THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

MISCELLANEOUS APPLICATION NO 101 OF 2011

(ARISING OUT OF HIGH COURT CIVIL SUIT NO 247 OF 2011)

PAYLESS SUPERMARKET LTD} ..... APPLICANT/DEFENDANT

VS.

DEMBE TRADING ENTERPRISES LTD} ..... RESPONDENT/PLAINTIFF

BEFORE HONOURABLE MR. JUSTICE CHRISTOPHER MADRAMA

RULING ON OBJECTION

There is an application brought by the applicant/defendant under order 25 rule 6, of the Civil Procedure Rules, section 98 of the Civil Procedure Act, section 33, 39 (2) of the Judicature Act, and article 126 (2) (e) of the Constitution for orders inter alia that the passport belonging to the applicants managing director is returned and that the plaintiff erred to cause the court to hold the passport belonging to the applicant's managing director. The application also pleads that the defendant has satisfied the claim for recovery of Uganda shillings 89,294,064/= by deposit of goods worth Uganda shillings 99,174,975.47/= on the 2nd and 21st of October 2010 with the plaintiff and that the said satisfaction be recorded as a decree so far as it relates to the suit. The applicant further seeks an order for refund by the plaintiff of the sum of Uganda shillings 9,880,911/=.

At the hearing of this application, Counsel Jimmy Muyanja appeared for the applicant while Counsel Verma Jivram appeared for the Respondent.

Counsel Jimmy Muyanja submitted that though his colleague had informed him that she would seek an adjournment because she needed more time to file an affidavit in reply, he had a point of law to raise (which did not require a reply to

be filed first). He referred me to Miscellaneous Application No. 534 of 2010 attached as annexure A1 to the application and the affidavit of Ismail Karmali the applicants managing director. He submitted that the defendant is a company and there was no prayer to lift the veil. At this point counsel Verma objected to the submission on the ground that the application before court was brought under order 25 rules 6. Order 25 rule 6 dealt with compromise of suits.

I suggested to the parties at this stage that the actual matter in controversy was whether the goods taken over by the Respondents from the applicant were sufficient to offset the claim in the plaint. If it is, the suit can be settled. The parties may appoint an independent valuer to determine the value of the goods. Consequently the hearing was stood over for 30 minutes to enable counsel and parties consult on the way forward.

When the parties came back, Counsel Jimmy Muyanja informed me that the parties had agreed on two options namely:

1. That the parties will convene a meeting to review the pricing mechanism of the goods held by the Respondent.
2. Secondly the second option has three terms and is an alternative in case the first option does not work, which terms were:
    a. The parties have agreed that a valuer will be appointed
    b. Secondly the parties are to report to court within 2 weeks on the appointed valuer.
    c. The costs of valuer will be paid by the applicant

Both options are to run concurrently.

Counsel Verma Jivra then further proposed a third option to the effect that if all else fails the goods will be returned to the Applicant and the suit tried, which option was not acceptable to the applicants counsel. The applicants counsel then sought to move court on his “point of law”.

He submitted that the Respondents MD Mr. Ismail Karmali whose passport is held by court is not even a Respondent to the application. Again counsel Verma objected to this line of submission on the grounds that the application is brought

under order 25 rules 6 of the CPR. She asked the court to peruse the order which deals with compromise of a suit. She contended that the submissions counsel intended to make on the issue of the passport and the fact that Mr. Ismail Karmali is a director whose passport was held under MA 534 was an order issued under order 40 rules 2 of the Civil Procedure Rules. She contended that this rule was very clear. If the applicant is disgruntled, the proper procedure is to proceed under order 44 rule 1 (p) by way of appeal. Consequently she contended that the issue of the passport could not be raised in this application as there is no appeal from MA 534 of 2010

In rejoinder Counsel Muyanja submitted that it is Lord Scrutton who said that the devils mind cannot be read. He contended that the objection of his learned friend was an attempt to read the devils mind. That order 40 referred to rightly is cast in stone and states that the defendant may be arrested and property of a defendant may be attached before judgment. However taking the courts attention back to MA 534 of 2010 the defendant there is Payless Supermarket Ltd. There was no application to lift the veil and there was no order to lift the veil. Going by the record order 44 does not apply to the issue of the passport of Ismail Karmali, because he was not a respondent to the application. The application before court is premised on section 33 of the Judicature Act and section 39 (2) of the judicature Act as well. These sections empower the court to exercise its inherent and equitable powers to erase an irregularity from the court record. The objection brought under order 44 did not show any justification as to how Mr. Ismail Karmali's passport will have been retained by court going by the record itself. If the court is inclined to take the view that the registrars order was proper, counsel prayed that court be lenient to the Respondents MD and at least release the passport for a one month's period to enable him conduct his normal schedule of business. That the essence of the respondents fight for the passport is focused on the question as to whether directors or a shareholder notwithstanding there is no order lifting the veil can be proceeded against. The applicant will be willing to put in the passport of Nushat Karmali who is the wife of the Applicants MD and a director of the applicant. To wind up under the Judicature Act, counsel contended that he was not appealing the Registrars decision but bringing out the irregularity.

He pointed out that the order reads "...till Thursday" which would have been by 23th of September 2010." He reemphasised that Ismail Karmali was not the Respondent and that court did not lift the veil.

Verma in rejoinder submitted that counsel had done nothing but appeal to this court. She referred to the wording of the application paragraph 2 thereof which pleads that the respondent/plaintiff erred to hold the passport belonging to Mr. Ismail Karmali. As far as annexure A (1) is concerned, these proceedings have not been certified by court and as such reliance should not be placed on it. The law is that the annexure is not certified by court. The second issue is that at page 4 the second last sentence the words "till Thursday" continued to read "...when parties are promising to agree on the security". The issue is that by then a tentative security would have been furnished. At page 4 there is an application for a warrant of arrest. The warrant of arrest had not lapsed. She referred to an order (Warrant of arrest) dated 16th December 2010

She submitted that under section 62 of the Evidence Act, where secondary evidence is given the document sought to be produced should be certified. As far as the alternate security is concerned the Respondent submitted that it has never heard about this new Director and that Mr. Ismail Karmali is the Alpha and Omega of the defendant/applicant.

Counsel Verma then raised a further objection on the ground that the applicant's application is supported by defective affidavits of Ismail Karmali and Mr. Bokhiriya Sajan. She asserted that both affidavits are sworn and not affirmed. The first deponent is a Muslim. Section 5 of the oaths Act provides that a Christian shall hold a Bible when taking oath. She referred to the case of **Epaja Aloysius vs. Best Lines Ltd (HCCS MA 15 of 2001) [2001] KALR 450** for the proposition that a Hindu and a Muslim cannot swear but have to affirm and where they swear the affidavit is a nullity. She contended that the affidavits in support of the application are sworn by a Hindu and a Muslim respectively and were defective and ought to be struck out and the application dismissed with costs.

Muyanja in reply submitted that when he begun to address the court, he informed the court that he was aware of the intended adjournment and sought

only to address court on the irregularity of the court proceeding. In that context he mentioned that all other matters would be deal with on a certain date after adjournment. That he was only referring to irregularity in the record of MA 534 of 2010. Counsel referred to section 1 of the Evidence Act and asserted that the Act does not apply to affidavits presented to court rendering the submission on section 62 Evidence Act irrelevant. He further contended that the Respondents counsel had gone into the merits of the application. Lastly, that the irregularity brought to court's attention is one which can be cured by the court exercising substantive justice under article 126 of the Constitution.

Verma in rejoinder to her second objection submitted that her intention was to seek an adjournment but she had no choice but go into the application because the applicants counsel by moving under a point of law was raising issues of irregularity. Even if the Evidence Act did not apply, as far as the issue of affidavits goes, the application would still go by the objection. Courts have been cautious with litigants who rely on article 126 of Constitution. The article cannot be used to flout procedure. She prayed that the application be dismissed with costs.

I have carefully considered the objections of the Respondents Counsel and replies thereto by the Applicants Counsel. The second objection is to the effect that the affidavits are defective because they do not comply with the Oaths Act. Where affidavits are a nullity then the application is not supported by any affidavit as prescribed and would be dismissed. I would therefore start by considering this objection.

The first problem with the second objection is the assumption that the deponents are Muslim and Hindu respectively by merely reading the names of the deponents. Paragraph 1 of the affidavit of Bokhiriya avers that he is an Indian of sound mind. On the other hand, paragraph 1 of the affidavit of Ismail Karmali avers that he is a Kenyan of sound mind. There is no evidence in support of the objection that any of the above persons are Muslim or Hindu. This information cannot be given from the bar by the Respondents Counsel. It also demonstrates that the Respondents prayer to put in an affidavit in reply was material to this objection. Both affidavits are sworn to in accordance with section 5 of the Oaths

Act cap 19 Laws of Uganda. Assuming it is true that Mr. Ismail Karmali is a Muslim and Bokhiriya Sajan is a Hindu would the affidavits be defective?

Section 5 of the Oaths Act provides for the form and manner in which an oath may be taken. It provides:

> "5. Form and manner in which oath may be taken.
> (1) Whenever any oath is required to be taken under the provisions of this or any other Act, or in order to comply with the requirements of any law in force for the time being in Uganda or any other country, the following provisions shall apply, that is to say, the person taking the oath may do so in the following form and manner—
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> (a) he or she shall hold, if a Christian, a copy of the gospels of the four evangelists or of the New Testament, or if a Jew, a copy of the Old Testament, or if a Moslem, a copy of the Koran, in his or her uplifted hand, and shall say or repeat after the person administering the oath the words prescribed by law or by the practice of the court, as the case may be;
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> (b) in any other manner which is lawful according to any law, customary or otherwise, in force in Uganda.
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> (2) For the purposes of this section, where a person taking the oath is physically incapable of holding the required copy in his or her uplifted hand, he or she may hold the copy otherwise, or, if necessary, the copy may be held before him or her by the person administering the oath."

Section 5 of the oaths Act only prescribes how an oath shall be taken. There is no evidence that the procedure prescribed under section 5 of the Oaths Act was not complied with. As far as the case of **Epaja Aloysius vs. Best Lines [2001] KALR 450** is concerned, the court found that the respondents managing director who swore the affidavit was a Hindu. At page 451 last paragraph the law report reads that Mr. Raithatha confirmed that he was a Hindu. The MANIRAGUHA J held that as Mr. Raithatha could not swear on the Bible the best he could do was to affirm. The court referred to section 8 of the Oaths Act cap 52 laws of Uganda before revision and found that the affidavit was defective and could not be relied upon.

It is difficult to apply this authority to the facts of this case. In the first place it was confirmed in that case that the deponent was a Hindu. Secondly, there is no evidence that Ismail who maybe a Muslim was not sworn on the Koran. Section 5

of the Oaths Act also applies to Muslims. Even if one does not have a belief in the Bible or Koran, this in itself does not render an oath taken in the manner and form prescribed by section 5 of the Oaths Act defective under section 7 of the Oaths Act which provides as follows:

> "7. Absence of religious belief
> Where an oath has been duly administered and taken, the fact that the person to whom it was administered had, at the time of taking the oath, no religious belief, shall not for any purpose affect the validity of the oath."

Thirdly the law does not show that a Muslim would object to being sworn as prescribed by section 5 of the Oaths Act. In other words the above cited provisions of section 8 of the Oaths Act need not be mandatorily applied to a Muslim. Section 8 of the Oaths Act further provides as follows:

> "8. Affirmation.
> Any person who objects to the taking of an oath and desires to make an affirmation in lieu of the oath may do so without being questioned as to the grounds of that objection or desire, or otherwise; and in any such case the form of the required oath shall be varied by the substitution for the words of swearing, the words, "I solemnly, sincerely and truthfully affirm that ....", and such other consequential variations of form as may be necessary shall thereupon be made; except that in any case where the Oath of Allegiance is taken, for the words "truthfully affirm" in this section there shall be substituted the words "truly declare and affirm", and the words "So help me God" shall be omitted."

It applies to any person who objects to taking of an oath and desires to make an affirmation in lieu of the oath. There is simply no evidence that the deponents objected to taking an oath or ought to have done so by virtue of their religious belief or any conceivable reason. The taking of an oath per se under section 5 of the Oaths Act does not render an affidavit defective. In the absence of further evidence on court record by way of an affidavit in reply as to the belief of the deponents, this objection is premature and therefore cannot be determined at this stage.

This brings me to the very first objection of the Respondent to the effect that the point of law sought to be argued by the Applicants counsel and which intends to assert that the Applicants Managing Director was not a Respondent to MA 534 of 2010 and that his passport was irregularly deposited as security could not be raised in this application. It is a contention that:

1. There was a ruling of the Registrar which was binding and could only be challenged on appeal. There was no appeal as stipulated by order 44 (1) (p) of the Civil Procedure Rules.

2. Secondly that the application was brought under order 25 rule 6. Order 25 rule 6 deals with compromise of a suit and does not apply to the current application.

Though I will consider the above points jointly I will start with the second point. It is true that order 25 rule 6 of the Civil Procedure Rules deals with compromise of a suit. It provides:

> "where it is proved to the satisfaction of the court that the suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court may, on the application of a party, order the agreement, or compromise, or satisfaction to be recorded, and pass a decree in accordance with the agreement, compromise or satisfaction so far as it relates to the suit."

In this case it cannot be said that there is any lawful agreement or compromise. There was attachment before judgment. Neither can it be said that the defendant had satisfied the plaintiff as envisaged in the above provision. The provision allows any party to move the court to have the suit adjusted where there has been any lawful agreement, or compromise or satisfaction. Satisfaction of the plaintiff has to be proved. On the other hand, it is order 40 which deals with attachment before judgment. The Registrar of the Court moved under order 40 rule 2 to obtain satisfaction from the MD of the applicant in lieu of an arrest under the said rule 2 which provides that the court may order the defendant to

furnish security for his or her appearance at any time when called upon during the pendency of the suit. The applicant's MD furnished his passport as security in this matter and was not arrested and detained in accordance with the warrant of arrest before judgment of the court dated 16th of December 2010. The warrant of arrest before judgment dated 16th December 2010 commanded the applicants managing director deposits in court **Uganda shillings 89,294,064/**- as security for his personal appearance. In lieu of detention after arrest the passport of the MD was deposited in court. I have perused the handwritten record of the Registrars court. On the 29th of September 2010 the applicants managing director was arrested and Raymond holding brief for Verma D prayed that the passport be deposited in court. The passport was accordingly deposited as negotiations continue till Thursday. On the 30th of September the arrest warrant was renewed for the applicants MD to deposit security as agreed. The matter then arose again when Counsel Jimmy Muyanja came into the picture and appeared before the Registrar on the 16th of February 2011 and the matter was adjourned to the 23rd of February 2011. Jimmy Muyanja and Deepa Verma appeared on the 28th of February 2011 before the Registrar. Counsel for the applicant raised the issue of the deposit of passport of the MD when he was not a party and the veil had not been lifted. That the deposit of passport had been overtaken by deposit of goods. The Respondents counsel opposed the application and Jimmy Muyanja prayed that the matter be referred to the trial judge. The notes of the Registrar reads "Matter referred to the trial judge to help the parties' fast track a convenient remedy since both sides can't appear to agree on anything." The power of the registrar to refer a matter to the high court is governed by order 50 rules 7 wherein a judge may dispose of the matter or refer the matter back to the registrar with directions.

On the first point which is bound up with the second point, the order of the Registrar was made under order 40. The Registrar has powers to make orders for attachment or arrest before judgment. Her powers are contained under order 50 as amended by Practice Direction No 1 of 2002. A registrar of the High Court has powers to handle the whole of order 40. Secondly under rule 8 of order 50 thereof any person dissatisfied with any order of the Registrar may appeal to a

judge of the High Court. The appeal shall be by motion on notice. For purposes of order 50 of the Civil Procedure Rules, the Registrar is a civil court. (See rule 6 thereof). Under section 79 (1) (b) of the Civil Procedure Act, an appeal from the decision of a registrar shall be lodged within 7 days of the decision. Last but not least, an appeal lies as of right under order 40 (2) of the CPR (See order 44 (1) (p)). The proceedings referred to by counsel as an illegality because a Managing director instead of a company was compelled arose in September 2010. This application was filed in February 2011 over 4 Months later.

I agree with the Respondents counsel that the issue of whether the passport was irregularly attached cannot be raised in this application. Secondly there is no issue referred for trial by the high court in the registrar's reference. Is it the question whether the passport should be released? The Registrar has powers to rule on this and should determine that question arising from an order of attachment before judgment. In any case the reference by the Registrar to the Trial Judge has not been argued yet by the parties. As far as arrest of a director of company is concerned, I do not agree with the applicant's contention that there is a glaring irregularity which requires the court to invoke its inherent powers in the interest of justice. Without going into the merits of the application, arrest of a director of a company is not an illegality per se. A company only moves and thinks through its directors. A limited liability company cannot be arrested but its directors can. In the same was where a state department is indebted the Secretary to the Treasury may be compelled to pay under threat of arrest. According to Gower's Principles of Modern Company Law 4th edition and page 209 – 210 thereof, the acts of a company may be treated as those of its directors for purposes of criminal liability. Two cases are of interest. **In Biba Ltd v Stratford Investments Ltd [1972] 3 All ER 1041, a** director was held for contempt of court committed by a company. Bright man J states at page 1045:

> "...I therefore gladly follow the decision of Warrington J and I adopt his view that an undertaking given to the court is equivalent to an injunction for the purposes of RSC Ord 45, r 5. *In those circumstances it follows that the respondent director of the defendant company is liable to proceedings*

for contempt under RSC Ord 45, r 5, and therefore has a case to answer." (Emphasis added)

Secondly the case of **Huckerby v Elliott [1970] 1 All ER 189** further demonstrates that a director may be held liable for the acts of a company. Per Ashworth J at page 194:

> "I agree and I only venture to add a word or two in particular reference to another passage in the learned stipendiary's oral judgment. He said first of all in discussing s 305(3) of the Customs and Excise Act 1952 what his views were about three ingredients involved in that section. He dealt with consent and said: '*It would seem that where a director consents to the commission of an offence by his company, he is well aware of what is going on and agrees to it*.' I agree with the stipendiary and it was on that basis that proceedings were taken against the appellant's co-director, Mr Lunn. He knew what was going on and he agreed with it and he pleaded guilty." (Emphasis added)

Counsel for the applicant invoked section 33 of the Judicature Act deals with gives power to the High Court to grant any remedies a party may be entitled to in matters which are properly before the court. This provision cannot be invoked for a matter that is improperly before the court. As I have noted above it cannot be said that there is an illegality brought to the attention of court which may override questions of pleadings and even admissions made. It may be argued that the MD could not appeal because he was not a party. This application was brought by the applicant which is the company and the same argument can be used to submit that the Managing Director ought to have brought an action in his own individual right. Section 39 (2) of the Judicature Act deals with cases where there is no procedure provided for the high court by any written law or practice, whereupon the court may adopt a procedure justifiable by the circumstances of the case. It cannot be said that there is no procedure laid out. The procedure for appeals is explicit with time lines prescribed.

Having held that the issue of holding of the applicant's passport under the order of the Registrar cannot be raised in the current application does it fail entirely for any incompetence? The notice of motion also seeks other remedies not objected to specifically. These are in paragraphs 3 – 8. Though counsel for the Respondent has raised the issue of whether order 25 rule 6 was relevant, other sections and rules have been cited under which the application is brought. I.e. the issue of whether the debt has been satisfied cannot be disposed of on a preliminary point. Consequently, the rest of the applicant's application remains as long as there is no evidence that the Oaths Act was not complied with. For the reasons stated above the first objection that there is no appeal from the Registrars decision and the applicants counsel cannot raise the issue of the passport in his submission on a point of irregularity succeeds with costs. The Respondent should be given an opportunity to file an affidavit in reply and the matter proceeds. Ruling delivered in open court the 11th of March 2011

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

Jimmy Muyanja for Applicant

Deepa Verma Ikram Respondent

Katuna Akonyo C/C

Ojambo C/C

Christopher Madrama 11/3/2011

Judge