



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

Civil Suit 737 of 2007

EMERALD EVERGREEN COMPANY LTD.....PLAINTIFF/APPLICANT

VERSUS

ZABLON O. ONALNG trading as

HOMESLAND SERVICES (AUCTIONNERS).....1ST DEFENDANTS/RESPONDENT

ASHA SAID 2ND DEFENDANT/RESPONDENT

JANE ATIENO ODERO 3RD DEFENDANT/RESPONDENT

PHILIP OMONDI ODERO 4TH DEFENDANT/RESPONDENT

MARY ANYANGO 5TH DEFENDANT/RESPONDENT

RULING

It surprises me that in the this suit despite the proclaimed service upon the 1st Defendant and also upon M/s Abisai & Co., Advocates at Rongo and Migori respectively, the aforesaid Advocates served on the basis that they are acting for the 2nd to 5th Defendants, proceedings are going on ex-parte with no appearance for the Defendants who seem to be based at Rongo or Migori. The Plaintiff is based in Nairobi and seems to have filed this suit in Nairobi on the basis that the cause of action arose in Nairobi.

The Amended Chamber Summons before me dated 25th October, 2007 is from the original one dated 22nd October, 2007 and filed on 23rd October, 2007 together with the Plaintiff in this suit against the five defendants. There are three prayers in the Plaintiff and are indicated as A, B and C the last one being a prayer for costs.

Prayer A seeks a permanent injunction restraining the Defendants from attaching or selling by auction or in any other way alienating, disposing of or interfering with the Plaintiff's exclusive enjoyment of its proprietary rights and possession of Motor Vehicle Registration Number KAP 978 R and any other of its properties whatsoever.

Prayer B is for general damages for unlawful attachment and this suggests that the suit Motor Vehicle aforementioned is already attached even though prayer A has limb seeking to restrain attachment.

The suit, as seen from the plaint and further pleadings, is based upon the plaintiff's claim that it is the lawful owner of the suit Motor Vehicle which has therefore been wrongfully attached by the Defendants who are treating the vehicle as the property of Emerald Funeral Service Limited, a Judgment debtors in four civil cases in the Principal Magistrate's Court at Migori, namely:-

P.M.C.C. No.304/2005 where the Plaintiff is Asha Said;

P.M.C.C. No.305/2005 where the Plaintiff is Jane Atieno Odero;

P.M.C.C. No.306/2005 where the Plaintiff is Philip Omondi Odero; and

P.M.C.C. No.310/2005 where the Plaintiff is Mary Anyango

In the Amended Chamber Summons dated 25th October, 2007 now before me therefore, the Plaintiff, now applicant, seeks court orders in terms of four prayers numbered 3,4,5, and 6

“ Under Order XXXIX Rules 2, 2A, 3, 5, and 9 of the Civil Procedure Rules, Section 3A and 63(c) and (e) of the Civil Procedure Act, section 65 (2) of the Constitution of Kenya

s 3(1) of the Auctioneers Rules 1997 and All Enabling Provisions of the Law and Procedure.”

In prayer number 3 the Applicant wants the Respondents be restrained from attaching and selling by auction or in any other way alienating disposing of or interfering with the Plaintiff's exclusive enjoyment of its proprietary rights and possession of the Motor Vehicle Registration Number KAP 978 R pending the hearing and determination of this suit.

As if prayer number 3 above is consistent with prayer number 4, the Applicant goes on in prayer number 4 to ask for a stay of execution of the decree issued by the Principal Magistrate's Court at Migori in each of the aforementioned Civil Cases until the hearing and final determination of all those suits.

In prayer number 5 the Applicant asks this court to use its supervisory jurisdiction “to call up from the **Principal's Magistrate's Court at Migori the court files and all record pertaining to above mentioned suits pending further orders from this honourable court.**”

Prayer number 6 is for costs “of this Application”

That is a formidable combination of the powers of this court in relation to proceedings in a subordinate court, however it ought to be realized that any combination, where necessary, ought to be done, not only correctly, but also lawfully, for the ends of justice. That is why we have the Civil Procedure Act and its Rules to guide us appropriately.

It follows therefore that although this Chamber Summons dated 25th October, 2007 is in a pending suit where this court can grant an injunction in accordance with provisions of Order XXXIX, that procedure is not intended to use this court to stop execution of a judgment entered by a subordinate court of competent jurisdiction. If that were done, as I am being asked to do in this case, the law will have been misapplied and injustice will be the ultimate result.

Similarly if the High Court is used under its supervisory jurisdiction to call up case files in cases properly in subordinate courts to store them in the High Court when the High Court, in proceedings such those before me in this case, is making stay of execution orders against judgments in those case files properly entered by subordinate courts of competent jurisdiction, the law will have been misapplied and injustice will be the ultimate result. In law and for ends of justice, the High Court normally makes stay of execution orders against judgments entered by subordinate courts where appeals from those Judgments have been filed in the High Court and there is need for stay of execution orders.

Otherwise in a situation such as the one forming the basis of this suit and therefore forming the basis of

this Chamber Summons, I thought the Applicant were alive to provisions of the Civil Procedure Act and Rules relating to objection proceedings which give a stranger in a suit, like the plaintiff herein in relation to aforementioned Civil Cases in the Principal Magistrate's Court at Migori , the opportunity to go to Migori Court to object to the attachment of the Motor Vehicle and during the hearing of the objection interpartes, satisfy the Magistrate in each of those four cases that indeed the attached Motor Vehicle is owned by him, the stranger objecting and not the Judgment debtor in the suit. The Objector will then have the opportunity of appealing to the High Court from the decision in the objection of the Magistrate if aggrieved by that decision in the objection and all that is in our Civil Procedure law which, on the contrary, does not have the law for the procedure now adopted in this case although the Applicant thinks the provisions it has referred to in this Amended Chamber Summons enable the Applicant to do what it is doing in this suit. I hold the Applicant is misapplying the provisions the Applicant is citing for this Amended Chamber Summons.

It should not be forgotten that subordinate court's including the Principals Magistrate's Court at Migori; are lawful courts of this country endowed with competent jurisdiction to enter the type of judgments the Applicant is trying to challenge through this Chamber Summons and the suit. Those judgments must be respected by everybody and be challenged only in accordance with the law which does not allow a stranger in the relevant proceedings to challenge Magistrate's Judgment in those proceedings the way the Applicant in this Chamber Summons before me is doing. A stranger, like the Applicant before me now, is permitted through objection proceedings only.

True the Chamber Summons has not been opposed but that should not be a reason for me granting prayers in the Chamber Summons even if the First Respondent was not licensed to execute court orders in Nairobi. The Applicant must itself follow the law correctly before the Applicant it blames any one else for breaking the law.

As I think what I have said so far is sufficient to dispose of the Chamber Summons, although other reasons may still be there, I do find the said Chamber Summons, not only containing a grain of chaos for our Civil Cases Procedure, but also misconceived in law, incompetent and therefore not maintainable and do hereby dismiss it with no order as to costs and interim orders granted on 29th October, 2007 hereby terminated.

Dated and delivered at Nairobi this 5th day of December, 2007.

J.M. KHAMONI

JUDGE