



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 1 OF 2014

BEMUTA AGENCIES LTD.....APPLICANT

VERSUS

JATOMY ENTERPRISES LTD

GEOFFREY GITAU.....RESPONDENTS

RULING

1. This application is brought by way of chamber summons under Order 22 Rule 1 of the 2010 Civil Procedure Rules and under Rule 11 (4) of the Advocates Remuneration Order and as well as under all enabling provisions of the law. It was brought under certificate of urgency and was certified as such. It seeks stay of execution of warrants of attachment dated 20th April 2016 issued upon the application of the 1st respondent, pending the hearing and determination of this application, which is in relation to the objection to the bill of taxed costs. The chamber summons is supported by the grounds on the face of the summons and is anchored in the supporting affidavit of Benson Maingi Mutahi dated 5th July 2016.

2. The applicant has raised 5 grounds in support of its application. In ground 1 the applicant has stated that Mwangi auctioneers acting on instructions from the 1st respondent attached the stock in trade of the applicant on 2nd July 2016 and threatened to carry away the same on 9th July 2016. In ground 2 the applicant has stated that the 1st respondent has commenced the process of execution of the decree against the applicant without effecting service of the certificate of costs or decree and without demanding payment, despite the applicant having an advocate on record. In ground 3 the applicant has indicated his intention to object to the taxed bill of costs that was done on 29th January 2016. In ground 4 the applicant has stated that he stands to lose his tools of trade, disruption of business and the source of his livelihood if the 1st respondent proceeds to carry away and auction its goods. In ground 5 the applicant has stated that the 1st respondent will suffer no prejudice if the prayers sought are granted.

3. In his supporting affidavit which runs to 12 paragraphs, the applicant through the deponent has deponed that its advocate on record inadvertently forgot to diarize the date and as a result failed to attend court on 29th January 2016. He has further deponed that the mistake of its counsel should not be visited upon it. He has also deponed that since the delivery of the ruling on 29th January 2016, there was no further action or communication from the court or the 1st respondent touching on this matter regarding the demand for payment of the taxed bill of costs in the sum of Kshs 106,200/-. He has also deponed that the certificate of taxation was not served upon them. Additionally, the applicant has deponed that he was surprised on 2nd July 2016, when the auctioneers went to its shop and attached the applicant's stock in trade for a purported decree in the sum of Kshs 106,200/- when its stock in trade is more than five million which the auctioneer under valued at Kshs 150,000/-.

4. Furthermore, the deponent has deponed that the company risks suffering substantial loss if the auctioneers carry away its stock in trade as stated in the proclamation of the attachment. He has also deponed that he was informed by the advocates on record that they were not served with a certificate of taxed costs and were also not served with a demand requiring a settlement of the taxed costs. The deponent has also stated that the subject matter of the main suit in the lower court is for a liquidated demand of Kshs 343,995/-, which suit is still pending in that court. It is also his affidavit evidence that unless stay of execution is granted, the applicant will be prejudiced and it is for that reason that he seeks a stay of execution pending the hearing of the application.

5. The applicant's counsel has filed written submissions in which he has set out the issues for determination which in his view are three. The first one is whether the length and the reason for delay by the applicant are justifiable. The second one is whether the intended objection has chances of success if the application is granted. And the third one is whether the 1st respondent will be prejudiced if the application is granted. He has in that written submission answered the issues raised for determination in the positive and has urged this court to grant its application.

6. The respondent has opposed the application for stay of execution. The respondent has filed three grounds of opposition to the application, terming the application as being bad in law and an abuse of the court process. He also stated that there is no basis for staying the execution process. And finally, he has stated that the prayer of the applicant in objecting to the taxed bill of costs has been brought too late in the day.

7. In their written submissions, counsel for the 1st respondent has submitted that the applicant did not state in its affidavit the effort they made to inquire what transpired in court since 18th January 2016, when the bill of costs was argued. He has further submitted that since 18th January 2016 the applicant's counsel went to sleep and was only woken up by the respondent six months later on 2nd July 2016, when the auctioneers went to execute for the payment of the taxed costs, which were assessed at Kshs 103,650/- on 29th January 2016. Counsel have also further submitted that the applicant has not indicated the items that were not properly taxed by the Deputy Registrar in this application. According to counsel for the respondent, the applicant is merely delaying the execution process to the prejudice of the respondent, who is entitled to the fruits of his judgement.

8. I have considered the affidavit evidence of the applicant. I have also considered his grounds in support of that application. Finally, I have considered the rival submissions of both counsel. I believe the affidavit evidence of the applicant's counsel that they omitted to diarize the date of this matter. As a result they failed to attend court. I also believe the affidavit evidence of the applicant that they were not served with the certificate of taxed costs or a demand for its settlement. Finally I believe the applicant's affidavit evidence that unless stay is granted the applicant will suffer substantial loss and that the intended reference will be rendered nugatory. The respondent did not file a replying affidavit. I find that the respondent is entitled to the fruits of its judgement as submitted by his counsel. I also find that the applicant is entitled to the order of execution and attachment to be reviewed on certain conditions.. There is tension between the rights of the applicant and those of the respondent in this regard. In view of this, I find that unless stay of execution is granted, the applicant is likely to suffer substantial loss. I also find that unless stay of execution is granted, the intended reference may be rendered nugatory.

9. In the light of the foregoing reasons, I hereby strike the balance in granting the applicant's application for stay of execution and for the grant of leave within which to raise the objection to the taxed the bill of costs as set out in prayers No. 2 and 3 of the chamber summons dated 5th July 2016, on condition that the applicant deposits in court the decretal sum of Kshs 103,650/- within 45 days failing which this order will lapse. Additionally the applicant has to file a reference within 14 days failing which this order will lapse.

10. The costs of this application will be costs in cause.

RULING DELIVERED, DATED and SIGNED in open court at **EMBU** this **18th** day of **AUGUST, 2016**.

In the absence of counsel for the Applicant and in the presence of Mr. Kathungu for the 1st Respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

18.08.16