

UGANDA / JUDGMENT

Comesa Technologies (U) Ltd v Mushabe (Civil Appeal No. 1906 of 2013) [2014] UGHCEBD 2 (24 March 2014)

[2014] UGHCEBD 2

COURT

High Court: Execution and Bailiffs Division (Uganda)

CASE / FILE NUMBER

Civil Appeal No. 1906 of 2013

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA (EXECUTION DIVISION)

CIVIL APPEAL No. 1906 OF 2013

(Arising from EMA No. 1489 of 2013; arising out of Taxation Misc. Cause No. 228 of 2013)

COMESA TECHNOLOGY (U) LIMITED } APPELLANT

VERSUS

DAVID G. MUSHABE } RESPONDENT

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

JUDGMENT

The background to this appeal is that the Respondent herein had been retained by the Appellant as its legal Counsel; but along the way the two fell out, leading to the Respondent filing a 'Counsel against Client' bill of costs in this Court vide Taxation Miscellaneous Cause No. 228 Of 2013, for settlement of his legal fees. The parties however reached a negotiated settlement, in the Taxation Cause, on what was due from the Appellant to the Respondent; and, accordingly, filed a consent judgment/decree reflecting the same. They further agreed that the full settlement of the negotiated sum would be concluded within 24 (twenty-four) months from the 17th day of April 2013, which was the date the consent judgment/decree was sealed by Court.

However on the 22 nd day of July 2013 – which was only three months into the period agreed upon in the consent order for settlement of the sum owing – Counsel for the judgment creditor (Respondent herein) in brought an application for execution which was endorsed by hand as EMA 1489 of 2013. Therein, he applied for an order of execution of

the decree, *'by way of attachment of the judgment debtor's immoveable property, land comprised in Block 113 Plots 672 & 673 Kyagwe land at Namanve',* in satisfaction of the sum of U. shs. 275,000,000/= which was then outstanding. Accompanying this application was a letter from the said Counsel, to the Registrar Execution, stating that what had precipitated the application was that, from the date the consent decree was made, the judgment debtor: –

- (i) had transferred 100% of its share holding to another company;
- (ii) had sold off certain of its specified land to another company; and, was in the process of disposing of its only remaining land;
- (iii) was not a going concern;
- (iv) had no known bank accounts.

The judgment creditor's fear, it was expressed in the letter, was of nothing remaining to attach in execution in the event of default at the time full settlement became due. The Registrar then, pursuant to this application, issued notice to the judgment debtor to show cause why execution should not issue in the terms applied for. Counsels for both parties appeared before the Registrar; and both made oral submissions, with Counsel for the judgment debtor vehemently contending that the application was premature, as the judgment debtor had not defaulted at all. He however proposed that in the event that Court were to find merit in the application, then the certificate of title to the judgment debtor's land should be deposited with a neutral Counsel, whom he named, as security for the payment of the decretal sum outstanding.

The learned Registrar, in his ruling, found no merit in the application; pointing out, rightly, that there was no provision in the consent

judgment that supported the grounds for the application. Indeed, the consent order did not prohibit the judgment debtor from doing business; which the transfer of its shares, and sale of its lands, complained against by the judgment creditor, was. He however seized on the proposal made by Counsel for the judgment debtor, and so ordered that the certificate of title to land comprised in Kyaggwe Block 113, Plot 672 be deposited with the neutral Counsel named by Counsel for the judgment debtor, as security for settlement of the decretal debt outstanding and owing from the judgment debtor.

However, the Appellant herein filed this appeal on the 30th September, 2013; in which it seeks that the learned Registrar's order regarding the deposit of the certificate of title with the neutral Counsel should be set aside for being illegal, and thereby null and void. The Appellant immediately realised that it had lodged the appeal out of time; and so it promptly, on the same day, filed Miscellaneous Application No. 1907 of 2013 seeking leave to file the appeal out of time.

It is now settled that where a party lodges an appeal out of time without first obtaining leave to do so, when Court subsequently grants leave to file the appeal out of time, it validates the filing already on record. I am of the considered persuasion that the interest of justice requires that I grant the leave sought herein; hence, I hereby grant such leave.

However, by letter dated 10/10/2013 – which was inexplicably stamped as having been received by the Court Registry on 7th October 2013 – Counsel for the judgment creditor notified the Registrar of the judgment debtor's failure to deposit the certificate of title to the neutral Counsel. He accordingly urged the Registrar to take remedial actions against named officials of the judgment debtor. The learned Registrar however declined to act on the informal application; and in a hand written endorsement thereon, equally dated 7th October 2013, advised Counsel to file a formal application instead. The judgment creditor complied by filing Misc. Application No. 1972 of 2013 (ex- parte) on the 8th October 2013, for an order of Court that the judgment debtor's certificate of title be delivered as had earlier been so ordered.

In his affidavit in support of the application, the Applicant deponed that the judgment debtor had transferred its shares to a holding company; and that in failing to deliver the certificate of title of land to the neutral Counsel agreed upon, the directors of the judgment debtors had thereby resisted and obstructed execution of a lawful Court order. Accordingly, it made an alternative prayer that upon the judgment debtor's continued failure to deliver the certificate of title, Court should then issue an order for the arrest of Kin Kariisa, Fox Odoi, and Moses Katakanya (Directors of the judgment debtor) for contempt, resisting and obstructing a lawful Court order. This, Counsel for the judgment creditor, in his submission at the hearing of the ex-parte application, urged the Registrar to grant.

The learned Registrar Execution, in his short ruling, found merit in the application, and agreed with the submissions of learned Counsel for the judgment creditor; and so he ordered for the arrest of Kin Kaliisa, Fox Odoi, and Moses Katakanya, and issued a warrant to that effect. Soon after, Kin Kaliisa, being one of the named directors of the judgment debtor was, under arrest, brought before the Registrar Execution as had been ordered. Counsels for the parties appeared before the Registrar Execution. Mr. Okello Oryem, Counsel for the judgment debtor, challenged the consent that led to the committal proceedings as having been entered into without the authority of the judgment debtor, as in any case the certificate of title to the land in issue was not in the possession of the judgment debtor.

He pointed out that the judgment debtor's appeal, against the consent order, was due for hearing in only two days' time; and submitted that it made no sense to deposit the sum owing from the judgment debtor in Court, as security, accessible in only 17 (seventeen) months, when that payment had not yet become due. He pointed out further that the Registrar's order varied the terms of the earlier consent order which provided for payment within a period of 24 (twenty four) months; and yet the Registrar had no power to vary such order. He contended that adverse alteration of the terms of the earlier consent, resulting in the committal of the director of the judgment debtor to jail, would render the appeal nugatory; and thus occasion a miscarriage of justice.

He thus urged Court to stay the committal proceedings pending the disposal of the appeal. In the alternative, he proposed that the judgment debtor could deposit the money owing in Court; to be accessible within 24 (twenty four) months. Mr. Murungu for the judgment creditor however submitted that the lodgment of an appeal did not, by itself, lead to an automatic stay of execution of the order for the payment of the monies owing from the judgment debtor under the consent order. He urged that the judgment debtor should either deliver the certificate of title as ordered earlier; or pay the full sum owing from it, in Court. Short of this, he contended, the director produced in Court under arrest should be committed to prison.

In his ruling, the learned Registrar concurred with Counsel for the judgment creditor that indeed an appeal per se does not amount to a stay of execution. He again seized on the alternative settlement proposal by Counsel for the judgment debtor, which was formally executed by the parties and their respective Counsels, and was duly sealed by him, and resulted in the second consent order. So, he ordered the judgment debtor to pay the decretal sum owing from it to

Court as security for the settlement of its obligation to the judgment creditor; after which, the judgment debtor's director under arrest would be released. This second consent varied the mode of settlement of the decretal sum contained in the first consent order.

It was after this that the judgment debtor's director under arrest procured funds from the bank and paid to the Court bailiff who, in clear breach of the Court order regarding the mode of payment of that money, however remitted it to the judgment creditor. The issues that emerge are therefore, first, the order that the judgment debtor deliver its certificate of title to a neutral party. Counsel for the judgment debtor had only made a conditional proposal, subject to the Registrar finding that the judgment debtor had acted in breach of the consent order that the certificate of title in issue was to be delivered to the named neutral Counsel. Since there was no default by the judgment debtor, the Registrar's order for the delivery of the certificate of title with the neutral Counsel was not justified at all.

Second, the order for the warrant of arrest of the directors of the judgment debtors to issue, was both procedurally erroneous and gravely wrong in substance. A warrant of arrest should always be preceded by a notice to a person to show cause why a warrant of arrest should not issue against such person. It is only after default on the notice that such a warrant may issue without the Court having heard the person first. This ensures compliance with the cardinal rule of natural justice that no one is condemned unheard. Producing a person before Court under arrest, without having afforded such a person the prior opportunity to be heard, is unacceptable. Even if such a person is released for want of proof of any case against such a person, grave damage would have been occasioned already.

Similarly, even where it is established that there is indeed a case against such a person brought to Court under arrest, but without prior notice to show cause against an impending arrest, it would not validate or justify that arrest. In the instant case before me, there was no justification presented by evidence for the arrest of any of the named directors of the judgment debtor. First, given the fact that the judgment debtor is a non-natural person, there was need to first lift the

corporate veil to expose the person responsible for the day – to – day management of the judgment debtor. Second, there was need to persuasively establish by evidence that the order for the delivery of the certificate of title had truly been served on such a person who however defied it. This, on the evidence, was not so.

Third, the payment of the money by the bailiff to the judgment creditor was in breach of the order made by Court for payment of that money; which was quite clear that it be made to Court as security. A matter which the Registrar must seriously take up with the particular bailiff, and task him to explain why he acted in defiance of the order of the Registrar; and then take whatever disciplinary action deemed appropriate in the circumstances of the case. It is therefore quite evident that the Registrar erred in making the two orders referred to herein above; especially the one that the judgment debtor pay the sum outstanding in Court as security, as if the amount payable by the judgment debtor was pending final determination to necessitate payment of this sum as security pending such determination.

This being so, and given that the judgment debtor had not at all defaulted in his payment obligation, I would have easily set aside the said orders. The problem I am confronted with, however, is in the fact that Kin Kaliisa's contention is that the money he paid to the bailiff, which the latter remitted to the judgment creditor, was not the

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judgment debtor's; but instead his. That being so, it is improper for this contention to be raised in an appeal by the judgment debtor. The proper course of action should have been an objector application, by Kin Kaliisa, protesting against his arrest and forced payment of the money to the judgment creditor when the corporate veil had not been lifted. This would have buttressed the contention that he was under no obligation to satisfy the decretal amount owing.

I would in that case have ordered the judgment creditor to refund that money. However since the payment is contested by the judgment debtor, who was under duty to pay the judgment creditor within an agreed period 24 (twenty four) months, and indeed the contested payment was made within this period, I find unease in faulting the settlement albeit the flagrant and unconscionable circumstances under which it was done. This is due to the simple reason that I am convinced that the earlier consent, which provided for that payment, had the full authority and blessing of the judgment debtor. There is no cogent evidence that the consent it now repudiates, which the Registrar duly recorded in a consent order, was done behind its back. I must confess the discomfort I find in having to disturb it.

It makes no sense to me that the very sum of money that, at the time, was owing from the judgment debtor, and was available, should be paid not to the judgment creditor but to Court, as security. If the money belonged to the judgment debtor, then there was nothing wrong in having it paid to the judgment creditor; and in this regard, I would have varied the Registrar's order by substituting payment to the judgment creditor, for payment to Court as security. If on the other hand the money belonged to the director of the judgment debtor instead, as is the contention here, then there was no justification for ordering it to be paid to Court as security for the

judgment debtor's obligation when the corporate veil had not been lifted. Had this been an objector application by Kin Kaliisa, I would have promptly set the order aside.

However, for Kin Kaliisa, not all is lost. It is quite open to him to pursue his rights for the recovery of his money from the judgment debtor either through an internal arrangement, or through legal action. In the premises then I disallow this appeal and make the following declarations and orders: –

- (i) The order for settlement of the decretal sum within 24 (twenty-four) months was with the consent of the judgment debtor.
- (ii) The Registrar had no authority in law to review the earlier consent order by varying the provision for the settlement of the decretal amount owing. The review order is set aside.
- (iii) The Court bailiff acted in breach of the Registrar's order in paying the outstanding decretal amount to the judgment creditor and not to Court; however,
- (iv) The payment made to the judgment creditor by the bailiff, in full and final settlement of the decretal sum, was done within the period provided for in the first consent order.
- (v) Each party shall bear their respective costs of the appeal.

Alfonse Chigamoy Owiny – Dollo JUDGE 24 – 03 – 2014

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