THE REPUBLIC OF UGANDA

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

MISC. APPLICATION NO. 0521 OF 2023
(ARISING FROM CIVIL SUIT NO. 0307 OF 2023)

1. VICTORIA APARTMENTS LIMITED
2. KEMAL LALANI
3. HAIDER DAUDANI :: APPLICANTS

VERSUS

1. GAMING EAST AFRICA & ENTERTAINMENT LIMITED
2. FARROKH SAYAR SARABI
3. NATIONAL LOTTERIES AND GAMING REGULATORY BOARD
4. BANK OF INDIA UGANDA LIMITED :::::::::::::::::::::::::::::::::::::: RESPONDENTS

(Before: Hon. Lady Justice Patricia Mutesi)

RULING

Introduction

The applicants filed a summary suit *vide* Civil Suit No. 0307 of 2023 ("the main suit") seeking to recover $73,500 in accumulated rent arrears along with $44,000 and UGX 140,000,000 in interest-free loans from the 1st and 2nd respondent. The 1st and 2nd respondents filed an application for leave to appear and defend the main suit which is yet to be disposed of.

The Application

The applicants brought this application by way of a Chamber summons under Section 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71 and Order 40 rules 1, 2, 3, 4, 5, and 6 of the Civil Procedure Rules S.I. 71-1 seeking an order attaching the 1st respondent's security bond held by the 3rd respondent worth UGX 500,000,000 and the 1st respondent's assets as listed in its Board Resolution dated 28th February 2023 and any other properties to be hereafter

identified. The application also seeks an alternative order directing the 1st, 2nd and 3rd respondents to furnish security sufficient to satisfy the applicants' claim in the event that these applicants succeed in the main suit.

The application is supported by the 2 affidavits of the 2nd and 3rd applicants who are both directors in the 1st applicant. In his affidavit, the 2nd applicant stated that out of the USD 117,500 and UGX 140,000,000 claimed in the Plaint, USD 73,500 constitutes unpaid rent owed by the 1st respondent to the 1st applicant while USD 44,000 and UGX 140,000,000 constitute friendly interest-free loans advanced to the 1st respondent which have never been repaid. He stated that the 1st respondent's Board of Directors passed a resolution in February 2023 allowing the 1st respondent to sell off its assets. He asked the Court to stop this disposal of assets before the trial of the main suit which would constrain the applicant's recovery. He also asked the Court to attach the 1st respondent's bond held with the 3rd respondent pending the disposal of the main suit. The 3rd applicant's affidavit largely reiterated the contents of the 2nd applicant's affidavit.

The 1st respondent opposed the application through an affidavit in reply sworn by Mr. Samuel Kakande, its Company Secretary. Mr. Kakande disputed the alleged indebtedness claimed in the main suit. He stated that the 2nd and 3rd applicants have already confiscated some of the 1st respondent's gaming equipment as a set-off for the alleged rent arrears. He also stated that the 1st respondent had never sanctioned the alleged interest-free loans. Mr. Kakande further stated that the security bond is a legal requirement for payment of statutory claims, which cannot be attached, especially since there are claims that have already been raised over it. He added that all the assets listed in the 1st respondent's Board Resolution have already been sold to 3rd parties.

The 3rd respondent opposed the Application through an Affidavit in reply sworn by Mr. Denis Mudene Ngabirano, its Acting Chief Executive Officer. He stated that on the 13th of February 2023 the 4th Respondent issued a Bank Guarantee of UGX 500,000,000/= in favour of the 3rd Respondent. He reiterated that as a legal requirement, the 3rd respondent is mandated to hold onto the 1st respondent's security bond for purposes of paying statutory liabilities incurred by the 1st

respondent, i.e. paying taxes or its employees or persons participating in any activity organized or provided by it as a licensee. He maintained that the bond is, therefore, not liable to attachment in any court proceedings.

The 4th respondent's affidavit in reply was sworn by Mr. Edrine Barasa, its Credit Manager. Mr. Barasa confirmed that on 10th February 2023, the 4th respondent availed the 1st Respondent with a Bank Guarantee facility (for the security bond) of UGX 500,000,000 valid until 31st December 2023 at 5:00 pm. He also confirmed that the Guarantee still exists and is yet to lapse.

The Applicants filed an affidavit in rejoinder to the 1st, 3rd and 4th Respondent's affidavits in reply, which I have considered.

Representation and hearing

At the hearing, the applicants were represented by Mr. Mwebesa Raymond of M/s Kampala Associated Advocates, while the 1st and 2nd respondents were represented by Mr. Kassim Muwonge of M/S Astral Advocates. The 3rd respondent was represented by Mr. Moses Mugisha from the Attorney Generals chambers, and the 4th respondent was represented by Ms. Kiiza Lilian M/S Kiiza and Kwanza Advocates. All parties filed written submissions to argue the application as directed by the Court, save for the 4th Respondent. I have fully considered the materials on record, the submissions of the parties and the laws and authorities cited.

Issues arising

1. Whether this Application discloses grounds for the issuance of an order of attachment before judgment.
2. Whether the 1st and 2nd Respondents have shown sufficient cause why they should not furnish security.
3. What remedies are available to the parties.

Resolution of issues

Issue 1: Whether this Application discloses grounds for the issuance of an order of attachment before judgment.

Courts will not permit the course of justice to be frustrated by a defendant taking action whose purpose is to render nugatory or less effective any relief which the plaintiff may obtain after trial. (See **Order 40** of the Civil Procedure Rules ("CPR")). Accordingly, the Court can attach a defendant's assets before judgment so that the plaintiff is assured that the decree, if passed, will not be in vain and can be satisfied.

In **Coil Limited v Transtrade Services Ltd, HCMA No. 0006 of 2016**, this Court guided that owing to the intrusive nature of an order of attachment of property before judgment on the defendant's property rights, that order should be made in exceptional cases after it is established that:

1. The applicant's case in the main suit 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 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.

At this stage, the Court is not required to analyse the merits of the main suit in detail. Court should only make a prima facie determination that the applicants' case is strong and likely to succeed. In the instant case, the tenancy is acknowledged but no proof of rent payment has been adduced. The friendly loans are also acknowledged to have been taken and no proof of repayment is adduced. Therefore, the applicants have a prima facie case likely to succeed in the main suit.

Secondly, there is a real risk that the 1st respondent will dispose of all its property before judgment thereby frustrating the applicant's recovery. This has been proved through Annexure C to the 3rd applicant's affidavit in support which is a duly-registered resolution of the 1st respondent's Board of Directors authorizing the sale and disposal of all the company's assets. The 1st respondent corroborated this

resolution in paragraph 12 of its affidavit in reply. The 1st and 2nd respondent's behaviour is clearly that of desperate men on the run and this Court is justified in finding that all their assets may be out of reach after judgment in the main suit.

The applicants neither pleaded nor proved their willingness and ability to pay damages to the 1st Respondent in the event that this Court later determines that the attachment order should never have been issued. Nonetheless, I am inclined to overlook this consideration owing to the 1st respondent's overwhelming resolve to dispose of all its assets as soon as possible which would, in all reasonable certainty, render any recovery against it impossible in the main suit. As the Court stated in **Coil Limited (supra)**, the considerations referred to above are discretionary and the Court should use that discretion judiciously, being guided, at all times, by the overall proportionality of issuing the attachment order.

Order 40 rule 5(2) of the CPR demands that the plaintiff must, unless the court directs otherwise, specify the property to be attached and the estimated value of the same. Commenting on that provision, this Court in **Ssengendo Paul & Anor v Pio Crypto Centre Investment Limited, HCMA No. 345 of 2021**, held that Order 40 rule 5(2) is mandatory and that its rationale is that court must satisfy itself that the property to be attached can sufficiently satisfy the plaintiff's claim in the event of judgment in his favour. The rule also ensures that the plaintiff does not attach property whose value is much more than his/her claim.

Save for the security bond/bank guarantee whose value is known, no other values are attached to the list of properties set out in the 1st respondent's Board resolution. Court cannot attach property whose estimated value has not been stated. Similarly, the applicants' prayer for attachment of the respondent's property which the applicants may hereafter discover is also untenable. Court cannot attach what has not been specified.

I will now consider the possibility of attaching the security bond. The 1st and 3rd respondents have insisted that this bond is not, legally, available for attachment. This is a bond which was submitted by the 1st respondent to the 3rd respondent pursuant to Section 40(1) of the Lotteries and Gaming Act, 2016 and Regulation

30(1) and Item 3 in Schedule 2 of the Lotteries and Gaming (Licensing) Regulations, 2017. The bond is a legal prerequisite for the grant of a casino operating license.

Section 40(2) of the Lotteries and Gaming Act, 2016 ("the Act") provides that the bond shall be used by the 3rd respondent to pay taxes or employees of the licensee or persons participating in any activity organized or provided by the licensee in the case of default. The claims in the main suit neither constitute tax claims nor employee claims. The applicants have also made the rather ambitious argument that theirs are claims by a person *'participating in an activity organized or provided by the licensee'* within the meaning of Section 40(2) of the Act.

I concur with the 3rd respondent's submission that the words of Section 40(2) of the Act are clear and unambiguous and that they should be given their natural, literal and ordinary meaning. It is trite law that clear and unambiguous language in a legislative provision is a conclusive determinant of the legislative intent behind that provision. (See **Hon. Theodore Ssekikubo & Others V. The Attorney General and 4 Others, SC Constitutional Appeal No. 1 of 2015)**.

The phrase *'an activity organized or provided by the licensee'*, in my considered view, refers to products and, or, services ordinarily offered by a licensee under the Act. These activities would normally relate to the conduct of lotteries, gaming, betting and casinos since that is the calibre of services ordinarily expected to be *'organised'* or *'provided'* by a licensee under the Act. The persons participating in such activities would be the customers of the licensee who visit the gaming houses, betting houses and casinos to partake of the services offered there. Undoubtedly, the applicants' claims fall outside the purview of Section 40(2) of the Act.

The applicants also argued that no genuine claims have, so far, been made to the 3rd respondent under the bond and that this justifies its attachment. I reiterate that the bond is not liable for attachment in the present circumstances. In any case, even if no 'genuine' claims have been made so far, the bond must remain untouched so that it can service any and all claims that may hereafter be made before it lapses.

My finding is that the bond is not liable for attachment in view of the nature of the applicants' claims in this case. I, however, note that the bond is set to lapse on 31st

December 2023 at 5:00 p.m. If the bond remains uncashed (for the purposes provided under Section 40(2) of the Act) by that day and time, all cash assets forming the security upon which the bond was issued by the 4th respondent will immediately become receivable by the 1st respondent.

Therefore, as a compromise intended to safeguard the ends of justice, this Court shall issue a conditional order of attachment before judgment in the main suit, directing that should the bond remain uncashed by 5:00 p.m. on 31st December 2023, the 1st respondent's security for the bond shall immediately be frozen until the disposal of the main suit.

Issue 2: Whether the 1st and 2nd respondents have shown sufficient cause why they should not furnish security.

I have considered this issue in case it transpires that the security bond held by the 3rd Respondent was cashed in accordance with Section 40 (2) of the Act and there are no available funds in the 1st Respondent's relevant Accounts held with the 4th Respondent.

The applicants sought an order directing the 1st, 2nd and 3rd respondents to deposit security equivalent to the aggregate monetary value of the claim in the main suit. The 1st respondent opposed this prayer submitting that the same is unnecessary since the claims in the main suit are frivolous.

I find that this is a proper case in which the 1st and 2nd respondents should be required to furnish Court with security. In **Evelyn Bachwenkojo Karugaba v Shengli Engineering Construction Co. (U) Ltd, High Court of Uganda at Fort Portal Misc. Application No. 044 of 2022**, the Court found that the key phrase in Order 40 Rule 1 is *"with intent to obstruct or delay execution...or avoid any process of the court"*. As such, a defendant may be called upon to furnish security where the court is satisfied that that defendant intends to obstruct or delay execution by selling his property or removing it from the jurisdiction of the Court.

The 1st respondent's Board Resolution unequivocally proves the 1st respondent's intention to sell off all its assets. The 1st respondent corroborated this bad faith in its affidavit in reply stating that the said assets have already been sold to 3rd parties,

albeit without adducing any corroborating documentary evidence to that effect. These developments reinforce my earlier characterization of the 1st and 2nd respondents as desperate men on the run. I find no sufficient cause why an order to furnish security should not issue. However, since the 3rd respondent is not a defendant in the main suit, it will not have any obligations in the decree therefrom and no order for security can, in all due fairness, issue against it.

The Applicants prayed for security of $117,500 and UGX 140,000,000 but, in my view, such amounts would be excessive and prohibitive. An order that the 1st and 2nd respondents furnish security in cash or the form of a bank guarantee issued by a banking financial institution licensed by Bank of Uganda to the tune of UGX 300,000,000 within 45 (forty-five) days from the date of this ruling is more just and fair in the circumstances.

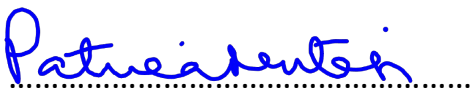
Issue 3: What reliefs are available to the parties.

Considering the above findings, this application succeeds in part and I make the following orders:

i. A conditional order of attachment before judgment is hereby issued directing that should the 1st Respondent's security bond/bank guarantee remain uncashed (for the purposes provided in Section 40(2) of the Act) at the stroke of 5:00 p.m. on 31st December 2023, the money in the 1st respondent's FDR account Number 340140200001732 held with the 4th Respondent and all the accumulated recurring deposits in the 1st respondent's A/c No. 340144100000141 held with the 4th respondent shall be frozen pending the disposal of the main suit.

ii. In the event that the security bond was cashed and /or there are no available funds in the 1st Respondent's above mentioned accounts, the 1st and 2nd respondents shall jointly and severally furnish Court with security in cash or in the form of a bank guarantee issued by a banking financial institution licensed by Bank of Uganda to the tune of UGX 300,000,000 within 45 (forty-five) days from the date of this ruling, pending the disposal of the main suit.

iii. Costs of this application shall abide by the outcome of the main suit.



Patricia Mutesi

JUDGE

(22/12/2023)