



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2119 OF 2014**

(Before Hon. Justice Hellen S. Wasilwa on 3<sup>rd</sup> December, 2018)

KENYA CHEMICAL AND

ALLIED WORKERS UNION.....CLAIMANT/DECREEHOLDER

VERSUS

EAST AFRICAN PORTLAND

CEMENT COMPANY LIMITED....RESPONDENT/JUDGMENT DEBTOR

AND

KENYA COMMERCIAL

BANK KENYA LIMITED.....OBJECTOR/APPLICANT

**RULING**

1. The Notice of Motion by the Objector/Applicant was filed in Court on 31st August 2018, under Certificate of Urgency and brought under Rule 32 (2) of the Employment and Labour Relations Court Rules 2016 , Orders 2 Rule 51 (2), Order 52 and Orders 51 (1) of the Civil Procedure Act.

2. The Objector/Applicant seeks the following prayers:-

*1. The Application be certified as urgent and be heard ex-parte in the first instance.*

*2. An order of stay do issue restraining the attachment, removal, sale, disposition or any other interference with all the properties listed in the Proclamation dated 6<sup>th</sup> August 2018 issued by Jovan H. Kariuki T/A Moran Auctioneers, pursuant to instructions issued to him by the Claimant/Decree Holder , pending full hearing and determination of this Application.*

*3. The proclamation of the above noted properties be lifted.*

*4. The costs of this Application be awarded to the Objector/Applicant.*

3. The Application is supported by the Affidavit of Tom Ogola the Objector/Applicant's Manager of Litigation, sworn on 31<sup>st</sup> August 2018, on the following grounds:-

*1. The Objector learnt that Jovan H. Kariuki T/A Moran Auctioneers served the Respondent/Judgement Debtor on 8<sup>th</sup> August 2018 with a proclamation of Attachment dated 6<sup>th</sup> August 2018.*

*2. The seven (7) day period prior to attachment of the proclaimed assets expired on 13<sup>th</sup> August 2018.*

*3. A stay of execution order issued on 14<sup>th</sup> August 2018 by Honourable J. Onesmus N. Makau was granted against the*

*Claimant/Decree holder on condition that the Respondent/Judgment Debtor deposit the decreed sum of Kshs. 1,401,585,364.80/= within fourteen (14) days pending an inter-partes hearing of the Respondent/Judgment Debtor's Notice of Motion dated 13<sup>th</sup> August 2018 fixed for 18<sup>th</sup> September 2018.*

*4. The Respondent/Judgment Debtor defaulted on the said order, which lapsed on 28<sup>th</sup> August 2018. Therefore, execution proceedings are to proceed.*

*5. The Objector has a legal interest in the items proclaimed within the meaning of Order 22 Rule 15 (1) of the Civil Procedure Rules, on the basis of several Debenture including one dated 7<sup>th</sup> October 2014 issued to it by the Respondent/Judgement Debtor. Thus the said proclaimed items are not available for attachment by the Claimant/Decree Holder.*

*6. The Objector Bank has a prior security right which prevails over the rights of the Claimant/Debenture Holder and all other third parties as it registered the said Debenture under the Movable Properties Security Rights At No. 13 of 2017 pursuant to section 92 of the said Act.*

*7. There is a real and imminent danger that the Claimant/Decree holder may execute any time.*

4. The Claimant/Decree Holder filed its Replying Affidavit sworn by Were Dibo Ogutu OGW, the Claimant's National General Secretary, on 3<sup>rd</sup> September 2018 opposing the Notice of Motion. It contends that:-

*1. It filed the suit on 26<sup>th</sup> November 2014 seeking orders against the Respondent for the full implementation of the Collective bargaining Agreement signed between the Claimant and the Respondent. Consequently, on 6<sup>th</sup> July 2016 this Honourable Court delivered Judgment and held that the Respondent had partially breached the Collective Bargaining Agreement by partially implementing by leaving out workers who were employed on fixed term contracts.*

*2. The Respondent dissatisfied by the Judgment filed Civil Appeal Number 14 of 2016 which the Court of Appeal dismissed for lack of merit.*

*3. This Application is a conspiracy between the Respondent/Judgment holder to deny the Claimant the enjoyment of the fruits of the Judgment and that there is a connection between the Objector/Applicant's number of shareholders and Directors as the two companies are the same.*

*4. The Objector had failed to disclose material facts on the outstanding amount from the Judgment Debtor and failed to exhibit a bank statement to show and demonstrate the outstanding amount.*

*5. The movable assets do not belong to the Objector /Applicant but to the Respondent/Judgment Debtor.*

*6. The Debenture have no indication that they can oust or stop the execution of valid court orders but rather recognise the execution process under Clause 15 (1). In addition, that Clause 11.4n of the Debenture dated 3<sup>rd</sup> May 2012 of the Debenture recognises that execution may be levied against the Judgment Debtor's properties.*

*7. About 500 of the Claimant's members who are beneficiaries of the decretal sum have been unfairly terminated and are exposed to severe hardship.*

5. The Objector/Applicant filed a further Affidavit sworn by John Wagacha Ngáng'a, it's Senior Relationship Manager –Corporate Banking Division, on 25<sup>th</sup> September 2018. He states that the failure to lift the Claimant's Proclamation Notices dated 6<sup>th</sup> August 2018 would result to irreparable damage as the proclaimed properties form part of the existing securities of the Objector Bank.

6. The Parties filed their respective submissions to the Application.

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

7. The Objector/Applicant in its written submissions argues that the Claimant/Decree Holder does not dispute that the validity of the securities executed by the Respondent/Judgment Debtor in favour of the Objector/Applicant. It submits that pursuant to Order 22 Rule 51 (1) of the Civil Procedure Act a person is entitled to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree. In support of this it relies on the case of **Dubai Bank (K) Ltd v Come –Cons Africa Ltd and Impack Holdings Co. Ltd (2012) eKLR** where the Court held that the law is that a Court in the objection proceedings cannot make a finding as to the ownership of property the subject of objection proceedings but simply decide whether or not the objector has interest, legal or equitable in the attached property.

8. The Objector/applicant further submits that an Objector must exhibit evidence of its legal or equitable interest in any property attached in execution of decree as buttressed in the case of **Akiba Bank Ltd v Jetha & Sons Ltd (2005) eKLR**. Moreover, that its burden of proof on ownership of the claimed assets is on a balance of probability and that it has duly tendered evidence on the balance of probability that it has a legal interest over all the properties in the proclamation notice.

9. The Objector submits that it secured interest over the assets is fixed as opposed to floating as stated in the Charging Clause of its Debenture dated 7<sup>th</sup> October 2014. It therefore argued that it has proved it has a legal interest over all the assets attached in the Proclamation

Notice.

10. It submits that in accordance with the Section 92 of the Movable Property Security Rights Act, 2017 it had registered its rights over any possible third part creditors of the Respondent/Judgment Debtor. Hence, the registration under the Movable Property Security Rights Act confers the Objector/Applicant with a prior security right which prevails over the rights of the Claimant/Decree Holder.

**Claimant/Decree Holder's Submissions**

11. The Claimant/Decree Holder in written submissions argues that this matter has been severally heard and determined by both this Honourable Court and the Court of Appeal with the judgments delivered in favour of the Claimant. The Respondents are not willing to honour the Court's decree. It is therefore their submission that the Objector/Applicant herein had failed to meet its statutory burden under Order 22 Rule 51 (1) of Civil Procedure Rules having colluded with the Respondent in ensuring that justice is delayed.

12. The Claimant/Decree Holder further submits that it has proved on a balance of probability that the Applicant/Objector has failed to establish its legal or equitable interest on the whole or part of the attached property.

13. The Claimant/Decree holder submits that a stay of the intended execution shall amount to unreasonable delay or limitation of its rights to own and /or acquire property. The Debenture cannot defeat a valid decree issued by the Honourable Court as Clause 15 (d) recognises the execution process.

14. The Claimant/Decree Holder submits that the Objector/Applicant's remedy in the circumstances is to demand the principal and interest due from the Judgment Debtor and not to seek a lawful execution. In addition, the failure by the Objector to exercise this option is a conspiracy to obstruct the Claimant's members from reaping the fruits of the judgement or decree. In respect of this, it relies on the case of **Diversey East African Limited v Mohandon Food Distributors Limited & Another 1 E.A 43.**

15. It finally submits that the Objector/Applicant has failed to prove any legal or equitable interest on the attached property as held in **Awo Sharriff t/a Mohammed Investment v Abdulkadir Shariff Mohammed & Another (2006) Eklr.**

16. I have examined the averments of all the Parties. The Objector/Applicant relied on the Appendix P.O 5 Form 4 as evidence that some of the proclaimed properties are registered with them as collateral and therefore they have a priority over them. Indeed Form 4 lists a number of items which are the motor vehicles listed in the proclamation from item No.1 to 18.

17. Other items apparently changed by the Objector are as per the Further Supplement Debentures Appendix 3 dated 7.10.2014 as shown at Clause 4(d) which are all present and future fixed assets, plants, machinery, vehicles, computers and office and other equipment of the company including tools, spare parts, replacement and addition and the full benefits of all warranties and contracts relating to them but excluding its stock in trade (together with the assets referred to sub-clauses (a), (b) and (c) above, the "land fixtures".

18. As evidenced above, it appears that the Judgement Debtor charged all its assets present and future to the Objector/Applicant. In the circumstances, I find the Objector has a privileged position over the said properties and as such the Objection/Application succeeds and I set aside the proclamation and attachment as prayed.

19. The Judgement Debtor will pay costs of the Auctioneer and of this application.

Dated and delivered in open Court this 3<sup>rd</sup> day of December, 2018.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Nyabena for Claimant – Present

Omamno holding brief Paul Ogude for Objector/Applicant – Present

Impalo holding brief for Muchiri for Judgement Debtor – Present