



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 53 of 2002

SILVESTAR INDUSTRIES NAIROBI LIMITED.....PLAINTIFF

VERSUS

SAGGA INDUSTRIES LIMITEDDEFENDANT

RULING

The application for my determination is brought under Order 21 Rules 49 and 59 of the Civil Procedure Rules. The application has three prayers namely:-

- (1) That this Honourable court be pleased to issue an order prohibiting the judgement debtor from transferring or charging its property known as L.R. No.Limuru town Plot No.185 to any individual or financial institution.**
- (2) That this Honourable court be pleased to order that the defendant's property known as L.R. No.Limuru town plot No.185 be sold to satisfy the decree herein for Kshs.920,011/85 together with interest thereof at court rates from 27th July, 2006 until payment in full.**
- (3) That the costs of this application be in the cause.**

The applicant's case is that it obtained judgement against the defendant on 5th December, 2005 for the sum of Kshs.530,000/= together with interest thereon at court rates from 18th January 2002 until payment in full. It is alleged that it is difficult to trace the assets of the judgement debtor. And after a thorough investigation, it was discovered the defendant owns a property known as **L.R. No.185** situate in Limuru.

The defendant filed a replying affidavit sworn by **Mr. Obadiah Kihara Wainaina**, who is the Managing director of the defendant company. He claims that the plaintiff's application is incompetent, misconceived and does not lie in law. He confirms the existence of plot No. Limuru town 185 but he says the same is charged to Kenya Commercial Bank Limited for Kshs.10 million. And placing a prohibitory order on the parcel will curtail the Bank's statutory power protected by the charge.

Mr. Kinyanjui Advocate for the respondent raised several issues, which to him rendered the application as improper. The first point is that the deponent of the supporting affidavit does not state the

true place of abode, which is in contravention of Order 18 rule 4 of the Civil Procedure Rules. The address used by the deponent he stated is that of the Advocate for the plaintiff, while the deponent is the Managing director of the plaintiff company with its own postal address.

Secondly he submitted that an affidavit cannot state matters which are not within the deponent's knowledge, information and belief. But in this case the source of information is not disclosed.

He also submitted that the signature on the verifying affidavit and the one appearing on the supporting affidavit is different, therefore that there is a possibility of forgery being committed by the deponent.

On merit **Mr. Kinyanjui** Advocate submitted that the application is brought under the wrong provision of the law. There is no abstract of title having conducted the necessary search. And that such a search will tell the court whether the property is charged or not. In any case there is no evidence to show the property belongs to the judgement debtor and the only way to do so is to exhibit a copy of the title.

I have taken into consideration the submissions of both Advocates in order to arrive at a proper determination. I have also considered the supporting affidavit and the reply. And after my consideration I think it is important to consider whether the application is properly before court.

Order 21 Rule 49(1) states;

“where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgement-debtor from transferring or charging the property in any way and all persons from taking any benefit from such purported transfer or charge and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property”.

The applicant in its first prayer seeks an order prohibiting the judgement-debtor from transferring or charging the suit property **No.Limuru Town 185** to any financial or individual institution. And in paragraph 10 of the replying affidavit, the judgement debtor confirms that the property exists and that it charged to Kenya Commercial Bank for Kshs.10 million. The defendant also confirms through its Managing director that it does not carry any business but exists in name only.

The defendant does not contest it owes the plaintiff the sum claimed in the decree but says that it no longer carries business. It is strange for the defendant not to contest the circumstances that gave rise to the debt but uses technicalities to delay or defeat the case of the judgement-creditor. The existence of the suit property is not denied. And in my view a party need not prove facts already admitted by the opposite party. In essence the issue of the title of the property is not in dispute. The only dispute is whether the property is charged to Kenya Commercial Bank. The defendant does not offer any evidence to show that the property is charged to Kenya Commercial Bank or any other institution.

The defendant complains that by placing a prohibitory order on the property, the court would curtail the Bank's statutory power of sale protected by the charge. It is not within the powers of the defendant to assert a right on behalf of 3rd party without any evidence. Such an allegation cannot be sustained before a court of law, as there is no sufficient or reasonable evidence to support it. My view is that the judgement debtor is taking two inconsistent positions with a view too defeat the case of the judgement creditor. Such a conduct smacks of dishonesty which a court of equity cannot allow.

It is the responsibility of the defendant to satisfy the decree that was obtained against it. It is no defence to assert the defendant is no longer carrying business. Such statement made under oath is an admission of deceit with a view to obstruct the case of the plaintiff. It is my position that the applicant's application is proper and cannot be defeated by technicalities. The essence of the court is to determine matters on merit. I see no reason to fault the statement made by the deponent on the supporting affidavit. The issue of the address and place of abode are matters of technicalities, which cannot be used to derail the case of the plaintiff.

In any case no prejudice would be suffered by the defendant by use of an address which belongs to the Advocate for the plaintiff. The failure to comply with such technical or procedural matters cannot defeat the merit determination of the dispute. This court is concerned with substantive determination of a party's cause of action. And matters of procedure cannot be elevated to a position higher than substantive determination of the dispute. The rights of the parties cannot be trampled over due to procedural lapses committed through human error and more so inadvertently. I do not think the rights to substantive justice would be wished away simply because a party thinks a deponent did not indicate his place of abode. In this case no prejudice has been caused to the defendant by the inadvertent omission of the plaintiff. The omission does not go to the root of the matter for my determination.

Having given this matter my utmost consideration, I think the application is well merited and it is allowed with costs to the plaintiff.

Dated and delivered at Nairobi this 26th day of April, 2007.

M. A. WARSAME

JUDGE