



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 249 OF 2008 (O.S.)

**IN THE MATTER OF: THE FOREIGN JUDGMENT (RECIPROCAL ENFORCEMENT ACT)
CAP 43 LAWS OF KENYA**

AND

**IN THE MATTER OF: REGISTRATION AND ENFORCEMENT OF JUDGMENT BY THE
HIGH COURT OF KENYA**

AT KAMPALA ON 22ND AUGUST 2008 IN CIVIL SUIT NO. 198 OF 2008

BETWEEN

**ARUA MERCHANTILE LIMITED
HON. KAHINDA**

OTAFIIREPLAINTIFFS

VERSUS

**SEMLIKI MINERAL RESOURCES LIMITED
HUMPHREY**

BABUKIIKA.....DEFENDANTS

**MUMIAS SUGAR CO.
LIMITED.....OBJECTOR**

RULING

The Applicant is an Objector under the provisions of Order 21, Rule 56 and 57 of the Civil Procedure Rules and seeks inter alia the following orders:-

“ 1.

2.

3. THAT this Honourable Court be pleased to vacate, lift, raise and/or wholly set aside the attachment of the whole of the 12,460 bags of sugar packed in 25 x 20 ft containers lying at the Kenya Ports Authority, Mombasa and any other movable assets as more specifically set forth in the proclamation dated 29th September 2009 issued by Messrs. Mwara Investments Ltd in purported execution of the Decree against the judgment debtor.

4. ____...”

It is the Objector/Applicant’s case that it has both legal and equitable interest by way of an injunction obtained from the High Court Mombasa on 20th February 2008 n Mombasa H.C.C.C. No. 251 ‘B’ of 2007 against the disposal and removal, clearing, packaging, transporting, interfering, with and distribution of the said 12,460 bags of sugar packed in 25 x 20ft containers as per Bill of Lading No. MSCUDU 408888 held at Kenya Ports Authority, Mombasa, labeled with words **”MUMIAS SUGAR CO. LTD”** till the hearing and finalization of the said suit being Mombasa HCCC No. 251’B’ of 2007. In the said suit the objector as the plaintiff seeks the following orders as against the First Defendant herein which is the Judgment debtor in these objection proceedings:-

“(a) A declaration that the Defendant is not entitled to package, deal and trade in the 12,460 gunny with the plaintiff’s brand name and trade mark.

(b) A permanent injunction restraining the Defendant by themselves, its employees, servants, and/or agents from disposing of, clearing, removing, dealing, exporting, smuggling, removing from jurisdiction, distributing otherwise, the 12,460 bags of sugar contained in the 25 containers held a Kenya Ports Authority.

(c) General damages for passing off and/or interfering with the brand name and trade mark of the plaintiff.

(d) An order for destruction of 12,460 gunny bags of sugar branded in the name of the plaintiff.

(e) Costs of the suit and interest.

There is no dispute that upon an inter partes hearing of the above-mentioned injunction application Honourable Justice Sergon on 20th February 2008 granted the temporary order of injunction against the Defendant in the said suit which is the Judgment debtor in this suit and against whom the decree is being executed.

When considering the balance of conveniences the Honourable justice Serگون stated as follows:-

“

The third principle which must be considered before granting an order of injunction is the aspect of convenience. That is to say that where the court is in doubt it would decide the application on a balance of convenience. The Defendant company is a limited liability company in Uganda. The sugar in dispute was destined for Uganda. If the Defendant is allowed to take the same to Uganda of course it would be extremely difficult if not impossible to obtain possession of the sugar for destruction.

.....”

For clarity, the plaintiff in the said court is Mumias Sugar Company Limited which is now the Objector herein and which obtained the aforesaid injunction order in its favour on 20.02.2008. The Defendant in the said suit is Semliki Mineral Resources Limited which is the 2nd Defendant in the present suit and the Judgment-debtor.

The Decree-holder in this case and the Respondent in the Objection proceedings are Arua Merchantile Limited and Hon. Kahinda Otafiire.

The Respondents filed a Replying Affidavit sworn by the 2nd Respondent on 11.12.2009 and depones inter alia that:-

Ⓟ It is true that the sale of the 12,460 bags of sugar was advertised by Mwara Investment Limited and the public auction was to be carried on 10th November 2009.

Ⓟ That the order granted by the court in Mombasa HCCC No. 251 ‘B’ of 2007 restrained the 1st Defendant herein from dealing with the Sugar while the bags were still labeled!

Ⓟ The said order did not prohibit the attachment and sale of the sugar in execution of a decree of a competent court.

Ⓟ In this notice of objection to attachment the objector claims legal and equitable interest in the Sugar and has obtained an order of stay of execution.

Ⓟ The Objector’s main complaint was the 1st Defendant’s use of the Objector’s label on the bags not the sugar itself and that is why the objector sought a prayer for destruction of the gunny bags bearing the name of the Objector.

Ⓟ The Objector has not proved any legal and/or equitable interest it has in the sugar itself. The plaintiffs are equitable and legal beneficial owners of the sugar having provided the purchase money and having been decreed in a judgment by the High Court in Uganda n HCCC NO. 198 of 2008 and the Decree

endorsed by this Honourable Court in the suit herein.

Ð The Order of the court only prohibited the Defendant therein from disposing of, clearing, packaging, transporting and removing the sugar still bearing the label “Mumias Sugar Company Limited” but there was no order made for the destruction of the sugar. It is evident from the ruling that the Order seeking destruction of the sugar was expressly denied by the Honourable court.

Ð It is not the Defendant or the 1st Defendant being allowed to take the Sugar to Uganda but the sugar has been attached in execution of a lawful decree obtained against the Defendants herein.

Ð The execution of the decree is pursuant to the judgment obtained by the plaintiffs herein against the Defendants in Uganda in HCCC No. 198 2008 which was registered herein and leave granted for its enforcement. Accordingly there is no bad faith or abuse of the court process by the Plaintiffs and no contempt of Court Orders or at all has been demonstrated by the Objector.

Ð The Objector is entitled to seek a remedy only in HCCC No. 251 ‘B’ of 2007 against the Defendant therein for failing to furnish the security for costs as ordered by the court. The Objector has not sought for the sale of the sugar to secure its costs and accordingly the claim of the plaintiffs take priority to that of the Objector herein of which none has been demonstrated.

Ð The 1st plaintiff disclosed in HCCC No. 346 of 2008 at paragraph 12 of the plaint of the existence of the suit herein.

Ð The execution of the decree herein is lawful and regular and not an abuse of the process by the court as alleged and the Objection proceedings herein should be dismissed with costs.

I have considered the application, to the respective affidavits and submissions by Counsel. The Objector was represented by Mr. Otieno with Mr. Ananda Advocates and Mr. Asige represented the Respondents/Decree-holder.

From the facts and material before the court and considering the submissions on the law, I am of the view that the first questions this court must determine are:-

1. What is the legal consequence of the order of injunction which was granted by this court in MOMBASA HCC NO. 251 ‘B’ OF 2007 by Honourable Justice Sergon after hearing the parties therein?

2. Whether the property/goods, in this case the 12,460 bags of sugar which is the subject of the injunction Order of 20.02.2008 in the pending proceedings (Mombasa HCCC No. 251 ‘B’ of 2007) involving the owner of the sugar is attachable in execution of a decree against the said owner and obtained subsequently?

3. Whether the Decree herein by itself supersedes the injunction Order of 20.02.2008 and thereby takes priority over it or discharges the same?

It is my view that these questions must be answered first before one can delve into the questions whether the Objector has any legal or equitable interest in the whole or part of the property attached that

disentitles the decree-holder to proceed with the execution thereof.

It is necessary to go back to the express terms of the Temporary Injunction Orders granted on 20th February 2008 by the High Court of Kenya sitting at Mombasa and presided over by the Honourable Justice Serгон. The Court ordered as follows:-

“THAT a temporary injunction be issued to restrain the Defendant its servants, employees and/or their agents or otherwise howsoever from disposing off, clearing, packaging, transporting, interfering with, removing from jurisdiction and/or distributing the 12,460 bags of sugar packed in 25 x 20 ft containers held at Kenya Ports Authority, Mombasa labeled with words “Mumias Sugar Company Limited” till the hearing and finalization of this suit. The said containers are as per the Bill of Lading No. MSCUDU 40888 annexed hereto in the affidavit sworn by the Security Manager, ISAAC SUMBA SHEUNDA and marked “ ÍSS 4”.

This means that Prayer 3 of the Chamber Summons, dated 24th October 2007 was granted in its entirety. The prayer for an order to destroy the said sugar was disallowed because to allow this would mean that the **“Court will have lost the subject matter of the suit.”**

The said orders it is deemed was duly served on the Defendants and on Kenya Ports Authority as the subsequent proceedings in the said suit show.

The effect of the said temporary injunction order as against the Defendant its servants, employees and/or their agents is clear and understandable from a simple reading of the order. The Defendant could not take, remove, interfere, transfer, dispose or deal with the said sugar in any manner whatsoever pending the hearing and final determination of the suit without orders of the court.

The objectives of the order and the effect is the preservation of the said sugar which is the subject-matter of the suit, HCCC No. 251 ‘B’ of 2007 until the complete finalization of the said suit. The court clearly said that if the sugar in dispute was allowed to be removed and taken to Uganda or if it was destroyed as earlier sought then it would be impossible to obtain its possession for destruction if the suit succeeded. Also if it was destroyed then the **“Court would have lost the subject-matter of the suit.”**

I therefore, hold that besides the restraining of the Defendant against interfering with the sugar, the said sugar being held at the Kenya Ports Authority became a property under the High Court’s “Control,” No one could interfere with the sugar or deal with it as to dispossess the court of the subject-matter of the suit. The injunction orders were not granted to the Objector per se but in their nature were to preserve the subject-matter of the suit. An injunction order while the product of application of equitable interests does not confer on the Applicant who obtained it, any legal ownership or equitable proprietary interest per se. The object of an injunction is for preservation and in the case until the suit was determined and final orders given in respect thereof.

In fact, the sugar was not in the possession, care, custody or control of the First Defendant, the judgment debtor from 20.02.2008. It was in the custody, care and control of the court through the court order and was not attachable or available for attachment through execution of a decree which was in any case obtained subsequent to the grant of the injunction orders.

The Temporary Injunction Orders were granted by this court on 20.02.2008 and to remain in force until HCCC No. 251 ‘B’ was heard and finally determined. The judgment of the High Court of Uganda in

favour of the Respondents was registered in Kenya on 17.10.2008 through orders of this court and leave granted to enforce the judgment against the Respondents on the same day.

I do hold that as a matter of fact the Injunction orders of 20.02.2008 to effect was in force on the date the Decree was issued on 17.10.2008 and was still in force when the sugar was proclaimed for attachment on 29th September 2009. The injunction order is a valid and regular order of the court and it had attached on the goods herein, the sugar on 20.02.2008. As a result the decree and warrants of attachment could not be enforced on the sugar a second time without the discharge of the Injunction orders.

The sugar herein was not attachable or available for attachment by way of execution of the Decree and warrants herein. They had been preserved and protected by lawful and valid orders of this court which were granted and obtained before the Decree was issued and warrants executed. I do hold that the decree and warrants herein did not and could not in law supersede the Injunction order and rank in priority in terms of enforcement. The decree and execution of the Warrants did not and could not in law discharge the injunctive order of this court issued on 20.02.2008. The orders of Injunction which are still in force can only be discharged on application or otherwise by orders of this court to return the sugar back into the free market and control/possession of the parties and where they can then take action against each other as the law permits them.

The foregoing aside, was the Temporary Order of Injunction applicable, binding and enforceable against the plaintiffs/Decree-holders herein? To whom was the order directed? The said order appears as follows:-

“ (a) A temporary order of injunction to restrain the defendant, its servants, their employees and/or agents or otherwise from disposing of

.....

(Emphasis mine)

Who are the “Or otherwise” contemplated, envisaged or meant in the said orders? Can it be extended and/or include a decree-holder against the Defendant?

In the ‘Longman – Dictionary of Contemporary English’ – New Edition, 2003 , the definition of “Or otherwise” is stated as follows:-

“

5 Or otherwise, especially used to refer to the opposite of what has just been mentioned...”

It is my interpretation thereof that the ordinary and usual meaning of

“Or otherwise” in the context of the order is the opposite of any servant, employer or agent of the Defendant. It would mean any other person who does not have such a relationship or similar relationship with the Defendant, (ejusdem generis). It means other persons with other types of relationships with the Defendant. There must be some relationship or connection with the Defendant as the order would not be applicable or enforceable against the whole world. I do hold that “a decree-holder or judgment creditor” has a relationship/connection with the Defendant which is opposite to those stated (servant, employer,

agent etc). But there is a relationship that may give him some colour of right to claim or interfere with the sugar and on the basis of the words “or otherwise”, the Injunction order would affect and apply to him/her/it.

I therefore hold that a decree-holder or judgment creditor is bound by the injunction order and is therefore prohibited from attaching the goods (sugar) which is the subject matter of the injunction order. If the terms “or likewise”, etcetra etcetra” etc were used then the situation would have been different as the ‘ejusdem generis’ principle would have applied.

Apart from the foregoing, this court is greatly concerned about the clear challenge of the plaintiffs in these proceedings to the actions and conduct of the Objector in H.C.C.C. No. 251 ‘B’ of 2007 and therefore the Injunction Orders granted on 20th February 2008, themselves. The plaintiffs in paragraph 15 of this Replying Affidavit admit that they knew of the existence of H.C.C.C. No. 251 ‘B’ of 2008. In HCCC No. 346 of 2008 filed by 1st plaintiff herein against inter alia, the Judgment-Debtor and the Objector on 11.12.2008 the 1st plaintiff pleaded as follows:-

“.....
.....

8. Upon further enquiries made by the plaintiff it was established that the aforesaid 10,000 tonnes of sugar had been fraudulently converted and imported in the name of the 2nd Defendant where the 1st Defendant was its Managing Director and that the 3rd Defendant had obtained an order of injunction in Mombasa High Court Civil Case No. 251 ‘B’ of 2007 to restrain the 2nd Defendant from transiting the aforesaid consignment of sugar and/or taking possession of it and conveying it to its destination in Kampala, Uganda.”

The said suit in which somehow the filing of HCCC No. 251 ‘B’ of 2007 and the Injunction Order granted therein is being challenged is still pending according to the submissions of Objector’s Counsel. Despite the pendency of the said suit and the knowledge of the existence of the Injunction order and the fact that it had been enforced, the plaintiffs herein proceeded to purportedly attach the sugar through warrants of attachment obtained herein.

In the circumstances, the actions and conduct of the plaintiff/Respondents herein are questionable and in my view amount to an gross abuse of the court proceeds, if nothing more grave and serious.

If the plaintiffs/Respondents were aggrieved by the injunction order which they were obviously were, they ought to have proceeded to prosecute their suit, HCCC No. 346 of 2007 and challenged the injunction order in any other manner e.g. applying to be joined in HCCC No. 251 “B” of 2007 and applying to set aside the said injunction order of which they knew its existence, lawfulness and validity. They should have moved the court to discharge it. Instead they chose to arrogate themselves the powers of the court to interpret and find whether the injunction order were valid or not and arbitrarily purported to execute the decree here upon the injunctioned sugar. It is now well established in the High Court of Kenya as well as the Court of appeal, the highest court in our land at the moment that an order made by a court of the unlimited jurisdiction such as the High Court of Kenya must be obeyed unless and until it has been set aside by the court. The words herein have been borrowed from those of Lord Diplock in **ISAACS –V- ROBERTSON (1984) 3 ALL ER. 140 AT 142** which was applied by the Court of Appeal of Kenya in **CIVIL APPEAL NO. 59 OF 1993 – OMEGA ENTERPRISES (KENYA) LIMITED –V- KENYA TOURIST DEVELOPMENT CORPORATION & OTHERS.**

In the ISAACS –V- ROBERTSON case Lord Diplock went on to say:-

“

There is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without this needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give it to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of the rules of natural justice.”

The said principles apply in this case. The injunction order could only be set aside or discharged after an application was made and the Objector was given an opportunity to be heard on the merit. This is what the execution of the warrants of attachment purported to do when it was executed. As a result, this is one case which attracts ex debito justitiae to right by the court to set aside the attachment of the sugar herein.

I therefore do hereby order the attachment of the 12,460 bags of sugar be and is hereby forthwith vacated, lifted raised and wholly set aside in terms of prayer 3 of the application.

The argument that what the Objector was interested in are the labels on the gunny bags and not the sugar are self-serving and an intrusion in HCCC No. 251 ‘B’ of 2007 in which the plaintiffs are not parties and have no “locus standi” to interpret the court orders given therein.

The Plaintiffs/Respondents shall pay the costs of these proceedings to the Objector.

DATED AND DELIVERED AT MOMBASA ON THIS DAY 18TH DAY OF MARCH 2011.

M. K. IBRAHIM

J U D G E

Coram

Ibrahim J
Court clerk – Kazungu
Mr. Mwakireti for the Plaintiff/Respondent
Mr. Ananda for the Objector
No appearance for the Defendant

Ruling delivered in their presence.

IBRAHIM, J