



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 157 OF 2005**

**TREADSETTERS TYRES LIMITED.....PLAINTIFF**

**• VERSUS -**

**COUNTY MOTORS LIMITED.....DEFENDANT**

**RULING**

1. On 2<sup>nd</sup> March 2015 auctioneers attached the defendant's truck Registration Number KAY 900J together with its trailer Registration Number ZB 9879.
2. The auctioneers who effected the said attachment were known as **VICTORIA BLUE SERVICES**.
3. According to the Warrant of Sale which was issued by the auctioneers, they were carrying out the process of executing the Decree in this case, and the sums which they were instructed to recover amounted to Kshs. 9,450,750/25.
4. Following the attachment of the truck and trailer, the defendant rushed to court under a certificate of urgency, seeking to stay execution until the court determines the earlier application dated 10<sup>th</sup> December 2014. In order to fully appreciate the reference to the application dated 10<sup>th</sup> December 2014, it is important to set out the background to this matter.
5. On 14<sup>th</sup> December 2012 Havelock J. delivered a Ruling in which he held that the defendant owed the plaintiff Kshs. 5,541,883.46, plus auctioneer's charges of Kshs. 244,722/-.
6. Notwithstanding that Ruling the court later issued a warrant of sale of property in Execution of the Decree herein, on 9<sup>th</sup> May 2013, for the sum of Kshs. 13,687,694.15.
7. On 3<sup>rd</sup> July 2013 Havelock J. directed that the file be placed before the learned Deputy Registrar, in order to have the figures re-worked.
8. The plaintiff's advocates wrote to the Deputy Registrar, requesting that the court should re-calculate the outstanding amount.
9. In the light of the orders made by Havelock J. on 3<sup>rd</sup> July 2013, the Learned Deputy Registrar dismissed the defendant's application for stay of execution. The basis for the said dismissal was that Havelock J. did not find anything irregular with the actual process of attachment. It was the view of Hon. D.W. Nyambu, Deputy Registrar, that the only error was about the calculations of the sums which were still due under the Decree.
10. It was the considered view of the Defendant that the Deputy Registrar lacked jurisdiction to determine the application dated 11<sup>th</sup> July 2013. Being of that persuasion, the defendant filed an application dated 13<sup>th</sup> August 2013 seeking the setting aside of the Ruling of the Deputy Registrar. In the alternative to the setting aside of those orders, the Defendant sought leave to appeal.

11. Having given due consideration to the application dated 13<sup>th</sup> August 2013, Havelock J. delivered his Ruling on 1<sup>st</sup> April 2014. By his said Ruling, the learned Judge held that the Deputy Registrar had jurisdiction because she basically conducted functions in accordance with the Directions which had been given by the learned Judge. Therefore, the Court found no indiscretion or fault on the part of the Deputy Registrar. In the circumstances, the application dated 13<sup>th</sup> August 2013 was dismissed with costs.
12. Shortly after Havelock J. had dismissed the application dated 13<sup>th</sup> August 2013, the defendant filed the application dated 14<sup>th</sup> April 2014. The new application was for stay of execution pending the appeal which the Defendant wished to pursue against the Ruling dated 1<sup>st</sup> April 2014. The defendant also sought leave of the court to appeal.
13. Whilst the application dated 14<sup>th</sup> April was still pending, the Defendant filed an application dated 10<sup>th</sup> June 2014.
14. Havelock J. retired from the Judiciary before the applications dated 14<sup>th</sup> April 2014 and 10<sup>th</sup> June 2014 were determined. Thereafter, the task of determining the applications fell upon my shoulders.
15. On 18<sup>th</sup> November 2014, Ochieng J. delivered his Ruling, granting to the Defendant, leave to appeal. Secondly, the court granted a conditional stay of execution. The execution would be stayed if the defendant provided security for the due performance of the Decree. In specific terms, the Defendant was required to deposit Kshs. 10,000,000/- in a joint account, which would be in the joint names of the advocates for the two parties herein. The security was supposed to be made available within 7 days from 18<sup>th</sup> November 2014.
16. The court further ordered that if there was a default in the provision of the security, the plaintiff would be at liberty to proceed with the process of execution.
17. The two parties mutually extended the period for the provision of the security, from 7 days to 30 days. The court was notified about that consensual extension of the period for compliance, and the same was adopted as an order of the court on 19<sup>th</sup> November 2014.
18. However, the defendant's bankers declined their application for a financial facility of Kshs. 10,000,000/-. They told the defendant that their bank account could not sustain a cash collateral of Kshs. 10,000,000/-.
19. However, the bank suggested to the defendant that they could issue a Bank Guarantee for the sum of Kshs. 10,000,000/-.
20. In the light of that development, the defendant filed an application dated 10<sup>th</sup> December 2014, seeking a variation of the court order dated 18<sup>th</sup> November 2014. The intention of the defendant was that, instead of being required to deposit cash amounting to Kshs. 10,000,000/-, the defendant be allowed to provide a Bank Guarantee.
21. In seeking that variation, the defendant expressed the view that if it were compelled to deposit cash amounting to Kshs. 10,000,000/-, that would result in severe liquidity problems for the defendant's business.
22. On 15<sup>th</sup> December 2014, the defendant's application was heard, in the first instance, before Amin J. Having been persuaded that there was need to preserve the subject matter of the application, the learned Judge ordered that there would be a stay of execution until 11<sup>th</sup> February 2015, when the matter was to be listed for mention before Ochieng J.
23. For the record, Ochieng J. was on leave from mid-December 2014 until early February 2015. It is as a result of that fact that the application was first dealt with by Amin J.
24. As fate would have it, the case was not on the cause-list on 11<sup>th</sup> February 2015.
25. On 13<sup>th</sup> February 2015, the defendant's advocates delivered to the learned Deputy Registrar, a letter dated 11<sup>th</sup> February 2015, through which they were seeking a Mention before the Judge. That letter was written because the case had been omitted from the cause-list on 11<sup>th</sup> February 2015.
26. However, before the matter could be listed for mention, the defendant's truck and trailer were attached by an auctioneer. It is that attachment which prompted the application dated 3<sup>rd</sup> March 2015.
27. It was the contention of the defendant that the orders granted by Amin J. were still in force when

- the auctioneers attached the defendant's vehicle.
28. The defendant submitted that the orders issued on 15<sup>th</sup> December 2014 remained in force in spite of the failure to list the case for mention on 11<sup>th</sup> February 2015.
29. The defendant's view was that because its application dated 10<sup>th</sup> December 2014 was still pending before the court, the plaintiff had stolen a march on the defendant by proceeding with execution.
30. For every single day that the defendant's vehicle remained in the hands of the auctioneers, the defendant was said to be losing the sum of Kshs. 120,000/-. It was therefore submitted that the interests of justice demand that the subject matter be preserved. The only way for preserving the vehicle, as indicated by the defendant, was that the auctioneer be stopped from selling it.
31. But the plaintiff did not share the views of the defendant. According to the plaintiff, the court had given to the defendant 7 days only, within which to make available the security of Kshs. 10,000,000/-.
32. Thereafter, the parties compromised the court orders, when they agreed that the defendant would have 30 days to provide the security.
33. In effect, the plaintiff believes that the orders made on 18<sup>th</sup> November 2014 were no longer available, so as to be capable of variation.
34. As far as the plaintiff was concerned, the order now in force was the one which the parties recorded by consent.
35. There is no doubt at all that as at the date when the auctioneer attached the vehicle, there was no order in force, staying execution of the Decree. The order made by Amin J. on 15<sup>th</sup> December 2014 was very clear, in so far it said;

*“2. THAT the stay granted by Hon. Mr. Justice Ochieng to continue until the inter-parties mention on 11<sup>th</sup> February 2015”.*

36. It is clear that the order would remain in force only until 11<sup>th</sup> February 2015, when the case was scheduled to be mentioned.
37. It is regrettable that the case was not on the cause list for 11<sup>th</sup> February 2015. However, it is also understandable that because the court file was in the typing pool, where proceedings were being typed to enable the defendant lodge its appeal to the Court of Appeal, the failure to list the case was not orchestrated by anyone who had ill motives.
38. But then again, the defendant ought not to be crucified at the altar of convenience, by being told that because the proceedings were being typed at your request, you should understand why the case was not listed on the cause-list on 11<sup>th</sup> February 2015. There should be a system which could result in the court file being made available to court when the case was scheduled to come up before the court, even when proceedings were being typed.
39. With utmost humility, this court accepts that the failure to list the case, simply because the court proceedings were being typed, is an indication of system failure on our part.
40. Nonetheless, when the case was not listed on 11<sup>th</sup> February 2015, the defendant ought to have been pro-active, as it knew that the orders issued on 15<sup>th</sup> December 2014 were expiring on 11<sup>th</sup> February 2015.
41. It was not until a week later that the plaintiff's advocates wrote to the auctioneer, instructing him to proceed with the process of execution of the Decree. As there was no order of stay which was in force as at 18<sup>th</sup> February 2015, the plaintiff acted well within the law, to seek further steps in the execution of the Decree.
42. And when the auctioneer proceeded to attach the defendant's truck and trailer, that action was not illegal, as suggested by the defendant.
43. By the end of the day, on 9<sup>th</sup> March 2015, when I heard this application, it was clear to me that the plaintiff had not acted unlawfully, irregularly or illegally. It was for that reason that on that day, I told the defendant that it had 14 days within which to come up with the security, failing which further execution would be undertaken.
44. In the result, I find no merit in the application dated 3<sup>rd</sup> March 2015: It is therefore dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 17<sup>th</sup> day of April 2015.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Mugisha for Nyaanga for the Plaintiff

Miss Chekurui for Menezes for the Defendant

Collins Odhiambo – Court clerk.