



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 56 OF 2016

OAKPARK APARTMENTS MOMBASA LIMITED.....1ST PLAINTIFF

KEPHA NYAMOGO OENGA & 29 OTHERS.....PLAINTIFFS

VERSUS

KENYA REVENUE AUTHORITY.....1ST DEFENDANT/1ST RESPONDENT

GEORGE NJOROGI MUIRURI T/A

LEAKEY'S AUCTIONEERS.....2ND DEFENDANT/2ND RESPONDENT

RULING

1. The application for determination is dated 1st June, 2016. It has been brought under the provisions of Order 41 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. It seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) Pending the hearing of and determination of this case an order of injunction be and is hereby granted restraining the defendants either by themselves or through their agents, servants or employees from proceeding with the threatened distress over, distraining, advertising for sale, offering for sale, selling by public auction, attaching, moving, selling, disposing of, transferring, using, dealing with or otherwise interfering with the plaintiff's movable property listed in the three proclamations of attachment of movable goods No. 1416, No. 1417 and No. 1418 all dated 24th May, 2016 or any other plaintiffs' goods; and

(iv) Costs of the application be provided for.

2. The application is premised on the grounds in support of it and the affidavit of Emmah Achoki, sworn on 1st June, 2016. The said deponent was duly authorized to swear the affidavit on behalf of the 1st applicant. It is also supported by her further affidavit sworn on 5th November, 2016. Although the application reads that it is supported by the affidavit of Kepha Nyamongo Oenga, this court did not trace the said affidavit among the bundles of documents filed with the application or in the court file. The 1st respondent through Lenny Makazi swore an affidavit on 15th August, 2016 to oppose the application.

3. Mr. Oluga, Learned Counsel for the applicants informed the court that 3 proclamation notices were issued for the applicants' goods that were attached by an Auctioneer. He sought an interim injunction against the respondents to restrain them from the intended public auction of the applicants' properties.

4. He submitted that the goods proclaimed belong to the applicants while the tax arrears were being pursued against Insulae Africanus Ltd. He cited the case of **Giella vs Cassman Brown** [1973] EA 358, on the principles for grant of an injunction.

5. On the principle of a *prima facie* case, Mr. Oluga submitted that the proclamations issued were invalid as the Auctioneer did not have territorial jurisdiction to proclaim goods in Mombasa. Counsel made reference to annexure EA9 at page 962 of the 1st applicant's annexures which contains the Law Society of Kenya Newsletter of 11th May, 2016 which was circulated to Advocates. At annexure EA10, the name of the 2nd defendant /2nd respondent is listed thereon at page 990 as No.186 under license No. 4945. The entry thereon for Licensed

Auctioneers as at 20th April, 2016 shows that Leaky's (sic) Auctioneers was licensed to carry out auctioneering business in Nairobi, Thika, Kiambu and Kajiado, yet the subject proclamation notices were issued in Mombasa. Counsel submitted that the Auctioneer contravened the provisions of Sections 12(4), 20(1) (b) and (c) of the Auctioneers Act and Rule 3(1) of the Auctioneers Rules, 1997.

6. He relied on the case of **Joska Taaka Wanyonyi vs Esther Opondo** [2007] eKLR where the court found that an Auctioneer repossessed a motor vehicle contrary to the provisions of the Auctioneers Act and the license issued to them by the Auctioneers Licensing Board. Counsel submitted that based on the foregoing, the applicants have established a prima facie case.

7. It was submitted that the goods attached were in the apartments and others are furniture which belong to the applicants. He stated that the 1st applicant, Oakpark apartments Mombasa Limited developed the apartments, retained some and sold 30 of them. The deponent attached leases and lease agreements for the applicants who bought the apartments at Pangoni Beach Hotel. Counsel asserted that the property which was in the apartments that belongs to the applicants cannot be sold to satisfy a debt owing to Insulae Africanus Ltd. He added that the property of Oakpark Apartments Mombasa Limited (1st applicant) was also attached.

8. In making reference to the respondent's submissions, Mr. Oluga submitted that under the provisions of Section 18 of the Tax Procedures Act, the 1st respondent cannot go after the 1st applicant to pursue tax owing from Insulae Africanus Ltd, as a result of the Directors being the same. He urged that Insulae Africanus Ltd was incorporated in the year 2010 and as such, it could not have been incorporated to evade taxes that fell due in the years 2012 to 2015.

9. On the 2nd principle of irreparable injury, it was submitted that if the goods are sold, the applicants' business will be paralyzed, their reputation will suffer and their business will be damaged. They will thus suffer irreparable injury.

10. Counsel for the applicants further submitted that if the orders are granted, the respondent can still pursue Insulae Africanus Ltd. He stated that the damage done if the goods are carted away cannot be compensated.

11. On the principle of a balance of convenience, Mr. Oluga urged the court to grant the orders sought as the goods are in the premises and if at the determination of the case, the court finds that the goods should be sold, then the respondent will be able to sell the same.

12. Mr. Ochieng, Learned Counsel for the 1st respondent opposed the application and submitted that a notice of compliance and verification of records was issued for Pangoni Beach Resort. The 1st Respondent thereafter visited the hotel and took an audit of the activities therein. He stated that the Directors of the hotel were involved in the exercise. These were Emmah Achoki (the 1st applicant's deponent), Quara Ltd, Raphael Wamiti, Yesse and Wachira. He stated that a compliance notice was issued to Insulae Africanus Ltd T/A Pangoni Beach Resort and Spa but the Directors of the said resort asked for more time. He stated that the respondent indulged them for almost 6 months and thereafter a tax arrears demand notice for Kshs. 100,728,714.00 was issued. An agency notice was then issued to the bank account of Insulae Africanus Ltd T/A Pangoni Beach Resort and Spa at National Industrial Credit Bank Ltd. Counsel further submitted that another tax demand notice was issued on 24th May, 2016 which was followed by an order to a certified bailiff to seize the properties.

13. It was submitted that the notices were issued to Pangoni Beach Resort based on the documents they gave to the respondent. In making reference to the financial statements of Insulae Africanus Ltd, Mr. Ochieng's position was that the said company gave the names of the Directors and its principal place of business as Pangoni Beach Resort and Spa Shanzu. He stated that the said statements do provide for trade and receivables as well as equipment. Inventories therein are described as food and beverages.

14. Counsel for the 1st respondent submitted that the annual report and financial statements for the year ended 31st December, 2013 shows that Directorship was rotational. He contended that Insulae Africanus Ltd was incorporated by the applicants to manage Pangoni Beach Hotel Ltd. He expressed the view that Insulae Africanus Ltd was the pseudonym for Pangoni Beach Resort Ltd. It was submitted that in the financial statements of the year ended 31st of December, 2013, Oakpark apartments Mombasa Ltd represented by Tito Alai resigned from Directorship on 18th July, 2013. It was argued that although the applicants had the right to enjoin Insulae Africanus Ltd to this case, they did not do so. He stated that although the applicants are different from the Management Company, Insulae Africanus Ltd, they would be held liable under Section 18 of the Tax Procedures Act and tax would still be collectable from them. Counsel stated that the applicants have not demonstrated a prima facie case with a possibility of success.

15. On the principle of irreparable injury, Mr. Ochieng submitted that Section 47 of the Tax Procedures Act provides for refund of tax and in the event that the court finds that the applicants are not liable, the 1st respondent will refund the amount of money paid. He submitted that the applicants have not disputed the fact that taxes are payable as evidenced by their letter dated 4th March, 2016 where they asked for more time to settle the demand. He stated that tax is payable under Articles 209 and 210 of the Constitution and the issue of the applicants reputation suffering does not arise.

16. On the principle of the balance of convenience, it was submitted that the court should not allow parties trying to evade tax to get away with it. He relied on the case of **Alfred N. Mutua vs EACC and 4 Others** [2016] eKLR which cited **Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 Others** [2014] eKLR. He prayed for the application to be dismissed.

17. In a brief rejoinder, Mr. Oluga submitted that the applicants have disputed the taxes because they are due from Insulae Africanus Ltd as the notices were issued to the said company. He submitted that the company is a distinct legal entity from the individuals but the goods attached belong to the applicants as indicated in the proclamation notices.

18. He argued that unless the corporate veil of the said company is lifted, Directors of a company cannot be held liable for a debt of a company. He stated that Section 18 of the Tax Procedures Act allows the 1st respondent to go after Directors if there was an arrangement entered into with the intention of rendering non-payment of tax liabilities.

ANALYSIS AND DETERMINATION

The issue for determination is if the applicants have satisfied the principles for grant of an interim injunction.

19. The first issue that the court would like to address is if the Auctioneer who issued the proclamation notices acted without jurisdiction by proclaiming goods that were in Mombasa County. The proclamation notices were issued by Leakey's Auctioneers on 24th May, 2016. Counsel for the applicants produced a list of Licensed Auctioneers and their areas of jurisdiction. The said list released by the Auctioneers Licensing Board contains the names of Licensed Auctioneers as at 20th April, 2016. It shows that George Njoroge T/A Leakey's Auctioneers was licensed to operate in **Nairobi, Thika, Kiambu and Kajiado only**.

20. Section 20(1)(b) of the Auctioneers Act No. 5 of 1996 provides as follows:-

“The Board shall keep a registrar, in such form as it may determine, of all licenses issued under this Act and shall enter therein in respect of every license-

(a) The full names and identity card number of the auctioneer;

(b) The place of business in respect of which the license is granted;

(c) The county or counties to which the license relates;

(d) The date of expiry of the license;

(e) Particulars of any amendment of the licensee;

(f) Particulars of any revocation or suspension of the license;

(g) Any other particulars the Board may require to be recorded.” (emphasis added).

21. Rule 3(1) of the Auctioneers Rules, 1997 states as follows:-

“The Board shall issue two kinds of licenses –

(a) A class “A” licence which shall be a general auctioneering licensee limited to specific districts;

(b) Class “B” license which shall be a general auctioneering license which shall enable the holder to realize charged securities, repossess and sell any property throughout Kenya, execute court orders, and to levy distress within specific districts.” (emphasis added).

22. The 3 warrants of attachment issued by Leakey's Auctioneers indicate that it is a class “B” registered Auctioneer. It is thus evident that the said Auctioneer's license is restricted to certain districts within which **it can levy distress**. Going by the list of licensed Auctioneers as at 20th April, 2016, Leakey's Auctioneers area of jurisdiction in so far as levying of distress was concerned, was limited to Nairobi, Thika, Kiambu and Kajiado.

23. The 1st respondent's deponent gave a wide berth to the said deposition contained in paragraph 18 of the 1st applicant's affidavit. In the case of **Jeska Taaka Wanyonyi vs Esther Opondo** [2007] eKLR, the court held thus:-

“The said auctioneers repossessed the said motor vehicles from the possession of the respondent at Nakuru. It is apparent that the said Madume Auctioneers repossessed the said motor vehicles from Nakuru when they clearly did not have the territorial jurisdiction to do so. There is no evidence to suggest that the said Madume Auctioneers had obtained an order of the court to enable them execute a repossession order out of their area of operation. The said Madume Auctioneers therefore repossessed the said motor vehicle contrary to the provisions of the Auctioneers Act and the licence issued to them by the Auctioneers Licensing Board.”

24. In his written submissions, Mr. Oluga urged the court to find that the proclamations issued by the 2nd respondent were invalid, null and void for being in breach of the Auctioneers Act and the rules made thereunder. He stated that on that score alone, the applicants have shown a prima facie case with a probability of success and the application should be allowed at this juncture.

25. Mr. Ochieng in urging the court not to grant the orders sought relied on the provisions of Section 18(1) of the Tax Procedures Act to show that the assets that were proclaimed are recognized in the financial statements of the Taxpayer Insulae Africanus Ltd and that the applicants being directors and others being controlling members of the Taxpayer are jointly and severally liable for the tax liability of the Taxpayer. He submitted that the intention or effect of the incorporation of the Taxpayer Insulae Africanus Ltd was to facilitate evasion of taxes. In his view, Insulae Africanus Ltd was the pseudonym for Pangoni Beach Resort and Spa.

26. To show that the 1st respondent was not trying to recover tax liabilities from the wrong party, Mr. Ochieng cited the provisions of Section 23 of the Income Tax Act which gives the 1st respondent powers to counteract the avoidance or reduction of liability to tax which could

otherwise be affected by the transaction.

27. Counsel submitted that the applicants undertook to make good the demand after the 1st respondent issued them with a demand notice for taxes raised. The said amount was not settled which led to the distraint of goods and chattels of the applicants towards recovery of the taxes owing.

28. Mr. Oluga submitted that the notices issued by KRA were issued to Insulae Africanus Ltd but the goods attached belong to the applicants as evidenced by the proclamation notices. He stated that section 18 allows KRA to go after Directors if there was an arrangement entered into with the intention of rendering non-payment of tax liabilities, which is not the case here. He further submitted that unless the corporate veil is lifted, the Directors of a company cannot be held liable for a debt of a company.

29. The principles for grant of an injunction were well settled in **Giella vs Cassman Brown** [1973] EA 358 at page 360, Spry VP held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, 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.”

30. In the present case, the applicant’s goods were attached by an Auctioneer who was not licensed to proclaim goods in Mombasa County and its environs. Proclamation of any goods by the said Auctioneer was an unlawful act that cannot be sanitized by the 1st respondent arguing that the said goods were attached due to tax arrears. Even if the tax arrears are owing but the process engaged to recovering the same is tainted, the proclamation notices are rendered null, void and incapable of enforcement. As earlier noted, the issue of an Auctioneer being instructed to distraint goods outside his jurisdiction was not addressed by the 1st respondent’s deponent in his affidavit.

31. The foregoing factor on its own would entitle the applicants to the orders sought. I have however anxiously considered what will follow next if I issue the orders sought and what equitable remedy this court can grant so that the ends of justice are met by both parties. The annexures to the 1st respondent’s affidavit clearly show that it is owed taxes. It is however up to the 1st respondent to follow due process in recovery of the same.

32. In the circumstances of this case, I invoke the provisions of Section 3A of the Civil Procedure Act which provides as follows:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

33. I therefore make the following orders:-

(i) That the 3 proclamation notices, dated 24th May, 2016 issued by Leakey’s Auctioneers against Insulae Africanus T/A Pangoni Resort and Spa are hereby declared null, void, invalid and are hereby set aside;

(ii) That all goods listed in the schedule of movable property in the 3 proclamation notices issued by the 2nd respondent on 24th May, 2016 shall be released forthwith;

(iii) The 1st respondent will be at liberty to enforce its rights to recover outstanding taxes through a properly executed legal process; and

(iv) The costs of the application herein are awarded to the applicants.

DELIVERED, DATED and SIGNED at MOMBASA on this 9th day of February, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms. Mwanasdumbah holding brief for Mr. Oluga for the applicants

No appearance for the 1st respondent

No appearance for the 2nd respondent

Mr. Oliver Musundi - Court Assistant