



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 55 OF 2020

CONSOLIDATED WITH

CIVIL SUIT NOS. 98 & 99 OF 2020

INVESCO ASSURANCE

COMPANY LIMITED.....1ST PLAINTIFF

AFRICA MERCHANT ASSURANCE

COMPANY LIMITED.....2ND PLAINTIFF

DIRECTLINE ASSURANCE

COMPANY LIMITED.....3RD PLAINTIFF

VERSUS

AUCTIONEERS LICENSING BOARD.....1ST DEFENDANT

NATIONAL ASSOCIATION OF KENYA

AUCTIONEERS.....2ND DEFENDANT

KINYANJUI NJUGUNA & COMPANY

ADVOCATES.....1ST INTERESTED PARTY

LAW SOCIETY OF KENYA.....2ND INTERESTED PARTY

JUDGMENT

1. By way of the plaint dated 20th April 2020, the 1st plaintiff lodged a suit against the 1st and 2nd defendants and sought declaratory reliefs *in rem* to the effect that properties itemized in the plaint and funds held in mobile money platforms operated by mobile telecommunication companies in Kenya, to which the plaintiff has subscribed, are tools of trade and implements necessary for the performance of the 1st plaintiff’s trade; a declaration that funds held in mobile money platforms operated by mobile telecommunication companies in Kenya, to which the plaintiff has subscribed, do not belong to the 1st plaintiff and are therefore not available for attachment under Section 44 (1) of the Civil Procedure Act (“the Act”). The 1st plaintiff also sought for a permanent injunction restraining any person or licensed auctioneer from proclaiming or attaching any of the tools of trade listed in the plaint.

2. The 2nd and 3rd plaintiffs subsequently filed separate suits against the 1st and 2nd defendants (HCCC NOS. 98 & 99 OF 2020 respectively) seeking reliefs similar to those sought in the suit lodged by the 1st plaintiff. On 21st July 2020, it was agreed by consent of the parties that the two (2) suits above be consolidated with HCCC No. 55 of 2020 being the lead file.

3. The 1st plaintiff pleaded in its plaint that, whereas Section 44(1) of the Act, which governs the procedure for execution of decrees issued by the courts, provides a list of items exempted from attachment and sale including tools and implements of trade, the Act in itself does not define what constitutes “tools of trade.”

4. The 1st plaintiff further pleaded that auctioneers have taken advantage of the lacunae in the definition of the above term by proclaiming, attaching and carrying away goods necessary for its insurance business, the particulars of which are listed under paragraph 13 of the plaint.
5. It was similarly pleaded in the plaint that as a result, the 1st plaintiff has suffered and continues to suffer excessive loss/damage, the particulars of which are stated under paragraph 19 of the plaint.
6. The 1st plaintiff pleaded that unless the reliefs sought are granted, its ability to sustain its operations and honour its obligations to its insured persons and the general public will be compromised.
7. Upon service of summons, the 1st defendant and the 2nd interested party filed their separate statements of defence dated 28th September, 2020 and 14th January, 2021 to deny the averments made in the plaint. Going by the record, it is apparent that the remaining parties did not file any substantive pleadings in response to the plaint.
8. At the hearing of the lead suit, it was agreed by consent of the parties that the matter be determined by way of affidavit evidence and written submissions. The parties were then directed to file written submissions. At the time of writing this judgment, only the submissions by the plaintiffs, the 1st defendant and the 1st interested party had been availed to this court.
9. On their part, the plaintiffs who filed joint submissions argue that in the past, various interpretations have been arrived at by the courts as to what constitutes “tools and implements of trade.” The plaintiffs further argue that, the tools particularized in the respective plaints are necessities for the running of their insurance businesses, hence they ought to be declared as tools of trade which are exempt from execution. The plaintiffs cite *inter alia*, the case of **Jonathan Wepukhuli t/a Gati Cleaning Agency Limited v Julius Odhiambo Oduor [2019] eKLR** in which the court reasoned that, in a business/trade, computers and furniture are necessary tools for such business/trade and would therefore qualify for the protection granted under the provisions of Section 44 of the Act; and the case of **Bora Capital Limited v Jane Njeri Munyi [2018] eKLR** where the court upheld the decision of the trial court that office furniture do not constitute tools of trade and hence the proclamation was valid.
10. It is the submission of the plaintiffs that the term “person” under Section 44(1) of the Act is not restricted to natural persons but extends to corporate bodies, and therefore urge this court to find as such.
11. Further to the foregoing, it is the submission of the plaintiffs that the funds held in the mobile money platforms are essential in ensuring payment of premiums from their insured persons to the public, hence continued attachments of such funds will only expose the plaintiffs to grave consequences including the risk of statutory management.
12. For all the foregoing reasons, the plaintiffs have pleaded with this court to exercise its discretion in granting the reliefs sought, in the interest of justice.
13. By way of its submissions dated 26th February, 2021 the 1st defendant contends that Section 44(1) of the Act does not apply to juristic persons such as the plaintiffs herein and rely *inter alia*, on the case of **Invesco Assurance Co Ltd v Kinyanjui Njuguna & Co Adv & another [2020] eKLR** whereby the court determined that the applicant in that instance could not seek protection from Section 44(1) (*supra*) and the goods listed in its pleadings would become amenable to execution by attachment and sale.
14. The 1st defendant similarly contends that the funds held in mobile money platforms referenced by the plaintiffs are also amenable to attachment by way of garnishee proceedings and are therefore not protected under the law.
15. The 1st interested party in its submissions argues that Section 44(1) of the Act is clear as to what constitutes tools and implements of trade and that there is no need for further interpretation. The 1st interested party also argues that the aforesaid provision applies solely to natural persons and does not extend to corporate entities such as the plaintiffs herein, going further to submit that, if the plaintiffs are of the view that the provision is ambiguous as they so claim, then they should move Parliament to amend or expand on the interpretation thereof. Reference was placed on the case of **Master Fabricators Limited v Patrick Omondi Ndonga [2014] eKLR** in which the court held that, the aforementioned provision does not apply to body corporates, among other authorities.
16. It is therefore the submission of the 1st interested party that the properties itemized in the plaint do not fall in the category of what would constitute tools of trade and therefore the reliefs sought cannot be sustained, particularly the permanent injunctive order sought. The 1st interested party concludes by contending that, the plaintiffs have no solid case and their respective suits ought to be dismissed with costs.
17. I have considered the pleadings, affidavit evidence and written submissions presented by the parties. Upon doing so, I have identified three (3) key issues for determination before me and which I shall address hereunder.
18. The *first* issue for determination has to do with whether the proviso of Section 44(1) of the Act extends to corporate entities such as the 1st plaintiff and by extension, the 2nd and 3rd plaintiffs.
19. According to the 1st plaintiff, the above provision is not limited to natural persons but extends to juristic persons including corporate entities. In contrast, the 1st defendant contends that Section 44(1) (*supra*) applies solely to natural persons. This position was echoed in the affidavit of advocate Seth Khisa for the 1st interested party as well as the witness statement of advocate Mercy Wambua, Chief Executive Officer of the 2nd interested party.
20. For reference purposes, I will quote verbatim the provisions of Section 44(1) (*supra*) which stipulate as follows:

“All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree:

Provided that the following shall not be liable to attachment or sale—

...

(ii) the tools and implements of a person necessary for the performance by him of his trade or profession ...”

21. The confines and interpretation of the term “person” have previously been considered by the courts. In the case of **Master Fabricators Limited v Patrick Omondi Ndonga [2014] eKLR** relied upon in the 1st interested party’s submissions, Sargon J rendered himself thus:

“The appellant averred that it stands to suffer substantial loss since its tools of trade have been proclaimed. On this issue I am of the view that the provisions of Section 44 of the Act does not apply to corporate bodies and share the same opinion as the court in Blackwood Hodge Kenya Ltd v Lead Gasoline Tank Clearing Sam and Chase (K) Ltd where it was held that:

“Section 44 of the Civil Procedure Act (Cap 21), in which it is provided that the tools and implements of a person for the performance of his trade or profession shall not be liable to attachment or sale, is not intended to protect corporate entities but artisans whose livelihood depends on their workmanship. The word person in that section does not include a corporate body.”

22. The above position was reaffirmed in the case of **Invesco Assurance Co. Ltd v Kinyanjui Njuguna & Co. Advocates & another [2020] eKLR** equally cited by the 1st interested party and the 1st defendant wherein the court reasoned that, if at all the definition of “person” under Section 44(1) (supra) was intended to extend to corporate bodies, then the same would have expressly been brought out in the Act. In the same manner, the court in the most recent case of **Invesco Assurance Company Limited v Kinyanjui Njuguna & Co. Advocates & another [2021] eKLR** clearly brought out the position that Section 44(1) (supra) does not include corporate entities.

23. In the present case, it is not in dispute that the 1st plaintiff and by extension the 2nd and 3rd plaintiffs, are corporate bodies engaged in the insurance business.

24. While I note the 1st plaintiff’s submission that the decision arrived at in the case of **Blackwood Hodge Kenya Ltd v Lead Gasoline Tank Clearing Sam and Chase (K) Ltd** (supra) which has been cited in the abovementioned judicial authorities is *per incuriam*, I associate myself with the findings of the respective judges that, if the relevant provision was intended to extend to corporate entities, then the same would clearly have stated as such. I am equally persuaded, the term “person” applies to natural persons only for purposes contemplated by Section 44 of the Act.

25. The *second* issue for determination is whether the properties listed in the plaint would constitute tools and implements of trade for purposes under Section 44(1) of the Act.

26. In his witness statement, Paul Gichuhi Legal Manager of the 1st plaintiff, stated that Section 44(1) does not define what constitutes tools and implements of trade, and that this has led to misuse by auctioneers when it comes to the execution of decrees. The witness further stated that the properties listed in the plaint are essential for the operations of the 1st plaintiff and therefore urged the same be declared as tools of trade exempt from execution.

27. On its part, the 1st defendant argues that the properties itemized in the plaint are not exempt from execution under Section 44(1). Seth Khisa for the 1st interested party stated in his affidavit that the said properties do not constitute tools of trade as claimed by the 1st plaintiff; rather, they are equipment capable of attachment under the provisions of the Moveable Property Security Rights Act, 2017. Mercy K. Wambua who is representing the interests of the 2nd interested party, stated that what constitutes tools/implements of trade can only be interpreted in accordance with the unique circumstances of every case.

28. I have already determined that the 1st plaintiff, being a corporate entity as opposed to a natural person, cannot seek protection under Section 44(1) of the Act. Suffice it to say, the court is being called upon to determine whether the properties particularized in the plaint fall within the category of tools and implements of trade.

29. I am of the view that, what constitutes tools of trade may vary on a case-to-case basis and therefore largely depends on the unique circumstances of the respective case. According to Halsbury’s Laws of England, 4th edition, volume 13 at par 249 cited in the case of **Invesco Assurance Co Ltd v Kinyanjui Njuguna & Co Adv & another [2020] eKLR**:

“The tools and instruments of a man’s trade or profession and instruments of husbandry are distrainable only if there are no other goods on the premises sufficient to countervail the arrears of rent. The axe of a carpenter, the books of a scholar, the kneading-rough of a baker, the stocking-frame or loom of a weaver and even the cab of a cab driver have been held to be within this rule.”

30. It is noteworthy that it is not in every instance that, property required for the operations of a business will constitute a tool of trade necessary for the performance of such trade. For example in the case of **Francis Kamau Njoroge & Another v James Mbire Ngaita & 4 Others [2016] eKLR** relied upon by the 1st interested party, the court held that office furniture could not be regarded as tools of trade for the

defendants therein. A similar finding was arrived at in the case of **Bora Capital Limited v Jane Njeri Munyi [2018] eKLR** cited in the plaintiffs' submissions.

31. On the other hand, in the case of **Jonathan Wepukhuli t/a Gati Cleaning Agency Limited v Julius Odhiambo Oduor [2019] eKLR** equally cited by the plaintiffs, the court found that in a business/trade, computers and furniture are necessary tools and would therefore qualify for the protection granted under Section 44 of the Act

32. Going by the pleadings, the properties of the 1st plaintiff are categorized under the four (4) main heads of human resource; office amenities and infrastructure; information communication and technology infrastructure; and mobile money transaction platforms.

33. From the pleadings, it is clear that the 1st plaintiff and by extension the 2nd and 3rd plaintiffs are companies engaged in the insurance business under the Insurance Act, Cap. 487 Laws of Kenya.

34. Upon considering the foregoing, I am of the view that while the properties listed in the plaint may be useful in seeing the smooth operation of the 1st plaintiff's business, I am not convinced that they would constitute tools of trade absolutely necessary for purposes of the business and which would entitle protection under Section 44(1) of the Act (supra). In my view, the 1st plaintiff would still be able to find alternative means of processing its insurance claims and giving out insurance policies. In any event, given the numerous claims for compensation and settlement of decrees that have been issued against the 1st plaintiff and which are still pending, I am of the view that it would not be in the public interest to accord the relevant properties of the 1st plaintiff protection against execution.

35. I therefore find that in the present instance, no credible evidence has been brought forward to convince me to conclude that the properties itemized in the plaint are tools of trade necessary for the operation of the 1st plaintiff's insurance business.

36. I am now left with the *third* and final issue for determination, being whether the 1st plaintiff is entitled to the reliefs sought in the plaint.

37. Having found that the properties in the plaint do not constitute tools of trade and that the 1st plaintiff is not a 'person' entitled to protection against execution under Section 44(1) of the Act, I decline to grant the declaratory reliefs sought. Moreover, I concur with the position taken by the 1st defendant, the 1st and 2nd interested parties that, given the circumstances at hand, any reliefs granted would operate as a blanket order in the face of the multiple suits filed and decrees issued against the 1st plaintiff, both by courts of concurrent status and those of higher status than the High Court.

38. I am likewise convinced that, in any event, a granting of the reliefs sought would have an overreaching impact on third parties and decree holders, to the detriment of the public interest which far outweighs the interest of the 1st plaintiff.

39. Consequently and for all the foregoing reasons, the instant suit is hereby dismissed with costs to the 1st and 2nd defendants, and the 1st and 2nd interested parties respectively. This judgment shall apply to HCCC No. 98 of 2020 and HCCC No. 99 of 2020.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Nderitu holding brief Mr. Awele for the Plaintiffs

Mr. Khisa holding brief for the 1st Defendant

Mr. Muhatia Pala for the 2nd Defendant

Mr. Khisa for the 1st Interested Party

Mr. Makhandia holding brief for Gwandaru Thuita for the 2nd Interested Party