



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.COMM. 146 OF 2015

GENTION AG.....PLAINTIFF

VERSUS

BELOILCO HOLDINGS LIMITED.....DEFENDANT

RULING

1. I have perused the file and noted that there has never been an application for execution by attachment so as to yield to a prohibitory order. There is equally not evident in the court file any proceedings towards settling of terms of sale of the property even if the property was lawfully attached.
2. Consequently, the documents in the court file and identifiable as notifications of sale, prohibitory order, warrant of attachment and sale of immovable property as well as terms and conditions of sale all dated 21/7/2016 are to the court not founded on due process anticipated and mandatory under the Provisions Order 22 Rules 48 & 77.
3. I have equally noted that although the terms of sale, even if validly founded, had set a term that the sale would be 45 days after Notice. The same terms were allegedly issued on the 26/8/2016, the property was advertised by Ms. Kinyua & Co. Auctioneers on 10th/11th August 2016, long before the terms were set and sale allegedly took place on 26/9/2016. There was no notice after settlement of terms.
4. I find that there was no application for execution that could have yielded to the prohibitory order neither was there any application to give rise to the settlement of terms on the warrants of attachment and sale.
5. Equally although the application for vesting order was duly filed, it was conveniently designed to be served upon the defendant in person when the same defendant had an advocate on record. The law mandated that only advocate and not the party be served. In this matter he was not served but instead one MOHAMED CHANDU was served on behalf of the defendant. That same Mohamed Chandu had on 27/5/2016 swore an affidavit in support of the plaintiff application for “**injunction pending the attachment, execution and sale of the suit property**” on which a vesting order has been now made.
6. I see clear impropriety for it is difficult to understand how the same Mohamed Chandu was able to balance his capacity as siding with the plaintiff as a ‘duly appointed agent’ and at the same time being available to accept process on the part of the defendant and totally fail to appear for the defendant on the date fixed.
7. One would say more but it is enough to say that there has been pending before the court two

applications by either side. There is the plaintiffs application dated 27/5/2016 seeking injunction pending attachment and sale which is yet to be prosecuted and was due to be canvassed by written submissions today.

8. To this court, no attachment could legally ensure prior to the determination of that application. There is also the defendant's application dated 6/6/2016 seeking stay and setting aside which was also to be canvassed today. Both could not proceed because Mr. Koceyo for the plaintiff had not filed written submissions as ordered by the court.

9. Equally the record does not show that costs have been taxed nor application under section 94 Civil Procedure Act having dealt with. All the foregoing point to a scheme to circumvent the law, overreach or just evade due process. To this court if that is not a clear abuse of the court process then nothing may be.

10. For my view that the law has been circumvented and a match stolen upon the defendant, I invoke the courts' inherent powers to curtail such abuse, under section 3 & 3A Civil Procedure Act and set aside, the documents dated 21/7/2016 and described as, **Notification of sale, prohibitory order, warrant of attachment and sale as well as the terms and conditions of sale** for having been procured unlawfully. They are expunged from the court record.

11. Having been so expunged the Vesting Order and a Certificate of Sale all flowing from the proceedings before the Deputy Registrar and grounded on the documents I have expunged are themselves declared irregular null and void and are equally expunged from the court record.

12. The parties shall now focus on having the two applications dated 27/5/2016 and 6/6/2016 fixed for hearing and determined by the court prior to any other proceedings being taken.

13. To safeguard the integrity of happenings in this file, it shall be kept under the custody of the Deputy Registrar.

14. This order shall be extracted and served on the Land Registrar just in case further steps may be taken to pursue the process the court has invalidated by this ruling.

Dated this **11th October 2016.**

HON. P.J.O. OTIENO

JUDGE

Delivered in the presence of :-

Mr. Onyango for Koceyo for Plaintiff

Mr Amoko for the defendant

FURTHER ORDERS

The two applications dated 27/5/2016 and 6/6/2016 are fixed for hearing by way of highlighting submissions on 19/12/2016. The Plaintiff must file and serve the written submissions within 14 days

from today and on default the matter shall proceed with only document as shall have been filed by close of business on 25/10/2016.

HON. P.J.O. OTIENO J

11/10/2016

MR ONYANGO

I pray for leave to appeal and to be supplied with proceedings and Certified Copy of the ruling.

MR AMOKO

No objection.

COURT

Let the parties be supplied with certified copies of proceedings and ruling upon payment of requisite court fees.

Leave is granted to the plaintiff to appeal against my ruling of today.

HON. P.J.O. OTIENO J

11/10/2016