



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 36 of 2007

HYDERY (P) LIMITEDPLAINTIFF
VERSUS
SWAN MILLERS LIMITEDDEFENDANT
AND
MOMBASA MAIZE MILLERS (KISUMU) LTD.....OBJECTOR

R U L I N G

On the 9th November 2007, the Court entered summary judgment for the plaintiff against this Defendant for a sum of Kshs.9,400,000/-, Interest thereon as per the agreement in the sum of Kshs.438,666.70 and bank charges in the sum of Kshs.800 all totaling Kshs.9,839,466.70. The court also ordered the Defendant to pay the plaintiff interest on the sum of Kshs.9,839,466.70 at Court rates from the date of filing suit until payment in full was made. The Defendant was also to pay the plaintiff the costs of the suit.

The summary judgment was entered upon the hearing of an application by the plaintiff. The defendant did not attend the hearing despite being served. The court still gave a considered decision.

In execution of the decree the plaintiff applied for attachment and sale of the Defendant's immovable property namely Kisumu Mun/BLOCK 3/190 measuring approximately 1.735 Ha or thereabouts and KSM/BLOCK 3/124 measuring approximately 1.6.39 or thereabouts.

The application was allowed by the Deputy Registrar and upon settlement of terms the court issued a prohibitory against the aforesaid properties. The court then ordered the sale of the properties to realize a sum of Kshs.12,594,517.40.

Upon learning of the intended sale by public auction of the two properties the Objector herein commenced Objection proceedings leading to the Chamber Summons dated 11.12.2008 under the provisions of Order XXI, Rules 56 and 56 of the Civil Procedure Rules. The Objector applied for an order that the attachment levied against its property known as Kisumu Municipality/Block 3/124 pursuant to the Warrants of attachment issued herein on 19th September, 2008 be raised and the plaintiff do bear the cost of such attachment. The Objector contends that the attachment was unlawful and wrongful in that the properties belong to the Objector and the Defendants in the suit have no interest or claim whatsoever on it and the whole of the execution proceedings herein are a nullity and an abuse of the process of the Honourable court.

The application is supported by an affidavit sworn by one Mr. David Omuya, an in-house legal Officer on 11th December 2008 in which he deponed, inter alia as follows:-

- That on 19th November 2008 the Objector's property herein known as KISUMU MUNICIPALITY/BLOCK 3/190(also known as KISUMU MUNICIPALITY/BLOCK 3/124) was advertised for sale by Nyaluoyo Auctioneers of Kisumu.
- That upon their Counsel perusing the court file it was found that:
 - a) on 9th November 2007, this Honourable court issued judgment against the defendant in favour of the plaintiff and the Decree herein was not issued until the 30th June 2008,
 - b) On 2nd July 2008 the plaintiff herein obtained a prohibitory order in respect of the property,
 - c) Two applications for execution herein dated 10th July 2008 and 3rd September 2008 were filed herein pursuant to which two warrants of execution of a money decree dated the 16th July 2008 and 19th September 2008 were issued. The execution proceedings herein are thus an abuse of the process of this Honourable court.
 - d) That the plaintiff's costs of this suit have not yet been taxed nor has the plaintiff obtained leave pursuant to Section 94 of the Civil Procedure Act to execute the Decree herein before the costs are ascertained. To this extent, the whole of the execution proceedings herein are unlawful and a nullity.
 - e) On 10th September, 2000 the plaintiff obtained a further prohibitory order in respect of the property.
- That on 16th August 2006 the Objector purchased the above property from the Defendant pursuant to which the Defendant transferred all its rights, title and interest in it to the objector upon completion of the sale.
- That the reason that the objector has been unable to register the said transfer in its favour is as a result of a dispute as to the valuation of the property for stamp duty purposes which has now only been resolved.
- That it is clear from the foregoing that the Defendant since late 2006 had no interest whatsoever in the property and the attachment, levied herein is not only wrongful but is unlawful, illegal, a nullity and actually an abuse of the process of this honour to the court.

In opposition to the said application the defendant filed a
Replying Affidavit sworn by a director Mr. Masumali G. Merali in which it is deponed inter alia:-

- That the two properties do not belong to the Objector, but are still registered in the name of the Defendant/Judgment Debtor.
- That before commencing the execution proceedings and obtaining the prohibitory order against the properties official searches were made and the certificates of official search issued by the Land Registrar indicated and confirmed that the defendant herein was the register owner.
- That accordingly it is false and untrue for Mr. Omuya to allege that the aforesaid properties belong to the objector.
- That it is true that judgment was entered on 9th November, 2009 and the plaintiff obtained a prohibitory order in respect of plot No. Kisumu Municipality/Block 3/190.
- That the plaintiff made an application for execution dated 10th July 2008, it became impossible to locate and identify Plot No. Kisumu Municipality/Block 3/190 on the ground even from the survey map of Kisumu Municipality.
- That consequently in Order to secure the plaintiff's interest it was necessary to ascertain the other

properties of the/defendant which could be attached and the plaintiff identified Plot No. Kisumu Municipality/Block 3/124 and obtained a prohibitory order in respect thereto. Accordingly there is no abuse of the court process but is instead due diligence on the part of the plaintiff.

- That the fact costs have not been taxed cannot render the execution proceedings unlawful or a nullity. The execution proceedings were lawful as there is a decree which the defendant has to date not satisfied.
- That the objector in collusion with the Defendant obstructed and delayed execution of the decree herein in a purported agreement of assets of property between the Defendant and Luna Limited.
- That the purported transfer of lease of Plot Number Kisumu Municipality/Block 3/190 is not a transfer. It is neither dated nor registered and therefore the Objector has no legal or equitable interest in the said land.
- That there is no agreement of sale between the Objector and the defendant and/or any transfer from the Defendant to the Objector of the title Numbers Kisumu Municipality/Block 3/190 and Kisumu Municipality/block 3/124 and the Objector does not have a right of interest in any of the attached properties either wholly or in part.
- That under the provisions of Order XXI, Rule 53 the Objector has to show that it has legal or equitable interest as envisaged in the whole or party of the property attached which the Objector herein has failed to do.
- That this application is designed to frustrate and delay the execution of the decree herein and should be dismissed and judgment entered against the Objector for costs occasioned by the Objector and execution be allowed to proceed to its conclusion.
- That there is no dispute disclosed in the documents produced which has purportedly prevented the Defendant and/or Objector from registering the purported transfer from 16th August 2006, the date of the alleged Agreement of Sale, to December 2006 when the properties were advertised for sale.
- That accordingly the objector has failed to show that it has envisaged legal and equitable interest in the properties attached and the application be dismissed with costs and execution allowed to proceed.

With leave of the court the Objector filed a Further

Affidavit sworn by one Munir Thabit its Finance Officer in which the Objector denies that there is any collusion between itself and the Defendant in obstructing or frustrating the plaintiff in the execution. That the Defendant has no legal or equitable interest in the property which has been attached by the plaintiff and has had none since the year 2006. That it paid 200,000,000/- to the Defendant in November 2006 for the said properties. The deponent, annexed copies of correspondence allegedly showing why the properties could not be registered in the name of the Objector although the interest therein passed even before this suit was instituted.

I have carefully considered the applications and the supporting affidavit, the two affidavits in opposition, submissions, by counsel and the authorities presented to the court.

It is my view that there are two questions which are raised by the application and opposition to it. These are:-

1. Whether the whole execution proceedings herein are unlawful and a nullity on the ground that the plaintiff's costs have not yet been taxed and that the plaintiff has not obtained leave pursuant to section 94 of the Civil Procedure Act to execute the Decree herein before the costs are ascertained.
2. If the answer to the said question is in the negative then the second question would be whether the Defendant has any legal or equitable interest in the whole or part of the property attached to confer on it the rights to the orders sought in the objections proceedings.

I will deal with the first question first. There is no dispute that after the judgment was entered the costs have not yet been taxed and ascertained. The plaintiff has not denied that it did not seek and obtain leave pursuant to Section 94

of the Civil Procedure Act to execute the Decree herein before the costs are either agreed upon and taxed.

Section 94 of the Civil Procedure Act provides as follows:-

“94. Where the High court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of costs incurred in the suit can be ascertained by taxation, the court may order that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

The Court of Appeal in the case of **Bamburi Portland Cement Co. Ltd –v- Abdul Hussein (1995) LLR 1870 CAK**. Observed obiter dictum, by J.A. Lord A.B. Shah as follows:-

“I would like to end by making some pertinent observations as regards the execution of the decree. Section 94 of the Civil Procedure Act requires for execution before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then court must be made by way of a notice of motion. The motion must be served on the other party and heard inter partes. Order 21, Rule 7(4), of the Civil Procedure Rules purports to confer on the Registrar and Deputy Registrar the power specifically given to the High Court under Section 94 of the Act Rule 7 (4) is clearly *ultra vires* Section 94 of the Act because the Section reserves that power exclusively to the High Court.

(The Court of Appeal bench comprised of JJA Kwach, Omolo and Shah)

In the Court of Appeal case of **LAKELAND MOTORS LIMITED –V- SEMBI (1998) LLR 682 – CAK** in a unanimous decision of the Court JJA, Gicheru (as he then was) Omolo and Shah held:-

“The exercise of Judicial desertion by the Superior Court under Section 94 of the Act necessarily requires that parties to a decree passed by the court in the exercise of its original jurisdiction should be availed an opportunity to be heard before making an order for execution of that decree before taxation. This is the spirit of the observations of Shah J.A. with which we agree in BAMBURI PORTLAND CEMENT CO. LTD –V- ABDULHUSSEIN (1995) LLR 2519 (CAK) in regard to the application of Section 94 of the Act. Save for the letter dated 22nd January 1998 addressed to the Deputy Registrar High Court of Kenya at Kisumu seeking the issuance of a Court Warrant of attachment and sale of the applicant’s movable properties before taxation under the aforesaid section, it does not appear on the record before us that the applicant was even made aware of this move by the respondent. This apart, it does not also appear and this was not contested by Mr. Kasamani for the respondent at the hearing of this application on 18th February 1998 that the applicant was involved in its preparation of the decree passed by the superior court in the civil suit referred to at the beginning of this ruling is required by the relevant provisions of Order XXI Rule 7 of the Civil Procedure Rules.

.....
.....

There does not appear to be any provisions in the Auctioneers Act 1996 nor in the

Auctioneers Rules 1997 for dispensing with the foregoing rule. Yet the respondent proceeded to execute the decree and physically attached the applicants movable goods without complying with the said rule. The flagrant disregard of the provisions of this rule stacks of gross irregularity in the respondent's execution process of the decree of the superior court in Civil Case No. 222 of 1997. It would be an abuse of the process of this court if we were to countenance such an execution.

Hence while we decline to order a stay of execution as requested by the applicant under rule 5 (2)(b) of the Rules of this court as outlined at the commencement of their ruling we think that on account of the respondent's non-compliance with the law in the execution process of the decree as we indicated in this ruling and to prevent abuse of the process of this court in the exercise of our inherent power under rule 1(3) of the aforesaid Rules the said execution process must and is hereby set aside.

.....

However, the costs occasioned by the irregular and wrongful attachment including the court broker's costs shall be borne by the Respondent.” (emphasis mine)

While this court may not necessarily be bound by the Obiter dictum of Lord A.B. Shah in the Bamburi Portland Cement case, however, the said to opinion views accepted and upheld by a full bench in its ratio decidendi in LAKELAND MOTORS LTD –V- SEMBLI.

As a result, I do hold that the said decision is the law now in respect of the Interpretation of Section 94 of the Civil Procedure Act and Rules 7 of over 21 of the Civil Procedures Rules. Being a decision of highest court in the land, I am bound by the said decision. Happily, I wholly agree with the rationale of the decision and the interpretation of the law.

I do hold that any provisions of Order XXI of the Civil Procedure Rules suggestive of any other procedure or election which departs from Section 94 of the Act would be *ultra vires* the Act.

On my part I have not seen any provision that gives any power to the Registrar the power to consider and grant leave for execution before taxation or ascertainment of cost. I think that this is the reverse of the High Court presided over by a judge.

It was submitted on behalf of the plaintiff that the Objector is not a party in the suit and he has no locus standi to raise the question of the validity and irregularity of any of the execution processes. That the Defendant who was entitled to raise the said question did not challenge or oppose the executions. Such a question was dealt with Justice Waki (as he then was) in HCCC NO. 70 OF 1998 ATTA (KENYA) LTD –V- AFRO BAKERS LTD. He observed.

“.....

Their Counsel Mr. Hassan merely appeared in court and submitted that the objector would prove ownership of the goods and that the wrong advocates had appeared. But that is putting the cart before the horse. It must be shown in the first place that there was an attachment and a lawful one at that ...”

I am persuaded by the said approach. This is a court of law. It is the High Court of Kenya. It is established by law and regulated by the law. The court must be guided by the Civil Procedure Act and its Rules. While in certain cases, it may invoke sections 1A and 3A of the Act yet the rules of procedure and procedural law will not be disregarded. To

allow that would amount to an invitation for judicial chaos in civil litigation. There must be due process of the law, Even if the Defendant has not challenged the execution, here it is an Objector which claims that the attachment is unlawful and a nullity. I think that it is entitled to question the validity and regularity of the execution before even proving conclusively that it has an legal or equitable interest in the property attached, or is the owner. On a prima facie basis, on the basis of the material before the court, this court is able to determine and is of the view that the Objector is not a busy body and has been compelled to come to this court.

I do hold that the execution herein was irregular, unlawful and a nullity on the ground that no leave to execute was obtained as envisaged by Section 94 by the Civil Procedure Act.

As a result *ex debito justitiae* or *suo motu*, I do hereby recall the Warrants of Sale/Attachment, and set aside the same.

There shall be no execution of the Decree without compliance of Section 94 of the Civil Procedure Act, among other provisions of the Law.

In view of this there is no need to delve into the question of the Objector's interest or otherwise as there is no valid execution the basis upon which objection proceedings can be instituted or determined on merit.

I do hereby order that the plaintiff do pay the costs of the objection proceedings in any event and the cost of the Auctioneer if any.

Orders accordingly.

Dated and delivered at Mombasa this 9th day of March 2010.

M. K. IBRAHIM

J U D G E

9/3/10

Coram:

Ibrahim, J

Mr. Kazungu – Court clerk

Mr. Khagram for the Objector

Mr. Asige for the Plaintiff

Ruling in their presence.

Ibrahim, J