



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

HIGH COURT CIVIL MISCELLANEOUS APPLICATION NOS 146 OF 2018.

(Also 147 of 2018, 150 of 2018, 151 of 2018, 153 of 2018, 156 of 2018, 157 of 2018, 158 of 2018, 159 of 2018, 160 of 2018)

**IN THE MATTER OF ATTACHMENT OF AFRICAN MERCHANT ASSURANCE PROPERTIES AND ANY OTHER
MOVEABLE PROPERTIES**

AND IN THE MATTER OF THE AUCTIONEERS ACT

AND IN THE MATTER OF APPLICATION FOR PROVISION OF SECURITY/BREAKING ORDERS

BETWEEN:

BENARD MAKATIANI T/A BENWILL AUCTIONEERSAPPLICANT

AND

AFRICA MERCHANT ASSURANCE COMPANY LTD ...RESPONDENT

R U L I N G

1. The Court has before it an Application brought by Benard Makatiana trading as Bewill Auctioneers from Bungoma (hereinafter called the Auctioneer). The Auctioneer is seeking the leave of this Court to break in alternatively enter forcibly into the premises of the Respondent in order to attach the property previously proclaimed. The Respondent, African Merchant Assurance Company Limited has its offices at Transnational Plaza, Mama Ngina Street, Nairobi, which is in the CBD/ The Auctioneer also wishes for the assistance of the Police from Langata Police Station which is several miles away from the offices.

2. The Application is said to relate to 10 separate Miscellaneous Causes, namely **146, 147, 150, 151, 153, 156, 158, 159 and 160 all of 2018**. The Application was filed under a certificate of urgency. It was brought ex-parte under "Sections 3, 3A, 63E and 98 of the CPA and Order XX1 Rule 71 of the CPR and section 9(1) and (2) of the Auctioneers Rules as amended by legal notice no. 144".

3. The Applicant seeks the following orders:

“1. THAT this application be heard ex-parte and on priority basis.

2. THAT an order do issue to the applicant to attach the said AFRICAN MERCHANT ASSURANCE CO. LTD and any other moveable properties of AFRICAN MERCHANT ASSURANCE CO. LTD

3. That the Officer Commanding Station (O.C.S) LANGATA Police Station/or, nearest administrative Police post be directed to provide security during the breaking in/ attachment of proclaimed items from AFRICAN MERCHANT ASSURANCE CO. LTD.

4. The costs of this application be borne by the debtors.”.

4. The Application is brought on the following grounds :

“1. The Applicant herein Benard Makatiani T/A Benwill Auctioneers on 23rd day of September, 2020 receive letter of instructions from M/s Wanjiru Karugu & Co Advocates.

2. THAT the Applicant proclaimed the said Defendant on 2nd day of October, 2020

3. The Defendant African Merchant Assurance co. ltd and/or his agents representatives, servants and assignees has not paid money owed to M/s Wanjiru Karuga & Co.

4. THAT the said proclamation and intended attachment has not been challenged or stayed in a court of law.

5. The applicant have attempted severally to seize the attachables but have experience resistance, intimidation and harassment by the Defendant and/or his agents, representatives, servants and assignees during the attachment from their premises where the said items are kept by locking applicants and its agent inside the building.

6. It would be in the interest of justice and in accordance with the law that the orders sought be granted.”.

5. The Application is Supported by the Affidavit of Bernard Makatiani purportedly sworn on 26th October 2020 before the Advocate by who he is instructed. Paragraph 2 of the Supporting Affidavit sets out the alleged debt. It is described thus “that I received warrants of attachment and sale from the firm of M/s Wanjiku Karuga & Co Advocates on 23rd day of September, 2020 to proclaim the Defendant for non-payment of the Advocates Fees. The Advocate is named in the Application as SIMIYU WATTANGA ADVOCATES amounting to Kshs.1,851.150/=. The warrants are said to be attached as Exhibit BM 2. There was proclamation on 2nd October 2020 and a copy is exhibited as BM 3. The Deponent then states that he believes that following proclamation the debt has not paid the amount owed.”. The Application is ex- parte and therefore the Debtor’s response is not before the Court, neither has the Advocate instructing the Applicant stated categorically that she has not been paid.

6. Exhibit 2 comprises the following:

(1) a warrant of attachment in Misc Cause 146 of 2018 in the sum of 190,025/=

(2) Warrant of attachment in Misc Cause No 147 of 2018 in the sum of KShs.257,525/= dated 23rd September 2020

(3) Warrant of attachment in Misc Cause No 150 of 2018 in the sum of 186,725/=

(4) Warrant of attachment in Misc Cause No 151 of 2018 in the sum of Kshs.163,825/=

(5) Warrant of attachment in Misc Cause No 153 of 2018 in the sum of Kshs.260,325/=

(6) Warrant of attachment in Misc Cause No 156 of 2018 in the sum of Kshs.209,525/=.

(7) Warrant of Attachment in Misc Cause No. 157 of 2018 in the sum of KShs.163,825/=.

(8) Warrant of attachment in Misc Cause No 158 of 2018 in the sum of Kshs.163,825/=

(9) Warrant of attachment in Misc Cause No 159 of 2018 in the sum of Kshs.112,425/=

(10) Warrant of attachment in Misc Cause No 160 of 2018 in the sum of Kshs.143,125/=. The are said to amount to a total of KShs.1,851,150/=.

7. In relation to (1) above, it is notable that amount is consistent with the Certificate of costs in that matter issued by DR Maragia on 8th May 2019. The Record also shows that in that matter there were 4 warrants of execution issued by the DR before the one dated 23rd September 2020. The sum in that warrant is stated to be KShs.190,025 including further costs. There is no corresponding certificate in relation to the other nine warrants exhibited or produced anywhere in the Application.

8. Exhibit BM 3 comprises the proclamations. They are 104 in relation to **Misc 146** in the sum of 109,025/=. 102 relates to 147/2018, 105 relates to **151/2018**, 103 relates to **153/2018**, 110 relates to **156/2018**; 107 relates to **157/2018**; 101 relates to **158/2018** 108 relates to **159/2018** and 106 relates to **160/2018**.

9. The Application is grounded on the non-payment and/or obstructive conduct of the debtor. The only evidence supporting that ground appears at paragraph 5 of the Notice of Motion. It states that, “*the Applicant have attempted severally to seize the attachables but have experience resistance, intimidation and harassment by the Defendant and/or his agents, representatives, servants and assignees during the attachment from their premises where the said items are kept by locking applicants and its agent inside the building.*”. In the Supporting Affidavit, paragraph 4 the Applicants states that he knows that the debtor has not paid the amount owed to M/s Wanjiru Karuga & Co Advocates, nor have the Auctioneers costs been paid. The Deponent has not explained how he knows that no payments have been forthcoming. At paragraph 5 he says that during the attachment he experience resistance, intimidation and harassment by the debtor, his agents etc during the attachment of the items from the premises.

10. Although the Proclamations explains that the proclaimed goods will be removed and sold unless the amount due together with the cost of this attachment is paid, the Proclamations do not set out the Auctioneer’s Charges, thereby making it impossible for the debtor to pay the

sums dues. The proclamations are dated 23rd September. It would be reasonable to expect that they would be effected shortly after. If they were effected on 23rd September, the period allowed of 7 days would expire on 30th September. However, the Proclamations was indicated as having been received by someone with the initials A.K. on 2nd October, the Covering Letter is dated 7th October 2020 and it provides for goods being taken to custody. In the circumstances, there are three possible dates when the attachment could have taken place. The Supporting Affidavit states that the proclamation took place on 2nd October 2020 but fails to mention the date on which the alleged intimidation and/or obstruction took place. In the circumstances, the Applicant has failed to put forward any evidence whatsoever of the date and time on which those alleged acts are supposed to have taken place. The lack of particularity renders the allegations implausible. Save for an hearsay statement there is no evidence of failure to pay, there is nothing to show the dates on which attachment was attempted – unsuccessfully. The warrants were returnable by 23rd November 2020. In the circumstances, the Applicant has failed to demonstrate a prima facie case for an ex parte injunction.

11. In the circumstances, the Court makes the following Orders:

- a. Applicant to serve Respondent;
- b. The Respondent be and is hereby granted leave to file and serve a response within 7 days of service.
- c. List for Hearing before the Duty Court on 30th December 2020.
- d. The Applicant shall inform the Respondent in writing of the amount of Auctioneer's fees payable;
- e. Respondent shall pay the sums outstanding to the Applicant within 10 days of service
- f. In the event that the Respondent fails to make any and/or any adequate payment, the Auctioneer shall attach the proclaimed goods.
- g. The Respondent whether through its directors, servants agents or howsoever is forbidden from interfering with the attachment provided paragraphs (a) to (d) above are complied with.
- h. The OCS shall ensure officers attend on the day of attachment to ensure that there is no breach of the peace.

Dated 17th December 2020

Order accordingly,

Farah S. M. Amin

JUDGE

Delivered electronically signed and dated at Kakamega this the 18th day of December 2020

In the presence of:

Court Assistant:

Date given in Court: Appearance not required.

Sent by email to

Charles.mwelese@gmail.com (M/S Matete Mwelese & Co Advocates)

And wanjikukarugaadv2@gmail.com (M/S Wanjiku Karuga & Co Advocates)