



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**HIGH COURT CIVIL NO. 1 OF 2004**

CLEARSPAN CONSTRUCTION (A) LTD .....PLAINTIFF

VERSUS

EAST AFRICAN GAS COMPANY.....DEFENDANT

AND

VIKING WORLD INVESTMENT SA.....OBJECTOR

**R U L I N G**

1 I have had the occasion to Rule on this matter at least three times previous to this.

2 the defendant **EAST AFRICAN GAS COMPANY LIMITED** has approached this court with a Notice of Motion dated 20<sup>th</sup> April 2015. Defendant by that application seeks an order that the warrants of attachment dated 10<sup>th</sup> April 2015 in respect of defendant's four LPG storage tanks be set aside. That stay is sought on the following grounds.

*(a) By warrants of attachment dated April 10, 2015 and served upon the defendant on April 14, 2015 the plaintiff, through Makini Auctioneers Agencies, purported to attach Four Large LPG Storage Tanks in execution of a decree for money.*

*(b) The Four Large LPG Storage tanks are not movable property as described by the plaintiff through the aforementioned auctioneer.*

*(c) The property purportedly attached forms part and parcel of the land on which it stands.*

*(d) The plaintiff has not followed the correct procedure in law for the sale of immovable property in execution of a decree for money.*

*(e) The purported attachment is procedurally and substantively bad in law and incurable defective.*

*(f) The operation of a facility for LPG storage is strictly regulated by law and not susceptible of auction to the general public.*

*(g) It is on the interest of justice that the Application be allowed.*

## **BACK GROUND**

3 Judgment was entered in favour of the plaintiff on 3<sup>rd</sup> November 2009. The plaintiff has met legal huddles in its attempt to recover that judgment from the defendants. Those legal huddles are in the form of and various applications. By Notice of Motion dated 13<sup>th</sup> August 211 the defendant sought an order to stay execution on the ground that the costs had not been taxed. Stay was granted for specific period of 6 months by this court's Ruling on 13<sup>th</sup> October, 2011. The defendant filed a Notice of Motion dated 29<sup>th</sup> August 2012 seeking an order to settle the decretal sum by installment. The court in its Ruling dated 18<sup>th</sup> January 2013 dismissed that applicant. A corporation called Viking World Investment SA filed an objection application, dated 20<sup>th</sup> March 2013. Viking by that applicant sought a finding that it had legal and equitable interest in the four LPG storage tanks which were the subject of attachment in respect of the judgment herein. This court on 19<sup>th</sup> March 2015 dismissed Vikings objection.

### **NOTICE OF MOTION DATED 20<sup>TH</sup> APRIL 2015.**

4 By this Notice of Motion the defendant seeks a determination that the four PG storage tanks are immovable property and that accordingly since the plaintiff did not follow the laid down procedure of attachment of immovable goods, under Order 22 Rule 48 of the Civil Procedure rules, the warrants of attachment should be set aside.

5 For the court to make a determination that the tanks are immovable property the defendant only relied on black and white photographs, which are very unclear. The ones that are clear seem to show the tank to be resting upon some concrete stones. None of the photographs provided by the defendant specifically show the tanks to be attached to the ground. The defendant through the affidavit sworn by Evans Lagat on 20<sup>th</sup> April 2015 stated thus:

The four (4) large LPG Storage Tanks are part of a facility used to store liquefied petroleum Gas, which, under law in particular the Energy Act and the Energy (Liquified Petroleum Gas Regulations, 2009) a facility such as this cannot be operated by a person who does not have a licence issued by a Energy Regulatory Commission. For safety and other reasons, the licensing process is very rigorous, taking into account such factors as the position and proximity of adjoining buildings and environmental concerns. I verily believe that the plaintiff's intention to sell these tanks by auction to the public is not only illegal, it is also dangerous. I attach hereto and mark as EL 3 a true copy of the Energy (Liquified Petroleum Gas Regulations, 2009)

6 The present application will succeed or fail on the court's determination whether the storage tanks are immovable property.

7 The burden to prove that they are, falls squarely on the defendant. The defendant to prove to the court that they are immovable property annexed to the application photographs which as I stated above are most unclear. The defendant did not produce any expert report which could have assisted the court to make that determination. One gets the impression that the defendant does not itself believe that tanks are immovable property. If it did believe more cogent evidence could have been presented in support of the application. It is not surprising that the defendant does not present credible evidence to prove the same because by its previous application dated 13<sup>th</sup> August 2011, by which defendant sought stay of execution on the ground that the plaintiff had not taxed the costs before execution, the defendant in the prayers of that application specifically referred to the storage tanks as moveable. In prayer No 2 of that application the defendant sought stay of sales of parcels of land and then prayed for stay of sale of the storage tanks thus:

***“And the movable property comprising four Large LPG storage tanks pending interpartes hearing.”***

The defendant repeated that term “movable property comprising of four large LPG storage tanks” in prayer 3 of that application. The defendant by filing the present application failed to explain why in the year 2011 it described the storage tanks as movables and now seeks a determination that they are immovable.

8 On balance of probability I find that the storage tanks are not immovable property. The defendant failed to meet the burden of proof to prove that they are.

9 If selling the storage tanks by public auction contravenes any law, the defendant is not a party who can enforce such a law.

10 **As a consequence of the above finding I do hereby dismiss the Notice of Motion dated 20<sup>th</sup> April 2015 with costs to the plaintiff.**

Dated and delivered at Mombasa this 30<sup>th</sup> day of July 2015.

**MARY KASANGO**

**JUDGE**

30.7.2015

Coram

Before Justice Mary Kasango

C/Assistant – Kavuku

For Plaintiff:

For Defendant:

For Objector :

**Court**

The Ruling delivered in their presence/absence in open court.

**MARY KASANGO**

**JUDGE**