



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 41 OF 2006

(Before Hon. Lady Justice Hellen S. Wasilwa on 15th April, 2020)

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

VERSUS

ROLMIL KENYA LIMITED.....RESPONDENT /JUDGEMENT DEBTOR

AND

HEBROS AUCTIONEERS RESPONDENT

AND

TRANSAFRICA MOTORS LIMITED.....OBJECTOR/APPLICANT

RULING

1. Pending before me for determination is the Notice of Motion Application dated 20th December, 2019 filed under Certificate of Urgency. The same is brought under Order 22 Rule 51 (1) and (2), Rule 52 and 53, Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and any other enabling provisions of the Law seeking Orders that:-

1. *This application be certified as urgent.*

2. Pending hearing and determination of this application an order of stay do issue staying the proclamation dated 19/12/2019 and any attachment or sale by auction arising therefrom and/or execution of the decree of court in the matter against the Objector/Applicant.

3. The proclamation dated 19/12/2019 by M/S Ballon Nangalama T/Hebros Auctioneers is *unlawful*.

4. The properties the subject of the proclamation dated 19/12/2019 by Hebros Auctioneers the agents of the Plaintiff/Decree holder namely; 10 new Generators, 2 new Fork lifts, 2 new Sonalika Tractors, 1 new Tanker, 1 new Safe, a fair Reception Desk, 6 fair Reception Chairs, motor vehicles KAQ 139Q, KBY 317 D, KBE 868 B, KBU 985 K and KAH 113 S are the property of the Objector and cannot be attached in execution of the court decree herein.

5. The 2nd Respondent be condemned to pay costs of this application in any event.

2. The Application is premised on the grounds that:-

a. The properties upon which the proclamation dated 19/12/2019 is intended to be executed comprising 10 new Generators, 2 new Fork lifts, 2 new Sonalika Tractors, 1 new Tanker, 1 new Safe, a fair Reception Desk, 6 fair Reception Chairs, motor vehicles KAQ 139Q, KBY 317D, KBE 868B, KBU 985K and KAH 113S belongs to the Objector.

b. The Objector is a lawful tenant of M/S Ramson International Ltd the legal and lawful proprietor of Plot No. 6 and 17 being subdivisions from LR No. 12473 Nairobi previously owned by Respondent/Judgment Debtor who bought the property from Rolmil Kenya Ltd through a sale by private treaty sanctioned by lending bankers M/S Standard Chartered Bank and M. Oriental Bank Ltd.

c. The premises proclaimed by Ballon Nangalama T/A Hebros Auctioneers are well branded in the names of the Objector and not the Judgment Debtor and was very irregular for the Auctioneer to do the proclamation despite being advised that the premises are of the Objector and not the Judgment Debtor.

d. The proclaimed properties namely; 10 new Generators, 2 new Fork lifts, 2 new Sonalika Tractors, 1 new Tanker, 1 new Safe, a fair Reception Desk, 6 fair Reception Chairs, motor vehicles KAQ 139Q, KBY 317 D, KBE 868 B, KBU 985 K and KAH 113 S are properties of the Objector.

e. There is no business or shareholding connection between the Objector and the Applicant or the Respondents and that the said parties are distinct legal entities in law and thus no decree against the Judgment Debtor can be executed against the Objector/Applicant.

f. It is trite law that once goods have been proclaimed, it is illegal to remove or sell them and hence the illegal and irregular proclamation is bound to greatly prejudice and also cause loss and/or damage to the Objector.

g. If the proclaimed properties are attached and/or carted away by the Auctioneer, the Objector is bound to suffer irreparably and be occasioned economic loss and/or damage.

h. Unless the orders sought are granted the Objector/Applicant is bound to suffer irreparably and the application rendered nugatory.

3. The Application further supported by the Affidavit of **ALI MOHAMMED ABUBAKAR** sworn on 20th December, 2019, in which he reiterates the averments made in the Notice of Motion Application.

4. In response to the Application the Claimant/Decree Holder filed a Replying Affidavit deponed by **WYCLIFFE AMAKOMBO NYAMWATTA**, the General Secretary and Chief Executive Officer of the Claimant Union herein on 30th January, 2020, in which he avers that the Claimant Union did enter into a Recognition Agreement with the 1st Respondent/Judgment Debtor and concluded and signed a Collective Bargaining Agreement on 19th December, 2002 which was registered by the Industrial Court on 5th February, 2003.

5. He further contends that the 1st Respondent/Judgment Debtor failed to implement the Collective Bargaining Agreement forcing the Claimant/Decree Holder to institute the instant Cause and subsequently obtained an award dated 6th August, 2008 which he maintains has not been complied with to date.

6. The Claimant/Decree Holder further avers that the 1st Respondent/Judgment Debtor sought review of the award but the Application was dismissed. It is further contended that the 1st Respondent/Judgment Debtor made yet another Application to the Court of Appeal and the same was similarly dismissed with costs.

7. The Claimant further avers that the 1st Respondent/Judgment Debtor has failed to satisfy the award forcing it to institute execution proceedings and the Court on 14th October, 2019 re-issued Execution Order and proceeded to instruct the 2nd Respondent to execute.

8. The Claimant/Decree Holder maintains that the 1st Respondent/Judgment Debtor has since the year 2011 failed and/or refused and/or neglected to comply with the Court Orders and that the goods impounded by the 2nd Respondent were within its premises and are known to belong to the 1st Respondent/Judgment Debtor.

9. In conclusion the Claimant/Decree Holder urged this Honourable Court to allow it proceed with execution of its decree.

10. In a brief rejoinder the Applicant filed a Supplementary Affidavit on 31st January, 2020 deponed by **ALI ABUBAKAR**, the Managing Director of the Objector/Applicant herein on 31st January, 2020 in which he reiterated the averments made in his supporting Affidavit sworn on 23rd December, 2019 in support of the objection Application.

11. He further averred that the Objector, Transafrica Motors Limited has never been a party to the instant proceedings as between the Judgment Debtor and the Judgment Creditor and cannot therefore make any averments in relation to the proceedings.

12. He maintained that the premises the 2nd Respondent purported to distress against are rented to the Objector Transafrica Motors Limited by its sister company Ramson International Limited and that the two Companies are not in any way related to the Judgment Debtor as their directors and shareholders are different.

13. He further maintained that the Motor Vehicles proclaimed are clients' properties who stand to be greatly prejudiced should the purported sale by way of public auction is allowed to proceed.

14. He therefore urged this Honourable Court to allow the instant Application as prayed.

15. In disposing off the instant Application, parties hereto agreed to file their written submissions to the same.

Submissions by the Parties

Objector/Applicant's Submissions

16. In its submissions the Objector maintained that it is the lawful tenant of M/S Ramson International and the Legal and lawful proprietor of Plot No. 6 and 17 being subdivisions from LR No. 12473 Nairobi previously owed by the Respondent/Judgment Debtor. It therefore contended that the alleged proclamation was therefore unlawful as what was proclaimed belonged to it and not the Judgment Debtor herein. It relied on the Lease Agreement confirming the same.

17. The Objector further submitted that it has met the threshold for granting of the Orders sought in their Application as provided under Order 22 Rule 51 of the Civil Procedure Rules.

18. It is further contended that the Claimant/Judgment Creditor has failed to discharge its burden of proof to persuade this Court that the goods in issue are properties of the Judgment Debtor to warrant their attachment.

19. The Applicant further submitted that under the principle of separate corporate entities, it cannot be held liable for liabilities of any subsidiary company.

20. The Applicant urged this Court to be guided by the case of **Chai Trading Co. Limited Vs Muli Mwanzia & 2 Others (2019) eKLR** that cited with approval the Court of Appeal decision in the case of **Hannah Maina T/A Taa Flowers Vs Rift Valley Bottlers Limited (2016) eKLR** where it was held:-

“In the circumstances the Respondent could not be held liable for the debts of its subsidiary company, the two being distinct and separate legal entities.”

21. The Objector urged this Court to allow its application as prayed.

22. I have examined the averments of both Parties herein. The main contention by the Applicant/Objector is that the properties attached by the Decree Holder do not belong to the Judgement Debtor but to them.

23. They aver that the proclaimed properties namely 10 new generators, 2 new fork lifts, 2 new sonalika tractors, 1 new safe, a fair reception desk, 6 fair reception chairs, motor vehicles KAG 139Q, KBY 317D, KBE 858B, KBU 985K and KAH 113S all belong to them.

24. The Applicants aver that they are tenants of the property previously owned by Rolmil Kenya Limited (the Defendant herein) and sold to Ramson International Limited. They attached the sale agreement as evidence of this position.

25. The Applicants also exhibited a lease agreement signed between themselves and Ramson International Limited as proof of the tenancy agreement between them and the owner of the said property who is not the Defendant herein.

26. In addition to the evidence of the ownership of the premises and lease agreement, the Applicant annexed evidence that he runs a car dealer business under the name and style of Transafrika Motors Limited.

27. The other evidence is on ownership of motor vehicles KAG 139Q, KAH 113S, KBU 985K, KBE 858B and KBY 317D whose evidence show that the vehicles do not belong to the Judgement Debtor.

28. There was however, no evidence produced to show ownership of the 10 generators, 2 new forklifts, 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.

31. Costs to be shared between the Applicant and Decree Holder in ratios of 1:3.

Dated and delivered in Chambers via Zoom on this 15th day of April, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties