THE REPUBLIC OF UGANDA

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

HCT-OO-CC-MA-33 OF 2009

AKRIGHT PROJECTS LIMITED……..APPLICANT

VS

EXECUTIVE PROPERTY HOLDING LIMITED……RESPONDENT

BEFORE: HONOURABLE MR.JUSTICE ANUP SINGH CHOUDRY

R U L I N G

(Payment to individuals or directors not payment to Company and consent order cannot be varied).

This is an application brought by Akright Projects Ltd by way of motion and Order 52 rule 1, 2 , 3 Section 98 and CPA and Section 33 of the Judicature Act Chapter 13.

The Applicants seek order that the execution of warrant of attachment issued by the Executive Properties Holding Ltd whom I will refer to as Respondents(Defendants) dated 27th January 2009 be set aside with costs.

The grounds for setting aside the attachment are that there has been substantial payment towards the consent order and that:

(i) The Applicants would be willing to pay any balance left.
(ii) The Applicants will suffer substantial loss with their customers if warrant is not set aside.

(iii) The Applicant will face series of litigation/actions from customers who have paid for the Plots.

Background

The warrant of attachment was issued following a consent judgment dated 8th October 2008 when the Respondents in application No. 140 of 2008 agreed to vacate its caveat upon the Applicants paying 435 million shillings to the Respondents.

The consent judgment arose from a Joint Venture agreement dated 4th April 2006 between the Applicants and the Respondents. The Respondents i.e. the 1st Defendant Company Executive Properties Holding Ltd agreed to contribute towards the purchase of Block 276 Plot 349-677 and Block 303 Plot 85 in the sum of 435 million shillings. The Respondents accordingly registered a caveat to protect its interest.

The consent judgment required the Applicants to pay the Respondents the sum of 435 million shillings originally paid by the Respondents into the Joint Venture scheme as a condition of vacating the caveat. The directors of Respondent's company and 3rd parties were not parties to the Joint Venture agreement.

The consent decree dated 8th October 2008 was signed by all 12 Defendants i.e. individual Directors mentioned in the suit 140 of 2008, but the judgment for the sum of 435 million shillings was entered in favour of the 1st Defendant only i.e. Respondents herein.

The Respondents accept that the capital contributions pooled towards the total sum of 435 million shillings for the Joint Venture Scheme came from individuals who were the subscribers, Directors, Shareholders or 3rd parties associated with the Respondent Company.

The Addendum dated 4th August 2006 to the Venture Agreement confirmed payment by the 1st Defendant of the sum of 435 million shillings and this document was also signed by the Applicants. The warrant of attachment dated 27th January 2009 was granted by the Registrar Haduli in favour of all the judgment Creditors i.e. it included the 1st Defendant as well as the other 11 Defendants as Joint Creditors against the Applicants.

It is the Applicant's case that they refunded the sum of 435 million shillings to all the individual subscribers who paid the monies to them through and on behalf of the 1st Defendant and that they have fulfilled their obligations under the consent order by having paid back the total sum of 435 million shillings to individual subscribers, Directors etc. and hence the Respondents have no cause of action to levy the attachment or that the warrant of attachment issued by the Registrar on 27th January 2009 was unlawful and should be set aside.

In support of their contention the Applicants as required at the last hearing have produced a schedule of payments clearly stipulating who paid initial monies and whom the monies was reimbursed to by the Applicants. In the schedule of payments filed on 10th March 2009 under paragraph 3 it lists 16 individuals four of them were 3rd parties while the other 12 were officers, members, directors, and shareholders of the company and they in total contributed the sum of 500 million shillings.

The Respondents maintain that the consent judgment was in their sole favour and that they have not been paid notwithstanding that the payments may have been made to the individuals who may or may not have been directors, shareholders, or officers of the Respondent company, but certainly not paid to the company.

The issue before the court is whether the sum of 435 million shillings paid by individuals or 3rd parties for and on behalf of the 1st Defendants towards Joint Venture Scheme and acknowledged in the Addendum dated 4th August 2006 is monies paid by the 1st Defendants. And secondly, whether the monies refunded to the individual subscribers was a payment in satisfaction of the consent judgment against the 1st Defendant (Respondent) that is whether payment made to individual subscribers amounted to payment to the Respondent Company.

It is not uncommon for companies to raise initial capital by way of subscription or contribution from its Directors or 3rd parties and quite often this is known as Directors Loans. The fund received from such contributions is the money belonging to the company and as such was payment by the Respondents to the Applicants or the payments by the individuals initially on behalf of the Respondent Company to the Applicant in the Joint Venture Scheme was in fact and indeed a payment that was made by the Respondent company (the 1st Respondent).

However, it brings the matter to the next issue whether the payment back to individuals was payment to the company? A payment to the Director, individuals or 3rd parties cannot be held to be a payment to the company unless the payments were stipulated as paid to the company or were payments received by individuals as agents of the company and expressed as such.

In A.L Underwood vs. Bank of Liverpool (1924) K.B 775 where a party wanted to have a transaction with a company, and the money meant for the company was paid into the personal Account of a Director, it was held that the person who paid the money in the personal name of the Director instead of the company could not be said to have transacted with the company because the Director was not authorized to receive company money in his personal names. Underwood's case is applicable to the instant case.

It is most unlikely that the payments to the individuals by 3rd parties could also be a payment of Directors loans or that it would be a payment to the company. I do not accept that the Respondents were paid the amounts specified under the consent judgment because any payments made by the Applicants were clearly not payments to the Respondents (Underwood Vs Bank of Liverpool (1924) K.B. 775 and the Applicants ought to have been more prudent in view of the consent order.

The court does not have power to alter or vary a properly constituted consent order in favour of the 1st Defendant (Respondent) who have not been paid in full or at all. The consent order can only be annulled or set aside if there is evidence of fraud or unless it is varied by further consent order, or some exceptions grounds.

Having heard the parties and their arguments I need to consider whether there is any merits in setting aside the attachment. There is certainly no merit in the Applicant's submissions because the debt is payable under the consent order to the Respondents only. On the balance of convenience the Respondents should not be prejudiced from conducting their business by withholding the attachment as they are entitled to pursue their legal remedies.

I do not accept that grave prejudice will be caused to the Applicants by not setting aside the attachment because the arm of law has to take its course and the Applicants ought to have

known full well that any dealings with 3rd parties or customers would be riddled with problems until they started on a clean slate with the Respondents.

The Respondents cannot be held responsible for the problems of the Applicants. The Application is refused with costs.

Anup Singh Choudry

J u d g e

11/03/2009