



**Presbeta Investment Limited & another v National Bank of Kenya & 2 others (Environment & Land Case 135 of 2016) [2024] KEELC 1499 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1499 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 135 OF 2016**

**NA MATHEKA, J  
MARCH 19, 2024**

**BETWEEN**

**PRESBETA INVESTMENT LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**MILELE BEACH HOTEL COMPLEX LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**NATIONAL BANK OF KENYA ..... 1<sup>ST</sup> DEFENDANT**

**THE PRESBYTERIAN FOUNDATION ..... 2<sup>ND</sup> DEFENDANT**

**SPOTLIGHT INTERCEPTS AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> defendant moved the court through an application dated 17<sup>th</sup> October 2023 seeking orders for the following:
  1. Spent.
  2. That this Honourable Court be pleased to grant stay execution of the ruling issued on 8<sup>th</sup> February, 2019 and any orders therefrom against the 2<sup>nd</sup> defendant pending the hearing and determination of this application.
  3. That this Honourable Court be and is hereby pleased to grant leave for stay of execution of the warrants of attachment of movable property in execution of a decree for money and warrants of sale of property in execution of a decree for money issued to Status Auctioneers for recovery of a sum of Kshs. 15,836,200 and any orders arising therefrom against the 2<sup>nd</sup> defendant pending the hearing and determination of this application
  4. That this Honourable Court be pleased to vary, set aside, and/or lift the warrants of attachment and sale issued on 6<sup>th</sup> September 2023 and proclamation dated 11<sup>th</sup> October 2023



demanding payment of a total of Kshs. 18,023,278.00 or any form of distraint and subsequent advertisement for sale of the 2<sup>nd</sup> Defendant's proclaimed properties.

5. That costs be provided for.
2. In a joinder, the 1<sup>st</sup> defendant filed grounds of opposition dated 31<sup>st</sup> October 2023 stating inter alia that the said application offends the provisions of Order 9 rule 9 of the Civil Procedure Rules. The same through its legal manager, Chrispus Maithya also filed a replying affidavit sworn on 5<sup>th</sup> December 2023 stating the following averments which I have summarized as below:
  1. That the firm of Gitahi Githu & Co. Advocates have offended the rules of Order 9 rule 9 of the civil procedure rules as they did not obtain a consent from the previous advocates of Ndegwa Katisya Sitonik & Associates who were on record for the 2<sup>nd</sup> defendant.
  2. The 1<sup>st</sup> defendant agrees that costs were not awarded against the 2<sup>nd</sup> defendant and hence the decree could not be executed against the same.
  3. The legal manager vehemently denies that the goods of the 2<sup>nd</sup> defendant were attached.
  4. The 2<sup>nd</sup> defendant is a separate legal entity from the plaintiffs and thus lacks any locus to stop the execution process. Furthermore, the 2<sup>nd</sup> defendant has not adduced any evidence to show that it is the proprietor of the 2<sup>nd</sup> plaintiff.
  5. The legal manager denies that the 2<sup>nd</sup> defendant will suffer any injuries or loss as the goods do not belong to them.
3. In response to the 1<sup>st</sup> defendant's legal manager replying affidavit, one Patricia Karanja who is the legal officer of the 2<sup>nd</sup> defendant swore a further affidavit on 25<sup>th</sup> January 2024 and averred the summarized following:
  1. The firm of MMA Advocates LLP appeared to represent the 2<sup>nd</sup> defendant in the early stages but after the suit was struck out the firm of H.N Njiru came on record after receiving instructions to represent them in taxation.
  2. The legal officer stated that the firm of Ndegwa Katisya Sitonik & Advocates never represented the 2<sup>nd</sup> defendant.
  3. The legal officer also stated that they a consent had been executed between the firm of H. N Njiru & Advocates and themselves. The said consent is dated 16<sup>th</sup> November 2023.
  4. The goods contained in the proclamation notice belong to the 2<sup>nd</sup> defendant and therefore the same has a right to seek injunctive orders.
  5. The 2<sup>nd</sup> defendant is the owner of Milele Beach Hotel which has no affiliation to Milele Beach Hotel Complex Limited which is the 2<sup>nd</sup> plaintiff. Further, the 2<sup>nd</sup> defendant avers that there the plaintiffs do not own any property in the Milele Beach Hotel.
4. The history of this suit is that the plaintiffs filed this suit against the defendants through a plaint dated 30<sup>th</sup> May 2016 and was later struck out on 31<sup>st</sup> May 2018. The reasons for striking out the suit was that the court had already discharged its mandate as provided under section 7 of the Arbitration Act and hence there is no dispute to be determined since the dispute was under the jurisdiction of an arbitrator. In addition, the court had been informed that the plaintiffs vacated Milele Beach Hotel. After the suit was struck out, warrants of attachment were issued to the 3<sup>rd</sup> defendant on 6<sup>th</sup> October 2023 and the same proceeded to proclaim what seems to be goods in a hotel. The proclamation notice dated 11<sup>th</sup>



October 2023 is vague in the court's opinion but based on the averments by the 2<sup>nd</sup> defendant it would seem the goods proclaimed are in Milele Beach Hotel.

5. Counsel for the 2<sup>nd</sup> defendant submitted that the previous legal officer left employment without proper handing over hence the new legal officer was not aware whether the 2<sup>nd</sup> defendant was represented or not. Counsel admitted that Order 9 rule 9 of the Civil Procedure Rules was put in place to protect advocates from mischievous clients who would wait until judgment is delivered and then replace him. They however stated that in this case the lack of handing over left them with no choice but to instruct the firm of H.N Njiru & Company advocates to protect its propriety rights. Counsel however submitted that a consent had already been executed and therefore the issue of representation was already settled. Counsel also submitted the 2<sup>nd</sup> defendant has satisfied the requirements in *Giella vs Cassman Brown (1973) EA 358* and are therefore entitled to injunctive orders and concluded by stating that the plaintiffs are separate entities from itself and any purported execution against itself would be unlawful.
6. I have considered the application and responses thereto and the submissions therein. In determining the true judgment debtor, we have to go back to the ruling of 31<sup>st</sup> May 2018. The wordings used in holding are as follows:

10. In the result, the Notice of Motion dated 14<sup>th</sup> March 2017 is merited and is allowed. The plaintiffs' suit is struck out with costs to the 1<sup>st</sup> and 3<sup>rd</sup> defendants."

7. The 1<sup>st</sup> and 2<sup>nd</sup> defendants ought to seek execution against the plaintiffs and not the 2<sup>nd</sup> defendants. It is trite that any execution should be directed towards the plaintiffs and not the 2<sup>nd</sup> defendant.
8. The prayers are threefold but the substantive prayer was for stay of execution of ruling and the warrants of attachment and consequently setting aside of the said warrants of attachment and proclamation and any subsequent advertisement for sale. The 2<sup>nd</sup> defendant through its legal officer Patricia Karanja claim that the goods in the proclamation notice belong to Milele Beach Hotel of which they are the registered proprietors. The 1<sup>st</sup> defendant has also denied that they served the 2<sup>nd</sup> defendant with the aforementioned proclamation notice. In *National Industrial Credit Bank Limited vs S. K. Ndegwa Auctioneer (2005)* eKLR, the court of appeal defined the process of proclamation as follows;

From the moment the goods are proclaimed, the judgment-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law and the court through the auctioneer. The judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the auctioneer moves to the second stage of conducting the sale of the attached goods."

9. The said proclamation notice annexed as PK 3 is vague and difficult in determining who was being served. Rule 12 (1) of the Auctioneers Rules provides the step by step when seizing or attaching movable goods other than perishables and livestock as follows;
  - (1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—
    - a. record the court warrant or letter of instruction in the register;
    - b. prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods



are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;

- c. in writing, give to the owner of the goods seven days notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction;
- d. on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction;
- e. ensure safe storage of the goods pending their auction;
- f. arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter;
- g. not remove any goods under the proclamation until the expiry of the grace period.

10. The proclamation is vague and open to speculation, but what is clear is that the 1<sup>st</sup> defendant has not denied that the items proclaimed are in Milele Beach Hotel. I have perused the file and unfortunately, there is no document linking ownership of Milele Beach Hotel to either the plaintiffs or the 2<sup>nd</sup> defendant. I am also equally dissatisfied with the nature of the proclamation notice by the 3<sup>rd</sup> defendant who is an agent of the 1<sup>st</sup> defendant.

11. The law in staying execution of warrants of attachment can be found in Order 22 rule 22 of the Civil Procedure Rules provides that there should be sufficient cause and a security but I am reluctant in issuing this order as the judgment debtors are the plaintiffs and not the 2<sup>nd</sup> defendant. Hence I dismiss prayer 2 and 3 of the application. With respect to prayer 4 I cannot lift the warrants of attachment as they have been validly processed against the plaintiff and the 2<sup>nd</sup> defendant lacks locus in making such application. However, in the second limb of prayer 4 of setting aside the proclamation I am guided by the rules of natural justice that it is only trite that the proclamation notice is set aside and fresh ones be issued to the plaintiffs. It should be clear that the recipients are 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs. I find that the application is merited and order that the proclamation notice and any other subsequent distraint or advertisement of sale against the 2<sup>nd</sup> defendant is set aside with no orders as to costs.

12. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19<sup>TH</sup> DAY OF MARCH 2024.**

**N.A. MATHEKA**

**JUDGE**

