THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGAND AT KAMPALA

Misc. Application No55/2012

(Arising from Civil Suit No 57/2008)

1 A-TEC INDUSTRIES (UGANDA} LTD
2 KILEMBE COPPER SSMELTER LTD- APPLICANTS/OJBECTORS

VERSUS

1 GUNTER PIBER
2 BUWEMBE BREWERIES & DISTILLERS LTD} PLAITIFFS/JUDGEMENT CREDITORS

3 E-KRALL INVESTMENTS LTD
4 THOMAS EGGEENBURG
5 DRB MINING (U) LTD DEFENDANTS/JUDGMENT DEBTORS

BEFORE: HON MR JUSTICE ANUP SINGH CHOUDRY

Dated this 20th November 2012.

RULING

(Attachment and Execution. Possession; Company law - Board Resolution or ratification required for company Secretary to commence proceedings; Affidavit defective not sworn on behalf of company; MOU not binding agreement; MOU treated as Sec 40 Memo viz land; Assignment of sublease must be by deed; Equitable assignment until title registered; Licence to occupy not give interest in land or demise thus gives no physical possession for the purposes of attachment. Licence determined at will; Holding companies holding shares; same persons for attachment.). Wasted Costs Order under Order 98 CPR Act against the Advocate under Inherent powers for misconduct.)

Representations:

Andrew Bagaye for the Objector of Andrew and Frank Advocates

Kenenth Mununguu Counsel for the Objector of Mushabbe Mununguu and Co Advocates

Ssemamambo Rashid and Reneto Kania Counsels for Judgment creditors of Kalenge Ssemamambo and Co. Advocates

Riber Gunter-Judgment Creditor

Owor John, Director, 2nd Judgement Creditor Company.

This is an application by way of Notice of Motion under S.33 of the Judicature Act, 022 Rule 55(l)and (2), and 56 and 57; Order 52rrl and 3 of Civil Procedure Rules, to stay the sale of goods by the Judgment Creditor namely a rotating furnace; a small grinding mill and copper slugs . The judgment creditors attached these goods at plot M25 Masese Jinja. The Warrant of attachment dated 15th February 2012 commanded the auctioneers/ bailiffs to attach the moveable property of the judgment debtor in satisfaction of the debt and for the purposes of this application included the three items mentioned above.

Brief facts

On 6th March 2012 the Objector Company A Tech Industries (Ug) Ltd (hereinafter called the Objector) preferred a claim to the property attached on the grounds that they purchased the rotating furnace from Turkey in early January 2012 for the sum of Euros 123,969 and, thus, are the owners and in possession thereof and that the remaining two items namely the copper slug and grinding mill were transferred to the Objectors by the Judgment Debtors pursuant to a Memorandum of Understanding dated 18th September 2008 and that they are the Assignees / possessors of these latter items and became so 4 years prior to the attachment. That the judgment debtor have no interest whether legal or equitable in the attached properties including the premises at Masese Jinja, which had also been assigned and thus the warrant was issued in error. The application is supported by affidavit of Andrew Bagaye, the Company Secretary. He was also Counsel for the Judgment Debtor before filing this application

Issue

The question to be decided is, whether on the date of attachment on 15th February 2012, the judgment debtor or the Objector was in possession, or where the court is satisfied that the property was in possession of the debtor, it must be found whether they held it on their own account or on trust for the judgement debtor. The sole question to be investigated is, thus, one of possession. Question of legal rights and title are not relevant except so far as they effect the decision as to whether the possession was on account of or on trust for the judgment debtor or some other person. To that extent the title may be part of the enquiry.

See Harilal and Co v Buganda Industries Ltd (Her Majesty's High Court of Uganda at Kampala (Lewis J) May 5 1960).

Brief Background

This case has a long history of perpetual litigation. It commenced in 2008 under case No 57 of 2008.The judgment Creditor sued the four Judgement Debtors - E Ekrall Investments (U) Ltd, DRB Mining U Ltd, Thomas Eggenburg and Joseph Byamugisha- for moneys held and/or lent to the debtors. Judgement in favour of Judgement creditor was given on 8th August 2011.

On 11 December 2011, the Judgement debtor brought an application to stay execution in the Court of Appeal. Another application was also filed prior to Court of Appeal in the High Court under Application No 145of 2011.It arrived before me. In view of the concurrent jurisdiction of both courts to deal with stay of application, I ordered the payment of judgement debt into the court pending hearing in the Court of Appeal. The order to pay was not complied with and the application in the Court of Appeal was withdrawn and/ or not proceeded with. Andrew Bagaye was Counsel for the judgement debtor. He is also the Secretary of Objector Company .And commenced proceedings on behalf of the Objector. His affidavit does not confirm that he filed the same on behalf of the Objector There is no evidence before the court of any Board Resolution or ratification that authorised Andrew Bagaye to issue these proceedings on behalf of the Objector.

Objectors submission is that the premises and goods were assigned or transferred to them pursuant to the Memorandums of Understanding (MOU) dated 18th September 2008 and they have been in possession at ail material times..

MOU

From legal point of view the term Memorandum of Understanding! MOU) should only be used to depict and embody the understanding of the parties in principle without creating any right or obligation of legally binding nature unless the MOU specifically stipulates that the document is to have legal effect. The document is a gesture of goodwill .It has no legal effect in the commercial domain. It cannot be enforced by action.

' A distinction is drawn between ,on the one hand **,** documents which are only informal memoranda , and , on the other,, those which are intended as a complete contract documents , ie exhaustive records of the terms finally agreed' to which parties consider themselves bound. (VideTrietel GH , An Outline of the Law of Contract, 4th Ed, Butterworth p75).

In Milner v Percy Bilton (**1966) 2 ALL E.R 894)** the term "understanding' was held to mean ' something quite different from a binding legal contact; at utmost the word connotes a gentleman's agreement.

Synonymous with MOU are terms such as Heads of Agreement or Letter of Intent. The Courts will however attempt to give effect to individual heads of the MOU to the extent that they are severable and binding; where it is possible to construe a reasonable construction of the undertaking..

The Memorandum of Understanding before this Court dated 18th September 2008 is headed **Memorandum of Agreement and Understanding.lt** is both a Memorandum of Agreement and a Memorandum of Understanding. It is not solely a Memorandum of Understanding. Its legal implications will therefore

follow different regimes-the sublease will fall under the agreement and the other 2 items will be caught by the MOU.

In my view the Agreement of Understanding to assign the sublease can be treated as Sec 40 Memo.
Under the historic Section 40 of the English law of Property Act 1925 (Section 40 Memo) which every freshman and lawyer in coveyancing law is familiar with, a contract for sale of land has to be in writing or evidenced by a Memorandum in writing (Sec 40 Memo), otherwise it was unenforceable by action. Sec 40 applies to any contract for sale of land or other disposition in land or any interest in land. Disposition is define as including a conveyance which in turn is defined as including mortgage, charge, lease . Thus contract for the sale of land or the grant of lease or assignment of lease is caught by this section.

Section 40 of LPA 1925 has now been amended by Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. It states:

2(1) - A contract for the sale or other disposition of interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document, or where contracts are exchanged in each. 2(2) the term may be incorporated in a document either by being set out in it or by reference to some other document
2(3) the document incorporating the terms, or where the contract are exchanged, one of the documents incorporating them must be signed by or on behalf of each party to the contract.
Under Section 2(6), disposition means
Interest in land and means any estate, interest or change in or over land.

Grossman v Hooper, (2001**) ALL ER (D) 245(Apr)** Held: a contract of sale of Land must be in writing and include, in document or in each document, if contracts are exchanged, all the express terms that have been agreed

between the parties (Sec 2 Law of Property (Miscellaneous Provisions) Act 1989. However Sec 2 only applies to Executory contracts.
For the purpose of the MOU this court is satisfied that there is sufficient evidence in writing to assign the sub lease under Clause 3c of the Memorandum of Agreement /MOU and to that extent the agreement can be acted upon. The MOU was signed by both parties and contains terms of assignment of sub lease which are reasonably discernible.
However the issue is whether there was effective assignment of the sub lease. Copy of Title of Registration (Exhibit B to the affidavit in rejoinder) indicates that the sublease to debtor E Ekrall was to be assigned to the Objector and a caveat thereto is registered accordingly to protect that transaction. This is registered on 31 st October 2008 after the agreement was signed on 8th September 2008.
Any assignment or grant of a lease must be by deed: S 52 English Law of Property Act:' all conveyance of land or any interests therein are void for the purposes of conveying or creating a legal estate unless made by deed

A mere caveat on the registered title of the lessor is not evidence of assignment sublease. In the absence of a deed there is no assignment.
In Brown and Root Technology Ltd v Sun Alliance and London Assurance Co Ltd (2001) Ch. 733, the Court of Appeal held that an assignee will only enter into a relationship of privity of estate with the landlord on the date on which the assignment is registered at the land registry. It is not until this date that the legal term is actually vested in the assignee. Hence assignment takes place in equity until completed by registration. It is only a registration which effects assignment of the lease in law.
Until registration the assignment is an equitable assignment.

An equitable assignee cannot bring an action on his own. Can it be said that an equitable assignee can be in possession of demise? In my view it would be a dangerous practice to allow an equitable assignee to take possession and it is most unlikely that a well drafted contract of assignment would contain such a term.

The term possession is defined in Black's law Dictionary 7th Ed by Bryan AGarner at pg 1183 as follows:

1 ***The fact of having or holding a property in one's power.***

2 ***The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object;***

3 ***Something that a person owns or controls.***

The same author define actual possession as:' physical occupancy or control over property while constructive possession is control or dominion over property without actual possession or custody of it

An equitable assignee without value and in occupation of the land has a licence pending registration of the title; and cannot have physical or constructive occupation because the licence can be determined at will. A licence does not pass any interest in land and does not amount to a demise; nor does it give exclusive right to the licensee to use the demise.

I am satisfied that there was no legal assignment of the sub lease as there was no deed or registered sub lease at the time of attachment even if it was intended to grant a sub-lease under the Agreement / MOU. The objector was not in possession of the premises, physical or constructive occupation as he had no demise.

The creditors submit that the MOU dated 18th September 2008 precedes the Incorporation of the Objector company, A Tech Industries (U) Ltd which was Incorporated on the 19th September 2008;.and that the MOU was void ; the

Objector did not have capacity to enter into any agreement-they did not exist.

The eloquent explanation given by Mr. Bagaye in his affidavit in rejoinder (Para 4) is that certificate of Incorporation was issued on 18th September but the name of company was miss pelt as Enterprises and not Industries. The forms were resubmitted for amendment and the certificate was issued on 19th September. This is not a convincing explanation: Each company has its peculiar name and specific Incorporation Number. The amended Certificate of Incorporation from the Companies House would have shown that. There was no such certificate produced to the court.
I am satisfied that the incorporation of the Objector company on 19th September 2008 was conclusive evidence and confirmed officially.
The company was not in existence at the time of signing the MOU. Any proposed assignment of sublease was void. . For the same reason the judgement debtors could not have assigned to the Objector Company the goods in a void document.
The Objector cites 2 cases to support their submission. Prompt Facilities Ltd v Rihard Onen (Respondent) and Joyce Ataro Kitgum (Objector). Misc Applic. No 25of 208 arising from case No 256 of 2007.The second case is Uganda Mineral Waters Ltd v Amin Piran and Kampala Minerals Ltd (Misc Appplic. 531 of 195 arising from Case No 308 of 1992 .These cases do not help the Objector and they can be distinguished from the facts of this case where the Objector was not in possession.

In light of the facts that have unfolded in this hearing I have paid due attention to the affidavit deposed by the Objector. . And in my view this affidavit is void.
It is not sworn on behalf of the Objector Company.

A company secretary has no power, without the Resolution of the directors of the company to commence any proceedings on behalf of the company.

See Dainter Co Ltd v Continental Tyre and Rubber Co (Great Britain)Ltd (1926) 2Ac 307 HC.

The Court has not seen any ratification by the directors of the company for issuance of proceedings by Andrew Bagagye in the absence of Board Resolution..

See Moline v London, Birmingham, and Manchester Insurance Co (1902) KB 589 at 596 CA

This court is satisfied at all material times the properties and goods including the premises were held by the debtor E Krall Ltd. Objectors application in this regard is therefore dismissed.

Under Sec 3 of the English Charging Orders Act 1979, so far as material provides: subject to the provisions of the Act, a charge imposed by a charging order shall have the like effect, and shall be enforced in the same courts and in the same manner as an equitable charge created by a debtor by writing under his hand.

I shall now consider whether the Rotating furnace was in the possession of the Objectors, as they submit that they purchased it in Turkey at the price of 123,960 Euros around January 2012 and it was subsequently imported by ship. The Bills of lading stand as evidence of the Objector's title to the goods.

Bill Of lading (Definition in Law Dictionary 3rd Ed by R Hardy Ivamy, Butterworth):

A mode of authenticating the transfer of property in goods sent by ship. It is, in form, a receipt from the captain given to the shipper or consignor, undertaking to deliver the goods, on payment of the freight, to some person whose name is expressed in it, or endorsed on it by the consignor. The delivery of this instrument will transfer to the party so named (usually called the consignee), or to any other person whose name is endorsed thereon, the property in the goods. It is thus used both as a contract of carriage and as a document of title to the goods (See Carriage of Goods by Sea Act 1971)

The significance of the Bill of Lading as evidence of a right to possession is shown in the decision of the court of Appeal in ***Trucks & Spares ltd v Maritime Agencies (Southampton) Ltd (1951) 2 ALL ER 982*** *in which the court ordered the carriers to deliver to consignees notwithstanding that the bills of lading had been retained by the carrier in respect of the shipper's indebtedness to them. DENNIG L.J, said ' I think we cannot allow strangers to the contract of carriage to claim the goods at this stage without production of bills of lading.*

Evidence before this court (Exhibits fl to f3) show that the consignor was A Tec Industries AG in Vienna (see sales invoice Fl) who paid for the consignment. The consignee was A Tech Industries U Ltd. And the goods were dispatched on 1st January 2009. The freight on arrival in Jinja was paid by the Objector. Objectors were clearly the possessors of the goods and owner thereof as evidenced by bills of lading. Creditors however submit that that Objector was not the owner nor the possessor of rotating furnace and they rely on the sales invoice that was paid by someone else; and that it was imported by the judgement debtor E Ekrall as reflected in the MOU date 18th September2008 (see para 2 (b) (ii)).

In other words it was a benami transaction i.e where a property is purchased by one person for which consideration has been paid or provided by another person, the said transaction is considered to be a benami transaction. The role of this court is not to investigate benami transactions. However to satisfy itself that the goods were not held on account of the judgement debtor or some other person the court will consider the shareholding in the debtor company and the Objector company :

E- Krall Ltd

Shareholders are: Michael Krall 100 shares; Thomas Eggenburg 100 shares; and Congo Mining Holdings GMBH 800 shares. CEO of Congo Mining Holdings Ltd was Thomas Eggenburg one of the judgement debtors.

On 6h March 2012 Congo Mining Holdings sold its 8800 shares to Deustche Rohstoff Begbau Ag (DRB) for 88.000.0000 shillings. DRB therefore became a shareholder in E Krall Ltd.

The shares in DRB and Congo Mining Holdings Ltd were signed by Thomas Eggenburg . Thus the two companies DRB and Congo Mining Holdings are apparently the holding companies of Thomas Eggenburg and Michael Ekrall. The shares of DRB were held in favour of Michael Ekrall and Thomas Eggenburg (see para 2a of the MOU)

A holding company is one that has no operations, activities or active business but holds assets such as shares.

8800 shares of DRB held in Ekrall were later transferred to A Tech Uganda Ltd in consideration of A Tech providing capital and protecting E Krall's operations at Masese Jinja (see para 2b of the MOU) Thus A Tech Ltd also became a major shareholder in E Krall. The Objector became a shareholder in E Krall, of which they were stakeholders.

Rotating furnace possessed by the Objector was in fact the possession of E Krall because the operations at Masese were the operations of Ekrall (see para 2b of the MOU) and under par 2b the Objector was to pay custom duties, storage and transportation to the furnace suppliers in consideration of transfer of the said 8800shares.

The Objector also brought as its investors and shareholders A Tech Industries AG and A Tec Minerals and Metals GMBH on 19th September 2008. A Tech Industries AG in Vienna bought the rotating furnace to introduce capital on behalf of E Krall.

The Objector company was effectively a holding company for Michel Krall and Thomas Eggenburg. And the new shareholders in the Objector company introduced capital to sustain EKrall at Masese Jina such as purchasing the rotatory furnace.

For the above reasons the court is satisfied that the judgement debtors and the Objector Company are the same people .The judgement debtors operated through its holding companies such as A Tech Uganda limited. A Tech Uganda Ltd was main shareholder in E Krall and it arranged to introduce capital

through its new shareholders which were also holding and connected companies.

I am satisfied at all material times the properties and goods including the premises were held by the debtor company E Krall Ltd directly or indirectly. I am also satisfied that the MOU was entered into for the express purpose of saving the judgement debtors movable property from execution.

The result is that the Objector having failed to establish that on the date of the attachment they were in possession either actual or constructive, and failed to disclose that they were shareholders of the debtor company, the application must be dismissed with costs.

The application was not authorised by the company and was filed at the behest of Andrew Bagaye, a lawyer and officer of the court. It was an abuse of the court process and resulted in wasted costs and time. I therefore order wasted costs of this application to be paid to the creditors by Mr. Andrew Bagaye personally. This should send a signal to other advocates as a deterrent and clear message that the arms of the courts will catch those who manufacture cases before the courts. .

Mr. Bagaye should have known full well the status of both companies as a prudent advocate. He failed as an advocate to understand that one cannot execute a document with a non-existing company. And that a caveat is not evidence of an assignment of a lease.

It is wrong for an advocate to get emotionally involved with his client at the expense of compromising his professional obligations. It is conduct unbefitting an advocate. Such futile cases enlarge the courts backlog.

Choudry
JUDGE
20 November 2012.