**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA; AT KAMPALA**

**(EXECUTION DIVISION)**

**MISC. APPLICATION No. 1689 OF 2013**

***(Arising out of EMA No. 366 of 2013)***

***(Both arising out of H.C.C.S. No. 37 of 2013)***

**MAKUBUYA ENOCK WILLIAM ..... APPLICANT**

*VERSUS*

**1. BULAIMU MUWANGA KIBIRIGE *t/a***
***KOWLOON GARMENT INDUSTRY)***

**2. MOSES KIRUNDA *t/a***
***SPEAR LINKS AUCTIONEERS* :::::::::::::::::::::::::::::::::::::::::::: RESPONDENTS**

**BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO**

**RULING**

This application, brought under section 34 of the Civil Procedure Act, seeks the following orders of this Court: –

(a) A declaration that the attachment and sale of the Applicant's plant machinery (property) at Ntinda was marred with material irregularities and illegalities, was done wrongly and in contravention of the law.

(b) That the purported sale of the said machinery be declared null and void/and or reversed and the machinery released.

(c) In the alternative, but without prejudice to the foregoing, that the Respondents pay or compensate the Applicant the fair market value of all the properties that were attached in excess, and wrongfully.

(d) Such orders as the Court deems fit and proper in the interest of justice.

The grounds set out in support of the application, which are more specifically set out in the affidavit of the Applicant deponed in support of the application, are that: –

(i) The Respondents attached properties that were not listed in for attachment; thereby over attaching the Applicant's properties.

(ii) The execution/sale of the Applicant's properties; to wit, plant machinery at Ntinda, was marred with material irregularities and illegalities, was done wrongly and in contravention of the law.

(iii) The machinery, which was attached and/or sold, was grossly undervalued; and, thereby, occasioned great financial loss to the Applicant.

(iv) The interests of justice demand that the execution of the decree in Civil Suit No. 37 of 2013 be annulled and/or reversed.

(v) The application is brought in good faith, and has not been brought after inordinate delay.

(vi) It is just, fair and equitable that this application be granted.

The background to this application is that the Applicant was the Defendant/Judgment Debtor in HCCS No. 37 of 2003 (the head–suit herein) which was a summary suit. The Applicant sought leave to defend himself in the head–suit, but his application was dismissed; and, consequently, a decree was issued. He lodged an appeal against the order dismissing his application for leave to defend himself as aforesaid; and the only order he prayed for, material to the execution then in progress, was that it be stayed. The Court, however, did not stay the execution; and so, the execution process proceeded to conclusion. The appeal to the Court of Appeal is against the order of the trial Court denying the Applicant leave to defend the suit. Accordingly, since this application before me is restricted to the execution process, it has nothing to do with the matter before the Court of Appeal; hence, it is properly before this Court.

In the Applicant's affidavit, deponed in support of the application, the salient points that he raises to fault the execution process are that: –

(a) The schedule to the warrant for attachment was defective; and caused the Bailiff to attach items not liable for attachment.

(b) The Bailiff attached items in excess of what Court ordered in the warrant of attachment.

(c) The items attached in execution were grossly undervalued.

(d) The sale, of the items attached, was done without fresh advertisement for it after the extension of the expired warrant.

I will therefore consider these as the issues for determination in this application.

**1. Whether the schedule to the warrant of attachment was defective and caused the Bailiff to attach items not liable for attachment.**

It is imperative for Court to specify clearly, in the warrant of execution, the items it has ordered the Bailiff to attach. However, it is not always possible for the judgment creditor, whose duty it is to specify the items intended for attachment, to have access to or have full knowledge of the particulars of the judgment debtor's properties liable for attachment in execution. In such a situation, the judgment creditor would understandably not fully particularize the items for attachment; but only specify them in general terms. The Court must however be satisfied and issue a warrant wherein it specifies, either with unmistakable clarity, or as reasonably as the circumstance of the case permits, the items it orders the Court Bailiff to attach.

In the instant case before me, the specification contended by the Applicant as having been defective was in the schedule at the back of the warrant of execution issued on the 20th March 2013, which specified the items for attachment as *'Plastic Manufacturing Machines and Equipment <u>including</u>'*: then a list of items followed; and ended with *'<u>ETC</u>'*. (**emphasis mine**). It is unmistakable that the items for attachment were restricted to *'plastic manufacturing machines and equipment'*. However, the use of the word *'including'*, meant the items listed in the warrant were not exclusive, or exhaustive, as to the items liable for attachment. Likewise, in ending the list of items liable for attachment with the word *'ETC'*, Court meant that the list was not exhaustive as to such items.

The Court's use of the words *'including'*, and, *'ETC'*, unmistakably meant there were other items liable for attachment, but had not been specifically named on the list in the schedule. However, following the *ejusdem generis* rule of construction and interpretation, these items not specifically named had to strictly fall under the category of *'plastic manufacturing machines and equipment'*.

The attachment of any other item falling outside this category, even if it belonged to the judgment debtor, would be an act done in excess of the orders of attachment; and thus, unlawful as the Court Bailiff would have acted *ultra vires* the powers conferred upon him by the warrant of execution issued to him. The Court would have to revoke any such attachment and sale, for not having been clothed with the authority of Court.

**(2). Whether the Bailiff attached items in excess of what Court ordered in the warrant of attachment.**

The Applicant alleges that the Bailiff attached items not listed in the warrant. This included machines and consumables or trade goods. The 2nd Respondent has denied this in his affidavit in reply to the application; and has attached a Police Form which has an inventory of the items attached under EMA No. 366, HCCS No 037 of 2013; evidently the execution in issue. The document clearly states that on the 22nd day of March 2013, the Bailiff evicted the occupants together with their properties; and attached machineries as well. The Bailiff states that: *'I have just evicted the occupants of plot M.275 and their properties. I also attached the machineries. All household properties, finished products, have been removed and remained in the hands of Mugerwa and Edward Kamwoma the machines Engineer'*.

It is manifest, from this document, that a number of people witnessed the eviction of the Judgment debtor from the suit premises (factory); as well as the attachment of items wherefrom. These witnesses were, two Police Officers from Jinja Road Police Station, the LC1 Chairperson of the area, and other persons including a mechanic found in the factory premises. Each of these persons signed on the inventory document, against their respective names, as witnesses. It is notable that these persons, including the Applicant's officials, who witnessed the attachment, appended their signatures on an inventory in which there is no mention anywhere of any consumables amongst the items attached by the 2nd Respondent. There is no evidence from any of these officials to controvert that of the 2nd Respondent.

In addition, the 2nd Respondent has annexed an advert contained in the issue of the Daily Monitor Newspaper of Wednesday April 3rd 2013, (page 35), which states that the items attached were *'one plant of plastic manufacturing machines and equipments'*. Further still, the 2nd Respondent made a return of the warrant to Court, on the 20th of May 2013, explaining how the execution was carried out. Again, here, he mentions the plastic and manufacturing machines and equipment as the items he sold to the highest bidder in a public auction. There is thus no

persuasive evidence placed before me of the alleged excess attachment by the 2nd Respondent, in contravention of the orders contained in the warrant of execution. I must therefore disallow this ground of objection to the execution.

**(3). Whether the items attached in execution were grossly undervalued.**

It is trite, that property attached in execution must be valued prior to its sale. This is intended to avoid the abuse of the execution process by the Bailiff. The applicant and the 2nd Respondent have, each, relied on a separate valuation report in support of their respective contention; and these are the only valuation reports on record. Attached to the 2nd Respondent's affidavit is a valuation report by M/s Systems Engineers dated the 4th, of April 2013. From the report, the properties valued were plant and machinery, categorized under four sections; namely, (i) plastic section, (ii) recycling section, (iii) polythene bag making section, and (iv) other equipment. Under each category is a detailed specification of the respective machine or equipment. There is no mention of consumables in the report.

The Applicant has however relied on a valuation report made by M/s Meys Consult, Consulting Engineers & Valuers, dated June 2012; which was a whole year before the impugned attachment took place. The cover of the report is clear that M/s Meys Consult, Consulting Engineers carried out the valuation for Poloplast Limited. In law, and in fact, even if the Applicant were proved to be a shareholder in Poloplast Limited, the limited liability company is different from the Applicant. There is no indication that the machines valued, were located in the suit premises; which would have linked it to the attached items. Even if the machines and equipment so valued by M/s Meys Consult belonged to the Applicant, a whole year stands between this valuation and the date of the impugned attachment; thus, rendering the validity of the valuation of little worth, if any.

I have already discounted the valuation by M/s Meys Consulting Engineers, adduced by the Applicant, as having nothing to do with the Applicant; and, in any case, was done a whole year before the impugned attachment. The valuation by M/s Systems Engineers, after the attachment of the items in execution, placed their open market value at U. shs. 191,250,000/= (One hundred ninety one million, two hundred and fifty thousand only); and the forced sale value at U. shs. 95,625,000/= (Ninety five million, six hundred and twenty five thousand only). The Applicant has revealed in his affidavit in support of the application that some of the machineries and

equipment attached in execution had been acquired in two transactions by the Applicant from the 1st Respondent in the year 2008.

The consideration, for the two transactions, totaled U. shs. 374,000,000/= (Three hundred and seventy four million only). The impugned attachment took place five years later; in 2013. Owing to depreciation and wear, the open market value of these items at U. shs. 191,250,000/= (One hundred and ninety one million, two hundred and fifty thousand only), given by M/s Systems Engineers, was reasonable. In any case, the items fetched slightly more than their forced sale value, and the minimum price imposed by the Registrar in his order for the sale to proceed. Accordingly, in the absence of evidence that the items valued by M/s Meys Consult, Consulting Engineers & Valuers, for Poloplast Limited, are the ones attached in execution, there is no evidence before me that the items attached in execution herein were undervalued.

**(4) Whether the sale of the properties attached, should have been preceded by fresh advertisement, after the extension of the expired warrant.**

The 2nd Respondent, vide annextures to his affidavit in reply to the application, sets out the course of events from the issuance of the impugned warrant of attachment to him, right up to the sale of the attached items; and the eventual report to Court of what had transpired. The warrant was issued on the 20th day of March 2013, to be returned on or before the 19th day of April 2013. The attachment took place on the 22nd day of March 2013; and this was when the warrant was still extant. The advert for the sale of the attached items was placed in the Daily Monitor issue of 3rd day of April 2013, and the requisite valuation of the attached items was done on the 4th day of April 2013. At this time, the warrant was still in force.

It is evident that the thirty days from the date of the advert, after which any sale could take place, would have fallen on the 3rd day of May 2013; well after the 19th day of April 2013, when the warrant would have expired. However, on the 30th day of April 2013, the 2nd Respondent sought Court authority to conduct the sale as was advertised since the date of sale, as per the advert, had not yet lapsed. On the 3rd day of May 2013, the Registrar Execution, upon being satisfied with the valuation done, ordered the 2nd Respondent to sell the attached items for *'not less than Shs.95,625,000/='*. Following this, the 2nd Respondent sold the items, to the highest bidder in a public auction, for the sum of shs. 100,000,000/=, as shown by the agreement of sale, and receipt, both dated the 6th day of May 2013.

The Applicant contends that any sale should have followed a fresh advert after the renewal of the warrant. A situation where Court renews a warrant after both the warrant and date of sale contained in the advert has passed, without any sale having taken place, must be distinguished from one where the warrant is renewed before the date of sale as is contained in the advert for sale has passed. For the first instance, there is need for a fresh advert after the renewal of the warrant since both the warrant, and the date of sale stated in the advert, have both expired. This is because, in such a situation, there is otherwise nothing to enforce. However, while the second instance has an expired warrant, the impending sale is founded on an advert issued when the warrant was still valid.

Therefore then, unlike with the first instance where there is nothing to enforce, what the Registrar really does in the second instance, as is the case here, is to revalidate the warrant which has expired, so as to enable the ongoing process of advert for sale to be clothed with validity to the end. It is quite easy to distinguish an expired warrant with an expired advert period with no sale, from an expired warrant with a running advert for a pending sale. In the former, there is nothing to salvage at all; and it is imperative that a new process commences. However, in the latter case, the advert made during the validity of the now expired warrant would have attracted potential buyers who are aware of the impending sale. It is this sale, which necessitates being clothed with validity by validating the warrant. Hence, in ordering the sale herein to proceed, the Registrar effectively validated the expired warrant.

By way of analogy, even where a warrant and date of sale have lapsed, the Bailiff does not have to and indeed does not first release the items attached before seeking renewal of the warrant. All that the Bailiff does is to have the warrant renewed or extended; and the execution process continues as if there had been no interruption. If it were otherwise, then when the warrant has expired before the sale, the Bailiff has no valid authority to hold the items attached in execution. The Bailiff would have to release such goods and re–attach them upon the renewal of the warrant. In effect then, when the Court either extends a warrant which is about to expire, it extends the lifespan of the warrant without it suffering any interruption. However, when it gives the expired warrant a fresh lease, it revalidates it; and therefore, the warrant operates as if it had not suffered from expiry.

As it is, the thirty days, from the date of the public notification of sale by advert, expired on the 2nd day of May 2013; and the sale of the attached items became due. Indeed, the sale took place

on the 6th day of May 2013; which was only four days after the expiry of the public notification by advert of sale by public auction. Accordingly then, there was no need at all for any fresh notification of sale by advert as there was no adjournment of sale by Court as provided for under 0.22, r, 65 of the Civil Procedure rules. Therefore, with regard to the sale after the validation of the warrant, I am unable to discern any miscarriage of justice occasioned anywhere by the order of the Registrar for the sale to proceed, in accordance with the advert for the impending sale; and on the basis whereof the 2nd Respondent conducted the sale, in a public auction.

Finally, the present case is akin to a situation where a claim is preferred or objection is made to the attachment of property that it is not liable to attachment, but the claim or objection is brought late. 0.22, r.55, of the Civil Procedure Rules, bars any investigation into such a situation, *where the Court considers that the claim or objection was designedly delayed*. If the 2nd Respondent had truly attached items in excess of what was listed in the warrant, the Applicant should have challenged such excess attachment within reasonable time and averted the sale. Instead, the Applicant challenged the attachment long after the sale of the items had taken place. This compels me to make the reasonable inference that the challenge came as an afterthought.

I know only of the special provision under summary suits, where 0.36, 2.11, of the Civil Procedure Rules, empowers Court to set aside a decree and even execution where, for instance, the judgment debtor had not been given the right to be heard. This is because to allow such a process to go unaddressed would occasion grave miscarriage of justice as a cardinal rule of natural justice would have been breached. In sum then, I am unable to fault the 2nd Respondent in whatever he did in carrying out the execution process in the manner he did. He largely operated within the law. I find this application lacking in merit; and accordingly dismiss it with costs.

Alfonse Chigamoy Owiny – Dollo
**JUDGE**

**05 – 09 – 2014**