



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC. APPLICATION NO. 13 OF 2019

INVESCO ASSURANCE COMPANY LIMITED.....APPLICANT

-VERSUS-

KINYANJUI NJUGUNA & CO. ADVOCATES.....1ST RESPONDENT

VICTORIA BLUE AUCTIONEERING SERVICES.....2ND RESPONDENT

RULING

1. The Application coming for consideration in this ruling is the one dated 7th September, 2020 filed under certificate of urgency seeking the raising of attachments on the items specified in the items specified in the Application which the Applicant contends are tools of trade within the meaning of the provision to section 44 (1) of the Civil Procedure Act.
2. The Application is based on the grounds on the face of it and supported by the Affidavit of **PAUL GICHUHI** the Legal Manager of the Applicant sworn on 7th September, 2020.
3. It is deposed in the Supporting Affidavit that the judgment/debtor Applicant is a limited company duly registered under the Companies Act, 2015 CAP 486 Laws of Kenya, and it is licensed to carry on insurance business in the Republic of Kenya under the Insurance Act Cap 487 Laws of Kenya.
4. Further, that the provision to section 44 (1) of the Civil Procedure Act Cap 21 Laws of Kenya Exempts “tools and implements of a person necessary for the performance by him of his trade or profession and books of accounts” from attachments in Execution of decrees.
5. It is further deposed that the Respondents here attached the judgment debtor/applicants tools or implements of trade necessary for its insurance business as follows; executive office table, executive office seats and office desks which are essential for the performance of the performance of the Applicants’ daily operations in the ordinary course of business.
6. It is further deposed that the Respondent has also instituted **Milimani Insolvency Petition No. E155 of 2019 KINYANJUI MUGUNA & CO ADVOCATES Vs. INVESCO ASSURANCE LTD** which is a winding up petition and it is unprocedural for the Respondent to use two modes of Execution and therefore the warrants of attachment are unprocedural and an abuse of the court process designed to cripple the Applicant’s operations.
7. The Applicant attached the Application filed in Insolvency Petition E155 of 2019 and subsequent interim orders of stay granted therein.
8. The Applicant further deposed that Sections 428, 429, 430, 471 and the second schedule to the Insolvency Act No.18 of 2015 precludes any disposition of the assets of any company undergoing insolvency proceedings and voids and warrants and deposit of security to that effect.
9. The 1st Respondent filed a Replying Affidavit in opposition to the Application dated 7th September, 2020 in which it is deposed that Section 44 (1) (ii) of the Civil Procedure Act Cap 21 upon which the Application is premised applies to natural persons and not to corporations such as the Applicant which is a limited liability company licensed to carry general insurance business in Kenya and as such the furniture cannot be regarded as “tools of trade of the Applicant”.
10. It is further deposed in the Replying Affidavit that the Applicant is abusing the process of the court by bringing this Application which is meant to delay and/or avoid to meet its obligation of settling the decree issued on 28th March, 2020.
11. The Respondent also deposed on the Replying Affidavit that the Applicant has not provided or even proposed to provide reasonable security by way of part payment to the Decree holder and further that the Applicant is notorious for failing to honour its obligations to settle undisputed decrees and has consistently abused the process of court through forum shopping and obtaining *ex parte* orders in various courts

such as Makueni, Kisumu and Nairobi.

12. The parties filed written submissions in the Application dated 7th September, 2020.

13. The Applicant submitted that the Civil Procedure Act Cap 21 Laws of Kenya does not define what constitutes “tools or implements” necessary for the performance of a trade and profession and that this omission was deliberate and intended to accommodate the ever revolving circumstances and conditions of the business environment.

14. To buttress that point, the Applicant stated in his Supporting Affidavit that he was duped by the Advocate that the matter before court was the succession case.

15. I have perused the taxation ruling and I find that the issue of the agreement between the advocate and the client did not feature. It is in the interest of justice that the taxing master determines whether or not there was a fee agreement.

16. I find that this reference has merit and I allow the same and set aside the ruling delivered on 20th June, 2018 together with the certificate of costs dated 6th July, 2018 and I direct that the Bill of Costs dated 28th March, 2018 be taxed a fresh before any other taxing master other than the one who taxed it on 20th June, 2018.

17. The Applicant relied on the cases of **BORA CAPITAL LIMITED -VS- SANE NJERI MUNYI [2018] eKLR**, **JONATHAN WEPUKHULU t/a GAR LEANING AGENCY LIMITED -VS- JULIUS ODHIAMBO OWOUR [2019] eKLR** and **VICTORIA PUMPS LIMITED -VS- KENYA PORTS AUTHORITY & 4 OTHERS [2015] eKLR**.

18. The Applicant in its submissions denied engaging in forum shopping in various courts and stated that the Respondent failed to disclose that it commenced insolvency proceedings against the Applicant vide **MILIMANI INSOLVENCY PETITION E155 OF 2019; KINYANJUI ADVOCATES -VS- INVESCO ASSURANCE LIMITED** and the rationale of Sections 428, 429(1) (a) 430 & 431 of the Insolvency Act No.18 of 2015 is that once a liquidation Petition is presented, the assets of the Company need to be protected as they are subject to the liquidation.

19. The applicant also submitted that the Respondent having elected to file Insolvency Proceedings, the Respondent is estopped from pursuing parallel proceedings and therefore all proclamations against the Applicant’s assets after 21st June, 2018 are illegal and void.

20. Further, the Applicant submitted that proceeding with Execution during the pendency of liquidation proceedings defeats the very purpose of filing an Insolvency Petition and wrongly preempts the Court’s determination in the liquidation petition.

21. The 1st Respondent opposed the application and submitted that the protection from attachment in Section 44 (1) of the Civil Procedure Act Cap 21 does not apply to corporate entities but only to natural persons and further that the proclaimed items in the form of office furniture and other office amenities are not for all intents and purposes tools of trade of the Judgment debtor a corporate engaged in General Insurance Business.

22. The 1st Respondent relied on the case of **BLACK HODGE (KENYA) LIMITED -VS- LEAD GASOLINE TANK CLEANING SAM & CHASE (K) LTD [1986] eKLR** and **MASTER FABRICATORS LIMITED -VS- PATRICK OMONDI NDONGA [2014] eKLR**.

23. The 1st Respondent also submitted that the Applicant is engaging the Court on an academic exercise while avoiding the issue of it’s obligation to fully settle the decretal sum of Kshs.2,235,112.50 plus interest.

24. The 1st Respondent further submitted that no Insolvency Order has been issued in **MILIMANI INSOLVENCY PETITION NO. E155 OF 2019** pursuant to Section 431 (2) of the Insolvency Act, No.18 of 2015 preventing the Decree Holder from pursuing all lawful means of recovering the debts owed by Judgment Debtors and further Section 428(1) (b) & 2 states that one may only apply to the Court before which an Insolvency Petition is pending for orders of stay.

25. The 1st Respondent also submitted that Hon. Lady Justice Ongudi dismissed a similar Application filed by the Applicant in **INVESCO ASSURANCE CO. LTD -VS- KINYANJUI NJUGUNA & CO. ADVOCATES & ANOTHER [2020] eKLR** and stated that if the Applicant has any such orders, it would be presenting them to Auctioneers instead of struggling to demonstrate to individual courts that it is protected by Section 44 of the Civil Procedure Act. Cap 21.

26. The issues for determination in the Application dated 7th September 2020, are as follows:-

- (i) Whether the Judgment Debtor is covered by Section 44 (1) of the Civil Procedure Act.
- (ii) Whether the stay of attachment on items proclaimed by the 2nd Respondent should be lifted.
- (iii) Costs of this suit.

27. On the issue as to whether the Judgment Debtor is covered by section 44 (1) of the Civil Procedure Act Cap 21, I have considered the authorities relied on by both parties and agree with the finding of the court in the case of **FRANCIS KAMAU NJOROGE & ANOTHER - VS- JAMES MBIRE NGATIA AND 4 OTHERS [2016] eKLR** that the items which are not liable for attachment or sale are specified in Section 44 (1) (i) and (ii) of the Civil Procedure Act Cap 21 "these include the necessary wearing apparel, cooking vessels, beds and

bedding of the judgment-debtor and of his wife and children, and those personal ornaments from which, in accordance with religious usage, a woman cannot be parted and the tools and implements of a person necessary for the performance by him of his trade or profession. "

28. The Applicant is a corporate entity engaged in general insurance business and furniture cannot be regarded as tools of trade of the Applicants. I agree with the finding of Bosire J. in **BLACK HODGE (KENYA) LIMITED -VS- LEAD GASOLINE TANK CLEANING SAM & CHASE (K) LTD [1986] eKLR** that "section 44 is intended to protect, not corporate entities but artisans – whose livelihood depends on their workmanship. The relevant provision reads:- “ section 44 (1) (ii) the tools and implements of a person for the performance by him of his trade or profession;” (underlining mine). In my view “person” as used in the sub-section does not include a corporate body.

29. I also find that the submissions of the insolvency petition filed at Milimani are not relevant because no insolvency order has been issued from the Milimani Insolvency Petition No. E155 of 2019 pursuant to section 431 (1) (b) and (2) of the Insolvency Act, No. 18 of 2015 to bar the respondents from seeking to execute the decree.

30. The Applicant is seeking to shield themselves from meeting their lawful obligation to settle the decretal sum by hiding under legal technicalities.

31. I find that the Application dated 7th September, 2020 lacks in merit and the same is dismissed with costs to the Respondents.

32. The Interim Orders of Stay of Execution granted on 9th September, 2020 be and are hereby set aside and discharged unconditionally.

Delivered, signed and dated at Kericho this 29th day of January, 2021.

A. N. ONGERI

JUDGE