THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0486 OF 2021

(Arising from Civil Suit No. 227 of 2021)

CHINA FORESTRY INTERNATIONAL DEVELOPMENT CO. LTD ……. APPLICANT

VERSUS

CHINA SHANDONG HI-SPEED UGANDA LTD ……. RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicant sued the respondent seeking recovery of general and special damages for breach of contract, refund of the purchase price, interest and costs. The applicant is involved in the transport business that requires the use of heavy trucks and trailers. The respondent is a dealer in the Sinotruck brand of heavy duty Lorries and trailers. By a contract dated 1st April, 2020 the applicant purchased four such trucks from the respondent. Between the months of July, 2020 and February, 2021 each of those trucks was involved in an accident characterised by the sudden rapture / break of the trailer connector, which the applicant contends constitutes a latent defect in the manufacture of the said trucks. As a result of those incidents, the applicant incurred liability to the cargo owners and persons involved as victims of the accidents. The applicant has since grounded the trucks and demanded for compensation for the losses incurred and for a refund of the purchase price, to no avail, hence the suit. The respondent is yet to file its written statement of defence.

b. The application.

The application is made under section 98 of *The Civil Procedure Act* and Order 41 rules 1 (b), 2 (i) and 9 of *The Civil Procedure Rules*, seeking a temporary injunction order restraining the respondent from withdrawing any funds from its account held in the Standard Chartered Bank, until the final determination of the suit. The applicant's claim is that it has learnt of a plot by the

respondent to withdraw all its funds from the said account in order to defeat the applicant's claim. The respondent has no other known assets within jurisdiction capable of satisfying the decree in the event that one is entered against the respondent. The applicant stands to suffer irreparable damage in the event that the application is not granted.

c. The affidavit in reply

The respondent's company Secretary in his affidavit in reply refutes the applicant's claim. While acknowledging the sale, he contends that the respondent undertook repairs of all defects that were brought to its attention by the applicant. The respondent is not aware of any of the accidents alluded to by the applicant. The respondent contents that the agreements of sale excluded liability for the applicant's reckless driving and negligent handling, which apparently is the cause of the applicant's loss. The respondent has no intention of abandoning its market in Uganda where it has a strong financial stake and standing.

d. Submissions of counsel for the applicant

M/s Tumwesigye Louis and Co. Advocates submitted that Order 40 rule 1 (b) of *The Civil Procedure Rules*, permits court to issue a temporary injunction preventing the wasting, damaging, alienation, sale, removal or disposition of property as the court thinks fit until the disposal of the suit or until further orders, where it is proved by affidavit or otherwise that the defendant threatens or intends to remove or dispose of his or her property with a view to defraud his or her creditors. The applicant only needs to show that; - (i) the applicant has a *prima facie* case against the respondents; (ii) the applicant will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; (iii) the threatened injury to the applicant outweighs the threatened harm the injunction might inflict on the respondent. The applicant has a claim against the respondent that is likely to succeed. The respondent has no other known assets in Uganda capable of satisfying the decree yet it is making arrangements of withdrawing all funds from the only known bank account. The applicant therefore stands to suffer irreparable injury and loss, for which reasons the application ought to be granted.

Submissions of counsel for the respondent.

M/s Balikuddembe and Co. Advocates submitted that the application is unfounded since it is based on speculation. The respondent dutifully offered after sales service in accordance with the period of warranty under the contract upon the expiry of which it can no longer be held accountable for the applicant's reckless driving and negligent handling of the trucks. The respondent has no intention of abandoning its market in Uganda where it has a strong financial stake and standing.

e. The decision.

Although the application is made under Order 41 of *The Civil Procedure Rules* and seeks a temporary injunction preventing access to funds on a bank account, it in essence seeks an order of attachment before judgment provided for by Order 40 rule (1) which states as follows;

> Where at any stage of a suit, other than a suit of the nature referred to in section 12 (a) to (d) of the Act, the court is satisfied by affidavit or otherwise: -
>
> (a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him or her—
>
> (i) has absconded or left the local limits of the jurisdiction of the court;
>
> (ii) is about to abscond or leave the local limits of the jurisdiction of the court; or
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> (iii) has disposed of or removed from the local limits of the jurisdiction of the court his or her property or any part of it; or
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> (b) that the defendant is about to leave Uganda in circumstances affording a reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him or her before the court to show cause why he or she should not furnish security for his or her appearance.

The conditions that must be satisfied under Order 41 rule (1) (b) of *The Civil Procedure Rules* are similar to those required under Order 40 rule (1), to wit;- the applicant should show, *prima facie*, that his claim is bonafide and valid and also satisfy the court that the respondent is about to remove

or dispose of the whole or part of his or her property, with the intention of obstructing or delaying the execution of any decree that may be passed against him or her, before the power is exercised.

Whether the respondent will have sufficient assets at the end of a trial to fully satisfy any judgment that may be obtained is a pertinent consideration both for the applicant and court. The last thing a litigant wants to do is to incur expenditure on litigation only to receive a paper judgment that cannot be satisfied. A plaintiff though is not normally entitled to secure assets in advance to ensure that they will be available to satisfy a judgment that may not come for years (see *Lister v. Stubbs, [1890] All E.R. 797*). Attachment before the Judgment is considered a very harsh remedy because it substantially interferes with the defendant's property rights before the final resolution of the overall dispute. During the pendency of the suit, a defendant is normally entitled to carry on its ordinary course of business, and if business takes a turn for the worse and there is no money left by the time a judgment is granted, that is too bad for the applicant.

However, in situations where the respondent has acted fraudulently in the past or may act fraudulently in the future, a plaintiff may be able to apply to the court for an order of attachment before judgment (a *Mareva injunction*). Hence in *Bahman (Prince Abdul) Bin Turki Al Sudairy v. Abu Taha, [1980] 3 ALL ER 409 at 412* Lord Denning M.R. stated that

> A *Mareva injunction* can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding or a danger of the assets being removed out of jurisdiction or disposed within jurisdiction or otherwise dealt with so that there is a danger that the plaintiff if he gets judgment will not be able to get it satisfied.

The rationale behind an order of this nature was explained in *Polly Peck International plc v. Nadir (No 2) [1992] 4 All ER 769, 785g-786a*, as follows:

> So far as it lies in their power, the courts will not permit the course of justice to be frustrated by a defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the applicant may thereafter obtain. It is not the purpose of [the] injunction to prevent a defendant acting as he would have acted in the absence of a claim against him. Whilst a defendant who is a natural person can and should be enjoined from indulging in a spending spree undertaken with the intention of dissipating or reducing his assets before the day of judgment, he cannot be required to reduce his ordinary standard of living with a view to putting by sums to

> satisfy a judgment which may or may not be given in the future. Equally no defendant, whether a natural or a juridical person, can be enjoined in terms which will prevent him from carrying on his business in the ordinary way or from meeting his debts or other obligations as they come due prior to judgment being given in the action. Justice requires that defendants be free to incur and discharge obligations in respect of professional advice and assistance in resisting the applicant's claims. It is not the purpose of a [the] injunction to render the applicant a secured creditor, although this may be the result if the defendant offers a third party guarantee or bond in order to avoid such an injunction being imposed.

Such an order freezes the respondent's assets pending trial. They are granted for an important but limited purpose: to prevent a respondent dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign (see *Fourie v. La Roux [2007] UKHL 1*).

Because orders of this nature run contrary to the general rule against execution before judgment, extreme caution should be exercised before grant of such an order. It may be abused by the applicant who may choose to use it as a leverage for coercing the defendant to settle the suit, or as an end in itself, thereby truncating the pending litigation at the very outset or, cause unnecessary hardship to the respondent or third parties. The order should be made in exceptional cases and for that reason, for the order to issue, the applicant must establish that:

1. The applicant 's case for damages against the respondent is strong and likely to succeed;
2. There is evidence that the respondent is removing, or there is a real risk that the respondent is about to remove, his or her assets from the jurisdiction to avoid the possibility of a judgment; OR
3. The respondent is otherwise dissipating or disposing of his or her assets in a manner clearly distinct from his or her usual or ordinary course of business or living so as to render the possibility of future tracing of the assets remote, if not impossible; AND
4. The applicant is prepared to pay the respondent damages in the event that the court later determines that the order should never have been issued and the respondent suffers damage as a result of the order.

An order of this nature can have very serious adverse effects often over a long period, sometimes even financial ruin, for the individual or company against whom it is made. The court should therefore be satisfied not only that there is a properly arguable case against the respondent and a risk of dissipation or hiding of assets, but also as to the proportionality of the order. Mere foreign residence or domicile of the respondent is not enough. The Court ought to be furnished with details, so far as they can be established, about the nature and financial standing of the respondent's business including its length of establishment.

Regarding the existence of a suit that is likely to succeed, the test of a good arguable case is that it must be one which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success (see *The Niedersachsen [1983] 1 W.L.R. 1412*).

I have considered the plaint filed by the applicant although the respondent is yet to file a written statement of defence. The suit is based on averments of fact, which if established by evidence, are capable of supporting a finding in the applicant's favour. Although there is no evidence that the plaint has been served on the respondent and despite the respondent not having filed its defence yet, I am satisfied that the applicant's claim meets this test.

Risk of dissipation is usually the most important factor. If the applicant can satisfy the test, it is then for the court to decide whether it is just and convenient to grant the order. I have considered the circumstances of this case. The respondent is said to the holder of a bank account from which it intends to withdraw all funds. There is nothing to show that the respondent has at any time since the filing of the suit dissipated, removed or disposed of funds on that account in a manner clearly distinct from its usual or ordinary course of business so as to render the possibility of future tracing of the funds remote. There is no clear or irrefutable evidence to show that there is a real risk that the respondent is about to remove those funds from the bank account purposely to avoid the possibility of a judgment. It appears to me that the applicant's fears are not backed by any credible evidence.

In paragraph 9 of the affidavit in support of the application, it is deposed thus; -

> ...the applicant has leant of a plot of the respondent to withdraw the money from its main account in Standard Chartered Bank …..at Speke Road Branch in order to defeat the applicant's claim.

The averment neither discloses irrefutable evidence to show that there is a real risk that the respondent is removing or about to remove funds from the account purposely to avoid the possibility of a judgment nor a dissipation, removal or disposal of such assets in a manner clearly distinct from the respondent's usual or ordinary course of business so as to render the possibility of future tracing of the assets remote.

An order of this nature is not meant to prohibit the respondent from dealing with or withdrawing funds in the ordinary and proper course of business but only where there is a real risk that the respondent will dissipate or dispose of the funds other than in the ordinary course of business. It is for that reason that both Order 40 r 1 (a) (iii) and Order 41 rule (1) (b) of *The Civil Procedure Rules* require proof that the respondent has dealt with its property or any part of it "with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him or her."

I am persuaded by the decision in *Uganda Electricity Board (In Liquidation) v. Royal Van Zanten (U) Ltd, H.C. Misc Application No. 251 of 2006,* where it was decided that;

> Court ought to be satisfied not only that the defendant is really about to dispose of his property or about to remove it from its jurisdiction but also that the disposal or removal is with intent to obstruct or delay the execution of any decree that may be passed..... the satisfaction must be of the Court as regards these matters and it must be based on some material derived either from the affidavit of the party, applying .... or otherwise. (emphasis added).

The averments in paragraph 9 of the affidavit in support of the application state that "the applicant has leant of a plot" to withdraw the money from its main account in Standard Chartered Bank. The deponent did not disclose the source of information by which he "has leant of a plot." Suffice to mention here that an affidavit based on information which does not disclose the source of that information is defective and may not support the application it purports to (see *Kabwimukya*

Aristella v. John Kasigwa [1978] HCB 251). It would be unsafe to rely on the contents of a defective affidavit which cannot be relied upon to support an application.

The standard of candour required in applications for orders of this nature was explained in *Rex v. Kensington Income Tax Commissioners, Ex parte de Polignac (Princess) [1917] 1 K.B. 486 at 509*), and emphasised in *Re Stanford International Bank Ltd [2011] Ch 33*, as follows;

> … it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. ..... Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. ..... An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect [an applicant] seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the respondent or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge.

The level of disclosure required was outlined in *Siporex Trade SA v. Comdel Commodities [1986] 2 LR 428 at 437* as follows;

1. The applicant is required to show the utmost duty of good faith and must present his case fully and fairly; as such "fair presentation" cannot be separated from the duty;
2. The affidavit or witness statement in support of the application must summarise the case and the evidence on which it is based;
3. The applicant must identity the key points for and against the application and not rely on general statements and the mere exhibiting of unhelpful documents;
4. He or she must investigate the nature of the claim alleged and facts relied on before applying and must identify any likely defences;
5. He must disclose all facts, or matters, which reasonably could be taken to be material by the judge deciding whether to grant the application; the question of materiality is not to be determined by the applicant.

The applicant must ensure that the information included in the affidavits sworn in support of the application to the court constitutes full and frank disclosure of all relevant and material facts. This is because applications of this nature are usually brought without notice to the respondent (since to give prior notice would risk the assets being dissipated or removed before the court can hear the matter), and therefore the court makes an initial order having heard only one side of the story. To a great extent, therefore, the court is at that stage relying on the candour and integrity of the applicant and must assume, when granting such orders, that it has not been misled.

Any evidence to support the inference that the respondent is, or will dissipate or dispose of assets, must be carefully considered by court. This requirement has not been met in the application at hand. To show that there is a real risk of dissipation, the applicant is required to disclose all relevant evidence showing assets are being divested or dissipated. The applicant has simply not taken sufficient steps to obtain and furnish the information to court.

Being a discretionary remedy, I must also consider the proportionality of the order. The effect of the order on the respondent's ability to conduct its business in the ordinary course is a relevant consideration since its liability is yet to be determined. The question of proportionality relates to how to balance the need to preserve the interests of the applicant pending the outcome of the decision of court, protecting the integrity and not undermining the authority of the court's orders and judgment while at the same time protecting the rights of innocent third parties lawfully created in the course of commercial transactions with the respondent.

In absence of any undertaking on the applicant's part as to damages, i.e. that if it is later determined that the order should not have been granted and the respondent suffers damages as a result of freezing its bank account, the applicant will pay the respondent the damages, to grant the order would be grossly unfair. Such an undertaking is almost certainly mandatory, unless dispensed with by court for good reason such as the possibility of stifling the action (see *Customs and Excise Commissioners v. Anchor Foods Ltd [1999] 1 WLR 1139*). The requirement is meant to weed out speculative or tactical applications and provides the court with added assurance that the applicant is serious and confident in the justness of its cause.

Further justification of such a cross-undertaking is to be found in *Re Bloomsbury International Ltd [2010] EWHC 1150 (Ch), 12*, Per Floyd J; -

> The court makes the litigant give a cross undertaking in damages against the possibility that it may turn out at trial that the order should not have been made. In a case where it does turn out that an order should not have been made, the party restrained may have suffered harm at the behest of the litigant which would result in injustice if there existed no means for it to be redressed. Absent a cross undertaking, the law does not provide any automatic means of redress for a party who is harmed by litigation wrongly brought against him in good faith. The cross undertaking is the means by which the court ensures that it is in a position to do justice at the end of the case

I was neither provided with a justification for dispensing with this requirement nor have I found any. Mere possibility or fear of dissipation is insufficient to convince the Court to grant the remedy. As a result, the order sought is disproportionate to the nature of the action and in the circumstances taken as a whole, I am not persuaded that it is just and equitable to grant the order restraining order. The balance of convenience does not favour the applicant. In the final result, for the foregoing reasons, the application is dismissed with costs to the respondent.

Dated at Kampala this 20th day of May, 2021

……..
Stephen Mubiru
Judge,
20th May, 2021.