



Nicola Farms Limited v Summer Meadows Limited & another (Miscellaneous Civil Application 304 of 2018) [2021] KEHC 435 (KLR) (Civ) (17 December 2021) (Ruling)

Neutral citation: [2021] KEHC 435 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION 304 OF 2018
MW MUIGAI, J
DECEMBER 17, 2021**

BETWEEN

NICOLA FARMS LIMITED APPLICANT

AND

SUMMER MEADOWS LIMITED 1ST RESPONDENT

REGENT AUCTIONEERS 2ND RESPONDENT

RULING

NOTICE OF MOTION

1. The Applicant filed a Notice of Motion Application dated 18th February 2021 for orders that;
 1. The court be please to stay the warrants of attachment dated 3rd February, 2021 pending the hearing of this Application and the Reference.
 2. An order of injunction be and is hereby issued against the Respondents from proclaiming, auctioning, selling or in any way whatsoever dealing with the Applicant's property pending the hearing and determination of this Application.
 3. An order of injunction be issued against the Respondents from proclaiming, auctioning, selling or in any way whatsoever dealing with the Applicant's property pending the hearing and determination of the Reference.
2. Which Application was supported by the sworn Affidavit of John Wahinya Karuga dated 18th February 2021 and based on the following grounds: -
 - a) The 1st Respondent obtained warrants of attachment and sale dated 3rd February, 2021 against the Applicant. The 1st Respondent then instructed the 2nd Respondent to Proclaim the



Applicant's Property and which they did and the unless the Orders herein sought are granted urgently, the Applicant's Property will be auctioned and sold on 21st February, 2021.

- b) The 1st Respondent filed a Bill of Costs dated 11th July 2019 against the Applicant which was taxed on 26th November 2019 for an amount of Kshs. 549,159/=.
- c) Consequently, the Applicant and the 1st Respondent proceeded to file objection to the ruling of the Hon. Deputy Registrar vide a Notice of Objection dated 29th November 2019 and 3rd December 2019 respectively and which sought the reasons thereto.
- d) To date, neither the ruling nor the reason for the ruling are yet to be supplied to the Applicant despite numerous reminders and the Respondent withdrew its objection and proceeded to obtain a Certificate of Taxation dated 11th September 2020.
- e) Consequently, the Respondent has obtained warrants of attachment against the Applicant and has proclaimed the Applicant's goods despite the fact that the Applicant has a pending reference and unless this Application is heard urgently and on a priority basis and the orders herein sought be granted, the Applicant is likely to suffer irreparably.
- f) THAT the Applicant has an arguable Reference with high chances of success and unless the orders herein sought are granted, the whole reference will be rendered nugatory.

REPLYING AFFIDAVIT

3. The Application was opposed vide the sworn Affidavit of Gideon Mutai dated 8th March 2021 and stated that;
 1. The Applicant has always been aware of the 1st Respondent's intention to levy execution as communicated in the letter dated 17th September, 2021 served upon the Applicant. (Marked "GM-I" is a copy of the said letter)
 2. Despite the Applicant's knowledge of the impending execution, it neglected and/or failed to settle the taxed sum or take any steps in staying execution and the 1st Respondent rightly proceeded to recover the taxed sum.
 3. The instant Application does not meet the threshold set out in Order 42 Rule 6 (2) of the [Civil Procedure Rules, 2010](#) which requires the Applicant to demonstrate that: -
 - i. Substantial loss may result to the Applicant unless the order for stay is made;
 - ii. The Application was made without unreasonable delay; and
 - iii. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
 4. The Applicant has not adduced any facts to demonstrate that the 1st Respondent will be unable to pay back the taxed sum if the Application is not allowed and in the event that the intended Reference is determined in the Applicant's in favour.
 5. The refusal of stay of attachment will not render the intended Reference nugatory as the matter involves a money decree capable of being repaid by the 1st Respondent in the event the Reference is allowed,



6. Further the 1st Respondent is a person of means capable of offering restitution to the Applicant if the intended Reference succeeds and hence the Applicant will not suffer irreparable damage and loss.
7. The Applicant is guilty of inordinate delay in bringing this Application well over four months since the 1st Respondent communicated its intention to execute.
8. The Applicant has not proposed and/or indicated any willingness of depositing security needed under Order 42 Rule 6(2) to guarantee the due performance of the Certificate of Taxation. There is no proper reference known in law before the Court and so it cannot be established if the Reference is arguable.
9. Failure of the Taxing Master to forward reasons for taxation pursuant to the Applicant's Notice of Objection is in itself a ground for filing a Reference and does not preclude the Applicant from filing a competent reference but the Applicant elected not to file the Reference.
10. In any event, the Taxing Master's ruling on taxation is detailed enough and it contains reasons for taxation. (Marked "GM-2" is a copy of the said ruling)
11. In the view of the foregoing generality the Application is frivolous, scandalous, vexatious and abuse of Court process as the same is simply purposed to delay, scuttle, prejudice and bring hardship to the 1st Respondent's entitlement of the taxed costs and should be dismissed with costs.
12. In the alternative and without prejudice to the foregoing, in the event that the Court is inclined to allow the application, the Applicant be compelled to deposit a total sum of Kshs. 551,601/-, being the taxed costs, further court fees and court collection fee, into a joint interest earning account in the names of the Advocates for both parties.

FURTHER AFFIDAVIT

4. The Applicant filed a Further Affidavit of David Mereka dated 18th March 2021 and stated that;
 1. The Application dated 18th February 2021 is not devoid of merit since it seeks a remedy against the Respondent's conduct which contravenes Section 44(1)(ii) of the *Civil Procedure Act* Cap 21 for reasons that the alleged attachment is illegal and seeks to attach the Applicant's tools of trade and was conducted without the knowledge, approval or order of this court. Accordingly, the instant Application is meritorious.
 2. The test in Order 42 Rule 6(2) is subjective to the circumstances of each case, the Application has been brought with due speed and the Applicant has further demonstrated that it will suffer irreparably if the orders for stay are not granted since its tools of trade have been proclaimed.
 3. The refusal of stay of attachment will in all considerations result to a substantial loss on the part of the Applicant since its tools of trade have been proclaimed and which tools are very essential to the Applicant's survival and therefore the intended reference will be rendered nugatory.
 4. The Applicant is not guilty of laches since the Applicant immediately responded to the 1st Respondent Notice of Intention to execute by advising the 1st Respondent to stay any actions relating to the matter having filed a Notice of Objection dated 29th November 2019 and which Notice had been copied to the 1st Respondent.
 5. There is a Notice of objection to the Taxing Officer's decision and the same is properly on record. Further, the Applicant has on numerous occasions requested for the reasons attendant



to the Taxing Officer's decision as per the attached letters marked DMM1, DMM2, DMM3, DMM4 and which reasons are yet to be supplied. The Applicant cannot therefore be faulted for not filing a Reference in the absence of the reasons by the Taxing Officer. Be it as it may, even where the reasons are apparent on the face of the Ruling, the objecting party is not enjoined to file a reference until such a time that the Taxing Officer shall perform his mandatory obligation under paragraph 11(2) of the Advocates Remuneration Order, that is, to record and forward to the Objector the reasons for his decisions on the objected items.

APPLICANT'S SUBMISSIONS

5. The Applicant submitted that it has met the threshold for granting of Stay of Execution as provided under Order 22 Rule 22 of the Civil Procedure Rules. The import of the said provision is that an objector to a decision of a Taxing officer is required to give notice within 14 days thereof of the items objected to, and the Reference is to be filed within 14 days of receipt of the reasons for the decision from the Taxing Officer. The Applicant complied with the said provision and cannot therefore be accused of inordinate delay. The period for filing a Reference is to be determined on a case by case basis and not later than 14 days upon receipt of the reasons from the Taxing Officer. The Applicant has not been supplied with the reasons for the decision and therefore has not proceeded to file its Reference. *Kinyua Muyaa & Co Advocates Vs Kenya Ports Authority Densim Scheme & Others (2017) eKLR*,
6. Further, the Applicant argued that an order for injunction should issue against the Respondents from proclaiming, auctioning, selling or in any way dealing with the Applicant's property pending hearing and determination of the Reference. There is indeed a genuine fear by the Applicant that the attached properties will be sold thereby rendering the Applicant's Reference nugatory.
7. It was the Applicant's submission that submit that the Respondent's actions were in contravention of Section 44(1) of the *Civil Procedure Act* as most of the properties attached are the Applicant's tools of trade which in any case the value of the properties so attached exceeds the taxed amount of Kshs. 549,159/- and if the Court does not grant the injunctive orders sought by the Applicant, the Respondent will proceed with their illegal acts.
8. The Applicant has a prima facie case with a very high probability of success and the said attachment and/or proclamation of the Applicant's tools of trade will occasion the Applicant substantial loss if the Court does not come to the aid of the Applicant thereby rendering the auction of its proclaimed tools of trade.

1ST RESPONDENT'S SUBMISSIONS

9. It was the Respondent's submission that the Applicant's Application has not met the threshold required for stay execution. The Applicant essentially sought to appeal against the Taxing Master's ruling on taxation of the 1st Respondent's bill of costs but has not demonstrated to the Court that it has met the threshold set out in Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010.
10. In the case of *Labh Singh Harman Singh Ltd v Attorney General & 2 others [2016] eKLR* the Court held that the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 should be satisfied by the party that wishes to challenge the Taxing Master's decision on taxation of a bill of costs. The court held:

“By analogy of the stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules, a court will in granting stay of execution pending hearing and determination of a reference to a judge from taxation of costs be guided by presence of



substantial loss and the provision of suitable security for due performance of the terms of the decree or order that may eventually be binding upon the applicant”

11. Further, the goods proclaimed are not tools of trade and the Applicant will not suffer any substantial loss if an order for stay of execution is not granted. In any event, the certificate of costs is a money decree capable of being repaid by the 1st Respondent in the event the Reference is allowed. The 1st Respondent is capable of offering restitution to the Applicant if the intended Reference succeeds and hence the Applicant will not suffer irreparable damage and loss. The Applicant alleged that the proclaimed goods are tools of trade but failed to demonstrate how the proclaimed goods qualify as tools of trade. In *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* as cited in *Victory Construction v BM (a minor suing through next friend one PMM) [2019] eKLR* where the court was succinct thus:

“For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”

12. The Respondent contended that Applicant has not established that it will suffer irreparable harm which would not adequately be compensated by an award for damages if the court does not grant an order for stay of execution pending hearing and determination of the Reference.
13. The certificate of costs against which an order for stay of execution is sought is purely a money decree therefore no substantial loss will result if the stay of execution is not granted. The Applicant has not demonstrated how it will suffer substantial loss if stay of execution is not granted and therefore fails to convince this court that it deserves a stay of execution.
14. On a balance of probabilities, we submit that the 1st Respondent has proved that the Application has no high chances of success as highlighted herein above. The Applicant has failed to meet the threshold set in Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 to warrant this court to grant a stay of execution. Further, there is no Reference known in law filed by the Applicant and the court cannot establish its probability of success. The Applicant therefore has failed to satisfy the third condition set in the case of *Giella Vs Cassman Brown Co. Ltd 1973 E.A 358*.

DETERMINATION

15. After considering the Application, the response filed herein and the submissions by the parties, the issue for determination is whether an order of injunction should issue against the Respondent?

Whether an order of injunction should issue against the Respondent?

16. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella versus Cassman Brown & Company Limited (1973) E A 358*, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”



17. The law governing the granting of interlocutory injunction is set out under Order 40(1) (a) and (b) CPR 2010 which provides that: -

“Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”

18. The Applicant argued that the 1st Respondent obtained warrants of attachment and sale dated 3rd February, 2021 against the Applicant. The 1st Respondent then instructed the 2nd Respondent to Proclaim the Applicant's Property and which they did and the unless the Orders herein sought are granted urgently, the Applicant's Property will be auctioned and sold.

19. One of the grounds for the injunction adduced by the Applicant is that it is awaiting the reasons for the Ruling by the Taxing Officer. I share in the opinion of Odunga J in *Evans Thiga Gaturu, Advocate -versus- Kenya Commercial Bank Limited [2012] eKLR* held in this regard: -

“It is therefore clear that the interpretations by the Court especially the High Court on this issue is far and varied. In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles.

However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons, as it happened in the case of *Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005*, where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent.”

20. The Taxing Officer's ruling dated 26th November 2019 on taxation is detailed enough and it contains reasons for taxation.

21. It is noteworthy that the Applicant contended that;

“d) To date, neither the ruling nor the reason for the ruling are yet to be supplied to the Applicant despite numerous reminders and the Respondent withdrew its objection and proceeded to obtain a Certificate of Taxation dated 11th September 2020”



22. A copy of the said Ruling is available in the court file and the Applicant cannot argue that it has not received the Ruling to date. Moreover, how can the Applicant seek reasons for a Ruling that it has not seen? On this ground the Applicant has not shown that it has a prima facie case. The mere filing of the said objection is not sufficient to prove that the Applicant has a prima facie case with probability of success.
23. On whether the Applicant will suffer irreparable damage, the Applicant argued that it will suffer irreparable loss if its goods of trade are attached. The goods to be attached are the Applicant's tool of trade and will thus suffer loss should the attachment of the goods materialize.

Where does the balance of convenience lie?

24. In the case of *Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR*, the court dealing with the issue on balance of convenience expressed itself thus: -

“Where any doubt exists as to the applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.”

DISPOSITION

1. Given the above-mentioned circumstances the balance of convenience tilts in favor of the Applicant as it stands to lose its tools of trade should the intended reference be found in its favor.
2. In light of the above, an order of injunction shall issue in favor of the Applicant pending the determination of the reference.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH DECEMBER 2021(VIRTUALLY)

M.W.MUIGAI

JUDGE

