



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. 356 OF 2015

BETWEEN

ELSEK & ELSEK CONSTRUCTION LIMITED.....PPPLICANT

AND

PRESBYTERIAN UNIVERSITY OF

EAST AFRICA UNIVERSITY REGISTERED TRUSTEES.....RESPONDENT

AND

ECOBANK KENYA LIMITED.....ATTACHING DECREE HOLDER

RULING

Introduction and Background

1. The facts leading to the application under consideration are not in dispute. This matter originated as an application by the Applicant (“Elsek”) against the Respondent (“the University”) to enforce an arbitral award dated 10th June 2015 and an additional award dated 3rd August 2015 under the **section 36** of the **Arbitration Act**. The awards were recognised on 14th October 2015 and enforced by a Decree issued on 22nd January 2016.
2. After a back and forth regarding execution of the decree, Elsek and the University entered into an agreement on 20th December 2019 resolving the matter. That agreement was varied on 9th June 2020 and adopted by the court by a consent dated 7th July 2020 (“the Consent”). Under the Consent, the University agreed to settle the decree by transferring twenty (20) acres of it land; LR. No. 7219/15 (IR. No. 114045/1) (“the Decretal Property”) to Elsek’s nominee, Diamond Housing Limited. It is this Consent and execution thereof that is impugned by Ecobank Kenya Limited (“Ecobank”) as University has now commenced steps to start subdivision of the Decretal Property.
3. Almost contemporaneously Elsek and Ecobank were involved in separate proceedings; **Ecobank Kenya Limited v Elsek & Elsek (Kenya) Limited & 3 Others Mombasa HCCC No. 70 of 2014** (“the Mombasa Suit”). That suit was settled by a consent dated 29th September 2014 and adopted by the court on 16th December 2014. Under that consent Elsek agreed to pay Ecobank KES 50,000,000.00 in full and final settlement on terms agreed therein.
4. In due course, Ecobank learnt of the settlement between Elsek and the University. It moved the court in the Mombasa Suit for orders to attach the decree in this matter. By a ruling dated 16th February 2018, Mwangi J., made the following order:

[15] I hereby attach the decree issued in Nairobi High Court Miscellaneous Application No. 356 of 2015, Elsek & Elsek Construction Company Limited vs Presbyterian University of East Africa Registered Trustees in satisfaction of the decree issued in Mombasa High Court Civil Suit No. 70 of 2014, Eco Bank Kenya Limited vs Elsek & Elsek (K) Ltd & 2 others. I further issue a notice informing the said Honourable court of attachment of the said decree and requesting the said court to stay execution of the decree unless and until this court cancels the notice herein or the holder of the decree sought to be executed or his judgment debtor applies to the court receiving such notice to execute its own decree.

5. The court issued a Notice of Attachment of a Decree addressed to the High Court at Milimani dated 16th February 2018.

The Applications

6. Ecobank has filed two applications dated 12th August 2020 and 9th December 2020. The applications mainly seek an order for stay of execution of the Consent dated 7th July 2020 and adopted by the Court as an order on 16th July 2020 and a further order setting aside the said Consent Order on the basis that Ecobank was excluded in the negotiations. The applications are supported by the affidavits of its Head of Remedial Department, Elizabeth Hinga, sworn on 12th August 2020 and 9th December 2020.

7. The applications are opposed by Elsek through the affidavit of its Managing Director, Osman E. Elsek, sworn on 25th August 2020 and the Grounds of Opposition dated 15th December 2020. It is also opposed by the University through the affidavit of its Vice Chancellor, Prof. J. K. Mungania sworn on 27th August 2020 together with Grounds of Opposition filed therewith. The parties filed written submissions in support of their respective positions.

Submissions

8. The thrust of Ecobank's case is that the Consent is illegal and a nullity because it was entered into and filed in court without Ecobank's knowledge. It contends that it is a party to the suit by reason of having attached the Decree issued herein to satisfy the sums outstanding to it in the Mombasa Suit. Ecobank contends that if the Consent is effected to a separate legal entity, Elsek will effectively leave Ecobank without any avenue of recovery of the debt owed to it.

9. Ecobank states that on 31st August 2020, the court directed it and Elsek to negotiate and secure Ecobank's interest. These negotiations were unsuccessful and on 17th September 2020, the court directed Elsek's advocate to take instructions from Elsek and revert on whether the title for the eventual subdivision could be deposited in court pending hearing of the application dated 12th August 2020. Before Elsek responded to the direction, Ecobank learnt that the intended subdivision has been advertised in the Daily Nation of 13th November 2020. It has also filed an objection to the intended subdivision with the County Government of Kiambu.

10. Elsek and the University oppose the applications on the ground that Ecobank was aware of the negotiations resulting in the Consent. They contend that Ecobank, through its counsel and representative were appraised of the progress in the negotiations and indeed participated in court proceedings before this court. They further contend that Ecobank did not raise any concerns or object to the settlement hence this application is an afterthought and made in bad faith.

11. Elsek states that Ecobank's position has not been compromised as the Decree in favour of Elsek is yet to be settled as the Consent provides that before subdivision and transfer of the decretal property, the prohibitory order and caveat must be removed in addition to meeting statutory approvals which has not been done.

12. Elsek argues that position taken by Ecobank is unfair and unreasonable as the value of Ecobank's decree in relation to the value of the compromised settlement between Elsek and the University is less than 5% of the estimated value of the Decretal Property sought to be exchanged in settlement of the Decree held by Elsek. It further states that in order to sustain continuity and safeguard and in the public interest, the University requested to negotiate a settlement granted that execution by Elsek of its decree amounting to about KES 8 billion would have crippled the University.

13. Elsek submits that Ecobank's demand to charge the entire land as alluded to in Ecobank's letter dated 29th July 2020 on one hand and stopping the transaction through the orders sought herein on the other is unreasonable. Elsek states that the Decretal Property cannot be charged because it is not registered in its name. It also denies that the use of a nominee amounts to fraudulent practice. It avers that the use of a nominee in a transaction of this nature is commonplace in commercial transactions and that since the nominee is an agent or trustee for the appointing party, it does not derive any enforceable rights. Elsek retains, in law, all rights and obligations under the contract and remains the *bonafide* beneficiary of the transaction.

14. Elsek submits that Ecobank has failed to demonstrate that the Consent is tainted by fraud or misrepresentation. It further submits that Ecobank's applications have no merit and are an attempt to delay the conclusion of the matter. Elsek reiterates that pursuant to the Settlement Agreement, any dispute between itself and Ecobank ought to be referred to the proper court seized of the matter in Mombasa.

15. The University accepts that under **Order 22 rule 47(1)(b)** of the *Civil Procedure Rules* ("the *Rules*"), the court in the Mombasa suit issued a Notice of Attachment of the Decree in this suit but Ecobank failed to seek any other direction from this court on the same hence its applications should be dismissed. As regards jurisdiction of this court, the University submits that all the orders relating to the attached decree are to be made by the court attaching the decree, that is the High Court at Mombasa, and not the court whose decree is to be attached. It submits that under **section 34** of the *Civil Procedure Act*, all questions arising between the parties to the suit in which the decree is passed or their representatives relating to execution discharge or satisfaction of the decree are to be determined by the same court hence in this case, Ecobank's applications ought to be heard in Mombasa.

Analysis and Determination

16. Resolution of Ecobank's applications turns on the understanding of the procedure for attachment of decrees set out in **Order 22 rule 47** of the *Rules* which provides as follows:

[Order 22, rule 47.] Attachment of decree.

47. (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made —

(a) if the decrees were passed by the same court, then by order of such court; and

(b) if the decree sought to be attached was passed by another court, then by the issue to such other court of a notice by the court which passed the decree sought to be executed, requesting such other court to stay the execution of its decree unless and until—

(i) the court which passed the decree sought to be executed cancels the notice; or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the court receiving such notice to execute its own decree.

(2) Where a court makes an order under subrule (1) (a), or receives an application under subrule (1) (b) (ii), it shall, on the application of the creditor who has attached the decree of his judgment- debtor proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in subrule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in subrule (1), the attachment shall be made by a notice, by the court which passed the decree sought to be executed to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other court, also by sending to such other court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the court from which it was sent.

(5) The holder of a decree attached under this rule shall give to the court executing the decree such information and aid as may be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the court or otherwise, shall be recognised by any court so long as the attachment remains in force. [Emphasis mine]

17. It is not in dispute that the High Court in Mombasa, upon application by Ecobank, issued to this court a Notice under **Order 47(1)(b)** aforesaid. The effect of the Notice is twofold. First, it requests the court receiving the Notice to issue to issue a stay of execution of the attached decree unless and until the court which passed the decree being executed, in this case the High Court at Mombasa, cancels the said Notice. Second, the holder of the decree sought to be executed, in this case Ecobank, may apply to the court receiving the Notice, that is the High Court at Milimani, to execute its own decree. In this case, the court has only one obligation upon receiving the Notice from Mombasa; it is to stay execution of the decree being attached.

18. Elsek objected to the applications on the ground that this suit was the subject of arbitration proceedings to which Ecobank was not party. It submits that this court cannot intervene in this matter under **section 10 of Arbitration Act** which provides that the court cannot intervene in the matters unless provided for under the **Act**. I do not find any merit in this argument, once the arbitral awards were recognized and a decree issued, that decree became a decree of this court subject to all the incidents of a decree under the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** and the **Civil Procedure Rules**. The decree is therefore subject to attachment like any other decree.

19. There is considerable merit in the argument that the proper court for resolution of any disputes regarding execution of the decree is the court that issued the decree. **Section 34(1)** of the **Civil Procedure Act** provides the basis for the court to deal with matters concerning execution of decrees. It provides as follows:

34(1) All questions arising between parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit. [Emphasis mine]

20. Under the foregoing provision, that the trial court or the court issuing the decree retains jurisdiction to adjudicate on all issues between the parties to the suit arising out of execution of the decree. In **Leisure Lodges Limited v Japhet S. Asige and Another MSA HCCC No. 279 of 2004 (OS) [2018] eKLR** the court held that:

[25] On the question that this court is functus officio, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act.

21. The Court of Appeal in **Adiel Muriithi Philip v Thomas Maingi NYR CACA No. 282 of 2007 [2017] eKLR** considered **section 34(1)** of the **Civil Procedure Act** and concluded that, “A plain reading of the above provisions shows that matters concerning discharge and satisfaction of the decree are determined by the court executing the decree.” (see also **Githunguri Dairy Farmers Co-operative Society v**

22. I therefore find and hold that the proper court for determination of all matters regarding discharge and satisfaction of the decree issued and the decree attached is by the High Court at Mombasa. But that is not the end of the matter as this court is required to act on the notice issued under **Order 22 rule 47(1)(b)** of the **Rules**. Counsel for the University argued that Ecobank was required to seek the court's direction or make an application in that regard. A reading of the provision does not require the attaching creditor to make an application, the notice issued by the executing court to the attaching court is sufficient to move the attaching court. That Notice cannot be ignored and must be given effect by this court. In any case, the logical consequence of the attachment of a decree, is that the parties thereto and in particular the decree-holder, loses the right to enforce it and must now look to that court which attached it for any further relief. Likewise, any dealings with the subject matter of the decree must be subject to the order of attachment.

23. Upon attachment and in the absence of the Attaching Creditor's application to execute the decree by itself, the jurisdiction of this court is to act on the notice and stay execution of the proceedings. All other issues including whether the consent should be set aside must be resolved by the High Court at Mombasa.

Conclusion

24. Having reached the conclusion that the decree in this matter has been attached and that this court is obliged to give effect to the Notice of Attachment of Decree dated 16th February 2018, execution of the decree herein be and is hereby stayed. As this court lacks jurisdiction to deal with the matter concerning the attached decree the applications by Ecobank are struck out as all matters concerning execution including satisfaction and discharge of the decree shall be heard in Mombasa.

Disposition

25. I now make the following orders:

(a) In accordance with the Notice of Attachment of Decree dated 16th February 2018 issued by the High Court in Mombasa, **Ecobank Kenya Limited v Elsek & Elsek (Kenya) Limited & 3 Others Mombasa HCCC No. 70 of 2014** there shall be a stay of execution of the decree and all further and subsequent proceedings in relation thereto in this suit unless and until the High Court at Mombasa cancels the notice issued by it or the holder of the decree sought to be executed or its judgment debtor applies to this court to execute the said decree.

(b) The applications dated 12th August 2020 and 9th December 2020 be and are hereby struck out.

(c) Each party shall bear its costs.

DATED and DELIVERED at NAIROBI this 26th day of JANUARY 2021.

D. S. MAJANJA

JUDGE

Mr Kabaiku instructed by Wainaina Ireri and Company Advocates for the Applicant.

Mr Mbigi instructed by Mbigi Njuguna and Company Advocates for the Respondent.

Mr Rimui instructed by KRK Advocates LLP for the Attaching Creditor.