THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO. 0052 OF 2023

KCB BANK UGANDA LIMITED :: APPLICANT

VERSUS

TAMO LINKS SERVICES :: RESPONDENT

(Before: Hon. Lady Justice Patricia Mutesi)

RULING

This application is brought by notice of motion under Section 98 of the Civil Procedure Act, Section 47 of the Security in Immoveable Properties Act, 2019, Order 51 Rule 1 of the Civil Procedure Rules seeking orders that:

1. The Respondent hands over possession of collateral to wit: Motor Vehicles (Sino Trucks) Registration Nos. UBJ 582B; UBJ 753B; UBJ 581B; UBK 161C; UBK 588D; UBK 587D; UBK 314D; UBK 591D; UBK 592D; UBK 595D; UBK 594D; UBK 597D; UBK 596D; UBK 599D; UBK 296C; UBK 590D and UBK 593D to the Applicant.
2. The Applicant be allowed to sell the stated Sino Trucks; and
3. Costs be provided for.

The application is supported by an affidavit deposed by TIMOTHY NABAALA, the Applicant's Senior Manager Recoveries and Collections, in which he averred as follows; That through a facility letter dated November 10th 2020, the Applicant advanced to the Respondent an Asset Based Finance facility of USD 189,000 and Unsecured Insurance Premium Finance of USD 14,381.73 for purposes of purchasing three Sino Trucks Howo 8*4 Tipper RHD and for comprehensive insurance for the financed trucks. The acquisition of the loan facility was authorized by the Respondent's Board of Directors through a Board Resolution

dated 1st December 2020. As security for the loan facility, the Applicant and Respondent entered into a Chattels Mortgage wherein the Respondent pledged Sino Trucks Registration Nos. UBJ 582B, UBJ 753B and UBJ 581B. The Applicant registered that chattels mortgage with Uganda Registration Services Bureau and obtained an acknowledgment.

He further averred that through a facility letter dated June 01st 2021, the Applicant extended a second Asset Based Finance facility of UGX 3,621,375,000/= to the Respondent for purposes of purchase of 14 (fifteen) Sino Trucks and Insurance Premium Finance of UGX 289,710,000/= for comprehensive insurance for the financed trucks. The said facilities were secured by a chattels mortgage over the purchased Sino Trucks Registration Nos. UBK 161C; UBK 588D; UBK 587D; UBK 314D; UBK 591D; UBK 592D; UBK 595D; UBK 594D; UBK 597D; UBK 596D; UBK 599D; UBK 296C; UBK 590D and UBK 593D. The Applicant registered that chattels mortgage with Uganda Registration Services Bureau and obtained an acknowledgment.

He averred that the Applicant disbursed the said facilities which enabled the Respondent to purchase the said Sino Trucks, but the Respondent failed to repay the loan facilities as set out in the facility agreements and is in default. Further that the Applicant has issued several default notices to the Respondent requiring the Respondent to clear the accumulated loans and the outstanding in vain. That the Respondent's loan facilities are in default and are currently outstanding to a sum of UGX 4,658,492,595 (Uganda Shillings Four Billion Six Hundred Fifty-Eight Million Four Hundred Ninety-Two Thousand Five Hundred Ninety-Five) as of 04th June 2023. Further that the subject trucks are subject to loss and dilapidation from continuous use and therefore subject to significant loss of value, and that they continue to waste away and depreciate in value and have no comprehensive insurance to secure the Applicant's interests. He contended that it is in the interest of justice, equity and fairness that this application is granted.

The Respondent opposed the application through an affidavit in reply sworn by one of its directors, AMANYIRE PATRICK IVAN who averred that the Respondent has been servicing the loan facility according to the payment plan so there is no need to sell the Sino Trucks, and the Applicant's intended sale of the said properties is unlawful since the Respondent is not indebted to the applicant. Further that the intended sale the said Sino Trucks is premature and sought in bad faith as the loan period is still running based on the loan statement availed, and that the Respondent has never been served with any demand notice. He averred that the outstanding loan sums stated by the Applicant are totally inaccurate and grossly inflated and not supported by the loan statement which is aimed at unjust enrichment and depriving the respondent of its assets. He contended that there is need for a comprehensive audit to verify if there is any outstanding or delayed payments and, if so, how much, and that the Applicant cannot be permitted to attach and sale the trucks when the debt is highly disputed by the respondent.

He stated that the Applicant is aware that the trucks were taken to Democratic Republic of Congo by the Respondent's contractor without the Respondent's knowledge, and upon learning about it recently the Respondent has been making efforts to retrieve them. That all the trucks were comprehensively insured and the applicant can always recover from the insurance policy should the trucks get lost completely.

The Applicant filed an affidavit in rejoinder reiterating the contents of the affidavit in support of the application.

Representation and hearing

The applicant was represented by Mr. Augustine Idot of M/S Kampala Associated Advocates while the respondent was represented by Tumwesigye Humphrey of M/S Mujurizi & Tumwesigye Advocates. The hearing proceeded by way of written submissions. I have considered the materials on record, the submissions of counsel and the law and authorities cited.

Determination

Issue: Whether the Applicant is entitled to the orders sought?

This dispute arises out of two asset based financing facilities which the Applicant extended to the Respondent. The first facility of USD 189,000 for the purchase of 3 Sino Trucks Registration Nos. UBJ 582B, UBJ 753B and UBJ 581B and unsecured insurance premium finance of USD 14,381.73 for comprehensive insurance cover of the 3 trucks was extended through a facility letter dated 10th November 2020.

The second facility of UGX 3,621,375,000/= for the purchase of 14 Sino Trucks Registration Nos. UBK 161C; UBK 588D; UBK 587D; UBK 314D; UBK 591D; UBK 592D; UBK 595D; UBK 594D; UBK 597D; UBK 596D; UBK 599D; UBK 296C; UBK 590D and UBK 593D and insurance premium finance of UGX 289,710,000/= for comprehensive insurance cover of the 15 trucks was extended through a facility letter dated 1st June 2021. The parties agreed that the 17 trucks shall constitute part of the security for the two facilities.

Following the purchase of the 17 sino trucks, the parties created chattel mortgages over each of them through two agreements dated 1st December 2020 for the first facility and 15th June 2021 for the second facility. The Applicant perfected the mortgages by registering them with the Registrar General. This effectively created security interests in the trucks and made the Applicant a secured creditor pursuant to **Section 4** of **the Security Interest in Movable Property Act, 2019** *(hereinafter "the Act")*. Under **Section 5(2)** of the Act, a duty of good faith applies to both the Applicant and the Respondent in the performance of the chattel mortgages.

The Applicant now asserts that the Respondent has since failed to repay the loan facilities as set out in the facility agreements and is in default. The Applicant states that it has issued several default notices to the Respondent requiring the Respondent to clear the accumulated loans and the outstanding amounts, in

vain. The Applicant also asserts that the trucks have irregularly been taken out of jurisdiction in total breach of the chattels mortgage agreements.

On its part, the Respondent contests the propriety of this application. It asserts that this application is incompetent, misconceived and barred in law and that the procedure adopted by the Applicant is improper. The Respondent also maintains that it is not indebted to the Applicant and challenges the accuracy of the loan account statements.

Part VI of the Act deals with the enforcement of security interest. **Section 44(1)** of the Act provides that where a debtor defaults on the obligation to pay or where another event of default occurs, the security interest becomes enforceable. **Section 44(2)** of the Act adds that where a grantor defaults to perform a secured obligation, the secured creditor may enforce the security interest by exercising any right under the Act, provided in the security agreement or provided under any other written law.

Section 47 of the Act then provides:

> *"**47. Expedited possession by secured party***
>
> *(1) In cases not covered by Section 46, and subject to the rights of a person with priority in the possessions of a collateral, including a lessee or licensee, the secured creditor is entitled to take possession of the collateral after default, with or without a court order.*
>
> *(2) For purposes of subsection (1) a secured creditor may take possession of a collateral without a court order–*
>
> *(a) the grantor, in writing, consents to the secured creditor taking possession of the collateral without a court order;*
>
> *(b) the secured creditor gives a notice of default and a notice to take possession by the secured creditor, to the grantor or the person in possession of the collateral, where the collateral is not with the grantor; and*

(c) *possession or control of the collateral can be taken without breach of the peace …"*

Section 48 of the Act also provides:

> *"**48. Sale by secured creditor***
>
> *(1) Save as provided for under Section 46, where a debtor is in default, a secured creditor may sell any or all of the collateral in its condition or following any commercially reasonable preparation or processing.*
>
> (2) *The sale of the collateral shall be by auction …"*

Section 46 of the Act deals with a secured creditor with a secured interest in accounts receivable. The provision allows such a creditor, upon the occurrence of a default, to instruct the account debtor to make payment to the secured creditor without recourse to court. This implies that both Sections 47 and 48 of the Act apply to all other secured creditors as defined by the Section 1 of the Act, including chargees under any type of charge or chattel mortgage, sellers who reserve title in the goods sold, financial lessors and commercial consignors, among others. The latter category of secured creditors can take possession of the mortgaged chattels after obtaining an order of court, save when any of the exceptions expressly set out in Section 47(2) of the Act are present. They can also exercise their rights to sell the mortgaged chattels after obtaining an order from the court.

The Act, however, does not specify the procedure through which a secured creditor seeking to exercising his or her rights under Sections 47 and 48 are to approach the courts. Additionally, the **Security Interest in Movable Property Regulations, 2019 (S.I. No. 30 of 2019)** do not make provision for how the courts ought to deal with requests made by secured creditors under Sections 47 and 48 of the Act. For this reason, I do not find any fault with the procedure and form adopted by the applicant in presenting this application.

It is trite law that an application may be made by motion supported by an affidavit (if the application is grounded in evidence) where no written law specifies otherwise. See **Order 52 rules 1 and 3 of the Civil Procedure Rules S.I. 71-1**. In the absence of any written law prescribing the procedure to be adopted by a secured creditor in approaching court for orders under Section 47 and 48 of the Act, the Respondent's contest to the procedure adopted by the Applicant in this application is unjustified.

Similarly, I do not find any incurable defects in the motion or the affidavit in support of the application as claimed by the respondent.

Clauses 11.1 of both facility letters prescribed failure by the Respondent to make any repayment of principal or payment of interest or other moneys in respect of the facilities on its due date as one of the events of default which entitles the Applicant to recall the facility rendering the outstanding principal and accrued interest wholly recoverable and the security immediately enforceable. Clauses 2 of both chattel mortgage agreements also describes an event of default as a default by the mortgagor/respondent on its loan obligations.

The Applicant asserted two defaults on the part of the Respondent in proving its entitlement to the remedies sought. First, the Applicant asserted that the Respondent defaulted in the repayment of the principal and the accrued interest on the two facilities. The Applicant has adduced the Respondent's account statements in proof of the claimed outstanding debt. The Respondent has contested the accuracy of the claimed outstanding amount and has also adduced its account statements to this end. In the affidavit in rejoinder, the Applicant adduced the Respondent's payment schedule and clarified that loan repayments were supposed to be automatically debited from the Respondent's current account but that there was always insufficient money on the Respondent's account to repay the installments whenever they fell due.

I have reviewed the account statements and I have confirmed that the Respondent started to default on the installments from the very first month after the first facility was disbursed. There is hardly a month when there was

enough money on the Respondent's current account to settle the facility installments as and when they fell due. This amounts to a default within the meaning of Section 44(1) of the Act and Clauses 11.1 of both facility letters.

In view of this finding, this Court deems it fit to order the parties to appoint an auditor/auditors to make a comprehensive financial audit of the performance of the two facilities in order to determine the amount of money which remains outstanding under the two facilities from the Respondent, if any.

Second, the Applicant asserted that the trucks were taken out of Uganda contrary to Clause 2(e)(vi) of the second chattel mortgage agreement. In paragraphs 15 and 16 of its affidavit in reply, the Respondent admitted that the trucks had indeed been taken to the Democratic Republic of Congo, but maintains that the Applicant was always aware of this and that this act was done by one of the Respondent's subcontractors without the Respondent's knowledge. The respondent also stated that it is making efforts to retrieve the trucks.

However I note that the Respondent did not name its alleged subcontractor, and it also did not adduce any evidence proving that the Respondent informed and obtained the consent of the Applicant before taking the trucks out of jurisdiction. It therefore appears to the Court that the Respondent took the trucks out of this Court's jurisdiction in order to defeat any recovery efforts by the Applicant. This is utmost bad faith contrary to **Section 5(2)** of the Act. It is also a breach of Clause 2(e)(vi) of the second chattel mortgage agreement and it amounts to a breach of the security agreement which is a default under Section 44(2) of the Act.

In any case, in Clause 2(i) of the second chattel mortgage agreement, the Respondent expressly agreed not to assign, sell, transfer or otherwise dispose of or abandon all or any part of the assets. In fulfilment of its duty of good faith in the transaction, the Respondent ought not to have created any third party rights over the vehicles. Subcontracting of the vehicles to a third party without the knowledge or consent of the applicant created third party rights in the

possession and use of the vehicles which was inconsistent with the purpose of the chattel mortgage.

The Respondent has also claimed that there is no need for this Court to issue the orders sought in this application because comprehensive insurance covers were taken out for all the trucks and that if the trucks are not recovered, UAP Old Mutual Insurance Uganda Limited will settle all the outstanding amounts under the facilities.

Clause 19.1 of both facility letters provided that:

> *"**Insurance***
>
> *19.1 All insurable assets forming part of the Bank's Security shall be **comprehensively insured against theft / damage/ fire** for the full value thereof during the tenure of the Facilities by an insurance company approved by the Bank and in the Bank's panel with the interest of the Bank being duly noted on the policy document."* Underlined for emphasis.

Clearly, the risks insured against for both facilities are theft of the trucks, damage to the trucks and fire gutting the trucks. The Respondent has not alleged or proved that any of these risks has occurred. For this reason, the Applicant cannot have recourse to the insurance policies to recover the outstanding debt.

Besides, my understanding of the Insurance Premium Finance Agreement entered into between the Applicant, the Respondent and UAP Old Mutual Insurance Uganda Limited is that the insurance cover is for the trucks. The cover is not meant to settle unpaid installments in the credit facilities. Default in repayment of the facilities is not one of the risks that was insured against.

It is trite law that courts must give the words contained in a contract their ordinary meaning in their contractual context, construing them at the same time to yield a businesslike commercial sense (see **Andrew Akol Jacha v Noah Doka Onzivua, High Court of Uganda at Arua Civil Appeal No. 0001 of 2014**). In this case, the only way in which the facilities can be given a commercial sense is by allowing the Applicant to take possession of its security and to sell off the same

in order to recover the unpaid balance of the loan and all the accrued interest thereon.

Considering the above findings, I make the following orders:

i. The Respondent shall hand over possession of collateral to wit: Motor Vehicles (Sino Trucks) Registration Nos. UBJ 582B; UBJ 753B; UBJ 581B; UBK 161C; UBK 588D; UBK 587D; UBK 314D; UBK 591D; UBK 592D; UBK 595D; UBK 594D; UBK 597D; UBK 596D; UBK 599D; UBK 296C; UBK 590D and UBK 593D to the Applicant.

ii. The Applicant is allowed to sell the stated Sino Trucks by public auction. The Applicant shall deposit the proceeds from the sale of the Sino Trucks on an escrow account.

iii. The parties shall jointly appoint an auditor or auditors to audit the performance of the two facilities and furnish a report to the parties, with a copy to the Court, within 3 (three) months from the date of this ruling.

iv. The Applicant shall thereafter apply the proceeds from the sale of the sino trucks to settle the outstanding principal and accrued interest under the two facilities along with the costs of recovery. Any balance shall then be returned to the Respondent.

v. The costs of this Application are awarded to the Applicant.

It is so ordered.

Patricia Mutesi

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Patricia Mutesi

JUDGE

(28/09/23)