



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NUMBER E16 OF 2020

CIVICON LIMITEDPLAINTIFF/APPLICANT

VERSUS

1. MULJI DEVRAJ & BROTHER LTD

2. JOEL TITUS MUSYA T/A

MAKURI AUCTIONEERS.....DEFENDANT/RESPONDENTS

RULING

1. This suit was commenced by way of **Plaint** dated **10th November, 2020** and filed on **12th November, 2020**, whereby the claim by the Plaintiff is for loss and damage occasioned by an unlawful execution of a court Decree by the 2nd Defendant/Respondent under the instructions of the 1st Defendant.

2. It is pleaded that the 1st Defendant sued the Plaintiff vide **Mombasa CMCC No.530 of 2019** and obtained ex-parte Judgment for Kshs.9,473,815.00. Thereafter the 1st Defendant took out execution proceedings against the Plaintiff to recover the said Judgment sum.

3. Under the instructions of the 1st Defendant, the 2nd Defendant served the Plaintiff with a proclamation notice and subsequently, on diverse dates visited the Plaintiff's premises and carted away goods with an alleged estimate value of above Kshs.50,000,000/=, exceeding the value of the

Decree issued by the Magistrate's Court.

4. The Plaintiff's complaint is that, despite being ordered by the subordinate court to render accounts for the goods already proclaimed, the 2nd Defendant (sic) has failed to accede to the courts order and has continuously visited the Plaintiff's premises purporting to execute undisclosed warrants to the Plaintiff's financial detriment.

5. In this case, the Plaintiff avers that the execution was in breach of among other laws, **Rule 12(1)(b)** of the **Auctioneers Rules** and seeks this court to declare the same as unlawful and illegal. The Plaintiff also prays that the court awards general damages as well as exemplary damages for the loss suffered.

6. Together with the **Plaint**, the Plaintiff filed an application dated **10th November, 2020** inter alia seeking orders that;

a) Spent;

b) Spent;

c) Pending the hearing and determination of this suit, the Defendants be restrained whether by themselves, their agents, representatives, servants, employees and/or any other person acting under their authority from attaching, advertising for sale, selling or in any other manner whatsoever dealing and/or interfering with any properties belonging to the Plaintiff;

d) The costs of this application be provided for.

7. The grounds adduced in support of the application reiterate the synopsis I have given above and maintained that the 2nd Defendant/Respondent has failed and/or refused to render accounts on the properties proclaimed and the amounts realized after the sale auction. However, the affidavit in support annexed inter alia, the Ruling delivered by the trial court wherein the court directed that the 2nd Defendant should render accounts and the list of the items carted away from the Plaintiff's premises.
8. The application was opposed by both Defendants, with the 1st Defendant filing a **Notice of Preliminary Objection** dated **12th January 2021** and the 2nd Defendant filing a **Replying Affidavit** sworn by **Joel Titus Musya** on **15th December, 2020** and a **Notice of Preliminary Objection** dated **23rd November 2020**.
9. Among the grounds taken out by the 1st Defendant are that *the Plaintiff has failed to demonstrate any legal breach or wrong that it has committed, that the application violates the mandatory provisions of **Section 34** of the **Civil Procedure Act** and finally that no ground has been put forth by the Plaintiff that the court can exercise its discretion in its favour.*
10. On the other hand, the 2nd Defendant opposed the application as well as the entire suit on inter alia grounds that; *the suit is res subjudice and the application Res judicata hence both offend the provisions of **Sections 6,7 & 8** of the **Civil Procedure Act**, that the application and the suit are filed in contravention of **Section 34(1)** of the **Civil Procedure Act** and **Section 6** of the **Judicature Act**.*
11. In the **Replying Affidavit, Mr. Titus Musya**, while conceding that a default Judgment was entered against the Plaintiff/Applicant in **CMCC No.530 of 2019**, stated that the Judgment was for Kshs.10,517,777/= but not Kshs.9,473,815/= and valid warrants were issued for execution of the decree thereof. He avers that he served the Plaintiff with a proclamation notice and the proclaimed goods were valued by **Auto Decade Assessors** before they were sold. A public auction was then conducted on **6th March, 2020** and the amount recovered was Kshs.7,000,000/= leaving a balance of Kshs.3,571,777/=.
12. He has further deponed that the Applicant has not been candid with the court in stating that it was not served with the requisite proclamation notices or that the public auction was conducted in contravention of the Auctioneers Rules. The 2nd Defendant denies having proclaimed goods valued over 50 million as alleged and adds that, if anybody has to blame, it is the Plaintiff for allowing its rogue agent, **Mr. Ngamau** to cart away its goods and is now shifting the blame by claiming that it is the 2nd Defendant who took away the goods not proclaimed. The Plaintiff is also faulted for failing to disclose to the court that it is on verge of complete take over by **AEA Limited** and the suit herein is meant to delay the ongoing execution.
13. The 2nd Defendant stated that he has not refused to render accounts as directed only that it could not render accounts within 15 days in accordance with **Rule 18(4)** of the **Auctioneer Rules** owing to the fact that courts had closed due to Covid-19 Pandemic. That it is only until **29th October, 2020** when the 2nd Defendant rendered the accounts and it avers that the Plaintiff has not objected to those accounts.
14. The Plaintiff filed a further **affidavit** sworn by **Ben Kiilu** on **26th January, 2021** in retaliation of the averments made by the Respondents. In that affidavit, **Mr. Kiilu** deposited that the warrants issued by the court were valid for the period between **13th February, 2020** to **13th April, 2020** and the 2nd Defendant conducted two auction sales, one on **6th March, 2020** and the other on **24th April, 2020**, well after the expiry of the warrants of attachment. He added that the 2nd did not stop there but continued to carry away goods from the Plaintiff's premises, notwithstanding that warrants of attachment had already expired.
15. It is said that the Defendant's actions necessitated the filing of an application dated **24th June, 2020** by the Plaintiff herein seeking stay of execution which after consideration. The lower court found that the execution did not adhere to Auctioneer Rules.
16. **Mr. Kiilu** admitted that the 2nd Defendant had filed accounts upon court's directions to do so but submitted the Plaintiff/Applicant had objected to those accounts vide a **letter** dated **30th November, 2020**. The Applicant further faulted the valuation reports produced by the Defendants by stating that they are dated **6th March, 2020**, the same day when the auction was conducted. In his view, those valuation reports were disguised efforts to couch the anomalies committed by the Defendants/Respondents.
17. That doubt is extended to the fact that neither the instructions to the valuers were shown to the court nor was the practicing certificate of the valuers annexed to the valuation reports. As such, the Applicant is apprehensive that the valuation reports were only prepared to cover the irregularities in the manner in which the execution was conducted.
18. Directions were issued that the application be canvassed by way of written submissions. All the parties obliged with the Plaintiff filing its submissions on **5th February, 2021**, the 1st Defendant on **5th March, 2021** whilst those of the 2nd Defendant were filed on the **3rd March, 2021**.

Plaintiff's Submissions

19. The Plaintiff's submissions began by addressing **Section 34** of the **Civil Procedure Act** which was raised in both the Defendants' **Notice of Preliminary Objections**. The Section provides as follows:-

34 (1) All questions arising between the 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.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit

as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation.—for the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

20. According to the Plaintiff, **Section 34** of the **Civil Procedure Act** does not bar actions for damages against auctioneers who have unlawfully or improperly exercised the power of a licensed auctioneer. Therefore, according to the Plaintiff, a claim for wrongful execution is a totally distinct cause of action and cannot be litigated under the umbrella of execution of the Decree in **CMCC No.530 of 2019**.

21. It is the Plaintiff's case that the court in **CMCC No.530 of 2019** is *functus officio* and cannot adjudicate on the claim for damages for wrongful execution. To buttress the submissions, the Plaintiff relied on the cases of **Kuronya Auctioneers –vs- Maurice O. Odhoch & Another [2003]eKLR**, **Josephat Lishenga –vs- Muganda Wasulwa t/a Keysian Auctioneers [2018]eKLR**, and **Bhavin Ashwin Gudka & Another –vs- John Oruru Machoka [2020]eKLR**.

22. The Plaintiff then took up on the 3rd ground of the 2nd Defendant's **Preliminary Objection** which is an allegation that the suit was filed in contravention to **Section 6** of the **Judicature Act, Cap 8 Laws of Kenya**. The Plaintiff then reiterated that there is an unchallenged Ruling of the trial court in **CMCC No.530 of 2019** where the court found the Defendants to have breached various provisions of the Auctioneer Rules when carrying out the execution. To wit, the trial court found that the execution contravened **Rule 12** of the **Auctioneers Rules**.

23. It is submitted that the 2nd Defendant was under duty to exercise ordinary prudence and care, hence the provisions of **Section 6** of the **Judicature Act**, do not avail him any protection in the event of a contravention of the law. These submissions are supported by excerpts from the cases of **Biatogo-VS-Agricultural Finance Corporation [1991]KLR**, **Hezron Otichi Nyambane –vs- Alfred Mudeizi Sagwa t/a Pave Auctioneers & Another [2020]eKLR** and **Republic –vs- Director of Public Prosecution & Another Ex- parte Zachariah W. Baraza [2017] eKLR**.

24. As regards the allegations that the suit herein together with the application are *res judicata*, the Plaintiff submitted that ground as vague in that, the 2nd Defendant has not provided the particulars of the previous litigation that involve the same parties and subject matter. That, even if the court was to proceed under the assumptions that the former suit referred to by the 2nd Defendant was **CMCC No.530 of 2019**, the claim for *Res-judicata* as well as *Res-subjudice* cannot stand since the former suit involved a liquidated claim of Kshs.9,473,815.00 and not a claim for damages for wrongful execution.

25. It is further submitted that the 2nd Defendant was not a party in the former suit and therefore, it cannot be said that the parties in **CMCC No.530 of 2019** were the same as the parties in this instant suit. In support of that point of view, the Plaintiff relied on the case of **John Florence Maritime Services Limited & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others [2015]eKLR**.

26. In summing up the Objections, the Plaintiff/Applicant submitted that the other grounds taken out in the Defendants' **Preliminary Objections** are not pure points of law to be argued as **Preliminary Objections** and this court should disregard them as well.

27. As regards the Application dated **10th November, 2020**, the Plaintiff submitted that it has met the threshold for grant of an injunction as was rightly set out in the landmark case of **Geilla –vs- Cassman Brown & Co. Ltd [1973] E.A 358**.

28. On the first condition, which is demonstrating the existence of a *prima-facie* case, the Plaintiff argues that it has established a strong case which has been buttressed by the Ruling of the court in **CMCC No.530 of 2019** to the extent that the execution process by the Defendant contravened the Auctioneers Rules. Therefore according to the Plaintiff, it is entitled to a claim of damages for the breach occasioned by the Defendants. Secondly, on whether the Plaintiff is bound to suffer irreparable harm if the orders sought are not granted, it is the Plaintiff's case that the Defendants have in their possession various items that were carted away from the Plaintiff's premises and are estimated at a value of over Kshs.50 million and the court should grant the injunction so as to avoid further loss of the Plaintiff's properties. Thirdly and finally, the Plaintiff submitted that it has made out a case on a balance of convenience to warrant the court exercise its discretion in its (the Plaintiff's) favour.

1st Defendant's Submissions

29. The submissions by the 1st Defendant are fairly brief and the key point taken out is that the only avenue open to the Plaintiff to contest the execution process as it is doing now, is to challenge the process in **CMCC No.530 of 2019** and not filing a fresh suit like the one at hand. In that view, the 1st Defendant submits that the Plaintiff has disregarded the Provision of **Section 34** of the **Civil Procedure Act** in filing the present suit.

30. The Plaintiff is also faulted for failing to disclose that it has filed an application challenging the execution which is pending before the trial court. To buttress its submissions, the 1st Defendant has relied on the cases of **Gichuhi Kimira –vs- Samuel Ngunu Kimotho & another [2007] eKLR** and **James Wanaina Imunyo & 6 Others –vs- Karanja Mbugua & Co. Advocates & Another [2012] eKLR**.

2nd Defendant's Submissions

31. On the part of the 2nd Defendant, his learned Counsel **Mr. Opolu** submitted that the cause of action herein is predicated on execution proceedings in **CMCC No.530 of 2019** and therefore the Plaintiff is trying to invite the court to supervise an execution of a decree currently being undertaken by a different court contrary to **Section 34** of the **Civil Procedure Act**. His view is that, all questions arising from execution of a decree should be determined by the court upon which the decree was

issued. Since no stay orders have been issued in **CMCC No.530 of 2019**, the learned Counsel terms the instant suit and application as an abuse of the court process and opines that no action could be undertaken against the 2nd Defendant for the reason that he was executing his obligations as an officer of the court. The Counsel submitted that that was the spirit of the **Judicature Act**. The case relied upon to put forward this point of view is the case of **Davis & Shirliff Ltd –vs- Attorney General [1978] eKLR.**

32. It is further submitted on behalf of the 2nd Defendant that this suit is *re subjudice* in view of the lower court case **CMCC No.530 of 2019**. To qualify that assertion, **Mr. Opolu** relied on the Supreme Court case of **The Kenya National Human Rights –vs- Attorney General, Independent Electoral & Boundaries Commission & 16 Others [2020]eKLR.** *Firstly*, the learned Counsel submitted that there are two suits which involve the conduct of execution in satisfaction of a valid court decree. That is, the suit herein and the lower court suit **CMCC No.530 of 2019**. However, the Counsel views this suit as a disguised appeal which has been brought through the back door. *Secondly*, the Counsel submitted that the two cases are pending before courts with competent jurisdiction and therefore this court cannot countermand the subordinate court's executory power.

33. *Thirdly* and lastly, **Mr. Opolu** submitted that the two suits involve the same parties, to wit, the Plaintiff in this suit is the Defendant in the lower court case while the 1st Defendant herein is the Plaintiff in the lower court case. The learned counsel then pleaded with the court to let the execution process run its course and any concern thereof to be addressed in the ambit of **Section 34(1)** as submitted above.

Analysis and Determination

34. I must start by thanking the counsels on record for the comprehensive submissions they have filed. I have given due considerations to those submissions as well as the affidavits and all the documents filed by the parties with regard to the pleadings filed by either party. Having done so, I am of the humble view that there are only four issues which crystalize for determination. These are:-

a) Whether this court is seized of jurisdiction to hear and determine the suit herein and the application by virtue of Section 34 of the Civil Procedure Act and Section 6 of the Judicature Act.

b) If the answer to issue No.(a) is in the affirmative, then the next issue for determination is whether the suit and application are incompetent and fatally defective for contravening Sections 6 & 7 of the Civil Procedure Act.

c) If the answer to issue No.(b) is in the Negative, then the question for consideration is whether the Plaintiff/ Applicant has established a case for grant of injunctive orders.

d) Lastly, who should bear the costs.

a) Whether the court is seized of Jurisdiction by virtue of Section 34 of the Civil Procedure Act as well as Section 6 of the Judicature Act.

35. The jurisdictional challenge as illustrated above was raised by both the 1st and the 2nd Defendants. In their respective **Notices of Preliminary Objection**, the Defendants impliedly challenged the court's jurisdiction to hear both the suit and the **Notice of Motion** application contending that they violated the provisions of **Section 34** of the **Civil Procedure Act** which requires that all questions arising between parties to a suit relating to execution of decrees should be determined in the suit in which the decree was issued and not in a separate suit as the Plaintiff has chosen to do.

36. To this end, I wish to associate myself with the sentiments of the Court of Appeal in the case of **Kuronya Auctioneers –vs- Maurice O. Odoch (supra)** to the extent that **Section 34** of the **Civil Procedure Act** allows parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. Therefore, the question which this Court should ask itself is whether this instant suit relates to execution, discharge or satisfaction of the decree issue in **CMCC No.530 of 2019**.

37. In this suit, I have read through the **Plaint** dated **10th November, 2020** and ascertain that the Plaintiff is seeking to be awarded damages for loss which it allegedly suffered due to an unlawful attachment and execution by the 2nd Defendant. The Plaintiff provided the particulars of loss as Kshs.50 Million, being an aggregate sum of goods carted away from its premises but not proclaimed at all.

38. In my humble view, **Section 34** of the **Civil Procedure** does not anticipate a claim for the purpose of compensation for the tort of wrongful execution or trespass to property and it would be improper for the aggrieved party to make that claim in a suit which relates to the complained wrongful execution which is a separate and distinct cause of action. I am therefore not convinced that the Plaintiff in filing the **Plaint** dated **10th November, 2020** contravened **Section 34** of the **Civil Procedure Act**.

39. Turning to the Plaintiff's **Notice of Motion** application dated **10th November, 2020**, the same is seeking interim injunctive orders pending the determination of the suit herein but not praying for a determination of any question related to the execution of the decree in **Mombasa CMCCNo.530 of 2019**. In the premises, I am unable to agree with the Defendants submissions that the suit and the **Notice of Motion** application both dated **10th November, 2019** are an affront to **Section 34** of the **Civil Procedure Act**.

40. Regarding the objection by the 2nd Defendant that the suit and the Application offend **Section 6** of the **Judicature Act**, it has been

argued that the 2nd Defendant was executing a valid **Court Decree** which had not been appealed against. Therefore, the 2nd Defendant as a person bona (sic) to execute a lawful court order is insulated by **Section 6** of the **Judicature Act** from any Civil claim. To that end, I agree with the 2nd Defendant that auctioneers while executing decrees of the court do so as agents of the court. In that regard **Section 6** of the **Judicature Act (Cap 8)** accords them protection when they execute an order of the court in good faith. In my view, that protection is to facilitate proper running and administration of justice.

41. However, **Section 23** of the **Auctioneers Act** demands of auctioneers to perform their duties in a manner befitting that of an officer of the court while **Section 26** of the same Act impliedly protects the subjects of the execution by providing that they are entitled to recover damages from the auctioneer in the event of a wrongful execution. This leads me to the conclusion that the protection under **Section 6** of the **Judicature Act** is not absolute but dependent on whether the execution was lawful or not. It is not available when the auctioneer exercises his/her power in contravention of the law.

42. In the present suit, the Plaintiff/Applicant sued the 2nd Defendant for a tort of wrongful attachment and trespass to property by alleging that the 2nd Defendant carted away goods not proclaimed in the proclamation notices, a fact that was confirmed by the lower court in its Ruling. The 2nd Defendant is therefore called upon to justify his attachment of the goods from the Plaintiff's premises which, although he avers in the **Replying Affidavit** were worth Kshs.7 Million, the Plaintiff alleges they were

estimated at Kshs.50 million worth.

43. It is therefore evident from the foregoing that the Plaintiff was entitled to institute proceedings against the auctioneer and the 1st Defendant who issued the instructions. I do not find anything in **Section 26** of the **Auctioneers Act** to prohibit one from recovering damages from any other person he deems responsible for wrongful execution. Therefore, the jurisdictional challenge by the Defendant fails. I will now proceed to consider the second issue I have identified for my determination.

b) Whether the suit and application are incompetent and fatally defective for contravening Sections 6 & 7 of the Civil Procedure Act.

44. The 2nd Defendant contends that the present suit is *res-subjudice* **CMCC No.530 of 2019**, wherein the question of validity of the execution has been raised and is still pending. He avers that the lower court is the competent court to try the issue that has been raised in this suit and therefore this court cannot usurp the lower court's jurisdiction. Albeit 2nd Defendant, the parties in the two suits are the same but he has overlooked the fact that he is not a party to the suit pending before the lower court.

45. On *res-subjudice*, **Section 6** of the **Civil Procedure Act** Provides as hereunder:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

46. In the case of **Republic –vs- Registrar of Societies - Kenya & 2 Other Ex-Parte Moses Kirima & 2 Others [2017]eKLR**, the Court held that:-

“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

47. From the above-cited case, it is clear what the doctrine of *sub-judice* entails being that, same parties involved in same/similar subject-matter in various suits in different Courts.

48. In the instant suit, the subject matter is whether the Plaintiff is entitled to damages for a wrongful execution of a decree which I have stated herein-above that it could not be properly pleaded in the matter pending under **CMCC No.530 of 2019** which has a different subject matter. The 2nd Defendant is also not a party in **CMCC No.530 of 2019** and it therefore cannot be said that the parties are the same. Consequently, it is my finding that the doctrine of *res-subjudice* is not applicable to this case.

49. I also note that the 2nd Defendant averred that the suit herein and the application are *res-judicata* but he did not specify which former suit as regards the same subject as herein, involving the same parties litigating under the same title has been heard and determined by a court of competent jurisdiction to qualify the plea of *Res-judicata*. That allegation is therefore unfounded.

50. For the foregoing reasons, I am satisfied that the **Preliminary Objections** as raised by both Defendants cannot be sustained as I have seen no other point of law besides the ones I have considered hereinabove. It is my finding that the suit and the application as filed are competent and properly before this court. The **Preliminary Objections** are thus not merited and are hereby dismissed.

51. **The above determination now leads me to a consideration of the merits of the application.** As stated earlier, the applicant seeks interim injunctive reliefs to restrain the Defendants and their agents from attaching, selling and/or otherwise interfering with the plaintiff's properties pending the hearing and determination of the suit. The application is premised on **Order 40** of the **Civil Procedure Rules** which empowers this court to grant a deserving party temporary injunctive relief before the conclusion of a trial. Such is governed by the now well established principles initially well laid down in the case of **Giella vs Casman Brown & Co. Ltd [1973] 358.**

52. Needless to state, an injunction is an equitable remedy which is granted in the exercise of a court's discretion depending on the facts and circumstances of each case and the ends of justice.

53. However, those principles settling the law on injunction have remained that; *a Plaintiff seeking to get and be granted a temporary injunction must establish a prima facie case with probabilities of success, must establish that he stands to suffer a loss irreparable by an award of damages if the injunction be refused and where the court is in doubt, it balances the convenience between the parties*. See the decision by the Court of Appeal in the case of **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others [2019] eKLR**.

54. In the instant case, the Plaintiff/Applicant urges the court to find that the proclamation and attachment of goods worth over Kshs.50,000,000/= was illegal and unlawful. The Plaintiff alleges that it will suffer loss of its goods if the Defendants are not restrained from selling the same.

55. I have also read through the Ruling delivered by the lower court in **CMCC No.530 of 2019** on **4th September, 2020**. It was the finding of that court that the execution was tainted with failure to comply with **Rule 12** of the **Auctioneers Rules**. The court further found that the proclamation had not been signed by the owner of the attached goods or its representative.

56. In this case, the auctioneer purports that the Plaintiff's representatives failed to sign the proclamation notice, but the trial court correctly found that no certificate was prepared to that effect. The findings of the trial court have not in any way been faulted. That said, and given the evidence availed to the court, I am satisfied that the applicant has established that it has a *prima facie* case with a probability of success. It must however be remembered that a case with a probability of success is not one that must succeed at the hearing but it is a case which is arguable and merits further investigations through a trial.

57. Regarding whether the applicant has proved that it will suffer irreparable loss or damage that cannot be compensated by an award of damages, the applicant has contended that the Defendants should not be allowed to trample over its rights at the pain of paying damages. That if an injunction is not granted, then the Defendants will continue selling the Plaintiff's goods in its possession. I am persuaded that the Plaintiff will suffer loss if its goods are sold without the auctioneer observing the laid down legal principles that govern that sphere of practice notwithstanding that the Auctioneer can compensate the loss by damages.

58. On the balance of convenience, I have noted the position advanced by the each party, particularly the one taken by the Defendants that the Plaintiff has failed to disclose that it is on the verge of complete take over by **AEA Ltd** hence the application is meant to defeat the execution. In its further affidavit, the Plaintiff did not reply on this issue. In my view, what is deposed to but not rebutted must be taken to be true. The Plaintiff does not dispute that there is a valid decree against it of Kshs.10,517,777/=, which has partially been settled. I therefore take the view that, weighing the balance between the granting of an injunction against the right of a successful litigant to enjoy fruits of a Judgment in his favour is and must remain a practical test if justice is to remain equated with fairness.

59. That was the spirit of the court in the case of **Flemish Investments Limited –vs- Town Council of Mariakani, MSA HCCC No.459 of 2010, [2012]eKLR**, which was cited with approval in **John Mosingi Marube –vs- County Commissioner, Kisii County & 2 Others, [2016]eKLR**, that public or community interest should, in appropriate cases, be an additional consideration to the principles laid down in the **Giella –vs- Cassman Brown & Company Limited case, [supra]** in deciding whether or not to grant interlocutory injunctions.

60. In this case, it would not be in public interest to grant an injunction safeguarding the interests of the Plaintiff/Applicant to the detriment of the 1st Defendant's right to enjoyment of fruits of a successful Judgment. In my view, the balance of convenience should therefore strike an equilibrium taking into consideration the rights of both parties.

61. Having said the above, I am minded to grant an injunction as sought in the Plaintiff's application dated 10th November, 2020 but on terms that the Plaintiff provides unequivocal and irrevocable bank guarantee in favour of the 1st Defendant in the sum of Kshs.3,571,777.00 within 30 days from the date of this decision.

62. The costs herein shall be in the main cause.

It is hereby so ordered.

DELIVERED, DATED and SIGNED VIRTUALLY at MOMBASA this 28th day of APRIL 2021.

D. O. CHEPKWONY

JUDGE