



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA ELC NO.372 OF 2017

(FORMERLY NAIROBI HCCC NO. 816 OF 2014)

DANIEL MUCHERU & OTHERS.....PLAINTIFF/RESPONDENT

VERSUS

NAIROBI CITY COUNTY.....1ST DEFENDANT/RESPONDENT

STRABAG-BAU-AG.....2ND DEFENDANT/RESPONDENT

LIMA LIMITED.....3RD DEFENDANT/RESPONDENT

AND

STRABAG INTERNATIONAL GMBH.....OBJECTOR/APPLICANT

RULING

The matter for determination is the **Notice of Motion Application** dated **6th March 2017**, by the Objector / Applicant seeking for orders that;

- 1. That a declaration be and is hereby issued that the intended attachment , seizure and or execution of the Judgment and or execution of the judgment and or decree herein against the Objector herein is illegal, null and void and of no legal consequences.***
- 2. That be a permanent order of injunction be and is hereby issued, restraining the Plaintiffs by themselves, their agents, servants or whomsoever acting on their behalf from executing the decree herein against the Objectors property.***
- 3. That the Plaintiffs be and are hereby permanently restrained from henceforth pursuing post Judgment proceedings in respect of this suit, including service of any Court process against the Objector herein.***
- 4. That the costs of this Application be borne by the Plaintiffs.***

The Application is premised on the grounds that despite not being a

party to this case and having not being served with Summons to Enter Appearance or other Court processes, the Objector/ Applicant has since been served with **taxation notice** and proceedings with an express intimation from the Plaintiffs/Respondents that its goods have been proclaimed and bound to be attached and carted away anytime. That the 2nd Defendant was wound up and struck off the register of Companies way back in **2010**. That the filing and further continuation of this case against the 2nd Defendant is a legal nullity against a non-existent party, null and void ab initio.

That the continued service and further proceedings upon the Objector/ Applicant is tainted with malafide and ulterior motives alien to the law and known Court procedures. That **No** prejudice shall be visited upon the parties herein if the Application is allowed as the correct factual basis shall be laid to assist the Court in preventing further abuse of the Court process and diversion of the cause of justice.

In his Supporting Affidavit **Richard Owino Wambalo**, averred that the Objector/Applicant is a Company that was registered in Germany. That in a bid to be recognized and be allowed to operate in Kenya , the Objector/ Applicant applied to the Registrar Of Companies and on **20th July 1989**, was issued with a Certificate of Compliance signalling the authorization to which the Objector/ Applicant established and

began operating in Kenya.

That on **22nd July 2019**, the Objector/ Applicant was approached by the Plaintiff's Advocate at its offices in **Regent Court Management** with a forwarding letter and a Judgment to discuss the said Judgment and the issue of costs. He contended that the Applicant through its agents declined to accept service as the letter was addressed to the **2nd Defendant** and the Judgment did not involve the Applicant. The Applicant had not been previously served with **Summons to Enter Appearances** and Court process in this matter and could not be brought in the case too late in the day.

Further that on **24th January 2020**, the Applicant was once again served with a **Taxation Notice** and despite protestation, the Plaintiff's Advocate representative prevailed upon him under duress to accept service on behalf of the Objector/ Applicant. He averred that the Advocate further informed him that the Objector's/ Applicant's goods had already been traced and proclaimed and were about to be attached but refused to give him the proclamation Notice. That on **28th January 2020**, the Applicant sent a representative to Court to indicate its position.

It was his contention that the continued service of Court documents upon the Applicant post Judgment and despite the Applicant not being a party to the case, is laced with malafides and ulterior motives indicating an intended execution of the **decree** against the Applicant contrary to the rules of Natural Justice and the law. That there is imminent threat to the Objector's/ Applicant's goods being attached anytime unless restrained by Court. That the Applicant, has since established that the **2nd Defendant** was struck off the Register of Companies.

The Objector/ Applicant filed a further Affidavit by **Richard Owino Wambalo** sworn on **21st May 2020**, who averred that the Objector/ Applicant has over the year sought and has been issued with Single Business Permits to enable it operate in the City County of Nairobi. That the Objector/ Applicant has been leasing its office premise in its current location where the Plaintiff has posted the Judgment purporting to serve Court processes. He further contended that the Objector/Applicant has been requisitioning and making purchases of an assortment of items in its name over the years and dutifully paying its taxes. Further, it is clear that the Objector/ Applicant has been operating in its own name as an independent entity and it is a legal misnomer and absurdity for a litigant to sue one entity and purport to execute against another.

Though the Plaintiffs were served through their Advocate, they did not respond to the Application and therefore the Application is unopposed and the allegations by the Objector/ Applicant are uncontroverted.

However, the Objector/ Applicant still has the obligation to satisfy the Court that it deserves the orders sought.

The Objector/ Applicant filed written submissions on **23rd July 2020**, through the **Law Firm of Milimo Muthomi & Co Advocates**, which the Court has now carefully read and considered. The Court finds the issue for determination is ***whether the Objector/ Applicant is entitled to the orders sought.***

It is the Applicant's contention that the Plaintiffs have effected Service of Notice of Taxation to the Applicant of the instant case after Judgment has already been delivered, despite the fact that it was not a party to the suit. Further the Objector's/ Applicant's has contended that the Plaintiffs served it with the Judgment and Notice of taxation requiring it to pay the Decretal sum and has even threatened attaching its property. As already noted, the allegations by the Objector/ Applicant have not been rebutted and the Court has no reason to doubt the said Allegations.

Further the Objector/ Applicant has produced documents evidencing that it has always been operating in its own name and that it is distinct and separate from the **2nd Defendant** who was struck off the Register of Companies in **2010**, the said evidence is confirmed through the Gazette Notice.

The Plaintiffs have not opposed the Application and have therefore not shown the nexus they sought to rely on to serve the Objector/ Applicant with the Judgment and the Notice of Taxation for the instant suit. It is clear that the Applicant/Objector was not a party to the instant suit; **Strabag International GMBH and Strabag-Bau-Ag** are two different names and as per the evidence adduced, different entities. Unless a party can show the **Nexus** between the two, which evidence was not shown, the Court finds and holds, that the Plaintiffs have no reasons to execute against the Objector/ Applicant who was never a party to the suit.

Order 22, rule 51 of the Civil Procedure Rules provides;

(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.

In the case of **Nelson Kombe Mangaro ...Vs...Tana River Bus Services;Mansour Naji Said & another (Objectors/Applicants) [2019] eKLR** the Court held that;

In addition, there are a number of particular features that were not dealt with in the specific attachment by the respondent. The attachment was issued against the applicants who were not litigants in the original suit. The decree holder did not undertake due diligence to ascertain the ownership or legal interest and equitable interest of the property proclaimed to fully justify the attachment in execution of a valid Judgment of the Court. This is what seems to have occurred which broadly speaking must have infringed the rights of the shareholders, a decision which could have been avoided by recognizing and giving effect to the basic structure of a limited company with share capital and its shareholders.

The Objector/Applicant herein having never been a party to the suit, ought not to be served with any suit papers or threatened with

attachments, after Judgment of proceedings it did not participate in . The upshot of the foregoing is that the **Notice of Motion Application** dated **6th March 2020** by the Objector/ Applicant is found merited and the same is allowed entirely. Given the circumstances of this case, costs shall be in the cause.

It is so ordered.

Dated, signed and Delivered at Thika this 14th day of December, 2020.

L. GACHERU

JUDGE

14/12/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff /Respondent

No appearance for the 1st Defendant *Though Ruling notice*

No appearance for the 2nd Defendant *had been sent out*

No appearance for the 3rd Defendant

No appearance for the Objector/Applicant

L. GACHERU

JUDGE

14/12/202