



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 24 OF 2019

REMY GmbH & KG.....PLAINTIFF

-VERSUS-

HENKEL POLMER CO. LTD T/A HENKEL CHEMICAL (E.A).....DEFENDANT

RULING

1) The defendant took out the motion dated 22/10/2019 and sought for the following orders:

*i. Spent*

*ii. Spent*

*iii. Spent*

*iv. Spent*

*v. The execution process commenced by the plaintiff by removing the motor vehicles registration numbers KCK 889R, KBV 327L, KAZ 699R and KBK 897G from the defendant's Ruiru premises on 8<sup>th</sup> October 2019 and the defendant's office equipment from the defendant's Westlands office on 17<sup>th</sup> October 2019 be declared a nullity for breach of the law.*

*vi. The defendant's motor vehicle registration numbers KCK 889R, KBV 327L, KAZ 699R and KBK 897G and the defendant's office equipment unlawfully attached in execution of the decree be released to the defendant.*

*vii. The costs of this application be awarded to the defendant.*

2) The motion is supported by the affidavits each sworn by Ruth Henkel, Christabel Maingi and Saiqa Jabeen. When served with the motion, the plaintiff filed the replying affidavit of David Njoroge and the affidavit of Peter Mwangi Muya to oppose the motion. The defendants filed the further affidavit of Saiqa Jabeen to answer the aforesaid affidavits. When the motion came up for interpartes hearing learned counsels recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits. The defendant is basically seeking to be granted two main orders: **First** is for the execution process commenced by the plaintiff to be deemed as a nullity for breach of the law.

4) **Secondly** is an order directing the release of the defendant's motor vehicles and office equipments which were attached.

5) It is the defendant's averment that on 8<sup>th</sup> October 2019, **Peter Mwangi Muya** trading as **Recovery Concepts Auctioneers** on the plaintiffs' instructions entered the defendant's Ruiru Factory and removed motor vehicles registration nos. KCK 889R, KBV 327L, KAZ 699R and KBK 897G.

6) It is also averred by the defendant that on 17.10.2019, the same auctioneer entered into the defendant's offices in Westlands whereof it removed various office equipments.

7) It is the submission of the defendant that the auctioneer wrongfully and unlawfully attached and removed the defendant's goods. First, it is argued that the auctioneer failed to serve the defendant with a proclamation notice as required under Rule 12(1) (b) of the Auctioneers Rules, 1997.

8) Secondly, that the plaintiff never proclaimed the goods in the manner required by the auctioneers Act and therefore there was no lawful attachment in accordance with the law.

9) Thirdly, that all the defendant's assets which were attached by the plaintiff are under fixed and floating debenture entered into with **Barclays Bank of Kenya Ltd** and **NIC Bank Ltd** hence they are not available for attachment and sale.

10) The plaintiff on its part opposed the defendant's motion and argued that a valid proclamation was done by its auctioneers. The plaintiff also averred that there has been no sale scheduled so far hence the application has been filed prematurely.

11) The background of this application can be deduced from the pleadings and the material filed before this court. A judgement was entered in favour of the plaintiff as against the defendant on 3rd April 2019 and a decree was extracted on 6th August 2019. The judgment sum is USD411,623.10 plus costs.

12) The parties also agreed to allow the defendant to settle the decretal sum by three monthly installments. The defendant had by 30th April 2019 paid USD10,465 in partial compliance with the consent order. The defendant thereafter failed to make further payments thus prompting the plaintiff to commence execution proceedings.

13) I have already pointed out the sort of orders the defendant seeks. The **first** issue to be determined is whether the plaintiff issued a valid proclamation notice as required by law.

14) I have taken into account the arguments tendered by the parties over this issue. Having looked at the material placed before this court, I am convinced that prior to the attachment of the defendant's motor vehicles and the office equipments, that the auctioneers served a proclamation notice upon the defendant and its offices in Westlands Enterprise road and Ruiru. The record shows that service of the proclamation notice was effected on 28th August 2019. The proclamation notice attached to the auctioneer's replying affidavit show that the defendant's officials who were on site at the time of proclamation were served but they declined to acknowledge receipt of the same.

15) The plaintiff's auctioneer filed an affidavit of service outlining the process he undertook. The contents of that affidavit has not been controverted. It is apparent from the annexures attached to the auctioneer's replying affidavit that the items outlined in the proclamation are the same items which were attached meaning that the auctioneers had previously accessed the defendant's premises. I am therefore convinced that the auctioneer complied with the provisions of Rule 12 (1) (b) of the Auctioneers Rules 1997. The proclamation notice indicated the estimated values and their condition.

16) The **second** issue which arose for determination is whether the motor vehicles which are under a fixed and floating debenture can be attached. I have taken into account the arguments of both sides over this issue. It is not in dispute that some of the properties attached have some encumbrances registered against the title. It would appear the law envisaged such a situation to arise. Order 22 rule 57(2) of the Civil Procedure Rules provides inter alia as follows:

*“Such public notice shall be drawn up after notice to the decree holder and judgment debtor, and shall state the time and place of the sale, and specify as fairly and accurately as possible*

*a) The property to be sold.*

*b) Any encumbrance to which the property is liable.*

*c) The amount for the recovery of which the sale is ordered.*

*d) Every other thing which the court considers material for a purchaser to know in order to judge the nature and value of the property.”*

17) In my humble view, it is apparent from the above provision that the mere fact that a property attached bears an encumbrance does not in itself stop the same from being disposed of by way of an auction in satisfaction of a decree.

18) In the end, I find no merit in the motion dated 22.10.2019. The same is dismissed with costs being awarded to the plaintiff.

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 13<sup>th</sup> day of November, 2020.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant