THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 1620 OF 2021

(Arising from Civil Suit No. 0569 of 2021)

STANBIC BANK UGANDA LIMITED …… APPLICANT

VERSUS

THE PEPPER PUBLICATIONS LIMITED …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

On or around 3rd February, 2016 the applicant extended to the respondent a vehicle leasing facility for the purchase of three (3) Toyota Land Cruisers, one (1) Ford ranger double cabin pick-up truck and a Mercedes Benz GLS 350D. The respondent did purchase the said vehicles currently registered in the name of the applicant. The respondent subsequently applied for and was granted two additional credit facilities; an overdraft and an insurance premium facility. On 12th August, 2018 all three facilities were amalgamated into one as a business term loan. By 28th June, 2021 the respondent was indebted to the applicant in the sum of shs. 5,077,986,624/= which the respondent acknowledged by a letter dated 15th July, 2021. When the applicant commences the process of realising the collateral offered for that borrowing, the respondent filed the current suit seeking an injunction restraining the applicant from disposing off the collateral. On 9th November, 2021 the court granted the respondent a temporary injunction conditioned on the respondent depositing a sum of shs. 1,000,000,000/= within fourteen (1) days, which the respondent never complied with.

b. The application.

The application is made under the provisions of section 33 of *The Judicature Act,* section 98 of *The Civil Procedure Act* and Order 41 rules 6 and 9 of *The Civil Procedure Rules*. The applicant seeks an order attaching and disposing of the motor vehicles that are the subject of the vehicle

leasing facility. The applicant contends that the said motor vehicles constitute part of the collateral arrangement between the parties. The respondent has neither discharged the loan nor complied with the conditional injunction order. In the meantime the vehicles are in use and liable to depreciate in value die to natural wear and tear. The value realised before they depreciate further will be applied to offset the respondent's indebtedness. The applicant has the ability to compensate the respondent their value in the event of the respondent succeeding in the suit.

c. Affidavits in reply

The respondent did not file any affidavits in reply.

d. Submissions of counsel for the applicants.

M/s Kampala Associated Advocates on behalf of the applicant submitted that Order 41 rules 6 and 9 of *The Civil Procedure Rules* authorise the court to permit the sale of any movable property, being the subject matter of the suit, or attached before judgment in the suit, which is subject to speedy and natural decay, or which for other just and sufficient cause it may be desirable to have sold at once. The motor vehicles sought to be attached and sold are moveable property that serves as security for the subject matter of the suit and ate liable to depreciation. A sale pending the disposal of the suit would mitigate loss likely to be occasioned by their depreciation in value over time.

e. Submissions of counsel for the respondent.

M/s Allan and Partners Advocates did not file their written submissions on behalf of the respondents despite having undertaken to do so and time accorded to them to do so.

f. The decision.

According to section 64 (b) of *The Civil Procedure Act*, in order to prevent the ends of justice from being defeated, the court may direct the defendant to furnish security to produce any property

belonging to him or her and to place the same at the disposal of the court or order the attachment of any property.

On the other hand, Order 41 rule 6 of *The Civil Procedure Rules*, authorises the court to permit the sale of any movable property, being the subject matter of the suit, or attached before judgment in the suit, which is subject to speedy and natural decay, or which for other just and sufficient cause it may be desirable to have sold at once. merely having a just or valid claim or a *prima facie* case, will not entitle the applicant to an order of attachment before the Judgment, unless it is also established that the property is the subject matter of the suit and it is subject to speedy and natural decay.

The applicant should show, *prima facie*, that his or her claim is bonafide and valid and also satisfy the court that the property in issue is the subject matter of the suit and is subject to speedy and natural decay, before power is exercised. In all instances the applicant is required, unless the court otherwise directs, to specify the property required to be attached and the estimated value of the property. The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

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 party 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 party's property rights before the final resolution of the overall dispute. During the pendency of the suit, a party 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 avoid the danger that the party applying, if he or she gets judgment will not be able to get it satisfied. 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. the property in issue is the subject matter of the suit and is subject to speedy and natural decay; AND
3. 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 speedy and natural decay, but also as to the proportionality of the order. 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 pleadings filed by the applicant and the respondent's pleadings. The applicant's pleadings disclose averments of fact, which if established by evidence, are capable of supporting a finding in the applicant's favour. I am satisfied that the applicant's claim meets this test.

That the property in issue is the subject matter of the suit and is subject to speedy and natural decay 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. The court must be satisfied that the

circumstances afford a reasonable probability that the applicant will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the respondent in the suit

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 property in issue is the subject matter of the suit and is subject to speedy and natural decay.

Being a discretionary remedy, the court 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.

Ordinarily the applicant will be required to make an undertaking that if it is later determined that the order should not have been granted and the respondent suffers damages as a result of attaching its property, the applicant will pay the respondent the damages. 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 have considered further the circumstances of this case. There is clear and irrefutable evidence to show that the property in issue is collateral to the subject matter of the suit and is subject to speedy and natural decay. It appears to me that the applicant's fears that the circumstances in the instant case afford a reasonable probability that the applicant will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the respondent in the suit, are backed by credible evidence. The applicant has made the necessary undertaking in damages against the possibility that it may turn out at trial that the order should not have been made.

As a result, in the circumstances taken as a whole, I am persuaded that it is just and equitable to grant the order. The applicant is hereby granted leave to attach and dispose of the following motor vehicles; three (3) Toyota Land Cruisers Reg. Numbers – UAY 347 S, UAY 891 P and UAZ 891 V; one (1) Ford ranger double cabin pick-up truck Reg. Number UAY 082 P. The proceeds of the sale are to be applied towards partial discharge of the respondent's indebtedness to the applicant. The costs of the application will abide the result of the suit.

Delivered electronically this 7th day of March, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
7th March, 2022.