

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT NAKAWA**

**ARISING FROM MISCELLANEOUS CAUSE NO. 17 OF 2014**

**MISC. APPLICATION NO. 231/2014**

**NSHIMYE                      ALLAN                      PAUL                      MBABAZI**  
**:::::::::::::APPLICANT/JUDGMENT CREDITOR**

**t/d NSHIMYE & CO. ADVOCATES**

**VERSUS**

**MICROCARE INSURANCE LIMITED &**

**INSURANCE            REGULATORY            AUTHORITY            :::::::::::::::**  
**GARNISHEE**

**OF UGANDA**

**RULING**

The Applicant, Nshimye Allan Paul Mbabazi T/A Nshimye & Co. Advocates, filed a client/Advocate Bill of Costs against Microcare Insurance Limited in Miscellaneous Cause No. 17 of 2014 on 10/04/2014, the Judgment Creditor and Debtor recorded a consent Judgment in the sum of Shs. 110,000,000/= in favour of Applicant/Judgment Creditor.

The Judgment Debtor failed to settle the decretal amount, whereby the Judgment Creditor filed this garnishee Application to attach the Judgment Debtor's assets in form of money within the custody of the Garnishee, Insurance Regulatory Authority of Uganda. On 16/04/2014, an Order Nisi was issued to the

Garnishee. The Garnishee filed an Affidavit in reply in which it admits holding the funds belonging to the Judgment Debtor in the sum of Shs. 145,723,000/= as a security deposit, but denied liability on ground that the money is held in trust. The Garnishee was represented by M/S J.B. Byamugisha Advocates, while the Applicant was represented by M/S Kirunda and Wasige Advocates. Both sides were directed to file written submissions, which they did. And the issues for determination were:-

1. Whether the Garnishee is indebted to the Judgment Debtor.
2. Whether a Garnishee Order absolute should be issued against the Garnishee.

As to whether the Garnishee is indebted to the Judgment Debtor, Counsel for Applicant referred to paragraph 7 of the Garnishee's Affidavit in reply where the Garnishee avers that they hold UGX 145,723,000/= as Security deposit, and that the funds not only belong to the Judgment Debtor, but are sufficient to settle the Judgment Debt.

Counsel for the Guarnishee on the other hand quoted **Halsbury's laws of England (4<sup>th</sup> Edition) Vol. 17 para 529**, where he stated:-

**“The debt must be one which the Judgment Debtor could himself enforce within the jurisdiction of his own benefit, for the Creditor acquires no greater rights than those of the Debtor.**

He added that the Respondent, is not indebted to the Judgment Debtor in respect of the security deposit, which is a statutory fund held by the Respondent, Insurance Regulatory Authority of Uganda to be applied only as directed by Section 8 of the Insurance Act.

Counsel for the Guarnishee added that money, security deposit is to be used under restrictions and that there was no evidence to show the creation of a trust.

He concluded that the Guarnishee is a statutory authority and not a trustee. Counsel for the Guarnishee also introduced the matter of winding up petition of the Judgment Debtor, a matter not raised in the affidavit in reply.

Counsel for the Applicant on the other hand reiterated that the winding up petition was filed on 21/05/2014 after the Guarnishee's preliminary point of law was overruled by this Court on 16/05/2014. They further urged that the winding up petition is not related to the present Application and was filed as an afterthought and was an abuse of Court process leading to endless litigation.

I have considered and internalized the detailed submissions on both sides. The Security deposit referred to was established under Section 7(1) of the Insurance Act, Cap. 213 of the laws of Uganda. The same is an asset of the Insurer which in this case is the Judgment Debtor, Microcare Insurance Ltd, under S.7(2). It provides:-

**“The deposit under sub-section (1) shall be considered part of the assets in respect of the capital of the insurer.”**

The fact that the Security deposit is an asset of the Judgment Debtor in line with S.7(2) of the Insurance Act has not been denied or rebutted by the Garnishee as stated under paragraph 7 of their affidavit in reply. And as was held in *Samwiri Massa Vs Rose Achieng* [1978] HCB 297, Affidavit evidence which is not denied or rebutted is presumed to be admitted. And this Court agrees with the submissions of Counsel for the Applicant that the filing of the winding up petition after this Court had overruled the Preliminary point of law raised by Counsel for the Garnishee was an afterthought and amounts to an abuse of Court process and is unrelated to the present Application. The same promotes endless litigation as was held by the Court of Appeal in **DFCU Ltd Vs Begmohamed Ltd, Court of Appeal Civil Application No. 65 of 2005.**

I therefore find and hold that the said winding up petition cannot be a basis of the denial of a Guarnishee absolute. And as already noted, since it was not rebutted that the security deposit is an asset of the Judgment Debtor, and is in possession of the Garnishee, then the Guarnishee is indebted to the Judgment Debtor.

On whether the Garnishee Order absolute should be issued, Counsel for the Applicant submitted that this Court has the

geographical circuit jurisdiction as well as the original unlimited jurisdiction under Article 139 of the Constitution and Section 14 (1) of the Judicature Act. It was also submitted that there is unsatisfied Decree of UGX 110,000,000/= dated 11/04/2014 and so a Garnishee Order absolute be made.

Counsel for the Garnishee's submissions were that a Garnishee Order being an equitable remedy, it may be refused where the attachment of the debt would work inequitably or unfairly or cause prejudice to some other persons other than the Judgment Creditor. He relied on **Halsbury's Laws of England, 4<sup>th</sup> Edition, Bolume 17, paragraph 539.** Counsel for the Garnishee concluded that the security deposit is not a debt due or owing to the Judgment debtor.

Counsel for the Applicant on the other hand drew this Court's attention to section of the Insurance Act it provides:-

**“8 (a) where an insurer suffers a substantial loss arising from liability to claimants and the loss is such that it cannot be met from its available resources, the authority may, after ascertaining the nature of the claim and upon application made by the Insurer approve the withdrawal from the Security Deposit of the Insurer of an amount not more than 50 percent of the Security Deposit and any amount withdrawn shall be replaced by the Insurer not later than ninety days after the date of the withdrawal.”**

In my view, and in view of what is stated under S.8 above, then I agree with Counsel for the Applicant that the Garnishee is indebted to the J/D in respect of the Security deposit, and that the Security deposit is not a Statutory fund. This is because, as already noted, the Garnishee by its very admission in paragraph 7 of its affidavit in reply is holding a sum of UGX 145,723,000/= as Security Deposit.

From a reading of Sections 7 and 8 of the Insurance Act, these funds are supposed to be held by the Insurer. There is no single provision in Sections 7 and 8 which entitles the Garnishee to hold those funds, so they constitute a debt in respect of which the Garnishee is indebted to the insurer.

Furthermore, Security deposit is property of the Judgment Debtor and not a Statutory fund as submitted by the Garnishee.

In the premises, I find and hold that the Judgment Creditor has satisfied the grounds for the grant of the order sought as the Applicant is the holder of an unsatisfied Decree. Secondly, the Security Deposit held by the Garnishee Constitutes a debt due and owing to the Judgment debtor. The Security Deposit is therefore liable for attachment under S.44 of the Civil Procedure Act and O.23 of the Civil Procedure Rules. I also find and hold that no case has been made out to necessitate the summoning of any third parties to appear and state the nature and particulars of their claims upon the security deposits as such third parties were

never parties in the present case. Each case has to be handled on its own merits.

I accordingly do hereby issue a Garnishee Order absolute whereby the Judgment Debtors asset in the form of security deposit in possession of the Garnishee to be attached and paid out in settlement of Applicant's unsatisfied Decree. I also award costs of this Application to the Applicant.

.....

**W. M. MUSENE**

**JUDGE**

17/06/2014

Mr. Robert Kirumira for Applicant present.

Mr. Albert Byamugisha for Respondent present.

Parties absent.

Aida Mayobo, Court Clerk present.

Court: Ruling read out in Chambers.

.....

W. M. MUSENE

JUDGE