am satisfied that the objector no.1 has established both possession and ownership of the properties it seeks released from attachment.

26. Objector no.2 has shown that it purchased the property it seeks release from attachment, in 1989 from Taiwan. This is uncontested. Grace Dwonga the financial controller has stated in her affidavit that this machinery was in the possession of objector no.1 with the permission of objector no.2 at objector no.1's factory on plots no. M30 Yusuf Lule Road, and no.131-135 Yusuf Lule Road, Njeru.
27. Reviewing the evidence as a whole I am inclined to accept that the property attached belonging to the objector no.2 was in possession of objector no.1 at the time of attachment, and not in possession of the judgment debtor.
28. Accordingly I allow this application with costs. I order the immediate release of the properties attached to the objectors.
29. However, before I take leave of this matter I wish to address one matter that was not the subject of argument before me. The properties attached in this matter included factory equipment that may have been affixed to the land as to become part of the land. This is the property that was described in the application for attachment as moveable property. If some of this property was affixed to the land, as the photographs of the advertisement leave open the question, it obviously becomes part of the land, and would not therefore be properly described as 'moveable property.'
30. It is important that registrars take scrutiny of these applications, and ensure that warrants of attachment are not issued for moveable property when the property in question is immovable property requiring another mode of attachment. This is particularly important as under the fiat of a court order, machinery or equipment may be ripped off factory floors, and at times being rendered unusable, as a result of inexperienced handling!
31. In this case the court bailiff could not apparently remove the machinery in question, possibly because they were fixtures to the land, and he just locked up the premises of the objectors. In effect the bailiff seized the whole factory building, on a warrant for attachment of moveable property, and turned it into the court bailiff's warehouse. This was definitely trespass to the building.
32. A court bailiff authorised to seize moveable articles and take them in his custody, is not permitted, instead, to seize not only the articles authorised in the warrant of attachment,

but to take charge of the building in which the articles are located too, which was not and could not be authorised in such a warrant for attachment, as he did in this case, and deny those entitled to possession of the said building to remain in possession of the same. Such conduct is simply outrageous. It may have been partly actuated by the possible fact that many of the articles directed to be attached were actually fixtures to the land, and could not simply be carted away! In short some of the properties attached were not moveable articles.

Signed, dated and delivered at Kampala this 28th day of September 2006

FMS Egonda-Ntende

Judge