REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 274 OF 2009

LABH SINGH HARMAN SINGH LTD. ……………..……….. PLAINTIFF

VERSUS

AHMED SALIM AHMED JEIZAN ………………………... DEFENDANT

BETWEEN

JOHN M. MBIJIWE

T/A BEALINE KENYA ………………… AUCTIONEER/RESPONDENT

AND

OKONG'O, WANDAGO & CO. …………… ADVOCATES/APPLICANT

R U L I N G

1. Before the Court is an application dated 14th May, 2013 filed by the Advocate/Applicant. The application is brought pursuant to the provisions of **Sections 1A, 1B, 3A and 63(e)** of the *Civil Procedure Act*, **Order 51 Rule 1, Order 21 Rule 9 (1) (d) and (3), Order 22 Rules 15, 22 and 49** and **Order 52 Rule 4(3)** of the *Civil Procedure Rules, 2010* and **Rule 55** of the *Auctioneers Rules*. In the instant application, the applicant seeks the following prayers ***inter alia***;

"1. THAT this application be certified as urgent and service be dispensed with in the first instance;

2. THAT this Honourable Court be pleased to grant stay of execution herein pending inter-parties hearing of this application;

3. THAT this Honourable Court be pleased to make an order that the Advocates taxed costs against the Auctioneer of Kshs. 182,828/- in Milimani H.C Misc. No. 574 of 2012 Okong'o Wandago & Co. Advocates v John M. Mbijiwe t/a Bealine Kenya Auctioneers and Milimani H.C Misc. No. 540 of 2012 Okong'o Wandago & Co. Advocates v John M. Mbijiwe t/a Bealine Kenya Auctioneers be set off in satisfaction of the decree herein;

4. THAT a stay of execution do issue pending assessment of the Auctioneers fees by the

Deputy Registrar;

5. THAT an order for satisfaction be made in respect of the decree herein and the execution and attachment dated 10/5/2013 be lifted;

6. THAT the Court be pleased to make such further orders as may meet the ends of justice;

7. THAT the costs of this application be provided for".

2. The application is predicated upon the grounds as set out in the application, that on 22nd February, 2013 the Deputy Registrar taxed the application against the Respondent in **Milimani H.C Misc. No. 574 of 2012** and **Milimani H.C Misc. No. 540 of 2012** for a total sum of Kshs. 182,828/ which has not been paid. The Respondent owes the Applicant the aforementioned Kshs. 182, 828/- and that it is thus entitled to a cross Decree and set off. Further, the Applicant alleges that on 10th May, 2013 it paid to the Respondent Kshs. 88,662/- vide cheque no. 000973 being the difference between the amounts owed and the amount claimed by the Respondent in the instant application.
3. The Application is further supported by the affidavit of Amos Ogutu Wandago sworn on even date. The Applicant contends (reiterating the grounds as set out in the application), that the Respondent owed the Applicant Kshs. 182,828/- being the total taxed sum in Milimani H.C Misc. 540 of 2012 and Milimani H.C Misc. No. 574 of 2012. It avers that, in an attempt to settle the amount claimed by the Respondent of Kshs. 271,450/-, it paid Kshs. 88,662/- vide cheque no. 000973 on 10th May, 2013, with the balance of Kshs. 182,828/- being off-set against the taxed amountS payable to them by the Respondent. Further, it averS that attempts to resolve the matter were futile as the Respondent's advocates failed to turn up, or re-schedule after agreeing to meet. It is the Applicant's contention that it standS to suffer irreparable damage and immense loss should the execution proceed against it and that it is in the interests of justice that the amount owed to the Applicant be offset against the claim by the Respondent.
4. In opposing the application, the Respondent filed Grounds of Opposition on 28th May, 2013. It averred that the Respondent should not be compelled to offset the fruits of his judgment against matters that have no nexus to the instant suit. Further, it contends that the Orders of the Court in its ruling on 4th December, 2012 ordering the Applicant to deposit Kshs. 269,000/- in a joint interest earning account were not complied with, and therefore, the applicant was in contempt of Court and could not be heard to seek equity from the same Court that it was in contempt of.
5. The Applicant on 10th December, 2012, had made an application to this Court seeking for conservatory orders pending an intended appeal against the Ruling of the Court of 4th December, 2012. The Court, in a bid to balance the competing interests of the parties therein, determined that the amount of Kshs. 269,000/- should be deposited in a joint interest earning account by the Applicant, the upshot being that the said Orders would lapse. This determination was made by the Court on 20th March, 2013. On 15th May, 2013 the Applicant came to Court under certificate of urgency, seeking this Court's intervention on the intended attachment and sale of its property by the Respondent. On 29th May, 2013, when the Application was scheduled to be heard inter-parties, the Applicant was not present but a Ms. Munyasa appeared on its behalf, and, at the behest of Mr. Wanjohi for the Respondent, agreed to have the matter disposed of by way of submissions. However, on 5th July, 2013 when the case came up for mention to determine compliance with this Court's Orders, it was conveyed to the Court that the parties were in discussions to resolve the matter amicably and requested for a further 14 days to facilitate the same. The Court allowed the parties request but on 19th July, 2013, they came back to Court, detailing that negotiations had failed.
6. The Court has considered the Application and Affidavit in support, the opposition to the same and the submissions made by the parties. It would, on the face of it, seem a fairly simple matter to resolve, but unfortunately, the parties seem to have failed to find an amicable an expeditious resolution. The Applicant's contention is that the Respondent owes them Kshs. 182,828/- from

two previous matters, **Milimani H.C Misc. No. 572 of 2012** and **Milimani H.C Misc. 540 of 2012**. Further, it contended that since the amount is due and pending, it would only be fair that the amount be set-off against the Respondent's claim. The Respondent's contention is that there is no nexus between the Applicant's claim and the instant suit. Further, it is averred, that the two previous matters referred to by the Applicant do not in any way impugn on the Respondent's right to enjoy the fruits of his judgment and as such the application should be dismissed.

7. The Court, on 4th December, 2012 ruled in favour of the Applicant, allowing its application dated 4th July, 2012. The Respondent was ordered to pay the Applicant Kshs. 269,000/- within 30 days from the date of the Ruling. On 20th December, 2012 the Court allowed the Applicant's application dated 10th December, 2012 seeking for stay pending appeal. The application was allowed subject to the deposit of Kshs. 269,000/- by the Applicant in a joint interest earning account. No evidence of such deposit has been tendered by the Applicant, and neither has it tendered any evidence of an appeal being made against the Ruling of this Court of 4th December, 2012. It would therefore, appear, that the Court's Order for stay issued on 20th December, 2012 has lapsed. The Respondent was therefore at liberty to execute the Ruling delivered on 4th December, 2012. In execution thereof, the Respondent obtained Warrants for Attachment and Sale of the Applicant's property so as to satisfy the decree of Kshs. 269,000/- of which the Applicant has part satisfied by remitting Kshs. 88, 662/-. The balance of Kshs. 182,788/- remains outstanding as of the date of the instant application.
8. An order for stay is an equitable remedy, which in the present circumstances, would not be used to assist the Applicant to extricate itself from circumstances of its own making. This Court needs uphold the principles of both justice and equity. In so doing, the Court shall not aid a party at fault, when the aid sought has become necessary through his/her or its own fault. The applicant was aware of the Court's Orders issued on 4th December, 2012. The Orders were to the effect that such were to be complied with within 30 days, failing to which the Respondent was at liberty to execute the Decree. By failing to pay the Respondent Kshs. 269,000/- as ordered by the Court on 4th December, 2012 (and 20th March, 2013), the circumstances in which the Applicant finds itself were of its own making and, as such, it cannot be permitted to seek the Court's intervention for its own folly. It would not have found itself in this situation had it abided by the Court's Rulings of 4th December, 2012 and 20th March, 2013. The sequence of events clearly puts the Applicant at fault for not abiding by this Court's Orders. As aforesaid, the Court will not aid a party at fault, which follows the maxim of the principle of equity expressed as follows:

"No one is entitled to the aid of a court of equity when that deed has become necessary through his or her own fault... a court of equity shall not assist a person in extricating himself or herself from circumstances that he or she has created".

9. In my view, the Applicant acted in bad faith by failing to adhere to the Court's Orders of 4th December, 2012 and 20th March, 2013. It sought to rely on the provisions of **Sections 1A and 1B** of the *Civil Procedure Act*, also known as the "oxygen principle". The use of these provisions of the Civil Procedure Act has been well highlighted by the Court of Appeal in the case of **Hunker Trading Company Ltd v Elf Oil Kenya Ltd (2010) eKLR** in which the Appellate Court determined that:

"The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain or further the "O_2" principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court. Perhaps, it is appropriate for us to observe that litigants and their advocates should note that in "O_2 principle", they have a powerful ally where they are advancing its aims and a powerful adversary where they are bent on subverting its aims. As stated severally now, in some of our recent decisions, the "O_2 principle" is the hub upon which the objectives of the two Acts, their provisions and the rules made thereunder turn. It is a requirement of "O_2 principle" that the exercise of any power under the Act or the rules must be exercised in line with its principal aims. Similarly, the

interpretation of any provision in the Acts and the rules has to be "O_2" compliant…In conclusion, we wish to observe that "O_2 principle" which must of necessity turn on the facts of each case is double faced and for litigants to thrive under its shadow they must place themselves on the "right side". In the circumstances of this matter, the applicant is clearly on the "wrong side" and for this reason the principle must work against it."

10. In the circumstances, the Orders sought by the Applicant cannot issue. If the Court was inclined to determine otherwise, it would be aiding the Applicant to extricate itself from circumstances of its own making. As a result, the Application dated 14th May 2013 is hereby dismissed with costs to the Respondent.

DATED and delivered at Nairobi this 24th day of March, 2014.

J. B. HAVELOCK

JUDGE