



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL COURTS- MILIMANU LAW COURTS

CIVIL SUIT (SIC) HCCC NO 626 OF 2004

WOODS AUTO & ALLIED SUPPLIES.....PLAINITFF

VERSUS

KENYA BUS SERVICES LIMITED.....1ST DEFENDANT

KENYA BUS SERVICES MANAGEMENT LIMITED.....2ND DEFENDANT

RULING

1. The Objector's Notice of Motion application dated and filed on 23rd December 2013 was brought pursuant to the provisions of Section 1A& 1B,3A, 34, 38 and 63 (e) of the Civil Procedure Act, Order 22 Rule 51 and Order 52, Order 51 Rule 1 and 2 of the Civil Procedure Rules, Auctioneers Act and Rules, and under the inherent jurisdiction of this honourable court. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT the proclamation of 19th December 2013 by Mary W. Weru T/A Tigwoods Auctioneers in execution of the Decree of 15th February 2004 and any subsequent action by the auctioneer or decree-holder be declared illegal and unlawful and be set aside.

4. Costs be provided for.

THE OBJECTOR'S CASE

2. The Objector, which was a fleet management company, was licensed to operate buses within the Nairobi City Centre. It had entered into several agreements with various motor vehicle owners which it franchised and managed on their behalf.

3. It argued that it was a distinct legal entity from the Judgment-Debtor which neither had any legal or equitable rights over the goods that had been proclaimed. It said that it owned some properties while others belonged to third parties who had hired the same and that in any event, the Defendant did not own any assets there having been a **Winding Up Cause 21 of 2005 In the matter of Kenya Bus Services** to wind up the said company. It was its case that it would suffer irreparable loss unless a stay of execution of the decree was stayed and/or set aside.

4. It also contended that the goods that had been attached were the same ones that had been proclaimed pursuant to a decree in **Industrial Cause No 68 of 2013 Transport & Allied Workers Union vs Kenya Bus Services Limited** in which the court therein issued orders restraining any party from dealing with the goods until 17th January 2014 when it would give its Ruling or further directions. It did appear that the court granted a ruling to the effect that the Defendant and the Objector were the same legal entity, which matter was now subject of appeal at the Court of Appeal.

5. Its application was supported by the Affidavits of Edwins Massimba Mukabanah that were filed on 23rd December 2013, 27th January 2014 and 25th April 2014. The court noted that there was a Further Affidavit filed on 25th February 2014. Its written submissions were dated and filed on 27th February 2014.

THE PLAINTIFF'S CASE

6. In response to the Objector's application, the Plaintiff filed a Replying Affidavit and Notice of Objection on 14th February 2014.

7. It stated that in **Industrial Cause No 68 of 2006 Transport & Allied Workers Union vs Kenya Bus Services Limited** (Supra), Rika J found that the Defendant and the Objector were **"part of the same economic enterprise with common business objectives and indeed represented by the same firm of advocate or network of advocates."** It was the Plaintiff's case that the Defendant and the Objector "had perfected a web of legal chicanery" to avoid paying the Plaintiff the decretal sum herein.

LEGAL ANALYSIS

8. In its written submissions, the Plaintiff indicated that they were not informed of the position of the Industrial Court case. This court does not also have any knowledge of what the outcome of the Court of Appeal, case if at all. It will therefore have to proceed on the basis of the information that has been placed before it as the Industrial Court has equal jurisdiction to this court, which findings would not be binding upon it.

9. The Objector furnished the court with copies of Certificates of Incorporation which showed that the Defendant and it were incorporated on 8th January 1934 and 27th June 2006 respectively. The Objector referred the court to Section 16 (2) of the Companies Act Cap 486 (Laws of Kenya) that stipulates that a company becomes a body corporate from the date mentioned in the Certificate of Incorporation.

10. It also placed reliance on the case of **Salomon vs Salomon & Co Ltd (1897) A.C 22** in which Lord Halsbury LC at 30 and 31 stated as follows:-

"...once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate with self, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

11. The Plaintiff could not therefore attach the Objector's goods just because it was in the same premises as the Defendant as they were different legal corporate entities. The submissions by the Objector thus represented the correct position of the law.

12. Indeed, a party cannot be held liable for another's debt due to a similarity of names or to have his goods attached as was held in the case of **Busia Civil Appeal No 6 of 2010 Channan Agricultural Contractors (K) Limited vs Rosemary N. Oyula t/a Channan Agricultural Limited & Another** (unreported) and **Civil Appeal No 165 of 1989 Atago vs Agricultural Finance Corporation & Another** (unreported) respectively.

13. In addition to the above, the court noted that there was pending in court a Winding Up Cause against

the Defendant as was evidenced by Exhibit marked “EM 11” that had been attached to the Objector’s Supporting Affidavit that was sworn on 23rd December 2013. The Plaintiff did not present any evidence to rebut this assertion by the Objector. The court can only accept the same to have been the correct position.

14. Notably, the Winding Up Cause was commenced in 2005 while the execution was purportedly done in the year 2013. The law is clear that a decree holder cannot attach goods belonging to a company after the commencement of the winding up of the same. In the same vein, the Plaintiff could not purport to attach the Defendant’s goods after the commencement of the Winding Up Petition once it was filed in 2005.

15. Indeed, Section 225 of the Companies Act provides as follows:-

“ Where any company is being wound up by the court, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void.”

16. Accordingly, having considered the pleadings, affidavit evidence and written submissions in support of the parties’ respective cases, the court was more persuaded by the Objector’s arguments that the Plaintiff could not attach its goods to satisfy a decree that was issued against the Defendant herein as they were separate and distinct legal entities. It was the finding of the court that the Plaintiff’s Notice of Objection filed on 14th February 2014 was not merited at all.

DISPOSITION

17. For the reasons foregoing, the Objector’s Notice of Motion application dated and filed on 23rd December 2013 was merited and the same is hereby allowed in terms of Prayer (3) therein only as regards the proclamation and any subsequent action by the Auctioneer or Plaintiff. A declaration as was sought by the Objector could really be prayed for in a Plaint and not in application. The Plaintiff shall meet the Objector’s costs of the application herein.

18. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of January, 2015

J. KAMAU

JUDGE