



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**HIGH COURT CIVIL CASE NO. 32 OF 2013**

**ATLAS COPCO CUSTOMER FINANCE AB.....PLAINTIFF**

**VERSUS**

**POLARIZE ENTERPRISES.....DEFENDANT**

**RULING**

**[1]** The Notice of Motion dated **9 June 2015** was filed by the Plaintiff/Applicant under a certificate of urgency pursuant to the provisions of **Section 1A, 1B and 3A of the Civil Procedure Act** as well as **Order 40 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010** for orders that:

**[a] Spent**

**[b] Spent**

**[c] The Court be pleased to discharge the injunctive orders given on 31 March 2014;**

**[d] The Plaintiff be at liberty to proceed with the sale by public auction of the items supplied by the Plaintiff to the Defendant, and in particular, the TH 10 LM Water well rig machine SR No. 2009H10465 mounted on Ashok Leyland truck Reg. No. KBN 281D and the Drilling tools and accessories for the rig machine.**

**[e] That the proceeds of sale be deposited in a joint interest earning account in the names of the parties' Advocates on record pending hearing and determination of this matter.**

**[f] That the costs of the application be paid by the Defendant.**

**[2]** In support of the application the Plaintiff relied on the affidavit annexed thereto sworn by **Joseph Muchina** on **9 June 2015**. The Plaintiff's case, briefly, is that since **31 March 2014** when the court issued an order of temporary injunction herein restraining it from selling, advertising for sale and/or disposing or interfering with the Defendant's motor vehicle **Reg. No. KBN 281D** on which the rig that is the subject of this suit is mounted, the storage charges in respect of the rig continue to increase by the day, while the value of the rig continues to depreciate on account of its non-use. The Plaintiff is therefore apprehensive that the said charges might soon overrun the value of the rig if the current state of affairs is left to run its

course until the hearing and final determination of this suit. The court was therefore urged to discharge the injunctive orders in the interests of justice, to pave way for the sale of the rig; and for the funds to be deposited in a joint interest earning account in the names of the parties' Advocates.

[3] The Defendant opposed the application and relied on the affidavit of its Director, **Mr. James K. Mutia**, sworn on **24 June 2015**. It is the Defence case that the application is unfounded as the issues raised therein are *res judicata* and should therefore be dismissed accordingly with costs. The Defendant posited that the Plaintiff should instead release the truck to him for use and that the suit be fast-tracked for hearing and disposal on merits.

[4] The brief background to the application is that on or around **18 May 2010**, the parties hereto executed a Suppliers Credit Agreement whereby the Plaintiff was to sell to the Defendant the subject water well rig for **USD 434,027.67**. The Defendant was to make a down payment of **USD 65,105.15**, and the balance was to be paid in 60 monthly instalments in arrears together with interest at 11% per annum. Needless to say that although the Plaintiff supplied and delivered the equipment to the Defendant, the latter did not make the due payments as agreed. Accordingly, as at **31 January 2013** when this suit was filed, the Defendant was indebted to the Plaintiff in the sum of **USD 441,819.55**. For the reason that the Defendant did not respond to the Plaintiff and Summons to Enter Appearance in spite of service, a default judgment was recorded in the Plaintiff's favour on **24 April 2013**. It was pursuant to an application by the Defendant for setting aside of the *ex parte* judgment that the injunctive orders of **31 March 2014** were made. By that time, a Decree and warrants in execution thereof had been issued on the basis of which the Defendant's truck, **Reg. No. KBN 281D** had been attached along with the rig by **Keysian Auctioneers**.

[5] The Court has given due consideration to the application, the grounds set out on the face thereof, the averments in the affidavits filed by the parties as well as the pleadings and proceedings to date. I have similarly perused and considered the written submissions filed herein, including the authorities cited. First and foremost is the Defendant's argument that the application is *res judicata*, and that the issues raised therein are issues that were disposed of in the Ruling of **31 March 2014**. I however have no hesitation in rejecting that argument. **Order 40 Rule 7 of the Civil Procedure Rules** provides that:

**"Any order of an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."**

In the premises, the Defendant's argument that the application is *res judicata* is untenable. Thus, the only issue for me to consider is whether sufficient cause has been shown to warrant the discharge of the interlocutory injunction that is currently in place.

[6] In a two-pronged justification for the discharge of the temporary injunction, the Plaintiff contended that the continued storage of the equipment is causing it drastic deterioration with the imminent danger of loss of value in the horizon. Related to the foregoing is the continued escalation of storage charges. The solution proffered by the Plaintiff to meet the ends of justice was that the equipment be sold and the proceeds thereof be deposited in an interest earning account in the joint names of the parties' Counsel. On the other end of the spectrum is the Defendant's argument that the equipment is not only special but is also its only tool of trade, and that this was the reason why it sought the injunctive orders in the first place. Thus, it was the Defendant's contention that it would be a violation of its proprietary rights to dispose of it in the manner proposed without any proof that the Defendant's conduct since the issuance of the orders does not meet the court's approval. In support of the foregoing arguments, the Defendant relied on the following authorities:

**a) Harrishchandra Bhonovanbhai Jobanputra vs Paramount Universal Bank Ltd & 3 Others [2014] eKLR; and**

**b) Barclays Bank of Kenya Ltd vs Abdi Abhir Warsame & Another [2008] eKLR**

[7] Needless to say that the interim injunction was only issued because the Court was satisfied that it would serve the interests of justice in the matter pending the hearing and determination of the suit. I

therefore agree entirely with the view taken by **Munyao Sila J** in **Filista Chamaiyo Sosten vs Samson Mutai [2012] eKLR**, in which he stated thus:

**"...the discretion under Order 40 Rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing an injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the first place..."**

**[8]** It is imperative therefore that care be exercised to ensure that the Plaintiff is not merely out to have a re-think of the matter; and in this regard it is now trite that some of the factors that guide the exercise of the courts' discretion in this area of law are, but not limited to:

**a) proof that the injunction was obtained by concealment of facts which if presented would have worked against the granting of the injunction;**

**b) a radical change in the circumstances of the suit, such that it is no longer necessary to have the injunction;**

**c) proof that the general conduct of the holder of injunction is such that the court is impelled to discharge the injunction, for instance, where the injunction is being used to intimidate the Defendant or achieve an ulterior purpose;**

**d) proof that the sustenance of the injunction would cause an injustice.**

**[9]** It is not alleged herein that the injunction was obtained by concealment of facts or that a radical change in circumstances of this suit has since occurred such that it is no longer necessary to have the injunction. In the same vein, it is not the Plaintiff's case that the general conduct of the Defendant since the order was made is such that the court is impelled to discharge the injunction. Thus the only feasible ground that can be gleaned from the application is that the sustenance of the injunction would cause an injustice.

**[10]** The Plaintiff exhibited a letter dated **2 March 2015** from Leakey's Storage Limited to prove that the storage charges had escalated to **Kshs. 672,642/=** and that there was an imminent danger of the equipment be disposed of as uncollected goods. There was however no explanation as to why **Keysian Auctioneers** who apparently contracted **Leakey's Storage Limited** have let the storage charges go unpaid, granted that such expenses are, ordinarily recouped at the conclusion of the disputation. Similarly, there is no indication that the equipment is exposed to the elements, as was the case in **Nicholas Mahihu Muriithi vs Consolidated Bank & Another Civil Appeal No. 122 of 2007**. Accordingly, I would be of the view that the injunction was granted for good reason and that no justification has been given for me to discharge or vary the same as sought by the Plaintiff/Applicant. I however appreciate that time will ultimately be of the essence, and therefore there is need to fast-track the case as urged by the Defendant. Accordingly, while I would dismiss the Notice of Motion dated **9 June 2015** with costs, it is hereby directed that the parties proceed to take appropriate measures with a view of having the main suit fixed for hearing to facilitate expeditious disposal of the matter.

Orders accordingly.

**OLGA SEWE**

**JUDGE**

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL 2016**

**ERIC K.O OGOLA**

**JUDGE**