THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(EXECUTION DIVISION)

MISCELLANEOUS APPLICATION No. 23 OF 2014

(Arising from EMA No. 1071 of 2012, arising from H.C. (Comm. Div.) Civil Suit No. 289 of 2008)

MUSA NSIMBE ..... APPLICANT

VERSUS

1. JOSEPH NANJUBI
2. CHARLES MBOGO:: RESPONDENTS
3. FRANK KINTU

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

RULING

When this application came up for hearing, and Counsel for the Applicant had intimated that he wished to cross examine the 1st and 2nd Respondent on their affidavits filed in response to the application, Counsel for the 1st and 2nd Respondent informed Court that he wished to raise some preliminary points before the application could be proceeded with. Court then directed Counsels to file written submissions on the preliminary objections; which Counsels obliged. The two points of preliminary objection are that: –

1. The application is misconceived, incompetent, bad in law, frivolous, vexatious, and an abuse of Court process as it is contrary to law; and second, it includes the 2nd Respondent who was not privy to the contract pleaded in the head–suit herein.

2. The entire application is res judicata owing to the consent judgment in the head suit; hence, it offends section 7 of the Civil Procedure Act, and 0.7 r.11(d) of the Civil Procedure Rules.

The application, brought by notice of motion, against which this preliminary objection arises, seeks orders that: –

(i) The Applicant be discharged of liability arising from the execution of consent judgment entered under Civil Suit No. 289 of 2008.

(ii) The 3rd Respondent is compelled to pay back and satisfy his obligation in Civil Suit No. 289 of 2008.

(iii) The terms of the consent judgment be given full effect; and the Applicant's properties caveated by the 1st and 2nd Respondents be caveated.

(iv) The 2nd Respondent desists from malicious persecution of the Applicant.

(v) Provision be made for the costs of this application.

From the outset, I need to point out that the affidavit in reply, purportedly deponed by the 2nd Respondent, and commissioned by a commissioner of oaths, was not signed by the 2nd Respondent; and therefore, it was not deponed. A deponent must personally appear before the commissioner for oaths and read out his or her affidavit, or the same be read out to him or her, on oath. After this, the deponent signs the affidavit, and then the commissioner for oaths certifies that the deposition was done before such a commissioner of oath. This is what, in law, commissioning of an oath is. Where any of the steps in the process of deposition is lacking, the purported deposition is invalid for being incomplete; hence, it is unlawful.

On the first ground of the preliminary objection, I agree that the joinder of the of the 2nd Respondent in this application is misconceived since he was not a party to the head–suit. The provision of section 34(1) of the Civil Procedure Act, that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the Court executing the decree, and not by a separate suit, is quite clear as to the extent of its applicability. However, the 2nd Respondent was not a party to the head–suit whose decree is the subject of execution. He is also neither a bailiff to whom a warrant was granted to execute the decree, nor is he an objector to the execution being carried out.

Accordingly, his joinder as a party to the suit at the execution stage is wrong in law. If the Applicant seeks to make the 2nd Respondent liable under the decree, he must move the trial Court for review of the judgment. The trial Court would then, if the application succeeds, vary the decree and add the 2nd Respondent as a liable party under the decree. The remit of the executing Court is limited to the enforcement of a Court decree sent to it for execution. It does not enjoy any power to vary any decree. Accordingly, it is incumbent on the persons extracting a decree to ensure that the extract is not at variance with the judgment. Where there is some ambiguity or

error in the extract, it must be sent back to the trial Court for clarification or rectification. I therefore strike out the 2nd Respondent from the application.

As for the discharge of the Applicant from the liability imposed by the consent judgment, this Court can only do so upon being satisfied that the decree has been satisfied. The consent decree is unmistakably clear. It does not specify any moiety payable by either the Applicant, or the 3rd Respondent herein, in satisfaction of the decree. It makes them liable jointly and severally to satisfy the decree; and so either of the, or both, as judgment debtors, may satisfy the decree. Where either of them severally satisfies the decree, he is entitled to indemnity from the party who has not contributed to the satisfaction of the decree. It is not for the Court executing the decree to order for such indemnity. The party seeking such indemnity may file a fresh suit for such remedy.

The Applicant has cried foul that the 2nd Respondent has been subjecting him to persecution to pay him monies owing to him. Demand on the Applicant to satisfy the decree does not amount to persecution. If the 2nd Respondent were, in acting as counsel for the 1st Respondent, acting, doing anything not permissible in the process of ensuring that the Applicant satisfies the decree through pursuit of the process of execution of the decree herein, I would have called him to order. Unfortunately, there is no such evidence before me to that effect. Where parties take other course of action, not directly linked to the execution process, or at all, such are outside the function of the executing Court even where they are plainly wrong. The remit of the executing Court, I must reiterate, is limited to enforcement of the decrees of Court. It does not sit as a Court of judicial review.

The Applicant has further urged Court to vacate the caveats the 1st and 2nd Respondents have allegedly lodged on the Applicant's properties. True, it is a provision in the consent judgment that the payments due to the 1st Respondent by the Applicant and 3rd Respondent would follow the withdrawal of the caveats on the Applicant's land. Since the 2nd Respondent was not a party to the head–suit, that order, like all orders issued in the head–suit, does not bind him. Second, since the decree was clear that payment was consequent upon the withdrawal of the caveats, the presumption is that the Applicant effected the payments upon the withdrawal of the caveats as decreed. This presumption is of course rebuttable by the Applicant through cogent evidence negating it.

However, the evidence on record that would have served as a rebuttal of this presumption is wanting. The evidence the Applicant has adduced, as an attachment to his affidavit to support the contention that the Respondents have failed to heed the Court's decree to vacate the caveat, is actually an order of attachment made by a Court of law. As has been pointed out by the Counsel for the 1st Respondent, it predates and was never an issue in the contract that gave rise to the suit which ended with the consent judgment. Accordingly, in the face of the assertion by the 1st Respondent that the caveat has in fact been vacated as was decreed by Court, and there is no evidence to the contrary before this Court, I am compelled to agree with the 1st Respondent in this regard.

However, there is a part of the application to give full effect to the terms of the consent judgment, which I believe is not misconceived; and to this, I now turn. The consent judgment provides for payment of the specified decretal sum as follows: –

"2. The above amount shall attract interest at the commercial rate of 27% per annum from 6th August, 2008 the date of the receipt of the money, until payment in full.

3. The Defendants shall pay the 1st instalment of U. Shs. 20,000,000/= (Twenty million shillings only) to the Plaintiff within the ***first two*** *months from the date referred in clause 1 herein above and the balance of U. Shs. 40,500,000/= and interest shall be paid within the remaining* ***six (6) months*** *of this consent judgment."*

From the terms of the consent judgment reproduced above, it is clear that the 27% interest charged on the decretal amount was not a compound interest. Hence, the 27% interest must strictly be computed out of the principal sum of U. Shs. 60,500,000/= (Sixty million five hundred thousand only). This principal sum must be satisfied before any payment is assigned towards covering the interests ordered. The 27% interest must be computed out of the principal sum, or any balance there from that remains outstanding. It is wrong to add the interest payable onto the decretal sum, or the balance there from, and then charge 27% interest on the combined sum. This is compound interest, which the consent judgment certainly never provided for.

Accordingly, while the application may not strictly be frivolous and vexatious, I find that the preliminary objection succeeds largely, in that the application brought before this Court is in the main misconceived. Since the preliminary points I have pronounced myself on are pure points of law, and have in effect disposed of the application in its entirety, there is no need to delve into

the other grounds or points raised in the preliminary points of objection. In the result, the application stands dismissed with two thirds of the costs awarded to the Respondents.

Alfonse Chigamoy Owiny – Dollo
JUDGE

06 – 02 – 2015