



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 437 of 2004

METRO PETROLEUM LTDPLAINTIFF

VERSUS

TURBO HIGHWAY ELDORET LTDDEFENDANT

RULING

This Notice of Motion has been brought under Sections 3, 3A, 34 (1), 44(1) of the Civil Procedure Act, Order XXI Rules 2 (1) (2) 18, 22 (2) of the Civil Procedure Rules, the Auctioneers Act 1996 and Auctioneers Rules 1997 and all other enabling provisions of the Law for the following primary orders: -

- 1. That there be a stay of execution and/or further execution of the decree and the sale herein pending the hearing and determination of this application.**
- 2. That all the goods properties, motor vehicles and tools of trade attached by M/s Igare Auctioneers pursuant to the warrants of attachment and warrants of sale issued on 14.3.2006 herein be released to the defendant on a running attachment pending the hearing and determination of this application.**
- 3. that the execution levied herein against the defendant's property goods and tools of trade is illegal as the defendant has fully satisfied the decree herein. That accounts be taken for the court to determine how much the defendant has paid to the plaintiff/applicant.**
- 4. That notice do issue against the defendant to show cause why payment made by the defendant should not be recorded and certified by the court.**
- 5. That the court do record and certify the amount paid by the defendant to the plaintiff.**
- 6. That the proclamation of attachment and the attachment levied herein by M/s Igare Auctioneers be declared illegal, null and void.**

The application is supported by an affidavit sworn by one Amil Aggarwal a Director of the defendant and is based upon the following grounds: -

- 1. That the attachment against the defendant's property, goods and tools of trade is premature.**
- 2. That the plaintiff is estopped from the said act of attachment by virtue of the agreement dated**

28.10.2004 which is still in force.

- 3. That the plaintiff by virtue of the said agreement has continued to draw profits from the defendant's petrol stations and continued to receive payments from the defendant and has since recovered all the amount owed.**
- 4. That the attachment was levied without a proclamation contrary to the Auctioneers Rules 1997.**
- 5. That the auctioneers attached good that are exempt from attachment under Section 44 of the civil Procedure Act.**
- 6. That the Auctioneer is in breach of provisions of the Auctioneers Rules 1997.**
- 7. That all steps taken by the plaintiff from the proclamation and attachment herein of the property, goods and tools of trade herein were done maliciously, clandestinely and with the sole intention of ambushing and disabling the defendant.**
- 8. That the attachment has paralyzed the business of the defendant totally.**

The application is opposed and there are replying affidavits sworn by Kamaljit Singh Serbarwal the plaintiff's Deport and Station Manager, Eldoret, Alfred Nyongesa Barasa another Deport Manager, and Margaret Anindo an auctioneer. There are also grounds of opposition filed by the plaintiff's advocate. In response to those replying affidavits the defendant has filed further affidavits sworn by the said Amit Aggarwal and the said Alfred Nyongesa Barasa.

The application was canvassed before me on 19.6.2006 by Mr. Kuloba, learned counsel for the defendant and Mr. Oloo learned counsel for the plaintiff. I have considered the application, the affidavits both for and in opposition of the application together with the annexures. I have also considered the Grounds of Opposition. I have finally given due consideration to the submissions made to me by counsel including the cases cited. Having done so, I take the following view of this matter.

Judgment in this case was recorded in terms of a consent letter dated 21.10.2004. By that consent judgment the defendant was inter alia to pay to the plaintiff Kshs.48,000,000.00 together with interest at the rate of 12% p.a. with effect from 4.8.2004 until payment in full. Such payment was to be made in monthly instalments to be determined by the plaintiff. The defendant was further at its cost and within 7 days from 21.10.2004 to provide such security as was acceptable to the plaintiff for the said sum. The defendant was further to pay the plaintiff's advocates fees and costs of the suit.

On 24.11.2004 the plaintiff was allowed to execute by way of attachment and sale of the defendant's property. The record does not show that the plaintiff moved the court again until 22.2.2006 when M/s Margaret Anindo t/a Egare Auctioneers sought extension of jurisdiction to carry out execution. That application was made by the plaintiff's advocates and was heard and allowed by Hon. Waweru J. on 10.3.2006. It is clear that between 24.11.2004 and 22.2.2006 a period in excess of one year had elapsed. Accordingly the court should have issued a notice to the defendant to show cause why the decree should not be executed against it. I have not traced a copy of such NTSC in this record. I take it therefore that no such notice was issued. I have not also seen reasons recorded dispensing with the requirement of the NTSC. In the premises, the execution in question having occurred without compliance with the rules regarding NTSC is irregular.

Of prime importance however, is the agreement entered into between the plaintiff and the defendant on 28.10.2004 titled "Acknowledgement of Debt". The same is annexed to the supporting affidavit of Amit Aggarwal aforesaid as "AAI". To the replying affidavit of Kamaljit Singh Serbarwal the same agreement is annexed as exhibit "KSSI". The agreement is elaborate and involved the defendant, its directors as guarantors and the plaintiff over the plaintiff's claim in this suit. It is significant that that agreement was entered into just two days after the consent to judgment was recorded on 26.10.2004. In view of that

agreement, it is rather surprising that the plaintiff moved the court on 24.11.2004 seeking to execute the decree herein, sums whereof were the subject matter of the said agreement. The record does not show that the plaintiff filed another application for execution save the application to extend the jurisdiction of the Court Broker.

In my view if the plaintiff were to apply for execution to recover the sum in the decree herein, an in depth application would have had to be made detailing the status of the agreement. I detected no such application in this record. In the premises the orders that in my view meet the ends of justice are as follows: -

1. **Execution of the decree herein is hereby set aside.**
2. **All the goods, properties, motor vehicles and tools of trade attached by M/s Igare Auctioneers pursuant to the warrant of attachment and sale issued on 14.3.2006 herein be released to the defendant.**
3. **Accounts be taken on the basis of the Agreement dated 28.10.2004 and a report thereof by a qualified Auditor and or Accountant be filed within Thirty (30) days of today. Such Auditor or Accountant be agreed by the parties failing agreement either party be at liberty to apply.**
4. **All costs do abide the results of the auditors/accountant's report.**
5. **Either party has liberty to apply.**

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF NOVEMBER, 2006.

F. AZANGALALA

JUDGE

16.11.2006

Read in the presence of:- Kemboy holding brief for Nyairo for the applicant and Mr. Ogue holding brief for Mr. Onyango for the respondent

F. AZANGALALA

JUDGE

13.11.2006