



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

Misc. Case 530 of 2006

KENYA CHEMICAL AND ALLIED WORKERS UNIONDECREE-HOLDER

VERSUS

COSMO PLASTICS LIMITED.....JUDGMENT-DEBTOR

AND

SPA MILLERS LIMITED OBJECTOR

RULING

This is an application (by chamber summons dated 7th June, 2007) by SPA MILLERS LIMITED (hereafter called the Objector) under Order 21, rule 57(1) of the Civil Procedure Rules. It seeks the main order that the attachment by proclamation of certain goods on 24th May, 2007 in execution of decree herein be lifted. The Judgment-Debtor is COSMO PLASTICS LIMITED while the Decree-Holder is KENYA CHEMICAL & ALLIED WORKERS UNION.

There are three grounds for the application appearing on the face thereof:

1. That the attached goods belong to the Objector and not to the Judgement-Debtor.
2. That the attachment was done at the Objector's factory on Runyenjes Road, Nairobi and not at the Judgement-Debtor's premises.
3. That the Decree-Holder does not have any claim against the Objector, and that therefore the attachment is unlawful.

There is a supporting affidavit sworn by one ATEET D. JETHA, a director of the Objector.

The Decree-Holder has opposed the application as set out in the replying affidavit filed on 21st June, 2007. It is sworn by one JAMES CHIGWADO WATSAKA, the Decree-Holder's shopsteward based at the Judgement-Debtor's factory. The essential sum-total of the replying affidavit is that the attached goods belong to the Judgement-Debtor and not to the Objector.

I have considered the submissions of the learned counsels appearing, including the one case cited. To succeed in this application, the Objector must establish on a balance of probabilities that it is entitled to, or has a legal or equitable interest in, the whole or part of the attached properties. See rule 53(1) of Order

21 of the Rules. The attached goods are listed in the proclamation dated 24th May 2007, a copy of which is annexed to the supporting affidavit. They comprise mainly grinding, milling, lathe, drilling and other light industrial machines. It is deponed in the supporting affidavit that the attached and other goods were procured by the Objector from EXCEL MILLING LIMITED after obtaining a facility from a named bank. As evidence of this procurement two documents are annexed to the supporting affidavit. One is an invoice dated 5th December, 2005 for KShs. 18 million issued to the Objector by Excel Milling Limited. The other document is a letter of credit dated 29th December, 2005 addressed to the directors of the Objector by the named bank. The credit said to be extended is KShs. 18 million, and the purpose thereof is "to finance the purchase of maize flour milling machinery from Excel Milling Limited".

The Objector itself was incorporated on 18th October, 2005 as is evidenced by a copy of its certificate of incorporation annexed to the supporting affidavit. Finally, it is deponed that the attached goods were in two godowns, Nos. 10 and 11, which were clearly marked with the Objector's name and logo. There is a copy of a lease annexed to the supporting affidavit for those two and other godowns in favour of the Objector. The lessor is GOSRANI INVESTMENTS LIMITED. The lease document is dated 1st December, 2005. The lease is for a term of 5 years and 3 months to run from 1st July, 2005.

Against this evidence tendered by the Objector is the word of the Decree-holder's shopsteward based at the Judgement-Debtor's factory. That word is contained in the replying affidavit, and is to the effect:-

- (i) that the attached goods are machines, equipment and other properties belonging to the Judgement-Debtor that were transferred to the godowns where they were found in the years 2000 and 2001;
- (ii) that the shopsteward, James Chigwado Watsaka, participated as an employee of the Judgement-Debtor in relocation of the machines, equipment and other goods;
- (iii) that he identified the attached goods as belonging to the Judgement-Debtor because of "having worked, and undertaken maintenance and servicing of various machines, at Cosmos Plastics Limited for many years, and participated in the relocation of the machines and other properties of the said company....."; and
- (iv) that besides, another unnamed person described as "an African man" "confirmed" to the shopsteward and the auctioneer that the machines and other properties of the Judgement-Debtor were stored in godowns 9, 10 and 11.

I have considered the conflicting evidence regarding ownership of the attached goods. During submissions, the Decree-Holder's learned counsel raised technical objections to the various documents annexed to the supporting affidavit. However, there was no challenge to these documents in the replying affidavit. Had there been such challenge, the Objector would have had a chance to address the issues raised in a supplementary affidavit. I consider that the technical objections raised were raised too late.

The available documentary evidence shows clearly that the Objector is the lessee of the godowns at which the goods in question were attached. The attached goods, as already seen, are mainly grinding, milling, lathe, drilling and rolling machines. There are also other properties, including 82 office chairs. As evidence of its alleged purchase of the attached goods the Objector has exhibited an invoice for KShs. 18 million issued to it by the alleged seller, Excel Milling Limited. An invoice is not evidence of payment; it is a demand for payment. But of greater significance, according to the invoice what was sold was a complete sifted flour milling plant of 80 ton/24 hour capacity comprising a feeding bin, an elevator, separators, conveyors, etc. Also said to have been sold as per the invoice was a 45 ton mild steel silo that was not installed, and also various other hand machines, including an electric blower, a welding transformer, an angle grinder, a drilling machine, etc.

It is quite clear that the items appearing in the invoice have no resemblance to or connection with the attached goods at all. The attached goods appear to be old, separate and unconnected pieces of

machinery. There is no indication at all that they could have come from one complete and assembled flour milling plant. I accept the testimony of the shopsteward contained in the replying affidavit that the attached goods belong to the Judgement-Debtor and were stored in the years 2000 and 2001 where they were found by the auctioneer. That they were found in the Objector's premises is not surprising, given that the two appear to be sister companies.

The Objector has therefore failed to prove on a balance of probabilities that it is entitled to, or that it has a legal or equitable interest in, the whole or a part of the attached property. I must therefore refuse the application by chamber summons dated 7th June, 2007. It is hereby dismissed with costs to the Decree-Holder. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF JULY 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 11TH DAY OF JULY 2008.