



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 180 OF 2016**

**VITAL PLANTATION LEASE COMPANY LIMITED**

**VITAL BIO ENERGY (KENYA) LIMITED.....PLAINTIFFS**

**VERSUS**

**FRESCO BUSHLANDS (K) LIMITED**

**AGRICULTURAL DEVELOPMENT CORPORATION..DEFENDANTS**

**RULING**

1. Before me for determination are two applications both brought by way of Notice of Motion. The first Motion dated 2<sup>nd</sup> October 2019 was filed by the Plaintiffs herein praying for orders: -

**2. That this Honourable Court be pleased to grant leave to enjoin SBM Bank Ltd as an Interested Party as the property attached is charged to the said Bank;**

**3.....**

**4. That this Honourable Court be pleased to direct the Auctioneers herein to cease and desist from damaging the equipment attached in the proclamation as they are cutting up the same equipment/machinery hence reducing their market value;**

**5. That this Honourable Court be pleased to grant damages against the 1<sup>st</sup> Defendants, the Advocates for the 1<sup>st</sup> Defendants and/or the Auctioneers for the damage and loss incurred during the unlawful, wrongful and/or improper attachment;**

**6. That the costs of the application be provided for.**

2. The application which is supported by an affidavit sworn by the 2<sup>nd</sup> Plaintiff's Operations Director Eric Mwashigadi is premised on the grounds: -

**i. That the Defendants Advocates have instructed Igare Auctioneers to proclaim and sell the Plaintiffs/Applicants movable property to satisfy the decretal amount of Kshs 1,649,010/- plus auctioneers fees of Kshs 220,000/-;**

**ii. That the 2<sup>nd</sup> Plaintiff is being unfairly forced to pay the total sum of Kshs 1,881,168.40/- yet the proclamation intends to attach the 1<sup>st</sup> Plaintiff's movable property;**

**iii. That the proclamation dated 6<sup>th</sup> July 2019 is out of time as it expired on 15<sup>th</sup> July 2019 and is therefore improper and the execution ought to be stopped;**

**iv. That the property attached by the Auctioneers is charged to Messrs SBM Bank Ltd and therefore not amenable to attachment herein;**

**v. That the Plaintiff are ready and willing to abide by any condition the Court may deem fit to impose; and**

**vi. That unless the application is allowed, the 2<sup>nd</sup> Plaintiff shall suffer irreparably.**

3. That application is opposed. By their Grounds of Opposition dated 15<sup>th</sup> October 2019, the 1<sup>st</sup> Defendant/Decree-holder states: -

- a. That the application as drawn is ex facie bad in law, misconceived, incompetent, oppressive, mischievous, contra-statute and an abuse of the Court process;**
- b. That the application is dated and filed on 02/10/2019 but the same was brought to the attention of the Decree-holder's Advocates on 15/10/2019 through an email in an attempt to deny it an opportunity to respond to the same timeously;**
- c. That Eric Mwashegadi lacks the capacity and authority to file the instant application and the Decree-holder shall before or during the hearing of the application seeking leave to expunge his affidavit from the record;**
- d. That the application is baseless, unfounded and has been overtaken by events as the execution process is at a very advanced stage. Besides, the said application has failed to satisfy the requirements under Order 22 Rule 22 of the Civil Procedure Rules;**
- e. That SBM Bank Ltd is a Limited Liability Company and as such all its applications and/or actions in a suit have to comply with both substantive and procedural obligations of artificial person which is lacking in the instant application;**
- f. That the ongoing execution process is merited and legally founded;**
- g. That there is no link at all between the SBM Bank Kenya Ltd and the proclaimed goods and that the Decree is against both Plaintiff, jointly and severally.**

4. The Second Motion dated 22<sup>nd</sup> October 2019 has been instituted by the said SBM Bank Kenya Ltd as the Objector and they pray for Orders: -

- 3. That this Honourable Court be pleased to stay the sale of the assets proclaimed and attached pursuant to the proclamation notice dated 6<sup>th</sup> July 2019; and**
- 4. That this Honourable Court be pleased to vacate the proclamation notice proclaiming assets subject of the debenture.**

5. The Second Motion is supported by an affidavit sworn by the Objector's Assistant Legal Manager Kevin Kimani and is premised on the grounds that: -

- i. The attachment herein is unlawful and irregular since Igare Auctioneers who has no jurisdiction in the Coastal region has proclaimed and attached assets charged to the Objector.**
- ii. The proclaimed asserts constitute charged asserts under the Specific Debenture dated 2<sup>nd</sup> May 2014 from the 2<sup>nd</sup> Defendant herein to Chase Bank (K) Ltd.**
- iii. The assets and liabilities of Chase Bank (Kenya) Ltd ( In Receivership), inclusive of the proclaimed movable property, were transferred to the Objector herein vide Kenya Gazette Notice No. 6833 of 6<sup>th</sup> July 2018.**
- iv. The Objector's rights under the debenture overrides the rights of the decree-holder since the Objector is a secured Creditor; and**
- v. The Objector will suffer immense prejudice should the attachment and/or sale proceed.**

6. The Second Motion is equally opposed. In a Replying Affidavit sworn by the Plaintiffs Manager Kulalu Ravick Bare Muhumed, the Plaintiffs aver that the application is bad in law, misconceived and mala fides on the basis that: -

- a. There are no resolutions of the Bank sanctioning Kevin Kimani to swear the Affidavit in support of his application.**
- b. The alleged Objector has not attached searches showing its interest in the listed properties and that the 2<sup>nd</sup> Judgment Debtor has attached copies of logbook in this same file which does not capture the alleged interests.**
- c. The agents of the 2<sup>nd</sup> Judgment Debtor has sworn an affidavit indicating that the alleged goods are beyond his reach and that the 1<sup>st</sup> Judgment Debtor is responsible for all debts.**
- d. The Igare Auctioneers have numerous agents all over the Country including the Coastal Region.**

7. The Plaintiffs further aver that the auctioneers advertised the sale in the newspapers in August 2019 and if the Objector had any interests, then they would have come to Court then and their coming to Court now is merely meant to stall the execution process.

8. I have perused and considered the two applications and the respective responses thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

9. The First Notice of Motion is principally about the joinder of SBM Bank Ltd as an Interested Party. In *Francis Kariuki Muratetu & Another –vs- Republic (2016) eKLR*, the Supreme Court considered the grounds for joinder of such a party and observed as follows: -

**1. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.**

**2. The prejudice to be suffered by the intended Interested Party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.**

**3. Lastly, a party must in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.**

10. I have considered the First Motion vis-a-vis these principles. It is clear to me that the application does not meet the said threshold. I say so because it is clear to me that the party sought to be enjoined did not make the application and neither was it made with its authority. Instead, the application was made by the Plaintiffs who are clearly unable to articulate the personal interest the intended Interested Party has in the proceedings and/or the prejudice that it stands to suffer in the event of non-joinder.

11. As it turned out, the Intended Interested Party, a Limited Liability Company was neither aware nor did it sanction the attempt to enjoin it as such in these proceedings. That emerges clearly from paragraphs 9 and 10 of the Intended Interested Party's Affidavit filed in support of its Objection Proceedings (the Second Motion) wherein its Assistant Legal Manager avers as follows: -

**9. That the Objector did not know of the existence of this suit since it was not made a party and has just learnt of the proclamation and attachment through the Judgment Debtors Advocates.**

**10. That when the decree-holder served the Judgment debtor with the proclamation notice, the Judgment-debtor did not inform the bank but rather decided to file an application dated 2<sup>nd</sup> October 2019 seeking to enjoin the bank as a party to the suit.**

12. Arising from the foregoing, it was clear that the Intended Interested Party did not of its own desire to be a party as sought to be enjoined by the Plaintiffs.

13. The other prayer sought under that application was for an order directing the Auctioneers to cease and desist from damaging the attached equipment and another directing the payment of damages for the damage allegedly incurred. Nothing was however placed before me from which I could make a deduction that the Auctioneers had damaged the attached equipment.

14. In the result, I had not the very least hesitation in finding that the First Motion dated 2<sup>nd</sup> October 2019 had no merit.

15. Moving to the Second Motion, the Objector Bank urges this Court to stay the sale of the proclaimed and attached assets mainly on two grounds:

**i. That Messrs Igare Auctioneers did not have geographical jurisdiction to execute the decree; and**

**ii. That the Objector has a debenture with the 2<sup>nd</sup> Defendant/Judgment debtor which ranks in priority to the Decree-holder.**

16. In support of the contention that the Auctioneer did not have jurisdiction, the Objector has annexed to its affidavit a document titled "Auctioneers Licensing Board, Licensed Auctioneers as at 20<sup>th</sup> April 2016, Class A". As can be seen from the title of the said document, the same depicts the List of Auctioneers and their areas of operation as at 20<sup>th</sup> April 2016.

17. There was nothing placed before me to demonstrate once again that on 6<sup>th</sup> July 2019 when the said Auctioneers did the proclamation herein, they had no jurisdiction to do so.

18. On the second aspect of the Objector's application, it was contended that the proclaimed asset constitutes charged assets of the Bank and that its rights under the Specific Debenture overrides those of the Decree-holder. The Objector has not however attached any ownership documents from which its interests in the proclaimed movable assets could be discerned.

19. In its Supplementary Affidavit sworn on 27<sup>th</sup> November 2019, the 2<sup>nd</sup> Judgment Debtor attaches evidence of ownership of a number of motor vehicles and tractors all of which are registered in its name. A perusal of the attached log books does not indicate any evidence of joint-ownership with the Objector Bank.

20. Arising from the foregoing, I can only but agree with the Decree-holder that the application by the Objector is nothing but a smart scheme by the Judgment-debtors to use the Objector's name to forestall the lawful process of execution herein.

21. Arising from the foregoing, and for avoidance of any doubt, this Court finds no merit in the two applications. Both are dismissed with costs to the Decree-holder.

**Dated, signed and delivered at Malindi this 29<sup>th</sup> day of January, 2021.**

**J.O. OLOLA**

**JUDGE**