



**Aswa Developers & Contractors Limited v Compact Freight Systems Limited
(Civil Suit 85 of 2009) [2022] KEHC 17069 (KLR) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 17069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 85 OF 2009
MN MWANGI, J
APRIL 22, 2022**

BETWEEN

ASWA DEVELOPERS & CONTRACTORS LIMITED PLAINTIFF

AND

COMPACT FREIGHT SYSTEMS LIMITED DEFENDANT

RULING

1. The defendant's Amended Notice of Motion dated 3rd November, 2021 is the one due for determination by this Court. The defendant seeks the following orders-
 - i. Spent;
 - ii. Spent;
 - iii. That the Court be pleased to set aside and/or recall for purposes of cancellation the warrants of attachment and sale upon which the attachment and sale of the container loading machine make "Reachstaker", which is operating in customs area, is premised on;
 - iv. That the plaintiff be directed to release to the defendant all the goods belonging to the defendant that have been attached by the plaintiff in execution pursuant to the warrants of attachment and sale upon which the attachment and sale of the container loading machine make "Reachstaker", which is operating in customs area, is premised on.
 - (a) That in the alternative an order be made to the effect that pending the determination by the Court of Appeal of Civil Appeal No. 3 of 2021 between *Compact Freight Systems Limited v Aswa Developers & Contractors Limited*, that execution herein be stayed;
 - v. That the Court be pleased to order that all the Auctioneer's charges incurred by Kinyua & Company Auctioneers in execution of the warrants of attachment and sale upon which the



attachment and sale of the container loading machine make "Reachstaker", which is operating in customs area, is premised on be borne by the plaintiff; and

- vi. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the affidavits sworn on 19th April, 2021 and 3rd November, 2021 by Peter Nganga, the defendant's General Manager. In summary, the grounds are that on 7th December, 2018, Judgment was delivered in favour of the plaintiff for a sum of Kshs. 6,803,985.00. The defendant filed an application for stay of execution pending appeal but the same was dismissed on 7th October, 2020 prompting M/s Kinyua & Company Auctioneers to remove some of the attached items belonging to the defendant including a container loading machine make "Reachstaker", which machine is of primary and integral use by the defendant in carrying out its trade as a Container Freight Station and that the Auctioneer is particularly interested in removing the same.
3. The defendant's deponent averred that the attachment and sale of the said machine would render the entire operations of the defendant completely impossible and that the said machine was not liable to attachment or sale in execution of the decree issued herein pursuant to Section 44(1)(ii) of the *Civil Procedure Act*, as it constitutes the tools and implements of a person necessary for the performance by him of his trade. It was stated that the intended sale is contra-statute, illegal and as a result, the machine should be released to the defendant.
4. The deponent averred that a similar application dated 22nd October, 2020 had been filed by the defendant but the same was struck out by the Court on 16th April, 2021 for being incompetent, after it was established that the firm of Gikandi & Company Advocates was not properly on record. He stated that it was necessary for the instant application to be heard by the Court on merits.
5. It was also averred that on 14th October, 2020, the plaintiff through its agent M/s Kinyua & Company Auctioneers was agreeable to take custody of three motor vehicles KBR 018W, KBS 827M and KBR 768V in lieu of any further attachment pending determination of the appeal filed. It was deposed that since 7th October, 2021, an enquiry of the status of the three trucks had not been acknowledged.
6. The deponent averred that given the said circumstances and since the defendant had filed a Record of Appeal before the Court of Appeal in Civil Appeal No. 3 of 2021, *Compact Freight Systems Limited -vs- Aswa Developers & Contractors Limited*, any further execution of the decree against the defendant will result in substantial losses, yet the three trucks in the plaintiff's possession are worth at least Kshs. 18,000,000/=, which is substantial security.
7. It was also averred that the defendant does not know the financial standing of the plaintiff, and as such, any further execution will render the appeal nugatory, since the plaintiff will not be in a position to refund any part of the money that will be due to the defendant.
8. The plaintiff filed a replying affidavit sworn 14th December, 2021 by Stephen Kinuthia Wang'ombe, the plaintiff's director. He reiterated and fully adopted the averments in his affidavit sworn on 29th April, 2021.
9. The deponent averred that the entire amount due to the plaintiff is Kshs. 19,304,068.00 inclusive of the Auctioneer's fees and that being aggrieved with the Court's finding, the defendant filed a Notice of Appeal dated 14th December, 2018 together with an application dated 20th March, 2019 seeking stay of execution of the Judgment pending the hearing of the application and the intended appeal. He stated that the Court dismissed the said application on 7th October, 2020. He further averred that the defendant thereafter filed the application dated 22nd October, 2020, seeking to, inter alia, stay the



- intended execution pending the hearing and determination of the appeal against the ruling delivered on 7th October, 2020, but the said application was equally dismissed by the Court on 16th April, 2021.
10. The deponent deposed that the instant application ought to have sought an order for stay of execution pending the hearing and determination of the appeal against the ruling of this Court that was delivered on 7th October, 2020, but that is not the case herein. He stated that it is clear that the substantive application for stay of execution dated 20th March, 2019 had already been dismissed yet the defendant wants this Court to sit on appeal and/or review its earlier substantive determination.
 11. The deponent averred that Messrs. Kinyua Auctioneers procedurally and lawfully removed some attached items in execution of a valid decree of the Court and therefore the grounds being raised in the instant application ought to have been raised in the application dated 20th March, 2019, which was filed after the goods had been proclaimed. It was deposed that the fact that the issues are being raised now is a clear indication that the present application is an afterthought aimed at frustrating the plaintiff's enjoyment of the fruits of Judgment it has been waiting for since the year 2009.
 12. It was averred that the allegation that the attachment of the defendant's goods especially the container loading machine of Make "Reachstaker" will cripple the plaintiff's operations is a figment of an overstretched imagination, since the business premises and the proclaimed machines are owned by the defendant, a private limited liability company. It was stated that the said goods are not owned by KPA or KRA, and that attaching the goods will in no way affect KPA and KRA, as the goods can always be cleared from somewhere else, since the defendant is not the only Container Freight Station.
 13. The deponent deposed that the averments at paragraph 8 of the affidavit in support of the application are misleading for reasons that Section 44(1)(ii) of the *Civil Procedure Act* is only applicable to natural persons and not limited liability companies. It was further deposed that attachment and sale of the goods, including the Container Loading Machine is lawful and scrupulously procedural and the said goods cannot be released to the defendant.
 14. The deponent further averred that the instant application is fundamentally different from the application dated 22nd October, 2020, since the orders sought in the said application were premised on Order 42 Rule 6 of the *Civil Procedure Rules*, while the instant application is premised on Order 22 Rule 22 of the said rules. It was deposed that since this Court dismissed the substantive application for stay of execution dated 20th March, 2019, the instant application is res judicata and this Court is therefore functus officio and cannot entertain the application presently before it.
 15. The deponent also averred that the three trucks/trailers KBR 018W, KBS 827M and KBR 768V were never offered in lieu of further attachment as alleged, but were part of the items to be attached. He deposed that the orders of stay issued in the application dated 19th April, 2021 only restricted the sale of the container loading machine make "Reachstaker" and that the plaintiff sold the aforementioned three trucks so as to recover part of the decretal amount, as there was no legal impediment to the sale. He stated that all the trucks were sold for the sum of Kshs. 4,500,000/=, and that the value alleged by the defendant is outrageous.
 16. The deponent averred that the plaintiff has never been served with the letter dated 7th October, 2021 and therefore it is not aware of the contents of the said letter. He stated that it was the duty of the defendant to demonstrate that the said letter was served upon the plaintiff.
 17. He further averred that an appeal or an intended appeal does not operate as a stay of execution or proceedings under a decree and that under Order 42 Rule 6 of the *Civil Procedure Rules*, granting of stay of execution pending appeal is not automatic as it is predicated on existence of sufficient cause, substantial loss and provision of security for the due performance of the decree.



18. The deponent deposed that the plaintiff is a construction company with the requisite financial muscle to refund the defendant in the unlikely event that the impending appeal is successful, and that lack of knowledge of the respondent's financial standing cannot be construed to mean the plaintiff is incapable to refunding the decretal amount.
19. This Court directed parties to file written submissions in support of their respective cases. The defendant's submissions were filed on 3rd November, 2021 by the firm of Gikandi & Company Advocates, while the Plaintiff's submissions were filed on 18th November, 2021 by the firm of Mulanya & Maondo Advocates.
20. With regard to the setting aside of the warrants of attachment and sale of the container loading machine, Mr. Gikandi for the defendant argued that the "Reachstaker" was an integral part of the tools and implements of trade for the defendant. He further argued that the word "person" as used in Section 44 (1)(ii) of the *Civil Procedure Act* includes a corporate body as defined under Article 260 of the *Constitution* and Section 3 of the *Interpretation and General Provisions Act*. He contended that *Black Wood Hodge (Kenya) Ltd vs. Lead Gasoline Tank Claning Sam Chase(k) Ltd* [1986] eKLR is no longer good law as it was decided before the promulgation of the *Constitution* of Kenya, 2010.
21. He also submitted that pursuant to the consent entered into between the parties, which led to the attachment of the three trucks in exchange of the container loading machine, the plaintiff is now estopped from attempting to attach the said machine and as far as the defendant is concerned, the plaintiff would not attach anything until the appeal is determined and the defendant expects to be furnished with a full account of how the trucks were sold, since under the Auctioneers' Rules, there is an obligation for the Auctioneer to advertise for sale and to ascertain the reserve price. He stated that the purported auction was illegal. He cited the case of *John Mburu v Consolidated Bank of Kenya* [2018] eKLR, where the Court upheld the principle that representations either made expressly or by conduct cannot be reneged upon.
22. Mr. Gikandi submitted the power to grant or refuse an application for stay of execution is discretionary, and in this case, should the execution proceed, then the defendant stands to suffer substantial loss since the plaintiff is not capable of repaying the decretal sum of Kshs. 18,000,000.00, which is colossal, in the event the appeal succeeds. He indicated that an auction of the container loading machine will result in the crippling of the defendant's business completely.
23. With regard to the issue of security, he submitted that the defendant should not be burdened further to provide security, since it truly believes the three trucks/trailers are worth Kshs. 18,000,000/=, a fact not disputed by the plaintiff.
24. On the issue of res judicata, Mr. Wafula, learned Counsel for the plaintiff submitted that the orders sought in the instant application are similar to the orders that were sought in the application dated 20th March, 2019 and as such, the instant application is therefore res judicata and an abuse of the Court process. He was of the view that this Court lacks the requisite jurisdiction to entertain the instant application, as doing so will be tantamount to this Court sitting on appeal over its earlier decision. He cited the decision in *George W M Omondi & another v National Bank of Kenya & 2 others* [2001] eKLR, where the Court stated that there should be an end to litigation and that a party should not be vexed twice in respect of the same matter.
25. On whether the application for stay of execution is merited, Mr. Wafula submitted that execution is a legal process and the same cannot amount to substantial loss to be suffered by a party to warrant the granting of an order for stay of execution. He further submitted that the Judgement debtor has no blanket immunity from attachment and execution by being a Container Freight Station. He indicated



that the Judgment debtor can avoid the attachment by settling the decree of the Court. He also submitted that the defendant is into the lucrative business of storing containers pending compliance with customs procedures, which is evidence enough that it has the financial muscle to settle the decree.

26. On the issue of deposit of security, Mr. Wafula submitted that there was no valuation of the three trucks/trailers to support the defendant's illusory and fanciful argument that the three vehicles were worth Kshs. 18,000,000/=. He was of the view that the allegations are desperate attempts to mislead the Court and since no security had been furnished as envisaged under Order 42 Rule 6 of the Civil Procedure Rules, the orders sought must be declined.
27. As to whether the container loading machine constitutes the tools of trade and implements necessary for the performance of the defendant's trade, he submitted that Section 44(1)(ii) of the *Civil Procedure Act* does not apply to corporate entities like the applicant. He relied on the finding by the Court in *Zakheem International Construction Limited vs, Quality Inspectors Limited & Another* [2020] eKLR, where the Court held that Section 44 of the *Civil Procedure Act* was not meant to immunize companies from execution of the Court process, and that the meaning of trade, or profession must be read in a narrow sense to exclude a corporate person.

Determination

28. I have considered the Amended Notice of Motion application, the replying affidavit and the rival submissions. The issues for determination are-
- i. Whether this application is res judicata; and
 - ii. Whether the container loading machine of make "Reachstaker" should be released from attachment for being tools of trade.

Whether this application is res judicata .

29. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not be harassed twice on the same account of litigation. See the Supreme Court's decision in the case of Kenya Commercial Bank Limited vs Muiiri Coffee Estate Limited & another [2016] eKLR.
30. The Court of Appeal in *John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR, pronounced itself as follows on the doctrine of res judicata:

"The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

31. In the present application, the plaintiff contends that the defendant has raised issues that are similar to the ones raised in the application dated 20th March, 2019, which was considered and determined



in the ruling dated 7th October 2020. The defendant on its part stated that it had preferred an appeal against the said decision.

32. The test for determining the application of the doctrine of res judicata is provided in Section 7 of the Civil Procedure Act. In Independent Electoral & Boundaries Commission vs Maina Kiai & 5 others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is-
- (a) The suit or issue was directly and substantially in issue in the former suit;
 - (b) That former suit was between the same parties or parties under whom they or any of them claim;
 - (c) Those parties were litigating under the same title;
 - (d) The issue was heard and finally determined in the former suit; and
 - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
33. In making a comparison between the application dated 20th March, 2019 and the Amended Notice of Motion dated 3rd November, 2021, it is evident that the latter application is to a certain extent similar to the application which this Court dismissed on 7th October, 2020 which sought stay of execution of the Judgment delivered on 7th December, 2018. It is my considered view that this Court cannot consider and determine an application that is similar to another one that it had dealt with earlier. This Court cannot sit on appeal of its own ruling or Judgement for it already determined the issue of stay of execution in its ruling delivered on 7th October, 2020. Since the present application is not a review of the ruling delivered on 7th October, 2020, the applicant ought to pursue its application for stay of execution in the Court of Appeal. For the said reasons, I hold that the present application is res judicata to the extent that it seeks stay of execution of the Court's ruling of 7th October, 2020.

Whether the container loading machine of make “Reachstaker” should be released from attachment for being tools of trade.

34. The applicant contends that the attachment and sale of the container loading machine of make “Reachstaker” would render the entire operations of the defendant completely impossible as a CFS, and as such, the said machine is not liable to attachment or sale in execution of the decree issued herein pursuant to Section 44(1)(ii) of the Civil Procedure Act, as it constitutes the tools and implements of a person necessary for the performance by him of his trade. Conversely, the plaintiff argues that the execution against the defendant is procedural and lawful and that Section 44(1)(ii) of the Civil Procedure Act does not apply to corporate entities like the applicant.
35. Section 44(1)(ii) of the Civil Procedure Act provides that-

“All property belonging to a judgment debtor including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree provided that the following shall not be liable to attachment or sale-

- (i)



- (i) The tools and implements of a person necessary for the performance by him or his trade or profession". (emphasis added).

36. In the case of *Blackwood Hodge Kenya Ltd Vs Lead Gasoline Tank Clearing Sam and Chase (K) Ltd* (*supra*), Bosire J (as he then was) held as follows-

“Section 44 of the *Civil Procedure Act* (Cap 21), in which it is provided that the tools and implements of a person for the performance of his trade or profession shall not be liable to attachment or sale, is not intended to protect corporate entities but artisans whose livelihood depends on their workmanship. The word person in that section does not include a corporate body.”

37. Similarly, in *Invesco Assurance Co. Ltd v Kinyanjui Njuguna & Co. Advocates & another* [2020] eKLR, the Court pronounced itself as follows-

“I have reproduced a substantial part of the above section because I find merit in the DH’s submission that the entire wording and phrasing of the section clearly refers to natural persons. Indeed, if the legislature had intended that corporations be covered, nothing would have been easier than to state so expressly. Accordingly, I agree with the jurisprudence from the High court leaning towards the exclusion of corporations from protection of section 44 of the CPA.”

38. This Court has no good reason for departing from the two decisions which are persuasive to this Court. I therefore concur with Mr. Simiyu Wafula Advocate that Section 44(1)(ii) of the *Civil Procedure Act* is not meant to immunize companies like the defendant herein from execution of a Court process.

39. The Amended Notice of Motion dated 3rd November, 2021 is therefore hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 22ND DAY OF APRIL, 2022.

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Moraa holding brief for Mr. P. S. Wafula for the plaintiff/judgment creditor

Ms Randu for the defendant/judgment debtor

Mr. Oliver Musundi – Court Assistant.

