THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, JJSC)

CIVIL APPEAL NO. 3 OF 2002

BETWEEN

BAMU PARTNERS AND AUCTIONEERS..... APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

(Appeal from the decision of the Court of Appeal of Uganda at Kampala by (Hons. Kato, Berko, Twinomujuni, JJA), dated 5th January, 2001 in Civil Appeal No. 33/2000)

JUDGMENT OF KAROKORA, JSC.

The appellant, Bamu Partners and Auctioneers, was the successful party before the Deputy Registrar of the High Court, Taxing Officer in Taxation proceedings which the respondent opposed on the ground that the appellant had not effected any attachment of shares of Westmont Land (Asia) BHD in compliance with Order 19 r 43(1)(2) of Civil Procedure Rules. The respondent appealed to a judge of the High Court who reversed the decision of the Deputy Registrar. The appellant's appeal to the Court of Appeal was dismissed, hence this appeal.

The brief facts of the case which gave rise to this appeal were that in HCCS No. 476 of 1999 the Attorney-General (hereinafter referred to as the respondent) and the Uganda Commercial Bank (Ltd) (UCB) obtained judgment against Westmont Land (Asia) BHD for a sum of Shs. 32,272,821,041/= which was worthy 49% shares of the holding of the Bank. On 1st September 1999, the appellant applied to the Deputy Registrar of the High Court for a warrant of attachment and sale of Westmont Land (Asia) BHD's shares which it held in UCB. At the taxation proceedings, Dr. Sempasa for the respondent opposed item 1 on the bill of costs which is Shs. 968,184,623/= This amount was described as fees for attachment of shares. That amount is 3% of the decretal amount of Shs. 32,272,821,041/=. Counsel objected to the above claim on the ground that the appellant did nothing to deserve the award. In other wards he contended that the appellant neither attached nor sold the shares of Westmont Asia Land (Asia) BHD which it had in the UCB Ltd. because by the time the appellant received the warrant, the attachment had already been effected by the respondent.

There were six grounds of appeal which were argumentative and offended rule 81 of the Rules of this court. When the attention of Mr. Mbabazi, Counsel for appellant was drawn to this error, he conceded and abandoned grounds 1, 2 and 6. With leave of court grounds 3, 4 and 5 were amended to read as follows:-

(3) The learned Justices of Appeal erred in law in holding that the appellant did not comply with Order 19 r 43(1)(2).

(4) The learned Justices of Appeal erred in law in holding that it was appellant's duty to prove that he had carried out the attachment.

(5) The learned Justice of Appeal erred in law when they failed to consider and make findings on grounds of Appeal viz grounds 5,6,7,10 and 12 of the Memorandum of Appeal in Civil Appeal No.33/2002.

Counsel for appellant argued the three grounds together. He submitted that the gist of these grounds was whether the determination that there had been non-compliance with Order 19 r 43(1) and (2) of the Civil Procedure Rules could be made on the available

evidence. Counsel submitted that there was evidence on record showing that the appellant had notified the Secretary of the UCB Ltd that a warrant of attachment of the shares of Ms Westmont Land (Asia) BHD in the UCB Ltd had been issued to the appellant forbidding transfer of the said shares from UCB or receiving any payment of any dividends thereon until otherwise ordered by court. Further, counsel submitted that at the taxation proceedings parties proceeded on the basis that there was proper attachment, because even Dr. Sempasa had conceded before the Registrar that some work had been done by the appellant but contended that the attachment was done by the respondent. Counsel submitted that the Registrar held that if Dr. Sempasa carried out any work under Order 19 r 43 then he only assisted the court bailiff to carry out his assignment. Accordingly, the Registrar allowed the bill of costs as presented by the court bailiff.

When the matter went on appeal to the High Court the learned Principal Judge reversed the decision of the Deputy Registrar on the ground that the appellant had not complied with Order 19 r 43(1)and (2) of Civil Procedure Rules. The learned Principal Judge's decision was upheld by the Court of Appeal. Mr. Mbabazi, counsel for the appellant contended that the conclusion of the Court of Appeal was made in error, because the appellant had not been called upon to prove compliance with Order 19 r 43. Therefore counsel submitted that the appeal should be allowed and that the ruling of the Registrar should be restored or a retrial be ordered.

On the other hand Ms. Baturuuka, counsel for respondent, opposed the appeal and invited us to uphold the decision of the Court of Appeal. She adopted the submissions of the respondents before the Court of Appeal the gist of which was:-

"No proof whatsoever was led either before the Registrar or the Principal Judge that the bailiff in fact 'attached" anything in compliance with Order 19 r 43. There was no showing by the bailiff that they did anything in relation to the two critical acts required under law, namely:

(i) serving a copy of the prohibitory order to the secretary of the corporation and,

(ii) affixing a copy of the same in a conspicuous location of the court.

Such evidence as is available and was relied upon by the court, was the letter attached as annexture LT[1] to the respondent's affidavit in reply. That annexture revealed simply that a warrant of attachment (and not a prohibitory order as required) was enclosed and forwarded by bailiff to the company secretary of the UCB and possibly to the Registrar of Companies

In addition she submitted that before the Deputy Registrar Dr. Sempasa had submitted that there was no evidence to show that the appellant carried out the process of attachment of the shares in accordance with Order 19 r 43, and that the respondent procured the prohibitory order. Dr. Sempasa had opposed payment of item 1 of the bill of costs, because by the time the appellant appeared on the scene, the process of attachment had already been completed by the respondent.

On the complaint by the appellant's counsel that it was erroneous for the learned Principal Judge to rely on non-compliance with Order 19 r 43 which had not been an issue before the Deputy Registrar, counsel for respondent submitted that the learned Principal Judge was correct to address the issue of attachment of the shares as provided by the law. She contended that the Justices of Appeal considered the complaint and found that the learned Principal Judge correctly resolved that there was no attachment of the shares with the law. She therefore invited us to dismiss the appeal.

I shall consider each of the three grounds as amended separately.

Ground three complained that the learned Justices of Appeal erred in law in holding that the appellant did not comply with Order 19 r 43 (l)and (2). Clearly the attachment was in respect of shares which Westmont Land (Asia) BHD held in the UCB Ltd. There is no way, in my view, in which this issue would have been resolved without considering the question of whether the appellant had effected attachment as provided

by the law. Order 19 r 43(1) and (2) of Civil Procedure Rules provides for attachment of debt, shares, and other property not in possession of a judgment debtor as follows:-

"(1) ***In case of,***

(a) a share in the capital of a corporation;

(b) other movable property not in possession of the judgment debtor, except property deposited in or in the custody of any court, the attachment shall be made by a written order prohibiting.

(i) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividends thereon;

(2) A copy of such order shall be affixed on some conspicuous part of the court house and another copy shall be sent, in the case of the shares, to the proper officer of the corporation"

Clearly the attention of the appellant was drawn to non-compliance with the provisions of Order 19 r 43 at the hearing before the Deputy Registrar when Dr Sempasa stated that the attachment was done by counsel for respondent who had effected service. However, counsel for appellant, in rebuttal wondered how counsel for the respondent got involved in the attachment of the property they were supposed to protect.

The Deputy Registrar impliedly conceded that the respondent's counsel had effected service but held that if Dr. Sempasa's firm effected attachment he assisted the appellant in the attachment of the shares. He therefore allowed the bill of costs as presented.

The respondent appealed to the High Court against the ruling of the Deputy Registrar. The Principal Judge allowed the appeal on the ground that neither the appellant nor the respondent effected attachment of the shares in accordance with Order 19 r 43(2). The appellant appealed to the Court of Appeal which dismissed the appeal on the ground that the appellant had not proved that he had complied with the law.

The appellant further appealed to this Court. The complaint is whether the Court of Appeal erred in law in holding that the appellant never complied with the law. Clearly the attachment of shares in any Corporation is governed by Order 19 r 43(2) of the Civil Procedure Rules. After carefully going through the record, it is clear from the evidence that the appellant never took out and served the prohibitory order in accordance with the law.

In the result, I do agree with the conclusions of the learned Principal Judge who held that neither party had effected service in compliance with the law. Consequently, I cannot fault the Justices of Appeal who confirmed the decision of the learned Principal Judge, because, clearly there was no evidence that the appellant had effected attachment of the shares which Westmont Land (Asia) BHD had in the UCB Ltd in compliance with the law.

In the result, ground 3 must fail.

Ground 4 complained that the Justices of Appeal erred in law in holding that it was appellant's duty to prove that he had carried out the attachment. In the Court of Appeal Twinomujuni, JA, considered this matter in the following words.

"Before the Deputy Registrar and the Principal Judge the appellant's right to receive payment for work done in the attachment of the shares was challenged. It was his duty to prove that in fact he had carried the duty for which payment was being sought. In order to do that, he had to produce evidence to establish that he had complied with the mandatory provisions Order 19 r 43 of the Civil procedure Rules. It was not the duty of the respondent to prove that Order 19 r 43 was not complied with."

Mr. Mbabazi, Counsel for appellant, submitted before us that the Court of Appeal was in error in upholding the decision of the Principal Judge, contending that the appellant had not been called upon to prove compliance with Order 19 r 43 of the Civil Procedure Rules.

The respondent had opposed the appellant's bill of costs before the Registrar on the ground that the work which the appellant claimed to have done was done by the respondent. The Registrar overruled respondent's objection and held that the appellant had effected attachment. The Principal Judge, rightly in my view, reversed Registrar's decision on the ground that the appellant had not effected attachment in compliance with the mandatory provisions of Order 19 r 43. This was in conformity with the Supreme Court decision in the case of ***Adonia Makudi vs. Christ Mukasa SCCA No. 2 of 1986*** where this court held that an appellate court can on its own motion consider a point of law that was not argued by Counsel. Therefore I cannot see anywhere where the Court of Appeal erred in upholding the decision of the Principal Judge. If the appellant's claim for the amount in the bill of costs was based on the attachment of the shares which the respondent opposed on the ground that there was no attachment by the appellant to deserve any payment under 1st item of the bill of costs, then the onus was clearly on the appellant to prove that he had effected attachment of the shares in compliance with the mandatory provisions of 19 r 43 (supra). The record showed that he had not effected attachment of the shares.

Therefore ground four must fail.

Ground five as amended complained that the learned Justices of Appeal erred in law when they failed to consider and make findings on grounds of appeal viz grounds 5,6,7,10 and 12 of the Memorandum of Appeal in Civil Appeal No. 33 of 2000. Twinomujuni, JA., who wrote the lead judgment of the court formed the opinion that only two grounds emerged from the submission of appellant's counsel, namely:-

(1) Whether the appeal which was entertained by the learned Principal Judge was illegal/a nullity.

(2) Whether the learned Principal Judge erred in law or fact when he held that no attachment proceeding were accomplished in HCCS No. 447/99.

After carefully considering those grounds, the learned Justices of Court of Appeal, found no merit and dismissed the appeal. Kato, JA., as he then was, while agreeing with the conclusion of Twinomujuni JA., added that:-

"Although Counsel for the appellant framed nine alternative grounds of appeal, these grounds should be considered as irrelevant in view of the fact that the appellate judge correctly resolved that there was no attachment carried out by the appellant and that the appellant's Counsel did not raise the issue of time limit before the appellate judge."

Counsel for appellant did not addressed the court on what each of the grounds 6, 7, 10 and 12 complained of in order to spell out what the

Court of Appeal failed to consider. It is true that in the lead judgment of Twinomujuni, JA, these grounds were not addressed. However, Kato JA, as he then was considered these grounds and held thus:-

"These grounds should be considered as irrelevant in view of the fact that the appellate Judge correctly resolved that there was no attachment carried out by the appellant and that the appellant's counsel did not raise the issue of time-limit before the appellate Judge."

Although the Justices of Appeal never specifically considered each of these grounds, it was not shown that the omission had occasioned a miscarriage of Justice.

Therefore, this ground must fail.

In the result, I would dismiss this appeal. I would award the costs to respondent here and in the courts below.

Before taking leave of this case I am constrained to comment on the manner in which the court bailiff came to be involved in this case and the manner the court bailiff presented the bill of costs and the methods in which the Registrar taxed the bill of costs.

Firstly, the court bailiff came on the scene of this case after the respondent had effected attachment of the shares of the company in accordance with Order 19 r 43. At that stage, one would wonder why the Registrar found it necessary to instruct the appellant to come in the case when the shares of Westmont Land (BHD) were already attached and secured.

Secondly, assuming that the Registrar was right to assign the file with instructions to carry out attachment of shares, one would wonder what part the appellant did to justify claiming fees of shs. 908,184,623/= for the attachment.

In my view, one looking at the bill of costs as presented by the court bailiff and the manner in which it was taxed by the Registrar, one would wonder whether our law would not be described as an ass if it permits a court bailiff to claim fees amounting to as much as Shs. 968,184,623/= for attachment of shares in a company whether these were already attached as in the instant case or not. ***If the law. Statutory Instrument (S.I) No. 64 of 1987 as amended by SI No. 15 of 1991 permits the Registrars to allow such unconscionable amount of money as fees for attachment by court bailiff as it was done in this case, then an amendment of the relevant law is necessary to provide limits which the Registrar should not exceed in awarding the fees to the court bailiff. This is absolutely necessary in view of the fact that some Registrars like this one who handled this type of claim tend to endorse whatever the court bailiffs present as bill of costs without any due regard to the amount of work done.***

Lastly, I think that this is a proper case which should be passed on to the Hon. the Chief Justice with a suggestion that the Statutory Instrument (SI No 64/87 as amended by SI No 15/91) should be amended to provide for limitations of awards to Court bailiffs by the Taxing officers. The Registrar of this court is directed to send a copy of this judgment to the Hon. the Chief Justice for study and possible/necessary action.

JUDGMENT OF ODER, JSC.

I have had the benefit of reading in draft the judgment prepared by my Hon. Brother, Karokora, JSC.

I agree with him that the appeal should *be* dismissed with costs here and in the courts below.

As the other members of the Court also agree, the appeal is accordingly dismissed with such orders.

JUDGMENT OF MULENGA, JSC

I read in draft the judgment prepared by my learned brother Karokora JSC. I agree with him that this appeal should be dismissed with costs to the respondent.

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have had the benefit of reading in draft the judgment of my brother Karokora JSC

I agree with him that this appeal should be dismissed and I also agree with the orders he has proposed.

JUDGMENT OF TSEKOOKO, JSC:

I have had the benefit of reading in draft the judgment of Karokora, JSC, and I agree with his conclusions that the appeal should be dismissed. I agree with the orders proposed by him.

Delivered at Mengo the 11th day of March of 2003.