

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

HCT - 00 - CC - MA - 217 - 2010
(Arising from Civil Suit No. 819 of 2007)

FULGENCE MUNGEREZA & JORAM KARIISA APPLICANTS/ OBJECTORS
[JOINT RECEIVERS/MANAGERS OF UGANDA MARINE PRODUCTS LTD (IN RECEIVERSHIP)]

Versus

PONSIANO LWAKATAKA RESPONDENT/ JUDGMENT CREDITOR
UGANDA MARINE PRODUCTS LTD. JUDGMENT DEBTOR

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This application is brought under Order 22 r 55(1), 56 and 57 and Order 52 r 1 and 3 of the Civil Procedure Rules for orders that the assets vested in the applicants/ objectors as receivers/managers of Uganda Marine Products Ltd (judgment debtor) being six trucks registered under the numbers UAH 728D, UAB 547Z, UAB 548Z, UAB 540Z and UAE 433N, now the subject of a warrant of attachment dated 24th March 2010 be immediately released from attachment.

The brief background to this application is that on 18th October 2008, the applicants were appointed joint receivers/managers of the assets of the judgment debtor, by the East African Development Bank. The respondent/judgement creditor obtained judgment in Civil Suit No. 819 of 2007 and attached machinery and motor vehicles registration numbers UAH 728D, UAB 547Z, UAB 548Z , UAB 540Z and UAE 433N.

In the affidavit in support of this application, Mr. Mungereza deponed that; as joint receivers/managers of the judgment debtor, they took over the company

assets apart from the trucks registered under numbers UAH 728D, UAB 547Z, UAB 548Z, UAB 540Z and UAE 433N, which had been borrowed by some of the customers including the judgment creditor, to ferry fish. Mr. Mungereza deponed that the applicants convened a meeting of the company's creditors at which the customers of the company admitted to having borrowed the trucks and promised to return them.

Mr. Mungereza further deponed that the said customers subsequently denied having possession of the trucks. The said trucks were later traced and secured with the services of a court bailiff who discovered that five of the trucks had been hidden in various places including Kenya, Congo, Sudan, Kampala and Kisenyi landing site and their chassis and registration number plates had been changed. He deponed that they were unable to trace the sixth truck.

Mr Mungereza deponed that on the 16th of January 2009, the judgment creditor/respondent obtained an interim order restraining the applicants from disposing of the said motor vehicles which with the help of the police were removed from the applicants premises and parked at the CID Headquarters at Kibuli.

Mr. Mungereza deponed that he learned that court had issued a warrant of attachment of the machinery including the said trucks that had been parked at the CID Headquarters. Furthermore, that upon checking at the CID Headquarters, and on inquiry from the CID Headquarters personnel, the applicant discovered that the trucks were missing and that they had been taken away by a bailiff, on the basis of the said warrant of attachment. Mr. Mungereza further deponed that the said warrant was issued against the assets of the judgment debtor who was still under receivership.

In reply, Mr. Ponsiano Lwakataka the respondent/ judgment creditor deponed that he obtained judgment in Civil Suit No. 819 of 2007 and attached the said trucks. Furthermore, that before judgment the applicant was holding the said vehicles in exercise of a lien, and that at the time of attachment, the applicant was in possession of the said vehicles on account of the judgment debtor. Furthermore, that the respondent never attended the meeting of the customers which the applicants allegedly convened, and that he has never changed the number plates of the said vehicles. Mr Lwakataka further deponed that when the

vehicles were packed at the CID headquarters, he regained possession of them by virtue of the interim order that stopped the disposal of the said trucks.

At the hearing of this application, the applicants were represented by Ms Sebatindira, while the judgment creditor was represented by Mr. Kamba.

In relation to this application, Counsel for the applicant submitted that it is trite law that in proceedings of this nature, the sole question to be investigated by the court is that of possession. Questions of legal right are not important except in so far as they may affect the decision whether the possession is on account of or in trust for the judgment debtor or some other person. Counsel referred to the case of **HARILAL & CO. V BUGANDA INDUSTRIES LTD** [1960] 1 EA 318.

Counsel for the applicant further submitted that the law on receiverships operates in such a way that the appointment of a receiver vests in that person certain rights over company assets. Counsel referred to the book "KERR ON THE LAW & PRACTICE AS TO RECEIVERS" 16th Ed by Raymond Walton at pg 150 where it is stated that,

"The appointment of a receiver is one of the events which causes a floating charge to crystallise. The order operates from the date when the appointment becomes effective. The receiver becomes entitled to possession of the company's assets."

According to counsel for the applicant, at the time of the attachment, the receivers/managers had been appointed and had taken over the suit property, thus the applicants as receivers had possessory rights over the trucks, which are now the subject of attachment. Counsel for the applicant further submitted that the receiver's right over property has priority over claims of a judgment creditor. Counsel submitted that, as between a judgment creditor and mortgagee of the undertaking, who had obtained his mortgage before the recovery of the judgment, the right of the mortgagee is paramount. Counsel referred to the book "KERR ON THE LAW & PRACTICE AS TO RECEIVERS" 16th Ed by Raymond Walton at page 44 for this position.

Counsel for the applicant submitted that no attachment can be lawfully effected in respect of the property of a company under receivership. Counsel relied on the case of **JOHN VERJEE & ANOR V SIMON KALENZI & ORS** (CACA No. 71 of

2000) reported in [1997-2001] UCLR 83 and submitted that the receivers took possession before the warrant of attachment was issued, and therefore, no attachment could be effected on the trucks.

On the other hand, counsel for the respondent submitted that the receivers had not yet taken possession of the trucks at the time of attachment. Counsel submitted that there was evidence that the trucks had been borrowed by the respondent, from the judgment debtor, before the receivers took over the property, and that the respondent was holding the said trucks subject to a lien and therefore, the respondent can not be said to hold the said trucks in trust for the receiver but for the company.

I have considered the submissions of both counsels and the authorities cited for which I am grateful.

The test to be met in an application for release of property from attachment is well settled. It is laid down under Order 22 r 55, 56, 57 and 58 of the Civil Procedure Rules

The question to be determined by the court in an application of this nature is one of possession, that is whether at the time of the attachment, the property was in the possession of the objector, on his or her own account, or on account of any other person. This position of the law has been stated in several cases. In the case of **HARILAL & CO V BUGANDA INDUSTRIES LTD** [1960] EA 315 which has been cited by the parties.

Furthermore, in the case of **SOKEMPEX INTERSTATE CO. LTD V EURAPRO GENERAL IMPORT & EXPORT CO. LTD** [1981] HCB 73, **Oder Ag J**, (as he then was) found that, the question to be decided is, whether on the date of the attachment, the judgment debtor or the objector was in possession of the property, it must be found whether he held it on his own account or in trust for the judgment debtor, the sole question to be investigated thus being one of possession. The questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the judgment debtor or some other person.

The term possession is defined in BLACK'S LAW DICTIONARY 7th Ed by Bryan A Garner at pg 1183 as follows;

"1. The fact of having or holding property in one's power. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. 3. Something that a person owns or controls;"

The same author further defines what amounts to actual and constructive possession. The term actual possession is defined as *"physical occupancy or control over property"* while constructive possession is *"control or dominion over property without actual possession or custody of it."*

It has been submitted that at the time of appointment of the receivers, the trucks had been borrowed by the customers, including the judgment debtor. The respondent however states that he was in possession of the trucks, subject to a lien. The term lien is defined in BLACK'S LAW DICTIONARY 7th Ed by Bryan A Garner at pg 933 as follows;

"A legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied. Typically, the creditor does not take possession of the property on which the lien has been obtained."

From the above definition it is clear that a lien does not confer possessory rights over the property secured by the lien, but merely gives the person exercising the lien an interest in the property until the debt is satisfied. In other words such property is not held on ones own account but rather on account of or in trust for the debtor. There can therefore be no constructive possession of the property in such a situation.

Having found that the trucks were in possession of the respondent in trust for the judgment debtor, I will now consider whether at the time of the attachment, the applicants as receivers of the property had any interest or rights over the trucks.

The effect of appointment of a receiver has been stated by the author Sir Raymond Walton in the book "KERR ON RECEIVERS AND ADMINISTRATORS" 17th Ed at pg 158 as follows;

“Crystallisation of floating charge. The appointment of a receiver-who will almost invariably be known as ‘an administrative receiver’- is one of the events which causes a floating charge to crystallise. The order operates from the date when the appointment becomes effective. The receiver becomes entitled to possession of the company’s assets, and any interference with his possession is a contempt of court. He takes subject to all specific charges which have been validly created by the company in priority to the floating charge, and to all rights of set-off acquired by debtors to the company in respect of dealings with it. But the title of the receiver prevails over that of execution creditors who have not completed their execution, even though the debentures were not issued at the date of the execution, if there was a valid contract for their issue; it is therefore good against a person who has obtained a garnishee order nisi, or even absolute, if the charge crystallises before actual payment.”

In the case of **KASOZI DAMBA V M/S MALE CONSTUCTION SERVICE CO.** [1981] HCB 26, which has similar facts **Kantinti J** found that,

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1. *The order of attachment was made on 20th April 1980 and a receiver was appointed after the attachment.*
2. *The objector had to show that at the time of attachment, he was in possession; this was not shown to have been so. (See O.19 r 58 CPR)...*”

On the basis of the above authorities, it would appear to me that the title of the receiver prevails over that of a judgment creditor who seeks to execute after appointment has been made.

However in the application before court, the appointment of the receivers took place on 18th October 2010, and the warrant of attachment was issued on 24th May 2010. Clearly, the attachment was long after the appointment of the receivers had been done.

I am further fortified by the case of **JOHN VERJEE & ANOR V SIMON KALENZI & ORS** (CACA No. 71 of 2000) reported in [1997-2001] UCLR 83 where Twinomujuni JA, held that,

“Once a receiver has taken possession of the property before attachment, that property can not be attached by the other subsequent decree holders against the judgment debtor.”

Furthermore, in that same case, **Kitumba JA** and **Twinomujuni JA** found that although receivers are in law the agents of the debtor company, they hold property to pay the debts of the company, and therefore, the receivers were in possession not on behalf of the judgment debtor but for the mortgagee.

I am bound by that position of the law as stated by the Learned Justices of Appeal. I find therefore that by the time of the attachment, the control over the judgment debtor’s assets was with the applicants who were the receivers and therefore, the applicants had constructive possession of the property even if they may not have been in actual possession of the same.

Accordingly, I order that trucks registered under numbers UAH 728D, UAB 547Z, UAB 548Z, UAB 540Z and UAE 433N be released from attachment. Costs are awarded to the applicant.

Justice Geoffrey Kiryabwire

JUDGE

Date: 02/05/2012

02/05/12

10:00 a.m.

Ruling read and signed in open court in the presence of;

- Kakuru Martin h/b for Ruth Sebatindira

In Court

- None of the parties
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 02/05/2012