



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 817 OF 2007**

**ISAAC OKECH OSI.....PLAINTIFF**

**VERSUS**

**QUEEN DRYCLEANERS AND DYERS LIMITED.....DEFENDANT**

**AND**

**QUEENS DRYCLEANERS LIMITED.....INTERESTED PARTY**

**RULING**

The Application before the court for determination is the Notice of Motion dated the 17<sup>th</sup> day of December, 2015. The same was brought under Order 21 Rule 12(2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and any other enabling provisions of the law.

The Applicant/interested party has sought the following orders:-

1. Spent
2. That this Honourable Court be pleased to order a stay of execution by the Plaintiffs vide HEBROS AUCTIONEERS herein pending the hearing and determination of this application inter partes.
3. That QUEENS DRY CLEANERS LIMITED be joined to this suit as an interested party.
4. That this honourable court be pleased to lift the proclamation and attachment made on the 11<sup>th</sup> December, 2015 by HEBROS AUCTIONEERS
5. That the interested party be allowed to pay the decretal amount in monthly instalments of Kshs.50,000/- until payment in full.
6. That costs of the application be provided for.

The Application is based on the grounds set out on the body of the same and is supported by the annexed Affidavit of CAROLINE NYOKABI GICHURU sworn on the 17<sup>th</sup> December, 2015.

The deponent is the director of QUEENS DRY CLEANERS LIMITED, the interested party, which is seeking to be enjoined in the suit herein. In her Affidavit in support, she depones that sometime in February, 2013, the interested party entered into an agreement with the defendant and purchased the business and goodwill of the defendant and continued with the same laundry business earlier on operated by the defendant.

It was an express term of the agreement that the liabilities incurred by the defendant before the effective

date of the said agreement would be borne by the defendant and the interested party would not be liable for such liabilities.

That sometimes in March, 2015 the plaintiff vide HEBROS AUCTIONEERS visited the interested party's offices and place of business allegedly with proclamation in execution of a decree. The interested party instructed its advocate to file objection proceedings.

Subsequently on or about the 27<sup>th</sup> May, 2015, M/s HEBROS AUCTIONEERS visited the interested party's two premises along Market branch and Hurlingham Nairobi, proclaimed and carried away various items in the said premises.

The interested party filed proceedings against the said proclamation and intended sale. The execution arose out of judgment issued on the 6<sup>th</sup> November, 2014 against the defendant in favour of the Plaintiff for a sum of Kshs.1,500,000. The interested party filed two applications dated 29<sup>th</sup> May, 2015 and 12<sup>th</sup> March, 2015 which were heard together by Justice Mabeya and both were dismissed with costs.

The application dated 12<sup>th</sup> March, 2015 was by way of objection proceedings under Order 22 Rule 51 wherein the objector sought stay of the warrants of attachment for the reason that it was not a party to the suit pursuant to which the decree was issued.

The application dated 29<sup>th</sup> May, 2015 on the other hand sought for orders to lift the proclamation and attachment done on the 27<sup>th</sup> May, 2015 on the objector's property as the same was unlawful. It sought for an order that HEBROS AUCTIONEERS do immediately return the items proclaimed and carried away from the interested party's premises on the 27<sup>th</sup> May, 2015. In the learned Judge's ruling, he noted that the interested party (objector) was unable to prove ownership of the proclaimed goods.

It was further deponed that the company (interested party) operates on the goodwill and reputation of its customers and as a result of the proclamation, many of its customers have stopped coming to the premises for fear of their clothes being carried away as a consequence of which it's business has drastically gone down and the financial status of the company has suffered a big blow.

That upon the proclamation of its goods on the 11<sup>th</sup> December, 2015, the applicant entered into an agreement with the defendant to pay the decretal sum and the interested party can only manage to pay Kshs.50,000 per month until payment in full.

The application is opposed vide a replying affidavit sworn by ISAAC OKETCH OSI (the decree holder) on the 7<sup>th</sup> day of January, 2016 wherein he depones that the Applicant in bringing the application herein is abusing the court process as its objection to the execution was dismissed by the court. That he believes that the judgment debtor and the proposed interested party are one and the same thing the latter being a camouflage to aid the former from paying its just debts.

That the application has been brought in utmost bad faith as the applicant has concealed material facts in that after dismissal of its objection proceedings the applicant herein committed to pay the decretal sum by instalments of Kshs.152,649/- and upon that commitment the goods already attached by the auctioneers were released to the applicant.

It is further deponed that the Applicant herein has so far paid a total sum of Kshs.660,596/- out of the decretal sum in honour of the agreement but two of the cheques deposited bounced on presentation with only one being replaced. That the Applicant has not paid any instalment since November, 2015 and the postdated cheques deposited with the decree holder's lawyers cannot be presented for banking for fear of the same bouncing back.

He depones that the court should not vary the payment terms agreed upon by the parties and in any case, the applicant is most dishonest by failing to disclose the details of the consent and particularly that it gave the advocate for the decree holder cheques that bounced. That the judgment debtor has been paying

monthly instalment of Ksh.152,649/- and it would be completely unfair and irrational for this sum to be reduced to Kshs.50,000 as in so doing, the decretal sum would take over two (2) years to clear.

The submissions by the learned counsels reiterates the averments contained in the respective affidavits in support and in opposition to the application. In her submissions counsel for the applicant informed the court that she is seeking orders 3-6 of the application.

On his part, counsel for the Plaintiff/Respondent has submitted that the applicant must show sufficient reason for exercise of court's discretion by providing proof of hardship by attaching bank statements, list of debtors and creditors so that the court is able to see that there is hardship for it to exercise its discretion. He urged the court to dismiss the application.

I have carefully considered the application, the affidavits both in support and in opposition and the submissions by the learned counsels for the respective parties. Counsel for the respondent is on record as having no objection to prayer 3 of the application and the court is left with prayers 4, 5 and 6 to determine.

The issue that this Honourable court has to determine is whether the applicant/interested party has satisfied the court that it deserves the grant of the orders sought. I have perused the letter dated 26<sup>th</sup> June, 2015 by Caroline Gichuru the managing director of Queens Dry cleaners Limited to Nyawara & Co. Advocates for the plaintiff. The same is annexed to the Replying Affidavit by the decree holder and marked as "1003". In the said letter, the interested party committed itself to liquidate the decretal sum. The payment was to commence on the date of the said letter with payment of Kshs.50,000 cash and the balance was to be cleared in 12 months commencing July 2015. Postdated cheques of Kshs.152,649 each were to be given to cover the full amount and in case of the cheques bouncing, the judgment creditor was at liberty to proceed with further execution.

Pursuant to that commitment, the interested party/applicant issued various cheques towards satisfaction of the decretal sum. In his submissions Mr. Nyawara told the court that following that agreement, the attached goods were released to the applicant, a fact that was not disputed by the counsel for the applicant. The applicant paid a total of Kshs.660,596/- and the balance is outstanding to date with the judgment creditor still holding the post dated cheques and not depositing them for fear that they are likely to be dishonoured. The agreement was entered into in the month of June, 2015 and the application herein was filed on 17<sup>th</sup> December, 2015.

The applicant alleges that as a result of the execution it has been unable to maintain its customer base thus its financial status is not good and that explains why it has not been able to honour the two cheques previously issued to the Respondent.

The remedies sought by the Applicant are discretionary in nature and for the court to exercise its discretion, the applicant has to prove that its deserving the granting of the orders sought. In my view, the applicant has not done enough to that end. As submitted by the counsel for the judgment creditor/respondent the applicant ought to have annexed evidence by way of bank statements to show that its not in a position to liquidate the decretal sum as it had previously committed itself vide its letter dated 26<sup>th</sup> June, 2015. It is not enough for it to merely state that its financial status has suffered a big blow and hence its inability to pay the money.

Though the provisions of Order 21 (1) gives the court the discretion to order that payment of any amount decreed shall be postponed or shall be paid by instalments, sufficient reason must be given by the party seeking such orders. The applicant herein committed itself to pay the money from month of June, 2015 and barely six months thereafter, it filed the application herein alleging its inability to pay the money. In my view, no sufficient reason has been given why the court should exercise its discretion in favour of the applicant herein.

In the premises aforesaid, the application is dismissed save for Prayer 3 which is hereby allowed. Costs to the Respondent.

DATED, SIGNED and DELIVERED at Nairobi this 9<sup>th</sup> day of June, 2016.

.....

**L NJUGUNA**

**JUDGE**

**In the presence of:-**

.....*for the Plaintiff*

.....*for the Defendant*

.....*clerk*