

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLICATION NO. 626 OF 2020
(ARISING OUT OF MISC. APPL. NO. 338 OF 2020)
(ARISING OUT OF CIVIL SUIT NO. 173 OF 2020)

CATHERINE OCEN ARAO :::::::::::::::::::::::::::::::APPLICANT

VERSUS

SSABWE ANDREW :::::::::::::::::::::::::::::::RESPONDENT

BEDFORE: HON. JUSTICE ESTA NAMBAYO

RULING

The Applicant, Catherine Ocen ARAO brought this application against the Respondent, Ssabwe Andrew under S.98 CPA and O.52 Rules 1 & 3 of the CPR seeking for orders of this court that:-

1. The orders in ***MA. No. 338 of 2020*** dated 18th August 2020, be set aside.
2. The execution of the Order in ***MA No. 338 of 2020*** be stayed and/or set aside and the Applicant's Motor Vehicle be released from attachment.
3. Costs of this application be provided for.

The grounds of this application are well laid out in the Applicant's affidavit in support of this application but briefly, they are that:-

1. The orders in *MA No. 338 of 2020* be set aside for non-service of summons upon the Applicant.
2. The Applicant was never served at any material time which violated the right to be heard as enshrined in the Constitution.
3. The attachment before Judgment was issued in error following various falsehoods by the Respondent.
4. The M/V registration No. UBD 946Z Land Cruiser at all material times belongs to the Applicant and not the Respondent and should be released from attachment.
5. The Hearing Notice and Summons if any, in the main suit have never been served upon the Applicant.
6. The Respondent obtained the orders and warrant of attachments through fraud, illegalities, falsehood and misrepresentations.
7. It is just and in the interest of justice, equity and fairness that the above said order be set aside and the Applicant/Defendant be allowed to appear and defend the suit, applications and all matters on merits, interparties.

The Respondent opposes the application.

The brief background to this case is that the Applicant and the Respondent are wife and husband.

In 2018, the Respondent travelled to Dubai. He bought the vehicle in dispute and sent it to Uganda. The bill of landing indicates the Applicant as the consignee. Upon receipt of the vehicle, the Applicant made all the tax clearances with URA and registered the vehicle in her names. In 2020, the Respondent filed a suit against the Applicant claiming ownership of the vehicle.

He sought for recovery of the vehicle from the Applicant, a declaration that the Applicant/defendant breached trust when she registered the vehicle in her names, a declaration that the Respondent/Plaintiff is the rightful owner of the vehicle and that the Applicant/Defendant acted fraudulently when she registered the vehicle in her personal names and that this Court should direct the Registrar of motor vehicles to register the vehicle in his names. He also seeks for damages and costs of the suit.

The Respondent then filed ***MA No. 338 of 2020*** arising from the main suit seeking for orders of attachment before Judgment under O.40 of the Civil Procedure Rules which was heard and granted ex-parte with orders that the said vehicle be attached and parked at the Chief Magistrates Court of Mengo or Nakawa pending disposal of the main suit. The vehicle was attached. No return of attachment was filed in court. It is therefore not clear whether the vehicle was parked at Nakawa or Mengo Chief Magistrates Court as directed by court. It is the applicant's claim that she was not served before hearing the application for attachment ex-parte and that the Court was misled and it wrongly attached her vehicle, hence this application.

When the matter came up for hearing, learned Counsel Omongole Richard appeared for the Applicant while Counsel Ssemande David represented the Respondent. Written submissions have been filed for the parties.

Issues for determination are:-

- 1) Whether the orders in MA NO. 338 of 2020 should be set aside.**
- 2) Remedies**

Submissions

Counsel for the Applicant submitted that there was no evidence before Court to show that the Applicant was about to leave the country and that at the time the application for attachment before judgment was filed in Court; all borders were closed due to the COVID-19 pandemic. That there was equally no evidence to show that the Applicant was about to sell the vehicle and no evidence was brought to court to that effect.

Counsel relied on the case *Uganda Electricity Board (in liquidation) vs. Roya Van Zanfen (U) Ltd. HCMA NO. 251 of 2006* where it was held 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 intention to obstruct or delay the execution of any decree that may be passed”

Counsel also cited the case of *Coil Ltd. vs. Transtrade Service Ltd MA No. 14 of 2016* where court noted that:

“The Applicant must ensure that the information included in the affidavit sworn in support of the application to the court constitute full and frank disclosure of all relevant and material facts”.

In Mugimu vs. Basa Boda (1991) ULSLR court held that:-

“Before court should exercise its discretionary powers of ordering attachment of property before judgment or furnishing of security, there had to be real evidence that the defendant was about to leave the country or to sell the property and obstruct or delay justice”

Counsel explained that the Application did not meet the taste of full and frank disclosure of all the material facts neither did it show that the Applicant was about to leave the jurisdiction of this court fraudulently so as to delay or obstruct the decree of this court. He prayed that MA No. 338 of 2020 be set aside so that the vehicle is released to the Applicant and the matter be heard on its merits.

In reply, Counsel for the Respondent submitted that the vehicle was subject of the main suit on grounds of fraud which need proper investigations and that in considering orders of attachment before Judgment court looks at the need

to prepare a fair balance between the parties and to give them due protection while awaiting the final outcome of the proceedings. He relied on the case of ***Welt Machinen Engineering Ltd vs. China Road & Bridge Corporation 7 2 others HCMA No. 52 of 2015.***

He also relied on the case of ***Makubuya vs. Songdoh Films (U) Ltd. & Anor HCMA No. 321 of 2018*** where Hon. Justice Musa Sekaana held that in cases of attachment before judgment, court avoids situations of trying to defeat the case at a preliminary stage before its determination.

Counsel submitted that in this case it would not be proper to release the vehicle before the main suit is determined. Counsel explained that the cases relied on by Counsel for the Applicant are distinguishable to this application in that in the cases relied on, the property in attachment was not the property in issue before Court, while in this case the vehicle is the property in issue before Court and the Respondent has receipts to show that he is the one who purchased the vehicle but the Applicant having received the vehicle as a consignee decided to register it in her names as indicated in the log book. Counsel prayed that the vehicle should remain in the attachment pending disposal of the main suit.

Analysis

Under O.40 rule 1 (a) of the CPR, where at any stage of a suit the court is satisfied by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him or her-

a) is about to dispose of the whole or any part of his or her property.

b) is about to remove the whole or any part of his or her property from the local limits of the jurisdiction of the court, or

c) has quitted the jurisdiction of the court leaving in that jurisdiction property belonging to him or her.

The court may direct the defendant either to furnish security to produce and place at the disposal of the court the property or the value of the property as may be sufficient to satisfy the decree, or to appear and show cause why he or she should not furnish security.

It is important to note that the Applicant coming to Court under O.40 rule 1 (a) of the CPR must demonstrate that the whole intention of the Respondent disposing of his/her property or removing it from the local limits of the Court's jurisdiction or moving out of the local jurisdiction of the Court is so as **to defeat or delay the execution of any decree that may be passed against him/her**

arising out of the pending suit and there must be **evidence which is satisfactory to Court.**

In the case of *Coil Limited –v- Trans Trade Services Ltd. MA No. 14 of 2016 –*

The defendant's vehicle rammed into and destroyed the Plaintiff's generator; the plaintiff filed a suit for recovery of damages. The Plaintiff upon realizing that the defendant did not have an address or known assets in Uganda, filed an application for attachment of the vehicle involved in the accident before judgment under Order 40 of the CPR. Court while laying out grounds for consideration in cases of attachment before judgment noted that in such applications Courts should consider that:-

- i) The Applicants case against the Respondent is strong and likely to succeed.**
- ii) 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 judgment OR**
- iii) 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.**

- iv) **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 suffered damages as a result of the order.**

In this case, the Respondent/Applicant informed Court in paragraph (f) of his affidavit in support of MA No. 338 of 2020 that he found the vehicle in one of the bonds at Nakawa and when he asked about its details he was informed that the owner who he came to know that it was the Applicant/Respondent took it to the dealers in the said bond to sell it for her. The Respondent/Applicant then attached a photo of the vehicle that he found in the Nakawa bond. The photo of the vehicle attached has no number plate, yet the vehicle in issue has a number plate registered as **UDB 946Z**. Secondly, the Nakawa bond where the vehicle is said to have been taken for sale is not given.

The wording of Order 40 rule 1 (a), is very clear, **the court must be satisfied by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him or her**

My finding is that the evidence presented in the Respondent/Applicant's affidavit in support of MA No.338 of 2020 is not enough to show that the vehicle attached as annexure 'E' to the affidavit in support of the application without a registration no. was the vehicle in issue and that it was found in a bond in Nakawa without the Respondent/Applicant disclosing the address and name of the bond where the

vehicle is said to have been found. It is not satisfying to Court that the Applicant was about to dispose of the vehicle.

Secondly, the affidavit filed by Hope Ayesigire a process server attached to this Court does not show that the Applicant was served with summons to file a defence neither does she name the person she served the application to. All that she states is that she served the Applicant. It would have been important for her to state the name of the person identified to her as the Applicant. Under O.5 r. 10 of the Civil Procedure Rules, service of summons must be personal. See ***Betty Owaraga v. G.W. Owaraga HCCA No. 60 of 1992***. The Process server can only know that the right person has been served when she/he gets the proper Identity of the person (defendant) before tendering the documents which was not the case here. It is therefore my finding that the evidence presented does not show that the Applicant was aware of the suit filed against her regarding the vehicle; neither did she know that there was an application filed by the Respondent to attach the vehicle before judgment.

Counsel for the Respondent submitted that the vehicle should remain impounded because it is the subject of the main suit in this matter. In the case of ***Coil Ltd –v- Transtrade Services Ltd (supra)***, Justice Mubiru noted with approval of ***polly peck International plc-v- Nadir (No.2) [1992]4 ALLER 769,785g-786a that: -***

“...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 party.”

In this case, the vehicle was registered in the names of the Applicant in 2018. The bill of lading is in the names of the Applicant. The general rule is that the owner of the goods is the person named in the bill of lading as consignee and the one who holds the original bill of lading. The B.O.L is a document of title entitling the holder to claim the goods see the case of **P & O Nedloyd Uganda Ltd Vs Tesco International Ltd C.A. C.A. No.86/2004** and **Heskell v. Continental Express [1950] 1 All E.R. 1033.**

Much as the Respondent has pleaded fraud in the main suit, this is subject to proof. In view of the above, I find that it was not proper for the vehicle to be attached before judgment and make orders as follows: -

1. The orders in **MA. No. 338 of 2020** dated 18th August 2020, be and are hereby set aside.
2. Motor Vehicle registration **No. UBD946 Z Land Cruizer Engine No. 1UR0475513**, Chasis No. **JTMHX09J004086459** be released from attachment and handed over to the Applicant who will continue using the vehicle pending disposal of the main suit.

3. There should be no transfer of ownership, no sale and/or use as security for a loan of the said vehicle pending disposal of the main suit.
4. Costs of this application stay in the cause.

I so order.

Signed dated and delivered by mail at Kampala, this 6th day of November, 2020

Esta Nambayo

JUDGE

6/11/2020