



GULAM HUSSEIN F. GULAM HUSSEIN T/A HUSSEIN SERVICES STATION

SEA ANGLE SERVICE STATION LTD.....PLAINTIFFS

VERSUS

CAPITAL CARGO SERVICES.....DEPENDANT

IMPERIAL BANK LTD.....1ST OBJECTOR

CFC BANK LTD.....2ND OBJECTOR

RULING

What is before me for determination is an application by way of Notice of Motion dated 11th November 2009 by CFC Stanbic Bank Limited the 2nd Objector to these proceedings. The application is supported by an affidavit sworn on 30th October 2009 by one Kereto Marima who describes himself as a Joint Receiver and Manager of the Defendant.

The Applicant seeks several prayers. I reproduce prayers 2 and 3 as the 1st prayer is spent.

“2. That the Plaintiffs and their agents Messrs Work No Words Auctioneers be summoned in court to produce and disclose the whereabouts of the following motor vehicles:

- a) KAR 264K and Trailer ZC***
- b) KAU 879X and Trailer ZC 1423***

3. That if the Plaintiffs and their agents Messrs Work No Words Auctioneers have sold and/or disposed the following motor vehicles named in (2) above the court be pleased to compel the Plaintiffs and their agents Messrs Work No Words auctioneers to surrender the proceeds of sale of the motor vehicles named in (2) above to the 2nd Objectors agents namely; KEREIO MARIMA and IAN SMALL being joint Receivers and Managers of the Defendant”.

The Plaintiffs filed a short affidavit through one GulamHussein F. GulamHussein sworn on 21st July 2010 who describes himself as the 1st Plaintiff and the Director of the 2nd Plaintiff. I take it that this Affidavit is in opposition to the aforesaid Notice of Motion. Mr. Sammy Muli Mutua t/a Work No Words Auctioneers also filed in court two affidavits on 25th May and 9th July 2010 sworn on 25th May and 8th July 2010, respectively.

On 29th July 2010 at the instance of the Applicant, Mr. Sammy Muli Mutua, the auctioneer was examined on the contents of his affidavits.

The parties by mutual consent agreed to dispose off this application by way of written submissions. The Applicant/2nd Objector filed its submissions dated 13th August on 17th August 2010 while the Plaintiff filed theirs dated 24th August 2010 on 3rd September 2010.

I have perused the records and considered the rival submissions of the parties. The application is expressed to be brought under Sec 34 of the Civil Procedure Rules Act CAP 21, Section 351 & 352 of the Companies Act CAP 486. Section 351 states;

In my view and for purposes of this ruling the relevant section is Sec. 348 of the Company's Act which provides:

(1) "A receiver or manager of the property of a company appointed under the powers contained in any instrument may apply to the Court for directions in relation to any particular matter arising in connection with the performance of his functions, and of any such application the Court may give such directions, or make such order declaring the rights of persons before the Court or otherwise, as the Court thinks just".

In my humble view directions includes giving such orders that would preserve the assets of the company. This was not done. It was the most expedient

The application seeks orders that the auctioneer be summoned in court to produce and disclose the whereabouts of the subject motor vehicles. The auctioneer filed two affidavits which I have referred to hereinbefore and whereof he deponed that the subject motor vehicles were sold by public auction on 13th December 2008 to one M/S Lesk Investment Ltd. at a price of Kshs.850,000.00 each giving a total of KShs.1.7 million. Mr. S. M Mutua further deponed that at the time he sold the subject motor vehicles, there were no orders staying the public auction. The Plaintiff conducted a search with the Registrar of Companies who confirmed vide a letter dated 10th December 2008 that Receivers had not been appointed. This was not debunked by the applicant. The applicant has not presented before me any orders issued by the court stopping the sale save a letter dated 2nd December 2008 from the Business Advisory Group Limited purportedly signed for Kereto Marima, Joint Receiver and Manager by undisclosed person. Can this letter signed for the Joint Receiver and Manager stop a public auction where all the legal processes have been adhered to? With tremendous respect to the applicant, the answer is no. Prayer 2 must fail. The Receiver Manager was at liberty to move this court appropriately for directions or orders to stay the sale. The applicant has not explained why the Court was not moved.

Turning to Prayer 3, the auctioneer sold the vehicles to a 3rd party in the normal course of execution proceedings and remitted the sales proceeds to the Plaintiffs. The Plaintiffs have confirmed having received the sales proceeds which was in settlement of a decree of this Court. On what basis do I then order the Plaintiffs to surrender the sales proceeds of the motor vehicles which were sold in the normal course of execution proceedings and the same released? I find that no sufficient material has been placed before me to order the Plaintiff to surrender monies received in execution of a Court Decree.

It is pertinent to point out that if the proceeds were still in the hands or possession of the Auctioneer then its situation would have been different. The Auctioneer is an officer and agent of the Court in executing a Decree. As a result, even after sale of goods/chattels attached but before release of the proceeds, the court has power to give directions and stop payment to decree-holder pending the hearing of the objection proceedings. However once the proceeds are released to the Decree-holder then the Court stops there. It cannot follow to successful Decree-holder as execution is complete at the stage.

The upshot of this is that the application dated 11th November 2009 is hereby dismissed with costs. Orders accordingly.

Dated and Signed At Nairobi on This 14TH Day Of AUGUST 2012.

M. K. IBRAHIM
JUDGE

DATED AND Delivered At Mombasa on This 31ST Day Of AUGUST 2012.

J.W MWERA
JUDGE

Delivered in the presence of: