



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 572 OF 2000
IN THE MATTER OF THE ARBITRATION ACT 1995
AND
IN THE MATTER OF ARBITRAL PROCEEDINGS BETWEEN
GREENHILLS INVESTMENTS LIMITEDDECREE-HOLDER
AND
CHINA NATIONAL COMPLETE PLANT EXPORT CORPORATION
(COMPLAINT) NOW T/A COVEC..... JUDGEMENT-DEBTOR
AND
NATIONAL HOUSING CORPORATION..... GARNISHEE
RULING

Before the commencement of the hearing of the Decree Holder's application dated 6.12.2001 preliminary objections were taken in respect of the application by Mr. Omar K. Amin, the advocate for the objector. To appreciate the substance of those objections it is necessary to set out some background information.

In an arbitration between Greenhills Investment Limited and China National Complete Plant Export Corporation, the former was awarded Kshs.19,220,622.25 with interest thereon at 13% p.a. from 19.1.2000 until payment in full. Thereafter, the advocates for Greenhills Investment Limited applied by an *ex-parte* chamber summons for judgment to be entered according to the award. In that application the respondent was described as China National Complete Plant Export Corporation (Complant) now t/a Covec. Judgment was entered as prayed on 2.11.2000 and a formal decree issued on 22.11.2000.

I shall hereafter refer to Greenhills Investment Limited as the Decree holder, to China National Complete Plant Export Corporation (Complant) as the Judgment debtor and to Covec as the objector.

From the record it would appear that the Decree-holder adopted a double barreled execution process. On 25.6.2001, it applied for a garnishee order against National Housing Corporation, an alleged debtor of the Judgment creditor. Then on 27.7.2001 it also applied for execution by way of attachment and sale of the moveable property of the debtor. The garnishee order *nisi* was issued on 18th September, 2001. Then on 29.10.2001, the objector through the firm Omar K. Amin & Co. Advocates took out objection proceedings against the attachment of the items described in the schedule to the proclamation of

attachment on the grounds that the said goods belonged to the objector. The notice of objection was taken pursuant to the provisions of order 21 rule 53 of the Civil Procedure Rules. The record also shows that on the same date, the Deputy Registrar ordered a stay of execution until further order of the court. However the formal order issued by him is dated 29.11.2001. The court also issued a notice to the advocates of the decree-holder requiring them to intimate within 15 days of service of the notice upon them whether they proposed to proceed with execution. That notice was also dated 29.11.2001. Both notices were apparently served and received by the auctioneers on 30.10.2001. On the same date, that is 30.10.2001, Omar K. Amin & Co. Advocates filed a notice of their appointment as advocates for the objector. No further steps were taken in the objection proceedings with regard to the attachment and intended sale of the debtor's moveable.

The garnishee proceedings on their part were set down for hearing on 2.11.2001. On the latter date, the advocates for the decree-holder, for the garnishee and for the objector appeared before me. The advocate for the decree holder intimated his inability to proceed with the garnishee proceedings as there was doubt as to who the judgment debtor was. I ordered that the garnishee proceedings be stood over generally. The advocate for the garnishee immediately applied for the lifting of the attachment of the sums allegedly owed by the garnishee to the objector. I acceded to the application.

On 11.12.2001, the advocates for the decree-holder filed the application dated 6.12.2001 which is the subject of the preliminary objections. That application was by way of motion on notice. The same was expressed to be brought under Order 39 rule 1 and 2A, order 22 rules 4 and 5, section 3A of the Civil Procedure Act and all enabling provisions of the law. It sought three substantive prayers. One, that the order *nisi* attaching the debts of Covec, the Judgment debtor herein, due from the garnishee which order was lifted on 2.11.2001 be reinstated; two, that a temporary injunction do issue to restrain the garnishee from paying any monies to Covec until the final determination of the garnishee proceedings; and three, that the order of stay of execution made by this court on 29th October, 2001 be set aside and the decree holder be allowed to proceed with the execution. The application was supported by affidavits sworn by Sanjay Shah and Mehraz Ehsani on 22.11.2001 and 13th December, 2001 respectively.

The preliminary objection taken on behalf of Covec were: (1) it is not a party to the proceedings, (2) the applicant has failed to recognize the provisions of section 366 and section 368 (1) (a) of the Companies Act; (3) the application was procedurally incompetent and fatally defective in that it had included the name of COVEC in the title of the proceedings without an order of the court granting it leave to amend the same; (4) the application was incompetent and fatally defective in that it failed to comply with the provisions of order 44 of the Civil Procedure Rules in respect of the prayer for reinstating the garnishee order *nisi*; (5) the application was incompetent and fatally defective in that it did not comply with the provisions of order 39 rule 9 of the Civil Procedure Rules in respect of the prayer for injunction; (6) the application was incompetent and fatally defective in that it failed to comply with the provisions of order 21 rules 53-58 in respect of the prayer to set aside the stay of execution; (7) the affidavit of Mehraz Ehsani was fatally defective in that it contained amendments and deletions and it failed to disclose by whom it was drawn or upon whom it was to be served; and (8) the affidavit of Sanjay Shah is fatally defective in that it did not disclose the firm of advocates by whom it was drawn and upon whom it was to be served.

I think I could conveniently consider this application by considering the subject matter of grounds 7 and 8 as well as 4 and 5 and 1 and 3 together. Grounds 2 and 6 will be dealt with separately.

The issue raised by grounds 7 and 8 is whether or not an affidavit can be amended and whether or not it should indicate by whom it was drawn and upon whom it is to be served. The decree-holder's advocate quite properly conceded that an affidavit cannot be amended. I say the concession was properly made because an affidavit is evidence and cannot be amended. In the premises I uphold the objection that Mr. Mehraz Ehsani's affidavit having been amended is fatally defective and is for striking out. It is ordered that the same be struck out. On whether or not an affidavit should on the face thereof indicate by whom it was drawn and upon whom it is to be served, I agree with the submission of the decree holder's advocate that there is no such requirement in law. It is definitely not in the Oaths and Statutory Declarations Act, Cap. 15 of the Laws of Kenya or the Civil Procedure Rules and the objector's advocate did not pinpoint

which other statute or rule of court required any such indication. I think the advocate must have been labouring under the erroneous assumption that an affidavit is a pleading, which it is not.

Objection number 4 was that as the prayer for reinstatement of the garnishee order *nisi* could only be granted in an application for review of the order of 2.11.2001 and the Decree-holder had not expressly invoked the provisions of order 44 in its application, the application was incompetent. In that regard, I agree with the submission by the advocate for the decree-holder that by dint of order 50 rule 12 of the Civil Procedure Rules, it is not fatal to an application that the specific provision of law under which it has been brought has not been indicated. The objection is accordingly overruled.

Objection number 5 was in essence that since an interlocutory injunction was sought in the application, the application was incompetent as rule 9 of order 39 required such applications to be by way of summons in chambers. The decree-holder's response was that if an application was brought under two or more rules one of which called for the invocation of the procedure of motion on notice and another or others which required the invocation of the procedure of summons in chambers, the applicant has the option of using the motion on notice procedure. He relied on the Court of Appeal decision in *Johnson Kinyanjui & Another v Rachel Wahito Thande* [C.A. NO. 284 OF 1997]. He argued that application before court was under both rule 1 and 2A of order 39. The former required the summons in chambers procedure and the latter required the motion on notice procedure. He was therefore correct to invoke the motion procedure. Whereas I agree with the general proposition of law by the applicant, I am afraid that order 39 rule 2A of the Civil procedure rules is not really relevant to the prayers sought and accordingly the applicant's justification for invoking the motion procedure is not well founded in fact. However, the application before court is on the face of it partly brought under the provisions of section 3A of the Civil Procedure Act and one of the prayers sought is in effect asking for a review of the order made on 2.11.2001. The above consideration is sufficient to justify the invocation of the motion procedure as no other procedure is prescribed for bringing any application under section 3A or invoking the review jurisdiction of court. So one is back to the situation where some of the prayers sought are required to be under the summons procedure and others under the motion procedure. In those circumstances the invocation of the motion procedure for the omnibus application is perfectly in order. The objection to the contrary is accordingly overruled.

Issue numbers (1), (2) and (3) are basically to the effect that Covec is not a party to the proceedings and its name has been introduced in the proceedings without any legitimate amendment thereto having been made. I think this objection is rooted in the fact that the arbitration proceedings and the final award which is the genesis of the present execution proceedings were between Green Hills Investment Limited (the present decree holder) and China National Complete Plant Export Corporation. The latter was not indicated in the proceedings to be trading as Covec or in any other name. The first time it was indicated that China National Complete Plant Export Corporation (Complant) was trading as Covec was in the *ex-parte* chamber application for entry of judgment in terms of the final award. I agree with the submission of counsel for the objector that this was highly irregular as it had the effect of making execution against Covec possible even though Covec was not party to the arbitration proceedings and award and there was no amendment ever sought or allowed to the proceedings or record to show that Complant traded as Covec. There was no adequate response to this by counsel for the decreeholder. His rejoinder was that whether Complant and Covec were one and the same entity was a matter for evidence and not a fit point for a preliminary objection. Whereas I agree that a preliminary objection cannot properly be predicated on disputed matters of fact, I think the decree holder's argument was an evasion of the issue in contention, namely whether or not there was justification in dragging the name of Covec into execution proceedings when it was not part of the arbitration process and without any amendment to those proceedings and/or the final award. In the premises, I uphold this point of preliminary objection.

As regards ground (6) of the objection, the substance thereof is that the decree holder cannot properly ask that the order of stay of execution made on 29th October 2001 be set aside and that it be allowed to proceed with attachment and sale of the attached goods of the objector. I agree with the thrust of this point of objection. Once a court has ordered stay of execution under the provisions of Order 21 Rule 55 pursuant to a receipt of valid notice of objection, the only way to get that stay lifted is by the attaching creditor intimating to the court and to the objector within 15 days of being served with the order of stay

that he intends to proceed with the execution. (See rule 54). The decree holder did not do that and this court cannot allow the circumvention of the procedure spelt out in rules 54-57 of order 21 on the basis that no valid notice of objection was made for whatever reason. The objections to the validity of the notice of objection and the subsequent stay of execution should have been made in the objection proceedings which would have followed had the decreeholder complied with rule 54. In any case those objections do not stand serious scrutiny. The first was that the notice of objection was given on 29.10.2001 by the firm of Omar K. Amin & Co. Advocates who were not on record for the objector as they filed their notice of appointment on 30.10.2001. In the first instance, there is no rule which requires the advocate of the objector to file his notice of appointment prior to or concurrently with the notification of objection. As I understand the Civil Procedure Rules, order 3 rule 8 requires the giving of a notice of appointment of advocates only where a party has previously acted in person but thereafter appoints an advocate. Such was not the case here. The objector had not previously acted in person or at all. It was therefore unnecessary for its advocates to file any notice of appointment and the same may be disregarded as superfluous. A valid notice of objection was made the moment it was lodged in court by the objector's lawyers. The second objection was that the notification of objection by the Deputy Registrar was invalid as it was dated on 29.11.2001 instead of 29.10.2001 when the objection was lodged. A scrutiny of the court record shows that was a mere slip of the pen. It is an excusable clerical error. The notification was received by the auctioneers on 30.10.2001. In short, I uphold ground 6 of the preliminary objection. I would accordingly strike out prayer number 5 of the motion on notice.

The upshot of my consideration of the preliminary objection is this. Having upheld the objection that in the absence of any amendment to the final award which forms the root of the subsequent decree and all other subsequent proceedings including the motion subject matter of the preliminary objection, the impleadment of COVEC herein was wrong in law, it follows that the motion is incompetent and fatally defective. Indeed I would go so far as describing the same as an abuse of the process of the court. I therefore order it struck out in its entirety with costs to COVEC.

Dated and delivered at Nairobi this 16th day of April, 2002

A.G RINGERA

JUDGE