



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 118 of 2009

PRESSMASTER LIMITED..... APPELLANT/APPLICANT

VERSUS

ZAKARIA ARASA OIRA..... RESPONDENT

RULING

1. By a notice of motion dated 20th March 2009, Pressmaster

Limited who is the appellant in this appeal moved this court for several orders. Some of the prayers have already been dealt with but the applicant is now pursuing the following orders:

(i) An order of stay of execution of the judgment and decree in Nairobi CMCC No.12825 of 2005 delivered on 12th March 2009 pending the hearing and determination of the appeal.

(ii) That an order of interlocutory injunction do issue restraining the respondent Zakariah Arasa Oira, his agent or assigns from cashing using, alienating, or otherwise disposing of monies paid in satisfaction of the judgment and decree in Nairobi CMCC No.12825/05 Milimani, amounting to Kshs.341,494/= pending the hearing and determination of the appeal.

(iii) That the costs of the application be provided.

2. The application is supported by an affidavit sworn by Michael Mwanzia the human resource manager of the appellant, in which he depones that the respondent wrongly proceeded to attach the assets of the applicant without first proclaiming the goods. Thus coercing the appellant to pay a sum of Kshs.341,494/= in satisfaction of the judgment and payment of the Auctioneer's fees.

3. The appellant contends that unless the orders sought are granted, it will suffer substantial loss as the respondent is a man of little financial means and will not be capable of making restitution of the decretal sum, if the appeal succeeds.

4. On 20th March 2009, the appellant obtained an ex-parte order for deposit of the sum of Ksh 341,494/= into court. It is submitted that the respondent has failed to comply with that order.

5. Relying on *Jogoo Kimakia Bus Service Ltd. v/s Electrocom International Ltd (1985) KLR 260*, Mr. Obwayo who appeared for the appellant maintained that the execution was not complete as there was still a pending order for deposit of the money in court.

6. The Notice of Motion is opposed through a replying affidavit sworn by the respondent, and another affidavit sworn by Muganda Wasulwa, who is a registered Auctioneer trading as Keysian Auctioneers. The respondent maintains that the application before the court is frivolous, vexatious, an afterthought, and an abuse of the court process, as it is merely meant to delay the course of justice. It is contended that the appellant filed an application similar to the notice of motion now pending before this court on the 12th March 2009 and that the application was dismissed for non attendance on 18th March 2009. The auctioneers swears that he visited the appellant's premises on the 12th February 2009 and proclaimed the appellant's goods and that on the 19th March 2009 they proceeded to the appellant's premises and were paid the decretal sum.

7. Miss Ontiti Counsel for the respondent submitted that the notice of motion has been brought late after the execution process has been completed. Counsel further submitted that the appellant had failed to establish substantial loss, as he has not proved that the respondent will not have the means to reconstitute the decretal sum should that become necessary.

8. Relying on *H.C.C. No. 394/2002 Southern Credit Bank Cooperation v/s Andrew Sunkuli and another* and *H.C.C.C. No. 1065 of 2002 Jackson K. Kivinda v/s United Insurance*, Miss Ontiti further urged the court to distinguish the case of Jogoo Kimakia (*supra*), maintaining that in that case the court noted that it had control over the proceeds of the sale until the time that the judgment creditor receives them in his hands.

9. Miss Ontiti contended that in this case the fact that the advocate had received the money from the auctioneer on behalf of the client meant that the orders for deposit were obtained after the fact. The court was therefore urged to dismiss the application.

10. I have given due consideration to the application before me. There are two main issues that stand out. The first one is whether the execution process against the appellant had been completed and application overtaken by events. The second issue is whether, if the application is not overtaken by events, the appellant has satisfied the conditions of Order XLI Rule (4) (2) of the Civil Procedure Rules.

11. With regard to the first issue it is not disputed that the judgment subject of the decree sought to be stayed was made on 12th February 2009. A copy of the decree exhibited by the respondent as an annexure to the affidavit of the auctioneer, shows that the decree was issued on the same date. The certificate of stated costs is indicated to have been issued on unspecified date in March 2009. The warrants of attachment and sale are dated 10th March 2009 and the notification of receipt of warrants by the auctioneer is dated 11th March 2009. The averment by the auctioneer that he proceeded to the appellant's premises on 12th February 2009 and proclaimed the goods must therefore be an error. Indeed the date on the proclamation is reflected as 12th March 2009.

12. In his supporting affidavit Michael Mwanzia has also conceded in paragraph 4 that the auctioneer went to their premises on 12th March 2009. Although the appellant denies that there was no proclamation done on that date, it is evident that the auctioneer visited the appellant's premises and actually proclaimed the goods. There was therefore nothing wrong with the auctioneer's attempts to attach the appellant's goods on the 19th March 2009 pursuant to the proclamation of 12th March 2009. Indeed the auctioneer having given the appellant seven days notice, and no order for stay of execution having been obtained within that period, there was nothing to stop the auctioneer from attaching the goods.

13. The appellant having elected to pay the decretal sum, he cannot now turn round and claim that the same was done under duress. Moreover although the appellant obtained an ex-parte order for deposit of the decretal sum paid to the auctioneer. A copy of a letter dated 23rd March 2009 addressed to the respondent and the auctioneer was exhibited, showing that service of the order was done on that date. The respondent has maintained that by that date, the money had already been paid to the respondent through his advocate and the court order could not therefore be complied with.

14. It is evident that the circumstances in which the decretal sum was paid to the respondent are quite different from the circumstances that arose in the case of Jogoo Kimakia (supra). In this case the appellant made no attempt to obtain an order of stay of execution until after the execution had been levied against him I find therefore that the execution process had been completed and there is therefore nothing to stay.

15. Further even assuming that the execution process was not completed, the appellant has not satisfied the conditions of order XL1 rule 4 (2) of the Civil Procedure Rules. The application for stay of execution was brought about a month after the judgment and no explanation has been given for this delay. Further other than a bare allegation that the respondent is a man of humble means, there is nothing to support the appellant's contention that the respondent will not be able to reconstitute the decretal sum should that become necessary. The appellant has not therefore demonstrated that it will suffer substantial loss unless the order for stay of execution is granted.

16. For the above reasons I find no merit in this application and do therefore dismiss the application with costs.

Dated and delivered this day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

..... **for the appellant**

..... **for the respondent**

Erick – Court clerk