

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLC. NO. 955 OF 1997

(Arising from Civil Suit No. 115 of 1997)

DANZE ENTP. LTD 7 ORS:..... PLAINTIFFS/APPLICANTS

versus

COMMISSIONER GENERAL DEFENDANT/RESP.

BEFORE: The Hon. Principal Judge Mr. Justice J.H. Ntabogba

RULING:

This is a ruling on the application brought by notice of motion pursuant to order 37 rules 6,7 and 9 of the Civil Procedure Rules. It is brought by the six plaintiffs in High Court Civil Suit No. 115 of 1997 in which the defendant is the Uganda Revenue Authority represented by the Commissioner General of the Authority. The application seeks the following Court Orders:-

- (a) That “the trade goods set out in an annexure to the affidavit in support of the application which are the subject matter of the suit be released to the applicants for sale in the ordinary course of business or on such terms and directions as this Honourable Court may be pleased to order in which event the court should put in consideration the operation expenses set out in”
- (b) That “the applicants be allowed to inspect the trade goods seized in various premises to establish the extent of damage to the trade goods.”
- (c) That “costs of this application be provided for.”

The grounds upon which this application is based are set out in the affidavit which was sworn by Mr. John Ndyabagye, the Executive Director of Danze Enterprises Limited, the first of the six plaintiffs/applicants. He swore on the affidavit in support of the application on 24/10/97. The reasons given for the sale of the trade goods are that some of the trade goods are perishable in nature and are therefore subject to speedy and natural deterioration rendering

them unfit for consumption or their intended use. The category of those goods which are perishable in nature are listed down in category D of annexure A to the affidavit of John Ndyabagye. Annexure A is a categorized list of the goods seized by the defendant/respondent.

Annexure B to the same affidavit of John Ndyabagye is an inspection report of M/s Independent Adjusters Uganda Limited trading as McLarens Toplis. The report concentrated on the perishable goods, such as sugar, batteries, wheatflour, candies etc. The report clearly shows that the trade goods subject thereof are perishable and indeed some had started to perish at the time of compilation of the report which was on 12/3/97.

Although this application concentrates on the perishable nature of some of the goods subject of the Civil Suit as the main ground for the goods to be sold, there are other equally compelling reasons embracing even the nonperishable goods. The damage on any of the goods resulting from long period storage would diminish the value of the goods thereby resulting in loss to all the parties claiming interest in the goods, whatever such interest. Further, it is important that demurrage charges would continue to accumulate as a result of storage and in fact this is true to date. Sale of the goods would therefore avoid such exorbitant demurrage.

In short, sale of these goods would mitigate loss to the interested parties. With these reasons in mind, one would have expected any of the parties to have made an expeditious application for an order of sale of the trade goods. As I pointed out in my ruling delivered on 23/10/97, "Counsel on either side seem not to [have been] concerned that the goods... are perishable and that they are actually either perishing and/ [or] also some of them have been reported stolen. It would appear to me that unless each side is given permission to sell the goods and pocket the proceeds, they do not care whether or not the goods perish or pilfer. Surely, even if an order were made for the goods to be sold under the supervision of the court which would keep the sale of the proceeds for the successful party to eventually collect, it is difficult to see how any of the parties would thereby be prejudiced."

In that ruling of 23/10/97 I also expressed the court's inability to order the sale, unless it was moved under order 37 rule 6 and 7 of the Civil Procedure Rules. It must be noted that all along court has been concerned about its presiding over proceedings that watched valuable trade commodities perish when they could have been converted into cash. After all the goods are trade goods and their ultimate goal is to convert them into cash through their sale.

It is gratifying to note therefore that the parties have waken up to the reality and reason; and that the respondent defendant has been so cooperative as not to oppose the application for an order to sale. It is significant that either party has provided for or contributed to the conduct of the sale by, for instance, providing an expert valuer so that two joint such experts representing either side will determine the values of the goods to be sold and the loss occasioned on some of the goods thereby affecting the sale value etc.

During the hearing of this application the issue arose as to what mode of sale this court should order. In fact that seems to be the only issue over which the plaintiff could not agree with the defendant. I had, in a bid to bring the parties to consensus advised them to discuss that question. However, the parties reported, at the commencement of the proceedings of 10/11/97, that they had attempted but failed to agree. The plaintiffs/applicants maintained that the goods should be released to them and be allowed to be sold "in the ordinary course of business." The defendant, on the other hand, wanted the sale to be by a public auction.

In support of the applicants' preference for the sale in the course of business, all the 4 Counsel for the six applicants argued that a sale by public auction is usually panicky and is conducted in a hurry and that an auctioneer usually is not a seller of trade goods; that he sells distressed goods. Accordingly, Counsel argued that a sale by public auction of so many goods of varied types and values would force the goods to be sold at huge discounts. They requested that the sale should be by ordinary course of business of selling trade goods and selling at the best prices that can be offered and accepted. They want the goods to be sold and the sales to be governed by market forces. They undertake to sell within a time limit of 2 months but subject to coming back to court for extension of the time allowed. They desire that the respondent have representatives at every point of sale so as to be able to check on any irregular transactions that the applicants may make and to be able to lodge protests and

objections to the court which should supervise the sale.

They also request that since the selling process costs money court should provide, in its order, that costs of the sales be met out of the proceeds of the sale. The order should also provide that stock taking be immediately made; that each side appoints a professional valuers or assessor to carry out such stock taking. They concluded that the cost of valuation and sale would be a great deal lower than the cost of auctioning the goods. After all, the sale by auction goes to the highest bidder but not necessarily for the best price. They argued that sale by market forces would still fetch better prices than sale by auction even with a reserve price. Whatever mode of sale is ordered, Counsel requested that a track be maintained so that goods of each plaintiff are identified with the proceeds of their sale.

Counsel for the applicant reinforced their argument with a recent example whereby the entire assets of Foods and Beverages were sold by public auction at a sum of Shs. 670m/= and 3 months later only part of those assets were resold by ordinary means at Shs. 4b/= (Four Billion shillings). They said that illustrates that a sale by public auction would fetch less value.

Mr. Byamukama learned Counsel for the respondent maintained his stand that sale by auction, in the circumstances of the trade goods, would be better than sale in the ordinary way. He referred to the mode of sale advocated by Counsel for the applicants and said:-

“Their mode of sale has problems because I do not think that it would be possible to sell all the goods in only 2 months. And as we pointed out in paragraph 9 of the affidavit in reply, we do not believe that the applicants have the capacity to conduct the sale as claimed.”

Counsel said that the premises nominated by Mr. Ndyabage in his affidavit (in paragraph 10) as the shop where the sale of the goods would be conducted, was shop No.9 Market Street which belonged to a company other than the applicants. He argued that an order for the plaintiffs to conduct the sale would involve a conflict of interest and subject the sale to non-accountability. It is very cumbersome and difficult to monitor or supervise, if it is a sale by

ordinary means in the course of business. By the very submission of the plaintiffs that such a sale would be subject to the laws of demand and supply implies that 2 months and any other determined period would be impossible, Counsel argued. He observed, correctly, in my view that if the sale took too long, it would defeat its purpose of saving the goods from deterioration or decay.

During the course of arguments on both sides a number of other issues were raised. The one that took much of the time was whether or not the seizure of the trade goods by the respondent was in conformity with the legislative provisions. It will be noticed easily that I have refrained from examining that issue since, in my opinion, that is an issue that will have to be argued at the hearing of the substantive suit. I do not think either that it is necessary to argue or decide as to who is owner of the trade goods. That will also be subject of arguments of the substantive suit. My understanding of the purpose of this application is that it seeks an order of sale of the goods so as to avoid damage and pilferage caused by long storage and also to mitigate demurrage charges.

I do not think that this court should even engage into the nitty gritty of marketing in the sense of merchant's whole-sale and retail of goods. While, therefore, appreciating the desirability of selling the trade goods at the most favourable prices, I think that the court's concerns should be to ensure that the goods are sold at most favourable prices, and as expeditiously as will avoid further loss of goods and also their value. The Court must also ensure that the sale is conducted in most transparent and accountable manner and that the process of sale, no interested party will end up prejudiced. As I have said already, I congratulate the contesting parties on having seen reason and co-operated with the court to ensure that these goods are fairly converted from goods to cash, which was the purpose I suppose for which they were brought into or through the Country, whatever the case.

In the circumstances I am pleased to order as follows:-

- (a) That the respondent, URA, avails the trade goods as listed in Annexure 'A' of Mr. John Ndyabagye's affidavit in support this application.

- (b) That the two surveyors/valuation experts, namely Mr. A.S. Babumba-Kyeyune of M/s Allied Property Surveyors, of Total House, Plot 29/33 Jinja road, Kampala and McLarens Toplis of Independent Adjusters Uganda, Ltd, carryout valuation of the trade goods subject of this application and, in so doing, inspect and establish the damage sustained by any of the good, and also assess the price of all the goods for the purpose of their sale.
- (c) That while the applicants conduct the sale, the respondent ensure the presence of its representative or representatives who will report immediately any irregularity to court should such irregularity occur. As few people as will minimize the expenses of sale must be employed. Only employees of the first plaintiff shall be involved.
- (d) That the sale shall be supervised by the Court through the Registrar, and that such supervision of the Court means that any party aggrieved by any irregularity or malpractice during, or arising out of the sale, will be reported to the Registrar without delay, and that the Court will give such directives from time to time during the sale as will be necessary.
- (e) That the sale will keep identified the goods in which each plaintiff claims interest, so as to enable the claimant to identify the proceeds of the sale of the goods it has a claim of interest in.
- (f) That the proceeds of the sale will be deposited and kept on escrow account pending the final disposal of the main suit.
- (g) That the surveyors/valuers hereby appointed will commence business and do and complete their work in a period not exceeding 3 weeks from the date of this order.

- (h) That the sale of the goods will start three weeks from to-day and take a period of two months from the date of commencement of the sale.

It is ordered.

J.H.

Principal Judge

24/11/97