THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISC APPLICATION NO. 044 OF 2022

(Arising From Civil Suit No. 05 of 2022)

EVELYN BACHWENKOJO KARUGABA
(Suing through her lawful attorney
DENIS KARUGABA MARUNGA) ::::::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

SHENGLI ENGINEERING CONSTRUCTION CO. (U) LTD ::: RESPONDENT

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO

RULING

Introduction,

The applicant filed this application by Chamber Summons under Section 33 of the Judicature Act, Section 64(b), (e) & 98 of the Civil Procedure Act, Order 40 Rules 1 (a) of the Civil Procedure Rules (CPR) for orders that;

a) That the respondent's performance and retention money guarantees/bonds given in favour of Uganda National Roads Authority (UNRA) in respect to the execution of contractual works for the construction of the 100.4Km Kyenjojo-Kabwoya road be attached before judgment.

   Alternatively,

b) The respondent be ordered to furnish security in the form of a bank guarantee in the sum of UGX 3,000,000,000/= within 30 days from the date of the order

c) That the costs of this application be provided for.

The grounds of the application are reflected in the chamber summons and in the affidavit of Denis Karugaba Marunga, attorney of the applicant, and the gist of which is that;

i. The respondent is domiciled in the People's Republic of China but is executing contractual works for the construction of the 100.4Km Kyenjojo-Kabwoya road in Uganda since October 2019
ii. The respondent has been illegally trespassing and extracting rock materials from land jointly owned by the applicant and Irene Karugaba Baguma, from which the applicant filed Civil Suit No. 005 of 2022 claiming for several reliefs including mesne profits, declaratory orders, injunction and damages
iii. The respondent is currently winding up its construction works and will no doubt leave the court's jurisdiction and that it has no known assets within Uganda capable of satisfying a judgment debt if the suit is decided against it.
iv. Uganda has no reciprocal enforcement of judgment legislation with China in place and the judgment of the court would be in vain if it is passed against the respondent if this application is not granted

Guo Jinjing, the country manager of the respondent deposed an affidavit in reply opposing the application mainly on grounds that the respondent is duly incorporated in Uganda and domiciled in Uganda and has known assets including sino trucks, caterpillars, graders, excavators with an estimated value of over UGX 50,000,000,000/= in Uganda. Further that the applicant has no prima facie case against the respondent as the respondent's extraction of rock material from the applicant's land arises from an existing contract duly signed by the applicant.

The respondent also challenges the authority of the applicant's attorney arguing that the attorney has no power to commence these proceedings and that the power of attorney of which he relies has been overtaken by events.

Background

The applicant filed Civil Suit No. 005 of 2022 against the respondent in this court claiming for several reliefs including mesne profits, declaratory orders, injunction and damages. It is claimed that the applicant and the respondent initially executed a lease agreement by which the applicant and her joint owner allowed the respondent to extract rock material form the applicant's land. That upon expiry of the said agreement, the respondent continued to illegally trespass and extract rock materials from the said land. In its defence, the respondent claims that the continued extraction of the rock material was as a result of the lease extension that was endorsed by the applicant and that it is not illegal.

Hence this application

Representation and hearing.

The applicant is represented by M/S Alvarez Advocates while the respondent is represented by Kasaija & Partners Advocates. The hearing proceeded by way of written submissions. Both counsel have filed submissions that have been considered in this ruling.

Preliminary matters

In his written submissions, counsel for the respondent objects to the authority of the applicant's attorney on two grounds. First is that the power of attorney on which he relies does not give him power to institute a suit but to defend one. Secondly, that the impugned power of attorney has been overtaken by events and or revoked by the donor who elected to sign the lease extension by herself in her personal capacity as proprietor of the land. As such, counsel for the respondent argues that the applicant's attorney is wrongly before the court.

The applicant did not file a rejoinder and as such, these objections are not responded to by the applicant.

I have looked at the power of attorney on which the applicant's attorney relies in this suit. It reads in part; "*I hereby assign my above mentioned attorneys to institute suits, defend suits and represent me in all suit regarding the protection of the legal and equitable rights in the above mentioned land*". From the quoted passage, it is easy to conclude that the first limb of the respondent's objection is baseless. It is clear that the power of attorney provides for the power to institute suits.

Regarding the second limb, counsel for the respondent argues that because the donor of the power of attorney decided to act by herself to sign the lease extension as proprietor of the land, the power of attorney was overtaken by events, was in effect revoked and ceased to have effect.

I find trouble to accept the position advanced by counsel for the respondent. When a person executes a power of attorney, it creates a relationship of principal-agent between the donor and donee of the same. Unless it is an express term of the power, nothing in this relationship limits the rights of the principal to carry out transactions that he or she would have delegated to the holder of the power of attorney. In addition, where a power of attorney has been well executed and registered, it can only cease to have effect when it is formally revoked in writing, or where the donor or donee dies, where the principal becomes incapacitated or where it was for specified period of time and the same elapses.

The respondent's objection is overruled and I now delve into the merits of the application.

The application.

The applicant argues that she has a prima facie case against the respondent, that the respondent should be ordered to furnish security in the sum of UGX 3,000,000,000/= because the respondent is incorporated in China, has no

known assets in Uganda and that Uganda has no reciprocal enforcement of judgments legislation with China which would lead to the court making orders in vain if the same are against the respondent.

Counsel for the applicant relied on **Section 64(a) of the Civil Procedure Act** which is to the effect that 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. Counsel also relied on **Halsbury's Laws of England 4th Ed, Vol. 37** to argue that the purpose of an interlocutory application for attachment before judgment is to enable the court to grant such relief to preserve a fair balance between the parties and give them due protection while awaiting the final outcome of the proceedings.

Counsel for the applicant further submitted that the main object of the provisions of the law on attachment before judgment and provision of security is to prevent any attempt on the part of the defendant to evade justice and avoid the decree that may be passed against him or her. It is a sort of a guarantee against a decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree.

It is the case for the respondent that the respondent is incorporated in Uganda and domiciled in Uganda and that the allegations by the applicant that the respondent is about to leave the court's jurisdiction are speculative and intended to mislead court. Further that the respondent has several moveable assets within the court's jurisdiction including earth moving equipment estimated to be over UGX 50,000,000,000/= in value which would be more than sufficient to settle the decree if it is passed against the respondent.

Counsel for the respondent relied on the case of ***Makubuya Enock Willy T/A Pollaplast Vs Songdoh Firms Ltd & Anor HCMA No. 312 of 2018*** to argue that the power given to the court to attach the defendant's property before judgment is never meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach the property of the defendant before liability is established may have the effect of seriously embarrassing him in the conduct of the defence. Counsel noted that the respondent is a genuine company doing business with the government of Uganda and that there is no basis whatsoever for the court to grant this application.

It was also argued for the respondent that the applicant's suit is devoid of merit since the respondent's continued extraction of the rock material was as a result of the lease extension that was endorsed by the applicant and that it is not illegal. Counsel cited the case of ***Custom & Excise Commissioner Vs Ancor Foods Ltd (1999) 1 WLR 1139*** to argue that it is the position of the law that before the orders like the ones prayed for by the applicant are granted, there needs to be an undertaking by the applicant to pay damages to the respondent should it turn out later that the said order was wrongly made.

I have carefully examined the pleadings and submissions of the parties in this regard. The only issue is whether the respondent has shown sufficient cause why it should not be ordered to furnish security. **Order 40 rules 1 & 2 of the CPR** deal with arrest and attachment before judgment. They are reproduced hereunder for reference;

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

(1) Where at any stage of a suit, other than a suit of the nature referred to in section 12(a) to (d) of the Act, the court is satisfied by affidavit or otherwise—

a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him or her—

i. has absconded or left the local limits of the jurisdiction of the court;

ii. is about to abscond or leave the local limits of the jurisdiction of the court; or

iii. has disposed of or removed from the local limits of the jurisdiction of the court his or her property or any part of it; or

b) that the defendant is about to leave Uganda in circumstances affording a reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him or her before the court to show cause why he or she should not furnish security for his or her appearance.

2. Security.

Where the defendant fails to show such cause, the court shall order him or her either to deposit in court money or other property sufficient to answer the claim against him or her, or to furnish security for his or her appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him or her in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under rule 1(2) of this Order. (Underlining for emphasis)

The key phrase in Order 40 Rule 1 is "with intent to obstruct or delay execution…or avoid any process of the court**"**. My reading of the foregoing is that a defendant may be called upon to furnish security where the court is satisfied that the defendant has intention to obstruct or delay the execution of the decree by selling his property or removing it from the jurisdiction of the Court, or himself moving out of the court's jurisdiction.

Counsel for the respondent has pointed out that there was no evidence to show that his client is moving his property or that the respondent is leaving the jurisdiction of court with any sinister motive.

For an application like the present one, the plaintiff unless the court otherwise direct, should specify the property required to be attached and estimated value thereof. A perusal of the application shows that this has not been complied with. The applicant has specified that the guarantees issued in favour of UNRA to guarantee the respondent's performance obligations are to be attached. The value of the guarantees is not specified.

I also need to mention that demand guarantees are the undertaking of a bank to pay a beneficiary, independent of the principal contract, possibly on written demand. They are typically used in construction contracts and contracts for the international sale of goods and are designed to salvage the employer of the construction company, against non-performance by the construction company. As such, they are strictly interpreted and a third party may not derive a benefit unless the terms permit. In the present case, UNRA is the beneficiary of the bank guarantees issued by whichever bank to guarantee the performance by the respondent. From this, we can deduce that both the issuer and the holder of the guarantees are not parties to this application and it would be erroneous for the court to divest UNRA of the benefit of the guarantees when they have not been offered a chance to be

heard. In any case, UNRA has nothing to do with the suit filed by the applicant or this application.

The applicant prayed in the alternative that the respondent be ordered to furnish security in the form of a bank guarantee in the sum of UGX 3,000,000,000/=. I have looked at the plaint in Civil Suit No. 05 of 2022 and paragraph 15 thereof states that the plaintiff believes that her claim and reliefs sought are in the field of UGX 100,000,000/=. I would then wonder why she would require security worth billions, more still when the respondent's liability has not yet been established.

I need to note that I have examined the respondent's certificate of registration and confirmed that the respondent is incorporated in China and registered in Uganda as a foreign company doing business in Uganda. Apart from stating that the respondent has sufficient moveable assets to satisfy any decree against it in the suit, nothing has been presented to substantiate this assertion. The respondent's domiciliation in Uganda is also not clear.

It has also been noted earlier that object of the provisions of the law on attachment before judgment and provision of security is to prevent any attempt on the part of the defendant to evade justice and avoid the decree that may be passed against him or her. It is a sort of a guarantee against a decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree. Orders like the one prayed for by the applicant prevent against instances when a court could find itself issuing decrees in vain.

Upon further perusal of the plaint and written statement of defence in Civil Suit No. 05 of 2022, I note that there are serious questions of both law and fact to be tried by this court. For the foregoing reasons, I order the respondent to furnish security in form of a bank guarantee issued by any

commercial bank in Uganda in the sum of UGX 100,000,000/= within 30 days from the date of this ruling. Costs of this application shall abide by the outcome of Civil Suit No. 05 of 2022.

It is so ordered

Dated at Fort Portal this 17th day of January 2023

Vincent Emmy Mugabo

Judge.

Court: The Assistant Registrar shall deliver the Ruling to the parties.

Vincent Emmy Mugabo

Judge

17th January 2023.