



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISCELLANEOUS CIVIL APPLICATION NUMBER 383 OF 2011**

**RIFT VALLEY AGRICULTURAL**

**CONTRACTORS LIMITED (RVACL).....1<sup>ST</sup> APPLICANT/JUDGEMENT DEBTOR**

**BENSON THIRU KARANJA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**HARI GAKINYA T/A HARI GAKINYA & CO. ADVOCATES.....1<sup>ST</sup> RESPONDENT/DECREE HOLDER**

**GILLETTE TRADERS.....2<sup>ND</sup> RESPONDENT**

**PHILIP MWAURA WACHIRA.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicants vide a notice of Motion dated 7<sup>th</sup> June 2021, brought under Order 40 rules 1,2,3,4 and Order 51 Rule 1 of the Civil Procedure Rules, Section 3,3 (A) and 63 (c) and (e) of the Civil Procedure Act seek for the orders THAT: -

**1. Spent.**

**2. Spent.**

**3. The 1<sup>st</sup> Respondent/Decree Holder, 2<sup>nd</sup> Respondent/Auctioneering Firm and 3<sup>rd</sup> Respondent/Auctioneer by themselves, their agents, servants, employees or otherwise by whomsoever claiming through them be restrained from advertising for sale, attaching, auctioning off and selling any moveable property proclaimed on 2<sup>nd</sup> June 2021 pending further orders of the Court.**

**4. A Permanent Injunction do and is hereby issued against the 1<sup>st</sup> Respondent/Decree Holder, 2<sup>nd</sup> Respondent/Auctioneering Firm and 3<sup>rd</sup> Respondent/Auctioneer by themselves, their agents, servants, employees or otherwise by whomsoever claiming through them permanently restraining them from seeking to advertise for sale, attaching, auctioning off and selling any moveable property proclaimed on 2<sup>nd</sup> June 2021.**

**5. A declaration that the activities of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in relation to the suit at hand was, illegal, irregular and un-procedural.**

**6. The costs of this Application be provided for.**

**7. The 1<sup>st</sup> Respondent does pay costs of this Application.**

2. The Application is supported by the grounds on its face and the grounds in the affidavit of the 2<sup>nd</sup> Applicant **Benson Thiru Karanja** sworn on even date.

3. He deponed the Replying affidavit by **John Hari Gakinya** dated 9<sup>th</sup> September ,2020 in response to their application dated 31<sup>st</sup> August, 2020 is relevant and important as therein the 1<sup>st</sup> respondent admitted that he had been fully paid his dues in respect of this matter.

4. That it therefore, defies logic how the 1<sup>st</sup> Respondent through the court could proceed to procure RE-ISSUED Warrant of Attachment of Moveable Property in execution of Money decree dated 28<sup>th</sup> May, 2021 and Warrant of sale of property in execution of decree for money of even date.
5. He averred that the aforementioned warrant of attachment of moveable property and warrant of sale of property were null and void ab initio for offending the well settled rules of *ex dolo malo, non oritur actio* (no court will lend its aid to a man who founds his cause of action on an immoral or illegal act).
6. That in furtherance of the above mentioned warrants, the 3<sup>rd</sup> respondent through the 2<sup>nd</sup> respondent served the 2<sup>nd</sup> applicant's wife with Notice of Attachment dated 2<sup>nd</sup> June 2021 and proceeded to proclaim the 2<sup>nd</sup> Applicants' goods in an effort to recover the alleged total amount of Kshs. 333,411/= (i.e. Ksh.250, 640/- + Ksh.82, 771/- = Ksh.333, 411/-).
7. He depones further that it is his belief that the 1<sup>st</sup> respondent through his cronies the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is using his position as an advocate to constantly harass and intimidate him and the 1<sup>st</sup> Applicant all in an effort to unjustly enrich himself which conduct is not only grave abuse of the court process but also conduct unbecoming of an officer of the court.
8. He averred that the 1<sup>st</sup> respondent has fully been paid the Principle Amount and interest in respect to this matter and in **Nakuru High Court Miscellaneous Application No.384 Of 2011**.
9. The 2<sup>nd</sup> applicant cited verbatim the orders issued by this court in its ruling dated 26<sup>th</sup> February, 2021 which parties were to comply with. He contended that contrary to those orders the respondents jointly and severally instead of limiting their actions to the Notice of Attachment from Gillette Traders dated 25<sup>th</sup> August, 2020 pegged their illegal activities on a fresh Notice of Attachment from the same Traders dated 2<sup>nd</sup> June, 2021.
10. That further the respondents in blatant disregard of the court's restraining order procured reissuance of Warrant of Attachment of moveable property in execution of decree for money and warrant of sale of property in execution of decree for money all dated 28<sup>th</sup> May, 2021 in respect of this matter and therefore they are jointly and severally in contempt of the orders issued on 26<sup>th</sup> February 2021.
11. He averred that despite the order that this matter be mentioned before Deputy Registrar on 29<sup>th</sup> March, 2021 to confirm compliance on the said date the court was not sitting. Their advocates on record managed to secure a mention date of 25<sup>th</sup> May, 2021 when none of the parties appeared though their advocate's non-attendance was on grounds of bereavement.
12. He stated that their advocate on 26<sup>th</sup> May, 2021 served the Respondents with a mention date of 29<sup>th</sup> June 2021 but the 1<sup>st</sup> respondent in an effort to arrest and circumvent the intended court proceedings of 29<sup>th</sup> June, 2021, moved the court on 28<sup>th</sup> May, 2021 to be supplied with the aforementioned warrants.
13. He asserted that the instant suit and Nakuru Misc. Application No. 384 of 2011 are mutually exclusive and if indeed the 1<sup>st</sup> respondent maintains he has not be paid his full dues in the latter suit then he ought to have applied for warrants in the said file.
14. He deponed that costs are at the discretion of the court and based on the circumstances of this matter the respondents should be jointly and severally condemned to pay costs.
15. From the evidence on record it's apparent that the respondents were duly served with the application and did not file a response to the same.

#### **ISSUES FOR DETERMINATION**

- (i) Whether the warrants of attachment of moveable property in execution of decree for money and warrant of sale of property in execution of decree for money all dated 28<sup>th</sup> May 2021 were irregularly and illegally obtained.
- (ii) Whether a restraining order and a permanent injunction should issue as sought.
- (iii) Who should bear the costs of this suit?

#### **ANALYSIS & DETERMINATION**

***Whether the warrants of attachment of moveable property in execution of decree for money and warrant of sale of property in execution of decree for money all dated 28<sup>th</sup> may 2021 were irregularly and illegally obtained.***

16. The Applicants primary reason for this application is that the respondents were in breach of this court's orders issued on 26<sup>th</sup> February 2021.

The said orders were as follows:-

1. ***A restraining order is and is hereby issued against the respondents their agents, servants and employees from seeking to***

*advertise for sale, attaching, auctioning off and selling any moveable property proclaimed on 25<sup>th</sup> August 2020 pending further orders of this court within 30 days hereof;*

2. (a) *The parties to comply with order 22 rule 2(1) and (2) of the Civil Procedure Rules;*
- (b) *The respondent to comply with order 22 rule 7(2)(e);*
- (c) *The Deputy Registrar to comply with order 22 rule 13 (1);*
- (d) *The matter be mentioned before the Deputy Registrar on the 29<sup>th</sup> of March 2021 to confirm the position;*
- (e) *If parties find that there are unpaid balances of the decretal sum after a, b and c and if the same is confirmed on 29<sup>th</sup> March 2021 and the parties are unable to settle the same, the restraining order to lapse and execution to proceed.*

17. It was the applicants contention that the respondents were to limit themselves to the Notice of Attachment from Gillette Traders Limited dated 25<sup>th</sup> August, 2020 and that they acted contrary to the above Ruling by applying for a fresh Notice of Attachment dated 2<sup>nd</sup> June, 2020 from the said traders.

18. That the above orders were yet to be complied with yet the respondents went ahead and procured reissuance of the warrants herein.

19. There is no response to the application hence it is clear that the averments by the 2<sup>nd</sup> applicant are not controverted. They remain the uncontroverted facts and as was said in **Kenya Akiba Micro Financing Limited vs Ezekiel Chebii & 14 others [2012] eKLR** the court stated as follows:

**“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”**

20. This is particularly with respect to compliance with the compliance with the court orders. It would therefore be unprocedural to proceed as though the orders had been complied with. To that extent court orders I find that the warrants were obtained irregularly.

#### **Whether the applicants should be granted the prayers sought**

21. The applicants contend that the warrants herein are not in relation to this suit but in respect to **Miscellaneous Application Number 384 of 2011**. This position is apparent from the 1<sup>st</sup> respondent’s Replying Affidavit sworn on 9<sup>th</sup> September, 2021 where he has arithmetically exhibited his dues to be settled by the 1<sup>st</sup> Applicant. His position was that the decretal sum as at 31<sup>st</sup> August, 2020 was Kshs.249, 865/=. It is noteworthy that in his letter dated 25<sup>th</sup> May, 2021 addressed to court seeking the reissuance of the impugned warrants he claims the exact same amount of Kshs. 249,865/=.

22. It goes without saying that that was an issue for **Miscellaneous Application Number 384 of 2011** and not in this file.

23. That the 1<sup>st</sup> respondent in his Replying Affidavit sworn on 9<sup>th</sup> September,2021 acknowledged full payment of his dues with regard to this matter. A perusal of this Affidavit confirms so.

24. On this issue and in the foregoing circumstances the **restraining order** sought is deserved.

25. As to whether a **permanent injunction** can issue against the Respondents as sought, the Ruling of the deputy Registrar dated 8<sup>th</sup> September 2021 found that **‘as at 27<sup>th</sup> August 2020 the respondent applicant had already settled the entire amount including the additional claim of Kshs. 40,704/=.**

26. In the case of **Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib, Civil Appeal No.24 of 2016 [2018] eKLR**, where the Court defined a permanent injunction as follows; ...

**“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected”.**

27. The applicants having settled the full claim there was no reason at all for the 1<sup>st</sup> respondent to proceed as he did or to pursue this matter in the manner that he did. Without restraint the 1<sup>st</sup> respondent appears bent on continuing to pursue a payment that the court has decreed has already been made. The prayer for a permanent injunction succeeds.

#### **Who should pay costs?**

28. Costs follow the event. The applicants having been forced to come to this court on the irregular actions of the 1<sup>st</sup> respondents they are entitled to the costs to be paid by the 1<sup>st</sup> respondent.

29. In the end the following orders issue:

**i. A Permanent Injunction do and is hereby issued against the respondents by themselves, their agents, servants, employees or otherwise by whomsoever claiming through them permanently restraining them from seeking to advertise for sale, attaching, auctioning off and selling any moveable property proclaimed on 2<sup>nd</sup> June 2021.**

**ii. The applicants to have the costs of this Application to be borne by 1<sup>st</sup> respondent.**

30. Orders Accordingly.

**DATED, SIGNED AND DELIVERED VIA EMAIL THIS 14TH DAY OF APRIL 2022.**

**MUMBUA T MATHEKA**

**JUDGE**

CA Edna

Badia & Co Advocates:

Hari Gakinya & Co Advocates: