

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS APPLICATION NO.321 OF 2018
(ARISING FROM CIVIL SUIT NO.349 OF 2018)

MAKUBUYA ENOCK WILLY

T/A POLLAPLAST----- APPLICANT

VERSUS

- 1. SONGDOH FILMS (U) LTD**
- 2. KIM SUK YOUNG ----- RESPONDENTS**

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant brought this application by way of Chambers summons against the respondents jointly and severally under Section 98 of the Civil Procedure Act, Order 40 r.1.4,5,6 & 12 of the Civil Procedure Rules, Section 14(2) & 33 of the Judicature Act, for orders that;

1. A warrant of arrest issues against the 2nd respondent and bring him before the court to show cause why he should not furnish security for his appearance.
2. That alternatively, the respondents be ordered to deposit in court in court the sum of 400,000,000/= being money sufficient to answer the claim in the main suit or to furnish security for their appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against the respondent/defendants.

The applicant also prayed for costs of this application. The grounds in support of this application are set out in the affidavit of Makubuya Enock Willy dated 11th June 2018 which briefly states;

1. That the applicant filed in the High Court a suit against both the respondents with very great likelihood of success and the same is pending hearing before this honourable court.
2. The 2nd respondent is a foreigner who has indicated that he is about to leave Uganda in circumstances affording a reasonable probability that the applicant will and may thereby be obstructed or delayed in the execution of any decree that may be passed against both respondents in the main suit.

3. The respondent with intention to obstruct justice have disposed of and or sold off suit machines which gave rise to the cause of action in the main suit.
4. That the applicant claims an interest in the said machines having used his resources to ensure that the machines are functional.
5. That at all material times, for all intents and purposes, the 2nd respondent dealt with the applicant for and on behalf of the 1st respondent and the agreement giving rise to the main suit was unlawfully terminated by the 2nd respondent.
6. The respondent is in the process of selling off his known assets in Uganda which could be attached and sold in case the main suit is decided in his favour.
7. The applicant is not guaranteed that the respondents have the capacity to satisfy the decree that may be passed against them.
8. The 2nd respondent is a foreigner of a Korean Origin who at any time has indicated that he is absconding from the jurisdiction of this honourable court thus removing himself from the ambit of the powers of court.
9. That this application is intended to give a fair balance between the parties and give them due protection while awaiting the outcome of the main suit.

In opposition to this Application the 1st & 2nd Respondents filed an affidavit in reply wherein they vehemently opposed the grant of the orders being sought briefly stating that;

1. The applicant's claim is fictitious and unsustainable as the applicant believes that he can take advantage of the 2nd respondent's nationality to unjustly become rich.
2. That the applicant has indicated varying figures of his purported claim at different stages and comparison of the plaint and his letter dated 8th December 2017.
3. That the applicant has no chances of success in the main suit as he was solely responsible for the termination of the tenancy on account of non-payment of rent as the Written Statement of Defence and Counterclaim shows.
4. That the applicant has no pecuniary interest in both movable and immovable assets of the respondents and has no business in knowing how the 1st respondent conducts its business and the applicant is merely acting like a busy body.

5. The respondents own both movable and immovable assets in Uganda worth billions of Shillings and they have not sold any of the assets nor do they intend to do so.
6. The applicant's application is based on speculation, hearsay and clearly misconceived and a waste of courts time and the same ought to be dismissed with costs. At the hearing of this application court advised the parties to file in written submissions which the parties complied with.

In the interest of time the respective counsel were directed to file written submissions and i have considered the respective submissions. The applicant was represented by *Mr Mukwaya Edward* whereas the respondent was represented by *Mr Wilfred Niwagaba*.

The respondent raised a preliminary objection as to the propriety of the application before the court. He contended that under section 12 of the Civil Procedure Act takes the applicability outside the ambit of Order 40 of the Civil Procedure Rules specifically 12(d) which provides-for the determination of any other right to or interest in immovable property.

According to the plaint and specifically paragraph 4, the applicant/plaintiff's claim is for special and general damages for the breach of tenancy agreement as well as unlawful detention of the plaintiff's products.

The applicant's claim does not therefore fall within the exceptions of Section 12 of the Civil Procedure Act since it is basically a breach of Tenancy/contract.

The law on granting an Order of arrest and attachment before judgment is set out in ***section 64(a) of the Civil Procedure Act*** which provides as follows;

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed-

- (a) Issue a warrant to arrest the defendant and bring him or her before the court to show cause why he or she should not give security for his or her appearance, and if the defendant fails to comply with any order for security commit him or her to prison;
- (b) Direct the defendant to furnish security to produce any property belonging to him or her and place the same at the disposal of the court or order the attachment of any property;

Order 40 rule (1) (a) (iii) provides that The defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay any execution of any decree that may be passed against him or her; has disposed of or removed from the local limits of the jurisdiction of the court his or her property or any part of it;

The purpose of an interlocutory application for attachment before judgement has been summed up in **Halsbury's Laws of England 4Th Edition Volume 37 para 326** as follows;

"To enable the court to grant such interim relief or remedy as may be just or convenient. Such relief may be designed to achieve one or more of several objectives. For purpose of this

application for attachment before Judgment, such objective may be to 'preserve a fair balance between the parties and give them due protection while awaiting the final outcome of the proceedings...'

The above is buttressed by the fact that the main object of the above provisions of the law is to prevent any attempt on the part of the defendant to evade the course of justice and avoid the decree that may be passed against him.

Therefore such supplemental proceedings are taken recourse to in aid of an ultimate decision of the suit and are initiated with a view of preventing the ends of justice being defeated. It is a sort of a guarantee against a decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree.

It should equally be understood that an Order under these provisions of the law may not have anything to do with the ultimate result of the suit. This would imply that it does not involve serious consideration of the merits but court avoids situations of trying to defeat the case at the preliminary stages before its determination.

The power to arrest the defendant before judgment in favour of the plaintiff is a drastic action and must be taken after due care, caution and circumspection. Before a court exercises such discretion, it must have reason to believe on adequate material that unless the power is exercised, there is real danger that the defendant will remove himself/herself or his/her property from the jurisdiction of the court.

Similarly, an attachment before judgment practically takes away the power of alienation and such a restriction on the exercise of the undoubted rights of ownership ought not to be imposed upon an individual except upon clear and convincing proof that the order is needed for the protection of the plaintiff.

A man is not debarred from dealing with his property just because a suit has been filed against him. Otherwise in every case in which a suit is brought against a man if during the pendency of the proceedings he sells some of his properties that would at once be a ground to satisfy the court that he is disposing his property with intent to defraud the plaintiff. See *Civil Procedure and Practice in Uganda by Ssekaana (2nd edition) 2017*(page 286-287).

In the case of *Chandrika Prashad Singh v Hira Lal AIR (1924) Pat 312 Dawson Miller C.J* observed as follows;

“The power given to the court to attach a defendant’s property before judgment is never meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant’s property before a defendant’s liability is established by a decree, may have the effect of seriously embarrassing him in the conduct of the defence, as the properties could not be alienated even for putting him in funds for defending the suit, which may eventually prove to have been entirely devoid of merit.”

While applying the above principles and positions of the law to the present case, the applicant has shown that the defendant sold off or removed the said machines since they were not found at the warehouse/factory which the applicant was a tenant.

The respondents have in their reply contended that the applicant has no business in knowing how the first respondent conducts its business and the applicant is merely acting like a busy body. The respondent's stated that they own both immovable and immovable property in Uganda worth billions of shillings and he has not sold any of the assets and does not intend to do so.

The applicant has a suspicion that the respondents may indeed leave the country back to his country of Origin Korea and they do not know any other assets of the respondents that would be attached in case he obtained a judgment in the matter pending court.

The respondent has not shown any capacity to satisfy the decree in case the judgment is passed against the company and the mere statement of the 2nd respondent in the affidavit that they have assets worth billions is inadequate to satisfy court that they have the capacity to satisfy the decree.

The status of the 2nd respondent is not mentioned in his affidavit in reply and neither is the status of the 1st respondent whether it is a Ugandan company or foreign company and whether it has any known assets within the jurisdiction. No mention is made to any other shareholders/directors of the said company or whether it is a single member company.

The applicant has reasonable and probable cause to believe that the respondent is about to leave the jurisdiction.

The question of reasonable and probable cause depends in all cases not upon actual existence, but upon reasonable *bonafide* belief in the existence, of such a state of things as would amount to a justification of the course pursued in making the accusation complained –no matter whether the belief arises out of a recollection and memory of the accuser or out of information furnished by others. See *John Lewis vs The times [1952] AC 676*

In order to prevent the ends of justice from being defeated, the court in exercise of its discretion orders that the respondents furnish security to court of a value of 100,000,000/= (either in form of bank guarantee or property) within 1 month from today.

The main suit/matter shall be disposed of within a period of six months to avoid any hardship to the parties.

In the result for the reasons stated herein above this application has merit and is hereby allowed and costs shall be in the cause.

It is so ordered.

SSEKAANA MUSA
JUDGE
14th/09/2018