

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

**MISCELLANEOUS APPLICATION NO 36 OF 2016**

**ARISING FROM CIVIL SUIT NO 36 OF 2016**

**ANISUMA TRADERS LTD}.....APPLICANT**

**VS**

**GOLF COURSE HOLDINGS LIMITED}.....RESPONDENT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant commenced this application by Chamber Summons under Order 41 Rules 2 and 9 of the Civil Procedure Rules S.I 71-1, S.98 of the Civil Procedure Act, Cap.71 and S.33 of the Judicature Act, Cap.13 for a temporary injunction to restrain the Respondent's servants and/ or agents or entity claiming title or interest in the Applicant's home appliances and products situated on the Respondent's premises at Garden City Mall, Kampala from selling or dealing with them in any way until final disposal of the main suit and for orders that costs be provided for.

The grounds of the application are contained in the affidavit of the Director of the Applicant, Sunil Bhagchandani sworn at Kampala on the 19<sup>th</sup> of January 2016. He deposed to the following facts. By an agreement dated the 5<sup>th</sup> of July, 2013 for the Establishment of Specialty shops with Uchumi Supermarkets Uganda Limited, the Applicant opened an outlet for its entertainment/electronic products/home appliances within the premises of Uchumi Supermarket at Garden City Shopping mall (the premises of the Respondent) and traded therein as such under licence to do so.

It was agreed that the outlet established by the Applicant would sell the products it had on offer through the system operated by Uchumi and Uchumi as an agent would on the relevant dates remit to the Applicant all the receipts of the designated business in the preceding period of one (1) month less the Market Access revenue share for such Month and that the Applicant would always issue and send invoices to Uchumi for payment of the proceeds of sale of items belonging to the Applicant as purchased from the Uchumi outlet.

Page 2 of the agreement defined designated business to mean the non-exclusive business in Uchumi by Anisuma of selling the full range of Sharp, Ariston, Indesit, Venus, Canon, Nikon and a range of other top brands of entertainment electronic products, home appliances, telecom, IT and Office Equipment. The said products were at all times entirely the property of the Applicant as they were never sold or supplied to Uchumi Supermarkets Uganda Limited (in liquidation) and the agreement was for a Market Access Fee or Revenue Share.

In late 2015, Uchumi Supermarkets Uganda Limited closed business and the Respondent as Landlord instituted distress for rent proceedings against Uchumi Supermarkets Uganda Limited (in liquidation) to recover its rent arrears and in the process seized all the Applicant's goods found in the supermarket.

On 29<sup>th</sup> October 2015, the Applicant through its lawyers wrote to the Respondent's lawyers demanding release of the Applicant's property held on the premises of the Respondent and the Respondent's lawyers informed the Applicant that Uchumi Supermarket Limited (in liquidation) had inevitably been placed under liquidation and an inventory of the items found on the premises was being conducted to ascertain the value of the goods.

On 11<sup>th</sup> January, 2016, WATTS Business Associates Ltd acting on behalf of the Respondent without any communication to the Applicant advertised in the Daily Monitor Newspaper a notice of sale by public auction/private treaty of all the sanitary and movable properties (inclusive of the goods of the Applicant) belonging to Uchumi Supermarkets Uganda (in Liquidation) after the expiry of 14 days from the date of Advertisement at the Respondent's premises Garden City. To date the Applicant has received no formal response from the Respondent and the defendant continues to hold onto the Plaintiff's goods despite numerous demands from the Applicant.

The Applicant contends that there is a prima facie case with a high probability of success and if not stopped, the Applicant will suffer irreparable damage. Finally the Applicant avers that the balance of convenience is in its favour as the Applicant is a commercial enterprise whose main source of trading is business trading and is likely to suffer more if the application is not granted.

In a further supplementary affidavit Sunil Bhagchandani deposed that on 10<sup>th</sup> December, 2015, AF MPANGA Advocates advertised in the New Vision newspaper a public notice informing the public of the commencement of liquidation of Uchumi Supermarkets Uganda Limited and all assets were vested in the liquidator who is the only person entitled to custody and control of the Company's assets. On 27<sup>th</sup> January, 2016 the applicant's lawyers MMAKS Advocates, the lawyers of Uchumi with a copy of the letter to the Applicant requested them to confirm whether the Applicant's products as listed in the inventory report belong to Uchumi. On 1<sup>st</sup> February, 2016 AF MPANGA Advocates responded and confirmed that the Applicant was a specialty

partner of Uchumi and therefore products found in possession of Uchumi at the time of closure of the store by the landlord were not vested in Uchumi and therefore remained the property of the Applicant and in the interest of justice a temporary injunction should issue to restrain the Respondent from selling the Applicant's products because the products belong to the Applicant and not Uchumi.

In the affidavit in reply Mr. Amit Talreja, the General Manager of the Respondent Company deposed to the following facts. The Respondent is neither aware of nor privy to any arrangements or agreements between the Applicant and Uchumi Supermarkets Uganda Limited at Garden City. The Respondent granted a lease to Uchumi over part of the property known as Garden City Shopping and Leisure Centre in the terms detailed in an agreement dated 1<sup>st</sup> June, 2012. In the lease agreement Uchumi was not to sublet or part with or share possession or occupation of any part of the property let to it without first obtaining the written consent of the Respondent and Uchumi has never applied/requested for or was any such consent given to Uchumi by the Respondents to allow it part with or sublet any part of the premises let to it by the Respondents as indicated by the Applicant. It was also contended that the Respondent is not aware of the Applicant's claim with Uchumi and was advised by their lawyers that any sub tenancy (if any) is illegal and unenforceable in Courts of Law and cannot be condoned. Before Uchumi went into liquidation it had rent arrears in excess of US\$ 400,000 and the Respondent distressed for the outstanding rent before Uchumi went into liquidation and all property in possession of Uchumi at the premises were subject to orders of Court. The Applicant is unknown to the Respondent and is not privy to the lease agreement and the alleged claim if any lies in seeking for indemnification from Uchumi which is not a party to the Application. WATTS Business Associates in compliance with the distress Order issued by Court proceeded to invite the public for a sale of the assets of Uchumi by public auction and or private treaty. The Respondent does not hold any of the Applicants' goods but proceeded to distress on the goods that were in the possession of Uchumi on the Respondent's premises. The Respondent was allowed to sell all the goods in the premises to recover its rent. The items claimed by the Applicant are ordinary commercial items that can be quantified in value and atoned in cash in case the Respondent loses. The Respondent is a well- established Company running the first ever high standard mall and is likely to compensate the Applicant if Court determines so. The Respondent seeks to recover over US\$ 300,000 and shall be inconvenienced if this Application is granted.

In an affidavit in Rejoinder, Sunil Bhagchandani deposed that the Applicant was not party and is not privy to the tenancy agreement between Golf Course Holdings and Uchumi Supermarkets Uganda Limited and is therefore not bound by its terms and conditions. The agreement for establishment of specialty shops between Uchumi and the Applicant is not an agreement to sublet the premises from Uchumi but rather a licence to operate its designated business. The Applicant entered the Specialty agreement under belief and representation that Uchumi had the

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

right to grant a licence to the Applicant to operate its designated business and the Respondent was always aware of the Applicant's business and goods on the premises. The Applicant never sublet, parted or shared possession with Uchumi; it only sold its goods through Uchumi. The Specialty agreement is not illegal and the Applicant only seeks to recover its goods from the Respondent who has not challenged ownership of the goods. The court distress order was only in respect of assets of Uchumi and not thirds parties 'assets which are given absolute privilege and exempted from seizure and distress by the Landlord. The Respondents has not disputed ownership of the property. Seizure of the Applicant's goods has greatly crippled their business and the good will and reputation is likely to be damaged if the goods are sold and that cannot be atoned for by an award of damages. If the Respondent claims that it can compensate the Applicant's goods, it should make a conditional payment into court of the value of the Applicant's goods amounting to Uganda shillings 317,546,573/= until final disposal of the main suit. The Applicant is neither liable for the loss in rent nor payment of rent arrears to the Respondent as it was not privy to the Tenancy Agreement with Uchumi.

Counsel Mathias Sekatawa represented the Applicant at the hearing while Counsel Nicholas Mwasame represented the Respondent. The Court was addressed in written submissions.

In his submissions, Counsel for the Applicant submitted that the Applicant had a Specialty Agreement with Uchumi Supermarkets Uganda Limited under which the Applicant opened an outlet for its products within Uchumi Supermarket at the premises of the Respondent and at all times the products remained the property of the Applicant in accordance with clause 1 (h) of the Agreement which provides that it was for market access or revenue share and the Applicant would always issue and send invoices (Annexure B) to Uchumi supermarket for payment of the proceeds of the Applicant's products as would have been purchased through the Uchumi outlet. However when Uchumi Supermarket went into liquidation in late 2015, the Respondent as landlord distressed for rent and seized all the property at the Supermarket including the Applicants property. On 11<sup>th</sup> January, 2016, WATTS Business Associates Limited acting on behalf of the Respondent advertised sale of the said products in the Daily Monitor Newspaper to which the Applicant filed a suit and an application for a temporary injunction to prevent the Respondent from selling its goods.

With reference to the case of **American Cyanamid Company vs. Ethicon Limited (1975) 1 All ER 504** and also cited with approval in **Kiyimba Kaggwa vs. Hajji Abdu Nasser Katende (1985) HCB 43**, the Applicant's Counsel submitted that the conditions to be fulfilled before a temporary injunction can be granted are that:

1. The Applicant must show a prima facie case with a probability of success
2. The Applicant must show that he will suffer irreparable injury which cannot be adequately compensated by an award of damages
3. If the court is in doubt, it will decide the application on a balance of convenience

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~?+: maXimum728securityx 2016 style*

As far as a prima facie case with a probability of success is concerned, the Applicant's Counsel relies on the dictum of Lord Diplock in **American Cyanamid Company vs. Ethicon Limited (1975)1 All ER 504 at page 510**, that: "the court no doubt must be satisfied that the claim is not frivolous or vexatious in other words there is a serious question to be tried".

The Applicant's case made out is that the serious question to be tried is whether the Applicant owns the products as shown in Annexure "D" the inventory report. Secondly, the question is whether the Respondent is entitled to levy distress for rent against goods that do not belong to its tenant.

Counsel for the Applicant submitted that the goods belonged to the Applicant and the Respondent had no right to levy distress for rent against the Applicant's goods. Furthermore contrary to the assertion in the Respondent's Affidavit in reply, the Specialty Agreement was not illegal and unenforceable by Court due to lack of consent from the landlord.

There is no law, statute or public policy that prohibits the performance, object or formation of the Specialty Agreement. According to the case of **MTN Uganda Ltd vs. Three Ways Shipping Group Ltd, HCCS 503 of 2012** this court cited Prof. J. Bakibinga in Law of Contract in Uganda, Fountain Publishers 2001 at page 93 for the elements that make a contract illegal. An illegal contract is void and is manifested in 4 ways. These are in the formation of the contract; in the performance of the contract; in the consideration of the contract or in the purpose for which the contract is made. A contract is illegal if it is contrary to public policy and forbidden by statute. Counsel also relied on **Black's Law Dictionary 9<sup>th</sup> Edition at page 370** which defines an illegal contract to mean a promise that is prohibited because of performance, object or formation of the Agreement.

It is the Applicant's case that it was neither aware nor privy to the lease agreement between Uchumi and the Respondent and is therefore an innocent party to the breach and that in case of any breach of the Lease Agreement. The Specialty Agreement can only be voidable between parties to it as Uchumi represented to the Applicant that it had the right to grant the licence. He further submitted that the Respondent was always aware of the existence of the Applicant's business and goods on the premises of Uchumi and that the Applicant only seeks to recover its goods from the Respondent and that the Respondent cannot take away the Applicant's constitutional right to own and hold property.

Furthermore the Respondent in the affidavit in reply did not challenge the Applicant's ownership of the goods but only seeks to derive title and unjust enrichment of the Applicant's goods from the allegedly illegal Specialty agreement. According to **Chitty on Contracts Vol.1 General Contracts at p.1642** the principle of unjust enrichment involves enrichment of the defendant through receipt of a benefit. Secondly the enrichment is at the expense of the claimant and thirdly that the retention of the enrichment is unjust and qualifies for restitution.

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

In reply the Respondent's Counsel agrees with the principles for the grant of a temporary injunction and submitted with reference to the decision of Hon Justice Lameck Mukasa on **Bonny Katatumba and Hotel Diplomat Ltd vs. Shumuk Springs Development Ltd and Another HCMA 0193 of 2009** that the principles are applied sequentially and the applicant must satisfy the court with one condition for the grant of an injunction after the other.

With reference to **Francis Kayanja vs. Diamond Trust Bank of Uganda Ltd High Court Misc. Appl. No. 300 of 2008** the burden is on the applicant to show whether there are serious questions to be tried in the main suit. While the applicant relies on the issue of ownership of goods to disclose a prima facie case the Respondents counsel submitted that the basis of the relationship between the Applicant and Uchumi was the specialty agreement. Another issue is whether the specialty agreement and all actions carried out there under are enforceable in courts of law. However the respondent's case is that Uchumi could not part with possession of the premises without the consent of the Respondent under clause 2 (t) of the lease agreement. The clause is couched in mandatory language. Furthermore once an illegality is brought to the attention of Court, it overrides all questions of pleadings according to the holding of the Supreme Court in **Makula International vs. Cardinal Nsubuga Wamala (1982) 2 HCB 11**. The law has been followed in **Active Automobile Spare Limited vs. Crane Bank Limited and another, SCCA 210F 2001**, per Oder JSC at page 12. The Applicant conceded in its submissions that Uchumi allowed it to open an outlet within the Respondent's premises. This was without the Respondent's written consent. In the East African Court of Appeal case of **Broadways Construction Company vs. Musa Kasule and 2 others, Civil Appeal No. 39 of 1977**, where Lutta JA, held that in a contract for entering into possession which required the Minister's consent, was void ab initio for failure to obtain such consent and nothing done subsequently had the effect of rendering it enforceable. In **Erukana Kuwe vs. Isaac Patrick Matovu and another HCCS No.177of 2003**, Lady Justice Percy Night Tuhaise held that a transfer under the terms of a lease agreement which required prior consent of the mailo owner was illegal and unlawful without the consent first having been obtained. In the premises the sub tenancy that allowed the Applicant to take possession of the Respondent's premises without first obtaining the Respondent's written consent was/is illegal and as such no transactions made there under are enforceable by court.

The Respondent submitted that there was no cause of action because it had a relationship with Uchumi and not the applicant. The Applicant had a relationship with Uchumi which was not a party to the suit. Cause of action is defined in **Tororo Cement Limited vs. Frokina International Limited Civil Appeal No.1 of 2001** following with approval, the definition in **Auto garage & Another vs. Motokov (no.3) (1971) EA 514**, that a plaint discloses a cause of action where it is disclosed by the pleading that the plaintiff enjoyed a right, the right has been violated and the defendant is liable.

The Applicant chose to sue the Respondent and not Uchumi the party whom the Applicants claim violated their rights. The Respondent is a stranger to the Applicant and has no idea of any terms of the agreement between the Applicant and Uchumi and as such there is no cause of action and a triable issue against the Respondent.

On whether the Applicant would otherwise suffer irreparable injury which cannot be atoned for by an award of damages, the Respondent's counsel submitted that if the plaintiff were to succeed at trial in establishing its right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he sustained as a result of the defendant's actions. The law is that where damages are recoverable at common law that would be an adequate remedy and defendant would be in a financial position to pay them. In such cases no interlocutory injunction ought to be granted, however, strong the plaintiff's claim appears at this stage.

Counsel further submitted that the emphasis is not only on the nature and magnitude of harm but also whether the Respondent would be able to compensate the Applicant. Irreparable injury means substantial harm that monetary compensation could not sufficiently compensate. On the submission of the Applicant that its good will would suffer if the application is not granted, the Respondents counsel contends that the submission is fallacious and an attempt to mislead court. In **Bonny Katatumba and Hotel Diplomat Limited vs. Shumuk Springs Development and another MA 0193 of 2009**, Hon. Mr. Justice Lameck Mukasa held that because the Applicant had pleaded the exact sums he intended to recover, the Court would assign that value to the property and it meant that loss could be compensated by an award of damages.

He contended that in this suit the Applicant had stated the value of the goods currently being held by the Respondent and they can be adequately compensated by an award of monetary damages if the Applicant is successful in the main suit. The Respondent also runs the first modern shopping mall in Uganda and is financially capable of compensating the Applicant. The status quo is that the goods in question are at the Respondents premises and the subject of a certificate to levy distress duly issued by court and the order has neither been challenged nor overturned.

The court only considers the balance of convenience when it is in doubt on the first two conditions discussed. The Respondent's submission is that it is owed money by Uchumi of over US\$ 300, 000 and the Applicant can line up as a creditor in the liquidation proceedings against Uchumi with whom they contracted and thus the balance of convenience is in the Respondent's favour. Lastly the Respondent's counsel submitted that since the Applicant failed to satisfy the conditions for granting a temporary injunction, the application should be dismissed with costs to the Respondent.

In rejoinder the Applicant submitted that for purposes of a prima facie case the respondent raised two issues.

Counsel for the Respondent submitted that the Specialty agreement and all actions carried out there under are not enforceable in courts of law for illegality and therefore there is no prima facie case. Secondly the Applicant's suit discloses no cause of action against the Respondent. In relation to Issue 1, in rejoinder, the Applicant's Counsel disagreed with the Respondent's submissions and distinguished the authorities cited to support the contention that the Specialty Agreement is illegal and unenforceable and submitted that the case before this court is whether the Applicant has a prima facie case against the Respondent. He further submitted that the cases cited by the Respondent are clearly distinguishable in so far as they all demonstrate that for an act, contract or transaction to be held illegal, it has to be contrary to the law or statute. He pointed out that the Respondent was always aware of the Applicant's goods and outlet on its premises and acquiesced to it. He referred to Black's Law dictionary 9<sup>th</sup> Edition at page 26 for the definition of acquiescence which means to accept tacitly or passively, to give implied consent to an act.

In rejoinder the Applicant's Counsel further submitted that breach (if any) of the lease agreement between Uchumi and the Respondent only makes the contract voidable and the parties are entitled to different rights therein and the alleged breach does not make the Specialty agreement illegal and unenforceable as it is not contrary to any law, statute or public policy.

The case of **Erukana Kuwe vs. Isaac Patrick Matovu & Anor** is distinguishable from the facts of the present case because in the present case the Applicants do not seek to enforce their rights under the Specialty Agreement for the possession or occupation of the Respondent's premises but only seek to recover their goods from the Respondent's premises and prevent their sale. The Specialty agreement only shows how the Applicant owns the goods found on the premises and that even before the existence and performance of the Agreement they were the owners of the goods in issue. The Respondent never challenged the Applicant's ownership of the goods but instead seeks unjust enrichment by selling them. The goods always belonged to the Applicant not Uchumi and the Respondent has no right to them whatsoever.

On whether the Applicant's action discloses a cause of action against the Respondent, and with reference to the definition of a cause of action in **Tororo Cement Limited vs. Frokina International Limited Civil Appeal No. 1 of 2001** the Applicant indeed has a cause of action because it enjoyed a right of ownership of their goods, which right was violated by the Respondent seizing the goods and intending to sell them for their own benefit. These facts are disclosed by the Applicant's affidavits in support of this Application and the Respondent's submissions on failure to disclose a cause of action are misconceived.

The issues or objections raised by the Respondent of illegality and the Plaintiff disclosing no cause of action are preliminary objections to the main suit which ought not to be dealt with at this stage of the proceedings as held in **Kakooza Abdullah vs. Stanbic Bank (U) Ltd Misc. Application**



**No. 614 of 2012 and NAS Airport Services Limited vs. The Attorney General of Kenya (1959) 1 EA 53.**

Counsel for the Applicant disagreed with the Respondent's submission that the Applicant's loss of goodwill and reputation is a fallacy and an attempt to mislead court. He submitted that the Applicant's affidavit in rejoinder deposes that its reputation and goodwill will suffer irreparably if the goods are sold. The Applicant already cannot reliably meet its customer's demands due to the continued seizure of their goods by the Respondent as they constitute a substantial part of the Applicant's business and is therefore likely to close business as a result thereof. The Applicant stands to lose its force to attract customers and its reputation due to the Respondent's actions. With regard to the status quo being that the goods are subject to a certificate of levy for distress, the certificate is only in respect of goods of Uchumi and not third parties. In the premises the Applicant would suffer irreparable injury if the injunction is not granted.

With regard to the balance of convenience the Applicant's Counsel submitted that the question for consideration is who is likely to suffer more if the temporary injunction is not granted and the Respondent has not proved that it is likely to suffer more in any way. Furthermore the Applicant is not the party indebted to the Respondent to a tune of US \$ 300,000 so whether the Application is granted or not the Respondent is still able to recover this sum from Uchumi and the Applicant cannot line up as a creditor because the goods did not belong to Uchumi and Uchumi's lawyer confirmed in writing that they have no objection to the Applicant removing their goods from the premises and the Applicant is likely to suffer more if the Temporary injunction is not granted because the goods constitute a substantial part of its business and sale of the goods might lead to closure of the Applicant's business. The Respondent will not suffer because they have the premises to rent to other persons in the meantime until disposal of the main suit. In the premises the balance of convenience favours the Applicant and the temporary injunction ought to be granted to maintain the status quo until determination of the main suit.

**Ruling**

The grant of a temporary injunction by the High Court under section 37 (1) of the Judicature Act Cap 13 is meant to meet the ends of justice in any case where it is deserved and the power should not be restrictively applied. The jurisdiction under this provision is wide and is exercisable according to the facts and circumstances of each case and where the dictates of justice demand. Section 37 (1) of the Judicature Act cap 13 gives the High Court wide discretion to grant an injunction by an interlocutory order in all cases where it appears just to do so. When is it just? It provides that the order may be made unconditionally or on such terms as the court may think just. Case law cited by counsel is founded on interpretation of Order 41 of the Civil Procedure Rules. Order 41 rules 1 of the Civil Procedure Rules and particularly rule 1 (a) provides that where it is proved by affidavit or otherwise that "*any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a*

*decree; or*”, the court may grant an injunction to maintain the status quo. In other words the provision is applicable where there is property in dispute which is in danger of being alienated by a party to the suit. Furthermore Order 41 Rule 1 of the Civil Procedure Rules provides that: “... *The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.*” Clearly the intention of an injunction is to prevent the wastage, damaging, alienation, sale or removal of the property. In other words an injunction is granted to maintain the status quo so that the intended sale for example does not take place. The sale for instance would change the status quo. An injunction may also be granted to support a legal right. A section in *pari materia* with Section 37 (1) of the Judicature Act was interpreted in the United Kingdom in the case of **Montgomery vs. Montgomery [1964] All E.R. 22** where Ormrod J held that an injunction can be granted solely to protect a legal right. He held that the power was derived from the Supreme Court Judicature (Consolidation) Act, 1923, s. 45 (1) which provides:

*‘The High court may grant a mandamus or an injunction ... by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do’.*

The relevant part of the section is in *pari materia* with section 37 (1) of the Judicature Act cap 13 Laws of Uganda. Ormrod J held that it is a fundamental rule that an injunction is issued only to support a legal right. For instance the court can issue an injunction to restrain a spouse from molesting the other spouse. The decision is persuasive and I agree with it. Order 41 rules 1 deal with alienation of property by a party through sale or other action mentioned there under. According to the case of **American Cyanamid Co. Ltd vs. Ethicon [1975] 1 All E.R. 504** what needs to be established by the applicant is that there are serious questions to be tried and that the action is not frivolous or vexatious. With regard to this first condition it is my finding that there are serious questions to be tried which have been raised in this application. These are that:

1. The applicant claims ownership of goods which are in Garden City and which are the subject of a distress certificate order. The distress is for rent. Should the property of a third party be sold to pay off the debts of the debtor? Order 41 rule 1 applies to property which may be wrongfully sold in execution of a decree. Consistent with the underlying principle property attached by order of court may be released from attachment in objector proceedings to attachment and sale brought by a third party under Order 22 rules 55, 56, 57, 58 or 60 etc of the Civil Procedure Rules. Attachment or sale per se does not stop a third party from claiming ownership of goods the subject of a court order. All the third party needs is to prove prima facie that they have an interest in the property. The underlying principle is that the property of a third party should not be sold to recover money to clear the debts of another. For that reason there is a serious question to be tried relating to ownership of the goods. Secondly there is a certificate of distress merely

appointing a bailiff to distress on behalf of the particular landlord and property and there is no order to sell the property.

2. The specialty agreement is between the Applicant and Uchumi Supermarkets Ltd which is not a party to the main suit or application. A breach by Uchumi of a tenancy agreement by failure to pay rent may not necessarily rob the Applicant of a right to its property and any issue of illegality of tenancy may lead to a claim for mesne profits and not forfeiture of property per se. In fact the Respondents claim for rent is for the entire premises rented by Uchumi Supermarkets. The Applicant claims that Uchumi Super Markets Ltd was an outlet for its products. It alleges that Uchumi Supermarket would pay it after sales of the products under the specialty agreement. The premises had not been sublet. In other words Uchumi it is alleged is not precluded from acting as a commission agent or any other agent in running its supermarket in the premises of the Respondent. Clearly from the averments and affidavit evidence the Applicant has demonstrated that the above are triable issues. Even the issue raised by the Respondent as to whether keeping property with Uchumi under the impugned arrangement is illegal is a triable issue. The affidavit of both parties on factual matters require to be tested through cross examination before a conclusion is reached on the evidence and law according to the case of **American Cyanamid Co. Ltd vs. Ethicon [1975] 1 All E.R. 504** and the dictum of Lord Diplock. What is important is that there are serious questions that need to be tried.
3. Last but not least there is novelty in the issues raised in that the property of Uchumi Supermarkets vested in a liquidator and there is no dispute about this. Uchumi Super market Ltd or its managers the liquidators are not parties to this application or suit. If the property belongs to the Applicant, it does not vest in the liquidator. If it belongs to Uchumi Super markets it vests in the liquidator and any creditor should line up with other creditors. The Respondent claims to have distressed for rent before the vesting of the property. The Applicants case is that the Respondent cannot levy distress on a stranger's property. Both parties agree that the Applicant is not privy to the lease of premises by the Respondent to Uchumi Super Markets Ltd. The Respondent is not privy to the Specialty agreement between Uchumi Super market Ltd and the Applicant. The question of where the balance of convenience lies is the practical and legal effect of each case scenario in terms of vesting or not vesting of property on the liquidator.

On whether the Applicant would otherwise suffer irreparable injury that cannot be atoned for by an award of damages the summary of the situation is that the Applicant claims property. The property has been claimed to be wrongfully distressed for purposes of recovery of rent. Uchumi is under receivership and the question of whether the property belongs to the Applicant is critical in releasing the property from the order vesting the property in the managers of Uchumi. A stranger's property should not be available for sharing among creditors of a debtor. There is therefore a question of whether the court should prevent the sale from taking place to ascertain whether the goods belong to the Applicant. Both the respondent and Applicant are dealing with

the property outside the receivership and the receivers are not a party. While the property can be quantified the Applicant claims that its reputation is at stake and I am in doubt as to whether damages would be an adequate remedy. The Application will be decided on the balance of convenience.

**Balance of convenience:**

As far as law is concerned, the Applicant seeks to have its property protected from the advertised sale. It claims it would suffer more than the Respondent would. The Respondent claims it can compensate the Applicant and has the resources to do so. The question is whether the Respondent has nothing much to lose if the injunction is not granted. On the other hand the Applicant seeks release of its goods and alleges loss of reputation and possible collapse of its business. The Applicant seeks to enforce a property right and submitted that it is guaranteed under article 26 of the Constitution of the Republic of Uganda.

I have found the analogy of objector proceedings persuasive on this issue because the Respondent contended that it is holding the property the subject matter of the application by virtue of a court certificate of distress. By analogy, the law and practice of this court is that in applications under Order 22 rule 55, 56, 57, 58, of the Civil Procedure Rules objecting to attachment of property purported to belong to a judgment debtor, the power to release property from attachment is summary and based on prima facie evidence that the objector has an interest in the property at the time of attachment. The rules to release the property are based on prima facie findings of evidence and are not conclusive of the suit or dispute as to who should ultimately hold the property according to the case of **Harilal & Company versus Buganda Industries Ltd [1960] 1 EA 318**, the Judgment of Lewis J about the scope of order 19 rule 55 and subsequent rules on what is to be investigated by court when he held that:

“What has to be decided under O. 19, r. 55, which is the Indian O. 21, r. 58 is set out in Chitale and Rao’s Code of Civil Procedure (6th Edn.), p. 1880:

“What is to be investigated is indicated by the next three following rules, viz. r. 59, r. 60 and r. 61. The question to be decided is, whether on the date of the attachment, the judgment-debtor or the objector was in possession, or where the court is satisfied that the property was in the possession of the objector, 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 is, thus, one of possession. Questions of legal right and title are not relevant, except so far as they may effect the decision as to whether the possession is on account of or in trust for the judgment-debtor or some other person. ...

“As pointed out by Mr. Justice Sadasiva Ayyar in Ramaswami Chetty v. Mallapa:

‘in summary proceedings held in accordance with certain statutory provisions intended for speedy disposal of “emergent” disputes, the court may be prohibited from going into complicated questions of title or investigating complicated questions like fraud, trust and so on, while giving the party defeated in the summary inquiry, the right to have the whole matter and all the questions which are in dispute fully investigated in an ordinary regular suit. . . .”

The ratio in the above authority was cited with approval in **John Verjee and Another versus Simon Kalenzi, Court of Appeal Civil Appeal NO 71 of 2000** and followed in **C. Baguma v Highland Agricultural Export Ltd High Court Miscellaneous Application No. 655 of 2001)**

Under the rules further steps can be taken through an ordinary suit under Order 22 rule 60 to finally determine the rights of the parties. To my mind the question is why the court should exercise this summary remedy where an objector raises objection to attachment? It espouses an important principle not to sell the property of third parties or strangers to the action to raise money for a judgment creditor through court process.

Secondly I make reference to cases where property is seized by a land lord. Ordinarily this self help remedy allows the Landlord to hold the property until he or she is paid. The self help presupposes that the property belongs to the debtor. However before considering the rights of a bailiff in distress for rent cases, I refer to decisions in execution from England. In the case of **Curtis vs. Maloney [1951] 1 K.B. 736** the property of the plaintiff was in possession of an execution debtor and was seized by the sheriff in execution proceedings. The sheriff sold the ship to the defendant without any claim having been made to the goods. The Plaintiff sued the defendant for return of his ship or failure of that for detinue for the vessel or its value. The defendant claimed to have acquired good title by virtue of section 15 of the Bankruptcy and Deeds Arrangement Act, 1913. Judge Finnemore held that the Defendant acquired good title and the Plaintiff appealed to the Court of Appeal.

Section 15 of the Bankruptcy and Deeds Arrangement Act 1913 of Britain provides inter alia:

“Where any goods in the possession of an execution debtor at the time of seizure... are sold by such sheriff, high bailiff or other officer without any claim having been made to the same, the purchaser of the goods so sold shall acquire a good title to the goods so sold ....”

It dealt with goods in possession of a judgment debtor. Denning L.J. at page 745 held that the provision was another example of a contest between the common law rule that no man can get a better title than he has got and the statutory exception in favour of innocent purchasers. For the statutory protection of bona fide purchasers he held that the words under the section that the purchaser of the goods shall acquire good title “should be given their full meaning. The proviso thereof does not whittle down the title of a bona fide purchaser and *it does not deprive the*

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~?+: maXimum728securityx 2016 style*

original owner of his remedy against the execution creditor or against any wrongdoer who had converted the goods before the sale. In other words the law does not intend for the goods of other parties other than the judgment debtor to be sold. In the East African case of **Dyal Singh vs. Kenyan Insurance Ltd [1954] 1 ALL ER 847, PC Lord Reid** who delivered the decision of the Privy Council noted at page 849 that:

*In construing s. 45 (3) it is proper to bear in mind the position before passing of section 15 of the English Act of 1913 from which it was copied. A bailiff or other officer is only entitled to seize and sell goods which belong to the execution debtor, but it is often difficult for him to ascertain the ownership of goods in the possession of the debtor and he may without negligence sometimes seize and sell goods which do not, in fact belong to the debtor. He gives no warranty to the title of goods he sells.*

The Court also considered constructive notice and observed that provisions for constructive notice do not imperil the right of a purchaser in an auction. In fact such constructive notice could have been presumed on the bailiff who is protected. The right of action is so limited as not to extend to defeat the title of the purchaser. In Uganda bona fide purchasers are protected by statute under sections 49 in respect of land and section 50 of the Civil Procedure Act Cap 71 laws of Uganda in respect of chattels.

Where there is opportunity to prevent the sale it ought to be utilised to avoid the issue of title to property passing as considered in **Goodlock vs. Cousins [1897] 1 Q.B. 558**. Section 156 of the Country Courts Act 1888 required a claimant to goods taken in execution to deposit the amount of the value of the goods with the court to abide the decision of the judge. The bailiff would be allowed to charge costs for keeping the goods. It was held that where the Bailiff sells the goods, the buyer obtains good title thereof. Particularly Lord Lopes at page 561 held that the claimant has the opportunity of preventing a sale under the section by making a deposit with the bailiff. Where the goods are sold to a bona fide purchaser, he gets good title.

The circumstances of this case do not deal with a decree or order of the court but a certificate of distress. The Distress for Rent (Bailiffs) Act Cap 76 Laws of Uganda deals with appointment of bailiffs for purposes of distress for rent. The Respondent claims a right of distress as a landlord. According to **Osborn's Concise Law Dictionary Eleventh Edition** the terms "distress" means the legal seizure of the goods of a wrongdoer, to satisfy a debt or claim; e.g. levying distress for rent due under a lease. According to **Words and Phrases Legally defined** the term "distress" primarily connotes a summary remedy by which a person is entitled without legal process to take into possession the personal chattels of another person, to be held as a pledge for the satisfaction of a debt or demand. Finally **Stroud's Judicial Dictionary of Words and Phrases 2000 Edition** Sweet & Maxwell defines distress:

"A distress is one of the most ancient and effectual remedies for the recovery of rent. It is the taking, without legal process, cattle or goods as a pledge to compel the satisfaction of a demand, the performance of a duty, or the redress of an injury. The act of taking, the thing taken, and the remedy generally, having been called a distress; an inaccuracy which the older text-writers usually avoided"... Crown goods are exempt from distress (Secretary for War v. Wynne [1905] 2 K.B. 845, cited Public Trade)."

I have considered the Special Certificate to Levy Distress issued under the Distress for Rent (Bailiffs) Act Cap 76 laws of Uganda. Certificates are issued to a bailiff by a Chief Magistrate under section 2 thereof. The Distress for Rent (Bailiffs) Rules Statutory Instrument 76 – 1 deals with the appointment or certification of Bailiff and their fees etc. The bailiff merely acts as an agent of the landlord and the statute does not give him any powers in addition to that of the landlord. Distress for rent is levied against a tenant and not a trespasser according to the Supreme Court case of **Joy Tushabe & Anor vs. Ms Anglo – African Ltd & Anor SCCA 7 of 1999**. In that appeal **Hon. Mr. Justice Kanyeihamba JSC**, held that a distress for rent had to comply with the terms of the Act. To distress for rent the landlord or his agents had to proceed under the Distress for Rent (Bailiffs) Act, (cap 68 (Cap 76 revised edition)) and to do so there had to be a relationship of landlord and tenant. Where there was no tenant/landlord relationship the Distress for Rent Bailiffs Act could not apply. Both parties here agree that there is no landlord/tenant relationship between the parties. Uchumi is not a party. The Applicant seeks court protection of its claim to the property under distress. In order not to render the action nugatory with a possibility of getting rid of primary evidence through sale and passing of title to bona fide purchasers, the balance of convenience should also be taken to include the dictates of justice under section 37 (1) of the Judicature Act. In any case the right of sale is not statutory but common law upon failure of Uchumi Supermarkets Ltd to pay arrears of rent upon the distress of the landlord. Yet Uchumi is under liquidation.

Last but not least if the goods are sold there would be no evidence of them available to try the question of ownership of the goods. Furthermore the Applicant stands to lose more if the goods are sold than the respondent who seeks to recover rent and who under the right circumstances can claim as a creditor of Uchumi Supermarkets Ltd.

In the premises doing the best I can the practical remedy is to release the property from distress pending determination of the main suit. In such a scenario the goods shall be released into the hands of the Applicant who claims ownership thereof pending the determination of the suit on the question of ownership of goods.

A conditional temporary injunction issues restraining the Respondent's servants and/or agents or entity claiming title or interest in the Applicant's home appliances and products situated on the Respondent's premises at Garden City Mall, Kampala from selling or dealing with them in any way until final disposal of the main suit.

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

The goods shall be released to the Applicant on condition that the Applicant shall account for the proceeds of sale to the court and is liable to indemnify the Respondent should the suit be resolved against the Applicant.

The costs of this Application shall abide the outcome of the main suit.

Ruling delivered in open court on the 1<sup>st</sup> of April 2016

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Mathias Sekatawa Counsel for the Applicant

Nicholas Mwasame Counsel for the Respondent

Sunil Director of Applicant present in court

Amit Talreja General Manager of Respondent present in court

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

**1<sup>st</sup> April 2016**