



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1359 OF 2014

JAMES MULINGE.....CLAIMANT

VERSUS

FREIGHT WINGS LTD.....RESPONDENT

AND

VEGPRO (K) LTD.....1ST OBJECTOR

SIMBA COLT MOTORS LTD.....2ND OBJECTOR

AND

HIGH CLASS AUCTIONEERS.....INTERESTED PARTY

RULING

1. By application dated 28th July 2016, the Objectors herein seek for orders that;

1. The notification of sale of moveable property of the motor vehicle registration no. KAM 599X and the proclaimed items be stayed;

2. The items proclaimed dated 13 April 2016 and the intended sale of the said motor vehicle by the agents of the claimant/deeree holder is unlawful;;

3. The defendant/judgement debtor has no legal or equitable interest in the said proclaimed items and the motor Vehicle Registration No. KAM 599X;

4. This Court be pleased to order the Respondent herein through his authorised agent to return back any attached Objectors' goods vide proclamation by the High Class Auctioneers dated 13th April 2016.

5. Costs of this application be provided for.

2. The application is supported by the affidavit of Manase Otieno Osodo and on the grounds that the property to be sold belong to the Objectors and the defendant judgement/debtor does not have legal or equitable interest in the property proclaimed. That the warrant of attachment had expired and no new one had been issued.

3. Mr Osodo as the Respondent Human Resource Officer also avers that on 13th April 2016, High Class Auctioneers under instructions from the Claimant visited objector's premises and proclaimed various items including motor vehicle Registration No.KAM 599X that belong to the 2nd objector. That the attachment related to judgement entered against the Respondent for a sum of Kshs.5, 592,203.00. The attached good belong to the 1st Objector and the unproclaimed item and vehicle belong to the 2nd Objector and which vehicle had been purchased by the 1st Objector from the 2nd Objector on 4th December 2012. The vehicle has not been transferred to the 1st objector.

4. The objections also filed their list of cases.

5. In reply, the Claimant filed Replying Affidavit and avers that on 14th April 2016 the Respondent filed application seeking stay of execution and relied upon the proclamation notices now used by the 1st Objector in their application herein through the affidavit of Eva Okallo which then create a link between the Respondent and objectors. Therein, Evan Okallo deponed that she is the Human Resource Manager of the Respondent and 1st objector. The proclaimed goods were found in the premises of the respondent.

6. That the objector's application is made in bad faith and the supporting affidavit of Manase Osodo conflict with that to Eva Okallo as one is for the Human Resource Officer for the 1st Objector while the other is for the Group Human Resource Director, and a perjury. Such is with the intention of abuse of Court process. That Eva Okallo has further deponed to affidavits before the Court of Appeal seeking stay of execution as the Human Resource Manager of the Respondent and the 1st objector. The goods proclaimed have been confirmed by Eva Okallo as belonging to the respondent. Mr Osodo has confirmed that the 1st Objector has purchased Motor vehicle Registration No.KAM 599X though the log book has not been transferred. That the Respondent and the Objectors are under the same group of companies as supported by the witness statements and affidavits on record.

7. Both parties made their oral submissions in court.

8. Mr Achiando for the Objectors submit that the Claimant as the decree holder attached properties that belong to the objectors. The goods proclaimed, the only ones that belong to the Respondent are Motor vehicles registration No.KBL 977Q and KBP 026K and the rest of the goods belong to the objectors. The auctioneer did not do a due diligence to know what property was registered and belonged to the respondent. The Objectors are a company different from the objectors.

9. That the affidavits sworn by Ms Okallo that there was authority to swear affidavit for the Objectors is an inadvertent mistake. The Objectors are an independent company and can sue or be sued in their own right as held in **Channan Agricultural Contractor Kenya Ltd versus Rosemary Nanjala Oyula & 2 others [2013] eKLR**. That there is no rationale to open the corporate veil from a company where there is proof that the attached property belong to such a company. The group of companies under the 'VP Group' share work force but this does not change the status of the Respondent as the employer of the claimant.

10. On the question of perjury raised by the claimant, the Objectors submit that this Court has no jurisdiction under section 12 of the Employment and Labour Relations Court Act to address the same. The proclamation issued should be discharged with regard to properties of Objectors and the items that belong to the Respondent to remain. The Claimant should meet the costs incurred by the Objectors and those of the auctioneers. Had the Claimant been keen to identify the correct properties owned by the respondent, the proceedings by the Objectors and the wrong proclamation should not have arisen and therefore should meet the costs due.

11. Mr Onyony for the Claimant submit that the Objectors and the Respondent are out to take undue advantage of Court process. The Objectors have not produced search documents to confirmed ownership and the office furniture and equipments have not been proved as belonging to the objectors. No receipts or ownership evidence have been produced.

12. Where the subject vehicles belong to objectors, then the Respondent officers have no locus standi to represent their interests as demonstrated in the affidavits of Eva Okallo. Mr Osodo has averred under oath that vehicle No.KAM 599X belong to the Respondent but the transfer has not been done. Eva Okallo on the other hand and sworn an affidavit that she is acting for the Respondent and 1st Objector and that the proclaimed property belong to the respondent. The respondents and the Objectors have used the same information and proclamation to lie under oath with regard to ownership of the goods and thus obtained orders on this basis which amount to perjury and an abuse of Court process. Where a party obtains an order and makes sworn statement that a property (is) belong to them, the Court should give redress of such perjury. Such is collusion and connivance of the Respondent and Objector to defeat justice. The order of stay enjoyed by the Objector was obtained through perjury.

13. Mr Onyony also submit that there is a letter by the Respondent issued to the auctioneers that they would pay the decretal sum. In objection proceedings, a party must prove ownership of proclaimed goods which is lacking in this case. Upon such prove, the Court can then make an enquiry as to the rights of the Objector so as to direct as appropriate.

14. The Respondent witness in evidence-in-chief testified that they are a group of companies and operate as such and now seek to use that information to refuse to pay the decretal sum. Such is an abuse of Court process which should not be allowed. In the case of **Riccarti Business College of East Africa Limited versus Kyanzavi Farmers Company Limited [2016] eKLR**, the Court held that where there is fraud and a good reason for the Court to lift the corporate veil the Court should proceed and do so. In this case and based on the perjury, the Court should lift the corporate veil of the objectors. In **Channan Agricultural Contractor Kenya Limited** case cited above, an Objector must prove ownership which has not been satisfied herein.

15. On the question of costs, the Claimant submit that such should be paid by the Objectors as the Claimant took the auctioneer where he used to work and on the admission that the Respondent has purchased the subject vehicles, KAM 599X, the there being no evidence of the Objectors ownership of the other properties proclaimed, the costs due to the auctioneers are payable by the objectors. The misleading information by the officers who state under oath are officers for the VP Group, for the Respondent or Objector should be sanctioned with costs.

Determination

Whether the orders sought should issue

Whether there is perjury

16. I will start with the second issue first. Such I find material before delving into the orders sought.

17. The Claimant submitted that the affidavits made in support of the application by the Objector and sworn by Mr Osodo and the affidavit of Ms Okallo are in perjury as the statements made under oath is contradictory and meant to subvert the course of justice. The counsel for the Objectors in reply defended the averments and affidavit on the basis that this Court has no jurisdiction under section 12 of the Employment and Labour Relations Act to address a case of perjury. That the statements made by Ms Okallo were an inadvertent mistake.

18. The application dated 28th July 2016 filed by the Objectors is supported by the affidavit of Manase Otieno Osodo. He avers that he is the Human Resource Officer of the 1st Objector and he has the authority of the 2nd Objector to support the application. Such authority is annexed as appendix e “MOO1” signed by Eva Okallo, the Group Human Resource Director, 1st objector.

19. It is a fact and part of these proceedings, the Respondent filed application dated 17th March 2016 and seeking change of advocates. The application is supported by the annexed affidavit of Eva okallo who avers that she is the Human Resource Manager of the Respondent and dully authorised to make the

affidavit.

20. By application dated 14th April 2016, the Respondent made application seeking stay of execution pending hearing and determination of the respondent's intended appeal. The application is supported by the affidavit of Eva Okallo who avers that she is the Human Resource manager of the respondent. Part of the supporting documents attached to this affidavit by Ms Okallo is the proclamation of the interested party dated 13th April 2016 and acknowledged by the 1st objector, Vegpro (K) Ltd on equal date.

On 12th September 2014, the Respondent filed statement of Response to the claim and at paragraph 1 the Respondent admits that *the Respondent is part of a group of companies commonly known as "VP Group". The other companies are:*

... Vegpro Kenya Limited (which shares the same compound with the Respondent at specialised freights area, Jomo Kenyatta International Airport, Kongoni River Farm Limited and Sian Exports Kenya Limited. There is a combined workforce of more than 8,500 Kenyans directly employed by the VP Group.

21. To support its case, the Respondent filed several witness statements. Part of such statements included that of Vitalis Owira osodo who stated that he was the Senior Human Resource Officer of Vegpro (K) Limited and the Respondent is part of the VP Group.

22. There are obvious overlaps in the positions held by these 3 officers – Eva Okallo, Manase Osodo and Vitalis Osodo. The common denominator is that they are all related with the VP Group of companies. The averments of Eva Okallo are however challenged. That on the one part she avers to be the Respondent Human Resource Manager while at the same time avers that she is the Group Human Resource Director of the 1st objector.

23. In this regard, Perjury is the crime of making a knowingly false statement which bears on the outcome of an official proceeding that is required to be testified to under oath. The offence of perjury is a criminal offence. Section 108 of the Penal Code defines perjury as follows;

108. Perjury and subornation of perjury

(a) Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury.

(b) It is immaterial whether the testimony is given on oath or under any other sanction authorized by law.

(c) The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth are immaterial, if he assent to the forms and ceremonies actually used.

(d) It is immaterial whether the false testimony is given orally or in writing.

(e) It is immaterial whether the Court or tribunal is properly constituted, or is held in the proper place or not, if it actually acts as a Court or tribunal in the proceeding in which the testimony is given.

(f) It is immaterial whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not.

24. Therefore, Any person, who in any judicial proceedings, or for the purpose of instituting any judicial proceedings, knowingly gives false testimony touching any matter which is material to any question then pending in the proceedings or intended to be raised in that proceeding, is guilty of perjury.

25. In **David Omwenga Maobe v Republic [2015] eKLR**, the High Court in Kisii held;

The meaning of (the offence) perjury [in] Halbury's Laws of England Vol. 11(P.938) Fourth edition defines perjury as follows:-

“Any person lawfully sworn as a witness or as an interpreter in [a] judicial proceedings who wilfully makes a statement, material in that proceedings, which he knows to be false or does not believe to be true is guilty of perjury, and is liable on conviction on indictment”.

26. Proceedings for perjury relate to many factors that the Court must take into account one being that this can relate to civil or criminal proceedings as indeed the offence committed relate to the *wilful statements made in proceedings, which s/he knows to be false*. In **English Court of Appeal in R vs. Acher (2003) 1 Cr. Appeal R (5) 86, in an appeal against a case of perjury it was held that;**

There are many factors to be considered in determining the... sentence for perjury and related offences. There isn't, in our judgment, any distinction to be drawn according to whether the proceedings contaminated were of a civil or criminal nature... Factors to be considered include... the number of offences committed, the timescale over which they are committed, whether they are planned or spontaneous, whether they are persisted in, whether the lies or fabrications have any impact on proceedings in question...

27. The elements of the offence thus must be that a person;

- a) being a lawfully sworn witness or interpreter
- b) in judicial proceedings
- c) deliberately makes a material statement which is false, and
- d) knowing that it is false or not believing it to be true

28. In **R v Clegg (1868) 19 LT 47). (EA 1851**, the Court held that the false statement must be made deliberately, not inadvertently or by mistake. The statement must be material, so significant to the case, rather than of negligible relevance. The statement may be an opinion offered by an expert witness who does not genuinely hold that opinion.

29. In addition to the statutory perjury offences which deal with the criminality of undermining the administration of justice, there is a common law offence of perverting the course of justice. Any act or course of conduct tending and intended to interfere with the course of public justice will amount to an offence. This offence is triable only on prosecution by the Court. This offence will usually only be charged where there are serious aggravating features as held in **R v Sookoo [2002] EWCA Crim 800**.

30. As set out above, the consequences of perjury are severe. Where found culpable, the person who commits such an offence faces a sanction that may include denial of liberty similar to consequences for contempt of Court proceedings. Previously such proceedings have required a party to seek the leave of the Court to commence proceedings for perjury and for the person against whom such leave is sought to have notice of the consequences of the same before being sanctioned. In addressing a similar matter as this one, the Court in **Eliud Muturi Mwangi (Practising in the name and style of Muturi & Company Advocates) v LSG Lufthansa Services Europa/ Africa GMBH & another [2015] eKLR;**

... the bedrock of the entire application is that the individuals sought to be committed to jail or cross-examined were aware of the application herein ... but engaged themselves in a conspiracy to

defeat justice. Service of the notice of the application in question has been emphasized a lot by the Applicant and I should think it is the linchpin which drives the decision of the Court in all the application for contempt of court, perjury, giving false information and also for cross-examination of the persons concerned on certain matters relating to the impugned service and the signing of the agreements herein. [Emphasis added].

31. **In Ochino & Others versus Okombo & Others (1989) KLR 165**, the Court of Appeal held that;

...the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.

32. However, the law upon which such leave is required was based on the Laws of England, which laws have since changed. To thus continue relying on the same and by extension require a party to apply for leave so as to commence perjury proceedings particularly in a civil matter or employment and labour relations matter such as this one, would be to negate the changes since made in England and the principles of the Bill of Rights as set out under article 48 of the Constitution on access to justice. Where the Court finds a party under oath has given false averments, this Court basing its findings on the basis of such sworn affidavit and where found false, there is the inherent powers of the Court to punish. As a superior Court of record, a party who makes a false affidavit knowing the same to be so, not only commits perjury but the same amounts to an abuse of Court process.

33. I find the subject affidavit deponed by Ms Okallo and dated 28th July 2016 and the matters submitted by the Claimant with regard to averments set out in Ms Okallo's affidavit sworn and dated 14th April 2016 bear conflicting information with regard to her position held with the Respondent and her position held with the objectors. Where there is no clarification as to nature of changes leading to the factual differences in terms of positions held in either entity, and when challenged with regard to the same reliance was gone into the technicality of jurisdiction, either affidavit must be false. This does not aid the course of justice to make affidavits and statements under oath knowing the same to be false and or intended to derail the course of justice.

34. The impact of the same for the application now before Court is that, the Respondent and the Objectors are in collusion to defeat the work of the Court in arriving at a fair decision. Such is with the intention by both parties to defeat the course of justice. An application thus made with the outright aim of derailing the course of justice should be dismissed instantly. It should not see the light of day. Even where a sanction is due, the instant dismissal is safe enough to secure the inherent powers of the Court to accord justice to all parties before it.

35. However, noting the above, I shall not stop at an instant dismissal. I would address the substantive issue on its merits.

36. On the orders sought with regard to the notice of sale of moveable property of motor vehicle registration No.KAM 59X, The Objectors admit that they have conferred an interest over motor vehicle registration No.KAM 599X between themselves. The Respondent has not participated in these proceedings to deny such averments. I take it as part of the *VP Group* and having been served and opted not to participate, the Respondent is aware of these developments. The interest over the motor vehicle KAM 599X can therefore not be negated by such non-attendance. The Respondent in these proceedings is specific and the Claimant was emphatic that he was an employee of the respondent.

37. Save for the motor vehicle KAM 599X that ownership documents have been produced, all the other proclaimed goods and items and their ownership is not stated. Without going back on the question of perjury, where the Respondent is part of the *VP Group* of companies and the Objectors are part of the same, where the Respondent is keen to protect its interests to avoid settling the decretal sum, the participation to confirm ownership would have been a matter of course. Where the Objectors have gone out of their way to avail documents with regard to the ownership of the motor vehicle Registration KAM 599X, similar effort should have been gone into with regard to all the attached goods.

38. On the question of costs, it is apparent that the respondents and the Objectors are operating as *VP Group* as and when convenient. The witnesses called in Court and the affidavits made in pursuit of various orders are made under the group while in addressing the settlement of the decretal sum, a separation from the group is found necessary. Such I find to be an effort to circumvent the course of justice and on the face of it, an abuse of Court process. where the Respondent wrote to the Claimant and made a commitment to settle the decretal sum vide letter dated 22nd July 2016 and failed to attend as confirmed, such non-payment has resulted into their goods being proclaimed and attracted the attention and attendance of the Objectors. The costs being incurred to this end, even where the Respondent has refused to attend these proceedings are attendant to their non-payment of judgement amount. All the due costs inclusive of costs herein and those due to the Interested Party are all payable by the Respondent.

In conclusion therefore, application dated 28th July 2014 is hereby dismissed save that motor vehicle registration No.KAM599X shall be removed from the proclaimed goods and schedule of the interested party dated 13th April 2016. The Respondent shall meet all costs herein inclusive costs incurred by the Interested Party.

Orders accordingly.

Delivered in open court at Nairobi this 24th day of October 2016.

M. MBARU

JUDGE

In the presence of:

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