



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 85 OF 2023
ARISING FROM LABOUR DISPUTE REFERENCE NO. 120 OF 2022
(All arising from KCCA.CEN/LC/0107/2021)

LANG WANXI:.....APPLICANT

VERSUS

1. CHINA NATIONAL COMPLETE PLANT
IMPORT & EXPORT CORPORATION LTD
2. COMPLANT ENGINEERING & TRADE (UGANDA) LTD:.....RESPONDENTS

Before:

The Hon. Mr. Justice Anthony Wabwire Musana

Panelists:

1. Hon. Adrine Namara,
2. Hon. Susan Nabirye &
3. Hon. Michael Matovu.

Representation:

Mr. Gibson Munanura of M/s. Lawgic Advocates for the Applicant
Mr. Ernest Kalibbala of M/s. A. F. Mpanga Advocates for the Respondents

RULING

Introduction

- [1] This ruling concerns an application seeking an order prohibiting the Respondents from transacting any business on the register of and attaching the property comprised in Plot 1, Ntinda Close, LRV 1722 Folio 3 Ntinda Close, Kampala City, Kampala District, registered in the name of the 2nd Respondent (*from now the subject property*). The application was brought

under Section 98 of the Civil Procedure Act cap. 71(*from now CPA*) and Order 40 Rules 5 and 12 of the Civil Procedure Rules S.I 71-1(*from now CPR*).

- [2] The grounds of the application were set out in the supporting affidavit of the Applicant. In it, he deposed that he had instituted a claim against the Respondents for salary arrears inter-alia arising from constructive dismissal. He further deposed to the Respondents being foreign nationals with no known permanent assets within jurisdiction, the 1st Respondent currently undergoing liquidation, and the Respondents being about to dispose of the subject property to obstruct or delay the execution of a decree he may obtain.
- [3] The Respondents opposed the application. In his affidavit in reply, Mr. Piao Gui Long deposed that no liability had been determined against the Respondents and that the claim was speculative. The affidavit in support bore falsehoods and contradictions. The Respondents could settle any debts, and the winding up petition against the 1st Respondent was being defended.
- [4] In rejoinder, the Applicant averred that interim relief did not require a determination of liability and that the Respondents had become notorious for their inability to pay debt. By his employment with the Respondents, he was aware of the repatriation of all profits to China. Alternatively, he asked for security for due performance and averred that there was no legislative provision for reciprocal enforcement of judgments between Uganda and China.
- [5] In sur-rejoinder, Mr. Long deposed that the Applicant had raised new and prejudicial matters. He deposed that there was no attachment of the Respondents' property, the Respondents were trading normally, and there was no legal bar to the repatriation of profits in Uganda.

Submissions

- [6] It was submitted for the Applicant on the authorities of Order 40 rule 5 CPR, **Makubuya v Songdoh Films¹** and **Giorgio Zenegalia v Sari Consulting Ltd & Others²** that the object of the provision is to prevent any attempt to evade justice and that the Court has to balance the need to preserve the interest

¹ H.C.M.A No 32 of 2018

² H.C.M.A No. 91 of 2005

of the Applicant before the determination of the suit. The Applicant had to show more probable cause of his apprehension that the Respondent was about to dispose of property to render any order of Court nugatory. No evidence of ongoing projects had been adduced. The Respondents were foreigners with no known assets and intended to obstruct or delay the execution of a probable decree passed against them. In the alternative, the Respondents be ordered to furnish security in the sum of UGX 2,000,000,000/=.

- [7] Counsel for the Respondent countered that the Applicant had flouted filing directions. Counsel sought leave to adduce the affidavit in sur-rejoinder on account of the new matters raised by the Applicant in the affidavit in rejoinder. Counsel objected to the application because of the effect of staying all proceedings against a company under liquidation. In the Respondents' view, the application is incompetent. Further, the issuance of a guarantee would be untenable.
- [8] In respect of the application in the main, it was submitted for the Respondent that the Applicant must show that there is a main suit and the Respondents are about to dispose of their property or remove it from jurisdiction, with intent to obstruct the execution of any decree that may be passed against it or as an alternative, the Respondents have quit the jurisdiction of the Court. It was submitted that the value of the main suit was speculative, having dropped more than 50% in one year, and that there was no evidence to support the Applicant's apprehension of the Respondents disposal of property. Regarding furnishing security, the Respondent asserted that the main claim was largely speculative. Counsel distinguished the Songdoh case arguing that there was proof of the sale of machinery and that the present case was not on fours with the facts in the Giorgio Zenegalia case. Finally, Counsel cited the case of **Rashid Nyende & 44 Others vs. Shoprite Checkers (U) Ltd**, where this Court ordered the Respondent to deposit security where there had been a concession of no property in the jurisdiction.
- [9] In rejoinder, the Applicant vehemently objected to the affidavit in sur-rejoinder citing the case of **Amon Bazira v Maurice Peter Kagimu Kiwanuka**,³ where pleadings filed without leave were struck out. Regarding liquidation,

³ HCMA 1138 of 2016

the Applicant charged that the Respondents were approbating and reprobating. Counsel suggested that the property sought to be attached belonged to the 2nd Respondent and that it was the 1st Respondent under liquidation. As such, the Insolvency Act did not apply. Counsel contended that variance in the quantum of the claim did not dispel the likelihood of success, and the action was founded on constructive dismissal for which a range of remedies subsist. Concerning the second test, it was submitted on the authority of the Songdoh case that reasonable and probable cause depends not upon actual existence but a reasonable bonafide belief. On the alternative prayer to furnish security, Counsel distinguished the Nyende case for the reason that the Respondent, in that case, was willing to settle the Applicants.

Analysis and Decision of the Court

Preliminary points

- [10] We will deal first with the matter of late filing submissions. The essence of these timelines is that decisions of the Industrial Court are reached by consensus under **Section 14(1) of the Labour Disputes (Arbitration and Settlement) (Amendment) Act, 2021(from now LADASA)**. Any filing delays influence the dates set for coram. This affects the statutory imperative to expedite labour justice delivery. Secondly, it is trite that Court Orders and directives are not given in vain. They are to be obeyed, and this is a cardinal tenet of the rule of law. However, Counsel is not recalcitrant. In exercising our discretion, this Court shall permit the late filing of submissions and has considered them in this ruling.
- [11] The second preliminary point relates to filing an affidavit in sur-rejoinder without leave. Under Order 8 Rule 18(5) CPR, a party filing a pleading after they have been deemed closed would be required to seek leave. The Respondents sought to leave, albeit in their submissions. They suggested that the affidavit in rejoinder raised new matters which they sought leave to address. An affidavit filed without leave would be liable to be struck out, as pointed out by Counsel for the Applicant while citing the case of **Amon Bazira vs. Maurice P.K Kiwanuka**.⁴ However, the Respondent sought leave to file

⁴ Ibid

and validate an affidavit in sur-rejoinder following new matters raised in the affidavit in rejoinder. In the case of **Water and Environment Media Network (U) Ltd and 2 Others v National Environmental Management Authority and Another**⁵ Ssekaana J. holds that any party who files any affidavit under the heads of rejoinder, sur-rejoinder, rebutter or surrebutter must seek leave of Court. The Respondent sought leave in their submissions. We know this Court had fixed a schedule for filing submissions and delivering a ruling. Considering the schedule, we grant leave and validate the affidavits in rejoinder and sur-rejoinder.

- [12] The final preliminary point was the liquidation proceedings against the 1st Respondent's liquidation proceedings. The Applicant attached a public notice of a petition under Regulations 13 and 89 of the Insolvency Regulations. Counsel submitted that liquidation proceedings had commenced against the assets of the 1st Respondent. The liquidation process dissolves the business to repay creditors and promotes equitable distribution among creditors. It divests the directors and management of the debtor from all rights to manage and operate the business. A liquidator is appointed to assume all responsibilities divested by the debtor, including the right to initiate and defend legal actions on behalf of the estate and the right to receive all payments directed to the debtor.⁶ Under **Section 48 of the Employment Act, 2006**, on the bankruptcy or winding up of an employer's business, wages and other payments to which an employee is entitled are treated as preferential claims. In that regard, the insolvency proceedings against the 1st Respondent would consider the Applicants' claim.
- [13] Counsel for the Applicant suggested approbation and reprobation on the part of the Respondents in respect of the liquidation. The doctrine of approbate and reprobate is a legal principle that refers to a person or entity taking inconsistent positions in legal proceedings or actions. In other words, a party cannot approve of or benefit from an action in one instance and then disapprove of it in another instance.⁷ In our view, Counsel makes a clear point

⁵ Consolidated Miscellaneous Cause No. 239 and 255 of 2020

⁶ Ssekaana Musa J. "Analysing the Role of the Court in Balancing Stakeholder interests in insolvency and restructuring proceedings in Developing Economies – A Ugandan Perspective" Paper presented at the Debt and Insolvency law Africa conference held in Asokoro, Abuja, Nigeria in July 2022 <https://ssekaana.com/blogs/the-layman-s-guide-to-law/posts/7011654/> last accessed 19.06.2023 8:53 am.

⁷ See H.C.C.S No 036 of 2019 Haruna Sentongo v Orient Bank Ltd

that the commencement of the liquidation process is a bar to legal proceedings against the debtor. In this regard, we think the argument by Counsel for the Applicant is mislaid.

Merits of the application

[14] In light of the facts from the pleadings and submissions of the parties to this application, we agree with the Applicant that the question for determination is whether the Applicant has satisfied the conditions for a grant of an order for attachment before judgment. The application was premised under the provision of Order 40 r 5 CPR. It reads as follows.

"5. Where defendant may be called upon to furnish security for production of property.

(1) 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, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court , when required, the property or the value of the property, or such portion of it as may be sufficient to satisfy the decree, or to appear and show cause why he or she should not furnish security.*

2). The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value of the property.

3). *The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified."*

According to the Learned Authors, the Honourable Mr. Justice Ssekaana and Salma N. Ssekaana Esq, in their treatise⁸ **Civil Procedure and Practice in Uganda**, the threshold for a grant of this order is as follows:

- (i) The Plaintiff's suit (read Applicant) must be bonafide, and his cause of action must be prima facie unimpeachable subject to his proving the allegations in the plaint.
- (ii) The Court must have reason to believe on adequate materials that unless this extraordinary power is exercised, there is a real danger that the defendant will remove himself or his property from the ambit of the powers of the Court.

[15] On the first test, the facts in the matter before us are that the Applicant filed a claim for constructive dismissal against the Respondents. In his memorandum of claim, which was attached to the affidavit supporting the application, the Applicant seeks compensatory orders, benefit bonuses, and payment of salary arrears. The monetized claim is US\$ 20,000 monthly for 47 months and a benefit bonus of UGX 1,554,337,471. It would follow that the total claim is over UGX 5,000,000,000. The employment contract or basis for the bonus benefit is not apparent in the memorandum of claim. In our view, explicit provisions in these documents would have aided this Court in establishing prima facie evidence of the Applicant's claim. They are not on record.

[16] On the second test, the Applicant suggests an apprehension of financial distress on the part of the 1st Respondent against whom insolvency proceedings have been commenced. He submits that there is a relationship between the Respondents. However, no evidence of the association was shown to this Court. The Applicant is deposed to have been the Construction Department Manager and Project Manager of the Respondents. In our view, he was positioned to understand the nexus between the Respondents and demonstrate this nexus to this Court. He has not done so. In that stead, he

⁸ Civil Procedure and Practice in Uganda at page 286

has deposed an apprehension that the Respondents are about to dispose of the property with intent to defeat or delay the execution of any decree against them. In the Rashid Nyende case⁹ this Court observed that the import and purpose of the rules on attachment before judgment under Order 40 of the CPR are pre-emptive in character and seek to prevent an occurrence, an exit of jurisdiction that would render a decree or an award of the Court ineffectual or inoperable. An applicant must demonstrate that the Respondent has quitted the jurisdiction of the Court with the intent to avoid, defeat, delay, or obstruct the process of Court or any decree passed against him. The purpose of the remedy was explained in a passage in the case of **MAKUBUYA ENOCK WILL T/A POLLA PLAST VS SONGDOH FILMS (U) LTD & ANOR M.A 321/2018**.¹⁰

[17] In our view, beyond his apprehension, the Applicant has not provided evidence that the 2nd Respondent intends to sell or dispose of the subject property with an intent to obstruct or delay the execution of any decree passed against it. All adequate material of this intent should have been placed before us. Save for the plain statement of his apprehension; he has not provided this Court with any substantial and believable material of the 2nd Respondent's intent to dispose of the subject property to obstruct or defeat the execution of any decree that may be passed against it. We are fortified in this view by a citation of Dawson Miller, C.J. in Chandrika Prashad Singh v Hira Lal. Utmost caution and circumspection should be the guiding factors to the Court. The power to attach a defendant's property before judgment should be exercised sparingly. In our view, these dicta would place a higher burden on an Applicant to demonstrate the intent to obstruct or delay execution. The unsubstantiated and unsupported apprehension is not sufficient to meet the threshold.

[18] On the alternative claim for a deposit of a security sum of UGX 2,000,000,000, the Respondent submits that the claim is speculative, reducing by 50% from a year ago. Our reading of the provision of Order 40 rule 5 is that the defendant is called to furnish security where the Applicant has satisfied the Court that the defendant intends to dispose of property or

⁹ Supra

¹⁰ We observed that the purpose 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 purposes 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.

quit jurisdiction with intent to obstruct or delay the execution of a decree. We have found that the applicant has not met the threshold, and as such, the requirement to furnish security, in our view, is not sustainable.

- [19] Considering the facts in the present application, the law, the authorities, and the submissions, we determine that the application fails and is accordingly dismissed. There shall be no order for costs per our dicta in *Joseph Kalule v GIZ*¹¹.
- [20] As this Court is tasked with a statutory imperative to expedite the delivery of labour justice under Section 8(2) LADASA, we direct Counsel in Labour Dispute Reference No. 120 of 2022 to file the joint scheduling memorandum, their respective witness statements and trial bundles on or before the 23rd day of June 2023. The main cause shall be called for scheduling on the 26th day of June 2023 at 9:30 am.

It is so ordered at Kampala this 19th day of June 2023.

Anthony Wabwire Musana,
Judge, Industrial Court of Uganda

The Panelists Agree:

1. Hon. Adrine Namara,
2. Hon. Susan Nabirye &
3. Hon. Michael Matovu.

The image shows three handwritten signatures in blue ink, each written over a horizontal line. The top signature is the most prominent and appears to be 'A. Wabwire Musana'. The middle signature is less legible but appears to be 'S. Nabirye'. The bottom signature is also less legible but appears to be 'M. Matovu'.

Ruling delivered in open Court in the presence of:

1. **For the Applicant:** Mr. Gibson Munanura and in the Applicant's presence.
 2. **For the Respondent:** Mr. Ernest Kalibbala
- Court Clerk:** Mr. Samuel Mukiza.

¹¹ LDR 109 of 2020. This Court has ruled that costs are the exception rather than the rule in employment disputes.