



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 113 OF 2010

BETWEEN

BHUPENDRA SOMCHAND SHAH.....1ST APPLICANT

CORNELIUS MUTHURI.....2ND APPLICANT

SANJU LALCHAND SHAH.....3RD APPLICANT

AND

ELSEPHAN INGALULA SHISOKA.....CLAIMANT

VS

MASTER BAKERS (1987) LIMITED.....RESPONDENT

RULING

1. On 25th November 2013, I delivered a ruling in which I lifted the corporate veil of the Respondent Company and thereby imposed personal liability on Bhupendra Somchand Shah, Cornelius Muthuri and Sanju Lalchand Shah, the Applicants herein, all being Directors of the Respondent Company. The Applicants lodged a Notice of Appeal on 9th December 2013.

2. On 7th February 2014, Counsel for the Claimant applied for execution of the decree arising from the Ruling delivered on 25th November 2013 and on 21st February 2014, the Court issued warrants of attachment and sale to Jovan H. Kariuki T/A Moran Auctioneers.

3. On 14th March 2014, Jovan H. Kariuki appeared before the Duty Judge, **Mbaru J** and obtained orders authorising the Officer Commanding Gigiri Police Station to accompany the said Jovan H. Kariuki to Bhupendra S. Shah's house situated at Roslyn Estate, Gigiri Area of Nairobi for the purposes of keeping peace and to witness execution of the warrants of attachment and sale issued by the Deputy Registrar of this Court on 21st February 2014. When the Auctioneer visited the house of Bhupendra S. Shah he was issued with four post dated cheques in satisfaction of the decretal amount.

4. The Applicants then came to Court on 19th March 2014 under certificate of urgency seeking orders for stay of execution or further execution of the decree issued pursuant to the Ruling delivered on 25th November 2013. The Applicants also sought orders stopping the post dated cheques number 000011, 000012, 000013, 000014 issued

by the 1st Applicant in satisfaction of the decretal amount as well as refund of Kshs. 230,000 being auctioneer's fees paid to the Auctioneer.

5. The Respondent's application is based on the following grounds:

- a. That the Applicants have filed a Notice of Appeal against the Ruling delivered on 25th November 2013;
- b. That on 17th March 2014, Jovan H. Kariuki T/A Moran Auctioneers, in the company of police men and a huge number of rowdy menacing youths went to the first Applicant's residence at Roslyn Estate within Gigiri Area and broke the lock to the main gate and threatened to break doors and door locks to gain entry to the inner rooms of the house for the purpose of executing the decree;
- c. That in order to get rid of the rowdy menacing youths from his private residence the first Applicant was forced by circumstances to pay a sum of Kshs. 230,000 to the Auctioneer in cash and issue cheques number 000011, 000012, 000013 and 00014. According to the 1st Applicant, the cash payment was made and the cheques were procured through compulsion, duress and threats;
- d. That the Auctioneer did not proclaim before the attachment threatened on 17th March 2014 ;
- e. That the Claimant is a man of straw and any amount paid to him or toward satisfaction of the court orders of 25th November 2013 will not be recoverable should the appeal succeed and the Applicants will therefore suffer substantial loss;
- f. That although the Court ordered the examination of the Directors of the Respondent Company under Order 22 Rule 35 of the Civil Procedure Rules, the Court lifted the veil of incorporation under the same proceedings;
- g. That the Applicants' appeal has substantial merit and good chances of success;
- h. That the Applicants are ready to abide by any conditions that may be set by the Court while granting the stay of execution orders including a deposit of the decretal amount or part thereof;
- i. That it is in the interest of justice and fairness that the application be allowed.

6. Counsel for the Applicants appeared before the Duty Judge **Nzioki Wa Makau J** on 19th March 2014 and was granted interim orders staying execution pending *inter partes* hearing of the application on 2nd April 2014. The Duty Judge also stopped the cheque dated 24th March 2014.

7. In a replying affidavit sworn on 31st March 2014, the Claimant depones that the Applicants had failed to disclose to this Court that they had filed an application for stay in the Court of Appeal which remained pending. The Claimant further depones that the execution of the warrants of attachment and sale was undertaken within the law.

8. The Auctioneer, Jovan H. Kariuki swore a replying affidavit on 31st March 2014 demonstrating the steps he had taken towards execution of the warrants of attachment and sale. Kariuki depones that he proclaimed the property of Bhupendra Shah on 28th February 2014 and that prior to moving to Court on 14th March 2014, seeking police assistance to effect the attachment, he had made several attempts to collect the proclaimed goods but was denied access to the premises of Bhupendra Shah.

9. Kariuki further depones that on 17th March 2014, accompanied by police officers and his staff he went back to the house of Bhupendra Shah but was again denied access. Kariuki then showed the court order issued on 14th March 2014 to the employees of Bhupendra Shah and proceeded to break the padlock fastened at the gate and gained access to the compound. The 1st and 3rd Applicants came to the compound and asked the Auctioneer to wait for the 2nd Applicant which he did.

10. Upon arrival of the 2nd Applicant, it was agreed in consultation with Mr. Wachira, Counsel for the Applicants that the Applicants settle the decretal sum in four installments. It was also agreed that the Auctioneer be paid Kshs. 150,000 to off set immediate costs incurred with the balance of costs being payable on 18th March 2014. On the strength of this agreement, Kariuki acknowledged receipt of the amount received together with the post dated cheques and the Applicants confirmed the agreement by appending their signatures.

11. On 18th March 2014 at 3.00 pm, Messrs Mari and Nganga, Advocates for the Applicants, Bhupendra Shah, Sanju Lalchand Shah and the Auctioneer met at the Advocates' office at College House, University Way. At this meeting the Auctioneer's total charges were agreed upon at Kshs. 230,000 and were fully settled with the attendant invoice being signed by Bhupendra Shah and Sanju Lalchand Shah.

12. Bhupendra Somchand Shah swore a further affidavit on 1st April 2014 deponing that no proclamation was done at his house on 28th February 2014 as alleged by the Auctioneer. Somachand Shah denied being served with the proclamation and challenged existence of some of the items in the proclamation.

13. Order 42 Rule 6 of the Civil Procedure Rules, 2010 provides an appellant with the option of filing an application for stay of execution either at the court appealed from or the court to which the appeal is preferred. To that extent, the Applicants were well within their right to file an application for stay of execution at the Court of Appeal. The account of what transpired at the Court of Appeal to move the Appellants to file a similar application in this Court remained hazy.

14. What is clear however is that when the Applicants filed their application in this Court and when their Counsel appeared before the Duty Judge and obtained interim orders on 19th March 2014, a similar application was pending before the Court of Appeal which was fully seized of the matter. It is also clear and it was confirmed by Counsel for the Applicants that when he appeared before the Duty Judge, he did not disclose this crucial matter to the Judge.

15. In fact, it was only after the Claimant raised the issue in his replying affidavit sworn on 31st March 2014 that the 1st Applicant swore a further affidavit on 1st April 2014 explaining the circumstances under which the Applicants found themselves with two similar applications before the trial court and the appellate court. Mr. Nganga, Counsel for the Applicants who has had conduct of this matter for a long time, did not bother to put in an affidavit to explain why he failed to disclose to the Duty Judge such crucial information thus misleading the court to issue orders which in my view, the Court had no mandate to make. To my mind this is a serious abuse of the court process.

16. On 20th March 2014, soon after obtaining interim orders before the Duty Judge, the Applicants lodged an application at the Court of Appeal seeking leave to withdraw the application for stay of execution pending at the appellate court. The outcome of that application remains with the jury out there. In the meantime, the Applicants' application for stay of execution at the Court of Appeal is alive. This Court, being a trial court is therefore *functus officio* and in light of this finding, I see no need to render myself any further on this application. The result is that the Applicants' application dated 19th

March 2014 is dismissed with costs to the Claimant.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF
MAY 2014**

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JUDGE

In the Presence of:

.....*Applicants*

.....*Claimant*