



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

MISC. APPLICATION NO. 98 OF 2019

INVESCO ASSURANCE CO. LTD.....JUDGMENT DEBTOR/APPLICANT

-VERSUS-

KINYANJUI NJUGUNA & CO. ADVOCATES.....DECREE HOLDER/1ST RESPONDENT

MBUSERA AUCTIONEERS.....2ND RESPONDENT

RULING

1. This ruling which is applicable to Makueni High court civil miscellaneous application No. 99 of 2019 is with respect to two applications filed under certificate of urgency. The first one is dated 29/07/2020 and is brought under Sections 1A, 1B,3A, 44(1) of the Civil Procedure Act (CPA), Order 51 Rule (1) the Civil Procedure Rules(CPR) and all other enabling provisions of the law. The first two prayers are spent

a) Pending the hearing and determination of this application inter parties, the Honorable court be pleased to restrain the Respondents by themselves or their agents from proclaiming, attaching and/or selling the Applicant's tools of trade as listed in the proclamation dated 28/07/2020 namely reception counters, 11 office desks, 23 office chairs, 8 complete office computers, 3 office hangers, 11 telephone heads, office printer, photocopier machine and/or any such similar items in execution of the decree of this court dated 22/05/2019.

b) The Honorable court be pleased to set aside the proclamation, attachment and/or sale of the Applicant's tools of trade in the 2nd Respondent's proclamation dated 28/07/2020 namelyreception counters, 11 office desks, 23 office chairs, 8 complete office computers, 3 office hangers, 11 telephone heads, office printer and photocopier machine.

c) The Honorable court be pleased to permanently restrain the Respondents by themselves or their agents from proclaiming, attaching and/or selling the Applicant's tools of trade as listed in the proclamation dated 28/07/2020 namely reception counters, 11 office desks, 23 office chairs, 8 complete office computers, 3 office hangers, 11 telephone heads, office printer photocopier machine and/or any such similar items in execution of the decree of this Court dated 22/05/2019.

2. The application is supported by the grounds on its face and the supporting affidavit of the Applicant's legal manager, Paul Gichuhi sworn on 28/07/2020. Basically, the Applicant (JD) seeks the raising of attachments on the items specified in the application. Mr. Gichuhi deposes that the auctioneers have violated the proviso to section 44(1) of the CPA which exempts tools and implements of a person, necessary for the performance by him of his trade or profession and books of accounts, from attachment in execution of decrees. He deposes that if the JD's tools of trade are sold, its core business functions that heavily depend on them will be seriously compromised. Copies of proclamation and warrants of attachment are exhibited as **PG-1**.

3. Mr. Gichuhi has also deposed that the threatened execution is an abuse of court process because the decree holder (DH) failed to disclose that it has also commenced insolvency proceedings *vide* **Petition Milimani Insolvency E 155 of 2019; Kinyanjui Njuguna & co. advocates –vs- Invesco Assurance Ltd**. He deposes that allowing execution to proceed amounts to two modes of execution and is a violation of the Insolvency Act which requires the preservation of the Assets of a company once a liquidation petition is presented. The petition is exhibited as **PG-2**.

4. It is also his deposition that the JD has diligently continued to satisfy the amounts owed through continuous payments. The evidence of payment is exhibited as **PG-3**.

5. The 1st Respondent (DH) opposed the application through a replying affidavit sworn by counsel Seth Khisa on 18/08/2020. The gist of the opposition is that section 44 of the CPA applies to natural persons and not corporations. It is also his deposition that the items listed in the proclamation notice cannot be said to be tools of trade of the JD who is in the business of carrying on general insurance in Kenya. He deposes that the amount owing from the JD is Kshs.2,307,582/90 and the JD has not even hinted on how and when it intends to settle it. The decree is exhibited as **SK-1**. He deposes that the JD has not shown any goodwill in satisfying the decretal sum and that the purported payment is hot air as it relates to historical payments.

6. It is also his deposition that the JD is abusing the court process by arguing over interpretation of a clear statutory provision of section 44 of the CPA. He avers that the JD's sole aim is to avoid meeting its obligations as it is notoriously known for. He has exhibited a copy of an order from Kitui high court as **SK-2**. He states that in the application, the JD had raised the same moot issues of 'tools of trade' but was ordered to deposit the entire decretal amount as security and has failed to do so to date.

7. He has deposed that the JD raised the same moot issues, in Nairobi HCCC No. 55 of 2020, and obtained *ex-parte* injunctive orders which were set aside upon the court being appraised of the JD's conduct. A copy of the order is exhibited as **SK-3**. Similarly, he deposes that the JD obtained *ex-parte* orders in Nairobi H.C Constitutional Petition No. 139 of 2020 and Kisumu H.C Constitutional Petition No. 4 of 2020 but they were later set aside. Copies of the orders are exhibited as **SK-4** and **5** respectively.

8. He deposes that Mr. Gichuhi's depositions should be treated with extreme caution considering that he has previously been cited for making false averments. It is also his averment that the JD has dishonored consents, to settle debts, which it willingly executed. A copy of such consent is exhibited as **SK-6**. He deposes that the JD has painstakingly concealed its assets and monies to defeat all legitimate executions and still wants to protect the only known assets. He urges that this court should look beyond the conjured grounds and discern the JD's true intention which is to avoid settling undisputed regular decrees.

9. The second application was filed by the 1st Respondent and is dated 04/08/2020. It basically seeks that the orders issued by this Court on 03/08/2020 be set aside, vacated or discharged. In the alternative, it seeks that the orders be reviewed by ordering the JD to deposit security of the total decretal sum or bank guarantee from a reputable bank.

10. On 03/08/2020, this court issued interim orders and stayed the proclamation, attachment and sale of the JD's items as captured in the first application. With regard to the second application, this Court ordered *inter alia*;

"6. That the Applicant/Respondent (Invesco) to deposit in court Kshs.350,000/= as security within 7 days, failure to comply will result in the interim order of stay being lifted.

7. That the deposit will be paid just once to cover Makuani HCC. App 98 & 99/19."

11. When the parties appeared for mention on 21/09/2020, the court was informed that the JD had not deposited the security as ordered and the counsel holding brief for the JD confirmed the information. Consequently, the interim stay orders were not extended. Accordingly, the second application has been spent and there is no need to dwell on it.

12. Back to the first application, directions were given that the same be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Applicant's/JD's Submissions

13. Referring to the proviso to section 44 (1) of the CPA, Mr. Awele for the JD submits that the Act does not define what constitutes a 'tool or implement necessary for the performance of a trade and profession'. He submits that the omission was deliberate and intended to accommodate the ever evolving circumstances of the business environment. He contends that what may or may not amount to a tool of trade is not cast in stone and depends on various factors to be considered on a case by case basis.

14. He submits that the Respondent has not controverted the utility of the highlighted items as tools of trade. He relies *inter alia* on **Msa HCCA 82 of 2019: Jonathan Wepukhuli t/a Gati Cleaning Agency Ltd –vs- Julius Odhiambo Oduor (2019) eKLR** where the Court stated that;

"13. There is a second point that points to prospects of substantial loss being suffered by the Appellant. It is disclosed in the application when the Applicant says that execution as issued and levied against his tools of trade. Even though it has not been revealed what his trade is, the proclamation reveals that the proclaimed goods are office equipment and tools. In the present world, if one runs any business, computers and furniture are critical and necessary tools for such business or trade and would qualify for protection granted under section 44 of the Civil Procedure Act. That being the case, to allow execution upon such goods would be to allow violation of the law."

15. He further submits that the attachment of the JD's tools of trade will expose it to the irreparable damage of insolvency as it will be unable to carry out its core mandate and/or business to generate any or sufficient revenue to meet its obligations. He argues that the JD has filed suits which seek the interpretation of section 44(1) of the CPA with the hope that what constitutes a tool of trade is settled with finality to obviate the need of such objections every now and then.

16. He adds that a person who is overzealous in protecting his legal rights does not amount to a vexatious litigant so as to bar him from being

heard by a court of Law.

17. Relying on section 429 and 430 of the Insolvency Act, counsel submits that once a liquidation petition is presented, the assets of a company cannot be attached so as not to destabilize the equality among the creditors. He contends that it is unprocedural and an abuse of office to have an insolvency petition and warrants of attachment at the same time. He submits that the 1st Respondent elected to file insolvency proceedings and is therefore estopped from pursuing parallel execution proceedings.

18. Further, he submits that the 1st Respondent intentionally concealed the existence of a stay order, against all its warrants of attachment, which was issued by Nzioka J on 06/08/2020 in Milimani Insolvency Petition E155 of 2019. The 1st Respondent has also been accused of failing to disclose payments made in settlement of its claims. He contends that he who comes to equity must come with clean hands.

The 1st Respondent's/DH's Submissions

19. The 1st Respondent through Mr. Njuguna Kinyanjui has identified the following as the issues for determination;

- a) Whether the JD as a company is covered by section 44(1) of the CPA.
- b) Whether the orders of setting aside the proclamation notices, warrants of attachment & sale and permanently restraining the DH from executing against the JD's office amenities such as furniture and computers are appropriate.
- c) Who should bear the costs of the applications dated 29/07/2020 and 04/08/2020.

20. On the first issue, he submits that section 44 of the CPA was meant to protect artisans and natural persons whose ability to earn a livelihood is directly linked to their tools of trade such that taking them away will render them destitute. He contends that the entire wording and phrasing of the section clearly refers to natural persons. He relies *inter alia* on Blackwood **Hodge (Kenya) Ltd –vs- Lead Gasoline Tank Cleaning Sam & Chase (K) Ltd (1986) eKLR** where it was held that;

“With due respect to learned Counsel for the second defendant, section 44 of the Civil Procedure Act, which I think he had in mind, is intended to protect, not corporate entities but artisans-whose livelihood depends on their workmanship. The relevant provision reads;

Section 44 (1)(ii) the tools and implements of a person for the performance by him of his trade or profession (underlining mine)

In my view, ‘person’ as used in the sub-section does not include a corporate body. The submission by learned counsel does not therefore avail to his client.”

21. He submits that subsequent High Court decisions have reiterated that section 44 (1) (ii) protects natural persons and not corporate entities like the JD. He has cited **Mks Misc Application No. 460 of 2018: Invesco Assurance Co. Ltd –vs- Kinyanjui Njuguna & Co. Advocates & Anor (2020) eKLR** where in dismissing an application by the JD, Odunga J expressed himself as follows;

*“44. The Applicant submits that it is a matter of public notoriety that chairs, desks, filing cabinets and safes are primarily installed in offices for no other purpose but to facilitate essential work of company employees in the course of business hence the centrality of these items in the daily undertaking of the insurance business indisputably qualifies them as ‘trade tools’. In my view, if this is the criteria to be applied, nothing stops motor vehicles which are meant to enable the insurance company’s staff to source for business falling also under the category of tools of trade. I therefore agree with the position adopted by **Sergon J In Bora Capital Limited –vs Jane Njeri Munyi (2018) eKLR...***

*45. Therefore, not every item that is required by an entity to undertake its operations falls under the definition of tools and implements of a person necessary for the performance by him of his trade or profession. It was therefore noted and rightly in my view, in **Francis Kamau Njoroge & Anor –vs- James Mbire Ngaita & 4 Others (2016) eKLR.***

46. Accordingly, I find no merit in this application which I hereby dismiss with costs.”

22. He further submits that the claim about a lacuna in the law is misconceived and reeks of mischief. He contends that if the JD was genuine, it would have petitioned Parliament to make the necessary changes or instituted a Constitutional petition with the Attorney

General as a party. He submits that this Court should decline the invitation to change a clear statutory proviso. He relies on the case of **Nairobi H.C Constitutional Petition No. 472 of 2017: Apollo Mboya –vs- Attorney General & 2 Others (2018) eKLR** where Mativo J stated as follows;

“It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts. The Court cannot add words to a statute or read words into it which are not there.

Assuming there is a defect or an omission in the words used by the legislature, the court cannot go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry

out the obvious intention of the legislature but cannot legislate itself.”

23. On the second issue, its his submission that the items listed by the JD are not tools of trade hence the application has no merit. He contends that the JD has deliberately muddled issues with intent to obtain favorable but undeserving orders. It is also his contention that the JD has made vague statements and the purported proof of payment has not been shown to relate to the decree issued by this court.

24. Relying on section 431 (2) of the Insolvency Act, No. 18 of 2015, he submits that there is no insolvency order between the parties hence nothing prevents the DH from pursuing all lawful means of recovering debts owing from the JD. He has also relied on section 428 of the Insolvency Act to submit that, only the court handling the

Insolvency proceedings can stay matters pending before other courts. He contends that there are no such orders from the Insolvency Court in Milimani. He states that it is immoral for the JD to collect hundreds of millions in premiums then devise schemes to frustrate decree holders.

25. Having considered the application, the replying affidavit and the rival submissions, it is my considered view that the only issue for determination is whether the application is merited or not.

26. **Section 44** of the CPA provides as follows;

(1) All property belonging to the judgment debtor, including property over which or over the profits 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-

i. the necessary wearing apparel, cooking vessels, beds and bedding of the judgment debtor and of his wife and children, and those personal ornaments from which, in accordance with religious usage, a woman cannot be parted;

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

iii. where the judgment debtor is an agriculturalist,

a) the first ten thousand shillings in value of his livestock, if any; and

b) the first five thousand shillings in value of all implements, tools, utensils, plant and machinery used in connection with stock or dairy farming or in the production of crops or plants; and

c) the first one thousand shillings in value of agricultural produce necessary to enable him earn his livelihood

27. I have reproduced a substantial part of the above section because I find merit in the DH's submission that the entire wording and phrasing of the section clearly refers to natural persons. Indeed, if the legislature had intended that corporations be covered, nothing would have been easier than to state so expressly. Accordingly, I agree with the jurisprudence from the High court leaning towards the exclusion of corporations from protection of section 44 of the CPA.

28. On the flipside, the evidence shows that there is an active insolvency petition against the JD at the High court in Nairobi-Milimani Commercial & Admiralty Division. The same was filed on 28/06/2019. The DH agrees that the court handling the Insolvency proceedings can stay matters pending before other Courts. **Section 428** of the **Insolvency Act** provides as follows;

1. At any time after the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or contributory, may-

a) if legal proceedings against the company are pending in the court-apply to the court for the proceedings to be stayed; and

b) if proceedings relating to a matter are pending against the company in another court-apply to the court to restrain further proceedings in respect of that matter in the other court

2. On the hearing of an application under subsection (1)(a) or (b), the court may make an order staying or restraining the proceedings on such terms as it considers appropriate.

3. If in relation to a company registered (but not formed) under the companies Act, 2015, the application is made by a creditor, this section extends to any contributory of the company.

29. I have looked at the affidavit of Paul Gichuhi dated 17/09/2020 and particularly the annexure marked PG-3 which is an order of Lady Justice W. Okwany. I reproduce the same as follows;

“THIS MATTER coming up in Court electronically before Hon. Lady Justice W. Okwany on 5th August 2020 for directions on the

application of the company dated 27th July 2020. UPON HEARING Mr. Awele and Mr. Ibrahim, counsel for the Applicant/Company and Mr. Khisa, counsel for the petitioner for orders that

1. **That**, this application be certified urgent and that the same be heard ex-parte in the first instance.
 2. **That**, pending the inter-partes hearing and determination of this application, the Honorable court be pleased to stay all further proceedings in all matters pending in other courts by the petitioner against the Company/Applicant as more particularly listed in the schedule marked exhibit 'INV-3'.
 3. **That**, pending the inter-partes hearing and determination of this Insolvency Petition No. E155 of 2019, the Honorable court be pleased to stay all further proceedings in all matters pending in other Courts by the petitioner against the Company/Applicant as more particularly listed in the schedule marked exhibit 'INV-3'.
 4. **That**, the Honorable court be pleased to declare ALL warrants of attachment taken out at the instance of the petitioner against the Company/Applicant since 21st June 2019, void.
 5. **That**, the Honorable court be pleased to direct that ALL claims by the petitioner against the Company/Applicant be proved at the hearing of the substantive liquidation proceedings herein.
6. That costs of this application be provided for.

IT IS HEREBY ORDERED

1. **That**, the parties to file and exchange submissions to the application dated 27/7/2020.
2. **That**, status quo obtaining currently be maintained.
3. **That**, the application dated 4/8/2020 to be heard together with application dated 27/7/2020.
4. **That**, mention on 1/10/2020.”

30. The JD submitted that there are no stay orders from the court handling the Insolvency Petition and I am inclined to agree with it because nothing in the above orders indicate otherwise. This court is not aware of the *status quo* obtaining between the parties and cannot speculate.

31. The orders of Okwany J were issued on 06/08/2020 and the JD's submissions to the current application were filed on 18/09/2020.

32. Accordingly, I am of the view that, if indeed the JD is in possession of such orders, it would confidently be presenting them to auctioneers instead of struggling to demonstrate, to individual Courts, that it is protected by section 44 of the CPA.

33. *The result is that the application has no merit and is dismissed with costs. The orders herein apply to miscellaneous application No. 99 of 2019.*

Orders accordingly

Delivered, signed & dated this 8th day of October 2020, in open court at Makueni.

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H. I. Ong'udi

Judge