



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 460 OF 2018

BETWEEN

INVESCO ASSURANCE CO. LTD.....APPLICANT

AND

KINYANJUI NJUGUNA & CO. ADVOCATES.....1ST RESPONDENT

SADIQUE ENTERPRISES AUCTIONEERS.....2ND RESPONDENT

RULING

1. By a Motion on Notice dated 2nd July, 2020, the applicant herein seeks the following orders:

(1) This application be certified urgent and heard ex parte in the first instance.

(2) Pending the hearing and determination of this application inter partes, the Honourable Court be pleased to stay the proclamation, attachment and/or sale of the Applicant's tools of trade in the 2nd Respondent's proclamation dated 29th June, 2020, namely 20 complete computers, 10 computer laptops, 10 filing cabinets, 20 visitors chairs, 4 reception desks, 20 telephone heads, 30 office chairs, 5 drinkers, 3 photocopy machines, 3 interior routers, 5 executive office desks, 5 executive office chairs, 20 plastic chairs, 3 water dispensers, 4 safes, office carpets & office accessories.

(3) Pending hearing and determination of this application inter partes, the Honourable court be pleased to restrain the Respondents by themselves or their agents from proclaiming, attaching and/or selling the Applicant's tools of trade as listed in the proclamation in the 2nd Respondent's proclamation dated 29th June, 2020, namely 20 complete computers, 10 computer laptops, 10 filing cabinets, 20 visitors chairs, 4 reception desks, 20 telephone heads, 30 office chairs, 5 drinkers, 3 photocopy machines, 3 interior routers, 5 executive office desks, 5 executive office chairs, 20 plastic chairs, 3 water dispensers, 4 safes, office carpets & office accessories and/or any such similar items in execution of the decree of this court dated 14th November, 2019.

(4) The Honourable court be pleased to set aside, and/or quash the proclamation, attachment and/or sale of the Applicant's tools of trade in the 2nd Respondent's proclamation dated 29th June 2020 namely 20 complete computers, 10 computer laptops, 10 filing cabinets, 20 visitors chairs, 4 reception desks, 20 telephone heads, 30 office chairs, 5 drinkers, 3 photocopy machines, 3 interior routers, 5 executive office desks, 5 executive office chairs, 20 plastic chairs, 3 water dispensers, 4 safes, office carpets & office accessories.

(5) That the Honourable court be pleased to permanently restrain the Respondents by themselves or their agents from proclaiming, attaching and/or selling the Applicant's tools of trade as listed in the proclamation in the 2nd Respondent's proclamation dated 29th June, 2020, namely 20 complete computers, 10 computer laptops, 10 filing cabinets, 20 visitors chairs, 4 reception desks, 20 telephone heads, 30 office chairs, 5 drinkers, 3 photocopy machines, 3 interior routers, 5 executive office desks, 5 executive office chairs, 20 plastic chairs, 3 water dispensers, 4 safes, office carpets & office accessories and/or any such similar items in execution of its decree in the cause court dated 14th November, 2019.

(6) The costs of this application.

2. According to the Applicant, it is a limited liability company duly registered under the *Companies Act*, 2015, Cap 486 (now repealed) and licensed to carry on insurance business in the Republic of Kenya under the *Insurance Act*, Cap 487, Laws of Kenya. It is licensed to transact all lines of general insurance business and in so doing provides insurance cover to a countrywide base from its headquarters in Nairobi and its 27 branches countrywide.

3. It was contended that the **Civil Procedure Act** prescribes the list of items that may be attached in execution of decrees and those that are exempted therefrom and under the proviso to section 44(1) thereof, tools and implements of a person necessary for the performance by him of his trade or profession and books of accounts are exempted from attachment in execution of decrees.

4. It was however deposed that since there is a lacuna as to what constitutes tools and implements necessary for the performance of his trade or profession, the same has been hijacked by auctioneers who have, in abuse of discretion proclaimed items that are clearly the judgement debtor's tools or implements of trade necessary for the insurance business as set out in the affidavit. It was deposed that like most other businesses in the 21st Century, in order to timeously and consistently honour its obligations as required by law, the judgement debtor's staff requires the said amenities, facilities and infrastructure in order to facilitate their work.

5. While appreciating its obligations to honour valid claims against its insured and undertaking to do so in the ordinary course of business subject to the said protection, the applicant contended that unless the applicant gets the benefit of the proviso to section 44(1), it would be unable to perform its core functions and/or honour its obligations to its creditors.

6. On behalf of the Applicant, it was submitted that the application is premised on Order 22 rule 51 of the **Civil Procedure Rules** which entitles any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree at any time prior to payment out of the proceeds of sale of such property to give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.

7. According to the Applicant, its legal interest is anchored on section 44(1) (proviso) of the **Civil Procedure Act** Cap 21 Laws of Kenya (**the Act**) that protects tools of trade in execution of court decrees. According to the Applicant, the said provision prescribes the list of items that may be attached and those that are exempted from attachment in execution of a decree but exempts the tools and implements of a person necessary for the performance by him of his trade or profession and books of accounts.

8. It was however noted that the Act does not define what constitutes a '*tool or implement necessary for the performance of a trade and profession*', a position which the applicant submitted was deliberate and intended to accommodate the ever evolving circumstances and conditions of the business environment. In essence, what today may or may not amount to a tool of trade is not cast in stone and depends on various factors to be considered on a case by case basis. The Applicant submitted that it is a matter of public notoriety that like most other trades of the 21st century, in order to timeously and consistently honour its obligations as by law required, the Applicant relies for its operations on inter-alia an efficient, professional and productive staff working from its headquarters and countrywide branches including but not limited to accountants, sales and marketing, claim assessors, lawyers, front office staff, management etc. These employees require all the amenities, facilities and infrastructure referred to above. The practical and logical utility of these items as tools of trade have been demonstrated in detail in paragraph 14 of Mr. Paul Gichuhi's Affidavit sworn on 2nd July 2020. According to the Applicant, the Respondent has not controverted the utility of these items as tools of trade. The mere fact that finding other attachable properties is onerous cannot as a matter of law and public policy excuse the illegal attachment of items that are by law expressly exempted from attachment.

9. In support of the submissions, the Applicant relied on the case of **Bora Capital Limited vs. Jane Njeri Munyi [2018] eKLR** where it was held that:

“On the first ground, the appellant is of the submission that the property attached were its tools of trade which tools are exempted from attachment under Section 44(1) of the Civil Procedure Act. The appellant pointed out that the appellant is in business and is primarily engaged as real estate agents, developers and valuers. It is stated that in the process of execution the appellant's assets including chairs, tables, officer counter (sic), metal cabinets, computers and a printer were proclaimed. The respondent on the other hand is of the submission that the trial magistrate arrived at the correct decision in finding the attached property not tools of trade. In his ruling, the learned magistrate ruled that the proclaimed goods were office furniture and not tools of trade hence the proclamation was valid. With respect, I do not think the findings of the trial magistrate can be faulted, consequently this ground is found to be unmeritorious.”

10. The Applicant also relied on **Jonathan Wepukhuli t/a Gati Cleaning Agency Limited vs. Julius Odhiambo Oduor [2019] eKLR** in which it was held that:

“There is a second point that points to prospects of substantial loss being suffered by the Appellant. It is disclosed in the application when the applicant says that execution has issued and levied against his tools of trade. Even though it has not been revealed what his trade is, the proclamation reveals that the proclaimed goods are office equipment and tools. In the present word if one runs any business, computers and furniture are critical and necessary tools for such business or trade and would qualify for protection granted under Section 44 of the Civil Procedure Act. That being the case to allow execution upon such goods would be to allow violation of the law.”

11. Further reliance was placed on **Victoria Pumps Limited vs. Kenya Ports Authority & 4 others [2015] eKLR** where the Court held;

“From the pleadings it is apparent that the Applicant carried on the suit premise the business of Bar and Restaurant and as a lodge house. If that be true, and it has not been contested, then fridges, Tvs, tables, chairs are bed and mattresses are tools of trade necessary for the plaintiffs trade and are thus except and immune against distress under section 16 (1) g of the Distress for rent act as well as section 44 (1) of the Civil Procedure Act...I find that the distress upon the goods I consider tools of trade, the existence of a tenancy whose termination is the subject of litigation at the Business Premises Rent Tribunal and allegations that distress is being employed to evict the Applicant and thus terminate the tenancy, present a prima facie case and therefore the 1st test has been established in the affirmative.”

12. In the premises, it was submitted that is only fair and just that the reliefs sought be granted.

13. According to the Applicant, the continued attachment of its tools of trade exposes it to the irreparable danger of insolvency as it will be unable to carry out its core mandate and/or business to generate any or sufficient revenue to meet its obligations (including payment of decrees) as they fall due. With the indiscriminate attachment of what are clearly the Applicant's tools of trade, the threat of execution if allowed to fructify will make it impossible for the Applicant to sustain its operations and honour its obligations to its insured and the public at large. It was stressed that alienation of tools of trade makes it impossible for a judgement debtor to generate revenue necessary to meet its obligations in law. Accordingly, it was submitted that it is demonstrably evident that failure to grant the remedies sought will occasion greater and disproportionate loss and damage to the Applicant. Permitting attachment of the Applicant's tools of trade will defeat the legislative objects of section 44(1) (proviso) and/or render it redundant.

14. It was contended that contrary to the 1st Respondent's assertions, the Applicant has acknowledged its obligation to honour valid claims and undertakes to continue doing so in the ordinary course of business. For the avoidance of doubt, the Applicant's suit in HCCC 55 of 2020 seeks declaratory orders in rem that interpret section 44(1) of the CPA with the hope that 'what constitutes a tool of trade' is settled with finality to obviate the need for objection proceedings of this nature every now and then. Pending hearing and determination of the suit, the Judgement debtor has a right under order 22 rule 51 to lodge these objection proceedings to protect its legal interests.

15. It was the Applicant's position that any equipment *necessary* for the proper execution of a person's trade and profession qualifies as a tool of trade under section 44(1) of the Act; that what is necessary depends on the circumstances of each case including the line of trade and profession of the judgement debtor, the technology prevailing in the relevant industry at the material time, the ordinary processes, techniques and procedures employed in the execution of the trade or profession etc. In the 21st century, office processes, documents, communications etc. are largely automated. Interference with any hard or software necessary for their proper functioning amounts to interference with tools of trade.

16. It is a matter of public notoriety that chairs, desks, filing cabinets and safes are primarily installed in offices for no other purpose but to facilitate essential work of company employees in the course of business. The centrality of these items in the daily undertaking of the insurance business indisputably qualifies them as "trade tools." It was therefore submitted that there is more than a good chance that should the threats of execution of the specified items fructify, the Applicant will be crippled in its operations and ability to continue its business as a going concern hence it is just and fair in the circumstances that the court grants the attachments on the Applicant's tools of trade be unconditionally raised. We so pray.

17. The application was however opposed by the 1st Respondent. It was contended that Section 44(1)(ii) of the *Civil Procedure Act* applies to natural persons and not to corporations such as the applicant.

18. According to the 1st Respondent, the furniture and computers listed in the proclamation cannot be tools of trade of the applicant who is in the business of carrying on general insurance in Kenya. It was further deposed that the said proclamation arose from a regular decree issue by this Court which indebtedness has not been settled to date. The Respondent also disclosed the Applicant's past conduct which in its view amounted to forum shopping by instituting several cases in different courts.

19. It was disclosed that the applicant has painstakingly concealed its assets and monies to defeat all legitimate executions against it thereby frustrating the Respondent and that the only assets in form of furniture and computers that the 1st Respondent can rely on to satisfy the decree is what the applicant wants to be protected without satisfying the decree.

20. On behalf of the 1st Respondent it was submitted that the Applicant as a Company is not covered by Section 44(1) of the *Civil Procedure Act*. It was submitted that Section 44(1) (ii) of the said Act clearly stipulate that it applies to natural persons and not companies such as the Applicant since the statutory provision was meant to protect artisans and natural persons whose ability to earn their livelihoods is directly linked to their tools of trade and taking them away will render them destitute. The Applicant as a mammoth corporation headquartered in Nairobi and having as of now 27 branches countrywide cannot compare itself to artisans such as masons or carpenters. In the Respondent's view, the entire wording and phrasing in section 44(1) of the *Civil Procedure Act* leave no doubt that the section does not refer to corporate entities since all the items listed in the said section such as "wearing apparel, cooking vessels, beds and bedding of the judgment-debtor and of his wife and children, and those personal ornaments" make it clear that when the said section is read holistically it refers to natural persons. In this regard the 1st Respondent relied on the case of **Blackwood Hodge (Kenya) Ltd vs. Lead Gasoline Tank Cleaning Sam and Chase (K) Ltd [1986] eKLR** which was cited in the case of **Master Fabricators Limited vs. Patrick Omondi Ndonga [2014] eKLR**.

21. From the said decisions, it was submitted that Section 44(1)(ii) of the *Civil Procedure Act* covers natural persons and not corporate entities.

22. Further, it was submitted that when claiming that certain items are tools or implements of trade protected under section 44(1)(ii) of the *Civil Procedure Act* it is crucial for a party to disclose his/her trade or profession. The Applicant has through the supporting affidavit of Paul Gichuhi sworn on 2nd July, 2020 clearly stated that it carries out general insurance business. Therefore, the office amenities such as furniture, chairs, stationery, cabinets, safes, kitchen ware, computers, scanners, photocopiers etc. which are shown in the proclamation notices produced by the Applicant cannot be termed as tools of trade of the Applicant. In addition, the other items listed in the application dated 2nd July, 2020 cannot be termed as the Applicants tools of trade. In support of this submission, reference was made to the decision of **Sergon, J in Bora Capital Limited vs. Jane Njeri Munyi [2018] eKLR** and **Francis Kamau Njoroge & Another vs. James Mbire Ngaita & 4 Others [2016] eKLR**.

23. In the 1st Respondent's view, the Applicant's contention that there is a lacuna in law on the statutory provision of section 44(1) of the *Civil Procedure Act* is far-fetched and misleading with intention to protect the Applicant from meeting its obligations of settling uncontested regular decrees. The provisions of section 44(1) of the *Civil Procedure Act* have existed for decades with the Applicants full knowledge. In addition, it is not surprising that the Applicant who has the history of refusing to settle uncontested regular decrees is the one bring the instant application and suit. The other numerous insurance companies with clean record of settling uncontested regular decrees and fulfilling their obligations of settling judgments entered against their insured have no contention with the clear provision of section 44(1) of the *Civil*

Procedure Act.

24. The approach taking by the Applicant to claim that there is a lacuna in law, it was submitted, is misconceived and reeks of mischief. If the Applicant was genuine it would have petitioned Parliament to amend or expand the provision of section 44(1) of the **Civil Procedure Act**; or instituted a constitutional petition and joined the Attorney General as a party and reliance was placed on the decision of the Supreme Court of Kenya in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR** at paragraph 91. In urging the Court to decline the invitation by the Applicant to change a clear statutory provision in section 44(1) of the Civil Procedure Act, the Court was urged to be persuaded by the reasoning of **Mativo, J** in **Apollo Mboya vs. Attorney General & 2 Others [2018] eKLR** where at paragraph 30 he stated:

“It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.” (sic)

25. According to the 1st Respondent, the attached property are items that similarly fall within the purview of Securities law by dint of **The Movable Property Security Rights Act, 2017** which gives a concise description of what the proclaimed property are by providing in Section 2 as follows:

"Equipment" means a tangible asset other than inventory or consumer goods that is primarily used or intended to be used by the grantor in the operation of its business;.....

"Tangible asset" means all types of goods and includes motor vehicles, crops, machineries, livestock;.....

26. It was submitted that the proclaimed property being items that are subject to securities law by dint of **The Movable Property Security Rights Act, 2017**, the items are thus attachable in settlement of a decree. An elaborate description of the proclaimed items, being equipment that are subject to securities law and are thus attachable in execution of a decree, thus cannot constitute tangible assets in the nature a tool of trade as averred by the judgment-debtor. It was therefore contended that since the same are equipment are liable to attachment by dint of the security rights they possess, they in effect do not qualify as tools of trade.

27. This Court was urged to determine whether the judgment-debtor can perform its core business of insurance if the proclaimed items that it owns and alleges are indeed tools of trade are attached in execution of the decree of this court and to answer the same in the affirmative since modern business practices are modelled on leasing and not ownership of office equipment. Once owned the same constitute tangible assets susceptible to attachment in execution. If leased out by a third party, the same are protected under Order 22 rule 51 and the judgment-debtor would comfortably proceed to carry on its core business of issuance. It was contended that if the said proclaimed items are equipment that could be easily be leased to the judgment-debtor by a third-party then consequently the same are not tools of trade quintessentially fundamental to its core business, that if attached would cripple the judgement-debtor.

28. It was therefore submitted that the Applicant has not satisfied any of the grounds for granting of injunctive orders it seeks based on **East African Development Bank vs. Hyundai Motors Kenya Limited [2006] eKLR** and **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] eKLR**.

29. The debts the Applicant owes the 1st Respondent, it was submitted, by far outweigh the few office amenities proclaimed and the Applicant has adamantly refused to honour them to date. In the circumstances, there is no irreparable injury that may be occasioned on the Applicant if the application dated 2nd July, 2020 is dismissed with costs. The balance of convenience also tilts in favour of the 1st Respondent and not the Applicant. Attached to the relying affidavit sworn on 8th July, 2020 by Seth Khisa decrees; and consent which show the uncontested pending indebtedness of the Applicant to the 1st Respondent.

30. In addition, the injunctive orders sought by the Applicant have the effect of interfering with jurisdiction of other courts to execute decrees passed by them. It is bad in law for this Court to issue injunctive orders which go to the root of decrees passed by other courts of concurrent jurisdiction to it. This submission was based on the decision of **Ochieng, J** in the case of **Michael Bartenge vs. Stephen Bartenge [2007] eKLR** that:

“By virtue of section 30 of the Civil Procedure Act; “A decree may be executed either by the court which passed it or by the court to which it is sent for execution.” In effect, it is the court which executes decrees. The party who holds a decree which is in his favour, only applies to the court to execute the decree. Therefore, if the order to stop the execution was issued in the nature of an injunction, it would effectively be addressed against the court. And, as it is the duty of the court to execute its decrees, an injunction to restrain it from so doing would be purporting to stop the court from performing one of its roles. That, in my considered view, would not be proper, even if the orders were clothed in such language as suggested that the orders were directed against the defendant. The only manner in which courts are stopped from taking steps to execute decrees is through orders for stay of execution. No such order has been sought herein.” (Emphasis added)

31. For all the above reasons it was submitted that the application dated 2nd July, 2020 is unmerited and does not meet any of the grounds for granting injunctive orders.

Determination

32. I have considered the issues raised before me in this matter. The Respondent has taken issue with the Applicant's conduct of instituting legal proceedings before courts in order to evade its financial obligations. In my view forum shopping which the Respondent alleges does not apply simply because a party makes several applications before courts. That term only applies where a person with the intent of getting favourable orders institutes such proceedings before courts which in its view are likely to grant it favourable orders. With due respect to the Respondent, it has not been alleged that this matter was instituted before this court because the applicant believes that it is likely to extract favourable orders from this court. Parties and their advocates ought to choose their wordings carefully and should refrain from simply bandying words about unless they are absolutely sure of what they are alleging. "Forum Shopping" is not a phrase that should be casually thrown around unless there is evidence or ground of belief that it applies to a particular situation.

33. I must however say that there is absolutely nothing wrong in a party instituting legal proceedings against an action which it honestly believes is unlawful. Unless the matter is caught up by the two twin doctrines or principles of sub judice and res judicata, the doors of justice ought not to be slammed against a person simply on the basis that the person is overzealous of protecting what it believes in. The 1st Respondent must be reminded in no uncertain terms that the fact that a person is a zealot in pursuing what he thinks are his legal rights does not make him a vexatious litigant so as to bar him from being heard by a Court of law. As was held by **Madan, J** (as he then was) in **Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243**:

"In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."

34. The fact that a person is a zealot in pursuing what he thinks are his legal rights does not make him a vexatious litigant. See **Moses Kipkolum Kogo vs. Nyamogo & Nyamogo Advocates Civil Appeal No. 53 of [2004] 1 KLR 367**.

35. In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."

36. That said, the wise words of the Court of Appeal in **J M Mwakio vs. Kenya Commercial Bank Ltd. Civil Appeal No. 156 of 1997** ought to act as a guide the Court and parties where a party merely seeks to abuse the court process by making several applications in order to vex the opposite party. In that case the said Court expressed itself as follows:

"The appellant is a familiar figure in the Law Courts. He does not hesitate to institute litigation on any aspect of perceived breach of his rights. Whereas litigants are perfectly free to bring any number of suits they may so desire, they must understand that in doing so, they are bound to stick to the rules governing the conduct of litigation in courts... no consequence that flows out of the enforcement of law can be said to cause injustice. Moreover, it is a cardinal principle in the administration of justice that it is in the interest of all persons that there should be an end to litigation... The appellant must be told in no uncertain terms that no matter how many applications and suits he may institute in the courts seeking to recover the suit property, such attempts by him would be futile and a waste of resources since the dispute relating to the suit property has been heard and finally determined by competent courts. This appeal is indeed vexatious and amounts to an abuse of the process of the court and it is dismissed with costs...."

37. The matter before me is brought under section 44(1) of the *Civil Procedure Act* which provides as hereunder:

(1) All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree:

Provided that the following shall not be liable to attachment or sale—

(i) the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor and of his wife and children, and those personal ornaments from which, in accordance with religious usage, a woman cannot be parted;

(ii) the tools and implements of a person necessary for the performance by him of his trade or profession;

(iii) where the judgment-debtor is an agriculturalist—

(a) the first ten thousand shillings in value of his livestock, if any; and

(b) the first five thousand shillings in value of all implements, tools, utensils, plant and machinery used in connection with stock or dairy farming or in the production of crops or plants; and

(c) the first one thousand shillings in value of agricultural produce necessary to enable him to earn his livelihood;

(iv) books of accounts;

(v) a right to sue in damages;

(vi) a right of personal service;

(vii) stipends and gratuities allowed to pensioners of the Government, or payable out of a service family pension fund notified in the Gazette by the Minister, and political pensions;

(viii) two thirds of the salary of public officer or other person in employment;

(ix) a contingent or possible right or interest, including an expectancy of succession by survivorship;

(x) a right of future maintenance;

(xi) any fund or allowance declared by law to be exempt from attachment and sale in execution of a decree.

[Emphasis added]

38. The application is specifically hinged on section 44(1)(ii) of the said Act.

39. As rightly deposed by the applicant in its supporting affidavit, it is a limited liability company duly registered under the *Companies Act*, 2015, Cap 486 (now repealed) and licensed to carry on insurance business in the Republic of Kenya under the *Insurance Act*, Cap 487, Laws of Kenya. The 1st Respondent contends that in those circumstances, the applicant cannot rely on section 44(1)(ii) in order to successfully argue that the properties proclaimed were exempt from execution.

40. The said issue was the subject of the decision rendered by **Bosire, J** (as he then was) in **Blackwood Hodge (Kenya) Ltd vs. Lead Gasoline Tank Cleaning Sam and Chase (K) Ltd [1986] KLR 749** where he held that:

“The debt having been pending for a very long time, the conduct of the applicant in failing to make any payment in settlement of it had been such as would not persuade the court to come to its aid...Section 44 of the Civil Procedure Act is intended to protect, not corporate entities but artisans whose livelihood depends on their workmanship. The section reads “the tools and implements of a person for the performance by him of his trade or profession”. “Person” as used in the subsection does not include a corporate body. This section did not protect the applicant...There was a high probability that if the attached property was released, it may be attached in satisfaction of the applicant’s other debts.”

41. The said decision was cited with approval in the case of **Master Fabricators Limited vs. Patrick Omondi Ndonga [2014] eKLR**.

42. I associate myself with the said holding as expressing the correct law as regards the intention of the said section. In the premises the applicant herein cannot successfully invoke in its aid the said provision in order to bar the 1st Respondent from realising the fruits of its judgement. It is my view that the said section must be restrictively interpreted so as to aid only those whose means of livelihood and sustenance are in jeopardy of being ruined. It ought not to be invoked to simply protect those whose profits and businesses are in jeopardy. The exemption, in my view, is not meant for the protection of a particular industry but is only meant to protect a particular person’s ability to earn livelihood.

43. My decision is reinforced by the reasoning behind the decision of **Webber, J** in **Voi Posho Mill vs. Kenya Sisal [1962] EA 647** where he expressed himself as hereunder:

“Section 44 of the Civil Procedure Ordinance describes what property is liable to attachment and sale in execution of a decree...The words “necessary to enable him to earn his livelihood” clearly govern agricultural implements as well as agricultural produce and the proviso is designed, not to protect agricultural production generally, but the agriculturalist, to ensure that his livestock and implements are not seized, therefore depriving him of the means to earn his living. However, the court does not consider that the term agriculturalist can be extended to a person merely because his sole income is derived from agriculture and in addition to this his occupation as well as chief source of livelihood must be with the cultivation of land, or production of crops or the raising of stock.”

44. The Applicant submits that it is a matter of public notoriety that chairs, desks, filing cabinets and safes are primarily installed in offices for no other purpose but to facilitate essential work of company employees in the course of business hence the centrality of these items in the

daily undertaking of the insurance business indisputably qualifies them as “trade tools.” In my view, if this is the criteria to be applied, nothing stops motor vehicles which are meant to enable the insurance company’s staff to source for business falling also under the category of tools of trade. In a business offering lodging business for example, the only properties of the business may be TVs, tables, chairs, bed and mattresses which if exempt would render execution against such an entity a dead letter of the law. I therefore agree with the position adopted by **Sergon, J** in **Bora Capital Limited vs. Jane Njeri Munyi [2018] eKLR** for the observation that:

“On the first ground, the appellant is of the submission that the property attached were its tools of trade which tools are exempted from attachment under Section 44(1) of the Civil Procedure Act. The appellant pointed out that the appellant is in business and is primarily engaged as real estate agents, developers and valuers. It is stated that in the process of execution the appellant’s assets including chairs, tables, officer counter, metal cabinets, computers and a printer were proclaimed. The respondent on the other hand is of the submission that the trial magistrate arrived at the correct decision in finding the attached property not tools of trade. In his ruling, the learned magistrate ruled that the proclaimed goods were office furniture and not tools of trade hence the proclamation was valid. With respect, I do not think the findings of the trial magistrate can be faulted, consequently this ground is found to be unmeritorious.”

45. Therefore, not every item that is required by an entity to undertake its operations falls under the definition of **tools and implements of a person necessary for the performance by him of his trade or profession**. It was therefore noted, and rightly in my view, in **Francis Kamau Njoroge & Another vs. James Mbire Ngaita & 4 Others [2016] eKLR** that:

“The above goods are basically office furniture. Under Section 44(1) of the Civil Procedure Act, the properties of a judgement debtor which not liable for attachment or sale are specified. The provision relevant to this case is Section 44(7) (ii) in which it is expressly stated that the tools and implements of a person necessary for the performance by him of his trade or profession shall not be liable to attachment or sale. The defendants are advocates of this court. In my humble view, I do not think furniture can be regarded as the tools of trade or profession of the defendants.”

46. Mercifully the decision in **Victoria Pumps Limited vs. Kenya Ports Authority & 4 Others [2015] eKLR** was in respect of a finding whether or not there was a *prima facie* case hence it cannot be taken as expressing the finality of what constitutes tools of trade. Similarly, the decision in **Jonathan Wepukhuli t/a Gati Cleaning Agency Limited vs. Julius Odhiambo Oduor [2019] eKLR** arose from an application for stay pending appeal. What the Court determines in such application is whether the intended appeal is arguable and not frivolous. Therefore, a finding thereon unless confirmed on appeal is not necessarily binding on this Court.

47. Accordingly, I find no merit in this application which I hereby dismiss with costs.

48. It is so ordered.

Read, signed and delivered in open Court at Machakos this 27th day of July, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Langalanga for Mr Awele for the Applicant

Mr Mutinda for Mr Kinyanjui Theuri for the 1st Respondent

CA Geoffrey