THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS CAUSE NO.286 OF 2019

DEOX TIBEINGANA---------- APPLICANT

VERSUS

VIJAY REDDY----------RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this application by way of Notice of Motion against the respondent under Section 119 & 120 of the Insolvency Act and Section 98 of Civil Procedure Act and Order 52 r 1,2 & 3 of the Civil Procedure Rules, for orders that;

1. An Interim Protective Order doth issue against the respondent as the Applicant's creditors.

2. Costs of this application be provided for.

The grounds in support of this application are set out in the Notice of motion affidavit of ***Deox Tibeingana*** which briefly states;

1. That the applicant is a Judgment debtor vide CAD/ADR/No.25 of 2015 against the Respondent.

2. Upon Judgement/ award, the respondent instituted execution proceedings against the applicant vide EMA No. 193 of 2017.

3. That the respondent has since obtained a warrant of arrest arising out of Miscellaneous Cause No. 10 of 2016.

4. That several proceedings for execution and other legal processes have been instituted against the applicant by his creditors some of whom are the respondent.

5. The applicant's creditors have furthermore instituted charges over any of the applicant's property.

6. That the applicant intends to make an arrangement with all his creditors and/ or Respondent.

7. That the applicant has not made any previous application for an interim order in the last 12 months.

8. The applicant has the resources, assets and capacity to pay all the creditors and remain afloat but only required time to re-organise his business, and to dispose them off at the market value without the interruption of any of the creditors for about six months.

9. The applicant has appointed an insolvency practitioner willing to as supervisor of the proposed arrangement.

10. The Applicant is able to petition for his own bankruptcy.

11. That granting the applicant an interim protective order is appropriate for the purpose of facilitating the consideration and implementation of the applicant proposed arrangement.

12. The applicant is making this application in good faith and for the interest of his business, reputation and the respondent's interest as dealing without one compromising the interest of the other.

13. The applicant is willing and able on arrangements being made with creditors and/ or Respondent, to pay sums owed.

In opposition to this Application the Respondent-Vijay Reddy filed an affidavit briefly stating that;

1. The application has no merit, is a nullity in law and a total abuse of court process and only intended to frustrate execution of the award that was granted.

2. That the applicant was the respondent's former lawyer who duped him into entering a business transaction but eventually took his money amounting to US$ 250,000 way back in 2013.

3. That the respondent took the matter to Center for Arbitration and Dispute Resolution in the year 2015 and obtained an award.

4. That the applicant was dissatisfied with the award and applied to High Court to set it aside but the application was not wholly successful.

5. That the applicant was ordered to pay the respondent but has kept the respondent in the execution division trying to frustrate execution of the order of court.

6. That on 22nd August 2019, Court presided over by Justice Gaswaga directed the applicant to pay the decretal sums within two weeks and if not a warrant of arrest should issue.

7. That as a result of the said warrant of arrest issued against him, the applicant has now made this application to further delay the execution process.

8. That the applicant has not shown court the list of different creditors and the amounts in issue he would like to arrange for as required by the law at the filing of these proceedings.

9. That the applicant has not shown court the list of properties he intends to avail to the alleged supervisor as required by law before bringing to court such an application/cause.

10. That the applicant has not come to court with clean hands but rather to use court to deny the respondent from realizing the fruits of his judgment for all the period of four years he has been frustrated.

This court had directed that the parties file their submissions for the main cause so that the two applications are disposed of at once but it appears the counsel never complied since I have not seen any on record.

The applicant was represented by *Mr Ssempala David* whereas the respondent were represented *Mr Kagoro Friday Robert*.

Whether the Interim Protective Order could issue after court has issued an Order of execution or warrant of Arrest.

Section ***119(2) of the Insolvency Act*** provides;

" During the period for which an interim order is in force, in relation to a debtor-

(c) Except with leave of the court in and accordance with the terms imposed by the court-

(ii) no other proceedings, execution or other legal process shall be commenced or continued against the debtor or his or her property;…"

The above provision implies that execution proceedings shall be commenced or continued against the debtor or his or her property. Once the Interim protective Order is in force, this is premised on the fact that such debtor intends to make an arrangement with his or her creditors.

The Interim Protective Order is issued on concrete grounds of the debtor making a meaningful arrangement with his or her creditors. This in effect is a stay of execution. The general purpose of the stay of execution is to ensure that all claims

which can be proved in liquidation are enforced in liquidation process and not by competing executions outside it.

The judgment creditor may be paid in the same manner as a secured creditor and other 'real' secured creditors of the insolvent person or enterprise. This implies that the judgment creditor will have priority as a secured creditor over the remaining value of the secured assets after full payment of the secured obligation.

This means that the treatment of the Judgment of the Judgment creditor as secured creditor will fully benefit him/her in case the insolvent enterprise's assets have not been used to secure its obligations towards other creditors. See ***In the Matter of Maria K Mutesi*** *Bankruptcy Petition No. 5 of 2011*

The Court issuing an Interim Protective Order should be mindful of the existing court orders in execution already issued by other executing courts in order not to be used as an automatic stay of execution, where such court had denied a stay of execution to the judgment debtor or has made advanced progress in concluding the execution process.

If the judgment debtor has opted to make an application for interim Protection without making full disclosure of existing execution proceedings in other courts, then an Interim Protective Order should be recalled or vacated since it would be an abuse of court process.

Justice Madrama noted in the case of ***In the Matter of Maria K Mutesi*** *Bankruptcy Petition No. 5 of 2011 that; "* Proceedings in bankruptcy are meant to compulsorily administer a person's estate for the benefit of his or her creditors generally. The primary objective of bankruptcy law is to administer the estate of an insolvent so as to enable him or her pay his or her debts. The law facilitates a fair and equal distribution of available property of the petitioner among the creditors. Secondly the object of the law is to free the debtor of his or her debts in order that the debtor may make a fresh start as soon as the debtor is discharged by the court. Thirdly bankruptcy proceedings enable the court and the official receiver and the creditors as well to establish the reasons of the insolvency of the debtor and presumably deter people from rashly incurring debts which they are unable or unwilling to pay."

In addition ***Section 40(3) of the Civil Procedure Act*** provides that;

"Where a judgment debtor is arrested in execution of a decree for the payment of money and brought before the court, the court shall inform the judgment debtor that he or she may apply to be declared insolvent, and that he or she will be discharged if he or she has not committed any act of bad faith regarding the subject matter of the application and if he or she complies with the law of insolvency for the time being in force."

The law of execution of decree envisages making application under Insolvency law either for Interim Protective order or being declared insolvent. The discretion is with the court to determine whether the applicant has not committed any act of bad faith or is not using the application to abuse court process.

The applicant in the present case has not yet been arrested but has only been pre-emptive in making an application for an Interim Protective Order in order to avoid an arrest.

Under Section ***120(3) of the Insolvency Act***; The court is empowered to stay any execution against the judgment debtor.

Where an application for Interim Order is pending, the court may stay any action, execution or other legal process against the property or person of the debtor.

The Insolvency court may specifically stay execution of the judgment in exercise of it's discretion and if it is satisfied that it is a deserving case for such a grant. The court should be very mindful not to stay execution as a given otherwise all judgment debtors may flood court with applications for interim protection in order to circumvent the execution orders from the Execution Division as it was in this case.

Whether the application is competently before the court?

The respondent challenged the application for incompetency on grounds that; the applicant has not shown court the list of different creditors and the amounts in issue he would like to arrange for as required by the law at the filing of these proceedings.

Secondly, the applicant has not shown court the list of properties he intends to avail to the alleged supervisor as required by law before bringing to court such an application/cause.

Thirdly, the applicant has not come to court with clean hands but rather to use court to deny the respondent from realizing the fruits of his judgment for all the period of four years he has been frustrated.

An application for an Interim Order can only be stopped on its tracks if it is demonstrated that it is an abuse of Court process or that it is so hopeless that it cannot possibly succeed. But this must be in the clearest of Cases and the Court must be slow to grant the draconian Order of striking out.

As pointed out earlier, proceedings of this nature afford the debtor a certain amount of freedom. Just by example, upon grant of an Interim Order any proceedings (including execution or other legal process) may only be began or continued against the debtor or the debtor's property with the leave of the Court. An undeserved application should be disallowed at once if its clear motive is to attain a collateral objective of granting protection to an undeserving debtor. See ***Rajendra Ratilal Sanghani v Schoon Ahmed Noorani*** *Insolvency Cause Misc. No. 33 of 2018 [2018]eKLR*

So ,for instance, a debtor who is neither an undischarged bankrupt or is able to make an application for his own bankruptcy should not be allowed to use the process to avoid his/her obligations or as a stalling device.

Second, the Court must always remember that an Interim order is not an end to itself and before granting it, the Court must be satisfied that it will facilitate the consideration and implementation of the Debtors' proposal. The Court must never lose sight of this overarching objective.

This Court has examined the entire application herein and the affidavit in support and quickly notices that the Debtor has failed to give particulars of his other creditors and debtors and other liabilities and assets and if he has none, then he has not said so. This silence is loud. What is even more curious is that the silence

persists even when the Creditor contests the application as being brought in bad faith and on the basis of material non-disclosure and intended to delay execution.

The reluctance by the debtor to disclose other creditors and debtors and to set out his assets and liabilities even in the face of express challenge says something about the bona fides of the application. This Court reaches a conclusion that the Application may not only be an abuse of Court process but is so hopelessly wanting as it fails one crucial test.

An important theme of the Insolvency Act is that the door should not be shut too quickly on an insolvent person and in as much as is possible he/she/it should be given a second chance. However some heed needs to be paid to the following remarks by **Scott VC in *Hook –vs- Jewson Ltd [1997] 1 BCLC 664***, when considering similar provisions to our law on Interim orders;

"Judges must, I think, be careful not to allow applications for interim orders simply to become a means of postponing the making of bankruptcy orders in circumstances where there is no apparent likelihood of benefit to the creditors from such postponement."

These remarks are in consonance with the policy objective set out in section 120 (2) that one purpose of an interim order is to facilitate the consideration and implementation of the debtors' proposed arrangement.

This application is incompetently before court and is dismissed with costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
4th/11/2019