

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
MISC. APPLICATION NO. 345 OF 2021
(Arising from Civil Suit No. 936 of 2020)**

**1. SSENGENDO PAUL]
2. NAKUNGU GLADYS] APPLICANTS**

VERSUS

**1. PIO CRYPTO CENTRE INVESTMENT LIMITED]
2. FRED NTABAZI] RESPONDENTS**

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

This application was brought by chamber summons under Section 33 of the Judicature Act, Cap 13, Sections 64 & 98 of the Civil Procedure Act, Cap 71, Order 40 Rules 1,4,5,6 & 12; and Order 50 of the Civil Procedure Rules, SI 71-1 for orders that:

- a) A warrant of arrest issues against the 2nd Respondent and bring him before the court to show cause why he should not furnish security for his appearance.
- b) An order attaching all accounts of the first Respondent in Barclays Bank and Stanbic Bank and any other bank that may be holding sums for the 1st Respondent or 2nd Respondent.
- c) An order that the Respondent be ordered to deposit in the court the sum of Ugx. 791,000,000/= being sums sufficient to cover the claim in the main suit or
- d) An order for the attachment of motor vehicles registered in the names of the 2nd Respondent as set out in Annexure G
- e) An order that the 2nd Respondent be ordered to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against the Respondents.
- f) Costs of this Application be provided for.



Background

The Applicants are husband and wife who were approached by the 2nd Respondent and advised to invest with the 1st Respondent in the business of online forex trading. They were promised a return of 10% per week each for 48 weeks. The 1st Applicant invested UGX. 100,000,000/= and expected to receive a return of total UGX. 480,000,000/= but did not receive any return from the 1st Respondent. The 2nd Applicant invested UGX. 75,000,000/= with the 1st Respondent under three separate contracts with the expectation of a 10% return per week for 48 weeks. The 2nd Applicant only received UGX. 49,000,000/= out of the expected UGX. 360,000,000/=.

Efforts to recover sums owed to them under the contract have proved futile, and the 1st Respondent has unofficially closed business. However, the 2nd Respondent is carrying on the same business under a SACCO and he attempted to coerce the Applicants to relinquish their contracts with the 1st Respondent and transfer their contracts to the SACCO. The 2nd Respondent, who is the sole signatory to the 1st Respondent's bank accounts with Barclays Bank and Stanbic bank, has since learning of the Applicants' legal action against him vide Civil Suit NO. 936 of 2020 fled Kampala. He was last located in Kisoro. The Applicant and 33 others have also filed criminal charges against the 2nd Respondent for obtaining money under false pretenses and money laundering at Wandegaya Police Station vide SD REF: 44/09/05/20.

The 1st Applicant avers in his supporting affidavit that the 1st Respondent has no known assets that may be attached to satisfy a judgment debt. That the 2nd Respondent is likely to keep in hiding as his conduct has shown, and he is also likely to dispose of any assets that may be attached to satisfy any decree against him. Following a search at Uganda Revenue Authority (URA), the 1st Applicant discovered that the 2nd Respondent owns at least 34 motor-vehicles which can be attached before judgment.

The Respondents did not file a reply to the application even after court granted them more time within which to file a reply, and being served with the application and order for extension of time by way of substituted service in the Daily Monitor on Friday 21st May, 2021 at page 41.

Representation

At the hearing, the Applicants were represented by Mr. Moses Muziki. The Respondents and their counsel were absent.



The court directed for parties to file written submissions, which Mr. Muziki notified the Respondents of via substituted service. However, only the Applicants filed written submissions, and court will refer to these and the application in this ruling.

Issues for Determination

1. Whether a warrant of arrest should be issued against the 2nd Respondent to be brought before the court to show cause why he should not furnish security for his appearance
2. Whether the court should order for the attachment of the 1st and 2nd Respondents' properties before judgment
3. Whether the Applicants are entitled to remedies sought.

Resolution

Issue One: Whether a warrant of arrest should be issued against the 2nd Respondent to be brought before the court to show cause why he should not furnish costs for his appearance?

Section 64 of the Civil Procedure Act provides:

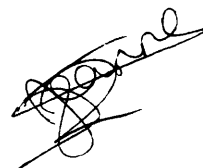
“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

(a) issue a warrant to arrest the defendant and bring him or her before the court to show cause why he or she should not give security for his or her appearance, and if the defendant fails to comply with any order for security commit him or her to prison;

(b) 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;

(c) grant a temporary injunction and in case of disobedience commit the person guilty of it to prison and order that his or her property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his or her duties by attaching and selling his or her property;

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(e) make such other interlocutory orders as may appear to the court to be just and convenient.” (Underlined for emphasis.)

This provision permits the court to undertake efforts in the law to ensure a defendant’s attendance of court proceedings. Under Order 40 Rules 1 of the Civil Procedure Rules (hereafter referred to as the CPR) relied upon by the Applicants it is provided for that:

“1. Where defendant may be called upon to furnish security for appearance.

(1) 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

(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

(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.

(2) Notwithstanding subrule (1) of this rule, the defendant shall not be arrested if he or she pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff’s claim; and the sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.” (Underlined for emphasis.)



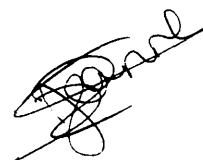
Section 12(a) and (d) of the Act (that is the Civil Procedure Act) referred to in Order 40 rule 1(1) above relates to suits for the recovery of immovable property, or determination of any right or interest in immovable property. Therefore, a warrant to show cause why a defendant should not furnish costs for his or her appearance cannot be granted against a defendant in a suit relating to recovery of immovable property or determination of interests in immovable property.

The main suit from which this application originates is Civil Suit No. 936 of 2020. The cause of action in Civil Suit No. 936 of 2020 is breach of contract, fraud, recovery of Ugx. 791,000,000, interest and profit thereon, damages, tracing orders and costs of the suit. Therefore, Order 40 Rule 1 applies to such as suit.

Counsel Muziki submitted that this court should grant the warrant of arrest for the 2nd Respondent to show cause why he should not furnish security for his appearance firstly because the 2nd Respondent is the sole signatory and majority shareholder of the 1st Respondent company. Secondly, because the Applicants have sued the 2nd Respondent in his personal capacity for fraud in Civil Suit No. 936 of 2020 and the Applicants (Plaintiffs in the civil suit) have prayed for the corporate veil to be lifted for fraud and hold the 2nd Respondent culpable for the 1st Respondent's actions. Counsel also submitted that there is a real danger and probable cause to believe that the 2nd Respondent has fled this court's jurisdiction.

The 2nd Respondent is the 2nd Defendant in Civil Suit No. 936/2020 and has been jointly sued with the 1st Respondent for breach of contract and fraud. Ssengendo Paul stated in paragraph 13 of his affidavit in support that when the 2nd Respondent learnt that the Applicants intended to bring legal action against him, he fled from Kampala and took up residence in the outskirts of Kampala. According to paragraph 14 of the affidavit in support, following a tip off from the 1st Applicant's friends, the 2nd Respondent was in July 2020 found hiding in Kisoro. He requested that the 1st Applicant gives him four days within which he would find a way for the matter to be resolved amicably. However, the four days expired and the 2nd Respondent refused to communicate with the 1st Applicant or his brothers. It is then that a criminal case was opened against him by the Applicants and 33 others at Wandegeya Police Station.

The 2nd Respondent's conduct as described in paragraphs 13 and 14 of the affidavit in support is that of a person on the run. The evidence in the affidavit in support went uncontroverted and it therefore stands true. This is on the authority of **Juliet Nabagala (Executrix of the estate of the late Scholastic Nanteza) -v- Tereza Mbiro, Misc. Cause No. 82 of 2011.**

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A warrant of arrest under Order 40 Rule 1 of the CPR should be made after careful consideration. This is because the repercussions of such an order as seen under Section 64(a) of the Civil Procedure Act is that failure to furnish security could lead to infringement of the subject defendant's personal liberty.

The 2nd Respondent has also demonstrated character of a person who intends to continuously delay or evade court processes. This is seen by the fact that all through the proceedings of Civil Suit No. 936 of 2020 and the attendant applications where he is a Respondent/Defendant, the Applicants/Plaintiffs have failed to physically serve him at his known residence or at the 1st Respondent's known business premises. The affidavit of service proving substituted service in this application dated 4th June, 2021; affidavit of service in Misc. Application No. 36 of 2021 dated 4th June, 2021; affidavit of service of summons to file a defense in Civil Suit No. 936 of 2020 dated 18th January, 2021; and the court order for substituted service in Civil Suit 936/2020 and all attendant applications in Misc. Application No. 115 of 2021 demonstrate the Applicants continued difficulty in locating the 2nd Respondent and effecting service of court proceedings on him. The Applicants have continuously been frustrated by the 2nd Respondent's evasive nature.

The above evidence satisfies grant of a warrant of arrest to show cause why the 2nd Respondent should not furnish security for his appearance in court. I find that the 2nd Respondent, a Defendant in the main suit, intends to delay and frustrate court process against him. He has also absconded the jurisdiction of this court. This is because he was last found in Kisoro in hiding. See paragraphs 13 and 14 of the affidavit in support. Therefore, a remedy to the Applicants under Order 40 Rule 1 of the CPR is warranted.

Issue one is answered in the affirmative.

Issue Two: Whether the court should order for the attachment of the 1st and 2nd Respondents' properties before judgment

The 1st and 2nd Respondents were jointly sued in Civil Suit No. 936 of 2020 for breach of contract and fraud, and the Applicants (Plaintiffs in the main suit) sought for the corporate veil to be lifted on the 1st Respondent for fraud.

Order 40 Rule 5 of the CPR provides:

5. Where defendant may be called upon to furnish security for production of property.



(1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him or her—

(a) is about to dispose of the whole or any part of his or her property;

(b) is about to remove the whole or any part of his or her property from the local limits of the jurisdiction of the court; or

(c) has quitted the jurisdiction of the court leaving in that jurisdiction property belonging to him or her,
the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the property or the value of the property, or such portion of it as may be sufficient to satisfy the decree, or to appear and show cause why he or she should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value of the property.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(Underlined for emphasis.)

The 1st Respondent's property that the Applicants seeks to attach is bank accounts held with Stanbic Bank (U) Ltd and Barclays Bank (now ABSA Bank). The evidence of existence of these accounts is in paragraph 9 of the affidavit in support and the attendant company resolutions authorising opening of the accounts marked Annexures E and F to the affidavit.

The 2nd Respondent's properties that the Applicants seek to attach are as mentioned in paragraph 20 of the affidavit in support and Annexure G to the affidavit. This court takes issue with Annexure G firstly because there is no indication that it is a URA authored document. Secondly, the annexure seems to simply detail transactions by the 2nd Respondent in respect of 13 motor vehicles registration numbers: UBF 156D, UBF 137M, UAX 021X, UBB 381E, UBD 135J, UBB 381E, UBA 721D, UBD 243P, UAQ 122W, UBF 339G, UBA 580Y, UAY 768L, UBD 765A, UBE 795B. This is based on transactions in the URA database by the 2nd Respondent. It does not conclusively prove ownership of the motor vehicles by the 2nd Respondent.



Counsel for the Applicants submitted that his clients are in no doubt, based off the 2nd Respondent's behavior, that he will dispose of all the motor vehicles he owns in an effort to defeat any subsequent order against him by this court. Paragraph 18 of the affidavit in support also makes this same allegation.

As already held above, the 2nd Respondent's behavior is that of a man on the run. He is no longer resident at his last known address, and does not show up at his company's premises. He has also run away from the jurisdiction of this court and was last located in Kisoro district. He has refused to respond to substituted service of court processes on him in this suit in a newspaper of wide circulation (Daily Monitor publication.) Such a person is also likely to sell off his properties so as to further evade and frustrate any other court processes against him as described in Order 40 Rule 5(1) of the CPR above.

However, Order 40 Rule 5(2) requires that the Plaintiff (in this case the Applicants) shall, unless the court directs differently, specify the property to be attached and the estimated value of the same. This provision is mandatory. The rationale is that court must satisfy itself that the property to be attached can sufficiently satisfy the Plaintiff's claim in the event that judgment is passed against the defendant. It is also to make sure that the plaintiff does not attach property whose value is much more than his/her claim. This is the reason Order 40 Rule 5(3) provides for conditional attachment.

The Applicants have not stated the estimated value of the property (both the 1st and 2nd Respondents' property) they seek to attach. They seek, as an alternate remedy, a blanket attachment of all of the Respondents' property. This is not in compliance with Order 40 Rule 5(2) of the CPR.

As such, issue two is answered in the negative.

Issue Three: Whether the Applicants are entitled to the reliefs sought.

The Applicants seek different orders as spelt out in the introduction of this ruling. However, following the resolution of issues 1 and 2 above, not all of the reliefs/orders sought can be granted.

Therefore, in line with the above resolutions, the following reliefs are granted:

1. A warrant of arrest is hereby issued against the 2nd Respondent to show cause why he should not furnish security for his appearance.



2. Costs shall abide the outcome of the main suit.

I so order.



Jeanne Rwakakooko

JUDGE

12/04/2022

This Ruling is delivered on this ____ day of _____, 2022