



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 251 OF 2017

UNIGLOBE NORTHLINE TRAVEL LTD..... APPELLANT

- V E R S U S -

AGNES KAGURE KARIUKI 1ST RESPONDENT

ICON AUCTIONEERS 2ND RESPONDENT

RULING

1. Uniglobe Northline Travel Ltd, the appellant/applicant herein, took out the motion dated 14.9.2018 in which it sought for the following orders:

- i. THAT for reasons to be recorded, service of this application be dispensed with and this application be heard ex parte, in the first instance in respect of prayers 2 and 3 above.*
- ii. THAT pending the hearing and determination of this application inter partes, an order be issued restraining the 2nd respondent, its agents, employees, advocates, proxies and hirelings from auctioning or in any manner selling or transferring ownership the items proclaimed on 23rd August 2018 and removed from the applicant's offices on 13th September 2018.*
- iii. THAT pending the hearing and determination of this application inter partes, an interlocutory mandatory injunction do issue compelling the 2nd respondent to return to the applicant's premises all the items removed from the applicant's premises.*
- iv. THAT the OCS of Parklands Police Station be directed to enforce the orders in terms of prayer 2 and 3 above.*
- v. THAT pending the hearing and determination of this application inter-partes, the court be pleased to extend the orders issued in the ruling dated 30th January 2018.*
- vi. THAT the costs of this application be provided for.*

2. The motion is supported by the affidavit of Rachael Kiarie. When served, Agnes Kagure Kariuki and Icon Auctioneers, the 1st and 2nd respondents filed grounds of opposition to resist the motion. Learned counsels appearing in this matter made oral submissions.

3. I have considered the grounds stated on the face of the motion and the facts deposed in the affidavit filed in support of the application. I have also considered the grounds of opposition plus the rival submissions of learned counsels. I have critically examined the prayers sought in the motion and it is apparent that in prayer 1 the applicant is basically seeking for the service of the motion to be dispensed with and for the motion to be heard ex parte. That prayer is spent.

4. In prayer 2 the applicant beseeched this court to issue an order to restrain the 2nd respondent from selling or transferring the goods proclaimed and removed from the applicant's premises pending the INTERPARTES hearing and determination of the motion.

5. The applicant also sought in prayer 3 for an interlocutory mandatory injunction to compel the 2nd respondent to return to the applicant's premises all the goods removed from the applicant's premises pending the INTERPARTES hearing and determination of the motion.

6. In prayer 5 the applicant applied for the extension of the orders issued on 30.1.2018 pending the INTERPARTES hearing and determination of the application.

7. In prayer 4, the applicant sought for an order of enforcement of the orders issued in prayers 2 and 3. In prayer 6, the applicant asked to be

provided with costs of the motion.

The motion dated 14th September 2018 came up for interpartes hearing on 18th October 2018 and what is pending is its determination which is scheduled for 2nd November 2018.

9. It is obvious that upon the delivery of the ruling on the application, the orders issued shall automatically lapse. It is unfortunate that none of the advocates who appeared at the interpartes hearing of the motion pointed out the sort of orders the applicant sought. Courts can only issue orders which were prayed for and the court is not permitted to amend the prayers without being prompted to do so.

10. Having pointed out the above preliminary issues, I now turn my attention to the merits of the motion. It is the submission of the appellant/applicant that on 30.1.2018, Lady Justice B. T. Jaden, issued an order for stay of execution of the decree on condition that the appellant/applicant deposits the decretal sum in a joint interest earning account in the joint names of both counsels within 30 days.

11. The applicant further stated that on 23.8.2018, the 2nd respondent visited the applicant's premises and proclaimed the applicant's goods. The applicant also stated that it instructed its advocate to engage the 1st respondent's advocate to express its willingness to deposit the decretal sum as ordered by the court on 30.1.2018.

12. The applicant further averred that it informed the 1st respondent that the properties proclaimed were charged to Chase Bank Ltd. Despite giving the aforesaid information to the 1st respondent's advocate, the 2nd respondent stormed the applicant's premises on 13.9.2018 and carted away the proclaimed goods.

13. The applicant pointed out that the goods taken away included computers with sensitive and confidential information which may be easily tampered with by the 2nd respondent. This court was beseeched to issue the orders to stop the 1st and 2nd respondents from selling the aforesaid properties.

14. The respondents strenuously opposed the motion. It was pointed out that the order for stay issued by Lady Justice B. T. Jaden lapsed when the applicant failed to comply with the condition to deposit the decretal sum within the period set by the court.

15. The respondent's further argued that since the order lapsed there is no order to extend. It was also argued that the auctioneer attached movable properties and not immovable properties which were allegedly charged with Chase Bank.

16. The record shows that on 30th January 2018, this court delivered a ruling granting the appellant/applicant an order for stay of execution of the decree pending appeal on condition that it deposits the decretal sum in an interest earning account in the joint names of learned counsel within 30 days. The ruling was delivered in the presence of the respondent's advocate and in the absence of the appellant's advocate.

17. The appellant has stated that it was not aware of the delivery of ruling until its goods were proclaimed on 23.8.2018. However the appellant has not explained why it took its erstwhile advocate so long to comply with the condition imposed by the court on 30.1.2018.

18. It has not even explained why the erstwhile advocate failed to attend court for the ruling on its application for stay.

19. It is not just enough to lay blame on eh appellant's advocate for its mistakes. This is one of the cases where the client is left to suffer for the mistakes of its counsel.

20. It is admitted by the appellant that it came to know of the ruling delivered on 30.1.2018 when the 2nd respondent proclaimed its goods on 23.8.2018. But it waited until 14.9.2018 to file the current motion. The reasons advanced in support of the motion is that the goods attached contain sensitive information which is crucial to the appellant's business. It is also argued that the goods are charged with Chase Bank.

21. With respect, I find the arguments advanced by the appellant not convincing. I agree with arguments advanced by Mr. Osundwa, learned advocate for respondents that the information can as well be down loaded to another backup.

22. I also agree with the learned advocate that the goods attached are movable and therefore they cannot be said to have been charged with Chase Bank Limited.

23. In short, I find that the appellant/applicant's motion to be without merit. It is dismissed with costs to the respondent. Even if I had granted the orders the same would lapsed at the determination of the motion dated 14.9.2018 and as sought in prayers 2, 3 an 5.

Dated, Signed and Delivered in open court this 2nd day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents