



REPUBLIC OF KENYA

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

Civil Appeal 477 of 2008

GOLDES GYM LIMITED..... APPELLANT

VERSUS

IDA TITO.....1ST RESPONDENT

BENEDICT W. MALOMBA.....2ND RESPONDENT

CHARITY KANINI MULI.....3RD RESPONDENT

MARY M. MULI.....4TH RESPONDENT

R U L I N G

By a notice of motion dated 22nd September, 2008, the applicant Goldes Gym Limited, seeks an order for stay of execution of the orders made on 2nd April, 2008, in the Chief Magistrate's Court, in Misc. Civil Application No.67 of 2008, pending the hearing and determination of the appeal. The applicant also seeks an order that the goods attached on 22nd April, 2008 be returned to the premises of the applicant.

The applicant is aggrieved by an order made by the magistrate in the lower court dismissing objection proceedings which the respondent had filed against the attachment of its properties by the respondents in execution of the decree. The applicant has filed a memorandum of appeal raising 11 grounds. The applicant maintains that its appeal has high chances of success, but that unless the order for stay of execution is granted the appeal will be rendered nugatory. The applicant contends that it will suffer irreparable loss if the attached goods which are worth over Kshs.50 million are sold as the value far outweighs the decretal amount. The applicant maintains that since the goods claimed belong to it, it should not be ordered to provide any security. In support of the application Counsel for the applicant has relied on *Butt vs Rent Tribunal (1982) KLR 417* and urged the court to exercise its discretion in the applicant's favour.

The respondents object to the application through a replying affidavit sworn by Ida N. Tito. It is contended that the application is an abuse of the court process, as it seeks to stay orders which are not subject of the appeal. It is maintained that there is nothing to stay in respect of the ruling delivered on 19th August, 2008 dismissing the objection proceedings. It is further contended that the applicant has not sought to appeal or challenge the orders granted on the 2nd April, 2008. Therefore, the applicant cannot

purport to challenge the orders by way of an appeal from the objection proceedings.

The respondents explain that they have a decree in their favour against the applicant's two directors and only shareholders, and that by an order dated 2nd April, 2008 the lower court lifted the veil of incorporation and allowed the respondents to execute the decree against the assets of the applicant. The respondents maintain that they have a lawful judgment and decree and should be allowed to execute it. The respondents further maintain that they are in a position to refund the decretal sum if required to. Counsel for the respondents urged the court to dismiss the application as the applicant has failed to satisfy the conditions laid down under Order XLI Rule 4 of the Civil Procedure Rules.

The orders issued by the Chief Magistrate's Court Milimani on 2nd April, 2008 in Misc. Civil Application No. 67 of 2008, which the applicant seeks to stay were as follows: -

- (i) That the application be and is hereby certified as urgent.
- (ii) That the judgment and decree issued by the Cooperative Tribunal in Case No.461 of 2007 between Idah N. Tito and 3 others vs Clip Investment Cooperative Society Ltd & 5 Others be and is hereby adopted by the Court.
- (iii) That attachment of the shares and assets of the 3rd and 6th respondents in Goldes Gym Limited be and is hereby granted.
- (iv) That actual seizure of all assets and properties of Goldes gym Ltd be and is hereby granted.
- (v) That an order to break-in be and is hereby issued in favour of Milestone Auctioneers into wherever the assets and properties of Goldes gym Ltd are located under supervision of Officer in Charge of Administration Police SGB Uhuru Chief Camp and Mukuru Nyayo Camp South B Nairobi.

It is evident that the attachment levied on the applicant's goods on 22nd April, 2008 was pursuant to the orders issued on 2nd April, 2008.

The applicant did not however appeal against the above orders or seek to have the same set aside, but filed an objection to the attachment of their goods pursuant to Order XXI Rule 53 of the Civil Procedure Rules. This is what led to the objection proceedings and the ruling delivered on 19th August, 2008 in which the objection was dismissed.

In effect the applicant has never challenged the orders of 2nd April, 2008 which ordered for the lifting of the veil of incorporation and attachment of the applicant's goods. The orders of 2nd April, 2008 therefore remain legal and valid. The application before me is not an ordinary application for stay of execution of the decree or order appealed against as provided under Order XLI Rule 4 of the Civil Procedure Rules. Thus, there is no justification for this court staying orders which are not the subject of the applicant's appeal. Nor is there any justification for this court releasing goods properly attached pursuant to a court order which has not been challenged. The upshot of the above is that I find no merit in the notice of motion dated 22nd September, 2008. Accordingly, it is dismissed with costs.

Those shall be the orders of this court.

Dated and delivered this 21st day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

No appearance for the applicant

Masese H/B for Rimui for the respondent