



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CIVIL MISC. APPLICATION NO. 3 OF 2019**

**ODHIAMBO OWITI & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**DOMINION FARMS LIMITED.....RESPONDENT**

**AND**

**WEST KENYA SUGAR COMPANY LIMITED.....OBJECTOR**

**RULING**

1. This matter is in a series of other similar matters filed in 2019. It is an advocate/client bill of costs matter, and had reached execution stage and when the Advocate was unable to get payment from the client, they went for execution of the movable properties believed to belong to the client Dominion Farms Ltd.
2. As soon as that execution process was engaged, the Objector, West Kenya Sugar Company Limited came in with a Notice of objection to attachment dated 12/2/2020, which is over one year ago. There is then the application for lifting of attachment dated 7/2/2020 which application has never been prosecuted. A stay order was granted to the Objector on 12/2/2020 which order is still in force.
3. The decree holder/advocate filed a replying affidavit sworn by Kennedy Odhiambo Owiti on 13/3/2020 and simultaneous with the filing of the Replying affidavit, they filed Notice to cross examine the deponent of the affidavit supporting the objection proceedings, Mr. Sohan Sharma, sworn on 7/2/2020.
4. On 15/7/2020, the applicants' counsel appeared but the Objector and Respondent did not appear. The applicants sought for directions for cross examination of the deponent as per the Notice issue and the court fixed 30/9/2020 for cross examination of the deponent.
5. On 30/9/2020 Mr. Ariho Advocate holding brief for Mr. Olendo for the Objector sought for time to avail the deponent for cross examination and parties advocates agreed to adjourn the matter to 21/10/2020.
6. On 21/10/2020 Mr. Olendo informed the court that he was unable to procure the attendance of the deponent who was skeptical of travelling because of covid-19 pandemic. He requested for one month to engage in a negotiated settlement out of court.
7. The court then rescheduled the matter to 25/11/2020.
8. On the latter date, Mr. Osewe Advocate held brief for Mr. Otieno for the applicant. He reported that the parties were still negotiating for settlement and needed 1½ months to confirm settlement as they had met and discussed.
9. The court again rescheduled the matter to 20/1/2021 to confirm a settlement and on 20/1/2021 no settlement was forthcoming in that Mr. Olendo indicated to court that they had neared conclusion and were waiting for availability of funds so he prayed for 2 weeks.
10. The matter was rescheduled for 3/2/2021 when Mr. Otieno Advocate for the applicant told the court that no settlement had been reached hence the application for objection proceedings should be fixed for hearing and Sohan Sharma to attend court for cross examination as per the Notice to cross examine dated 13/3/2020 and filed on 8/7/2020.
11. This court then fixed today's date for hearing of the application dated 7/2/2020 and directed Mr. Sohan Sharma to attend court for cross examination.

12. Today, Ms. Lukasile and Mr. Otieno advocates appeared for their respective clients for hearing as earlier fixed and Ms. Lukasile sought an adjournment on the ground that the deponent to be cross examined was not present.
13. Mr. Otieno advocate for the Applicant opposes the application and gives the history of the matter and concludes that no reasons for non-attendance of the deponent Mr. Sohan Sharma had been given. He urged the court to decline the adjournment sought and strike out the affidavit of Mr. Sohan Sharma and dismiss the application dated 7/2/2020 with costs.
14. In a rejoinder, Ms. Lukasile submitted that the court should not drive out of the judgment seat her client who deserves to be heard before striking out or dismissing the application as that will not be in the interest of justice.
15. I have considered the application for adjournment and the reasons thereof of non attendance of the deponent Sohan Sharma for cross examination. I have also considered the opposition to an application for adjournment and the reasons thereof, coupled with the consequences that would follow should the court decline an adjournment, and the rejoinder by Ms. Lukasile.
16. I have given the historical background to this matter which is in a series and is an advocate client bill of costs taxed due for execution of decree on a judgment entered by this court.
17. For the court to grant an adjournment, there must be plausible reasons advanced by a party seeking for an adjournment.
18. Parties got engaged in negotiations for settlement when the deponent was said to be scared of travelling to court to be cross examined. This court encourages such negotiations for out of court settlement. However, the negotiations collapsed and it became crystal clear that the objection proceedings must proceed for hearing with the deponent Mr. Sohan Sharma who was notified of the intention to cross examine him being aware of that intention being fulfilled.
19. Furthermore, parties now need not attend court physically as the court hears parties and their advocates virtually where they choose to appear physically, and these proceedings have substantially been conducted virtually through Microsoft Teams with links being sent to parties to join the court virtually.
20. It follows that the fear of contracting Covid-19 by the deponent is not founded as the court has taken the risk of hearing parties physically while observing covid-19 Ministry of Health protocols.
21. The deponent's/objector's counsel has not given any reasons why Mr. Sohan Sharma could not be available whether physically or virtually for cross-examination in this long standing and pending matter. Counsel simply said the deponent was not available for cross examination and sought more time to procure his attendance for cross examination. His whereabouts and when he will be available are unknown to this court.
22. The question is whether this court should entertain such a party with an adjournment. Access to justice is a right guaranteed under Article 48 of the Constitution. A right to be heard is also guaranteed under Article 50(1) of the Constitution. On the other hand, those rights can be subject to amuse unless parties are tamed by the court managing proceedings in an efficient and effective manner.
23. Parties will file suits or claims and obtain injunctions or stay orders and go to slumber, leaving the adverse parties remediless or with barren judgments and decrees. It is for that reason that the framers of our Constitution at Article 159(2) made it clear that in exercising judicial authority, the courts and tribunals shall be guided by the following principles: -
  - (a) Justice shall be done to all irrespective of status;
  - (b) Justice shall not be delayed;
  - (c) ADR including reconciliation, mediation, arbitration and Traditional dispute resolution mechanisms shall be promoted, subject to Clause (3).
  - (d) Justice shall be administered without undue regard to procedural technicalities; and
  - (e) The purpose and principles of this constitution shall be protected and promoted.
24. Delayed justice is abhorred by the Constitution because delayed justice is denied justice. Albeit the parties were said to be engaged in negotiated settlement which this court encouraged in compliance with Article 159(2)(c) of the Constitution, it is clear from the court record that the applicant was using the window for ADR to delay the conclusion of this matter.
25. For the above reasons, I find no acceptable reasons given for adjournment and I decline and dismiss the application for adjournment as it is not made in good faith and is intended to delay the administration of justice.
26. On the consequences of denial of the adjournment, as the deponent who was to be cross examined has not attended court by the several modes available, to be cross examined as per the advance Notice served on him, the effect is that, that affidavit in support of the application for objection to attachment with all its annexures is no affidavit. The same is hereby struck out.
27. Having struck out of the affidavit in support of the application for objection to attachment dated 7/2/2020, the question is whether that application has any feet to stand on.

28. Mr. Otieno has asked this court to dismiss that application for want of Prosecution.

29. The application is brought under Order 22 Rule 51 (2), Order 52, 51(1) of the Civil Procedure Rules, Order 22 Rules 51(1) of Civil Procedure Rules provides that:

***“51. (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.”***

30. Under Order 22 Rule 51(2), ***such Notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objects or person makes to the whole or portion of the property attached.***

31. It is clear from the provision above that the application supporting Notice of Objection to attachment in execution of decree proceedings under Order 22 Rule 51 of the Civil Procedure Rules must be supported by an affidavit.

32. As the affidavit in support has been struck out for non-attendance of the deponent to be cross examined on Notice, the application dated 7/2/2020 has no feet to stand on, it falls by the way and must be dismissed which I hereby do and dismiss the application dated 7/2/2020 with costs to the applicant/advocate in the application.

33. As the Applicant in the said application dated 7/2/2020 obtained a stay of execution/attachment order, the application having been dismissed as above, the stay orders of 7/2/2020 lapse. They are hereby set aside and vacated.

**Dated, signed and delivered at Siaya, this 2<sup>nd</sup> Day of March 2021 virtually in the presence of all advocates for the parties**

**R.E. ABURILI**

**JUDGE**