



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 764 OF 2010

EQUATORIAL COMMERCIAL BANK.....PLAINTIFF

VERSUS

MIT'S ELECTRICAL SERVICES LIMITED.....1ST DEFENDANT

PRIYA GANDHI.....2ND DEFENDANT

SATYA GANDHI.....3RD DEFENDANT

AND

MIT'S ELECTRICAL COMPANY LIMITED.....OBJECTOR

RULING

INTRODUCTION

1. The Objector's Notice of Motion dated 15th July 2014 and filed on 16th July 2014 was brought under the provisions of Section 3A of the Civil Procedure Act as well as Order 51 Rule 1 and Order 22 Rule 55 of the Civil Procedure Rules. Prayer (1) was spent. It sought the following orders:-

1. Spent

2. THAT there be a stay of execution of the decree passed by this Honourable Court on 5th day of August 2013 against the Objector/Applicant herein pending the hearing and determination of this application.

3. THAT this Honourable Court may grant any such orders it deems fit.

4. THAT the Costs of this application be provided for.

THE OBJECTOR'S CASE

2. The application was supported by the Affidavit of Priya Gandhi, the 2nd Defendant herein and a director of the Objector. It was sworn on 15th July 2014. Her Supplementary affidavit was sworn on 24th October 2014. The Objector filed its Written Submissions dated 20th February 2015.

3. The Objector averred that whereas it was not a party to this suit, the Plaintiff had instructed M/S Jocet Auctioneers to attach its goods pursuant to the Judgment that was delivered in favour of the Plaintiff on 5th August 2013.

4. It was the Objector's case that the auctioneers had a misconception that the 1st Defendant and the Objector were one and the same. It contended that if the auctioneers were to proceed with the attachment against it, it would suffer irreparable loss and damage as it was servicing contracts from third parties. It stated that in the event that the said contracts would be frustrated, the third parties might proceed and institute legal proceedings against it.

5. It therefore urged the Court to allow its prayers as had been sought in its application.

THE PLAINTIFF'S CASE

6. In opposition to the said Application, on 19th September 2014, Edwin Abuya, an Advocate of the High Court, swore a Replying affidavit on behalf of the Plaintiff herein. It was filed on 22nd September 2014. Its Written Submissions were dated 16th March 2015 and filed on 17th March 2015.

7. The Plaintiff averred that the said auctioneers had not executed the decree against the Defendants herein as they were still trying to locate their attachable assets and therefore they had no misconception between the 1st Defendant and the Objector. It was emphatic that no property has been attached in relation to the execution proceedings.

8. It was the Plaintiff's case that while the Objector had claimed that the said auctioneers had been instructed to attach its goods, the goods had not been specified. It was therefore the Plaintiff's case that the current application was misconceived and premature as it did not satisfy the requirements for Objector Proceedings.

9. It averred that the Court could not make an open order and therefore urged the court to dismiss the Plaintiff's said application with costs to it.

LEGAL ANALYSIS

10. The Plaintiff raised a preliminary issue that the present application had been brought under the wrong provisions of the law. The Objector filed its application under the provisions of Order 22 Rule 55 of the Civil Procedure Rules, 2010. The said Order gives the Court power to order that any property attached in execution of a decree to be sold and the proceeds paid to the person entitled. This does not correspond or relate to the prayers that had been sought for by the Objector. The relevant law for Objection Proceeding is Order 22 Rule 51 of the Civil Procedure Rules.

11. The Court is alive to the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 which enjoins it to do justice to the parties without undue regard to technicalities. However, the same cannot be a panacea for all mistakes particularly those that go to the root and substance of a matter. The foregoing notwithstanding, the Court will consider the merits of the Objector's application as the Plaintiff has not been prejudiced in any way and in any event it was evident from the pleadings that the Objector had intended to take out objection proceedings.

12. The Objector's main contention was that the auctioneers visited their offices at Methodist Guests House and expressed their intention to execute against it. The Plaintiff denied the allegations. The court will not belabour much on this as there is no evidence before it to prove the alleged visit by the auctioneers or otherwise.

13. The above notwithstanding, the Objector did not present before this court any evidence of attachment in the form of warrants of attachment or a description of the property attached. In the absence of such evidence, it would be difficult to prove attachment of any property belonging to the Objector by the

Plaintiff or of its intention to do so.

14. Having considered the pleadings, affidavit evidence and the written submissions in support of the Parties cases, it appeared that the Objector was apprehensive that its property would be attached by the auctioneers. In that case, Objection proceedings could not ensue as no actual attachment had taken place. There was therefore no property in dispute between the parties. Notably, mere apprehension would not be sufficient to persuade the court to grant the orders the Objector had sought. Indeed, actual attachment that was unlawful must have taken place, which was not the case herein.

DISPOSITION

15. In the circumstances foregoing, the upshot of this court's ruling was that the Objector's Notice of Motion dated 15th July 2014 and filed on 16th July 2014 was premature and not merited. The same is therefore dismissed with costs to the Plaintiff herein.

16. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 28th day of May 2015

J.KAMAU

JUDGE