



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NUMBER 510 OF 2010

GICHUKI KING'ARA & CO. ADVOCATES.....DECREE-HOLDER

VERSUS

KING'ORANI INVESTMENT LIMITED

TRANSFLEET LIMITED

TRANSFLEET EPZ LIMITED.....JUDGMENT-DEBTORS

R U L I N G

The judgment-debtors/Applicants herein have moved the court by way of a Notice of Motion dated the 28th July, 2016 brought under Sections 3A, 63(e) & 80 of the Civil Procedure Act, Cap 21 Laws of Kenya; Order 51 Rule 1; Order 22 Rule 22 and Order 45 of the Civil Procedure Rules 2010; Rule 12 of the Auctioneer's Rules, 1997. The Applicants have sought the following orders.

- 1. This application be certified as urgent and be heard ex parte in the first instance;***
- 2. The honourable court be pleased to order stay of execution of the warrants of attachment and warrant of sale issued to Kindest Auctioneers on 12th July, 2016 as well as Notification of Sale dated 22nd July, 2016 pending the hearing and determination of this application inter parties.***
- 3. This Honourable court be pleased to review its ruling delivered on 9th June, 2016;***
- 4. The warrants of attachment and sale of property as well as Notification of Sale issued to Kindest Auctioneers on diverse dates of 12th and 22nd July, 2016 be recalled, cancelled and declared void;***
- 5. The Honourable court be pleased to Order the release of all the movable assets as listed in the Notification of Sale dated 22nd July, 2016 and subsequently attached by Kindest Auctioneers;***
- 6. The costs of this application be provided for.***

The application is premised on the grounds set out on the body of the same and its supported by the affidavit of James Abiam Mugoya Isabirye sworn on the 28th July, 2016, wherein, it is deponed that on the 22nd January, 2016, the Judgment-debtors advocate on record Ochieng Onyango, Kibet and Ohaga Advocates were served with an application seeking entry of judgment in terms of the certificate of taxation dated the 25th November, 2015 in the sum of Ksh.11,675,079/-. The said application was fixed

for hearing on the 25th February, 2016. That the Judgment debtors being dissatisfied with the decision of the Deputy Registrar F. R. Wangila, delivered on the 17th November, 2015, filed a notice of preliminary objection on the 18th November, 2015.

It is further averred that on the 25th February, 2016, when the decree-holder's application dated the 25th November, 2015 came up for hearing, the counsel for the decree-holders submitted on the preliminary objection which he had filed in response to the application dated 25th November, 2015. That the other ground that the counsel advanced on behalf of the judgment-debtors in challenging the decision of the taxing officer was with respect to the instruction fees of Kshs. 7 Million which he submitted was excessive as to represent an error of principle on the part of the taxing officer.

It is averred that there is an error apparent on the face of the record in the court's finding that there was no reference filed whereas there was a reference on record filed on the 25th February, 2016 which has challenged the decision of the taxing officer.

That the decree-holder through the agency of Kindest Auctioneers obtained warrants of attachment of movable property as well as warrants in execution of the decree and in clear and blatant disregard of the law, failed to issue the judgment-debtors with the proclamation and notice to redeem the attached movable assets, went ahead and only issued the judgment-debtors with notification of sale of movable property dated 22nd July, 2016. It is further deponed that Kindest Auctioneers illegally and wrongfully carried out attachment of motor vehicle registration No. KAA 124J registered in the name of Mugoya Construction & Engineering Limited and not in the name of the judgment-debtors. The Applicants have urged the court to allow the application.

In response to the application, the decree-holder/Respondent filed a replying affidavit sworn by Leonard Muraya Njenga advocate on the 30th August, 2016. In the said affidavit, it is deponed that the application is meant to buy time and avoid paying a debt that is due and that no application for review was filed until after execution of the decree by the decree-holder yet the ruling was delivered on the 9th June, 2016.

That after said judgment was entered Mr. King'ara advocate called Mr. John Ohaga advocate who is on record for the judgment/debtors to discuss the way forward on settling the decretal sum, who promised to call back but he never did and after 30 days the respondents applied for execution. It is averred that the Judgment-debtor had engaged in all manner of delaying tactics since 2012 to ensure that the matter does not proceed.

The judgment-debtor avers that he was informed by the auctioneer that he duly issued a proclamation before attachment and he indeed got into discussions with the judgment debtor on payment before attachment. The respondent depones that he has been informed that Mugoya Construction & Engineering limited was wound up by which time the respondent was in possession of motor vehicle registration number KAA 124J. According to him, no certificate of records has been annexed as evidence of ownership. That the applicant/client is just engaging the court and the Respondent in un-ending rigmarole by filing endless applications and complaints while in the process of disposing its assets as it did in the Mugoya case where the same deponent took all the assets of Mugoya to Uganda outside the jurisdiction of this Honourable Court and therefore the applicants should be ordered to furnish security for the decretal sum.

This court has carefully considered the application, the affidavits, the oral submissions and the list of authorities.

The applicants/Judgment debtors have sought orders of review of the ruling delivered on the 9th June, 2016 among other orders on the ground that there was an error apparent on the record. I have perused the proceedings of the 25th February, 2016 when the proceedings pursuant to which the ruling sought to be reviewed took place. On the said date, the application dated 17th December, 2015 by the

Applicant/Advocate was coming up for hearing. When the matter was called out, counsel for the Applicant informed the court that he had just been served with a preliminary objection which was filed that very morning but nevertheless, he told the court he was ready to proceed with his application.

Parties agreed to dispose off the preliminary objection and the application dated 17th December, 2015 together but at no time was the chamber summons dated 25th February, 2016 brought to the attention of the court having been filed the same morning and not having been placed in the court file, though the counsel for the Respondent casually referred to it in his submissions. As noted by the court hereinabove, the application was filed in the morning and what was scheduled for hearing was the application dated 17th December, 2015. In the circumstances aforesaid, it was the duty of the counsel for the applicants to inform the courts there was an application on record so that the court could give directions on which application was to be heard first and considering that their application was seeking to set aside the certificate of taxation, it was upon him to seek directions of the court as to the hearing of his application which he failed to do.

Had the applicants drawn the attention of the court to the reference, the court would have given proper directions as to the hearing of the reference. It is one thing to file a reference and it's a different thing to prosecute it.

In the premises, this court finds that there was no error apparent on the face of the record but there is a sufficient reason for review of the orders as the reference ought to have been heard first. In the premises aforesaid, the application dated 28th July, 2016 is hereby allowed in the following terms: -

- 1. The ruling delivered on the 9th June, 2016 is hereby reviewed and the orders given therein set aside.**
- 2. The warrants of attachment and sale of property issued to Kindest Auctioneers are hereby recalled and cancelled.**
- 3. All the moveable assets listed in the notification of sale dated 22nd July, 2016 and subsequently attached by Kindest Auctioneers be released.**
- 4. The Auctioneers costs to be borne by the clients/applicants.**
- 5. Chamber summons dated 24th February, 2016 be listed for hearing on priority basis.**

Dated, signed and delivered at Nairobi this 31st day of October, 2016.

.....

L NJUGUNA

JUDGE

In the presence of

..... ***for the Decree-holder***

..... ***for the Judgment-debtor***