THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CIVIL APPLICATION No. 0014 OF 2016

(Arising from Arua High Court Civil Suit No. 0006 OF 2016)

COIL LIMITED ……. APPLICANT

VERSUS

TRANSTRADE SERVICES LIMITED …..…….…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

This is an application by Chamber Summons under section 98 of *The Civil Procedure Act*, and Order 40 rules 1, 2, 4, 5 and 6 of *The Civil Procedure Rules*, for orders that the respondent's motor vehicles registration No. KBU 456 J and ZE 4212 or such other motor vehicles as may be identified by the applicant be attached before judgment. In the alternative, the applicant seeks an order for the respondent to furnish security sufficient to satisfy the applicant's claim in the event of judgment being delivered in its favour. The application is supported by the affidavit of Mr. Pooja Dokwal, the General Manager of the applicant whose contents are to the effect that on 8th January 2016, the respondent's motor vehicles Registration Numbers KBU 456 J and ZE 4212 rammed into the applicant's electrical generator at Goli Customs in Nebbi District, damaging it beyond repair. On that basis, the applicant instituted a suit for the recovery of damages. However, the respondent is based in Kenya and has no known assets in Uganda. The applicant seeks an interlocutory order designed to prevent the dissipation or removal of the respondent's assets before trial, so that if the applicant succeeds at the trial there will be property against which it can enforce judgment.

Whether the respondent will have sufficient assets at the end of a trial to fully satisfy any judgment that may be obtained is a pertinent consideration both for the applicant and court. The last thing a litigant wants to do is to incur expenditure on litigation only to receive a paper

judgment that cannot be satisfied. A plaintiff though is not normally entitled to secure assets in advance to ensure that they will be available to satisfy a judgment that may not come for years (see *Lister v. Stubbs, [1890] All E.R. 797*). During the pendency of the suit, a defendant is normally entitled to carry on its ordinary course of business, and if business takes a turn for the worse and there is no money left by the time a judgment is granted, that is too bad for the applicant. However, in situations where the respondent has acted fraudulently in the past or may act fraudulently in the future, a plaintiff may be able to apply to the court for an order of attachment before judgment (a *Mareva injunction*). Hence in *Bahman (Prince Abdul) Bin Turki Al Sudairy v Abu Taha, [1980[3 ALL ER 409 at 412* Lord Denning M.R. stated that "A Mareva injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding or a danger of the assets being removed out of jurisdiction or disposed within jurisdiction or otherwise dealt with so that there is a danger that the plaintiff if he gets judgment will not be able to get it satisfied."

The rationale behind an order of this nature was explained in *Polly Peck International plc v Nadir (No 2) [1992] 4 All ER 769, 785g-786a*, as follows:

> So far as it lies in their power, the courts will not permit the course of justice to be frustrated by a defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the applicant may thereafter obtain. It is not the purpose of [the] injunction to prevent a defendant acting as he would have acted in the absence of a claim against him. Whilst a defendant who is a natural person can and should be enjoined from indulging in a spending spree undertaken with the intention of dissipating or reducing his assets before the day of judgment, he cannot be required to reduce his ordinary standard of living with a view to putting by sums to satisfy a judgment which may or may not be given in the future. Equally no defendant, whether a natural or a juridical person, can be enjoined in terms which will prevent him from carrying on his business in the ordinary way or from meeting his debts or other obligations as they come due prior to judgment being given in the action. Justice requires that defendants be free to incur and discharge obligations in respect of professional advice and assistance in resisting the applicant's claims. It is not the purpose of a [the] injunction to render the applicant a secured creditor, although this may be the result if the defendant offers a third party guarantee or bond in order to avoid such an injunction being imposed.

Such an order freezes the respondent's assets pending trial. They are granted for an important but limited purpose: to prevent a respondent dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign (see *Fourie v La Roux [2007] UKHL 1*). Because orders of this nature run contrary to the general rule against execution before judgment, extreme caution should be exercised before grant of such an order. It may be abused by the applicant who may choose to use it as an end in itself, thereby truncating the pending litigation at the very outset or, cause unnecessary hardship to the respondent or third parties. The order should be made in exceptional cases and for that reason, for the order to issue, the applicant must establish that:

1. The applicant 's case for damages against the respondent is strong and likely to succeed;
2. There is evidence that the respondent is removing, or there is a real risk that the respondent is about to remove, his or her assets from the jurisdiction to avoid the possibility of a judgment; OR
3. The respondent is otherwise dissipating or disposing of his or her assets in a manner clearly distinct from his or her usual or ordinary course of business or living so as to render the possibility of future tracing of the assets remote, if not impossible; AND
4. The applicant is prepared to pay the respondent damages in the event that the court later determines that the order should never have been issued and the respondent suffers damage as a result of the order.

An order of this nature can have very serious adverse effects often over a long period, sometimes even financial ruin, for the individual or company against whom it is made. The court should therefore be satisfied not only that there is a properly arguable case against the respondent and a risk of dissipation or hiding of assets, but also as to the proportionality of the order. Mere foreign residence or domicile of the respondent is not enough. The Court ought to be furnished with details, so far as they can be established, about the nature and financial standing of the respondent's business including its length of establishment.

Regarding the existence of a suit that is likely to succeed, the test of a good arguable case is that it must be one which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success (see *The Niedersachsen [1983] 1 W.L.R. 1412*). I have considered the plaint filed by the applicant and the corresponding written statement of defence by the respondent. The suit is based on averments of fact, which if established by evidence, are capable of supporting a finding in the applicant's favour. Although there is no evidence that the plaint has been served on the respondent and despite the respondent not having filed its defence yet, I am satisfied that the applicant's claim meets this test.

Risk of dissipation is usually the most important factor. If the applicant can satisfy the test, it is then for the court to decide whether it is just and convenient to grant the order. I have considered the circumstances of this case. The respondent is said to be in the transport business which necessitates its trucks to move across borders. There is nothing to show that the respondent has at any time since the filing of the suit dissipated, removed or disposed of its assets in a manner clearly distinct from its usual or ordinary course of business so as to render the possibility of future tracing of the assets remote. There is no clear or irrefutable evidence to show that there is a real risk that the respondent is about to remove its assets from jurisdiction purposely to avoid the possibility of a judgment. It appears to me that the respondent's trucks movement across borders continue in its ordinary course of business.

In paragraph 8 of the affidavit in support of the application, it is deposed thus; -

> ...the respondent's uncooperative conduct exhibited through her deliberate refusal to respond to the applicant's endeavours for securing a less costly and convenient settlement has made the applicant to lose faith over any possibility of the respondent abiding by any court order which the respondent may have means to fraudulently circumvent.

The averment neither discloses irrefutable evidence to show that there is a real risk that the respondent is removing or about to remove its assets from jurisdiction purposely to avoid the possibility of a judgment nor a dissipation, removal or disposal of such assets in a manner clearly distinct from the respondent's usual or ordinary course of business so as to render the possibility

of future tracing of the assets remote. Instead, the order was sought on account of the respondent's failure or refusal to cooperate in a proposed out-of-court settlement, as the basis of harbouring the fear of the possibility of the respondent circumventing a possible judgment of the court in favour of the applicant. In the circumstances, the affidavit does not disclose any reasonable basis for harbouring the fear that the respondent may not have sufficient assets at the end of a trial to fully satisfy any judgment that may be obtained. The order is not meant to prohibit the respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business but only where there is a real risk that the respondent will dissipate or dispose of its assets other than in the ordinary course of business. It is for that reason that Order 40 r 1 (a) (iii) of *The Civil Procedure Rules* requires proof that the respondent has disposed of or removed from the local limits of the jurisdiction of the court its property or any part of it "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 am persuaded by the decision in *Uganda Electricity Board (In Liquidation) v. Royal Van Zanten (U) Ltd, H.C. Misc Application No. 251 of 2006*, where it was decided that;

> Court ought to be satisfied not only that the defendant is really about to dispose of his property or about to remove it from its jurisdiction but also that the disposal or removal is with intent to obstruct or delay the execution of any decree that may be passed..... the satisfaction must be of the Court as regards these matters and it must be based on some material derived either from the affidavit of the party, applying .... or otherwise. (emphasis added).

The averments in paragraphs 3 – 24 of an undated supplementary affidavit filed in court on 1st September 2016, the applicant's Managing Director adds that when the Assistant Registrar of this Court granted an interim attachment Order on 21st March, 2016 the applicant proceeded to attach the respondent's mentioned trucks on 14th April 2016 but in contempt of that order, the respondent removed the trucks from lawful attachment and he is "reliably informed" that the respondent plans to wind up its business as quickly as possible before the suit is disposed off yet its purported COMESA insurance will not satisfy the judgment. Suffice to mention here that an affidavit based on information which does not disclose the source of that information is defective and may not support the application it purports to (see *Kabwimukya Aristella v. John Kasigwa*

[1978] HCB 251). It would be unsafe to rely on the contents of the supplementary affidavit for a defective affidavit may not be relied upon to support an application..

I have perused the pleadings presented to the Assistant Registrar, the submissions made to him, and the ruling delivered thereupon. I am afraid that nowhere do the proceedings reveal an attempt to prove or consider whether or not there was a real risk that the respondent was removing or about to remove its assets from jurisdiction purposely to avoid the possibility of a judgment nor a dissipation, removal or disposal of such assets in a manner clearly distinct from the respondent's usual or ordinary course of business so as to render the possibility of future tracing of the assets remote. The Assistant Registrar, with due respect, did not properly address his mind to the requirement of orders of this nature. Particularly, he did not address the standard of candour required in *ex-parte* applications for orders of this nature (see *Rex v. Kensington Income Tax Commissioners, Ex parte de Polignac (Princess) [1917] 1 K.B. 486 at 509*), such as was emphasised in *Re Stanford International Bank Ltd [2011] Ch 33*, as follows;

> … it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. ..... Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. ..... An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect [an applicant] seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the respondent or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge.

The level of disclosure required was outlined in *Siporex Trade SA v Comdel Commodities [1986] 2 LR 428 at 437* as follows;

1. The applicant is required to show the utmost duty of good faith and must present his case fully and fairly; as such "fair presentation" cannot be separated from the duty;

2. The affidavit or witness statement in support of the application must summarise the case and the evidence on which it is based;
3. The applicant must identity the key points for and against the application and not rely on general statements and the mere exhibiting of unhelpful documents;
4. He or she must investigate the nature of the claim alleged and facts relied on before applying and must identify any likely defences;
5. He must disclose all facts, or matters, which reasonably could be taken to be material by the judge deciding whether to grant the application; the question of materiality is not to be determined by the applicant.

The applicant must ensure that the information included in the affidavits sworn in support of the application to the court constitute full and frank disclosure of all relevant and material facts. This is because applications of this nature are usually brought without notice to the respondent (since to give prior notice would risk the assets being dissipated or removed before the court can hear the matter), and therefore the court makes an initial order having heard only one side of the story. To a great extent, therefore, the court is at that stage relying on the candour and integrity of the applicant and must assume, when granting such orders, that it has not been misled. I have considered the averments in the applicant's supplementary affidavit, despite the defect of its being un-dated. The deponent did not disclose the source of information by which he is "reliably informed." Any evidence to support the inference that the respondent is, or will dissipate or dispose of assets, must be carefully considered by court. This requirement was neither met in the application for the interim order nor for this one. To show that there is a real risk of dissipation, the applicant is required to disclose all relevant evidence such as property and company searches showing assets are being divested or dissipated. The respondent, on the face of it, is not a company registered in a country where the company law is so loose that nothing can be obtained about its undertaking or where it does no work and has no officers and no assets or nothing can be found out about its membership, or its control, or its assets, or the charges on them. The applicant has simply not taken sufficient steps to obtain and furnish the information to court.

Moreover, *The Foreign Judgments (Reciprocal Enforcement) Act, Cap 43* of the 2012 Revised Edition of the Laws of Kenya, provides for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and under item 5

of the Schedule to the *Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, 1984*, Uganda is listed as one of the countries which are "declared to be reciprocating countries for the purposes of the Act" and to which the Act applies "with respect to judgments given by superior courts of those countries." For that reason, if the respondent's assets are situate in Kenya, they can be attached and liquidated there in accordance with section 3 (1) (a) of the Act, which renders enforceable a judgment of this court "in civil proceedings whereby a sum of money is made payable." In absence of credible proof of a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by attachment, the respondent will dissipate or dispose of his assets other than in the ordinary course of business, this is a more or less a guarantee that the judgment will not go unsatisfied.

Being a discretionary remedy, I must also consider the proportionality of the order. The effect of the order on the respondent's ability to conduct its business in the ordinary course is a relevant consideration since its liability is yet to be determined. In this regard I note that since the suit was filed on 1st March 2016, no attempt has been made by the applicant to fix it for hearing. The applicant appears to be more focused on interlocutory applications than pressing for the expeditious disposal of the suit, which otherwise in all probability would be near completion by now if not decided already, had the applicant been more diligent in that direction. Such conduct smacks of the possibility of using the order oppressively.

On the other hand, when considering attachment of the respondent's assets before judgment, the question of proportionality relates to how to balance the need to preserve the interests of the applicant pending the outcome of the decision of court, protecting the integrity and not undermining the authority of the court's orders and judgment while at the same time protecting the rights of innocent third parties lawfully created in the course of commercial transactions with the respondent. In absence of any undertaking on the applicant's part as to damages, i.e. that if it is later determined that the order should not have been granted and the respondent suffers damages as a result of freezing its assets, the applicant will pay the respondent the damages, to grant the order would be grossly unfair. Such an undertaking is almost certainly mandatory, unless dispensed with by court for good reason such as the possibility of stifling the action (see *Customs and Excise Commissioners v Anchor Foods Ltd [1999] 1 WLR 1139*). The requirement

is meant to weed out speculative or tactical applications and provides the court with added assurance that the applicant is serious and confident in the justness of its cause.

Further justification of such a cross-undertaking is to be found in *Re Bloomsbury International Ltd [2010] EWHC 1150 (Ch), 12*, Per Floyd J; -

> The court makes the litigant give a cross undertaking in damages against the possibility that it may turn out at trial that the order should not have been made. In a case where it does turn out that an order should not have been made, the party restrained may have suffered harm at the behest of the litigant which would result in injustice if there existed no means for it to be redressed. Absent a cross undertaking, the law does not provide any automatic means of redress for a party who is harmed by litigation wrongly brought against him in good faith. The cross undertaking is the means by which the court ensures that it is in a position to do justice at the end of the case

I was neither provided with a justification for dispensing with this requirement nor have I found any. Mere possibility or fear of dissipation is insufficient to convince the Court to grant the remedy. As a result, the order sought is disproportionate to the nature of the action and in the circumstances taken as a whole, I am not persuaded that it is just and equitable to grant the order of attachment before judgment. The balance of convenience does not favour the applicant.

In the alternative, the applicant sought and order directing the respondent to deposit security in court. Within the context of attachment and arrests before judgment, according to Order 40 r (b) of *The Civil Procedure Rules* such an order is made only on respect of a natural person who 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. It is therefore is inapplicable to the facts of this case.

In the final result, for the foregoing reasons, the application sis dismissed with costs to the respondent.

Dated at Arua this 10th day of November 2016.

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Stephen Mubiru,
Judge