

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

MISCELLANEOUS APPLICATION NO. 0531 OF 2023

5 (Arising from Civil Suit No. 033 of 2022)

1. CHEN JIAN WEN }
2. CHEN JIANTING }
APPLICANTS
3. CHEN WEI JIAN }

10 **VERSUS**

1. BANG CHENG INVESTMENTS CO. LTD }
2. LI KANGYUAN } **RESPONDENTS**
3. LI JIANGUANG }

15 **Before: Hon Justice Stephen Mubiru.**

RULING

a. Background.

The 1st respondent is a company incorporated in Uganda on 23rd January, 2015. By a nominee
20 shareholding agreement signed on 25th April, 2015 the applicants were to be given 71% stake in
the 1st respondent which was to be held on their behalf by their sister, Ms. Chen Jian Fang, who
at the time was a majority shareholder holding 90% of the shares while the 3rd respondent held
the remaining 10% of the shares. Subsequently on 25th September, 2019 the applicants entered
into an investment agreement with the 3rd respondent (on behalf of the company) to invest a total
25 of ¥ 57,919,927 Yuan in the 1st respondent, contributed to in sums of; ¥ 8,612,700 by the 1st
applicant, ¥ 7,464,300 by the 2nd applicant, ¥ 4,306,300 by the 3rd applicant, and ¥ 8,325,600 by
the 3rd respondent.

The 1st respondent undertook business of mining and operation of a stone quarry in the process of
30 which it acquired land comprised in Bulemezi Block 60 Plot 231, LRV 4546 Folio 5 at
Nampungwe; Kyadondo Block 121 Plot 2927, LRV WAK 5553 Folio 9 at Nangabo; and
Kyadondo Block 121 Plot 2928, LRV WAK 5553 Folio 14 at Nangabo. The company also
acquired over ninety “Sino Truck” Lorries for its operations. The business of the company

thrived to the extent that during the year, 2016 the applicants received a sum of ¥ 4,306,300 as the return on their investment in the 1st respondent.

5 Until the year 2020 with the breakout of the Covid19 pandemic and the associated lock-downs, the applicants used to make regular visits to Uganda to appraise the progress of the business, which was at all material time primarily managed by the 3rd respondent. The relations between the applicants and the 3rd respondent became strained following the lifting of the lock-down when the applicants travelled to Uganda during the month of September, 2021 but were denied access to the 1st respondent's business premises upon instructions of the 2nd respondent. Upon a
10 criminal complaint made to the police by the 2nd respondent, the applicants were arrested and charged with the offence of criminal trespass. The applicants have since the year 2019 not received any return on their investment in the 1st respondent. The applicants contend that the 3rd respondent has since 2016 not been physically present in the country and for some time had practically left management of the company to his son, the 2nd respondent who is was sole
15 signatory to all the company's bank accounts. When queried by the applicants concerning suspected forgeries of the 3rd respondent's signature, the 2nd respondent too fled back to China and currently the management of the company is very unclear.

b. The application.

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The application by Notice of motion is made under the provisions of section 64 of *The Civil Procedure Act*; and Order 40 rule 5 (b), (c) and 12 of *The Civil procedure Rules*. The applicants seek orders; directing attachment before judgment of land comprised in Bulemezi Block 60 Plot 231, LRV 4546 Folio 5 at Nampunge; Kyadondo Block 121 Plot 2927, LRV WAK 5553 Folio 9
25 at Nangabo; and Kyadondo Block 121 Plot 2928, LRV WAK 5553 Folio 14 at Nangabo; a total of 97 Sino Truck Lorries registered to the 1st respondent; funds on US Dollar and shillings current accounts Nos. 002865000I and 0028650002 held with Diamond Trust Bank Limited and Stanbic Bank Limited, respectively; and one directing the 2nd and 3rd respondents to furnish security for their appearance in Court when required.

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It is the applicants' case that upon incorporation of the 1st respondent on 23rd January 2015, the applicants entered into a nominee sharing holding agreement on the 25th April, 2015 wherein it was agreed that Chen Jian Fang (sister to the applicants and wife to the 3rd respondent) was to hold 71% shares in the 1st respondent on behalf of the applicants for which they paid ¥
5 28,709,227 (Chinese Yuan, twenty eight million seven hundred and nine thousand, two hundred twenty seven). On the 25th September, 2019 to further concretize their interest in the 1st respondent, the applicants entered into another investment agreement with the 3rd respondent (on behalf of the company) to invest an additional amount of ¥ 28,708,900 (Chinese Yuan, twenty eight million seven hundred and eight thousand nine hundred) in the 1st respondent Company,
10 bringing the total investment to ¥ 57,919,927 Yuan. With those funds, the 3rd respondent on behalf of the 1st respondent purchased machines for stone production namely; an assembly line, an excavator, forklift, trucks and automobile from Shanghai Shibang Machinery Co. Ltd. The company also acquired leases over and in Nagabo on which its operations are conducted.

15 After the initial investment was done, the 1st respondent in 2018 paid out dividends totalling ¥ 5,949,579 to the Applicants. The 2nd and 3rd respondents periodically communicated and furnished the applicants with information regarding the business of the 1st respondent. Due to the subsequent outbreak of the covid-19 pandemic, the applicants were unable to travel to Uganda during the years 2020 but informed the 2nd and 3rd respondents of their intention to travel to
20 Uganda and check or inspect the business. Once they communicated that intention, the 2nd and 3rd respondents cut off ail communication with the applicants. The applicants then decided to physically come to Uganda however upon arrival at the stone quarry and the mine; they were denied entry to the premises on the express instructions of the 2nd and 3rd respondents. It is the applicants' contention that the 2nd and 3rd respondents have been mismanaging the 1st respondent
25 company evidenced by several actions undertaken by them without the consent of their business partners.

Without consent of the applicants the said Chen Jian Fang who was holding shares of the applicants transferred them to the son (the 2nd respondent). The applicants contend that the
30 actions of the 2nd and 3rd respondents who are shareholders in the 1st respondent company have caused the applicants, who are the beneficial owners, heavy financial loss. The actions of the 2nd

and 3rd respondents portray a pattern of incompetent management actions which are wrongful, negligent and arbitrary which will adversely affect the efficient accomplishment of the company's goals, such as; - the 2nd and 3rd respondents transferring shares to themselves against the interest of the applicants; obtaining personal loans without knowledge and consent of the applicants; the respondents admit that the Land is already subject to a mortgage to Bank of Africa Uganda Limited hence a threat that if not properly managed can result into foreclosure due to default; the trucks though still in the names of the company can easily be transferred into third parties' names and or disposed of to prevent them from being attached and render the said application a nugatory; the 1st respondent's bank accounts can be cleared of funds and closed with the new electronic e-Banking system the 2nd respondent who is not in the country and yet the sole signatory of the accounts can clear and clean the accounts affecting any orders and render the said Application a nugatory; the respondents admit that the 2nd respondent is the sole signatory of the accounts and yet he is not present in the Country and that leaves a management vacuum in the Company.

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The 2nd and 3rd respondents have since run away from Uganda leaving the management of the 1st respondent in the hands of unknown people, hence this application. In the circumstances the applicants seek to protect the interests by this application for attachment before Judgement of the 1st respondent's property, in order to stop the 2nd and 3rd respondents from alienating the same or putting it out of reach of court jurisdiction. The circumstances afford a reasonable probability that the applicants will or may be obstructed or delayed in the execution of any decree that may be granted against the respondents, and that the respondents have acted fraudulently in the past or may act fraudulently in future.

25. The respondents' affidavit in reply;

In its affidavit in reply sworn by the 2nd respondent as sole director of the 1st respondent, the respondents aver that the applicants are not shareholders in the 1st respondent and therefore do not have any locus to bring the instant application. The applicants are not members of the company and they have no locus to inquire into the management and affairs of the 1st respondent. The 2nd respondent denies that the applicants ever invested ¥ 28,708,900 or any other sums of

money in the 1st respondent. The 1st and 2nd respondents have never dealt with the applicants and they are not parties to the Partnership Deed signed and enforceable in China between the applicants and the 3rd respondent. The Sales Contract relied upon by the applicants lists a vibrating feeder, crusher, cone crusher, vibrating screen, 3 belt conveyers and control box, not
5 the items the applicants claim were bought with their funds. A company can be managed by the Directors and its staff as deemed convenient by its directors not the whims of onlookers. There is no evidence to show that the 1st and 2nd respondents are alienating, disposing of or transferring its assets from this Court's jurisdiction. The 1st respondent has sufficient and secure properties in Uganda and shall be able to satisfy the decree in the event that the main suit succeeds. The land
10 comprised in LRV WAK 5553 Folio 14 at Nangabo, LRV WAK 5553 Folio 9 at Nangabo, and LRV 4546 Folio 5 at Nampunge is all mortgaged to Bank of Africa Uganda and therefore cannot be sold. The application should be dismissed with costs.

d. Submissions of counsel for the applicant;

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M/s Ahamyia Associates & Advocates on behalf of the applicant submitted that the affidavit in reply deposes to the powers of attorney. The affidavit of the 3rd respondent declares the place of the oath as Kampala. From Internal Affairs they have communication that he was last in the country on 3rd January, 2023. There is a mortgage on the land and the trucks can be sold. The
20 quarry has security detail manned by the Uganda Police. The applicant will meet the cost of securing the property. The claim is estimated at 20 million Yen, hence about US \$ 28,000,000. The value of the land is about 2.5 billion and trucks is US \$ 8,000,000. The claim is much more valuable than the property sought to be attached. The company is lending money to the directors. The 2nd respondent borrowed shs. 1,500,000,000/= on 13th August, 2021. Search certificates
25 show that they have mortgaged the property to Bank of Africa registered on 9th January, 2017 securing US \$ 500,000, securing the property is to guarantee recovery by negotiation with the ban. The respondents re out of the country. It is not clear who is managing the business. They have three sets of MEMATS for the same company for the years 2017 and 2020 yet the certificate of incorporation is dated 20th January, 2015. This points to a scheme of trying to
30 manipulate the company structure. It is part of a wider pattern of behaviour. The 2nd respondent is sole signatory and using e-banking can move funds around. The dispute began in 2018.

Property is mortgaged in 2019 and personal loans in 2021. They mortgaged “I” then “G” and “H”

The main suit seeks for among other orders, payment or cash out of the applicants’ contributions
5 to the 1st respondent's business and operations and payment of the applicants’ return on
investment in the 1st respondent for all the years unpaid. There is an irretrievable breakdown in
the business corporation of the parties. The past actions of the 2nd and 3rd respondents prove it,
wit; the fraudulent transfer of the applicants’ shares by Chen Jian Fang to the 2nd respondent,
denial of the applicants’ entry into the 1st respondent company premises and the subsequent
10 instituting of criminal charges against the applicants, the failure to pay the applicants their return
on investment for the various years outstanding, the fleeing of the 2nd and 3rd respondent from the
country, the grant of the huge loan amounts to the 2nd respondent without approval of the
applicants. With this trajectory it is eminent that the respondents are likely to put their property
out of reach of the applicants and this court, hence the need for an order for attachment before
15 Judgement to ensure that the applicants do not obtain a paper judgement at the end of the trial.

The Land comprised in LRV WAK 5553 Folio 14 Block l2l plot 2928 at Nampunge Bulemezi,
LRV WAK 5553 Folio 9 Block l2l plot 2921 at Nangabo Kyadondo, Wakiso District and LRV
4546 Folio 5 Brock 60 plot 23 are worth an estimated value of shs. 2,350,000,000/= Motor
20 vehicles “Sino Truck” are each valued at US \$ 80,000 making a total of US \$ 8,000,000. The
Dollar and Shillings Bank Accounts No. 0028650001 and 0028650002 held in Diamond Trust
Bank and Account No. 9030012632621 and 9030012632680 held in Stanbic Bank are in the
name of the 1st respondent. All the above property and any other identified by court would be
sufficient to satisfy the order if granted and a probable decree in the main suit.

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e. Submissions of Counsel for the respondents.

M/s Kampala Tax Advisory Centre-Legal Department on behalf of respondents submitted that
the application does not demonstrate the danger of moving assets. There is no evidence of
30 moving assets. Paras 22, 34 – 36 of the affidavit in support show the company is not in a poor
financial state. The directors have not behaved in a manner that exposes the assets. The suit is for

recovery if an investment. The 1st and 2nd respondents are not parties. Only the 3rd respondent is a party. The investment agreement is made in September, 2019. They have not defaulted as shown in annexure “G.” Supposing it is registrable involving the amounts of money. The company and the 2nd respondent deny having signed the agreement. It is inadmissible. They have
5 listed 97 trucks whose value is about US \$ 8,000,000 in para 35 of the application. Paragraph 5 (c) yet the claim is US 4,400,000. The alternative is caveats lodge don the registration. The application does not show that there is risk of moving property out of jurisdiction. Or that the property is being sold. The Company is sufficiently liquid with a sufficient asset base that can satisfy a decree.

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The application is baseless in law and an abuse of the court's process or is otherwise fundamentally improper for being frivolous and speculative. The rationale is that the applicants through inadvertence have conceded that this present application is premature. The applicants do not adduce evidence to prove that the 1st respondent is removing any assets out of the Court’s
15 jurisdiction. Thirdly the applicants do not adduce evidence to show that the 1st respondent is in the process of selling any of its assets to avoid satisfaction of a decree passed against it. Only shareholders can bring a claim for dividends in respect of the 1st respondent. Therefore the applicants are not the proper persons to bring this instant application. For one to be a shareholder entitled to a dividend, he or she must prove that he/she is a member of the Company. The
20 applicants are not subscribers to the articles and memorandum of association of the 1st respondent. Further the applicants have not furnished this Court with evidence that they have acquired share certificates or receipts of share purchase in the 1st respondent.

This new company is different from the 1st respondent and the agreement was signed 4 years
25 after the 1st respondent was incorporated and existent. It is not conceivable that the applicants could have thought to incorporate and obtain shares in the 1st respondent in 2019 and not in 2015. The 1st respondent’s date of incorporation is 23rd January, 2015. The impugned investment agreement executed on 25th September 2019 is meant to incorporate Bangcheng International Investment Company Limited, not the 1st respondent. The 1st respondent was already in existence
30 at the time of executing the investment agreement. The 1st and 2nd respondents are not signatories to the impugned agreement. The investment agreement was executed in China. In addition it is

not registered by Uganda Registration Service Bureau for it to be enforceable in Uganda. The applicants' case is premised on an unreliable and illegal investment agreement and contested, unreliable sales contract.

f. The decision;

The court is empowered to make a freezing order, with or without notice to the respondent, to prevent the frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied. According to section 64 (b) of *The Civil Procedure Act*, in order to prevent the ends of justice from being defeated, the court may direct the defendant to furnish security to produce any property belonging to him or her and to place the same at the disposal of the court or order the attachment of any property. On the other hand, Order 40 rule 5 (c) of *The Civil Procedure Rules*, provides that 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 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.

The conditions that must be satisfied are; - the applicant should show, *prima facie*, that his claim is bonafide and valid and also satisfy the court that the respondent is about to remove or dispose of the whole or part of his or her property, with the intention of obstructing or delaying the execution of any decree that may be passed against him or her, before power is exercised. In all instances the applicant is required, unless the court otherwise directs, to specify the property required to be attached and the estimated value of the property. The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

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Whether the respondent will have sufficient assets at the end of a trial to fully satisfy any judgment that may be obtained is a pertinent consideration both for the applicant and court. The last thing a litigant wants to do is to incur expenditure on litigation only to receive a paper judgment that cannot be satisfied. A plaintiff though is not normally entitled to secure assets in
5 advance to ensure that they will be available to satisfy a judgment that may not come for years (see *Lister v. Stubbs*, [1890] All E.R. 797). Attachment before the Judgment is considered a very harsh remedy because it substantially interferes with the defendant's property rights before the final resolution of the overall dispute. During the pendency of the suit, a defendant is normally entitled to carry on its ordinary course of business, and if business takes a turn for the worse and
10 there is no money left by the time a judgment is granted, that is too bad for the applicant.

However, in situations where the respondent has acted fraudulently in the past or may act fraudulently in the future, a plaintiff may be able to apply to the court for an order of attachment before judgment (a *Mareva injunction*). Hence in *Bahman (Prince Abdul) Bin Turki Al Sudairy v. Abu Taha*, [1980] 3 ALL ER 409 at 412 Lord Denning M.R. stated that;
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A *Mareva injunction* can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding or a danger of the assets being removed out of jurisdiction or disposed within jurisdiction or otherwise dealt with so that there is a danger that the plaintiff if he gets judgment will not be able to get it satisfied.
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The rationale behind an order of this nature was explained in *Polly Peck International plc v. Nadir (No 2)* [1992] 4 All ER 769, 785g-786a, as follows:

25 So far as it lies in their power, the courts will not permit the course of justice to be frustrated by a defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the applicant may thereafter obtain. It is not the purpose of [the] injunction to prevent a defendant acting as he would have acted in the absence of a claim against him. Whilst a defendant who is a natural
30 person can and should be enjoined from indulging in a spending spree undertaken with the intention of dissipating or reducing his assets before the day of judgment, he cannot be required to reduce his ordinary standard of living with a view to putting by sums to satisfy a judgment which may or may not be given in the future. Equally no defendant, whether a natural or a juridical person, can be enjoined in terms which
35 will prevent him from carrying on his business in the ordinary way or from meeting

his debts or other obligations as they come due prior to judgment being given in the action. Justice requires that defendants be free to incur and discharge obligations in respect of professional advice and assistance in resisting the applicant's claims. It is not the purpose of a [the] injunction to render the applicant a secured creditor, although this may be the result if the defendant offers a third party guarantee or bond in order to avoid such an injunction being imposed.

Such an order freezes the respondent's assets pending trial. They are granted for an important but limited purpose: to prevent a respondent dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign (see *Fourie v. La Roux* [2007] UKHL 1).

Because orders of this nature run contrary to the general rule against execution before judgment, extreme caution should be exercised before grant of such an order. It may be abused by the applicant who may choose to use it as a leverage for coercing the defendant to settle the suit, or as an end in itself, thereby truncating the pending litigation at the very outset or, cause unnecessary hardship to the respondent or third parties. The order should be made in exceptional cases and for that reason, for the order to issue, the applicant must establish that:

1. The applicant 's case for damages against the respondent is strong and likely to succeed;
2. 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 the 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.

An order of this nature can have very serious adverse effects often over a long period, sometimes even financial ruin, for the individual or company against whom it is made. The court should

therefore be satisfied not only that there is a properly arguable case against the respondent and a risk of dissipation or hiding of assets, but also as to the proportionality of the order. Mere foreign residence or domicile of the respondent is not enough. The Court ought to be furnished with details, so far as they can be established, about the nature and financial standing of the respondent's business including its length of establishment.

i. Existence of a prima facie, bonafide and valid claim.

Regarding the existence of a suit that is likely to succeed, the test of a good arguable case is that it must be one which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success (see *The Niedersachsen* [1983] 1 W.L.R. 1412; [1983] 2 Lloyds LR 600).

I have considered the pleadings filed by the applicants. The subject matter of the dispute between them and the respondents is that the applicants claim to have made capital contributions of up to ¥ 57,919,927 to the 1st respondent's business operations, under a nominee shareholding agreement signed on 25th April, 2015 and an investment agreement signed on 25th September, 2019, they seek orders; for inspection of the 1st respondent's books of account, an inspection of the 1st respondent's operations, cash out their contributions to the 1st respondents, business undertakings, recovery of their return on investment, and enforcement of the investment agreement.

Ms. Chen Jian Fang is one of the subscribers to the memorandum and articles of association of the 1st respondent, registered on 23rd January, 2015. The applicants executed a nominee shareholding agreement on 25th April, 2015. By that agreement, Ms. Chen Jian Fang was constituted a nominee shareholder in the 1st respondent, holding shares therein on behalf of the applicants. In their capacity as signatories to the investment agreement of 25th September, 2015 the applicants have the *locus standi* to maintain a suit for breach of contract and for specific performance, in the course of which they may seek relief of rendition of an account, while in their capacity as the beneficial owners of shares held by Ms. Chen Jian Fang in the 1st respondent or her nominators under a nominee shareholding agreement signed on 25th April, 2015, they would have had the capacity to commence a derivative suit.

The suit is based on averments of fact, which if established by evidence, are capable of supporting a finding in the applicants' favour. The applicants have shown a good, arguable case on the merits. It is not appropriate or necessary to go into the merits in any detail: the issues are
5 hotly disputed and would remain for trial. The applicants' claims cannot not be rejected as fanciful and satisfies the test. I am satisfied that the applicant's claim meets this test. The applicants present a strong *prima facie* or good arguable case on the merits.

- 10 ii. Removal or disposal of the whole or part of the respondents' property, with the intention of obstructing or delaying the execution of any decree that may be passed against the respondents.

Risk of dissipation is usually the most important factor. If the applicant can satisfy the test, it is then for the court to decide whether it is just and convenient to grant the order. An order of this
15 nature is not meant to prohibit the respondent from dealing with its property in the ordinary and proper course of business but only where there is a real risk that the respondent will dissipate or dispose of the property other than in the ordinary course of business. It is for that reason that both Order 40 r 1 (a) (iii) and Order 41 rule (1) (b) of *The Civil Procedure Rules* require proof that the respondent has dealt with its property or any part of it "with intent to delay the plaintiff,
20 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," or that the circumstances afford a reasonable probability that the applicant will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the respondent in the suit

25 I am persuaded by the decision in *Uganda Electricity Board (In Liquidation) v. Royal Van Zanten (U) Ltd, H.C. Misc Application No. 251 of 2006*, where it was decided that;

Court ought to be satisfied not only that the defendant is really about to dispose of his property or about to remove it from its jurisdiction but also that the disposal or removal is with intent to obstruct or delay the execution of any decree that may be
30 passed.... the satisfaction must be of the Court as regards these matters and it must be based on some material derived either from the affidavit of the party, applying or otherwise. (emphasis added).

The standard of candour required in applications for orders of this nature was explained in *Rex v. Kensington Income Tax Commissioners, Ex parte de Polignac (Princess)* [1917] 1 K.B. 486 at 509), and emphasised in *Re Stanford International Bank Ltd* [2011] Ch 33, as follows;

5 ... it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal
10 dealings is considerable. An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect [an applicant] seeking an ex parte
15 order must put on his defence hat and ask himself what, if he were representing the respondent or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge.

The level of disclosure required was outlined in *Siporex Trade SA v. Comdel Commodities*
20 [1986] 2 LR 428 at 437 as follows;

1. The applicant is required to show the utmost duty of good faith and must present his case fully and fairly; as such “fair presentation” cannot be separated from the duty;
2. The affidavit or witness statement in support of the application must summarise the case and the evidence on which it is based;
- 25 3. The applicant must identify the key points for and against the application and not rely on general statements and the mere exhibiting of unhelpful documents;
4. He or she must investigate the nature of the claim alleged and facts relied on before applying and must identify any likely defences;
5. He must disclose all facts, or matters, which reasonably could be taken to be material by
30 the judge deciding whether to grant the application; the question of materiality is not to be determined by the applicant.

The applicant must ensure that the information included in the affidavits sworn in support of the application to the court constitutes full and frank disclosure of all relevant and material facts.

This is because applications of this nature are usually brought without notice to the respondent (since to give prior notice would risk the assets being dissipated or removed before the court can hear the matter), and therefore the court makes an initial order having heard only one side of the story. To a great extent, therefore, the court is at that stage relying on the candour and integrity
5 of the applicant and must assume, when granting such orders, that it has not been misled. Any evidence to support the inference that the respondent is, or will dissipate or dispose of assets, must be carefully considered by court.

The Courts will focus on whether, on the facts and circumstances of the particular case, the
10 evidence adduced objectively demonstrates a risk of unjustified dissipation. A risk which is “theoretical” or “fanciful” will not meet that threshold. To show that there is a real risk of dissipation, the applicant is required to disclose all relevant evidence showing assets are being divested or dissipated. In *Ninemia Maritime Corpn v. Trave Schiffahrtsgesellschaft mbH und Co KG [1983] 1 WLR 1412* it was held that;

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It is not enough for a plaintiff to assert a risk that the assets would be dissipated. He must demonstrate it by solid evidence. That evidence might take a number of different forms. It might consist of direct evidence that the defendant had previously acted in a way which showed that his probity was not to be relied on. Or the plaintiff
20 might be able to found his case on the fact that inquiries about the defendant's characteristics has led to a blank wall. Precisely what form the evidence might take would depend on the particular circumstances of the case. It would not be enough merely to prove that a company was incorporated abroad and to allege that there were no reasonable assets in the United Kingdom apart from those which it was
25 sought to enjoin

The term “real risk of dissipation” should not be equated with “likely, “more likely than not.” A “real risk” is one that is more than fanciful and such a risk must not require a comparative exercise to be carried out to justify its status as being “real.” It does not have to be proven that
30 dissipation either has happened or would happen, but only that there are objective facts from which such a risk could be inferred. For example, in *Shepherd Construction Ltd v. Berners (BVI) Ltd and another [2010] EWHC 763 (TCC)* a history of repeated and broken promises was sufficient to justify a finding that there was a risk of dissipation. On the other hand, in *Les*

Ambassadeurs Club Ltd v. Yu [2021] EWCA Civ 1310, where Court found that Mr. Yu had had ample opportunity to place his assets beyond the reach of the judgment creditor, but he had not availed himself of this opportunity, the Court observed that whilst Mr. Yu had the wherewithal to easily move his assets out of reach of creditors in the jurisdiction, this fact alone did not amount
5 to a real risk of him doing so. The Court found that there was no “real risk of dissipation” and declined to grant the order. There merely existed a suspicion or fear that there was a risk that the member would dissipate assets. By a resolution dated 13th August, 2021 the respondents lent a sum of shs. 1,500,000,000/= as an interest free loan for a period of two months. In the absence of any explanation, the Court considers this *prima facie* evidence of an act that can be characterised
10 as dissipation.

Risk of dissipation of assets can be gauged from the nature of allegation and past behaviour of the defendant. Prior misconduct, dishonest behaviour and unreliability is adequate to prove an apprehension of risk (see Gee Steven, *Commercial Injunctions*, 5th edn, Sweet & Maxwell,
15 London, 2004). In *Dynasty Rangers v. SBSK Plantations* (2001) 7 CLJ 168; [2001] MLJU 439 it was held;

Good grounds for alleging that the defendant has been dishonest is relevant. Dishonesty is not essential to the exercise of the jurisdiction and there is no need to show an intention to dissipate assets. But if there is a good arguable case in support
20 of an allegation that the defendant has acted fraudulently or dishonestly (e.g. been implicated in an ingenious scheme for the misappropriation of funds belonging to the claimant), or with an unacceptably low standard of commercial morality giving rise to a feeling of uneasiness about the defendant, then it is often unnecessary for there to be any further specific evidence on risk of dissipation for the court to be entitled to
25 take the view that there is a sufficient risk to justify granting Mareva relief.

In the instant case the organogram of the 1st respondent has over time become opaque. The experience of those who practise and sit in this Court is that such structures do lend themselves to being abused. The structure of the 1st respondent, with a sole signatory to its bank accounts
30 and a sole director out of jurisdiction, enables those who wish to move assets around or to hide them to do so more easily. Although this in itself is not a ground for inferring a risk of dissipation, it is capable of being regarded as contributing to the risk if there are other material on which to infer such risk. I have considered the fact that in the past, while it still had two

directors, they passed a resolution extending an interest free and unsecured loan of a substantial amount of money to one of the directors. There is a risk in this in that when the borrower makes decisions that do not make best use of the cash that the company is making available, the repayment of that cash is in jeopardy. The respondents have not shown that it has been recovered.

5 At any rate, the applicants have demonstrated that the respondents lack probity, which is sufficient to establish a real risk of dissipation of assets.

iii. Specification of the property to be attached; assets held by or on behalf of the respondent within the (geographical) scope of the proposed injunction.

10 This type of injunction is defined not by its geographic scope but rather by the assets to which it applies. The respondent must have assets within the jurisdiction of the court. In some cases it would be difficult to craft injunctive relief limited to the respondent alone, or to a single geographic region, in cases involving easily dispersed or mobile items. Assets could include contractual rights and choses in action. The scope should extend no further than necessary to
15 provide complete relief to the party seeking the injunction. The value of the assets restrained should usually not exceed the maximum amount of the applicant's likely claim including interest and costs.

The applicants seek the attachment before judgment, of land comprised in Bulemezi Block 60
20 Plot 231, LRV 4546 Folio 5 at Nampunge; Kyadondo Block 121 Plot 2927, LRV WAK 5553 Folio 9 at Nangabo; and Kyadondo Block 121 Plot 2928, LRV WAK 5553 Folio 14 at Nangabo; 97 "Sino Truck" lorries; and funds in US dollars and Shillings on Bank Accounts No. 0028650001 and 0028650002 held in Diamond Trust Bank and Account No. 9030012632621 and 9030012632680 held in Stanbic Bank, all in the name of the 1st respondent. All these are
25 assets belonging to the 1st respondent which are capable of preservation until a judgment can be obtained or satisfied.

iv. In all the circumstances it is just and convenient to grant the order sought.

30 The balance of convenience must be in favour of the applicant being granted the injunction. The focus should be on whether, on the facts and circumstances of the particular case, the evidence

before the court objectively demonstrates a risk of unjustified dissipation which is sufficient in all the circumstances to make it just and convenient to grant a freezing injunction. Being a discretionary remedy, the court must also consider the proportionality of the order. The effect of the order on the respondent's ability to conduct its business in the ordinary course is a relevant
5 consideration since its liability is yet to be determined. The question of proportionality relates to how to balance the need to preserve the interests of the applicant pending the outcome of the decision of court, protecting the integrity and not undermining the authority of the court's orders and judgment while at the same time protecting the rights of innocent third parties lawfully created in the course of commercial transactions with the respondent. For example in
10 *Commissioners of Customs and Excise v. Anchor Foods Ltd (No 2)*, [1999] 3 All ER 268, [1999] 1 WLR 1139 after the Court observing that such orders should not be used to interfere in normal business acts, it made an order granting the injunction, subject to an undertaking for costs, and allowing the defendant to bring evidence as to the proper values of the assets to be transferred.

15 Freezing orders are obviously highly restrictive, but they should not be used oppressively. The respondents should not be forced to cease trading and they should be allowed to meet reasonable expenses (see *Ninemia Maritime Corpn v. Trave Schiffahrtsgesellschaft mbH und Co KG* [1983] 1 WLR 1412). Ordinarily the applicant will be required to make an undertaking that if it is later determined that the order should not have been granted and the respondent suffers damages as a
20 result of attaching its property, the applicant will pay the respondent the damages. The applicant undertakes to submit to such order as the Court may consider to be just for the payment of compensation (to be assessed by the Court or as it may direct) to any person (whether or not a party) affected by the operation of the order. Such an undertaking is almost certainly mandatory, unless dispensed with by court for good reason such as the possibility of stifling the action (see
25 *Customs and Excise Commissioners v. Anchor Foods Ltd* [1999] 1 WLR 1139). The requirement is meant to weed out speculative or tactical applications and provides the court with added assurance that the applicant is serious and confident in the justness of its cause.

Further justification of such a cross-undertaking is to be found in *Re Bloomsbury International Ltd* [2010] EWHC 1150 (Ch), 12, Per Floyd J; -
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The court makes the litigant give a cross undertaking in damages against the possibility that it may turn out at trial that the order should not have been made. In a case where it does turn out that an order should not have been made, the party restrained may have suffered harm at the behest of the litigant which would result in injustice if there existed no means for it to be redressed. Absent a cross undertaking, the law does not provide any automatic means of redress for a party who is harmed by litigation wrongly brought against him in good faith. The cross undertaking is the means by which the court ensures that it is in a position to do justice at the end of the case

In the instant case, the fact that the 1st and 2nd respondents have quit jurisdiction is a justification for dispensing with this requirement. I have considered further the circumstances of this case. The respondents have in the past engaged in activities that establish a real risk of dissipation of assets, their removal or disposal in a manner that renders the possibility of future tracing of the property remote. There is clear and irrefutable evidence to show that there is a real risk that the 2nd and 3rd respondents may take the 1st respondent's property out of the reach of this court with the effect of avoiding the possibility of a judgment. It appears to me that the applicant's fears that the circumstances in the instant case afford a reasonable probability that the applicant will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the respondent in the suit, are backed by any credible evidence. There is direct evidence that the 2nd and 3rd respondents have acted in an unreliable fashion previously and therefore, cannot be trusted.

The injunction has the effect to prevent a party from removing or hiding certain assets. The form of the order is vital if it is to achieve its permissible object, whilst protecting the respondents and third parties from oppression and prejudice so far as is possible, consistent with the attainment of that object. The order should exclude dealings by the 1st respondent with its assets for legitimate purposes; in particular, payment of ordinary operational expenses, reasonable legal expenses and business expenses bona fide and properly incurred and dealings and dispositions in the discharge of obligations bona fide and properly incurred under a contract entered into before the order is made. As a result, in the circumstances taken as a whole, I am persuaded that it is just and equitable to grant the relief. Accordingly, the following orders are made;

- a) Subject to the existing mortgages thereon, the land comprised in in Bulemezi Block 60 Plot 231, LRV 4546 Folio 5 at Nampunge; Kyadondo Block 121 Plot 2927, LRV WAK 5553 Folio 9 at Nangabo; and Kyadondo Block 121 Plot 2928, LRV WAK 5553 Folio 14 at Nangabo is attached before judgment.
- 5 b) 75% of all funds now standing to the credit of the 1st respondent on its US dollars and Shillings Bank Accounts No. 0028650001 and 0028650002 held in Diamond Trust Bank and Account No. 9030012632621 and 9030012632680 held in Stanbic Bank, are hereby frozen and attached before judgment.
- 10 c) Until further orders of this Court, the 2nd and 3rd respondents, their agents, successors in title and persons claiming under them, are not to withdraw within one month, more than 25% of all future deposits made onto the 1st respondent's US dollars and Shillings Bank Accounts No. 0028650001 and 0028650002 held in Diamond Trust Bank and Account No. 9030012632621 and 9030012632680 held in Stanbic Bank.
- 15 d) Out of the 79 "Sini Truck" Lorries registered to the 1st respondent, 73 of them are hereby attached before judgment.

The 2nd and 3rd respondents are thereby hereby directed within fourteen (14) days from the date of this order, to furnish security in such sum of shs. 50,000,000/= each or to produce and place
20 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 they should not furnish security. For the avoidance of doubt, this order does not prohibit the 1st respondent from:

- 25 1. Withdrawing up to 25% monthly of future deposits made onto any of the above mentioned bank accounts for its operational expenses, inclusive of legal expenses,
2. Dealing with or disposing of any of its other assets in the ordinary and proper course of its business, including paying business expenses bona fide and properly incurred; and
- 30 3. in relation to matters not falling within (1) or (2) above, dealing with or disposing of any of its other assets in discharging obligations bona fide and properly

incurred under a contract entered into before this order was made, provided that before doing so it gives the applicants, if possible, at least seven (7) working days written notice of the particulars of the obligation.

- 5 Anyone served with or notified of this order, including the respondents, may for good reason apply to the Court at any time to vary or discharge this order or so much of it as affects the person served or notified. The costs of the application will abide the result of the suit.

Delivered electronically this 9th day of August, 2023.....**Stephen Mubiru**.....

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Stephen Mubiru
Judge,
9th August, 2023.