



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 558 OF 2005

NDUNGU GATHINJI :::: APPLICANT/PLAINTIFF-DECREE HOLDER

-VERSUS-

KENYA SUGAR

BOARD ::::::::::: RESPONDENT/DEFENDANT-JUDGEMENT DEBTOR

AND

THE AGRICULTURE, FISHERIES

AND FOOD AUTHORITY ::::::::::: OBJECTOR

J U D G E M E N T

INTRODUCTION

1. There are two Notices of Motion before the court. The first application is dated 27th October 2014 filed by the Plaintiff/Decree Holder seeking two main surviving orders that the order of stay of execution herein on 13th October 2014 be lifted or in the alternative the decree balance herein be deposited in the joint accounts of the parties advocates.
2. The application was allowed in terms of the second alternative and the said balance of the decretal sums was deposited in the account in the names of the advocates for the parties pending the finalisation of the application which is now the subject matter of this Ruling.
3. The second application is filed by the Objector herein on 28th October 2014. The application has the main prayer that the stay of execution referred to above issued on 13th October 2014 be extended pending the determination of this application. It also sought for the leave to issue a further notice to the attaching creditor to intimate to the court and to all the parties in writing within seven (7) days on whether they intended to proceed with the said attachment and execution.
4. The first application is premised on the grounds set out therein and in support by affidavit of Nzamba Kitonga, Senior Counsel dated 27th October 2014, while the second application, also premised on the grounds set out therein, is supported by affidavit of **Frankie Welikhe** dated **28th October 2014**. The two applications are therefore in contraction to each other, and i will determine them together, one opposing the other, in the interest of saving the

scarce judicial time.

5. The brief history of the applications is that this court issued a decree in favour of the Applicant/Decree Holder against the Respondent in terms of costs. That decree was partly paid by the Judgement Debtor leaving a balance of Kshs.7,981,797 and auctioneers costs. The Judgement Debtor refused to pay the balance causing the Judgement Creditor to take steps to execute the same through instructions issued to Galaxy Auctioneers. The said Auctioneers proclaimed and attached the goods of the Judgment Debtor. On 10th October 2014, the Objector filed a notice of Objection against the said proclamation and attachment alleging that upon the enactment of the Agricultural, Fisheries and Food Authority Act 2013, the property of the Judgement Debtor had passed to the Objector, and hence the objection to the attachment.

PARTIES SUBMISSIONS AND EVIDENCE

6. Mr. Gichamba counsel for the Objector submitted that following the Gazette Notice dated 6th August 2014 which in effect operationalised the Crops Act 2013, the Judgement Debtor changed its Corporate Status. By virtue of the Crops Act Number 6 of 2013, the Judgement Debtor has been made non-existent and its constituent legislation being the Sugar Act No. 10 of 2010 has been repealed by Section 42 of the said Crops Act, and that the Objector has been established under Section 3 of the Agriculture, Fisheries and Food Authority Act No. 13 of 2013. In furtherance of the above, Section 3 of the Third Schedule to the Crops Act stipulates as follows:- Any reference in any written law or in any document or instrument to a former institution shall, on and after the appointed day, be construed to be a reference to the "Authority". That drawing from the above, the Objector is indeed the "Authority" being referred to hereinabove. Counsel submitted that under the First Schedule to the Agriculture, Fisheries and Food Authority Act the Judgement Debtor herein has been listed as being a former institution. So, in consideration of the above, the Judgement Debtor is no longer in existence and has been replaced by the Objector, who is now the registered proprietor of all the Property constituting attachment by Messrs Galaxy Auctioneers vide a Proclamation of Attachment that took place on 9th October 2014. Counsel submitted that the Decree Holder through his agents, Galaxy Auctioneers above-mentioned, illegally and unlawfully proceeded to trespass on the Objector's premises with the sole purpose of unjustly proclaiming the Objector's property in fulfilment of a decree/warrant so issued by this court on 7th October 2014 in the main suit, to which the Objector is not a party. Following the above mentioned occurrence of events, the Objector swiftly moved to lodge a Notice of Objection dated 10th October 2014 and filed on the same day.

7. Counsel further submitted that this court, through the Deputy Registrar, went ahead to lawfully issue a stay of execution pursuant to Order 22, Rule 52 of the Civil Procedure Rules, 2010. It was submitted that the Objector is not a party to the main suit hence there is no viable reason for attaching its good in the name of executing the said decree. Drawing from the above, the Objector therefore stands to suffer a great and substantial loss should the Decree Holder be allowed to proceed with such execution, and that it is only in the interest and pursuit of justice that the prays sought in this application be granted

8. On his part, Mr. Nzama Kitonga S. C. for the Judgement Creditor submitted that in terms of Order 22 Rules 51 and 52 of the Civil Procedure Rules the Objector was required to file the said Notice of Objection together with an application and affidavit, and that no such application and affidavit were filed and served in consequence whereof:

a) The Notice of Objection was invalid, incompetent, illegal, irregular, wrong and unlawful.

b) The Deputy Registrar should not have made an order of stay of execution on 13/10/2014 based on the said Notice and the Order was therefore obtained fraudulently in concealment of material facts and is therefore null and void ab initio and should be set aside and/or vacated.

c) In the meantime the Order should be lifted and/or suspended pending the hearing and determination of this application or any other application.

9. Mr. Kitonga submitted that Section 6 of the said Act requires the Objector to continue with any pending court proceedings against the Judgement-debtor as if it was a party thereto. This in effect means that the Objector should either pay the decretal balance or face execution. It is the Judgement-Debtor. It cannot be an Objector. In any event the property of the Judgement-Debtor has not been formally transferred to the Objector. Counsel concluded that the purported Notice of Objection is invalid, incompetent, frivolous, scandalous, vexatious and a gross abuse of the court process.

ANALYSIS AND DISPOSITION

9. From the foregoing submissions of the parties there were only two issues to be determined by this court, viz

i. Whether the Notice of Objection filed in court on 10th October 2014 is valid.

ii. Whether the Objector is, for the purposes of Agriculture, Fisheries and Food Authority Act 2013 now the Judgement Creditor herein to pay the balance of the decretal due.

10. Under Order 22 Rules 51 and 52 of the Civil Procedure Rules the Objector was required to file the Notice of objection together with the application and affidavit. The requirement for the notice is mandatory. That means that where there is no valid notice the application which accompanies the Notice is also invalid or incompetent. Since in this matter there was so such Notice as required under Order 22 Rules 51 and 52 the application became invalid.

11. To address the first issue above, Order 22 Rule 51 and 52 states: -

Rule 51 (2) "Such notice shall be accompanied by an application supported by affidavit . . ."

Rule 52 "Upon receipt of a valid notice and application as provided under Rule 51, the court may order a stay of execution . . ."

12. It is clear that a court referred to under Rule 52 can only act upon receipt of a valid notice. In this case there was no Valid Notice, and therefore, the Deputy Registrar who issued the said order of stay acted in excess of his or her jurisdiction. What moves the court is a valid notice. Without a Valid Notice the court cannot purport to move. This leads me to the question of whether an Applicant who had failed to issue a valid Notice under Rules 51 and 52 of Order 22 can apply for a fresh Notice, or can seek to validate the notice, as is now the application by the Objector. It seems to me that the law does not envisage such a possibility. This is so because, since the court can only be moved by the presentation of a valid notice, a court which moved without such a valid notice, did not move at all, and therefore any orders purportedly issued by that court are illegal *ab initio*, do not exist and are incapable of being extended. To rectify such a situation, an Applicant's remedy may only be in withdrawing the impugned application and replacing the same with a valid application together with a valid notice. This means that the stay of execution of the decree herein granted on 13th October 2014 was issued in error and is herewith lifted and vacated forthwith. For the reason that I have stated, the said Notice cannot be extended for it never existed. This means that the Objectors Notice of Motion application, the second application herein, is dismissed with costs to the Judgement Creditor.

13. The next issue is whether the Objector herein is now the Judgement Debtor pursuant to the said Agriculture, Fisheries and Food Authority Act, 2013. Although I have dismissed the

Objector's application paving the way for the Judgement Creditor to proceed with execution herein, good order would demand that I also as well determine the second issue, so that the position of this court in that regard could be known.

14. This issue needs not be overemphasised. Parties are directed to the various self explanatory Sections of the said Act. In particular Sections 3, 4, 5 and 6 clearly show that upon the enactment of the Act, the Kenya Sugar Board, the former Judgment Debtor, became "the former institution" referred to in the First Schedule (Transition Provisions) of the Act. If there is still any doubt, I will quote verbatim Section 6 of the Act. It says: -

"6. Any proceedings pending immediately before the appointed day to which a former institution was a party shall be continued in lieu of the former institution –

(a) In respect of the regulatory formations of the former institution, by or against the Authority as if the Authority was a party thereto.

(b) In respect of the commercial objects of the former institution, by or against the successor company, as if the successor was a party thereto."

15. It flows from the above, that indeed the Objector is now by virtue of the said Act, a party to the proceedings before this court. The said execution will lawfully proceed against any property belonging to the Kenya Sugar Board which has not yet been transferred to the Objector, or indeed against any property belonging to the Objector.

16. Finally there was an issue of outstanding Auctioneers fees amounting to Kshs.401,345/=. The position of law is that costs follows the event, and if there is any dispute on costs, the same should be taxed. However, this court notes that there were two separate instructions issued to the Auctioneer, the first one of which was stopped to pave way for negotiations which were unfruitful, leading to the second instruction to execute. The fees arising from these events should be paid in the normal way and if any party is unhappy the same shall be taxed.

17. In the upshot, the first application by the Judgement Creditor dated 27th October succeeds in its entirety with further orders in terms of prayer 6 thereof as follows:-

a) The balance of the decretal sum herein being Kshs.7,981,797/= and Kshs.600,000/= being Auctioneer costs deposited in a joint account of parties advocates shall be forthwith released to the advocate of the Judgment Creditor.

b) This court cannot determine now what is payable to the auctioneer as costs. If parties are unable to resolve the issue of the alleged outstanding Kshs.401,345 due to the Auctioneer, the same may be determined through taxation.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Muga holding brief for Gichamba for the Plaintiff

Mr. Kitonga for the Defendant

Teresia – Court Clerk