REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

COMM. CASE NO. 295 OF 2008

BETWEEN

MOHAWK LIMITED……………………………………………………….. PLAINTIFF

AND

LEO INVESTMENTS LIMITED…………………………………………………….DEFENDANT

AND

MIRIHI LIMITED…………………………………………………….1ST OBJECTOR

NAIROBI SKYLINE PROPERTIES LIMITED…………………………2ND OBJECTOR

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Introduction and Background

1. By applications both dated 17th March 2025, the Defendant and the Objectors seek to stay the execution of the judgement and decree issued on 30th October 2023 and proclamations notices dated 12th March 2025 and set aside the same for being irregular and unlawful. The Defendant has also filed the application dated 14th

October 2025 seeking to set aside and vary the orders of 30th October 2023 adopting the Award of the Arbitrator published on 11th August 2011 and reinstate its application for setting aside the award dated 4th October 2011.

2. The applications have been responded to by various depositions and canvassed by way of written submissions that I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

3. Having gone through the pleadings and the submissions, I find that the court is being called to determine whether the decree and proclamation notices ought to be set aside and whether the orders of the court dated 30th October 2023 adopting the arbitral award ought to be set aside and the Defendant's application to set aside the Award reinstated.

4. The Defendant's position is that this matter originates from an Arbitration Award that was adopted as a Judgment of the Court on 30th October 2023 but the Defendant claims it was not aware of this judgment because neither they nor their advocate were present in court when it was delivered. It claims that it only became aware of the judgment on 12th March 2025, when auctioneers

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appeared at their offices to proclaim goods and that the Plaintiff's attempt to execute the decree is illegal because the Plaintiff failed to follow mandatory procedural rules including serving a 10-day notice before executing, which was not done, that the judgment was issued more than one year ago and in such cases, the law requires the Plaintiff to first issue a Notice to Show Cause to inquire why execution should not proceed, rather than moving straight to attachment of property.

5. **Order 22 Rule 18** of the ***Civil Procedure Rules*** provides as follows:

> *(1) Where an application for execution is made—*
>
> *(a) more than one year after the date of the decree;*
>
> *(b) against the legal representative of a party to the decree; or*
>
> *(c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:*
>
> *Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party*

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> *against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment- debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:*
>
> *Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.*

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.

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6. From the above provision, the requirement to issue a Notice to Show Cause is triggered when an application for execution is made more than one year after the date of the decree. I am in agreement with the Plaintiff that since the decree was issued on 1st December 2023 and the application for execution was made on 11th

September 2024, this was well within the one-year period prescribed by the ***Rules*** above. The Defendant appears to have calculated the time from the date of judgment which is 30th October 2023 to the date the Auctioneer proclaimed the goods on 12th March 2025 which is incorrect. The ***Rules*** does not look at when the auctioneer arrived but when the Plaintiff applied to the court to execute. Since the Plaintiff applied for execution on 11th September 2024, this was within the one-year period and it was therefore not obligated to serve a Notice to Show Cause.

7. On whether the Plaintiff ought to have issued the 10-day Notice of Entry of Judgment, **Order 22 Rule 6** of the ***Rules*** provides as follows:

> *Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:*
> *Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.*

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8. I am in agreement with the Plaintiff that the proviso to **Order 22 Rule 6** above explicitly limits the requirement for a 10-day notice to default judgments where the defendant failed to enter appearance or where they entered appearance but failed to file a defence. The judgment being executed is not a default judgment but arises from an Arbitration Award that was adopted by the court. Going through the pleadings, I note that the Plaintiff has provided extensive evidence of emails, Hearing Notices, and Mention Notices showing that the Defendant's advocates were actively participating in the proceedings leading up to the ruling of 30th October 2023. The Defendant was aware of this matter, had filed applications previously, and had requested adjournments. The Defendant's argument that it was absent on the specific day the ruling was delivered is negated by the fact that absence on the day of judgment does not retroactively convert a contested matter into a default judgment. The case was heard inter partes with both parties being given an opportunity to participate.
9. I therefore restate that the 10-day notice is designed to alert a defendant who has never participated or responded that a judgment has been entered against them. In this case, the

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Defendant participated in the process but it merely failed to show up for the judgment.

10. From my findings above, the Defendant's application dated 17th March 2025 that seeks to set aside the proclamation notice fails as the execution process is lawful and regular.

11. I now turn to the Defendant's other application that seeks to set aside the orders made on 21st March 2021 which dismissed its application to set aside the Arbitral Award and the subsequent judgment of 30th October 2023 which adopted the Award. The Defendant states that its original application to set aside the Arbitral Award dated 4th October 2011 raised weighty issues of jurisdiction and was wrongly dismissed. It avers that the dismissal happened during a mention and not a hearing and was based on incorrect information given to the court by the Plaintiff's advocate. That on 6th February 2020, the court (Okwany J.,) reinstated the suit and ordered the Defendant to list its application for setting aside the Award for hearing within 30 days. The Defendant claims it fixed the application for hearing on 30th April 2020 within the 30-day window but the matter did not proceed on that date, and eventually, on 21st March 2021, the court dismissed the application for want of prosecution.

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12. The Defendant alleges the Plaintiff's counsel misled the court on that date by claiming the Defendant had never fixed the application for hearing and that the Defendant was never notified of this dismissal and only learned of it when execution began in March 2025. The Defendant seeks to revive the application to set aside because it believes the Arbitrator acted without jurisdiction arguing that the case was based on a signed contract for Kshs. 12.4 Million, however, the Arbitrator heard claims regarding an unsigned contract for Kshs. 18.6 Million. The Defendant avers that this arrangement was illegal as it was intended to evade taxes, and therefore the entire Award flowing from it is unenforceable.

13. In response, the Plaintiff, in its deposition, outlines a long list of delaying tactics employed by the Defendant since the arbitration began in 2009. That the Defendant refused to appoint an arbitrator, filed multiple unmerited challenges to the arbitrator's jurisdiction which were dismissed as vexatious and malicious and refused to pay arbitral fees, nearly causing the arbitrator to withdraw. The Defendant then filed several Notices of Appeal against adverse rulings but never prosecuted them and that it filed an application to set aside the Arbitral Award in 2011 but deliberately failed to prosecute it for years. The Plaintiff restated that the court reinstated the suit on the condition that the Defendant lists its

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application for hearing within 30 days, failing which it would "...*be deemed as dismissed*." The Plaintiff states the Defendant did nothing for over a year and therefore, the dismissal on 21st March 2021 was not unprocedural but was the automatic consequence of the Defendant's own inaction and failure to comply with the orders.

14. The Plaintiff explains that after the Defendant's application to set aside was deemed dismissed, it finally set down the application to adopt the Award for hearing. That it served the Defendant with multiple hearing notices via email and physical service for dates in 2022 and 2023 and on 6th July 2022, the Defendant's counsel emailed to say they had a pending application, but when the matter came up, they were not ready and requested adjournments. Eventually, on 2nd October 2023, the Defendant failed to attend court entirely, and the ruling was delivered in their absence on 30th October 2023.

15. The Plaintiff asserts that the issue of the Arbitrator's jurisdiction was already raised by the Defendant as a preliminary issue before the Arbitrator. The Arbitrator heard the matter and dismissed the objection in a ruling dated 22nd October 2009 and the Plaintiff argues this issue is therefore *res judicata* and cannot be raised again now. The Plaintiff points out that the Defendant's application raises the same grounds as the previous application dated 17th

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March 2025 and the Plaintiff argues this is an abuse of the court process designed to multiply proceedings and further delay execution. For these reasons, the Plaintiff urges the court to find the application without merit and dismiss it with costs.

16. In an application for reinstatement, an applicant must appeal to the discretion of the court which discretion ought to be exercised in a just manner. In **Shah vs Mbogo & Another (1967) EA 116** Harris J. stated that *'The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice'.* There is need to balance the requirement as to whether reasonable grounds have been proffered for reinstatement and the prejudice to be suffered by the opposite party if such an order for reinstatement were to issue bearing in mind at the same time that dismissal is a draconian order that drives parties away from the seat of justice and should therefore be employed sparingly (See Nambuye JA., in **Ngugi v Thogo [2021] KECA 88 (KLR)].**

17. The guiding principles in an application of this nature have been articulated in several authorities. The Court of Appeal, in **Peter Kipkurui Chemoiwo v Richard Chepsergon**

[2021] KECA 979 (KLR) affirmed the principles and test to be applied in an application for reinstatement as set out by Chesoni J., (as he was then) in ***Ivita –v- Kyumbu [1984]* KLR 441,** where it was held as follows:

> *The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.*

18. Having gone through the application, the response and the parties' submissions, I find that the Defendant has failed to provide a good explanation warranting the exercise of the court's discretion in its favour for a number of reasons. One, the Defendant claims it was

unaware of the dismissal because counsel failed to inform it. However, the Plaintiff's evidence of emails and stamped Hearing Notices shows that the Defendant's advocates were actively aware of the proceedings and the failure to attend court on 21st March 2021 was not an excusable mistake but a pattern of conduct. The Plaintiff provided overwhelming evidence that since 2009, the Defendant has filed multiple frivolous challenges specifically to delay the conclusion of the matter. The court's discretion is not meant to reward such a history.

19. Two, the application to set aside the award was filed in 2011. The Defendant

was given a specific order in February 2020 to fix it for hearing within 30 days, it failed to do so and the Plaintiff waited for over a decade. The Defendant's new advocates argue that the dismissal was unprocedural because it happened during a mention. However, the dismissal was the direct result of a conditional order which stated that if the Defendant did not list the application within 30 days, it would be "…*deemed as dismissed*." The Defendant cannot blame the court for enforcing its own express order. Three, while dismissal is a draconian order, the court must consider justice to both parties. The Plaintiff obtained an Arbitral Award in 2011 and has been waiting for over 15 years to enjoy the

fruits of its judgment. The Defendant's conduct has consistently prevented this and has greatly prejudiced the Plaintiff. The Defendant argues it will suffer if the award stands, however, it had its chance to challenge the award on jurisdiction in 2009 and lost. It had another chance to set aside the award in 2011 and failed to prosecute it and it cannot now ask for a "another chance" based on the same arguments.

20. I am in agreement with the Plaintiff's submission that the Defendant's application appears to be a continuation of the delaying tactics. Since the delay was prolonged, the excuse is inadequate, the history shows a deliberate attempt to obstruct justice and I conclude that the Defendant has not met the threshold for reinstatement. Its application dated 14th October 2025 is therefore dismissed.

21. The next application to determine is that of the Objectors that seeks to stop the auctioneers from selling the goods proclaimed in the Notice dated 12th March 2025 and that the court declares that the proclaimed goods belong to the Objectors and are not liable for attachment. The Objectors describe themselves as separate legal entities who are not a party to the suit between the Plaintiff and the Defendant and that on 12th March 2025, auctioneers raided their head office at *Diamond Plaza* and proclaimed various items,

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including office computers, furniture, and vehicles. That the auctioneers threatened to return after 7 days to cart away the goods but the Objectors state that the execution is illegal and should be stopped because the judgment is against the Defendant, *Leo Investments Limited* but that they are a different entity and were not part of the case. That the proclaimed goods belong to the Objectors, not the Defendant and they claim the auctioneers and the Plaintiff failed to do proper due diligence to verify who owns the goods before proclaiming them.

22. In response, the Plaintiff depones that the Objectors are not independent third parties but are closely connected to the Defendant and are colluding to frustrate the execution. It claims that the directors of the 1st Objector are Zara Madatali Chatur and Rahim Madatali Saburali Chatur who are the same directors of the Defendant and the Plaintiff argues this is an attempt to use separate corporate identities to shield assets from execution. The Plaintiff avers that most documents provided by the Objectors as proof of ownership are mere quotations not paid invoices or delivery notes and that there is no evidence the items were actually purchased. That some documents like logbooks are in the names of other entities who are not parties to this objection, that another logbook shows a registration date of “01/01/1910”, which

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the Plaintiff argues is impossible and suggests the documents are fabricated.

23. The Plaintiff confirms the auctioneer visited the offices at *Diamond Plaza* because it constructed the building for the Defendant, who later refused to pay. The Plaintiff points out procedural flaws including that the Objectors did not follow the proper procedure under the law of filing a notice and requiring the Plaintiff to respond within 7 days, that the Notice of Objection was issued by the Advocates, not the Objectors themselves, which the Plaintiff argues is defective. As such, the Plaintiff urges the court to dismiss the Objectors' application with costs, stating it is a fraudulent scheme to deny it as the decree holder the fruits of its judgment.

24. **Order 22 Rule 51** of the ***Rules*** provides for objection to attachment of property as follows:

    (1) <u>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</u> 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.

    (2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the

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nature of the claim which such objector or person makes to the whole or portion of the property attached.

(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

25. A reading of **Order 22 Rule 51** above places the Objector with the burden of proving that it is entitled to or has a legal or equitable interest on the whole or part of the proclaimed/attached goods. This position has been buttressed by the court in a plethora of decisions including that of **Chotabhai M. Patel v Chaprabhi Patel [1958] EA 743,** where it was held that;

a) Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to attachment the court shall proceed to investigate the objection with the like power as regards examination of the Objector, and in all other respects as if he was party to the suit.

b) <u>The Objector shall adduce evidence to show that at the date of attachment he had some interest in the property attached</u>.

c) The question to be decided is, whether on the date of attachment, the Judgment Debtor or the Objector was in possession, or where the court is satisfied that the property was in the possession of the Objector<u>, it must be found</u>

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whether he held it on his own account or in trust for the Judgment Debtor. The sole question to be investigated is, thus, one of possession of, and some interest in the property.

d) Questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the Judgment Debtor or some other person. To that extent the title may be part of the inquiry.

26. Having gone through the application and the various rival depositions by the parties, it is my finding that the Objectors have failed to provide credible evidence linking them to the goods on the specific date of attachment. Whereas the Objectors annexed cash sale receipts, the Plaintiff's analysis in its Supplementary Affidavit casts significant doubt on their authenticity. It appears that the KRA PINs on key receipts for computers and generators were checked and found to be invalid and I can only conclude that if a PIN number is fake or invalid, the receipt itself is likely a fabrication. The Objectors provided cash payments of Kshs. 2.4 million and Kshs. 1.2 million without bank statements or proof of withdrawal which defies commercial logic. I also note that the NTSA searches provided were dated August 2025, five months after the

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attachment. They do not prove who owned the vehicles on 12th March 2025. Furthermore, some searches showed no owner at all, or owners that did not match the Objectors' names at the time of attachment, for instance, *Chatur Properties Limited* before the name change was formally linked to the attachment date.

27. Further, while the goods were physically found in offices occupied by the Objectors, the Plaintiff has raised an important question as to the relationship between the directors of the Defendant and the Objectors. The Plaintiff provided CR12 searches showing that the 1st Objector and the Defendant are controlled by the exact same individuals. Whereas I can agree that companies are essentially alter egos of the same individuals and share premises, the court is entitled to look at the reality of the situation. The Objectors' argument that the company is separate from its directors is legally and technically correct, but it does not automatically prove that the possession of the goods was independent. Given the familial and directorial links, the Plaintiff has raised a reasonable inference that the Objectors were holding the assets on behalf of, or for the benefit of, the Defendant to shield it from execution.

28. I find the Objectors' case to be weak because the evidence appears manufactured to defeat the execution. The Plaintiff pointed out that the Objectors' deponent, Doreen Nyawira Muchiri swore

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affidavits for both the Defendant in its application and the Objectors. This suggests a unified strategy between the two entities, not an independent third-party claim. I find that the documents presented by the Objectors were either quotations which are not proof of purchase, receipts with invalid tax PINs or vehicle records obtained after the fact. The Objectors had the burden to provide clear, cogent evidence like logbooks dated before March 2025, paid invoices or receipts with valid PINs, or bank statements which they failed to do.

29. I therefore conclude that the Objectors have not discharged their burden and they have failed to prove, on a balance of probabilities, that they had a legal or equitable interest in the goods at the time of attachment. The totality of the evidence points to a collusive scheme between the Objectors and the Defendant to frustrate the Plaintiff's lawful decree, a situation the court cannot countenance. The Objectors' application dated 17th March 2025 therefore collapses at this point as it lacks merit.

Conclusion and Disposition

30. The upshot is that applications dated 17th March 2025 and 14th October 2025 are all dismissed with costs being borne by the Defendant and Objectors and awarded to the Plaintiff.

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DATED SIGNED and DELIVERED virtually at NAIROBI this 19TH DAY of MARCH 2026

..
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Kisaka for the Respondent/Decree Holder.
2. Mr. Mwangi Kigotho for the 1st Defendant.
3. Ms. Kendi for the Objector.
4. Amos - Court Assistant

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