



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
MISCELLANEOUS CIVIL APPL. NO. 302 OF 2017
IN THE MATTER OF THE ARBITRATION ACT 1995 (AS AMENDED IN 2010)
AND
IN THE MATTER OF AN ARBITRATION BETWEEN
MEDUPROF-S BV.....APPLICANT
VERSUS
DR. ALFRED OTIENO ODHIAMBO.....RESPONDENT

RULING

(1) Before this Court is the Notice of Motion dated 22nd July 2020 by which **DR. ALFRRED OTIENO ODHIAMBO** the Plaintiff/Applicant seeks the following orders:-

1. SPENT

2. SPENT

3. SPENT

4. SPENT

5. THAT this Honourable Court be pleased to cancel, set aside, recall and lift the warrants of attachment and proclamation of attachment/repossession/distrain of movable property dated 1st July 2020 due to the procedural irregularity.

6. THAT this court be pleased to extend the period for filing Notice of appeal to the Court of Appeal.

7. THAT this Honourable Court be pleased to set aside the Judgment pending appeal number 370 of 2019 (Dr A O Odhiambo versus Meduprof S-Bv) in Uganda.

8. THAT the Respondent bears the auctioneers costs.

9. THAT the costs of this application be provided for.

(2) The application was premised upon **Order 40 Rule 4, Order 22 Rule 11 and Order 51** of the **Civil Procedure Rules 2010, Sections 1A, 1B and 3A** of the **Civil Procedure Act Cap 21, Laws of Kenya, Section 8(1) and 11** of the **Foreign Judgments (Reciprocal Enforcement) Act, Articles 48, 50, 159(2) and 165** of the **Constitution of Kenya 2010** and all other enabling provisions of the law. The same was supported by the Affidavit of even date sworn by the Applicant.

(3) The 1st Respondent **MEDUPROF-S BV** opposed the application through the Replying Affidavit dated **24th August 2020** sworn by **WILEM VAN PROOIJEN** the Managing Director of the 1st Respondent. The Applicant filed a Supplementary Affidavit dated **8th**

October 2020. On his part **GEORGE N. MUIRURI T/A LEAKEYS AUCTIONEERS** filed the Supporting Affidavit dated **23rd September 2020** sworn by the 2nd Respondent.

(4) The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions dated **12th September 2020**, whilst the 1st Respondent filed the written submissions dated **12th September 2020**. The 2nd Respondent did not file any submissions.

BACKGROUND

(5) This is a matter which has been proceeding simultaneously in the High Courts of both Kenya and Uganda. On **25th May 2017** **MEDUPROF-S BV** (hereinafter "**the Applicant**") filed a Judgment application seeking for Judgment to be recognized and enforced against **DR. ALFRED OTIENO ODHIAMBO** (hereinafter "**the Respondent**"). The Judgment arose from an arbitration conducted in **The Centre for Arbitration and Dispute Resolution** in Uganda being **SADIARB NO. 36 OF 2016**. Thereafter the parties entered into a Consent vide **Uganda Commercial Division Arbitration No. 4 of 2017** which was adopted and registered in the High Court. The Application before the Commercial and Tax Division of the High Court in Kenya, dated **25th May 2017** was heard and judgment was entered against the Respondent with a decree being issued on **17th October 2017**.

(6) The Applicant then filed an application dated **17th October 2018** seeking inter alia a stay of execution of the Judgment and decree together with the Warrants of Attachment dated **2nd October 2018** as well as a Proclamation of Attachment dated **11th October 2018**. In a Judgment delivered on **14th May 2020** the Court declined to grant a stay of execution and dismissed the Notice of Motion dated **17th October 2018**.

(7) The 1st Respondent then moved to execute the Judgment. The Plaintiff/Applicant then filed this present application. The Plaintiff/Applicant avers that the following Ruling of **14th May 2020**, the 2nd Respondent acting upon instructions from the 1st Respondent served him with a fresh proclamation for the Colossal sum of **Kshs. 21,036,723.00**. The Applicant avers that he was not notified of the date for delivery of the Ruling and that he was only served with the Court's orders of **14th May 2020** wherein his application for a stay of execution had been dismissed with costs. The Applicant is aggrieved that he was not accorded an opportunity to settle the decretal sum or to propose other modalities of settling the same.

(8) The Applicant contends that the 2nd Respondent ought to have served him with fresh warrants of attachment and decree before proclaiming his property. He expressed his dissatisfaction with the Court's Ruling of **14th May 2020** and urged the Court to extend the period of time within which to file an appeal. That his intended appeal was likely to be rendered nugatory if the above orders were not granted.

(9) On the other hand the 1st Respondent opposing the application averred that a second visit was made to the Applicants premises on **16th July 2020** and that therefore the proclamation issued to the applicant was different from the first proclamation made on **11th October 2018**.

(10) The 1st Respondent asserted that the Applicant was duly notified of the date of delivery of the Court's Ruling via e-mail. It was contended that no Memorandum of Appeal had been annexed to the application. The 1st Respondent pleaded that there must be an end to litigation and that the 1st Respondent is entitled to enjoy the fruits of its Judgment. Accordingly the 1st Respondent urged the Court to dismiss the present application in its entirety with costs to the Respondents.

ANALYSIS AND DETERMINATION

(11) I have carefully considered the application before this Court, the replies thereto as well as the submissions filed by all the parties in the matter. The following issues arise for determination:-

- (i) **Was the Applicant properly notified of the date of delivery of the Ruling**
- (ii) **Was the proper procedure followed by the Respondents in executing the Ruling.**
- (iii) **Should this Court set aside the Judgment registered in Kenya.**
- (iv) **Should the period to file an appeal be extended.**

NOTIFICATION OF RULING DATE

(12) The date for delivery of the Court's Ruling fell after the **Covid Pandemic** had been declared in Kenya. As a result the High Courts converted to online hearing of all its cases in order to reduce the risk of transmission of the Virus to both litigants and judiciary staff alike. Notification of the date for Ruling was made by the Hon. Deputy Registrar who forwarded the link to the virtual Court session to the firm of **M/s Gikera & Vadgama Advocates** who were on record for the Applicant. Having served the Advocates on record there was no obligation to serve a separate notice on the Applicant personally. Additionally my perusal of the Causelist for **Thursday 14th May 2020** indicates that the present matter **Misc. 302/2017** was clearly listed for delivery of the Ruling online. I am therefore satisfied that the Applicant was properly notified through his Counsel on record of both the fact and date of delivery of the Court's Ruling. If the Advocate failed to inform the Applicant of the date of the Ruling or the outcome thereof this cannot be blamed on the Court and nor should the Respondent be inconvenienced for this. The Applicant will have to take it up with his lawyer.

PROCEDURE IN EXECUTING THE RULING

(13) The Applicant has alleged that the Auctioneer (the 2nd Respondent) failed to follow the laid down procedure in that he failed to issue a fresh proclamation to the Applicant. **Rule 12(4) of The Auctioneers Rules 1997** provide as follows:-

“Where orders obtained by a Judgment debtor staying execution and served on an auctioneer are subsequently vacated, the auctioneer shall-

(a) Where the warrants of attachment and sale, or letter of instruction, are still valid, proceed with execution in compliance with these Rules;

(b) Where the warrants of attachment and sale have expired, apply for extension of the warrants for a period not exceeding forty-five days, within which he shall finalize execution;

(c) Where fresh warrants of attachment and sale or letter of instructions are issued with new figures, proceed in the manner provided in these Rules in respect of a fresh warrant.”

(14) The Applicant claims that he was **not** served with a fresh production order. However, the Auctioneer in his Supporting Affidavit dated **3rd September 2020** averred as follows:-

“ (i) THAT on the 10th July, 2020 I received instruction to execute Warrants of Attachment and Sale from High Court of Kenya at Nairobi issued to us by Titus Marenye Kagiri & Company Advocates Courts against the Judgment debtor.

(ii) THAT on 16th July 2020 we proceeded to the Judgment Debtor’s offices located at the General Accident House and served him with the proclamation notice giving him seven days to pay the decretal amount which he duly signed having on the same day made the proclamation and attachment at his house.

(iii) THAT before the expiry of the Seven Days’ Notice given in the proclamation, I was advised that the Judgment Debtor had filed an application in Court procured orders staying the execution.

(iv) THAT the allegation by the Judgment Debtor of me having not made the actual proclamation and attachment is untrue with ill intention of tarnishing my name and that of my firm.”

The above averments were neither challenged nor controverted by the Applicant.

(15) Further in his Supporting Affidavit dated **22nd July 2020** the Applicant in **paragraph 2** avers as follows:-

“THAT I was served with a Proclamation by the 2nd Respondent on the 16th July 2020 for a colossal sum of Kshs. 21,036,723.00.”

The said Proclamation was Annexure **AO1** to the Affidavit. This was clearly a proclamation made **after** the Court’s Ruling of **14th May 2020**.

(16) I have perused the said proclamation. It is dated **16th July 2020** and is based on instructions issued to the Auctioneer on **3rd July 2020**. As pointed out by the Respondent the items listed in this proclamation are different from the items that were listed in the earlier proclamation of **11th October 2018**. Accordingly I find that a fresh proclamation was done **after** the Court’s Ruling of **24th May 2020**. I therefore find that the Auctioneer followed due process in executing the decree from the Ruling of **14th May 2020**.

SETTING ASIDE THE JUDGMENT REGISTERED IN KENYA

(17) The Applicant has prayed that the Judgment dated **17th October 2017** emanating from the Ugandan Courts be set aside. I will not dwell much on this prayer because I believed this issue was covered exhaustively in my Ruling of **14th May 2020** and I do not intend to rehash that Ruling here. Suffice to say I find that no sufficient grounds have been advanced for setting aside that Judgment dated **17th October 2017** which Judgment was entered into by the consent of the parties.

EXTENSION OF PERIOD TO FILE AN APPEAL

(18) Lastly the Applicant pleads that the period within which to file an appeal be extended. The Applicant has not set out the reasons why the Court should extend the period for filing an appeal against the Ruling of **14th May 2020**. As far as this Court is concerned the Applicant (through his Advocate) became aware of that Ruling on the date the same was delivered. He has taken no action to appeal the same. No Memorandum of Appeal has been annexed to the application. In my view the Applicant is not entitled to the discretionary orders being sought.

(19) The Applicant by prayer (7) seeks to have the Judgment in Uganda set aside. The Applicant has been aware of the Judgment in Uganda since **24th May 2017**. Again this is a matter which I dealt with exhaustively in my Ruling of **14th May 2020**. The Court in Uganda ordered

the Applicant to deposit **Euro 120,000** as security for costs. No evidence has been presented in this Court that the sum of **Euros 120,000** has been deposited as ordered. For as long as that order remains uncomplied with the proceedings in Uganda remain in limbo. I find no persuasive grounds upon which to grant the Applicant the orders he is seeking. Further in my view this is a matter which ought to be canvassed before the Court in Uganda **not** here in Kenya.

(20) It is quite evident that the Applicants strategy is to clog the Courts with a plethora of applications in an attempt to evade paying the lawful debt owed to the Respondent. I can only remind the Applicant of the Kiswahili adage – **'Dawa ya deni ni kulipa.'**

(21) Finally I find no merit in the present application the same is hereby dismissed in its entirety with costs to the Respondents.

Dated in **Nairobi** this **5TH** day of **FEBRUARY, 2021**.

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MAUREEN A. ODERO

JUDGE