THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL No. 0231 OF 2022

(Arising from Civil Suit No. 0387 of 2013)

ABSA BANK UGANDA LIMITED ……..……..……..……..…...…… APPELLANT

VERSUS

1. CHUKWU EJIOFOR }
2. CHARLES BYAMUGISHA } …….…..……..…….…...… RESPONDENTS

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a. Background.

On 6th September, 2019 judgment was entered in favour of the 1st respondent against the 2nd respondent in the sum of shs. 287,174,642/= Believing that the 2nd respondent had sufficient funds on his account with the appellant, the 2nd respondent applied for and was granted a Garnishee *order nisi* on 24th September, 2019 attaching "all debts owing and accruing due from the above-mentioned garnishee to the above mentioned judgment debtor on bank account….to answer a decree recovered against the judgment debtor by the above mentioned decree holder." The then Assistant Registrar of the now defunct Execution and Bailiffs' Division of this court appointed the 3rd of October, 2019 as the date for return of the *order nisi*. The 2nd respondent had previously on 11th January, 2019 secured a conditional order of stay of execution of an interlocutory order, on condition that a sum of shs. 92,351,000/= was deposited in court, which the 2nd respondent complied with on 26th February, 2019.

On 3rd of October, 2019, counsel for the respondent moved court to make the garnishee *order nisi*, absolute. Counsel for the 2nd respondent reported that the 1st respondent had on 25th March, 2019 been paid the shs. 92,351,000/= previously deposited in court, after the order of stay had been vacated. The legal officer of the appellant reported that the bank held an account in the name of the appellant, but did not disclose the amount deposited thereon. The proceedings were adjourned

to 7th October, 2019 for the bank to disclose the amount standing to the 2nd respondent's credit on the garnished account.

On 7th October, 2019 the appellant's Legal Officer reported that although the total amount on the garnished account was shs. 455,671,729/= only shs. 55,000,000/= of it stood to the 2nd respondent's credit due to a cash covered payment guarantee of shs. 400,000,000/= taken out by the 2nd respondent on 25th March, 2019 in favour of M/s Vivo Energy Uganda Limited, which payment guarantee was valid until 21st March, 2020. For the duration of the guarantee, the judgment debtor had no access to that part of the fund. Counsel for the 1st respondent argued that irrespective of the payment guarantee, all the money on the account belonged to the 2nd respondent and could be garnished as such. On that account the Assistant Registrar ordered that M/s Vivo Energy Uganda Limited be summoned to appear on 30th October, 2019 to clarify whether it had a claim to that amount. In the meantime, the 2nd respondent secured orders of stay of execution, which were eventually set aside by the Court of Appeal on 18th December, 2019.

On 4th February, 2020 the Company Secretary of M/s Vivo Energy Uganda Limited informed court that due to the fact that the company supplies fuel to the 2nd respondent on credit, it required the 2nd respondent to take out a payment guarantee in the sum of shs. 400,000,000/= The company was presented with a guarantee issued by the appellant but had no interest in the funds on the 2nd respondent's account. The company only had the right to claim from the appellant in the event that the 2nd respondent failed to pay for the petroleum products purchased on credit. The 1st respondent subsequently secured another order of stay of execution pending proceedings before the Court of Appeal, which order was subsequently set aside on 13th January, 2022, paving way for continuation of the execution proceedings.

The Assistant Registrar having in the meantime been transferred and the Execution and Bailiffs' Division disbanded, the matter came before the Deputy Registrar of this Division on 27th January, 2022. Before her it was argued by counsel forth 1st respondent that from 7th October, 2019 until 19th January, 2019 the appellant had permitted the 2nd respondent to withdraw funds from the account despite the existence of the garnishee *order nisi*. He prayed that the appellant be found liable for the entire decretal sum then standing at shs. 369,897,914/=

b. The ruling;

In her ruling delivered on 29th February, 2022, the learned Deputy Registrar stated that the garnishee *order nisi* was issued and served on the appellant on 24th September, 2019. Subsequently, there were a series of orders of stay of execution issued by the Court of Appeal, the last one of which was set side on 13th January, 2022. None of those orders vacated the garnishee *order nisi*. The payment guarantee expired on 21st March, 2020 without M/s Vivo Energy Uganda Limited calling on the guarantee, at which point in time the amount of shs. 400,000,000/= reverted to the 2nd respondent, yet by 27th January, 2022 only shs. 4,523,397 was left on the account. Not even the shs. 55,671.729/= that the appellant had on 7th October, 2019 acknowledged as standing to the credit of the 2nd appellant was available on the account anymore. The only inference is that it was withdrawn by the 2nd respondent with the aid or under the watch of the appellant. The account in question had funds by the time the garnishee *order nisi* was received by the appellant. No third party interests accrued in respect of those funds. Nonetheless the appellant failed to comply with the order although it had the ability to do so. It was a deliberate ploy by the appellant to defeat the course of justice in order to deny the 1st respondent the fruits of his judgment. There was no justifiable excuse for the appellant having disobeyed the court order. The appellant was thus found to have acted in contempt of court. The garnishee *order nisi* was made absolute and the appellant was thus ordered to restore the 2nd respondent's account to the 24th September, 2019 status by crediting the account with shs. 455,000,000/= The 1st respondent was granted the costs of the proceedings.

c. The grounds of appeal.

Being dissatisfied with the decision of the Deputy Registrar, the appellant appealed to this court on the following grounds, namely;

1. The learned Deputy Registrar erred in granting the garnishee order absolute for a sum in excess of shs. 55,671,729/= being the only uncharged amount available on the 2nd respondent's account No. 02091011098 on the 24th September, 2019 when the garnishee order was served on the appellant.

2. The learned Deputy Registrar erred in law in not holding that there was a valid lien / charge on the shs. 400,000,000/= on the judgment debtor's account held by the garnishee as at the 24th og September, 2019 when the *order nisi* was served in spite of the clear documentary evidence of that lien / charge tendered in court by the appellant at the hearing of 7th October, 2019 being the shs. 400,000,000/= guarantee deed No. 189/19 dated 21st March, 2019, the confirmation of guarantee letter dated 4th April, 2019 and the account ledger screenshot showing shs. 400,000,000/= "hold" taken on 20th March, 2019 immediately prior to the issuance of the guarantee, none of which evidence was controverted.
3. The learned Deputy Registrar erred in enquiring into the irrelevant question as to whether the beneficiary of the guarantee, Vivo Energy Limited, had a claim on the judgment debtor's account instead of addressing the relevant question as to whether the garnishee had a lien / charge on the said account and then erroneously treating the answer to the former as addressing the latter.
4. The learned Deputy Registrar erred in law in not holding that the only valid amount payable by the garnishee to the judgment creditor being the unencumbered sum on the judgment debtor's account when the garnishee order was a sum of shs. 55,671,729/= which sum the garnishee is ready and willing to pay.
5. The learned Deputy Registrar erred in construing the sum attached under a garnishee *order nisi* as being the amount that can in law increase beyond the amount stipulated in the *order nisi* and in holding that the sum attached can increase on the basis of interest accruing on the decertal sum.
6. The learned Deputy Registrar erred in construing the appellant guilty of contempt of court, yet the appellant did not contest the validity of the garnishee *order nisi* but only asserts that it is limited in quantum to the unencumbered amount available on the account on the date the garnishee *order nisi* was served, being the sum of shs. 55,671,729/= which sum the garnishee is ready and willing to pay.

The appellant prays that the appeal be allowed and that the learned Deputy Registrar's order be substituted with an order that the garnishee *order nisi* do issue for payment of the garnishee to the judgment creditor of shs. 55,671,729/= The costs of the garnishee application be met from the attached amount and the costs of the appeal be met by the 1st respondent / creditor.

The grounds raised gravitate around four issues, to wit; (i) whether all funds on the judgment debtor's bank account were attachable; (ii) whether the learned Deputy Registrar erred in law when she made the garnishee order absolute for a sum of 287,174,642/=; (iii) whether the learned Deputy Registrar erred in law when she held the appellant in contempt of court; (iv) whether the appellant is entitled to the remedies sought. They will be considered in that order.

d. Submissions of counsel for the appellant.

Mr. Masembe Kanyerezi of M/s MMAKS Advocates for the appellant submitted that the attachment occurs on the day of service of the garnishee order nisi. The order specified the amount attached as debts owing or accruing due from the garnishee to the judgment debtor. It is not amounts that may or may not accrue on a future date. Hence multiple applications for garnishee may be made. Under rule 4 the entity disputing the quantum, the process is by trial. A claim by the third person is held with the judgment creditor. Annexure "C1" is dated 20th March, 2019 the date preceding the hold balance is 400,000,000/= The net balance was shs. 55,000,000/= There was no hearing leading to the contempt. Rule 9 they prayed for costs recoverable from the fund held by the bank.

e. Submissions of counsel for the 1st respondent.

Counsel for the respondents, Mr. Arthur Murangira submitted that the garnishee *order nisi* was issued on 24th September, 2019. On that date the amount due and recoverable was 287,174,642/= The order was served on the same date. The parties appeared on 3rd October, 2019. The court inquired as to whether the appellant held any money die to the judgment debtor. The appellant did not give the full details and was order to return on 7th October, 2019 on which date it was revealed that the count had shs. 455,671,729/= It froze the account. It was said that shs. 400,000,000/= was under a guarantee to vivo energy. The guarantee was shown and it was to expire in March, 2020. On that same day of 7th October, 2019 the court ordered the third party to appear in court and the matter was adjourned 30th October, 2019. The judgment debtor obtained a stay from the court of appeal until 18th December, 2020. On 4th February, 2020 the representative of VIVO Energy was in court. It expired on 21st March, 2020. Order 23 of *The Civil Procedure Rules*, rule 5 the events

can extend the order, including the staying order of a superior court. Rule 7 about payments indicates that it is a valid discharge. The contempt of court issue; the proceedings were stayed twice; first on 10th October, 2019 by the Court of appeal in Application 320 of 2019. For the period from that point to 18th December, 2019 the proceedings had been stayed.

The guarantee expired on 21st March, 2020 the account had shs. 40,182, 310/= The appellant had flouted the order of the Court of appeal and the garnishee *order nisi*. This was done between 7th October, 2019 and 20th March, 2020. On 7th October, 2019 the bank statement shows that shs. 400,000,000/= was debited. China Henan Case is that it operates as an injunction. If there are finds not affected by the order, the garnishee should await the pronouncement of court. It was returned on 19th March, 2020. A day later, it was removed and it was never returned. When we assembled on 27th January, 2021. This a matter borne out of the judgment creditors. The 1st respondents no fault in the proceedings that they should be penalised on costs.

f. Submissions of counsel for the 2nd respondent

Counsel for the respondents, Mr. Jackson Ntwatwa submitted that the ruling of the court required that reconciliation to be made. Shs. 99,000,000/= was paid as security for costs to the judgment creditor by the court, which amount the judgment creditor still holds.

g. The decision.

It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the learned Deputy Registrar to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). This Court must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*). In its appellate jurisdiction, this court may interfere with a finding of fact if the learned Deputy Registrar is shown to have overlooked any material feature in the evidence. In particular, this court is not bound necessarily to follow the learned Deputy Registrar's findings of fact if it appears either that

he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or the evidence in the case generally.

First issue; whether all funds on the judgment debtor's bank account were attachable.

Garnishee proceedings are a process by which a judgment creditor may obtain a Court order against a third party who owes money to, or holds money for, the judgment debtor. Garnishment may be served upon persons who hold earnings of a judgment debtor and upon persons or entities who are in the possession and control of a judgment debtor's credits, debts, money, choses in action, or personal property of any kind. Such orders are "usually obtained against a bank requiring the bank to pay money held in the account of the debtor to the creditor" (see *Osborn's Concise Law Dictionary*, 9th edition, page 181 and *Choice Investments Ltd. v. Jeromnimon [1981] 1 All E.R. 225*). Personal property capable of manual delivery owed to, or owned by, the judgment debtor, and in the possession or control of the garnishee at the time of service of such writ upon the garnishee, is subject to the process of garnishment. In the instant case, the proceedings were undertaken in respect of money deposited with the Registrar of this court by the respondent, in a failed attempt to secure an order of stay of execution pending appeal.

A garnishee *order nisi* is an interim or provisional order which states in essence that the court does not see any reason why the funds should not be attached in satisfaction of the judgment debt. It specifies the date on which the final order will be made unless a good reason for not to granting such an order is produced. A "garnishee" is a person who has been warned not to pay a debt to anyone other than the third party who has obtained judgment against the debtor's own creditor. Once served, the garnishee holds the property of the debtor in *custodia legis* and the debtor's property comes within the jurisdiction and control of the court. Attachment creates no charge or lien upon the attached property. It only confers a right on the decree-holder to have the attached property kept *in custodia legis* for being dealt with by the court in accordance with law.

As soon as the garnishee *order nisi* is served on the garnishee, it operates as an injunction. It prevents the garnishee from paying the money to the judgment debtor until the garnishee order is made absolute, or is discharged, as the case may be. Service of the *order nisi* "binds the debt in

the hands of the garnishee - that is, it creates a charge in favour of the judgment creditor" (see *Joachimson v. Swiss Bank Corporation [1921] 3 KB 110 at 131*). The fund so attached is the chose in action represented by the debt of the garnishee to the judgment debtor. On the making of the order nisi, that chose in action is bound, frozen, attached or charged in the hands of the garnishee. Subject to any monetary limit which may be specified in the order, the garnishee is not entitled to deal with that chose in action by making payment to the judgment debtor or any other party at his request (see *Societe Eram Shipping Company Limited and others v. Hong Kong and Shanghai Banking Corp Ltd, Compagnie Internationale de Navigation [2003] 3 WLR 21; [2003] 3 All ER 465; [2003] 2 Lloyd's Rep 405; [2004] 1 AC 260*).

Once served with these documents, the bank must freeze the account(s). This means that no withdrawals may be made, and no checks written against the account will be honoured. It prevents and avoids private alienations; it does not confer any title on the attaching creditors. Any private alienation without leave of the Court of the property attached, whether by sale, gift or otherwise and any payment of any debt or debts or dividends or shares to the judgment debtor during the continuance of the attachment, is null and void as against all claims enforceable under the attachment (see section 47 of *The Civil Procedure Act*).

However, some income that is exempt from garnishment, cannot be garnished. Under the principle of just exemptions, a debtor should retain enough income to meet his or her basic needs and those of his or her dependants. Consequently, some of the money in a bank account is automatically protected from garnishment. The bank account garnished may include funds and other types of income that are exempt from creditors such as:- (i) funds or allowances declared by law to be exempt from attachment or sale in execution of a decrees (section 44 (1) (j) of *The Civil Procedure Act*); (ii) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund as the Minister may, by statutory instrument, specify in this behalf, and political pensions (section 44 (1) (f) of *The Civil Procedure Act*); (iii) salaries of any public officer, servant of a railway company or local authority, or any person privately employed to the specified extent. Therefore a bank that receives garnishment orders must review the deposit records on the account to make sure the amounts deposited from protected sources are exempt from account garnishment.

Secondly, a garnishee order attaches only that sum of money on the account that constitutes "all debts owing or accruing due from the garnishee to the judgment debtor" to the extent specified in the order. The line between a contingent debt, which has no present existence, and a "debt accruing", which is a subsisting obligation to pay a sum in respect of a liquidated money demand, albeit sometime in the future, which can be garnished can sometimes be fine but it is conceptually intelligible and has long been upheld by the courts. "A debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in presenti, solvendum in futuro*. An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation" (see *Webb v. Stenton [1883] 11 QBD 518* and *Regina v. Chief Registrar of Friendly Societies, ex parte New Cross Building Society [1984] 2 WLR 370 at 399A*). A debt could be payable now (in which case it would be a "debt owing"), or it might be payable only on some future date (making it a "debt accruing"), but there must be a crystallised obligation of payment; without that, there is nothing to attach.

This definition excludes conditional obligations (ones which require that a debtor take specific steps, e.g., provide a certificate or some documentation to the garnishee) before the obligation becomes due. It is also the reason why contingent debts, which do not exist until and unless the contingency that triggers their creation occurs, cannot be garnished. The funds attachable are those "over which or the profits of which [the judgment debtor] has a disposing power which he or she may exercise for his or her own benefit" (see section 44 of *The Civil Procedure Act*). It follows that money deposited onto a bank account which cannot be taken out by the judgment debtor on demand so long as an instrument creating a lien over it is pending, or unless under the terms of that instrument the judgment debtor is entitled to withdraw the money or some part of it, is not attachable. The judgment creditor can only have execution against so much of that money as his judgment-debtor would be entitled to take out of the account on demand.

In *In re General Horticultural Co, Ex p Whitehouse (1886) 32 Ch D 512* Chitty J said, at p 515, that the effect of an *order nisi* "was to give the judgment creditor execution against the debts owing to his debtor" and held that the rule was settled that the order charged only "what the judgment debtor can himself honestly deal with." In *Rogers v. Whiteley (1889) 23 QBD 236* Lindley LJ considered the case where money in the bank account included money of which the judgment

debtor was trustee. That money, Lindley LJ said, at p 238, could not be ordered to be paid to the judgment creditor who obtained the charging order; "he can only obtain payment out of the debtor's own money." A useful rule of thumb is that in order for a debt to be the subject of a garnishee order, it must be actionable, i.e. it must be something which the judgment debtor could "immediately and effectually sue" the garnishee for. Thus, where the judgment debtor is precluded, for whatever reason, from suing the garnishee for the return of the money, there is no debt available for attachment by the judgment creditor. This is also consonant with the long-standing rule that a judgment creditor cannot stand in a better position as regards the garnishee than the judgment debtor himself (see *Re General Horticultural Company, ex parte Whitehouse (1886) 32 Ch D 512 at 516*).

In the instant case it was contended by the appellant that shs. 400,000,000/- deposited on the account was the subject of a payment guarantee expiring on 21st March, 2020 and therefore was not a debt owing or accruing due from the garnishee to the judgment debtor. A guarantee is a promise to answer for the debt, default or miscarriage of another. A payment guarantee assures a seller the purchase price is paid on a set date. Being a financial commitment that requires the bank to make a repayment based on the terms outlined in the original debt agreement between its customer and a third party, a payment guarantee is similar to a performance guarantee issued to one party of a contract as a guarantee against the failure of the other party to meet obligations specified in the contract. It is usually provided by a bank to make sure a contractor completes designated projects. It is essentially an unconditional undertaking to pay a specified amount of money to a named beneficiary, usually on demand, and sometimes on the presentation of certain specified documents (see Geraldine Mary Andrews, *The Law of Guarantees*, 2nd Ed. 1995 at p. 443*; Edward Owen Engineering Ltd v. Barclays Bank International Ltd [1978] QB 159*). It is an undertaking to pay a specified sum to the beneficiary in the event of breach of contract. Where the beneficiary seeks payment in accordance with the terms of the guarantee, the bank must pay.

A payment guarantee is a promise provided by a bank or any other financial institution that if its customer fails to perform its obligations under a contract with a third party, then the bank or the financial institution will take care of the losses. The bank will assure the third party through this payment guarantee that if its customer does not meet his or her liabilities under the contract with

that third party, then the bank will take care of them. When a bank signs a payment guarantee, it promises to pay a specified amount according to the request made by the third party. Hence, signing a payment guarantee implies a high risk for banks. Consequently obtaining a bank guarantee requires security in the form of cash in deposit with the bank, or property of a type and value deemed acceptable to the bank. A cash secured bank guarantee requires a specified amount of money to be held as security. It is in essence a transaction in which the payment of a debt is guaranteed, or secured, by cash held as collateral.

A payment guarantee secured by a cash in deposit with the bank once issued, creates a lien on the account to the extent of the funds secured by the guarantee. A lien is a legal claim or legal right accruing against the assets that are held as collaterals for satisfying a debt. It is a monetary claim against property intended to ensure payment. It effectively gives the creditor the right to seize the property that the creditor has a lien against to satisfy the outstanding debt. In the event of the bank customer failing to satisfy the underlying obligation under the contract executed with the beneficiary of the guarantee, the beneficiary has the legal right to seize the fund that is subject of the lien by a call on the guarantee if it is of the “demand” or “unconditional” type, without the consent of the bank customer. It imposes upon the bank the absolute obligation to pay the guarantee in the event of a demand, irrespective of any dispute there may be between the bank customer and the beneficiary with regard to the performance of the underlying contract. Generally, this will mean that the beneficiary may request payment in the amount of the guarantee by simply making a demand to the bank at any time prior to the expiration date of the guarantee, regardless of whether the bank customer has actually performed under the contract.

A payment guarantee may be cancelled in different ways, namely: upon the expiry of the undertaking issued by the bank; by the beneficiary returning the original version of the guarantee to the bank; by the issuing bank's receipt of a letter signed by the beneficiary stating that it expressly waives the guarantee in question; by the beneficiary calling on the guarantee, in which case the bank pays out the money to the beneficiary by debiting the account of the customer. Since in principle there is no disbursement, unless the payment guarantee is called upon, a payment guarantee is not repaid but rather it is cancelled. On receipt by the Bank of a request for payment of a payment guarantee, the customer's current account is debited with the full amount due.

Payment guarantees and bankers' guarantees have often been equated with and compared to irrevocable letters of credit commonly used in international trade. Thus, it is not entirely surprising that letter of credit law has been applied with some regularity to cases involving payment guarantees. Unless the bank knows that the demand on the guarantee is fraudulent, the bank will have little choice but to pay out on the guarantee (see *United City Merchants (Investments) Ltd. v. Royal Bank of Canada, [1982] 2 All E.R. 720; Edward Owen Engineering Ltd v. Barclays Bank International Ltd [1978] 1 All ER 976; [1977] 3 WLR 764, [1978] 1 Lloyds Rep 166 [1978] 1 QB 159, at 169; Hamzeh Malas & Sons v. British Imex Indus. Ltd., [1958] 2 Q.B. 127at 129; Bolivinter Oil SA v. Chase Manhattan Bank NA [1984] 1 WLR 392, [1984] 1 Lloyds Rep 251* and *R D Harbottle (Mercantile) Limited v. National Westminster Bank Limited [1978] 1 QB 146 at 151*). The bank's reputation depends on strict compliance with its obligations. This has always been an essential feature of banking practice. From the bank's point of view, it is in its best interest to pay out on the guarantee even in suspect circumstances in order to preserve its good name and reputation commerce.

In *Edward Owen Engineering Ltd v. Barclays Bank International Ltd [1978] 1 All ER 976; [1977] 3 WLR 764, [1978] 1 Lloyds Rep 166 [1978] 1 QB 159, at 169,* Lord Denning, M.R., stated that:

> A bank which gives a [payment] guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

When the guarantee is issued the withdrawal of funds availed as cash collateral can be triggered only by: (i) expiry of the guarantee as consequence of its maturity (funds are paid back to the customer – the applicant of the guarantee); (ii) expiry of obligations of the issuing bank due to release from the beneficiary (funds are paid back to customer – applicant of the guarantee); (iii) effecting payment under the guarantee following the claim received (to meets its obligations under the guarantee bank remits funds as collateral to beneficiary of the guarantee). That cash is expected to be paid to the beneficiary of the guarantee before expiry of the guarantee, or restituted to the customer upon expiry of the guarantee in this case, after 21st March, 2020.

In effect, legal ownership or title to funds in a cash secured bank guarantee vests in the bank during the validity period of the guarantee, while equitable ownership or title to the funds so secured by the guarantee vests in the beneficiary. The account holder only has a reversionary interest accruing upon expiry of the guarantee. Since the title to funds is transferred from the customer to the bank, no separate deposit agreements are concluded with the customer and no respective accrued interest is paid by the bank to the customer. The customer cannot withdraw these funds until the expiry of the guarantee as there is a legal agreement on the issue of the guarantee clearly specifying and stating that during the validity of the guarantee, these funds belong to the bank (from an ownership perspective). They are at the disposal of the bank and can be used to effect payments under the claims that might be presented under the corresponding guarantee.

As equitable claims, liens generally follow the "first in time, first in right" rule, which is to the effect that whichever lien is recorded first with the bank has higher priority than later recorded liens. A judgment lien is created when a court grants a creditor an interest in the debtor's funds, after a court judgment. The term "judgment lien" is used in its strictest sense: a lien attributed to a court judgment, where the court judgment itself is the basis for the lien. A garnishee *order nisi* creates a lien over funds of the judgment debtor found on the account. Secured creditors generally prevail against unsecured creditors and judgment creditors who have not begun legal process to collect on their judgment. Often, judgment liens are lower in priority than other types of liens. A payment guarantee will have priority over a judgment lien if the bank customer records it before the judgment creditor records its lien. Lien priority determines the order in which creditors get paid. If one lien has priority over another lien, it gets paid before the other lien. The current method of determining a creditor's entitlement to garnished funds therefore is "first come, first served." In the instant case the guarantee was issued on 21st March, 2019 while the garnishee *order nisi* was served six months later on 24th September, 2019.

A garnishee *order nisi* attaches only that amount on the account that stands to the credit of the judgment debtor. It affects only so much of the fund that stands to the credit of the judgment debtor in an account at the garnishee bank, which the judgment debtor can himself or herself honestly deal with. A "debt owing" or a "debt accruing" means an obligation, or any portion of an

obligation, that on the day of service of a garnishee *order nisi* is (i) is payable, or (ii) is payable on demand to the judgment debtor.

One of the questions in this appeal is whether a Judgment-debtor can be said to have disposing power over money on his bank account, that is the subject of a cash secured bank guarantee. Since money deposited on the judgment debtor's bank account to be paid to a third party under a payment guarantee cannot be withdrawn by the judgment creditor for the duration of the guarantee, it equally cannot be the subject an attachment under a decree in favour of a judgment creditor who is not named as beneficiary of that guarantee. Therefore Court is not competent to pay it out to anyone but the person entitled to it under the payment guarantee.

In conclusion, the learned Deputy Registrar misdirected herself when she ordered the appellant to restore the 2nd respondent's account to the 24th September, 2019 status by crediting it with shs. 455,000,000/= upon making the garnishee *order nisi,* absolute. The only sum of money on the 2nd respondent's account that was attachable as at that date was shs. 55,000,000/=

Second issue; <u>whether the learned Deputy Registrar erred in law when she made the garnishee order absolute for a sum of shs. 287,174,642</u>/=

A garnishee on whom an *order nisi* has been served has to appear and show cause why an order absolute should not be made. The order is made absolute, directing the garnishee to pay to the judgment creditor or into Court, whichever is the more appropriate, unless there is some sufficient reason why the garnishee should not honour it, or if payment to this creditor might be unfair to prefer him to other creditors. The general principle, when there is no insolvency, is that the person who gets in first gets the fruits of his or her diligence but the court will not allow one creditor, however diligent he or she may be, to get an advantage over the others by getting in first with a garnishee order (see *Pritchard v. Westminster Bank Ltd [1969] 1 All ER 999* and *Rainbow v. Moorgate Properties Ltd [1975] 1 W.L.R. 788*). If no sufficient reason appears, the garnishee order is made absolute. On making the payment, the garnishee gets a good discharge from its indebtedness to the judgment debtor, just as if he himself directed the garnishee to pay it (see Order 23 rule 7 of *The Civil Procedure Rules*).

According to Order 23 rule 4 of *The Civil Procedure Rules*, if the garnishee disputes his or her liability, the court, instead of making an order that execution be levied, may order that any issue or question necessary for determining his or her indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined. The garnishee may file an affidavit to deny that it is not in the custody of the moneys of the judgment debtor, or that the judgment debtor is not a customer, etc. and that becomes a triable issue, determined in any manner in which any issue or question in any proceedings may be tried or determined.

Where the garnishee does not forthwith pay into Court the amount due from him or her to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution, and does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order, execution may issue as though such order were a decree against the garnishee.

The money attached must be due or accruing to the judgment debtor from the garnishee on the date that the provisional order. Future debts accruing from the Garnishee to the judgment debtor are not attached. The rule that contingent debts cannot be the subject of a garnishee order is not just a product of judicial stipulation, but a consequence of the very structure of the garnishee process. A garnishee order is a proprietary remedy for the recovery of a judgment debt that operates by way of the attachment of the property of the judgment debtor, this property being the chose in action constituted by the debt of a third party (the garnishee) to the judgment debtor (see *Société Eram Shipping Co Ltd v. Cie Internationale de Navigation and others [2004] 1 AC 260*). The whole purpose of this process is to allow the judgment creditor to get at the assets of the judgment debtor. It follows, therefore, that if there is no property of the judgment debtor "in the hands of the garnishee," because the contingency that precedes the creation of the debt has not yet occurred or otherwise, then there is nothing that can be attached. At [62] of *Société Eram*, Lord Hoffmann put the point as follows:

> The essence of such an order [i.e., a garnishee order] is that it is execution *in rem* against the property of the judgment debtor, against a *res* or chose in action which belongs to him and which is within the jurisdiction of the court making the order. As the Royal Commissioners [whose report preceded the passage of ss 61-70 of *The Common Law Procedure Act* 1854 (UK), which is the legislature precursor to O 49 of

> the ROC) said in 1853, it is an attachment of "monies of [the] debtor in the hands of third persons." It is true that once the judgment debtor's chose in action has been captured or attached, the court will realise it or turn it to account by ordering the third party to pay the debt to the judgment creditor. But that is a process of realisation in the same way as the sale of a chattel belonging to the debtor which has been taken in execution. It is not a personal claim against the third party. The third party pays with his own money only in the same sense as a bank upon which a cheque has been drawn by a customer in credit pays with its own money. But the substance of the matter is that the judgment creditor is paid with the debtor's money, as the drawee of the cheque is paid with the customer's money.

In other words, a garnishee order is in substance, not an order to pay a debt, but an order on the third party to hand over something in their hands belonging to the judgment debtor to the judgment creditor (see *Pritchett v. English and Colonial Syndicate [1899] 2 QB 428 at 433* per Lindley MR). This explains why garnishee orders over contingent debts are so objectionable. The effect of such an order would be to compel the garnishee to discharge the judgment debtor's liability out of the garnishee's own funds. It does not matter how probable or soon it is that the garnishee will become indebted to the judgment debtor, or how likely it is that the garnishee would later be indemnified by the judgment debtor, the point is that as a matter of principle, garnishees are never supposed to reach into their own pocket, and any order bringing about such a result would be "wholly inimical to the structure of the garnishee jurisdiction" (see *Société Eram Shipping Co Ltd v. Cie Internationale de Navigation and others [2001] CLC 685 at 692*).

The order making the provisional garnishee order absolute compels the appellant as garnishee to discharge the judgment debtor's liability to the respondent by paying a sum of shs. 287,174,642/= part of which it will be using its own funds, without any certainty over whether (or when) it will receive that sum from the judgment debtor. This would not only be an outcome that is prejudicial to its interests, but also contrary to established principle.

In conclusion, the learned Deputy Registrar misdirected herself when she made the garnishee *order nisi,* absolute. The only sum of money on the 2nd respondent's account that was attachable as at that date was shs. 55,000,000/= For the foregoing reasons, I discharge the garnishee order absolute in the sum of shs. 287,174,642/= and substitute it with one in the sum of shs. 55,671,729/=

Third issue; whether the learned Deputy Registrar erred in law when she held the appellant in contempt of court.

Contempt of court refers to actions which either defy a court's authority, cast disrespect on a court, or impede the ability of the court to perform its function. It is defined as any act which is calculated to embarrass, hinder, or obstruct a court in the administration of justice, or which is calculated to lessen the authority or dignity of a court (see *Black's Law Dictionary*, 5th ed. (1979) 288). Civil contempt of court most often happens when someone fails to adhere to an order from the court, with resulting injury to a private party's rights. For example, failure to pay court ordered funds can lead to punishment for civil contempt. Typically, the aggrieved party, such as a judgment creditor who has not received court ordered payments, may file an action for civil contempt. It also includes conduct tending to obstruct or interfere with the orderly administration of justice.

The power to punish acts of contempt has been recognised as inherent in all courts. The purpose of recognising contempt of court is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice. Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful orders. Civil contempt powers of court are therefore used to coerce a party to perform an act. The contemnor will be punished for only so long as he or she refuses to perform the act required of them by the court. Once the contemnor performs that act, he or she will be immediately discharged from whatever sanction the court has imposed. Whether a contempt proceeding is criminal or civil depends on the substance of the proceeding and character of relief. If a court's purpose for finding contempt is to coerce the contemnor to comply with a court's order(s), then the charge will be one of civil contempt. However, if the court's purpose is to punish the contemnor for disobedience, then the charge will be one of criminal contempt. Similarly, criminal contempt is used to protect the judicial system but is generally meant to recognise an offense against public justice as opposed to a litigant's rights to litigation.

Civil contempt sanctions are said to be coercive in nature. Their purpose is "remedial, and for the benefit of the complainant." The sanction imposed should serve only the purposes of the complainant, and is not intended as a deterrent to offenses against the public. One who is punished

for civil contempt can avoid the punishment by doing as the court ordered and is therefore described as "carrying the keys of their prison in their own pocket." On the other hand, criminal contempt sentences are punitive in nature, to vindicate the authority of the court. They are generally unconditional and definite. Thus, punishment for criminal contempt generally takes the form of a determinate sentence, to vindicate past affronts to the court, while civil contempt imposes a conditional sanction, contingent on the contemnor's willingness to purge himself. However, it may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. Part of the problem stems from the fact that contumacious acts from civil suits could lead to either civil or criminal contempt and vice versa.

While a person who has committed a direct contempt (an act of contempt committed knowingly in the immediate view and presence of the court) may be punished without trial, a person charged with indirect contempt (any contempt that does not fall within direct contempt) must be given notice and opportunity to be heard. Classifying contempt is important as different categories of contempt carry different procedural safeguards and punishments. An individual charged with criminal contempt is afforded more or less the same rights as those afforded to an accused in a criminal trial. Among other things, he or she is presumed innocent, has the right against self-crimination, and the contempt must be proven beyond a reasonable doubt. On the other hand, civil contempt requires only basic fair trial protections. As such, the individual need only be given notice and an opportunity to be heard, and the burden of proof is a preponderance of the evidence.

While a criminal contemnor deserves all of the following: the right to be advised of the charges; the right to the assistance of counsel; the presumption of innocence; the requirement that guilt be proved beyond a reasonable doubt; the right to be tried by an unbiased judge in a public trial in those cases deserving a trial; the right to a "disinterested prosecutor"; the privilege against self-incrimination; the right to cross-examine government witnesses; the opportunity to present a defence and call witnesses (except when the contempt is committed in open court and no serious sanction is imposed); the protection against double jeopardy; and the availability of a presidential pardon, the premise that the civil contemnor "carries the keys to the jail in his own pocket" basically results in the civil contemnor receiving fewer procedural rights (or, in other words, less

due process) than the criminal contemnor. Civil contempt sanctions may be imposed in an ordinary civil proceeding upon notice and opportunity to be heard.

Once the alleged contemnor has been given notice, there is a hearing at which the complainant must prove noncompliance with the court's order. This is usually accomplished simply by showing the existence of the order and the alleged contemnor's noncompliance. The following essential elements must be proved beyond a reasonable doubt: (1) the court entered a lawful order of reasonable specificity; (2) the accused contemnor violated the order; and (3) the violation was wilful. There must be evidence that the alleged contemnor deliberately or recklessly disregarded his or her obligation to the court, or intended some disrespect to the court. The burden then shifts, and the potential contemnor must prove inability to comply. No presumption of innocence attaches to the alleged contemnor in civil contempt proceedings, save that people who face the possibility of loss of their personal liberty if they lose in a proceeding for civil contempt are entitled to the protection of the standard of proof that requires proof beyond a reasonable doubt. The protection afforded by the reasonable doubt rule extends to all civil contempt proceedings that involve a realistic likelihood of the deprivation of an individual's liberty.

Before imposing civil contempt sanctions based upon the violation of a court order, a court must conclude that: (1) the underlying order violated was valid and lawful; (2) the underlying order was clear, definite, and unambiguous; and (3) the contemnor had the ability to comply with the underlying order. Alternatively, that; (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of the noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner. A finding of wilfulness is not a prerequisite for imposing civil contempt sanctions. Additionally, civil contempt simply must be proved to a standard such as that which is applicable to the poof of fraud which is higher than the balance of probabilities, common in civil cases, but not as high as beyond reasonable doubt. On the facts of this case, I find that the learned Deputy Registrar misdirected herself when she found the appellant in contempt. The issue of contempt was not before her for determination and the finding was made in total violation of the appellant’s minimum fair trial rights. That finding is accordingly set aside.

Fourth issue; whether the appellant is entitled to the remedies sought.

Under Section 27 of *The Civil Procedure Act*, costs are awarded at the discretion of court. In sub-section (2) thereof, costs follow the event, unless for some reasons court directs otherwise (see *Jennifer Rwanyindo Aurelia and another v. School Outfitters (U) Ltd., C.A. Civil Appeal No.53 of 1999*; *National Pharmacy Ltd. v. Kampala City Council [1979] HCB 25*). It was also held in *Uganda Development Bank v. Muganga Constructions [1981] HCB 35,* that a successful party can only be denied costs if it proved that but for his or her conduct, the litigation could have been avoided, and that costs follow the event only where the party succeeds in the proceeding.

The principles applicable in the present case may be summarised as follows: (i) costs cannot be recovered except under an order of the court; (ii) the question whether to make any order as to costs, and if so, what order, is a matter entrusted to the discretion of the judge; (iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless, (iv) the judge may make different orders for costs in relation to discrete issues and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation; and (v) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue. Since the appeal has succeeded on all grounds, I have not found any reason to deny the appellant costs. The appellant is entitled to costs and all reasonable disbursements, the quantum of which shall be taxed if not agreed. The appellant is granted leave to offset the agreed or taxed costs from the garnished amount. All in all, the appeal succeeds on all grounds. The costs of the appeal and of the impugned execution proceedings are awarded to the appellant.

Delivered electronically this 7th day of April, 2022

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