REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Milimani Commercial Courts Commercial and Tax Division)

MISC APPLI 382 OF 2004

OWINO OKEYO & COMPANY …..……….........................……………..... PLAINTIFF

VERSUS

FUELEX KENYA LIMITED ...……………...........................……….…...…DEFENDANT

RULING

This application has been brought under the provisions of Order L. Rule1, and Order XXI Rules 6 and 7 of the Civil Procedure Rules and Section 3A and 94 of the Civil Procedure Act. The application seeks two primary orders of the court. These are: an order of stay of execution of the warrants of attachment and sale of the respondent's property and an order to strike out or set aside the applicant's application for execution filed on 16.2.2006 together with the warrants of attachment and any consequential orders arising therefrom.

The main reasons for the application are that the application for execution of the decree was made on behalf of the applicant firm which was dissolved and thus incapable of sustaining any legal proceedings and that the execution of the said decree was commenced without taxation and/or ascertainment of costs of the proceedings and in contravention of Section 94 of the Civil Procedure Act.

The application is supported by an affidavit sworn by one Nicholas Kanyeke the Financial and Operations Controller of the Applicant/Respondent company hereinafter called "the Client". Annexed to the said affidavit are two exhibits: a proclamation by Keysian Auctioneers and a Chamber Summons together with a supporting affidavit, a judgment in HCCC No. 637 of 2000 and a ruling in HC Misc. Appl. No. 156 of 2003.

The application is opposed on the primary grounds that the application is an abuse of the process of the court and is not maintainable in law; that the applicant is a firm name and is constituted by persons behind it and that there is a judgment in place which has not been appealed against, varied, altered or set aside.

I have considered the application, the affidavit in support thereof, the grounds of opposition and the able submissions by the learned counsels. Having done so, I take the following view of the matter. The foundation of this application is the argument that as the applicant firm was dissolved on 24.6.2003 pursuant to a judgment of Kuloba J. in HCCC No. 637 of 2000, it cannot sustain legal proceedings as

Ochieng J. ruled in HC Misc. Appl. No. 156 of 2003.

There is no dispute that the applicant firm of advocates was dissolved on 24.6.2003. But are proceedings it instituted against the respondent/client a nullity by reason of the said dissolution? Section 42 of the Partnership Act reads;

"***After the dissolution of a Partnership, the authority for each partner to bind the firm and the other rights and obligations of the partners continue notwithstanding the dissolution, so far as may be necessary to wind-up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise…"***

To my mind, it would appear that after dissolution of a partnership each partner has authority to bind the firm so far as may be necessary to wind-up the affairs of the partnership. It also appears to me that the rights and obligations of partners continue notwithstanding the dissolution to complete transactions begun but unfinished at the time of the dissolution. This position seems to be acknowledged in Order XXIX Rule 1 of the Civil Procedure Rules which reads;

"***Any two or more persons claiming or being liable as partners and carrying on business in Kenya may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were at the time of the accruing of the cause of action, partners in such a firm to be furnished and verified in such manner as the court may direct."***

This rule clearly recognizes that a partner may sue or be sued in the name of the firm of which he was a partner at the time the cause of action accrued dissolution notwithstanding.

The English position is the same. Order 81 Rule 1 as quoted in The Supreme Court Practice 1999 Volume 1 paragraph 81/1 reads;

"***Actions by and against firms within jurisdiction O.81 r. 1***

81/1 1. Subject to the provisions of any enactment, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue or be sued in the name of the firm (if any) of which they were partners at the time when the cause of action accrued."

Paragraph 81/1/11 in the same volume reads;

" '***Partners at the time when the cause of action accrued' – These words enable the co-partners in a firm dissolved before action to sue as a firm provided the co-partnership existed at the time the cause of action accrued."***

Turning now to the application at hand, there is no dispute that the partnership existed at the time the cause of action accrued. The Bill of Costs was taxed in the firm name. The application for judgment for the sum in the Certificate of Taxation was lodged in the name of the firm. The application for execution now impugned was lodged for the said firm. No objection was raised that the firm for which costs were sought had been dissolved. In any event, the respondent/client does not challenge liability to pay the costs. There is no allegation that another firm of Advocates has laid a competing claim against it. The stay of execution is not sought pending the filing of any further application/ action by the client. In my view this application is speculative and the client is clutching at straws.

With regard to the submission that the execution has commenced without taxation and/or ascertainment of costs of the proceedings contrary to Section 94 of the Civil Procedure Act, I have found as follows. The decree itself is pursuant to an order of costs in favour of the Advocates. Judgment for the said costs was sought in a Notice of Motion lodged under the provisions of Section 51 (2) of the Advocates Act. The summary procedure under that section in my view was intended inter alia to reduce

costs of recovering costs due to an advocate. An advocate would not be entitled to additional set of costs as he would in an ordinary suit. His costs would be limited to amount allowable on a Notice of Motion under the Advocates Remuneration Order.

Section 94 of the Civil Procedure Act reads;

"***94. Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation."***

Under this section, the High Court has a discretion to allow execution before costs of a suit have been ascertained by taxation. I have no doubt in my mind that if such leave had been sought it would have been granted in view for what I have stated above.

I have however been assured from the bar that the costs on the Notice of Motion will not be pursued. Nothing therefore turns on the provisions of Section 94 of the Civil Procedure Act.

The sum total of all the above is that the client's application dated 10.3.2006 and filed on the same date cannot succeed. It is dismissed with costs. Orders accordingly.

DATED AND **DELIVERED** AT **NAIROBI** THIS **3RD DAY** OF **MAY, 2006.**

F. AZANGALALA

JUDGE

3.5.2006