



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 55 OF 2020

INVESCO ASSURANCE COMPANY LIMITED.....PLAINTIFF

-VERSUS-

AUCTIONEERS LICENSING BOARD.....1ST DEFENDANT

DARIUS KIMWELE (Sued in his capacity as the

Secretary General of the National Association of Kenya Auctioneers).....2ND DEFENDANT

KINYANJUI NJUGUNA & CO. ADVOCATES.....1ST INTENDED INTERESTED PARTY

LAW SOCIETY OF KENYA.....2ND INTENDED INTERESTED PARTY

RULING

1) The plaintiff took out the motion dated 20th April 2020 in which it sought for interim injunctive reliefs in *rem* to restrain any auctioneer or any other person from attaching particularised items the plaintiff claimed to be tools of trade which are protected from attachment in execution of decrees and or orders under Section 44(1) of the Civil Procedure Act.

2) On 21st May 2020 this court issued a temporary order of injunction which read inter alia as follows:

a) THAT interim injunctive orders in rem be and are hereby issued to last until 26/06/2020 restraining any licensed auctioneer and or any other person from in any way proclaiming, attaching and/or in any way interfering with the plaintiff/applicant's tools of trade necessary for the conduct of its insurance business including the following:

i. Office amenities, facilities and physical infrastructure including furniture, chairs, stationery, cabinets, safes, kitchen ware;

ii. ICT infrastructure including laptops, desktops, servers, modems, scanners, CPU's, printers, photocopiers, network cables, telephone headsets, lines, routers and the necessary cabling for the same; and

iii. Mobile money transaction platforms including paybill and buy goods platforms;

b) THAT interim injunctive orders in rem be and are hereby restraining any licensed auctioneer and or any other person from in any way proclaiming, attaching and/or in any way interfering with the funds held in mobile money platforms including paybill and buy goods tills operated by mobile telecommunication companies in Kenya and to which the plaintiff has subscribed to facilitate its financial transactions.

3) The 1st intended Interested Party in response filed the motion dated 8th June 2020 in which it sought for inter alia:

i. THAT the application be certified as urgent and be heard ex-parte in the first instance.

ii. THAT pending the hearing and determination this application and/or applications currently before the court, the court be pleased to discharge interim injunctive and/or status quo orders issued on 22/5/2020 unconditionally.

iii. THAT in the alternative to prayer 2 pending hearing and determination of this application and/or applications currently before court, this honourable court be pleased to order the plaintiff to deposit the decretal sum being ksh.76,001,291.17 in court and/or in a joint interest earning account with reference to the Intended Interested Party herein.

iv. THAT pending the hearing and determination of the plaintiffs' application dated 20/4/2020, the plaintiff be compelled to advertise the application and suit in a newspaper with national circulation prior to enjoying orders in rem are to apply.

v. THAT an immediate order for security for costs totaling a minimum of kshs. 5,000,000/= be made before hearing and determination on this application and/or applications pending before the court.

4) The motion is supported by the affidavit of Kinyanjui Theuri.

5) The 2nd Intended Interested Party on its party filed the motion dated 29th May 2020 in which it sought for the following orders inter alia

i. THAT this application be certified urgent and be heard exparte in the first instance.

ii. THAT this application be heard prior to the hearing of the plaintiff's notice of motion dated 20th April 2020 or in the alternative, the order issued on 20th May 2020 be varied appropriately to allow the 2nd proposed party's application to be heard.

iii. THAT the Law Society of Kenya be enjoined in this suit as an Interested Party.

iv. THAT the interim injunctive order in rem issued on 20th May 2020 by the Honourable Mr. Justice Serگون be set aside, varied and/or discharged.

v. THAT the costs of this application be borne by the plaintiff.

6) The aforesaid motion is supported by the affidavit of Mercy K. Wambua. The plaintiff filed the replying affidavit sworn by Paul Gachuhi to resist the two motions.

7) This court gave directions to have the two motions disposed of by written submissions. It is important to point out at this stage that the 1st and 2nd Intended Interested Parties are basically seeking for two main orders. **First**, is an order to be enjoined to this suit as Interested Parties. **Secondly**, is an order for the setting aside or discharge of this court's interim injunctive orders in rem made on 21st May 2020.

8) The 1st intended Interested Party actually sought to be enjoined to this as an interested in the motion dated 13.5.2020. It sought for the discharge of the interim orders issued by this court on 21.5.2020 vide the motion dated 8/6/2020.

9) I have considered the grounds stated on the face of the motions plus the facts deponed in the affidavits filed in support and against the applications. I have also considered the rival submissions together with the authorities cited. The first question to be determined is whether or not the Intended Interested Parties should be enjoined to this suit as Interested Parties.

10) It is the submission of the 1st intended Interested Party that it should be enjoined to this suit because the orders being sought in this suit by the plaintiff if issued are likely to affect it. It was pointed out that the injunctive orders in rem are likely to be used to stay or bar execution of decrees, certificates of taxation and fee notes in favour of the 1st Intended Interested party by dint of monies owed to it and fruits of successful litigation.

11) On its part the 2nd Intended Interested Party stated that it is a crucial party in these proceedings for purposes of representing the rule of law, its members and furthering public interest.

12) In response to the Intended Interested Parties' submissions on the question of joinder, the plaintiff stated that in principle, it has no objection to having a party of the stature of the Law Society of Kenya enjoined to these proceedings which seek to establish jurisprudence on an important legal question as in this case but the plaintiff pointed out that judicious exercise of the court's discretion in this case militates against the two Intended Interested Parties for various reasons.

13) **First**, it is said that to join the 1st Intended interested Party would open floodgates to similar applications from hundreds of judgment creditors that will dilute or unnecessarily convolute the issues in this suit.

14) **Secondly**, that the 1st Intended Interested Party's interests could as well be urged through the Law Society of Kenya since it seeks to join this suit as representing its members.

15) **Thirdly**, that the 2nd Intended Interested Party seeks to introduce to this suit scandalous and contested factual allegations like the accusation that the plaintiff is forum shopping thus intimidating the court and whipping up public emotions unrelated to the legal questions at hand.

16) **Fourthly**, that the two applicants have not demonstrated how they intend to contribute to the resolution of purely legal issues raised in this suit.

- 17) **Fifthly**, that the 2nd Intended Interested Party has taken partisan position that seeks to scuttle a party's legitimate law suit.
- 18) In conclusion, the plaintiff argued that the Law Society of Kenya may be conditionally enjoined in this suit and be limited to the central and singular question of law raised in the plaint.
- 19) Having considered the rival submissions over the question of joinder, it is apparent that the court has an unfettered discretion in determining such an application. The law firm of **Kinyanjui Njuguna & Co. Advocates** has specifically stated that the orders sought by the plaintiff in this suit and in the motion dated 20th April 2020 are likely to be used to frustrate the execution of decrees, certificate of taxation and fee notes in favour of it.
- 20) The 1st Intended Interested Party has further stated that it is currently in litigation with the plaintiff in other matters.
- 21) I am convinced that the firm of **Kinyanjui Njuguna & Co. Advocates** has demonstrated sufficient interest in this suit. The firm has demonstrated the extent to which the orders sought by the plaintiff if granted will affect it.
- 22) The plaintiff has half heartedly conceded that the Law Society of Kenya should be conditionally enjoined to this suit as an Interested Party.
- 23) I am not convinced that this court should impose any conditions in enjoining the Law Society of Kenya as a party to this suit because the Law Society of Kenya has shown that it has sufficient interest in this suit.
- 24) In any case if the 2nd Intended Interested Party introduces issues which are scandalous and factually wrong, the Civil Procedure Act and Rules provides avenues of challenging the same within the suit.
- 25) In the end, I am satisfied that the firm of **Kinyanjui Njuguna & Co. Advocates** and the **Law Society of Kenya** have demonstrated sufficient interest in this suit, therefore they should be enjoined in this suit as the 1st and 2nd Interested Parties respectively.
- 26) The second prayer sought by both Interested Parties is for the discharge and or the setting aside of this court's interim injunctive orders in *rem* issued on 21st May 2020. The 1st Interested party has urged this court to set aside and or vary the order issued on 21st May 2020 on the basis that the plaintiff is guilty of forum shopping and secondly that this court lacks jurisdiction under Article 165(6) of the Constitution of Kenya, 2010 and Sections 30 and 34(1) of the Civil Procedure Act to issue such orders.
- 27) The 1st Interested Party further argued that the plaintiff abused the court process with intend to frustrate it and others not before court from executing decrees and orders issued by various courts. It was pointed out that the plaintiff had filed similar suits namely: **Milimani Constitutional Petition no. 394 of 2020** and **Kisumu Constitutional Petition no. 4 of 2020** where the plaintiff was denied orders of stay in both cases.
- 28) The 1st Interested Party further argued that under Section 34(1) of the Civil Procedure Act, all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution of the decree, shall be determined by the court executing the decree and not by a separate suit.
- 29) The 1st Interested Party pointed out that the orders issued on 21st may 2020 may frustrate execution of decrees issued by courts of concurrent or superior jurisdiction which is not acceptable in law.
- 30) The 2nd Interested Party is of the submission that this court's order issued on 21st May 2020 for all intents and purposes gave a blanket moratorium and immunity in favour of the plaintiff shielding it from all executions country wide against all decrees howsoever arising and whether emanating from other High Courts or even Higher courts which orders are adverse to the interest of persons not parties to this suit.
- 31) It was also pointed out that the plaintiff has been hoping from one court to another seeking favourable orders thus abusing the court process.
- 32) It is further stated that the plaintiff is guilty of deception and material non disclosure for failing to disclose to court the existence of other proceedings the plaintiff had filed.
- 33) In response to the Interested Parties' arguments, the plaintiff urged this court not to set aside the interim injunctive orders in *rem*. It argued that there is no evidence of material non-disclosure, deception, fraud or misrepresentation on its part.
- 34) The plaintiff further submitted that it raised a very serious question of law in this suit to show that it has a prima facie case, therefore the interim order should remain in place to protect the subject matter of the suit pending the hearing and determination of this suit.
- 35) The plaintiff also argued that the Interested Parties have not shown the prejudice they would suffer if the interim order is retained.
- 36) The plaintiff further pointed out that the prejudice which may arise concerns payment or non-payment of monies therefore the prejudice if any can easily be compensated by an award of damages.
- 37) The plaintiff also argued that if the interim orders are set aside, it will be exposed to a serious threat of insolvency as the tools of trade

necessary to generate revenues will be attached and sold.

38) Having considered the rival submissions, it is clear that the interested parties contention is that the interim injunctive orders in *rem* issued by this court on 21st May 2020 can be used to frustrate execution of decrees issued by various courts in respect of suits different from this suit. The plaintiff did not deny this assertion. The plaintiff is more concerned with the preservation of the items it says are tools of trade which it alleges are protected from being attached in execution of decrees under Section 44(1) of the Civil Procedure Act.

39) The plaintiff has listed the following items as its tools of trade:

i. Office amenities, facilities and physical infrastructure including furniture, chairs, stationery, cabinets, safes, kitchen ware;

ii. ICT infrastructure including laptops, desktops, servers, modems, scanners, CPU's, printers, photocopiers, network cables, telephone headsets, lines, routers and the necessary cabling for the same; and

iii. Mobile money transaction platforms including paybill and buy goods platforms;

40) The order issued by this court on 21st May 2020, restrained any licensed auctioneer and or any other person from proclaiming, attaching and or interfering inter alia with the funds held in mobile money platforms including paybill and buy goods tills operated by mobile telecommunications companies in Kenya.

41) With respect, I agree with the submissions of the 2nd Interested Party that the order is crafted in a way that for all intents and purposes the plaintiff is given a blanket protection from execution against all decrees emanating from various courts.

42) The fact that the interim order may be used to frustrate the execution of decrees from courts superior to this court may cause embarrassment and absurdity. It is obvious that the High Court cannot stay nor restrain execution of decrees emanating from courts above it.

43) The orders will obviously be used to affect parties who are not parties to this suit which is not permissible in law.

44) I am also convinced by the arguments of the 1st Interested Party that all questions relating to a decree should be determined by the court executing the decree and not by a separate suit. The plaintiff has in its application dated 20th April 2020 indicated that there exists various decrees and orders issued by various courts which are in active execution process. The plaintiff's complaint is that the auctioneers have in the process of execution proclaimed and attached what the plaintiff termed as its tools of trade therefore it was forced to seek this court's intervention.

45) It is apparent from the submissions and pleadings of the plaintiff that the plaintiff seeks to use the orders issued on 21st May 2020 to basically stay and or restrain execution of decrees and orders issued by various courts. Those decrees and orders may arise from courts superior to this court.

46) It is also clear that the plaintiff's complaint relates to execution of decrees and orders. The question as to whether or not the properties proclaimed or attached are tools of trade can easily be determined within the case the decree and or order emanates from. It is an issue which can be heard and determined under the provisions of Section 34 of the Civil Procedure Act. With respect, I agree with the submissions of the 2nd Interested Party that the plaintiff did not need to file a separate suit to determine an issue arising out of an execution process.

47) The plaintiff while seeking to be granted *ex parte* orders did not disclose to this court that the orders it was seeking may affect parties who are not parties to this suit. It did not also disclose the fact that it had previously unsuccessfully litigated over near similar issues in other courts with concurrent jurisdiction with this court. I am convinced that the plaintiff is guilty of material non-disclosure. In the circumstances, the plaintiff was not entitled to the *ex parte* orders. Consequently, the same are set aside.

48) In the end the 1st and 2nd Interested Parties motions dated 29th May 2020 and 8th June 2020 are found to be meritorious. Consequently, the following orders are granted:

i. The Law firm of Kinyanjui Njuguna & Co. Advocates and the Law Society of Kenya are enjoined to this suit as the 1st and 2nd Interested Parties respectively.

ii. The interim orders issued by this court on 21st May 2020 are set aside.

iii. The plaintiff to pay costs of the two motions.

Dated, Signed and Delivered virtually via Microsoft Teams at Nairobi this 23rd day of June, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant