



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 708 of 2012

LOCHAB BROS. LIMITED.....PLAINTIFF

VERSUS

PETER KALUMA T/A LUMUMBA

MUMMA & KALUMA ADVOCATES.....1ST DEFENDANT

ALBERT MUMMA T/A LUMUMBA

MUMMA & KALUMA ADVOCATES.....2ND DEFENDANT

MARGARET ANINDO T/A

IGARE AUCTIONEERS.....3RD DEFENDANT

RULING

1. By an Order made on 22nd November, 2012, this court allowed an application vide a Notice of Motion dated 12th November, 2012 by the Plaintiff in which the Plaintiff had sought two main orders – an injunction to restrain the 1st, 2nd and 3rd Defendants from advertising for sale, selling, disposing off or in any other manner dealing with the Plaintiff’s motor vehicle registration numbers KAL 665K and KAT 610Y together with their cargo. The order also required the Defendants to release the Plaintiff’s motor vehicles registration numbers KAL 665K and KAT 610Y together with their cargo comprising of wheat and steel railings/bars unconditionally pending the hearing and final determination of this suit. The orders were made ex parte as the Defendants did not appear.

2. Subsequently, the 1st and 3rd Defendants filed an application by way of a Notice of Motion dated 27th November 2012 and sought that those orders issued on 22nd November 2012 requiring release of the motor vehicles and goods attached for execution of the decree issued in HCCC No. 414 of 2009, be set aside. They further sought that the Plaintiff’s Application dated 12th November, 2012 be reinstated for hearing on merit. The Defendants also sought for the Application dated 12th November, 2012 and the Plaintiff dated 12th November, 2012 including the entire suit, be struck out. The Applicants relied on the grounds on the face of the motion and the Affidavit of Peter Kalume, sworn on 22nd November, 2012.

3. It is the Defendants contention that on 17th October, 2011, judgment was entered in their favour in **HCCC No. 414 of 2009 Lumumba Mumma & Kaluma Advocates -vs- Multiple Hauliers Limited & Others** against some of the Defendants therein for failure to enter appearance and file a defence, for the sum of Kshs. 7,416,760/- together with interest and costs. That the Plaintiff is jointly and severally liable

for settlement of the decree issued which remains unsettled. It is further contented that the Plaintiff has not applied to set aside the judgment nor filed a defence in the aforementioned suit. It is on this ground that the Defendants contend that the Plaintiff has sought to circumvent execution for the said decree by way of a new suit. It is also the contention of the Defendants that they were served with the Application dated 12th November, 2012, the Plaint dated 12th November, 2012 and the Orders issued on 22nd November, 2012, on the 27th November, 2012 via courier services. It is asserted that they did not have notice of the proceedings of 22nd November, 2012, pursuant to which the orders were made.

4. That further, the present dispute concerns the enforcement of the decree issued in **HCCC No. 414 of 2009 Lumumba Mumma & Kaluma Advocates -vs- Multiple Hauliers Limited & Others** which disputes should be litigated in the said suit. It is the contention of the Defendants that the filing of this suit is an attempt to stay or obstruct the decree against the Plaintiff who is the Defendant/Judgment debtor in the said suit. Moreover, the Defendant contend that the Plaintiff failed to fully disclose all material facts to the court while obtaining orders issued on 22nd November, 2012. It is also contended that the Plaintiff, who is the 11th Defendant in the aforementioned suit, will not suffer any damage if execution is allowed to proceed as it has recourse to reimbursement by its co-defendants in the aforementioned suit.

5. The Plaintiff, on its part, opposed the motion by filing the Replying Affidavit of Hardial Singh Lochab, sworn on 4th December, 2012 and filed on 5th December, 2012. The Plaintiff depones that the cause of action in the present suit is on the unlawful and irregular attachment and detention of the Plaintiff Company's motor vehicles and cargo even after the Plaintiff had satisfied its liability to the 1st and 2nd Defendants with regard to the Decree in **HCCC No. 414 of 2009 Lumumba Mumma & Kaluma Advocates -vs- Multiple Hauliers Limited & Others**. It was further contended that one of the Plaintiff's director, Mr. Narinder Singh Lochab, based in the Plaintiff Company's Eldoret Office had demanded for the immediate release of the attached motor vehicles by the 1st Defendant. The 1st Defendant was however adamant in his refusal to have the attached assets released, that the Application dated 12th November, 2012, the ex parte Order dated 13th November, 2012 and a copy of the Plaint dated 14th November 2012 were duly served on the defendants as evidenced by an affidavit of service sworn on 21st November 2012 by Rono K. Alfred. That contrary to the Defendants assertions, service of the same was effected at the 1st and 2nd Defendants' offices by a court Process Server and not by a Courier Agent as alleged. It is also asserted that the Defendants were fully aware of the hearing of the Application dated 12th November, 2012, but failed to attend court on the material day. The Plaintiff further contends that its attached assets comprising of the motor vehicles and cargo were duly released to it on 28th November, 2012 pursuant to the Court Order. Therefore, in its view, the application for stay is untenable and incapable of being granted. Moreover, the Plaintiff asserts that having satisfied its obligations to the Defendant, it cannot be called upon to give security for the due performance of the decree. The Plaintiff further deponed that it had already suffered loss and damage following the illegal execution on its assets. In this regard, the Plaintiff avers that it is misleading for the Defendant to purport that no damages will be occasioned by the attachment. The Plaintiff therefore requests this court to dismiss the Defendants application with costs.

6. I have considered the Affidavits on record and the submissions of counsel. It is not in dispute that the Plaintiff was a party to a suit in **HCCC No. 414 of 2009 Lumumba Mumma & Kaluma Advocates -vs- Multiple Hauliers Limited & Others** which gave rise to a decree of Kshs.7,416,760/- together with interest and costs against the Plaintiff and other parties. The Plaintiff has admitted that it was liable jointly and severally for settlement of the said decree. However, the Plaintiff contend that it had discharged its liability to the Defendants after payment of Kshs. 450,000/- together with the auctioneers fee following negotiations and settlement. It is the Plaintiff's contention that the Defendants resiled from that agreement and proceeded to attach assets belonging to the Plaintiff namely Motor Vehicles Registration Number KAL 665K and KAT 610Y together with the Cargo comprising of wheat and steel railings/bars in breach of the terms of settlement agreement between the parties to the aforementioned suit. The Plaintiff further submitted that whether or not there was such an agreement or breach of the same is an issue for determination in the substantive case.

7. On their part, the Defendants contended that the decree in **HCCC No. 414 of 2009 Lumumba Mumma & Kaluma Advocates -vs- Multiple Hauliers Limited & Others** remains unsettled and that the suit instituted by the Plaintiff mainly seeks a stay of execution and the setting aside of the default judgment which should have been easily sought in the aforementioned suit as opposed to instituting this suit. It was further submitted that the Plaintiff's argument that it had settled the matter with the Defendants was misleading, as only negotiations took place and no settlement agreement was made. Further the Defendants' counsel argued that the issues to do with the settlement and negotiations can be adequately ventilated in the aforementioned suit. It is on this premise that the Defendants want the Plaintiff dated 12th November, 2012 and the entire suit be struck out with costs.

8. It is trite law that the power of striking out a pleading is one that a court should exercise sparingly and cautiously, as the same is exercised without the court being fully informed of the merits of the case through discovery and oral evidence. The question at this point is, given the facts of this particular case, should the suit be struck out? In the case of **D.T. DOBIE & COMPANY (KENYA) LIMITED -vs- MUCHINA (1982) KLR 1** Page as Madan J held that ;

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable action or being otherwise an abuse of the process of the court.” (Emphasis mine)

Given the above , it is important to examine what is before me. The facts of this case are simple. There was a case, namely **HCCC No. 414 of 2009 Lumumba Mumma & Kaluma Advocates -vs- Multiple Hauliers Limited & Others** in which a decree was issued. The Plaintiff, who was a Defendant in that case, was jointly and severally liable for the settlement of the same. The Plaintiff's assets were attached in the execution of that decree. This, according to the Plaintiff, was in breach of a settlement agreement, causing it to institute the present suit and requesting this court to grant a temporary injunction against the 1st and 3rd Defendant from dealing with the Plaintiff's assets until the determination of the suit. The Plaintiff chose not to apply for a stay of execution nor set aside the default judgment in **HCC No. 414 of 2009 (supra)**. As it is, there is still a valid judgment of the court that has not been set aside and therefore still stands.

9. I agree with the Defendant's assertions that all the issues raised by the Plaintiff in its application dated 22nd November 2012 could have been adequately dealt with in **HCCC No. 414 of 2009 (supra)** as opposed to instituting the present case. On the Plaintiff's admission of the existence of that case, I am of the view that the suit before me as well as the Plaintiff's application dated 12th November, 2012, was an abuse of the court process, as the Plaintiff still could have pursued the same remedies from the court dealing with the case of **HCCC No. 414 of 2009 (supra)**. The institution of this case and the orders subsequently given, may have in essence, prejudiced or delayed the fair trial (read conclusion) of **HCCC No. 414 of 2009 (supra)**. There is also the likelihood that this Court may duly embarrass itself by giving conflicting orders to those issued in **HCCC No. 414 of 2009 (supra)** which has already occurred by restraining execution of an unsettled decree.

10. The motive of instituting this case by the Plaintiff is also suspect. It appears that the sole intention of the Plaintiff would be to delay the course of justice. As was pointed out by the Defendants, the Plaintiff did not enter appearance nor file a defence in **HCCC No. 414 of 2009 (supra)**. The Plaintiff further has not moved to court to set aside the default judgment entered against it alongside other defendants in the aforementioned case. The present suit is therefore an attempt on the part of the Plaintiff to cure that inadvertence. The conduct exhibited by the Plaintiff in this matter must therefore be deprecated and discouraged. Multiplicities of suits that deal with the same subject matter do not aid in the dispensation of justice but only seek to clog the courts.

11. Further, I take cognizance of the fact that the Orders of this Court issued on 22nd November 2012 requiring the release of the Motor Vehicles KAL 665K and KAT 610Y together with the Cargo comprising of wheat and steel railings/bars were stayed pending the hearing and determination of this application. This prayer was duly granted for 7 days on 29th November 2012. However, the Plaintiff has

disclosed to this Court under paragraph 10 of its Replying Affidavit that the said motor vehicles and cargo were released to it on 28th November 2012 by virtue of the Court order issued on 22nd November 2012. I therefore agree with the Plaintiff's counsel's submission that given the circumstance, such an order is spent as the issue has already been overtaken by events.

12. However, by virtue of Order 12 rule 7, the said Orders can be set aside. It is established law that the court has unfettered discretion to grant or refuse an order for setting aside. The exercise of such discretion will not be interfered with unless the presiding officer either acted on a wrong principle or exercised his discretion unjudiciously. In the case of **Patel –vs- East Africa Cargo Handling Services Limited (1974) EA 75 at 76**, it was held that:-

“There are no limits or restrictions on the Judge’s discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the Court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by rules”

Further in the case of **Films Rover International Ltd v Cannon Film Sales Ltd (1986) 3 ALL ER 772** at Page 780-781, Justice Hoffman stated;

“A fundamental principle is...that the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to be wrong”

In my view the Court Orders issued on 22nd November 2012 may have served to prejudice the case that was already pending with respect to the parties in **HCCC No. 414 of 2009 Lumumba Mumma & Kaluma Advocates -vs- Multiple Hauliers Limited & Others**. It is thus in the interest of the parties involved for the orders of this court issued on 22nd November 2012 be set aside. I believe that the Plaintiff still have recourse before the court in the aforementioned case. I shall therefore not make any pronouncement on the possible merits of the alleged existence of a settlement agreement even if I were to consider it.

13. Accordingly, I allow the Application dated 27th November 2012 in terms of prayer numbers 3, 4 and 5. The Orders issued on 22nd November, 2012 are therefore set aside. This suit by way of the Plaintiff dated 12th November, 2012 be and is hereby struck out. The Costs of this application and the suit shall be to the Defendants.

DATED and DELIVERED at Nairobi this 22nd day of February, 2013.

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A. MABEYA
JUDGE