

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Appeal 21 of 2007

(Appeal from original BGM SPM CC No. 312 of 1999)

NZOIA SUGAR CO. LTD.....APPELLANT/APPLICANT

VS

NZOIA OUTGROWERS LTD.....1ST RESPONDENT

SIUMA TRADERS.....2ND RESPONDENT

RULING

The applicant Nzoia Sugar Company Limited through Kiarie & Co. Advocates filed the application dated 24.4.2007 under a Certificate of Urgency seeking the following order:

“That the enforcement of the garnishee order issued by the Deputy Registrar and directed at National Bank, Bungoma Branch, or other form of execution be stayed pending the hearing and determination of the appeal preferred herein against the rulings and orders of K. Ngomo made on 18.4.2007 and on 19.4.2007.”

The application is supported by the 5 grounds on the face of the application and the supporting and further affidavits of Saul Wasilwa sworn on 24.4.2007 and 15.5.2007 respectively. The same is opposed by the 27 paragraph Replying Affidavit of Zakaria Baraza. The same was also opposed by the 1st respondent vide the grounds of opposition dated 24.5.2007. It is however noted that the application did not directly affect the 1st respondent as conceded by Mr. Masinde for 1st respondent in court on 9.5.2007. Mr. Masinde did not appear in court to oppose the said application either – may be for the reason that the same does not affect his client. I will therefore concentrate on the grounds on the face of the application along with the 3 affidavits on record for and against the application. In order to understand the application and orders sought, it is necessary to give a brief background of the matter that gave rise to these orders. There were arbitral proceedings between the applicant herein and the 1st respondent namely Nzoia Outgrowers Company Ltd. Awards were made and the same were adopted as judgment in Bungoma H. C. Misc. Civil Application No.312 of 1999 on 24.11.1999. Some warrants of attachment were issued pursuant to the decree that followed that Judgment. The applicant herein nonetheless challenged the validity of the said warrants saying that the same were based on a null and void decree. The applicant therefore moved the High Court by way of Judicial Review in Mis. Civil Application No.117/2005. The respondent herein was not a party in that Judicial Review Proceeding. The parties in the Judicial Review entered into a consent which was adopted by the Judge and which disposed of the application. Among the orders agreed upon and adopted by the parties was that the warrants of attachment issued on 17.12.2004 and the decree in question were removed into the High Court and quashed. This effectively meant that the decree and the warrants in question were no longer in existence from the date of that order and they could not therefore be enforced. The decree giving rise to the warrants was also quashed and this therefore meant that no other warrants could emanate from that judgment. There was also an order of prohibition issued to the effect that;

“The respondents by themselves, agents and/or servants from doing any act or thing that may injure the applicant or deprive it of its movable or immovable property whether by way of proclamation, attachment, sale or otherwise.”

There was also an order that each party bears its own costs. Admittedly, these orders did not make any provision for the payment of the auctioneers costs. Once the decree and warrants were quashed, the auctioneer who is now the 2nd respondent in the Notice of Motion dated 24.4.2007 was left without reprieve.

It is noted that the order of 28/11/2005 quashed the decree and all the warrants which emanated from that decree. This meant that all orders which the Deputy Registrar may have made before the date of that order were quashed along with the said warrants. This included the order he made of 17.08.2005 where he had condemned the applicant herein to pay costs to the respondent. I do not wish to go into detail but the Deputy Registrar has no jurisdiction to order a party to pay costs to another where such an order had not been made by the High Court. The auctioneer ought to have gone back to the High Court and asked the High Court to determine which party would be responsible for payment of his costs. This is actually what was held in some of the authorities presented to me by counsel herein.

The pertinent question that arises therefore, which in my view is the gist of this application is whether there was on record any lawful order to the effect that the applicant herein pays costs to the respondent. I have gone through the respondents replying affidavit and all the annexure thereto. I have not seen such an order. The respondent in paragraphs 6,7 and part of his replying affidavit admits that the bill that was taxed is the one dated 5.4.2005 and which was sanctioned by the Deputy registrar’s order of 17.08.2005. As stated earlier on, this order was superseded by the High Court Order of 28.11.2005 which quashed all those warrants and orders arising from the said decree. Indeed, once the decree was quashed no order of whatever nature emanating from that decree could be enforced. The bill of costs which was taxed on 18.4.2007 was therefore invalid and not capable of being taxed. Pursuant to the order of 28.11.2005, such a bill was non-existent for all intents and purposes. That is the conclusion I have arrived at after considering the application and the rival affidavits before me and also after being duly informed by the authorities presented to me by both counsel.

Having arrived at this finding, it goes without saying that no attachment or execution of whatever nature could lawfully flow from that bill. The issue here was not the taxation and so Rule 55 (3) of the auctioneers rules 1997 does not apply. Some peripheral issues have been raised as to the application being brought under the wrong provisions of the law; and also that Sichangi & Co. are not properly on record for failing to comply with provisions of O111 r.9A. Mr. Sichangi’s locus in this matter is a ground of appeal and I will leave the matter to be canvassed at the hearing of the said appeal if we get to that. For the purposes of this application, I chose to presume that he was properly on record. On the issue of whether the proper procedure was followed in filing this application, my finding is that this was a unique application which in my view is outside the ambit of OXLI r.4 of the Civil Procedure Rules reason being that the said order specifically deals with applications for stay of a decree or order from the subordinate court – hence the term *“court appealed from.”*

In this case, the application was to the effect that the orders giving rise to the appeal from the Deputy Registrar were non-existent. This was a proper situation to invoke the inherent powers of the court. The application did not therefore breach any rules of procedure. For all the foregoing reasons, my finding is that the applicant has shown sufficient cause that the order of stay should be granted. Accordingly, I allow the application and order that the enforcement of the garnishee order issued by the Deputy Registrar and directed to National Bank, Bungoma Branch, or other form of execution be and is hereby stayed pending the hearing and determination of the appeal filed on 24.4.2007. Costs will be in the cause.

W. KARANJA

JUDGE

DELIVERED, Signed and dated at Bungoma this 10th day of July, 2007. In the presence of Mr. Kiarie, Mr. Makali, Mr. Kassim and Mr. Sichangi for the parties.