REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 197 OF 2003

JATCO TRANSPORTERS & TOURS AGENCY LTD. ……....1ST PLAINTIFF

DANIEL MUTUA MUOKI ……..……2ND PLAINTIFF

VERSUS

JASON NJIRU KITHINJI

TRADING UNDER THE NAME & STYLE AS JETCO CABS...1ST DEFENDANT

BIG NIPPON LTD ……..……..……2ND DEFENDANT

SAMUEL M. WARUTERE……..……..……..3RD DEFENDANT

JOSEPH KIPKORIR CHEBII ……..…….4TH DEFENDANT

JETCO CABS LIMITED ……5TH DEFENDANT

RULING

The Plaintiffs have invoked the following provisions of the law;

(a) Order 50 rules 1 and 13 (2),

(b) Order 41 rule 4 and

(c) Order 21 rule 22,

all of the Civil Procedure Rules. They have also invoked the provisions of Sections 3A and 63 (e) of the Civil Procedure Act.

By invoking the said provisions, the Plaintiffs are seeking the stay of execution in relation to the taxed costs, until the hearing and determination of an objection to the decision of the taxing officer.

It is the contention of the Plaintiffs that the suit has not yet been concluded, and that therefore costs of an interlocutory application cannot be taxed and executed for, without a specific order of the court. No such court order exists in this case, yet the 5th Defendant had proclaimed some vehicles used by the 1st Plaintiff, in its business, submit the Plaintiffs.

At present, the Plaintiffs say that they have issued a Notice of Objection to the Taxing Officer, but there has been no response. But even as the Plaintiffs await a response, they fear that the 5th Defendant may carry away and sell the attached property. Yet, in the Plaintiffs opinion, the proclamation was irregular, as it did not comply with the provisions of the Auctioneers Act and rules made thereunder.

In order to have a better understanding of the submission, it is necessary to first set out the facts in issue.

By an application dated 30.4.03, the 5th Defendant asked the court to dismiss the Amended Plaint dated 14.4.03. In a considered Ruling, Mutungi J. made the following orders;

"1. Disallow and dismiss with costs, the amended plaint, dated 14.4.04.

2. Order that the Plaintiffs/Respondents herein meet the costs of the 5th Defendant, for this application."

Following the making of those orders, the 5th Defendant filed a Bill of Costs dated 1st October 2004. Immediately after the said Bill of Costs was taxed on 16th May 2005, the 5th Defendant took steps to execute for the taxed costs. The Plaintiffs now fault the 5th Defendant on two fronts;

(i) First on the grounds that the taxation and execution arising therefrom were irregular, as they violated the provisions of Order 50 rule 13 (2). The said violation is attributed to the fact that the suit has not yet been concluded.

(ii) The Court Broker had acted irregularly by proclaiming on 8th June 2005, yet seeking to remove the proclaimed goods a day later, under the pretext that he had proclaimed on 31st May 2005.

Order 50 rule 13 (2) of the Civil Procedure Rules reads as follows;

"Unless the court otherwise orders for special reasons to be recorded, costs awarded upon an originating summons, motion chamber summons or other process shall be taxed only at the conclusion of the suit."

It is common ground that Mutungi J. did not give any special reasons for the taxation of the costs which he awarded in his Ruling of 28th September 2004. Does that mean that the taxation was premature? The Plaintiffs insist that the taxation was premature, whilst the 5th Defendant thinks otherwise.

In my considered opinion, the 5th Defendant was right. Whilst acknowledging that the said Ruling was in respect of a Chamber Summons, I nonetheless note that it was an order which brought to an end the Plaintiff's claim against the 5th Defendant. The Judge not only allowed the Chamber Summons simplicita, he also dismissed the Amended Plaint. Prior to the amendment of the Plaint, the 5th Defendant had not been a party to these proceedings. Therefore, once the Amended Plaint, by which he had been made a party was dismissed, that brought to an end the claim against the 5th Defendant. In that sense, although the Ruling was in respect of a Chamber Summons, it also concluded the suit, as against the 5th Defendant. Therefore, in my considered view the 5th Defendant thereby became entitled to have its Bill of Costs taxed.

Secondly, the court expressly ordered that the costs payable to the 5th Defendant would not only be limited to those in respect to the application, but would also extend to the Amended Plaint, which, too, had been dismissed.

The other limb of this application relates to the manner in which the Court Broker had gone about proclaiming the Plaintiff's property.

It is contended by the Plaintiffs that the Court Broker first went on 8th June 2005 to a petrol station where the 1st Plaintiff's vehicles are ordinarily fueled. Once there, the Court Broker is said to have left a sealed envelope, with one of the 1st Plaintiff's drivers. The driver then delivered the sealed envelope to the 2nd Plaintiff, on the same day. On opening the sealed envelope, the 2nd Plaintiff found a proclamation dated 31st May 2005. On 9th June 2005, the Plaintiff's advocates wrote to the Court Broker complaining about

the said Broker. The Plaintiffs also rushed to court on 10th June 2005, where they successfully sought an interim stay of execution.

The version cited by the Plaintiffs regarding the sequence of events leading to the attachment is at variance with those of the Court Broker. Therefore, in an endeavour to ascertain the truth, the court directed that both the Court Broker and the 2nd Plaintiff be cross-examined.

During their respective cross-examination, the two gentlemen both stuck to their versions. The Court was thus unable to ascertain where the truth lay. However, some interesting facts did emerge during the said cross-examination. There are six vehicles whose particulars are set out in the Proclamation. The Court Broker has verified that none of the said vehicles belongs to the Plaintiffs. Therefore, he did not take any further action in relation to the said six vehicles.

However, the Court Broker also purported to proclaim against another vehicle, registration KAP 201P. This vehicle is not cited in the proclamation. When the Court Broker was faced with the question as to why he attached the vehicle when it was not listed on the proclamation, he justified his action by pointing out that he had a "saving clause", which enabled him to attach it. The said clause reads as follows; "Plus or any other attachable assets that can be found at the J/debtors place of residence or business to satisfy both decretal sum plus costs." If that clause is supposed to empower the Court Broker to attach any other assets of a judgement-debtor, it would imply that he could cart away anything. That is absolutely wrong. It violates the spirit and intent of Rule 21 of the Court Brokers Rules, which requires a Court Broker to prepare an inventory of the items attached. If Court Brokers were allowed to get away with the usage of such a clause, it would negate the requirement for an inventory. Indeed, it would be a recipe for chaos. Furthermore, in this case, the Court Broker's own assessment of the value of the vehicles which he had already proclaimed was Kshs.950,000/= , as against taxed costs of Kshs.695,640/= and the attachment costs of Kshs.89,940/=. If the Court Broker had acted properly, as he said in court, why would he still have needed to leave it open for the attachment of other assets, when the ones he had proclaimed had a value which exceeded the amount he was looking for?

The Court Broker provided an answer to the effect that even after proclamation, assets such as vehicles were moving around, and one could never tell if they would be available at the time of taking them away. That sounds logical. But it must be remembered that the law has provided mechanisms to deal with situations wherein someone removes goods which have already been proclaimed. Therefore, it is not good enough that a Court Broker wishes to gather together as much as they can lay their hands on. Execution is not a punitive exercise against the Judgement-debtor. It should be no more than to enable the Decree-Holder to recover what he has been awarded by the Court.

The experience of the Court Broker in this case gives rise to the question as to how best to go about verifying ownership of assets. Should the Court Broker make assumptions as to ownership or should he verify ownership prior to proclaiming goods? To the best of my knowledge there is no definite answer to that question. And, in any event, I think that it would not be best to give rigid rules in that regard.

However, I believe that in relation to assets such as vehicles, whose ownership can easily be verified through the Registrar of Motor Vehicles, the best practice should be to first ascertain ownership prior to proclamation.

Having said so, I need to revert to the application, and ask whether or not a stay should issue.

The Plaintiffs believe that they can successfully challenge the taxation. They may be right or wrong; that is not for me to ascertain at this stage. Pursuant to the provisions of Order 41 rule 4 (2);

"No order for stay of execution shall be made under subrule

(1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and the

application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

The applicant herein did not address these two ingredients. However, given the manner in which the execution process has been carried out so far, I find that there is genuine concern that the services provided by the 1st Plaintiff could be completely disrupted if the 5th Defendant was allowed to proceed with execution. And as the 5th Defendant also did not place any material before the court, from which it could be concluded that they have the financial ability to repay the money, in the event that the Plaintiff's objection were to succeed, the court cannot make any assumptions. Therefore, doing the best I can in the circumstances, I hold that the best way to do justice to the parties herein is to grant a stay of execution pending the determination of the objection which the Plaintiffs have taken against the taxation. However, the said stay shall only take effect if the Plaintiffs will have deposited, as security, the sum of Kshs.300,000/=. The said deposit can either be paid into court, or alternatively be held in a joint interest-earning account, held jointly by the advocates for the Plaintiffs and the 5th Defendant.

Costs of this application shall abide the outcome of the Plaintiffs objection.

Dated at Nairobi this 25th day of July 2005.

F. A. OCHIENG

JUDGE