



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CORAM: D. S. MAJANJA J.

MISCELLANEOUS CASE NO. E112 OF 2018

BETWEEN

ZAKHEM INTERNATIONAL CONSTRUCTION

LIMITED.....JUDGMENT DEBTOR/APPLICANT

AND

QUALITY INSPECTORS LIMITED.....DECREE HOLDER/1ST RESPONDENT

KINYUA & COMPANY AUCTIONEERSAUCTIONEERS/2ND RESPONDENT

RULING NO.4

1. The application before the court is a Notice of Motion dated 20th February 2020. It is made under **sections 1A, 1B, 3A and 44(1)(ii)** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)**, **Order 21 rule 12(2)**, **Order 40 rule 1(a)** and **Order 51 rule 1** of the **Civil Procedure Rules** and **Rule 10** of the **Auctioneers Rules, 1997**. The Judgment-debtor seeks a total of 10 prayers but in the main, its seeks an order setting aside the proclamation attaching its property and an order directing the Decree-holder through the Auctioneer to release the items proclaimed. It also seeks to set aside the orders issued in **Mombasa Chief Magistrates Court Misc. Application No. 65 of 2020 (Kinyua & Company Auctioneers v Zakhem International Construction Ltd)**.

2. The application is supported by the affidavit of Peter Ndegwa, the Judgment Debtor's Chief Accountant, sworn on 20th February 2020. He deponed that the process of attachment, culminating in proclamation notices dated 21st January 2020 is irregular as the Decree-holder has flouted several laws and procedures.

3. The thrust of the Judgment-debtor's complaint echoed by its counsel, Mr Oluoch-Olunya, is that the Auctioneer proceeded to proclaim its tools and implements of trade contrary to **section 44** of the **Civil Procedure Act**. In addition, it contended that the Auctioneer proceeded to attach and take away its tipper trucks registration numbers KCC 256L, KCC 258L and KCC 260L without having carried out any proclamation and while the trucks were on hire outside Mombasa and not in the Judgment-debtor's premises where they were supposedly proclaimed. The Judgment-debtor adds that the Auctioneer proceeded to proclaim and carry the three vehicles which had not been proclaimed as required by law.

4. Mr Ndegwa also complained that the attached items were grossly undervalued and it would be proper for this court to order an independent valuation to ascertain the realistic and correct value. He further deponed that the Decree-holder, through the Auctioneer, obtained orders illegally in **MSA CM Misc. Application No. 65 of 2020** which ought to be set aside.

5. The Decree-holder has opposed the application through the affidavit of Peter Kinyua Muchendu, the Auctioneer, sworn on 3rd March 2020. He gave an account of the fact that he received the warrants dated 17th January 2020 for the attachment and sale of the Judgment-debtor's moveable property. He proclaimed the assets and since the Judgment-debtor did not respond, he proceeded to take possession of the moveable assets. He deponed that he sold them by public auction on 10th and 18th February 2020 after advertising them as there was no objection.

6. As regards the argument that the Judgment-debtor could not attach the implements and tools of trade, counsel for the Decree-holder submitted that **section 44** of the **Civil Procedure Act** does not apply to corporate entities like the Judgment-debtor but only to natural persons. The Auctioneer also denied that it undervalued the proclaimed property. He maintained that he stated the value of the goods in the proclamation and that in any case, the Judgment-debtor did not apply to the court for valuation of the property prior to the sale or even provide an independent valuation. The Judgment-debtor contended that since the attached property has been sold to third parties by auction, the request to value the property has been overtaken by events.

7. In respect of the proceedings in **MSA CM Misc. Civil Application No. 65 of 2020**, the Auctioneer deponed that he filed the application to restrain the Judgment-debtor from transferring the motor vehicles attached when he realized that the Judgment-debtor was fraudulently and irregularly transferring them. As the application is still pending in the subordinate court, the Decree-holder and Auctioneer urged that the Judgment-debtor should raise its grievances in the subordinate court.

8. The Auctioneer also denied that it proclaimed vehicles that were not at the Judgment-debtor's premises. He stated that the attachment of motor vehicles registration numbers KCC 256L, KCC 258L and KCC 260L was regular as they were proclaimed on 29th January 2020 and the proclamations and inventory signed and acknowledged by the hirer of the Judgment-debtor, Margaret Kinuthia. The Decree-holder submitted that the Judgment-debtor is underserving of this court's discretion as it interfered with proclaimed properties, vandalized, relocated and hid other properties in order to frustrate the execution process. It concludes that the Judgment-debtor is still indebted to it.

9. It is not disputed that the Auctioneer sold the Judgment-debtor's property by public auction on 10th and 18th February 2020. In that respect, once the property was sold, the proprietary interest passed to third parties and the Judgment-debtors's rights were extinguished. If the court was minded to set aside the sale, then the third parties would have to be joined to these proceedings. This court cannot make a finding in respect of those properties without giving the purchasers an opportunity to be heard. In other words, the court cannot deal with the matter without breaching the rules of natural justice. However, and despite this finding let me deal with the other issues for the sake of completeness.

10. The Judgment-debtor has filed its list of assets and assigned values to each asset. It has not stated the basis for the assigned values hence I cannot say that they were sold at an undervalue. I agree with the Decree-holder that once the proclamation was served, the Judgment-debtor had the opportunity to challenge the valuation under **Rules 10** of the **Auctioneers Rules** but it did not do so. Once the property was sold, the Judgment-debtor lost the right to seek the court's intervention in this regard.

11. I have seen the order made in **MSA CM Misc. Civil Application No. 65 of 2020**. It is dated 17th February 2020 and it states as follows:

(b) THAT the Respondent is hereby restrained from transferring ownership of the motor vehicles in the attached schedule, which were attached by the Applicant pursuant to warrants issued in Milimani Misc. Appl. No. E112 of 2018 pending interparties hearing of this application.

(c) THAT the application be served for interparties hearing on 2nd March 2020 in court 9.

12. It is clear from the order that the application under consideration by the court was fixed for inter-parties hearing and the matter is still before that court. I would hesitate to intervene in a matter proceeding before another court when the party aggrieved has not taken advantage of its right to make its objections. I decline to intervene in those proceedings.

13. Finally, and in respect of **section 44** of the **Civil Procedure Act**, I would only quote the decision in **Blackwood Hodge Kenya Ltd v. Lead Gasoline Tank Clearing Sam and Chase (K) Ltd** NRB HCCC No. 2735 of 1984 [1986] eKLR where it was held that:

Section 44 of the Civil Procedure Act (Cap 21), in which it is provided that the tools and implements of a person for the performance of his trade or profession shall not be liable to attachment or sale, is not intended to protect corporate entities but artisans whose livelihood depends on their workmanship. The word person in that section does not include a corporate body.

14. I agree with the interpretation of **section 44** of the **Civil Procedure Act** which excludes attachment of the tools and implements of trade. The section was not meant to immunize companies like the Judgment-debtor from execution of court process. The core business of the Judgment-debtor is construction. It owns machinery and moveable property of various kind which may be attached and sold to satisfy a judgment debt. The meaning of trade or profession must be read in a narrow sense to exclude a corporate person.

15. For the reasons I have set out above, I dismiss the Notice of Motion dated 20th February 2020 with costs to the Decree-holder.

DATED and DELIVERED at NAIROBI this 3rd day of AUGUST 2020.

DAVID S. MAJANJA

JUDGE

Mr. Oluoch Olunya instructed by Oluoch Olunya and Company Advocates for the Judgment Debtor and Auctioneer.

Mr. Muturi instructed by Mwaniki Gachoka and Company Advocates for the Decree-holder.