



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 19 OF 2007

PONANGIPALLI VENTURA RAMANA RAO 1ST PLAINTIFF

KOLLURI VENKATA SUBBARRAYA KAMASASTRY ... 2ND PLAINTIFF

(Joint receivers and manages of MRC Nairobi EPZ LTD)

EABS BANK LIMITED 3RD PLAINTIFF

VERSUS

M.R.C. LIMITED 1ST DEFENDANT

MAERSK KENYA LIMITED 2ND DEFENDANT

PUNCHIHEWA PRASADA ROBERT 3RD DEFENDANT

PUNCHIHEWA MERCY SUSILA 4TH DEFENDANT

RULING

1. This appears to be one of those unfortunate Applications before Court which had fallen between the stools of the transfer of Judges. It is a Notice of Motion filed by the second Defendant dated 6th May 2010. The same was filed under Certificate of Urgency under the provisions of **sections 3A, 34 and 63e** of the *Civil Procedure Act* as well as the old **Order XXI rule 50 (a)** and **L rule 1** of the *Civil Procedure Rules*. The Application sought the following substantive orders:
 - a. That this Court be pleased to Order a stay of the sale of the second Defendant's movable property namely Top Loader Hyster Model no. H 4400 XL -16CH, attached pursuant to an Order made on 3rd December 2007.
 - b. That this Court be pleased to Order the lifting of the attachment in respect of the second Defendant's aforesaid property.
 - c. That consequence of the grant of prayer (b) above, the Court do Order restitution of the second Defendant's property as described and Order the same to be returned to the second Defendant immediately.

2. The Application of the second Defendant was based on the following grounds:

“A. Pursuant to an application made by the Plaintiffs, an order was issued on the 17th of January 2007 restraining the Defendants from delivering certain equipment in the possession of 2nd Defendant which orders were confirmed on the 9th of July 2007.

B. Further orders were issued by this Court on 3rd Day of December 2007 ordering the attachment of the property of the 2nd Defendant for lack of compliance of the order issued on the 9th of July 2007.

C. The 2nd Defendants property namely a TOP LOADER HYSTER Model No. H4400XL-16CH was subsequently attached by Kinyua Auctioneers (“the Auctioneers”) ostensibly on the basis of the aforesaid Court Order.

D. The Honourable Court thereafter and more specifically on the 3rd of February 2009 issued orders staying execution in this matter. These stay orders were extended from time of time until the 12th of April 2010 when the parties entered into a consent whereupon all orders issued as against the 2nd Defendant were fully discharged.

E. The Auctioneer (who has all along retained the top loader machine) has adamantly declined to release the top loader to the 2nd Defendant despite the aforesaid stay order and even in light of the consent of the parties.

F. The auctioneer has further threatened to dispose of the top loader machine by way of sale despite the fact that the retention of the said machine amounts to a breach of the Court Order issued on the 3rd of February 2009 and the subsequent consent Order entered into by the parties on the 12th of April 2010 the decree having been in the circumstances been satisfied.

G. The aforesaid top loader machine is incurring storage charges on a day to day basis and in addition is deteriorating to the extent that it may be un-serviceable and therefore rendered worthless if it is not released to the 2nd Defendant as urgently as possible”.

3. The Application was supported by the Affidavit of **Stella Kariuki** sworn on 6th May 2010. In that Affidavit, the deponent described herself as the Legal Officer of the second Defendant. She detailed the Grounds in support of the Application as above and annexed a copy of this Court’s Order dated 3rd December 2007 as well as copies of letters written by the Plaintiff’s advocates and the Auctioneer dated 2 December 2008 and 18 December 2008, plus notification of sale of property and a newspaper advertisement dated 11 December 2008. The deponent noted that this documentation seemed to suggest that the second Defendant’s Top Loader had been sold. The deponent then went on to say that the Auctioneer, in a telephone conversation had with her on 4 May 2010, asked for a sum of Shs. 2,800,000/- for the release of the said Top Loader maintaining that the amount of money requested related to storage charges and miscellaneous expenses. The deponent did not record whether the sum demanded by the Auctioneer was paid. However, she maintained that she had been advised by the second Defendant’s advocates on record that the Auctioneer by retaining the Top Loader such amounted to a breach of the Court Order issued on 3 February 2009 as well as the subsequent consent Order entered into by the parties herein on the 12 April 2010. Finally, the deponent to the Supporting Affidavit attached what she termed “the latest report by a technician on the condition of the top loader”.

4. In response to the Supporting Affidavit, the Auctioneer **Mr. Peter Kinyua Muchendu** swore a Replying Affidavit on 17 May 2010. Paragraph 4 of that Affidavit is indicative and reads as

follows:

“That the application as drawn is flabbergasting as it suggests that there are pending before this court attachment and or execution proceedings capable of being stayed or lifted while the correct position is that the attachment and sale of the *Top Loader Hyster Model No. H4400 XL – 16CH* was effected and completed in compliance with this court’s order of 2007. I will make reference to the exhibits annexed to the applicant’s supporting affidavit for their full meaning and purport.”

The Auctioneer denied any conversation with the said **Stella Kariuki** as she had detailed in her said Affidavit but the conversation was an entreaty by her that the Auctioneer should impress upon the purchaser to return the Top Loader to the second Defendant upon repayment of the monies paid at the auction of Shs. 3 million. The Auctioneer, at paragraph 7 of his said Affidavit, mused that the Top Loader having been sold on the fall of the hammer, was no longer available to the second Defendant which is why **Stella Kariuki** had sought his interposition assuming that the purchaser at auction of the said Top Loader were known to him. The Auctioneer then gave details of the sale of the machine at auction noting that the amount of the Decree or Order was in excess of Shs. 300 million. He further noted that the purchaser of the Top Loader moved the same to its yard or storage facility and he had referred **Stella Kariuki** to the yard where the loader was stored. The Auctioneer concluded his affidavit by stating that the Orders sought in the second Defendant’s Application before court could not be granted as it would be impossible to enforce them as the machine, the subject matter of the Application, had been sold to a third party in a public auction held on 18 December 2008, long before the issuance of the said stay Order of 2009.

5. The second Defendant’s submissions opened up by explaining the synopsis of the matter before this Court as well as the Orders sought. It referred to the Supporting Affidavit as well as the Replying Affidavit and noted that the point of divergence was as to whether the Top Loader machine had been sold or not and whether the Applicant was entitled to the Orders sought. The second Defendant made the point that the Auctioneer, in his Replying Affidavit, had stated that the machine had been sold without stating to whom it had been sold. The second Defendant submitted that no proof of sale of the Top Loader had been detailed by the Auctioneer who had failed to discharge this burden. In a significant paragraph the Second Defendant maintained:

“the Auctioneer further alleges that the machine was sold but we are not told;

- i. *Where the auction was carried out*
- ii. *Whom the machine was sold to i.e. who was the successful bidder*
- iii. *What the purchase price was*
- iv. *Whether a deposit at the fall of the hammer was paid*
- v. *Whether the balance of the purchase price was remitted within the given time*
- vi. *Whether the machine was subsequently transferred to the ‘purchaser’*

All these actions that would have evidence sale (*had the sale been conducted*) have a paper trail including but not limited to agreements to transfer, receipts from the Auctioneer as proof of payment is made, banker’s cheques from the ‘Purchaser’ etc.”

6. Thereafter, the second Defendant referred the Court to **Halsbury’s Laws of England Vol. 2 Para 935** as regards particulars and conditions of sale. The second Defendant noted that the Auctioneer was obligated to inform the parties and the Court of the outcome of the sale so that any excess thereof was remitted back to the judgement debtor. The second Defendant maintained that, to date, the Auctioneer had not reported to the Court or the judgement debtor or even, it seems, to his own

principals as to the outcome of the sale. The second Defendant maintained that the failure by the Auctioneer to adduce this crucial information, despite being given an opportunity to do so in his Replying Affidavit, clearly showed that no sale was conducted as alleged.

The second Defendant then referred to the Evidence Act as well as to **Cross in Evidence Sixth Edition** at pages 110 – 114. The second Defendant maintained that it had shown that there was no evidence that the machine had been sold and consequently the unrebuttable presumption is that the machine has been retained by, or in the custody of, the Auctioneer. It maintained that as provided by the old **Order XXI Rule 50**, the attachment of the Top Loader would therefore be deemed to have been withdrawn justifying the second Defendant's prayer that the execution Order be lifted and that the machine be restituted to it.

7. The Plaintiff in its submissions filed herein on 18 June 2010 described the circumstances that led to the issuance of the Order dated 29th November 2007 and the further Order of 3 February 2009. Earlier Orders of 9 July 2007 directing the second Defendant to deliver up possession of the property that it was holding to the Plaintiffs (as it belonged to the Plaintiff) were ignored resulting in the second Defendant being cited for contempt. The second Defendant having failed to comply with the Orders of the Court, the property was attached pursuant to the said Order of 27 November 2007. The attached goods were sold at a public auction on 18 December 2008. At the time that the goods were sold, the Plaintiff maintained that there were no stay Orders in place and thus the sale was proper. It noted that the outcome of the auction was communicated to both the Court and the Registrar of Motor Vehicles by the Auctioneer vide his letters dated 18 December 2008 which the second Defendant's deponent had annexed to her Supporting Affidavit as "SK 2". It further noted that the auctioneer in paragraphs 6, 7, 9, 11, 12 and 13 of his Replying Affidavits had deponed to the fact that the machine in question was sold at a public auction on 18 December 2008. The Auctioneer had gone on further to explain that the deponent of the Supporting Affidavit, **Stella Kariuki** was aware of the auction and after the same, had tried to negotiate the re-purchase of the machine from the purchasers thereof, through the Auctioneer.
8. As regards the report on the state of the Top Loader, the Plaintiff submitted that the Auctioneer had informed the said **Stella Kariuki** of the yard of the purchasers of the machine. According to the Plaintiff, it seemed that the second Defendant wanted to use whatever means to circumvent the Consent Order that was recorded between it and the Plaintiff's marking this matter as settled, dated 13 April 2010. The status report in connection with the machine was dated 25 April 2010. The Plaintiff referred the Court to the holding of the Court of Appeal in **Ismail Sunderji Hirani v Noorali Esmail Hirani (1952) 19 EACA** in which it was stated:

“Where a compromise is recorded under Order 24 Rule 6, the decree is upon a new contract between the parties superseding the initial cause of action. The compromise of a disputed claim made *bona fide* is a good consideration and the Court cannot interfere with its in circumstances which would afford good grounds for varying or setting aside a contract between the parties”.

It was the Plaintiff's submission that the second Defendant had not demonstrated any of the grounds that warranted the Consent Order to be interfered with by the Court.

9. To a certain extent I have sympathy with the second Defendant as regards the adequacy of the Auctioneer's said Replying Affidavit dated 17 May 2010. However, to this Court's mind the letter from the Plaintiff's advocates to the Auctioneers dated 2nd December 2008 annexed to the Replying Affidavit as exhibit "A" is very clear. It explains the proceedings before this Court during 2008 and notes that the second Defendant's application for stay of execution of Khaminwa J's Orders of 19 November 2008 was dismissed vide the Lady Justice's Ruling delivered on 1st December 2008. That paved the way for the execution of the Order of 29th November 2007 allowed by Lady Justice Lesiit and issued on 3rd December 2007 to be acted upon by the Auctioneer. In view of the fact that the second Defendant's Supporting Affidavit exhibited 2 letters from the Auctioneers reporting as regards the Public Auction held on 18th December 2008, I find it difficult to understand the second Defendant's submissions that the sale had never taken

place nor that it had not been properly reported upon. The Auctioneer's letter to the Deputy Registrar of 18th December 2008 is particularly indicative in that it details that the Auctioneers proceeded to attach, advertise (a copy of the advertisement in the Kenya Times edition of 11th December 2008 was also included in the exhibit to the Supporting Affidavit) and held the auction on that day. It is clear that **Great Lakes Ports Ltd** of P.O. Box 82411 – 80100 Mombasa purchased the Front Loader Hyster Model No. H 4400XL – 16 CH for Shs. 3 million. The Auctioneers requested the Deputy Registrar of this Court to issue the appropriate Certificate of Sale to the purchaser in respect of the machine.

10. As a result, I find that the auction sale of the Top Loader machine was properly conducted and that there is no merit to the second Defendant's Notice of Motion dated 6th May 2010. Accordingly, I dismiss the same with costs to the Plaintiffs.

DATED and delivered at Nairobi this 15th day of July, 2013.

J. B. HAVELOCK

JUDGE