



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 41 OF 2006**

**KENYA ENGINEERING WORKERS UNION.....CLAIMANT/DECREE HOLDER**

**VERSUS**

**ROLMIL KENYA LIMITED.....RESPONDENT/JUDGMENT DEBTOR**

**AND**

**HEBROS AUCTIONEERS.....RESPONDENT**

**AND**

**TRANSAFRICA MOTORS LIMITED.....OBJECTOR/APPLICANT**

**RULING**

1. Before me for determination is an Application by the objector dated 16<sup>th</sup> December 2020. The Applicant seeks orders THAT:

*(i) Spent.*

*(ii) Spent*

*(iii) That the court be pleased to review and set aside its ruling dated and delivered on 15<sup>th</sup> April 2020 limited to the attachment of 10 generators, 2 new forklifts, 2 new Sonalika tractors, 1 new safe, a fair reception desk and 6 fair reception chairs situated at the premises of the Objector/Applicant.*

*(iv) That an order do hereby issue that the properties known as 10 generators, 2 new forklifts, 2 new Sonalika tractors, 1 new safe, a fair reception desk and 6 fair reception chairs subject of proclamation dated 19<sup>th</sup> December 2019 by Hebros Auctioneers the agent of the Plaintiff/Decree Holder are the property'- of the Objector and cannot be attached in execution of the court decree herein.*

*(v) That costs of this application be provided for.*

2. The application is based on the grounds set out on the face of the Notice of Motion Application and in the supporting affidavit of **Ali Mohamed Abubakar**, the managing director of the Objector/Applicant, sworn on the same date.

3. The grounds advanced on the face of the application and the supporting affidavit arise from a ruling delivered on 15<sup>th</sup> April 2020 by Wasilwa J.

4. The Objector/Applicant avers that the Hebros Auctioneers on instructions of the Claimant/decree holder proclaimed the assets of the Objector/Applicant purporting to enforce the judgment against the Judgment Debtor.

5. The objector/Applicant not being a party to the proceedings moved this court through objection proceedings which ruling was delivered on 15<sup>th</sup> April 2020 virtually in the absence of all the parties. It states that during the filling of the objection proceedings it did not have access to ownership documents of the items that are subject to the current application and its finance officer in whose custody they were was away on annual leave.

6. The Objector/Applicant filed the current application seeking stay and review of the court ruling dated 15<sup>th</sup> April 2020. It states that there have been threats by auctioneers to proceed with attachment of the items they have proclaimed which do not belong to the Judgment Debtor and prays that the application be allowed as it will be greatly prejudiced and forced to carry a burden and/or the liabilities of the Judgment Debtor. It states it is a distinct company not related to the Judgment Debtor.

7. The Application is opposed by way of a replying affidavit sworn by **JASON NAMBALU NAMASAKE** Counsel for the Claimant/Decree Holder. The affiant avers that the Objector/Applicant and the Judgment Debtor have been frustrating the claimant's decree holder by failing to pay the judgment amount which forced them to execute.

8. He maintains that the goods were lawfully proclaimed in the premises of the Judgment Debtor and the same was confirmed by the ruling of Wasilwa J. dated 15<sup>th</sup> April 2020. The respondent urges the court to decline granting orders sought as it will be premature until the managing director of the Judgment Debtor gives evidence as to the ownership of the goods found in his premises. He further urges the court to issue the Managing Director of the Judgment Debtor with a notice to show cause why he should not be put to civil jail.

9. Directions were given that the application be canvassed by way of written submissions.

### **Objector/Applicant's Submissions**

10. The Objector/Applicant submits that it purchased plot no. 6 and 17 formerly owned by the Judgment Debtor. It submits that it is a separate entity from the Judgment Debtor and that the Claimant/Decree Holder erroneously proclaimed against it.

11. The Objector/Applicant submits that the ruling delivered on 15<sup>th</sup> April 2020 by Wasilwa J. held that;

*27. The other evidence is on ownership of motor vehicles KAG 139(2), KAH 113S, KBU 985K, KBE 838B and KBY 317D whose evidence show that the vehicle do not belong to the Judgement Debtor.*

*28. There was however, no evidence produced to show ownership of the 10 generators, 2 new fork lifts, 2 new sonalika tractors, 1 new safe, a fair reception desk and 6 fair reception chairs.*

*29. In the circumstances, I find that the application is proved in respect of the 5 named motor vehicles only which I direct released to the Applicant herein.*

*30. As for the other proclaimed goods, I find the Applicant has not proved its ownership and so I decline to grant orders lifting their proclamation.*

12. The Objector/Applicant submits that at the time of the delivery of the ruling the ownership of some items had not been proved thus the Court declined lifting the proclamation in respect of the said items. It submits that the ownership records for the items stated above were not in their possession at the time of filling the objection proceedings as the staff who was in charge of those records was away on leave.

13. The Objector/Applicant has annexed import documents for the Generators, forklifts, sonalika tractors and the invoice and payment receipts for reception desk and chairs.

14. The Objector/Applicant states that this application has satisfied the grounds set out in Order 45 Rule 1 of the Civil Procedure Rules having attached importation documents which were not in its possession at the time of the delivery of the ruling therefore it could not adduce them as evidence in court before delivery of the ruling.

15. The Objector/Applicant submits there is no appeal filed and that it has satisfied the requirements for Review as outlined in Order 45 of the Civil Procedure Rules. It prays that the application be allowed as prayed.

### **Claimant/Decree Holder Submissions**

16. The Claimant/Decree holder submits that the Judgment Debtor has continually used fraudulent tricks to avoid payment of the judgment and refused to carry out any orders of the court, therefore it cannot be allowed to hide under technicalities. It submits that the Objector/Applicant came into the scene in November 2018 and has all along been aware of the disputes between the workers and the Judgment Debtor and it was knowingly or unknowingly being used by the Managing Director of the Judgment Debtor. That it cannot now deny that it has no business dealing with the Judgment Debtor.

17. The Decree Holder further submits that the goods which are subject of this application were impounded within the premises of the Judgment Debtor boldly labelled as Romil (K) Limited therefore the proclamation was lawful.

18. It also submits that the impounded Motor vehicles KAQ139Q, KBY 317P, KBE 868B, KBU 985K and KAH 113S include the items proclaimed and they are used and belong to the Managing Director and the Judgment Debtor.

19. It submits that the Court should summon the managing director of the Judgment Debtor to give evidence on the ownership of the proclaimed goods.

20. The claimant/decree holder submits that the application is vexatious, Frivolous and a waste of the courts time as it derails the process of

paying legitimate dues to the Ex-employees who have waited nearly 20 years.

### **Analysis and determination**

21. I have carefully considered the application, evidence filed therewith and submissions before me. The issues for determination are whether the Application herein meets the threshold for review of judgment and orders and if the Applicant is entitled to the orders sought.

### **Whether this application is merited**

22. Objector proceedings were filed on the 20<sup>th</sup> December 2019. The same was heard and a ruling delivered on 15<sup>th</sup> April 2020 which the Objector/Applicant seeks to be reviewed. In the ruling, the Court held that;

*25. The applicants exhibited a lease agreement signed between themselves and Ramson International Limited as proof of tenancy agreement between them and the owner of the property who is not the defendant herein.*

*26. In addition to the evidence of ownership of the premises and lease agreement, the applicant annexed evidence that he runs a car dealer business under the name and style of Trans Africa Motors limited.*

*27. The other evidence is on ownership of motor vehicles KAG 139(2), KAH 113S, KBU 985K, KBE 838B and KBY 317D whose evidence show that the vehicle do not belong to the Judgement Debtor.*

*28. There was however, no evidence produced to show ownership of the 10 generators, 2 new fork lifts, 2 new sonalika tractors, 1 new safe, a fair reception desk and 6 fair reception chairs.*

*29. In the circumstances, I find that the application is proved in respect of the 5 named motor vehicles only which I direct released to the Applicant herein.*

*30. As for the other proclaimed goods, I find the Applicant has not proved its ownership and so I decline to grant orders lifting their proclamation.*

23. For all intents and purposes, the delivery of the judgement renders this court *functus officio* and the matter is *res judicata*. The only channel through which this court can “re-open” this matter is vide an application for review of judgement under Section 16 of the Employment and Labour Relations Court Act provides for review as follows: -

### **16. Review of orders of the Court**

**The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.**

24. Further, Rule 33 of Employment and Labour Relations Court (Procedure) Rules provides as follows: -

### **33. Review**

**(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—**

**(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;**

**(b) on account of some mistake or error apparent on the face of the record;**

**(c) if the judgment or ruling requires clarification; or**

**(d) for any other sufficient reason.”**

25. The Objector/Applicant has attached invoices for purchase of 2 folk lift dated 13<sup>th</sup> January 2017, commercial invoice for purchase of Sonalika tractors dated 9<sup>th</sup> February 2017, invoices dated 20<sup>th</sup> August 2019, invoice dated 6<sup>th</sup> October 2018, invoice dated 30<sup>th</sup> June 2018, invoice dated 18<sup>th</sup> July, 2019 invoice dated 30<sup>th</sup> August 2018 all for the purchase of office furniture. From the above invoices the purchaser is Trans Africa Motors Limited the objector/ Applicant.

26. The Objector/Applicant has stated in the affidavit of ALI MOHAMED ABUBAKAR in support of the review application that the documents of ownership filed in support of the application herein were in the custody of the Finance Officer who was away on his annual leave. The name of the said Finance Officer is not disclosed. The reasons he could not be recalled from annual leave in the face the threat of attachment of goods of such substantial value is not stated. No proof has been adduced that the said Finance Officer was on annual leave and could not be recalled or asked to avail the said documents by any other means.

27. The Applicant was aware that for objection proceedings to succeed the Objector must prove ownership of the goods he claims to be his and not the Judgment Debtor's.

28. The provisions for review of judgments and orders are explicit that where the ground for review is new evidence, such evidence must be "new and important evidence which, after the exercise of due diligent, was not within the knowledge of the person or could not be produced by that person at the time when the decree was passed or order made."

29. The evidence in support of the application is not new evidence. It is evidence which was available and in the custody of the Applicant's Finance Director who was on annual leave, according to the Applicant. It is therefore not "new evidence" or evidence which was not within the knowledge of the Applicant. It is further not evidence which could not be produced with the exercise of due diligence. Refer to the decision in **Charles Kimaita Mwithimbu & Another v Edward Mutua M' Mwithiga [2016] eKLR** where the Court stated that –

*"... It is not enough to merely state that there has been a discovery of new and important matter or evidence. You must show that, at the time of the decree, the new and important matter or evidence which has now been discovered, was not*

*within your knowledge or could not have been produced even after exercising due diligence at the time of the decree. This strict proof is a requirement of the law. ...*

....

*The least I can say here is that, I see an attempt to reopen this case and seal loopholes which made the case to collapse; that kind of practice should never be countenanced by a court of law. See what the Court of Appeal said in the case of **D.J. LOWE & COMPANY LTD v BANQUE INDOSUEZ CIVIL APPL. NAI. 217/98 (UR)** that:*

*"Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."*

30. The Applicant is telling the Court that this evidence was not produced before the Court and now that the decision of the Court was not in its favour, it wishes to produce more evidence so that the Court can change its mind. Parties are not allowed to produce evidence in instalments. Parties are also not allowed to patch up holes that have been pointed out in the evidence they adduced before the Court by producing more or fresh evidence. When a party comes to court it must produce all the evidence at its disposal to enable the Court make a determination on the issue once and for all. That is the essence of the principle of "res judicata".

**31. It is for these reasons that I must dismiss the application herein which I proceed to do with costs to the Decree Holder.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF JULY 2021**

**MAUREEN ONYANGO**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**