

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISC APPLICATION NO. 417 OF 2012

F.K. KAVUMA T/A KAVUMA & ASSOCIATES ::::::::::: APPLICANT

VERSUS

1. THE ATTORNEY GENERAL

2. GOODMAN AGENCIES LTD ::::::::::: RESPONDENT

BEFORE: HON JUSTICE ELDAD MWANGUSYA

RULING

This application was brought under Order 21 rules 1 & 10 of the Civil Procedure Rules, Section 101 of the Civil Procedure Act Cap 71; Section 21 of the Government Proceedings Act, Cap 77 and Rule 16 of the Government Proceedings (Civil Procedure) Rules SI 77-1 for orders that;

- a. The 1st respondent/garnishee and the 2nd respondent/ judgment debtor be ordered to appear before court to show cause why court should not restrain the 2nd respondent from receiving monies decreed to be paid to it by the 1st respondent in HCCS No.7119 of 1997 and M.A 34 of 2011 and order that the applicant herein who is the decree holder in HCCS No. 273 of 2008, be paid first the debt due to the applicant/ judgment creditor/ decree holder or so much thereof, as may be sufficient to satisfy the applicant's decrees together with costs
- b. The debt due to the applicant/ judgment creditor from the 2nd respondent under the Ruling and decree dated 15.11.2010 be attached from the 1st respondent/ garnishee by payment thereof
- c. A order nisi in respect of the said debt be issued by this court
- d. Costs of the application be provided for.

The application is premised on the following grounds;

- i. The applicant, a professional valuer and loss adjuster by a letter dated 23.03.2000 was instructed by M/s Goodman Agencies Ltd (the 2nd respondent) through M/s Bwengye, Tibesigwa & Co. Advocates to value motor vehicles that were hired, seized and

converted by the UPDF and thus the subject of HCCS No. 719 of 1997 where the applicant's evidence was used to determine their respective market and rental values of the vehicles and the Attorney General (garnishee) was ordered to pay shs14,485,547,842 with interest at 24% p.a from the date of judgment of 2nd September 2005.

- ii. The applicant/judgment creditor filed and obtained judgment and order in HCCS No. 273 of 2008 for recovery of shs 709,277,392 with interest being the fees for the services rendered to the parties: Goodman Agencies and the Attorney General in HCCS No.719 of 1997
- iii. The 1st respondent is indebted to the 2nd respondent
- iv. It is in the interest of justice that the applicant ought to be allowed to attach all the debts accruing from the 1st respondent/AG to the 2nd respondent/judgment debtor by an order directing that the 2nd respondent be restrained from receiving monies due to it from the 1st respondent until the applicant's decree in HCCS No.273 of 2008 is fully paid and satisfied.

It is supported by the affidavit sworn by F.K. Kavuma the Chief Executive of the applicant and he depones as follows;

1.
2. That the applicant is a judgment creditor as result of having successfully obtained judgment and order for payment of shs. 709,277,392 with interest being the fees for services rendered to the parties: Goodman Agencies Ltd and the Attorney General in HCCS No.719 of 1997. A copy of the said judgment and order are attached hereto and marked 'K1'.
3. That the applicant was by letter dated 23rd march 2000 instructed by M/s Goodman Agencies Ltd through M/s Bwengye, Tibesigwa & Co.Advocates to value motor vehicles that were hired, seized and converted by the UPDF and thus the subject of HCCS No 719 of 1997, to determine their respective market and rental values for purposes of establishing compensation due to the 2nd respondent herein, against the 1st respondent (garnishee). A copy of the letter of instructions is annexed hereto and marked 'K2'.
4. That the applicant carried out the valuation requested through M/s Bwengye, Tibesigwa & Co. Advocates, in their letter dated 23rd March 2000 ref: BWECO/GA/805/96 where they undertook to honour the applicant's fees for the work done.
5. That the Attorney General/ 1st respondent and garnishee is indebted to the 2nd respondent/ judgment debtor of the applicant, who has successfully obtained a decision from the Constitutional Court vide Constitutional petition No.3 of 2008, which on 28th/10/2012 unanimously ordered inter alia that Goodman Agencies Ltd – the 2nd respondent is at liberty to execute the consent judgment of the 2nd/09/2005 in HCCS No.719 of 1997, with interest at the rate of 24% p.a from the date of the judgment until payment in full.
6. The applicant is rightfully entitled to monies which were confirmed and decreed as owing in the sum of shs 7,009,277,392 by 15.11.2010 when Hon. Justice Choudry of the Commercial Court, ordered the Registrar of the court forth with to pay 5% of the total arising out of HCCS No. 719 of 1997 , plus interest thereon to the applicant herein.
7. That in course of the trial of HCCS No. 273 of 2008, the High Court issued an order of temporary injunction ordering that any grounds held on behalf of Goodman Agencies Ltd

and Hassa Agencies Ltd arising out of HCCS 719 of 1997, should not be distributed until the suit was finally determined. A copy of the order is annexed hereto and marked 'K4'.

8. That I have been advised by my lawyers M/s Kalenge, Bwanika, Ssawa & Co. Advocates, whose advice I believe to be true that I am entitled to seek the intervention of this honourable Court for an order restraining the 2nd respondent from receiving money due to it from the 1st respondent under HCCS No 719 of 1997 and directing that monies due to me under HCCS 273 of 2008 be paid to me first in settlement of the judgment and decree in HCCS 719 of 1997.
9. That in the interest of justice the applicant ought to be allowed to attach all debts accruing from the 1st respondent/Attorney General to the 2nd respondent/judgment debtor.
10. That I swear this affidavit in support of the application for the issue of an order nisi and eventually an order absolute in respect of the said debt this honourable court.

For the 1st respondent, Eva Kabundu, a State Attorney filed an affidavit in reply wherein she stated that;

- a. the applicant has never provided valuation services to the 1st respondent as alleged in paragraph 2 of the affidavit in support.
- b. that the 2nd respondent petitioned the Constitutional Court in Constitutional Petition No.3 of 2008 and filed an appeal on 10.11.2010 in the Supreme Court contesting the decision of the Constitutional Court.
- c. that the 1st respondent intends to challenge the award issued to the petitioner/2nd respondent.
- d. that the 1st respondent will be aggrieved if this application is granted to the applicant without the Supreme Court first entertaining the Appeal wherein the amounts owing to the 2nd respondent are still in dispute and where the 1st respondent asserts that it owes no money to the 2nd respondent

The 2nd respondent filed an affidavit in reply deposed by NICHOLAS WERE and it is reproduced hereunder:-

I, NICHOLAS WERE of C/o of Okuku & Co. Advocates Plot 37 Majanji road P.O Box 272 Busia and M/s Semuyaba, Iga Advocates Plot 64 Buganda Road P.O. Box 12387 Kampala do solemnly take oath and state as follows:-

1. That I am an adult Ugandan of sound mind and the Managing Director of the 2nd respondent company hence competent to swear this affidavit in reply.
2. That I have read through the affidavit of F.K Kavuma & Associates and I have this to state in reply.

3. That the judgment and order for payment of shs 709,277,392 with interest being the fees for services he rendered to the parties: Goodman Agencies Ltd and the Attorney General in HCCS 719 of 1997 was overtaken by events as it was based on proceedings of his Lordship Tabaro dated 13.8.2007 which were expunged by the Constitutional Court judgment in petition No. 3 of 2008 arising from HCCS No. 719 of 1997 delivered on 28.10.2010.
4. That in that judgment delivered on 28.10.2010 by the Constitutional Court of Uganda at Kampala before the Honourable justices of Appeal; Hon. Justice A.E.N Mpagi-Bahigeine JA, Hon Justice C.K Byamugisha, Hon Justice S.B.K Kavuma JA, Hon Justice A.S Nshimye JA, Hon Justice MS Arach Amoko JA, ruled that all proceedings conducted by the said learned trial judge from 02.09.2005 after the filing into court of the consent judgment of the same date 02.09.2005 are unconstitutional ,null and void ab initio.
5. That all the proceedings conducted by the learned trial judge, Justice Tabaro J from 02.09.2005 were expunged from the court record. A Photostat copy of the judgment and decree/order are attached hereto and marked as annexure 'A' and 'B' respectively.
6. That from then the judgment of his Lordship Anup Singh could not be executed since the subject matter upon which it was based was expunged by the constitutional court from the court record.
7. That the letter dated 23rd March 2000 annexed to the affidavit of Mr. F.K Kavuma t/a Kavuma & Associates was not an agreement as there is a dully signed agreement between Goodman Agencies Ltd and the applicant and decree holder dated 05.05.2000 between the parties drawn and witnessed by M/s Bwengye, Tibesigwa & Co Advocates. A copy of the same is hereto attached and marked "C".
8. That the agreement Mr. F.K Kavuma t/a Kavuma Associated was to receive 2% of the total court award on the valuation of vehicles and a further 1% on the total award on the rental value/loss of income of the said vehicles.
9. That by that agreement the said payment to Mr Kavuma t/a Kavuma Associated was to be effected after the decretal sum has been paid by the Attorney General.
10. That no payment has been made yet to M/s Goodman Agencies Ltd as the Attorney General/the 1st respondent/garnishee cross appealed against the Constitutional Court judgment in petition No. 3 of 2008 arising from HCCS No. 719 of 1997 delivered on 28. 10.2010 and at the same time there is a pending appeal of M/s Hassa Agencies (K) Ltd in the Supreme Court of Uganda vide Constitutional Appeal No. 05 of 2010. A photocopy of the notices of appeal, cross appeal and memorandum of appeal are attached and marked "D", "E", and "F".
11. That it is very clear that the decision delivered by the Constitutional Court vide Constitutional petition no.3 of 2008 is pending the said appeals and a cross appeal in the supreme court and it is very clear that no payment is due on it at all.
12. That the applicant is not rightfully entitled to monies which were confirmed and decreed as owing in the sum of 7,009,277,392 on the 15.11.2010 as ruled by Hon. Justice Choudry of the Commercial Court as that money is too much and moreover M/s Goodman Agencies Ltd filed an appeal against the said judgment. A photocopy of the same is hereto attached as annexure "G".
13. That the money demanded by the applicant cannot be paid forthwith as it is not yet due for payment under the above mentioned agreement.

14. That the money demanded by the applicant/decreed holder in HCCS No.719of 1997 was expunged from the court record and is no longer existent and it was an order for leave to obtain mandamus and no mandamus has ever been granted after all the proceedings were expunged.
15. That I am advised by my lawyers M/s Okuku & Co Advocates and M/s Semuyaba Iga Advocates and I verily believe that the Rules under which this application is brought prohibits attachment of government debts by way of garnishee proceedings.
16. That there is no money due and owing from the Attorney General to Hassa Agencies (K) Ltd as the ruling/order of justice Tabaro relied upon by the applicant/ decreed holder as there is no money to be distributed under the orders made by both Justice Tabaro and Justice Anup Singh in order to pay the applicant yet.
17. That HCCS No.273 of 2008 was in the commercial court before Justice Anup Singh and since it is pending appeal and the present application is for garnishee proceedings, it ought to be handled by the Execution and Bailiff Division of the High Court and not the Civil Division of the High Court, after the circular dated 30th June 2011 issued by the Ag. Chief registrar of the courts of Judicature. Annexure "H".
18. That much as in the course of the trial in HCCS No 273 of 2008, the High Court issued an order of temporary injunction ordering that any funds held on behalf of Goodman Agencies Ltd and Hassa Agencies Ltd arising out of HCCS 719 of 1997 should not be distributed until the above mentioned suit is finally determined, that matter is still pending in the Court of Appeal as there is an intended appeal.
19. That I have been advised by my lawyers M/s Okuku & Co. Advocates and M/s Semuyaba, Iga Advocates whose advice I verily believe to be true that the applicant is not entitled to seek intervention of this Honourable Court for garnishee orders as the said money is not due for payment yet as garnishee proceedings cannot be taken out of doubtful debts.
20. That Mr. Kavuma t/a Kavuma & Associates cannot be paid now as the valuers fees are not due for payment yet.
21. That since there is a pending appeal and cross appeal in the Supreme Court , the applicant ought not to be allowed to attach all debts accruing from the 1st respondent/AG to the 2nd respondent/Goodman Agencies Ltd and his application is premature
22.
23.

In rejoinder, the applicant reiterated the contents of his affidavit in support of the application and further referred to the contents of paragraphs 3, 4, 5, 10, 14 and 16 of Were Nicholas's affidavit in reply. He stated that the correct position in Constitutional Petition No. 3 of 2008 clearly expunged only the proceedings that were conducted by Tabaro. J after 02.09.2005 in HCCS No. 719 of 1997, the very date the consent judgment between the 1st & 2nd respondent was filed.

He further averred that the Constitutional Court ordered that the 1st respondent was at liberty to undertake execution in respect of the said consent judgment with interest rate of 24% p.a from

the date of judgment till payment in full. In rejoinder to paragraphs 6 - 13 and 15 - 23 the agreement dated 08.05.2000 was re-negotiated and the 1st respondent vide a letter dated 27.09.2002, gave instructions to the then Lawyers M/s Sam Kuteesa & Co. Advocates to disburse proceeds from the decretal amount in HCCS No. 719 of 1991 inter alia as to 5% thereof to valuer.

At the hearing of the application, the parties were allowed to file their written submissions. Mr Semuyaba and Okuku jointly appeared for the 2nd respondent, Christopher Bwanika for the applicant and Mr. Adrole Richard for the 1st respondent.

Christopher Bwanika, counsel for the applicant, contended that the applicant, as a professional service provider, he and his firm of valuers and loss adjusters were and are still entitled to remuneration for the services rendered to the 2nd respondent which were done so on the 2nd respondent's own request. It was his contention that hadn't it been for the applicant's valuation work done and the comprehensive report submitted, the 1st and 2nd respondents would perhaps not have reached an expedient conclusion of HCCS No 719 of 1997.

He further contended that the applicant filed a suit vide HCCS No 273 of 2008 against the 2nd respondent in the High Court and obtained judgment wherein the court ordered that the applicant to be paid 5% of the proceeds of the decree made in HCCS No 719 of 1997. Counsel thus invited this court to take judicial notice of the fact that HCCS No. 273 of 2008 has not been appealed against by the 2nd respondent or any other parties to it and that the same stands unsatisfied to date.

Additionally, counsel contended that the 2nd respondent took steps to execute the decree in HCCS No 719 of 1997 by applying to the High Court for the writ of mandamus against the 1st respondent to compel the Treasury Officer of Accounts who is an agent of the 1st respondent to pay the sums decreed in HCCS No. 719 of 1997 through an application vide HCMA No. 34 of 2011 in which Madrama J granted the writ of mandamus to the 2nd respondent. Counsel contended further that the Constitutional Court in Petition No.3 of 2008 at page 33 declared that the petitioner (now the 2nd respondent) was at liberty to undertake execution process in respect of the consent judgement.

The respondent in paragraph 14 of WERE NICHOLAS's affidavit however averred that the alleged application was merely for leave to file an application for judicial review seeking the prerogative writ of mandamus and not the writ itself. This is not correct. I have carefully read

the judgment of my learned brother Justice Madrama in MA 34 of 2011 and it is clear that the application was for the prerogative writ of mandamus which was granted and not merely leave as alleged by the 2nd respondent.

Counsel submitted further that the alleged pending appeal is only in respect of the interest rate of 24% that was awarded by the Constitutional Court and not the consent judgment as alleged by the respondents. He maintained that the judgment of Choudry J was in no way expunged by the judgment in the Constitutional Court. He contended that the facts deponed in paragraph 6 of Were's affidavit are falsities and cannot be corrected in the least degree.

I am in agreement with counsel's contention that the consent judgement entered by the parties was never an issue in the constitutional petition that saw the proceedings after 2005 expunged from the record and the since an appeal does not stay execution, then the 24% interest rate is as well part of the execution.

It was counsel's submission that it is a well settled principle of our law that an appeal does not in itself operate as a stay of execution of judgment. This principle was expounded in **Kampala City Council v National Pharmacy (1979) HCB 215** where it was held that the pendency of an appeal does not itself constitute a stay of execution. Counsel sought to rely on statutory provisions i.e. Rule 6 (2) of the Judicature (Court of Appeal) Rules directions and the Judicature (Supreme Court) Rules Directions for the proposition that an appeal does not operate as a stay of execution. Similarly in **Goodman Agencies Ltd v AG & Anor HCMA 34 of 2011** where it was held by Madrama J that for there to be a stay of execution, there has to be an application for an order to stay the decision appealed against and an order of stay should be in place. I am agreeable to this position.

He contended that in the instant case none of the above is in place, to do otherwise would be to undermine the law. He thus invited court to grant the applicant its dues as so decreed.

Counsel for the 2nd respondent took cognisance of the fact that an appeal to any court is not a bar or stay of execution. He however contended that the application should not be granted until the disposal of the appeal arising from the Constitutional Court to the Supreme Court where the 1st respondent challenged the interest awarded, which would form part of the money owing to the 2nd respondent.

For the first respondent it was contended that since there is a pending appeal in the Supreme Court, the grant of a garnishee order nisi and absolute would be detrimental to the 1st respondent who maintained in that appeal that it owes no monies to the 1st respondent. He thus maintained that since the amount due in this matter is still a subject of legal dispute in the Supreme Court, the application for garnishee is premature.

It has been conceded by the 1st respondent that there is no order of stay of execution of the decree in HCCS No 719 of 1997 and that the appeal before the Supreme Court is in respect of the interest on the decretal sum. He maintained that there was no objection that the applicant be paid out of the decretal sum and not the interest.

I don't agree with the respondents' contention, rules set by statute must be strictly followed. In the instant case there is no bar to the execution in this case in form of either an application to stay the execution or an order to that effect.

Counsel for the 1st respondent prayed that the restraint that the applicant seeks if so granted should be limited to the consent judgment entered between the 1st and the 2nd respondents as the interest granted to the 2nd respondent is under challenge in the Supreme Court.

Counsel further submitted that he was not aware of any Ruling between the Applicant and the 2nd respondent and cannot confirm whether the applicant is indeed a decree holder in HCCS No. 273 of 2008 as the 1st respondent was indeed not party to the suit.

For the 2nd respondent, Mr. Okuku and Mr. Semuyaba jointly contended that the application is premature, frivolous and vexatious as it was filed in the wrong court. It is not filed in HCCS No.273 of 2008 which file is in the Commercial Court neither is this application filed in MA No. 34 of 2011 where it supposedly arises from. Counsel reproduced the contents of the 2nd respondent's affidavit in reply to expound on the argument that indeed the application is premature. I do not intend to reproduce those contents as they are clearly on record.

Counsel further contended that the averment that Choudry J decreed that the Registrar of the High Court forthwith pays 5% of the monies accruing to the 2nd respondent by the 1st respondent in HCCS No 719 of 1997 with interest and costs on the amount of shs.709.277.392 was appealed against as there is a Notice of Appeal. Further that the order by Tabaro J from which the decree

of Choudry J arose was set aside by the Constitutional Court and that judgment is a subject of an appeal in the Supreme Court and that the costs so ordered by Choudry J have never been taxed and therefore not yet ascertained.

In further contention, counsel stated that it was in the agreement between the applicant and the 2nd respondent that valuation fees would only be paid after the completion of the case therefore since the Supreme Court has not yet disposed off the matter, the valuation fees are not yet due for payment as they can only come into picture after the Attorney General has paid. Counsel further contended that the consent judgment/decreed has other parties who have not been sued in this application. Basing on the above reasons, counsel maintained that indeed this application was premature in the instance.

A number of authorities both case law and statutory laws were cited by counsel to advance their case. For instance in **Uganda Commercial v Joseph Ziritwawula (1985) HCB 96** where an application by garnishee was upheld and the garnishee order absolute was set aside where the existence and the availability of the funds belonging to the judgment debtor had not been conclusively established. Garnishee can only be issued in case of ascertainable debts and not something which may become a debt in future. Whereas the debt depends on the performance of a condition there is no attachable debt until that condition has been fulfilled; (see **Sander Dass v municipal Council of Nairobi 1948) 15 EACA 33**)

In rejoinder, Mr. Bwanika contended that counsel reiterated his earlier submission and further contended that:

The appeal in the Supreme Court is only concerned with the interest awarded by court to the 2nd respondent, it is not disputed that the services of the applicant were rendered on the request of the 2nd respondent and the report generated thereby formed the basis for settlement of HCCS No.719 of 1997 as such the applicant is entitled to be reimbursed was settled by the decree in HCCS No 273 of 2008, the Constitutional Court could not have set aside the judgment of Choudry J in HCCS NO 273 of 2008 yet no Constitutional Reference was ever made from it by any other parties to it, the issue of untaxed costs is a subject of election by applicant/ judgment creditor and does not in any way bear on this application as the failure to tax would disadvantage the applicant but benefit the 2nd respondent and the application is brought in anticipation of payment given that the 2nd respondent is already armed with a writ of mandamus. This is the essence of Rule 16 of the Government Proceedings (Civil Procedure) Rules SI 77- 1.

Referring to **Soroti Municipal Council V Uganda Land Commission** (supra) counsel contended that this case is in favour of the applicant's case in as so far as it refers to 'money due

or accruing or alleged to be accruing from the government', this money is due to the 2nd respondent who has obtained a writ of mandamus compelling the Treasury Secretary to pay. The application does not seek to garnishee money in possession of government but it seeks an order to restrain the 2nd respondent from receiving monies due and owing to it before making provisions to satisfy the decree in HCSS No.273 of 2008.

In rejoinder to the 2nd respondent's submission, Mr Bwanika contended that although the 2nd respondent has not yet received any payment from the 1st respondent, it has taken exclusive steps to obtain payment from the 1st respondent on the sidelines of the applicant who is entitled to a percentage of the payment due and owing to the 2nd respondent by the 1st respondent. All that is sought is an order that the 2nd respondent be restrained from receiving monies due to it from the 1st respondent under HCSS No.719 of 1997 until the applicant's claim is paid. He contended further that if this order is not granted there would be nothing that would stop the 2nd respondent who already obtained a writ of mandamus from being paid by the 1st respondent.

Counsel further contended that it is the 2nd respondent that went out to the High Court to obtain a writ of mandamus against the Treasury Officer of Accounts and not any other decree holders, as such to argue that this application seeks to deprive the other decree holders (i.e. Emmanuel Hatangi Mbabazi, Leonidas, Felis and Javier Busogi) of their right to property would be asking the court to turn a blind eye, on the contrary it is the 2nd respondent who is scheming to deprive the applicant of his entitlement under the said decree.

The application herein falls under the ambit of the provisions of Section 21(1) of the Government Proceedings Act (Cap 77) which I reproduce hereunder:-

“Attachment of monies payable by the Government.

1. ***Where any money is payable by the Government to some person who under any order of any Court is liable to pay any money to any other person, and that other person would, if the money payable by Government were money payable by a private person, be entitled under rules of Court to obtain an order for attachment of the money as a debt due or accruing, the High Court may, subject to this Act and in accordance with the rules of Court, making an order restraining the first mentioned person from receiving that money to that other person; except that no such order shall be made in respect of:-***
 - a. ***Any money which is subject to the provisions of any enactment prohibiting or restricting assignment or charging or taking execution; or***
 - b. ***Any money payable by the Government to any person on account of a deposit in the Post Bank Uganda Limited.***

2. *The provisions of Subsection (1) shall, so far as they relate to forms of relief falling within the jurisdiction of the magistrates' Court, have effect in relation to the Magistrates' Court as they have in relation to the High Court.*

None of the exceptions is applicable to this case and once it is acknowledged that only an order of stay of execution can prevent the Attorney General from paying the monies owing to the second Respondent the implication of the above provisions is that before the 2nd Respondent is paid the monies due to the applicant would have to be paid. This is the import of this application which is granted with costs.

Before I take leave of this case I wish to comment on a matter raised by counsel for the Respondent that according to a circular of the Registrar this application should have been handled by the Executions Division. My observation is that the Circular of the Registrar is an Administrative arrangement that would not prevent this court from hearing the matter which it has jurisdiction to hear.

In conclusion this court grants the prayer that the applicant's decree in HCCS No. 273 of 2008 be met by the 1st Respondent before payment is made to the 2nd Respondent in HCCS No. 719 of 1997.

Eldad Mwangusya

J U D G E

26.03.2013

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