



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 157 OF 2005

TREADSETTERS TYRE LTDPLAINTIFF

- VERSUS -

COUNTRY MOTORS LTD.....DEFENDANT

RULING

1. The defendant has come before this court through a Notice of Motion dated 10th June 2014. The substantive reliefs sought were for:
 - a. *Leave to appeal to the Court of Appeal, against the Ruling which was delivered by Havelock J. on 1st April 2014;*
 - b. *Stay of Execution pending the hearing and determination of the intended appeal;*
 - c. *Declaration that the warrants of Proclamation and Attachment issued on 3rd April 2014 were unlawful and of no effect;*
 - d. *The proclamation dated 9th April 2014, by M/s Victoria Blue Services Auctioneers was unlawful and of no effect.*
2. It was the defendant's position that there were two (2) sets of proclamation, which had been issued by the Learned Deputy Registrar, at the same time. The said proclamations were issued to **ESHIKONI AGENCY AUCTIONEERS** and also to **VICTORIA BLUE SERVICES AUCTIONEERS**.
3. Considering that the Learned Deputy Registrar was said to have issued warrants of attachment to Victoria Blue Services Auctioneers on 3rd April 2014, that implies that those warrants were issued after Havelock J. had delivered the Ruling dated 1st April 2014.
4. In effect the said warrants were not, and cannot have been one of the subject matters of the decision made by the Learned Judge. It therefore follows that the issue of the warrants of attachment issued to Victoria Blue Services Auctioneers is not likely to feature in the defendant's intended appeal.
5. Nonetheless, the question as to whether or not the Learned Deputy Registrar had jurisdiction to hear and determine the matters which were placed before her is a weighty matter.
6. Of course, the Learned Judge has already held that the Deputy Registrar had jurisdiction.
7. The said jurisdiction was said to have arisen from two perspectives: First, by virtue of the provisions of the law and, secondly, in the light of the express Directions made by the Judge.
8. There is also the question regarding the alleged duplicity in the issuance of the warrants for attachment and sale of the defendant's assets.
9. The Defendant feels that there were two valid sets of warrants for attachment. That alone would

- be irregular. Furthermore, the said warrants cited different figures, leading the Defendant to conclude that there was something highly irregular.
10. But the plaintiff explained that there was only one valid warrant for attachment which had been issued at any one time. According to the plaintiff, the first warrant had expired or lapsed before another one was issued.
 11. And in relation to the figures cited on the respective warrants, the plaintiff pointed out that the difference was simply attributable to the further interest that had accrued.
 12. I have my clear view on the competing submissions made herein. However, I do not think that it would be proper for one Judge of the High Court to critique another Judge of concurrent Jurisdiction on the decision which that other Judge had made. I do not have the requisite jurisdiction to sit on an appeal over another Judge of concurrent jurisdiction.
 13. If I were to make further comments on the submissions concerning the correctness or otherwise of the Ruling dated 1st April 2014, I would effectively sit in Judgment over the decision of Havelock J. I decline to do so. Instead, I find and hold that the Court of Appeal would be the appropriate forum before which the parties can urge their respective views concerning the decision in issue.
 14. In my considered view, the application for leave to appeal out of time, was filed timeously. I so hold because the defendant had first sought leave through an oral application. When the plaintiff indicated to the court that it would be opposing the application, the Learned Judge then directed the defendant to lodge a formal application within 14 days.
 15. Thereafter, the Defendant complied with the directions given by the court.
 16. As the appeal raises an arguable point, and because the defendant's quest for leave was brought within a reasonable period of time, I do hereby grant to the defendant leave to appeal out of time.
 17. The intended appeal should be filed within the next **TEN (10) DAYS**.
 18. Meanwhile, as regards the request for stay of execution, I note that there is no pending appeal against the judgment. That means that the defendant doubtlessly owes the plaintiff.
 19. The only issue that concerns the defendant is the manner in which the execution process was being undertaken.
 20. Pursuant to the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, when a court grants an order for stay of execution, the applicant must provide security for the due performance of such Decree or Order as may ultimately be binding on the applicant.
 21. The defendant readily acknowledges that if there be an order for stay of execution, there must be a corresponding security for the due performance of the Decree.
 22. Accordingly, I do now order that there shall issue forthwith a stay of execution of the Decree. However, the said order shall only become effective upon the provision of security for the due performance of the Decree.
 23. The defendant did not offer any specific security. In the result, this court is unaware of the securities available to the defendant. However, that alone cannot derail the court. It only means that the court now has the discretion to impose upon the defendant the nature and value of the security deemed sufficient and appropriate.
 24. Accordingly, I now order that the defendant do make available, in cash, the sum of Kshs. 10 million within the next **SEVEN (7) DAYS**. The said money will be held in a joint account in the names of the lawyers for the two parties. The account in which it will be held must be one which earns interest.
 25. If the two Law Firms are unable to agree on the Bank or other financial facility at which the account is to be opened, the funds must be deposited in court within the prescribed period of **SEVEN (7) DAYS**.
 26. In the event of default in the provision of the security, the plaintiff will be at liberty to proceed with the process of execution.
 27. For now, the proclaimed goods remained attached for the next 7 days, during which period the defendant is to make available the requisite security, as ordered.
 28. The costs of the application dated 20th June 2014 will be borne by the defendant, in any event. It is so ordered because the need for the defendant to seek an extension of time to appeal cannot be attributed to the plaintiff. Therefore, although the application is successful, it is only right that the defendant, who owes the Decretal amount should shoulder the costs of its application.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of November 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the Plaintiff

.....for the Defendant

Collins Odhiambo – Court clerk.